
NAEPC
Journal
of Estate & Tax Planning
Click here to view the Third Quarter 2014 Issue

The Future of Estate Planning: Focus on The Legal Practitioner

While many lawyers have tried to believe otherwise, the practice of law is a business like any other business. Practicing law follows the same basic tenants as most every other business that is studied in business school. Even so, the practice and the very essence of the legal business model have evolved significantly over the past decade. Estate planning has been at the forefront of this evolution with a combination of factors driving the transformation. Changing demographics, revisions to estate planning and tax laws, and the rise of technology present estate planners with a unique opportunity to prosper in this new legal environment. Those who fail to adapt may find their practice a tough go in the near future.

I. The Business of Estate Planning: A Cost Benefit Analysis

In the early part of the 21st century, most "big law" law firms enjoyed near record profits and generally worried little about client pushback on their fees. In fact, the period of greatest financial success occurred during the last three decades. Consumers were spending more on legal fees while partners at these firms were seeing record breaking profits. Between 1978 and 2003, total U.S. legal expenses as a percentage of GDP rose from 0.4 percent to 1.8 percent.[1] As a result, by the mid-2000s, the profit share of the average partner at a big law firm was over $1 million dollars per year.[2] In fact, in the 25 year period from 1986 to 2011, the average profit per partner increased by 355 percent (from $325,000 to $1,480,000).[3] As comparison, the Consumer Price Index during that the same period rose by only 205%, while the nation's GDP increased by 235 percent.[4]

During these glory years, it was not unusual for partners, and even associates, to charge astronomical rates for their legal services. At the height of the economic boom, firms were reporting charging hourly rates as high as $1,000 per hour.[5] The overall partner high average at Reed Smith was reported at $875 per hour and the highest associate billing rate was reported to be $835 per hour, by an associate at Dorsey & Whitney.[6]

Operating in such an economic environment, law firms came to embrace the canon that clients associated high fees with good legal work.

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[1] Henderson, William D., *From Big Law to Lean Law*, 3 INT'L REV. L. & ECON., 24, available at http://www.masonlec.org/site/rte_uploads/files/Bill%20Henderson%20From%20Big%20Law%20to%20Lean%20Law%20v8%20FINAL.pdf.

[2] *Id.*

[3] *Id. at 7.*

[4] *Id. at 7.*

[5] Blattmachr, Jonathan G., *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 8, http://www.texasbarcle.com/Materials/Events/9948/135652_01.pdf (citing Lindsey Fortado, *Hourly Billing Rates Continue to Rise: Upward trend still in evidence at law firms, with some notable figures at the high end of the scale*, THE NAT'L L. J., Dec. 12, 2005, available at http://www.law.com/jsp/article.jsp?id=1134122711101&hbxlogin=1.)

[6] *Id.*

It was a great time to be a lawyer, particularly at a law firm that operated under the billable hour business model. Under such a business model, clients are charged based on the time expended by each attorney on a matter and attorneys are generally required to meet a minimum billable hour requirement set by the firm. The simplest way to increase profits was to make attorneys work more hours while charging clients increasingly higher hourly rates. All the while, attorneys were incentivized for being inefficient. More time spent on a project meant more billable time and thus, higher profits.

Unfortunately, such a system was and is simply unsustainable.

The vulnerability of the big law firm business structure was pushed to the forefront by the economic recession in the early 2000's. As the economy worsened and clients criticized their bills, firms were no longer able to bear the compensation structure for its attorneys or the overhead required under that structure. As a result, big law firms began hemorrhaging staff and attorneys. On one day in April of 2008, six major law firms laid off 748 attorneys and staff, now dubbed "Bloody Thursday."[7]

And unfortunately, more bad news for big law was on the horizon.

In 2009, a survey confirmed the grim state of the legal profession, reporting the worst decline in the survey's thirty year history. The top 250 law firms reported losing around 5,000 (or 4 percent) of their lawyers, including 8.7 percent of their associates.[8] Fifteen of the top 75 firms dropped more than 100 lawyers each.[9] Cumulatively, law firms, both big and small, disclosed that they laid off around 12,000 people in 2009, including 4,600 lawyers and 7,500 staff.[10] By far, however, big law firms suffered the most. Forty percent of big law firm associates had their starting salary reduced and sixty percent of firms deferred associate start dates in 2009.[11] And in a telling reality, partners were not left untouched by the economic forces. There was a 10.6 percent increase in partner mobility in 2010 over the previous year, as a record number of partners left or joined other law firms.[12]

In the aftermath, firms realized that the practice of law had been changed forever by the economic downtown and were forced to reinvent themselves in this new business environment.

Estate planning has been on the leading edge of this changing legal business model, mainly because such a practice does not fit well into the billable hour business model. The incompatibility can be explained from a purely cost-benefit economic analysis. The economics of big law requires that firms make their attorneys work plenty of hours and charge high hourly

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[7] Neil, Martha, *Bloody Thursday: Six Major Law Firms Ax Attorneys*, http://www.abajournal.com/news/article/bloody_thursday_4_major_law_firms_ax_attorneys_more_layoffs_at_others/ (February 12, 2009).

8 Ribstein (Deceased), Larry E., The Death of Big Law, 3 Wis. L. Rev. 749- 814, 751 (2010), available at SSRN: http://ssrn.com/abstract=1467730 or http://dx.doi.org/10.2139/ssrn.1467730.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

fees in order to provide for attorney compensation, partner benefits and overhead. Trust and estate departments simply cannot produce the revenue necessary to make the practice profitable in a billable rate business model. Unlike a typical litigation or mergers and acquisitions practice, estate planning practitioners cannot bill efficiently by the tenth of an hour. During a typical day estate planners meet with clients, attend conferences and coordinate the design of legal documents with other wealth management service professionals. Estate Planners draft and review estate plans and network with various referral sources. It is a constant hustle that is unique to the practice. Yet much of that time is not billable and cannot be charged to a client. While valuable, such activities would not be rewarded under the large firm business model. Estate planning clients also simply will not tolerate paying up to $1,000/hour for these services, as is often charged by partners at big law firm. As opposed to large corporations, trust and estate clients are generally more sensitive to their personal budgets.

It is no coincidence then, that as many of the big law firms re-examined and re-organized themselves in this new business environment, many well-known firms jettisoned their estate planning departments altogether, notable among them Gibson Dunn & Crutcher; Sonnenschein Nath and Rosenthal; Weil, Gotshal & Manages; and Debevoise & Plimpton.[13] Simply put, estate planning clients, lawyers, and the nature of the practice are simply not conducive to this business structure.

The solution to this problem lies not in changing the practice of estate planning, but instead, in changing the business model of law. To a large extent, this change has already occurred in the east and west coast legal communities. The trend in those areas has been a move away from estate planning departments within larger firms and towards independent boutique estate planning practices that focus exclusively on their unique practice area. Removed from the politics and financial pressures of other departments, estate planning boutiques can be structured in a manner that makes sense for all involved. As an added bonus, because the estate planning boutique will focus on one practice area, those large firms that have shed their departments can turn to such firms to handle specific client matters without the fear of having the client fished away.

It is estimated that estate and trust specialization accounts for around eight percent of all legal specializations.[14] Although that may not seem like a large proportion, it is in fact the fourth largest legal specialty category, behind civil trial, criminal law, and family law. In addition, the ABA House of Delegates currently approves only 13 specialized programs and two, or about 15 percent, are in estate planning, namely Estate Planning and Elder Law.[15]

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[13] Lattman, Peter, *Debevoise & Plimpton Drops Estates and Trust Practice,* http://dealbook.nytimes.com/2013/02/05/debevoise-plimpton-drops-trusts-and-estates-practice/?_php=true&_type=blogs&_r=0; *See also* Peacock, William, *Estate Planning: The Next 'Growth' Practice Area for Small Firms?,* http://blogs.findlaw.com/strategist/2013/07/estate-planning-the-next-growth-practice-area-for-small-firms.html.

[14] Blattmachr, *supra* note 5, at 7, (citing Am. Bar. Ass'n, Standing Committee on Specialization, *Informational Report to the House of Delegates*, "National Totals- Certified Specialists by Practice Area 2008," 2 (2009)).

[15] *Id.*

These specialty firms, now free from the constraints of the big law business model, are able to offer clients better billing options and enhanced customer service while rewarding attorneys for their efficiency and client development. Firms are able to accomplish these goals through project based, flat fee billing. In so doing, firms create an environment where attorneys are no longer required to meet billable hour requirements, allowing them to work efficiently and effectively on a client's plan. Attorneys are allowed to develop themselves professionally, through networking, education, community involvement, and client development. Such an arrangement creates a win-win environment for the attorneys and their firms as attorneys are incentivized to perform outstanding legal work while also giving them the flexibility to hone their expertise. As a side benefit, lawyers can practice law in an environment conducive to personal and professional growth, thus making for more fulfilled and happier lawyers.

Ultimately, the clients benefit the most. The flat fee billing model provides cost certainty. Instead of estimating expenses based on the length of time to complete a project, clients are assured of the final bill, regardless of the amount of time expended on a matter. As a result, clients can make value judgments on the appropriateness of a legal project on the front end, not on the back end after the work has been done and a battle over fees typically ensues. Additionally, clients can budget for the fee appropriately, making it easier to pay.

Perhaps the most important benefit of the project-based billing system is that by removing the hourly billing structure, the lines of communication between client and lawyer are opened. Once relieved of worrying over the cost of every call, email and question, clients are more likely to ask questions and to develop a relationship with their lawyer. Clients who communicate with their lawyer not only have a better overall client experience, but the lawyer can do a better job for their informed clientele. As a bonus, the informed client is much more likely to make a referral.

Lastly, once off the billable clock, collaboration is also encouraged amongst the client's entire wealth management team. Such discussions are imperative when drafting and coordinating a comprehensive estate plan. The absence of an hourly fee makes these discussions more fruitful, ensuring that all advisors are on the same page. Under the traditional billable model, these conversations are discouraged as the client frets over multiple clocks running in tandem and the double billing that results. Yet when everyone can get into a room for the client's benefit, the client can better experience the entire team working well together and perhaps even learn some of the inner workings of their own financial plan.

The flat fee, project based billing structure is a powerful business model from both the practitioner's and the client's perspective. It allows estate planning practitioners the flexibility to practice estate planning without the burden of the billing clock while also providing a better client experience. As Joel Schoenmeyer, of the Death and Taxes blog, so aptly wrote, "it may be that big firms don't need estate planning groups. But at this point, it doesn't matter because good estate planners don't need big firms either."[16]

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[16] Elefant, Carolyn, *Good News for Solo and Small Firm Estates Lawyers?,* http://myshingle.com/2007/01/articles/biglaw-practice-and-issues/good-news-for-solo-and-small-firm-estates-lawyers/ (citing the now non-operational Death and Taxes Blog).

II. The Economics of Law: Demand for Estate Planning Services

A. Population Demographics

The demand for estate planners has risen exponentially as the population prepares to undergo one of the largest shifts in history. As baby boomers, those born between 1926 and 1964, prepare for and reach retirement, there will be a growing number of seniors needing the services of estate planners. It is estimated that baby boomers are retiring at a rate of 10,000 per day,[17] with this segment of the population currently consisting of around 79 million people.[18] Moreover, as this huge population group moves toward retirement, their life expectancy is also increasing. In fact, baby boomers are estimated to be the generation with the longest life expectancy to date. Their life expectancy is currently estimated at 79[19] and Americans age 85 and older are the fastest growing demographic in the country.[20]

A large proportion of the baby boomer segment consists of their advisors as well. According to the Report of Estate Planning in the 21st Century Taskforce, a significant portion of today's estate planners are, in fact, baby boomers and like their clients, they too, are preparing for retirement.[21] As these practitioners retire, the supply of experienced estate planning attorneys will shrink precisely at the time when demand is increasing. This presents a significant opportunity for younger, experienced estate planners to fill the void created by these retirements.

As this generation ages, retires and passes away, their practitioners and advisors must prepare themselves for what amounts to one of the largest transfers of wealth from one generation to the next. It is estimated that in the next ten years, families are going to pass on more wealth than ever previously documented and they will be looking to estate planning professionals to shepherd that transfer. In fact, the largest intergenerational wealth transfer in history is projected to occur in 2052, with a total transfer of approximately $41 trillion.[22] This transfer will only be accomplished through and with the guidance of estate planning and financial services professionals, significantly increasing the demand for those services.

B. Changes in the Law: The American Taxpayer Relief Act of 2012

With the passage of the American Taxpayer Relief Act of 2012 (ATRA), a sense of certainty was finally embedded into the estate planning community. The estate exemption was set at $5,250,000 (indexed to inflation; currently $5,340,000) and portability was made permanent. Moreover, the act is not set to expire or sunset, as has been common in the past. Amid such exemptions, the estate planning community scrambled to re-evaluate and make recommendations accordingly for their clients.

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[17] Scroggin, John J., *Where is Estate Planning Going?*, 5, Lemberg Information Services Estate Planning Newsletter #2081 (March 25, 2013); republished on the Society of Financial Services Professionals Website; *available at* http://www.scrogginlaw.com/Scroggin-FurtureofEstatePlanning.pdf.
[18] *Id.* at 3.
[19] *Id.* at 6.
[20] *Id.* at 7.
[21] *Id.* at 29.
[22] *Id.* at 10-11.

As the federal estate tax exemption rose from $600,000 to several million dollars over the course of 15 years, the non-tax aspects of planning became increasingly important for the majority of estate planning clients. With such a high estate tax exemption, a smaller proportion of the population had to worry about estate tax liability. The changing population dynamics also demanded that professionals shift toward non-tax planning for modest estates as well. Thus, practitioners turned their focus to issues such as asset protection, incapacity planning, and the very essence of wise and responsible ways to transfer assets from one generation to the next.

Despite the high exemption level, even clients with moderate estates are well advised to engage in some form of tax planning when completing their estate plans. Although one can rely on portability, the benefits of a credit shelter trust still make it a prudent choice. The flexibility provided through disclaimer funding as well as the associated benefits, such as sheltering asset appreciation and asset protection, means that this form of trust should be strongly considered by all estate planning practitioners. Moreover, it is recommended that drafting attorneys not rely solely on portability when planning a client's estate, as the future of estate planning and tax laws are never certain.

High net worth clients still need to engage in complex and sophisticated estate planning, regardless of the estate planning law changes made by ATRA. Clients approaching the exemption amount and those who currently have estate tax liabilities should have multiple and complex revocable and irrevocable trusts, including dynastic, grantor trusts. In addition, such clients should engage in gifting strategies, tax mitigation and asset protection planning.

While the estate planning laws were made more certain by ATRA, the future of ATRA is still debatable. Efforts, thus far fruitless, have been made to reduce the exemption amount and/or repeal it altogether. The most recent White House Budget Proposal included a proposal to reduce the exemption amount to $3,500,000 beginning in 2018.[23] An argument can also be made that the estate tax exemption, which is tied to inflation, is simply unsustainable. A point will come when the number of households subject to the tax will be inconsequential. The revenue gained from the tax will no longer justify the tax and, at that time, Congress will likely act to reduce the exemption, making more households subject to the tax. Only time will tell; however, a prudent estate planner will draft with these contingencies in mind and with the aim of providing maximum flexibility in the document and for the client.

While the need for tax planning may have decreased for all but the mid to high net worth clients, estate planning is still an important aspect of every person's life, regardless of their wealth. The level of demand has not changed, the types of services desired have just shifted; that is, of course, until the laws change again.

[23] Sandhi, Jeanne, *Obama's Budget: Help for Workers, Taxes for the Rich,* http://money.cnn.com/2014/03/04/pf/taxes/obama-budget-taxes/.

C. Technology

Technology should be seen as a benefit and attorneys should position themselves to take advantage of this evolution to provide better client service and reduced fees. Many offices now incorporate "cloud" computing into their business structure, providing ready access to a client's documents as well as allowing attorneys and staff to work remotely. This increased access allows firms to be more responsive to clients and their questions, regardless of whether the practitioner is actually in the office. Such access also increases the communication and availability between attorneys and clients. Cloud technology is fairly cost effective when compared to the alternative server based system. By embracing technology attorneys can increase office efficiency, lower overhead and increase profit margins, passing such savings directly onto the client.

On the other hand, technology has also increased competition within the legal marketplace through the rise of online legal websites, such as Legal Zoom and its successors. These websites thrive on providing low-cost legal services. From prenuptial agreements to restraining orders, LegalZoom has provided do-it-yourself-services to more than 500,000 clients.[24] A common last will and testament costs just $69 to draft.[25]

To be competitive, these websites must focus on quantity over quality. They rely on clients both understanding and responding appropriately to prompted questions. Such an assumption is far from accurate, as many clients do not comprehend the practical consequences of their answers. Legal Zoom also does not provide some of the most valuable estate planning options, such as dynastic trust planning. Even so, Legal Zoom can create estate planning documents that are adequate for a client under the right circumstances. The biggest problem, however, is that the client is often not in a position to evaluate the quality and appropriateness of the documents produced beyond considering whether the document reads well and sounds legal.

LegalZoom and its peers have forced lawyers to have to justify their fees and worth when compared to these "self help" websites that charge $69 for a will. Ultimately, these self-help websites will not be for everyone, in large part because high end planning still requires human input and strategy. These websites also cannot compete with attorneys in regards to the legal products and client services they provide. However these websites, coupled with young, jobless lawyers willing to do work for a small fee, may well push estate planners to pick a path; one path will entail a high volume of low fee work, while the other path entails a lower volume of higher fee work. Again, this is merely a basic tenant of business but one that all estate planners should be cognizant of when planning their practice.

III. Conclusion

The future of estate planning is strong; however, legal professionals must be aware of the changing dynamics of the practice and position themselves to take full advantage of them. The

[24] Blattmachr, *supra* note 5, at 12, *citing* KoreAm, Legal Evoluation (Jun 1, 2007), http://iamkoream.com/legal-evoluation.
[25] *Id.*

shift in the legal business model and changing demographics, among both clients and practitioners, creates an opportunity for younger and experienced estate planning practitioners to create a niche to fill this void. Moreover, planning for flexibility, particularly in light of ATRA, which is anything but certain, will provide better outcomes for clients. Although some have viewed technology and the increased competition it has created as having a negative impact on the profession, attorneys can use technology to their advantage, creating a better client experience and reducing costs at the same time.

Regardless of these changes, and those likely to come, the truth is that clients will always need estate planning services. Everyone, regardless of their age or wealth, should engage is some form of estate planning. As Benjamin Franklin so eloquently stated, "In this world nothing can be said to be certain, except death and taxes."[26] As estate planners, death and taxes are certainly at the hub of our wheelhouse.

[26] *See* Franklin, Benjamin and Albert Henry Smyth, *The Writings of Benjamin Franklin: Volume 10*, 69 (MacMillan & Co., 1907).