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Subject: Sandra D. Glazier, Martin Shenkman, Jonathan G. Blattmachr & Joseph Garin on *Wellin v. Nixon, Peabody, LLP* - Case Lessons on Defensive Practice

"While Wellin focuses on whether or not the statute of limitations would operate to bar claims of breach of fiduciary duty and malpractice by the attorney involved in wrapping marketable securities in a FLP and the sale of interests in the FLP to an intentionally defective grantor trust (IDGT) in return for a promissory note, facts discussed in the brief opinion nonetheless provide fertile ground for the review and re-assessment of defensive practices that might be considered and perhaps implemented into a planner's practice."

Sandra D. Glazier, **Martin Shenkman**, **Jonathan G. Blattmachr** and **Joseph Garin** provide members with important and timely commentary on *Wellin v. Nixon, Peabody, LLP.*

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Martin M. Shenkman is one of the country's most prolific authors and speakers in the country on estate and tax planning and one of the earliest grantors of an Alaska Trust. Marty practices in New York and New Jersey.

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Joseph P. Garin is an equity shareholder at **Lipson Neilson P.C.,** in its Nevada office. He maintains a national practice, focusing on defense of professional liability claims, insurance coverage disputes, directors and officers claims, and risk & litigation management. Throughout his career, Mr. Garin has defended more than 500 lawyers and law firms in Nevada, Michigan, Colorado, and Illinois including the completion of jury trials, arbitrations and appeals. His other experience includes a range of litigation matters, including professional liability disputes, insurance coverage, director and officer liability, commercial law, and employer/employee disputes. He regularly consults with insurers and businesses of all sizes on risk management and litigation management matters. Mr. Garin is currently co-chair of the Professional Liability Committee for the Claims & Litigation Management Alliance ("CLM"), an international organization with more than 25,000 members.

Here is their commentary:

EXECUTIVE SUMMARY:

Raia v. Lowenstein Sandler, LLP – Thoughts on a Recent Malpractice Case,[i] addressed how *Raia* served as a catalyst for discussions among advisors regarding a variety of considerations that planners and advisors might wish to consider when engaged in the representation of estate planning clients. Like *Raia*[ii]*,* the recent *Wellin*[iii] case reinforces the importance of estate planners reviewing practices, procedures and other considerations when engaged to assist clients with regard to the creation and implementation of a client's planning desires. The issue in the *Wellin* decision is limited in scope to a determination of whether the statute of limitations should bar the claims alleged. But *Wellin* also identifies issues concerning potential implications resulting from the claimed failure to properly identify, address and potentially have clients waive, inter-generational and spousal conflicts of interest that plaintiff's alleged arose in the course of estate planning. Also, questions were raised as to whether the client was informed of the potential consequences of grantor trusts, and the potential risks of the transaction. These claims, that counsel did not explain potential consequences of a transaction, sounds similar to some of the claims raised in the *Raia* case.[iv]

> This article provides suggestions for more defensive practices that practitioners might consider (regardless of the applicability of those practices to the *Wellin* case). These considerations will be highlighted by the phrase "***Practice Consideration***."

> ***Practice Consideration****: One important lesson to practitioners from the Wellin case is that using ubiquitous planning techniques, even techniques that have provided valuable tax planning results in well-known cases, is not an assurance that problems may not occur. While the planning technique forms a basis for analysis in Wellin, which may be discussed in part, the focus here will be on practical solutions practitioners might implement as part of their practice in recognition of the uncertainties and prolonged statutes of limitations that may be involved when representation relates to estate planning.*

Caution to Readers

There are a number of seemingly important details that the short *Wellin* opinion does not disclose. The authors have no relevant information on the *Wellin* case other than those provided in the brief opinion. We assume that defenses to the allegations set forth in *Wellin* will be proffered and facts will be developed during the course of the litigation that will impact the ultimate outcome of the case. Nonetheless, there appear to be lessons that might be gleaned from the *Wellin* case, even at this early stage, that practitioners might currently consider.

A Few Initial Lessons Drawn From *Wellin*

Some initial practice considerations drawn from a review of the *Wellin* case include:

> ***Practice Considerations***:
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> - *Just as with Raia, Wellin reiterates the importance of informing clients of identifiable risks, consequences and considerations. It can be helpful to document some or many of those points in writing to be able to demonstrate at a later date that the warnings were given. When doing so, one may need to remain cognizant of the manner in which such risks are communicated if protection of the*

attorney client privilege and/or work product doctrines are to be preserved.[v] *Minimally, keeping adequate contemporaneous notes, regarding issues discussed, particularly areas of concern, can prove beneficial should litigation regarding the transaction later ensue.*

- *Family dysfunction is sufficiently common that practitioners may wish to discuss with the client how family dynamics might affect a plan.*

- *An analysis of potential conflicts of interest and documenting how they might be addressed and/or waived (to the extent possible) remains important whenever joint, multi-client and/or inter-generational representation is contemplated.*

- *Appropriate engagement and file closing processes can increase client awareness of the need to periodically review and reconsider estate plans and may help to protect an attorney from stale claims of malpractice. Whatever the eventual outcome of the Raia and Wellin cases, practitioners may wish to evaluate what processes might be utilized to enhance defensive practices.*

FACTS:

In *Wellin,* from 2001 until 2013, Nixon Peabody, LLP and Nixon Peabody Financial Advisors, LLC (separately and collectively "Counsel") represented Mr. Wellin in various estate planning matters. In 2003, it appears that the focus of the engagement related to attempting to effectuate a reduction in the potential estate taxes anticipated to be due on Mr. Wellin's death. The terms of the engagement letter (if any) were not discussed in the opinion. On the advice of Counsel, in 2003 Mr. Wellin formed Friendship Partners, LP (the "Partnership") with his spouse and his three children (from a prior marriage). The Partnership was funded with Mr. Wellin's Berkshire Hathaway Class A stock then valued at approximately $90 Million. At formation, Mr. Wellin owned 98.9% of the Partnership, while a separate LLC controlled the Wellin children's 1.1% interest. As part of the 2003 estate planning transactions, Counsel advised Mr. Wellin to contribute his Class A stock shares into the Partnership in exchange for limited partnership units, which left the LLC having the controlling interest over the Partnership and its assets. The opinion is silent as to whether Mrs. Wellin or any of the children and or spouse were also clients under this or any other engagement of Counsel.

Often estate planning vehicles, intended to effectuate a certain result, may later not be operative as planned or hoped. Estate planning, as with all planning steps, may have certain adverse risks, some identifiable and others not.[vi] The greater the anticipated or hoped for benefit, perhaps the greater the risk of a potential change in the law, or viability of the planning technique (whether by operation, statute or case law, economic changes, family changes, etc.).

> ***Practice Consideration***: *Practitioners may wish to consider the types and extent of written communications that might be utilized to alert a client of generic and reasonably identifiable specific risks of a proposed transaction. It is advisable that such communication not attempt to "sell" a particular technique, but rather identify options and consequences that might be considered as potential avenues for addressing the client's stated objectives*.

In 2006, Counsel advised Mr. Wellin that the strategy upon which the 2003 transactions had been premised, was now considered questionable and may no longer operate as intended to reduce his estate taxes. Alternate estate planning techniques, including a sale to a grantor trust (a so-called intentionally defective grantor trust or "IDGT"), were recommended. Despite such advice, Mr. Wellin did not immediately act upon the concerns and recommendations expressed by Counsel.

In 2008, Mr. Wellin was diagnosed with cancer and Counsel again recommended that the 2003 transactions be reviewed and a different strategy used in an attempt to reduce the estate taxes upon his estate. The *Wellin* opinion does not address whether separate engagements were created with regard to the advice rendered in 2003, 2006, 2008 or thereafter. It is not clear whether counsel advised the client as to other issues in later years, as he had in 2006. So, we cannot be certain what was actually done.

> ***Practice Consideration****: However, as discussed later, the closure of each of these engagements reflecting them as separate matters, and use of a new engagement for each new*

review and/or change in the plan, may be beneficial in increasing client awareness and reducing future liability risks for the planner. Such closures may help delineate when an engagement ends and a statute of limitations begins to toll. Many malpractice statute of limitations provide a discovery provision that may extend the time when the statute will toll. In Wellin the Court appears to suggest that the statute of limitations would not toll until "a person of common knowledge should have been aware that the attorney had given incorrect or misleading tax advice" This "standard" is also discussed below. When "discovery" provides a basis for extending the tolling of the statute of limitation, a closure letter may not necessarily fully protect the planner from a later filed claim. In Wellin the issue was the "attorney's alleged failure in 2009 to advise Mr. Wellin fully of potential tax liabilities in implementing an estate-planning strategy" which allegedly wasn't and couldn't have been reasonably discovered until Wellin retained new counsel years later. Nonetheless, separating and closing prior representations is a defensive practice worth considering.

In 2009, with the assistance of Counsel, Mr. Wellin established an IDGT. The Wellin children were named as the co-trustees. In 2009, Mr. Wellin sold his 98.9% interest in the Partnership to the IDGT in exchange for a promissory note worth about $50 Million, based upon Counsel's prediction that the transaction would result in a future *estate* tax savings to Mr. Wellin's estate of between $14 and $18 Million. It appears that after the IDGT sale was effectuated, Mr. Wellin continued to have questions regarding the impact the transaction would have on his *estate* tax liability. In January 2010 and in November 2011, in addition to the advice provided in 2009, Counsel indicated that the IDGT sale was a "very efficient strategy for reducing estate taxes" and would effectuate a "freeze" that would have the effect of transferring "more wealth" to the Wellin children because "any appreciation in the value of the [Partnership] over the Note interest rate passes to the trust beneficiaries … both gift and estate tax free." This advice was repeated in a letter from Counsel to Mr. Wellin in November, 2012. In 2010 and 2011, Counsel also indicated that if the assets of the Partnership were liquidated after Mr. Wellin's death, the children would inherit an additional $30 Million after *income* tax liabilities were calculated. From the written communications cited in the opinion, it does not appear that Counsel documented the potential of increased *income* tax liability Mr.

Wellin might experience if the Partnership assets were sold or liquidated during his lifetime.

> ***<u>Practice Consideration</u>****: Practitioners should be careful about estimating tax savings on matters given the vicissitude of the tax laws. Also, one may wish to limit, or even eliminate the use of terms such as "very," "optimal," "best," etc. In tax law, many planning strategies face offsetting risks. There are often options. It is may be difficult, if not impossible, to determine what the best or most efficient or effective strategy will be without the benefit of hindsight. Consider avoiding "absolute" or "charged" words in client communications. Instead of saying "…any appreciation…passes to the trust…" consider using terminology like: "….any appreciation….may pass to the trust…" Try to treat any email to the client as you historically would have treated a letter to the client. Review communications from the lens of "does this sound as if I am trying to sell a plan?" and if so, consider tempering the language.*

In early February 2012, Mrs. Wellin emailed Council indicating concern over whether Counsel had breached its duty of loyalty to Mr. Wellin in favor of his children with regard to issues relating to the treatment of certain of Mr. Wellin's tangible personal property. She accused Counsel of divided loyalties and, perhaps, making comments to one of the children that resulted in hostile behavior by the child toward Mrs. Wellin. In mid-2013, Mr. Wellin terminated his attorney-client relationship with Counsel and retained a new attorney who provided advice regarding the 2009 transaction. In July, 2013, Mr. Wellin sued his children in what appears to have been an attempt to set aside the 2009 transactions (the "Children's Litigation"). Mr. Wellin alleged in the Children's Litigation that he didn't know or understand that he had relinquished control over the Partnership under the 2009 transaction or that he would be responsible for income tax consequences if the partnership sold an interest in its assets during his lifetime. In November and December, 2013, while Mr. Wellin was still alive, the children (apparently acting as Trustees of the IDGT) sold the Berkshire Hathaway stock (that comprised assets of the Partnership owned by the IDGT) for $157 Million. Mr. Wellin died in 2014.

> ***<u>Practice Considerations:</u>***

- *A suggestion that some commentators have made about Wellin is that Counsel should have recommended a trustee that would have been "friendly" to the grantor, Mr. Wellin. Those commentators claim a "friendly" trustee might not have sold the stock triggering the gain for income tax purposes. But even that action would have to be taken with care, and may have raised other issues. If the trustee is "too" friendly, might that give rise to an IRS challenge that there was an implied agreement between the settlor Mr. Wellin and the trustee? Might Mr. Wellin's children have threatened the trustee to pressure the "friendly" trustee to sell the stock? What about the trustee's duty of undivided loyalty. That "duty" runs to the beneficiaries and not to the grantor! So, naming a friendly trustee, and even including a tax reimbursement clause as well, even together, may not have assured the desired result. Perhaps use of an institutional trustee might have facilitated a more thorough review and analysis of the potential ramification of a proposed transaction or even a potential attack based on an implied agreement between the grantor and trustee. Clients frequently reject the recommendation to use institutional trustees, often based on an unwillingness to incur the cost of an institutional trustee or the misconception that somehow institutional trustees are plagued by "red-tape" and formalities, etc. The actual cost of an administrative trustee is quite modest and in some cases can be obtained for less than $5,000/year. Even if the client declines the recommendation to use an institutional trustee, documenting that in the client file may provide a measure of protection to the practitioner.*

- *Since Wellin had given up interest and control, an independent and/or institutional trustee, owing a duty of loyalty only to the beneficiaries of the trust (which did not include Wellin), might nonetheless advise of the benefits of the sale, to shift the tax burden to Wellin, since no step up in basis would have occurred on Wellin's death*.

- *The reality of practicing estate planning is that many common planning situations are akin to the ancient Greek mythological characters of Charybdis the treacherous whirlpool, and the sea monster Scylla. Mariners had to navigate between the two to avoid a calamity. Estate planning often has a downside for each upside. Perhaps, every plan has a potential sought after benefit (reaching the tax savings port), but pursuing that benefit often requires delicate navigation between competing risks. More unpredictable than Charybdis and Scylla are the whims of Congress that could change the laws, risks and results in unpredictable ways. Practitioners might endeavor to apprise clients of as many of these as practical, in writing, so that if the plan falls afoul of a tax, it was the client's informed choice to take the voyage.*

In February 2016, Mr. Wellin's estate (the "Estate") sued Counsel alleging negligence, breach of fiduciary duty, and breach of contract premised upon the same underlying facts and alleged conduct of Counsel raised in the Children's Litigation. At its core, the complaint alleged that Counsel failed to inform Mr. Wellin of the "risks and consequences of the 2009 transaction, including Mr. Wellin's potential substantial tax exposure". Reports submitted by the Estate's experts indicated that Counsel had "'misrepresent[ed] the actual risks [and] benefits' of the 2009 transaction, and that [Counsel's] statement that the 2009 transaction would result in 'more wealth' transferred to the Wellin children was 'grossly misleading'."

The Estate's expert (Jerry Hesch, who is a well-known and respected estate planner, professor and director of the Notre Dame Tax and Estate Planning Institute) opined that Counsel failed to adequately advise Mr. Wellin of issues relating to the potential imposition of valuation and tax liability and that the 2009 transaction "exposed Mr. Wellin to a potential gift tax liability of $17.5 million, plus interest and penalties, in exchange for only a potential savings in estate tax" and the risk of "extreme" income tax liability if the Partnership interests were liquidated during Mr. Wellin's lifetime." Mr. Hesch also opined that because Mr. Wellin was not an estate tax lawyer he would not have been aware that he had been "misled" regarding the risks of the 2009 transaction until he met with new counsel in mid-2013.

Another of the Estate's experts generally agreed with Mr. Hesch's opinion and further opined that Counsel did not fully communicate the "risks and implications" of the 2009 transaction to Mr. Wellin and that Mr. Wellin "may not have [had] sufficient assets and liquidity to pay income taxes" that *could have* resulted from the 2009 transaction. This expert opined that the potential "income tax" exposure exceeded $40 Million, plus interest, as a result of the liquidation of stock that occurred before Mr. Wellin died.

<u>Practice Considerations</u>:

- *This is a common issue litigators defending estate-planning lawyers encounter. The grantor, spouse, children or estate claim they could not have "known" of the claim before they met with another lawyer. Practitioners might mollify this issue with more comprehensive documentation of the risks and uncertainties of the plan, providing optional plans from which the client may select, suggesting utilization of independent counsel for different parties to a transaction, and recommending a collaborative team to structure and implement a plan. Had the Wellin's CPA been proactively involved in the planning (we cannot discern whether this occurred from the opinion), that second professional may well have been able to corroborate that the implications of a grantor trust were explained to Mr. Wellin. Also, the more practitioners involved, perhaps, the greater likelihood that the defensive practices of each practitioner collectively would protect all of them better. Additionally, hearing the risks explained from different practitioners might have provided greater emphasis to the client and each might have explained the risks using different language that might have enhanced the client's understanding of the potential identifiable risks.*

- *The potential burden of proving what risks were relayed to a client in the event of litigation may outweigh the additional expense incurred in documenting the particulars of the transaction to the client. File notes are useful. Detailed billing entries may be better at communicating the risks to the client* *as bills are sent to the client (but billing statements may not be subject to protections afforded under the attorney-client privilege or work product doctrine). Perhaps the best evidence may be a letter or memorandum to the client that outlines what is changing with the new plan, and the identifiable risks and uncertainties involved.*

- *It may be beneficial to provide, where permissible and practical, that all disputes be resolved by confidential, private arbitration. Private arbitration keeps the document out of the public's eye. Unfortunately, under some state laws such provisions are not permissible or if permissible, not easily accomplished.*[vii] *However, in many jurisdictions it is far from certain that a lawyer can insist on arbitration if a dispute arises as to the work the practitioner did for the client in the absence of the client obtaining independent counsel with regard to inclusion of such a provision.*

Statute of Limitations

At the trial court level, Counsel filed two motions for summary disposition. One of the basis raised was that claims were barred by South Carolina's three year statute of limitations. The parties stipulated that the three years from the cessation of the attorney-client relationship expired on October 30, 2015. However, the Estate alleged that because Mr. Wellin did not learn he had not been fully and adequately advised of the risks attendant to the 2009 transaction until mid-2013 when he hired new counsel, the statute of limitations was extended and didn't expire until mid-2016. If Mr. Wellin didn't "know" or "should not have known" about the basis for the claim until he retained new counsel (under S. Carolina law) the claims would have been brought within the statute of limitations.

The trial court granted Counsel summary disposition on the basis that the statute of limitations barred the claim. The court found that because Mr. Wellin was aware of the "divided loyalties" of Counsel as between himself and his children, he knew or should have known he had a cause of action against Counsel in early 2012, when the issue of divided loyalty was raised by Mrs. Wellin (as his agent) with regard to addressing Mr. Wellin's tangible personal property. In 2012, while there had been no reference to issues relating to Mr. Wellin's sale of his Partnership interest to the IDGT in exchange for a promissory note, the trial court nonetheless held that the harms alleged were of the same “nature” (as they emanated from claims of “divided loyalties”) and that the Estate had failed to provide “evidence that the risks and consequences of the November 2009 transaction were not readily discoverable in February 2012”.

The appellant court reversed the trial court’s grant of summary disposition. It held that the trial court erred when it determined that the February 2012 communication triggered the limitations period because (a) the basis for the current claims related to Counsel’s failure in 2009 to adequately advise Mr. Wellin of the potential tax consequences of implementing the estate planning strategy recommended by Counsel, and (b) there was “compelling evidence” that a person of “common knowledge” would not have been aware that he had received incorrect or misleading tax advice without the input of new counsel (which didn’t occur until mid-2013). As a consequence, there existed disputed issues of material fact regarding when the injury was readily discoverable, resulting in the claims being reinstated and a remand of the matter for further proceedings.

It is unclear from the opinion at what stage during the trial court proceedings summary disposition was granted; particularly the extent to which discovery had been completed.

Identify and Explain Potential Issues to the Client

While the 2009 *Wellin* plan involved a $50 to $90 Million plus transaction, which reasonably could bear the cost and expenses associated with a more extensive and documented discussion of potential risks and benefits, many estate planning clients may not wish to incur the expense associated with the cost of an extensive and documented analysis that includes an explanation of each planning option discussed and the potential benefits and consequences. Often, a verbal or, perhaps, more general discussion ensues.

The more complex the assets or options, the greater the potential for beneficial or adverse tax, economic or other consequences. Sales to IDGTs have long been recognized as an effective means of “freezing” the value of assets for estate tax purposes, while providing the additional benefit of an income “tax burn” because, while the underlying assets are removed from the grantor’s estate for estate tax purposes, the income tax consequences remain the grantor’s obligation while the trust retains grantor trust status. That “tax burn” is often cited as one of the most powerful tax benefits of a plan, yet that burn could have singed the client in *Wellin*. That the taxpayer bears the tax cost is, from an estate tax planning perspective, potentially a valuable benefit as it reduces the estate further thereby potentially saving additional future estate taxes. The "tax burn" if often a sought after benefit. But, like for many things, there can be "too much of a good thing." Depending on the size of the gain and the grantor's remaining estate, that "tax burn" could have too much impact by reducing the grantor's estate beyond what the grantor is comfortable. This suggests the proverb "one man's meat is another man's poison." The ability to "swap" assets of equal value, and thereby replace assets of low basis for income tax purposes with assets of equal value having a higher income tax basis was not addressed by the court. This power (which is often used to create grantor trust status) can be an attractive feature that can provide future flexibility by permitting the grantor to swap an appreciated asset out of the grantor trust. The court also didn't address the fact that the sale to the grantor trust did not trigger income tax realization as a result of the sale itself and the interest paid on the note did not result in a realization of income to the grantor (also potentially attractive features of an IDGT).

Practice Considerations:

- *Suffice it to say, the case highlights the potential import of at least generally (and perhaps in some instances with particularity) highlighting not only the advantages of a proposed plan, but also the identifiable risks that may be attendant to the plan if implemented. The extent to which risks are specifically identified in writing might represent a balancing act, especially if the need to establish a business purpose for a transaction is anticipated. Documenting such risks in writing may subject the disclosure of the potential risks to the IRS, thereby providing a roadmap for use by the IRS in challenging a transaction. However, given the nature of the Raia and Wellin cases, and no doubt others, counsel may need to assess and balance the potential benefits and consequences of documenting risks to protect counsel. The clear implications of these and other cases is if that if counsel cannot demonstrate what the client was warned about, the client might merely choose to have selective memory and sue on the basis that they were never informed. Even sophisticated clients may feign ignorance of risks they knew or should have known about based upon their exposure to issues and/or experience.*

- *Also, of import is ascertaining and, perhaps, documenting the client's estate planning goals from which an array of options might be generated for the client's consideration, accompanied by an explanation of some of the accompanying risks and potential benefits of each such option. Not all risks are possible to identify, but perhaps the client might be cautioned about that too. Absent a Ouija Board or crystal ball, it's impossible for counsel to accurately predict economic changes (many planning techniques are interest rate sensitive), the changing value of assets, or future court or legislative developments. Even a clairvoyant planner can't accurately predict or plan for the myriad of permutations of family dysfunction that might occur. Providing options and identifying at least some of the risks that might be attendant to each choice, encourages the client to be vested in the process and may enhance their understanding that all plans and options have an attendant level of risk. The balancing of estate tax savings against income tax savings has long been an integral element of assessment as part of the estate planning process. The funding of assets to a credit shelter trust (as opposed to a marital deduction trust) or deciding on whether and to what extent a QTIP election might be made, generally has a consequential impact on whether a step up in basis will be available on the death of the surviving spouse. When selecting a formula or option, issues of unfettered control (or lack thereof), and estate tax vs. income tax consequences remain factors of import for consideration when providing advice to clients during the drafting as well as the administrative phases of an estate plan.*

- *Although this point was stated above, practitioners should encourage clients to consult with all of their advisers. A CPA may have more income tax knowledge (which was a critical issue in Wellin) than the estate planner. An insurance consultant may prepare an analysis showing how life insurance protects against mortality risk in so-called spousal lifetime access trusts (SLATs) or how long term care and disability coverage might provide protection given the portion of wealth transferred to an irrevocable trust. A wealth adviser or trust officer may provide financial forecasts to demonstrate possible* *financial consequences of a plan. Moreover, each may be privy to a different piece of the grantor's information or historic relationships and goals that might be pertinent to the analysis of options. Each of these steps may result in a different explanation or perspective being given to the client, another practitioner identifying similar or even different risks or concerns with a plan, and all of this may provide the client with a better understanding of the totality of a plan, including options and risks. From an evidentiary perspective, using a team approach (which includes the estate planning attorney, accountant, financial advisor and other professionals who might have important knowledge regarding assets involved in a proposed transaction), especially when complex estate planning options are being evaluated, might identify additional issues that bear consideration by the client.*

- *Nothing dictates that a client be warned of risks in writing, but Wellin (and Raia before it) certainly identifies the potential benefit of doing so should a claim against the planner, by the client, arise. Can a planner predict every potential risk or its permeation? The categorical answer to this question is "no". From a malpractice perspective, the general question raised is whether the attorney acted in accord with the standard of practice in his or her community. The goal, however, is to never even get to questions of ordinary vs. expert standard of care. Documentation that "triggers" or "limits" the statute of limitations, to the extent possible, may avoid the malpractice case proceeding to this analysis. Unless one holds himself or herself out as an expert or being like Yogi, "smarter than the average bear," such that they have expertise that sets them above the average estate planner, the standard they will generally be held to is what would a "C" rated attorney do under the facts and circumstances presented. It remains worrisome and uncertain as to what might trigger expert status. Certainly, practitioners might wish to avoid terms in marketing materials (e.g., firm brochure, firm website, etc.) indicating "best attorney," "outstanding practitioners," "renowned expert," etc.*

- *It is advisable not to oversell a plan or proposed transaction.*[viii] *The importance of having frank discussions with a client that* *provide the client with independent advice (whether it is what the client wants to hear or not) cannot be overstated. Perhaps of greater importance to the lawyer is proper documentation of these frank discussions.*

- *If a client wishes to preferentially treat a certain beneficiary or class of beneficiaries (such as Mr. Wellin's children over his spouse), documenting the client's desires and the rationale provided by the client during the planning process for doing so, may be important should later litigation regarding the client's intentions and the voluntary nature of the same become an issue. Not only might that documentation assist in the event of an undue influence claim, but in the Wellin situation it may have helped to establish that the plan and transactions engaged in by Mr. Wellin comported with his expressed estate planning desires. Readers should note that there was not adequate information available in the case to discern what might have actually occurred in Wellin in this regard, so the comment above is merely a general suggestion, perhaps, to guide practitioners to more defensive practice procedures.*

Judicial Estoppel

Given that the first litigation initiated by Mr. Wellin with regard to the 2009 transactions was against his children, a discussion of the affirmative defense of "judicial estoppel" may be merited. This doctrine was discussed in another article by one of the authors.[ix]

> Judicial estoppel is [a] doctrine which can bar a litigant from accepting the benefit of a position or bargain in one proceeding and then subsequently take a contrary position.[x] Courts around the country have applied the doctrine of judicial estoppel to bar litigants from assuming a particular position in a legal proceeding, such as affirming their understanding and acceptance of a settlement, and then assuming a contrary position in a subsequent legal proceeding that seeks to eschew the settlement and recoup benefits allegedly denied or omitted in the prior settlement.
>
> In *McKay v Owens*[xi], the Idaho supreme court affirmed a summary judgment in favor of defendant attorneys arising out

of a medical malpractice settlement that terminated the civil action.[xii] In *McKay* the application of judicial estoppel barred a legal malpractice case that followed the medical malpractice lawsuit settlement. The court found that "[b]y taking the position of agreeing to the settlement, [plaintiff] obtained an advantage (the settlement) from one party (the medical malpractice defendant)."[xiii] It held: "[Plaintiff] cannot now repudiate that statement [the agreement to settle] made in open court in front of a judge, and by means of her inconsistent positions [and]...obtain a recovery against another party, . . ."[xiv]

The *McKay* court provided guidance on the application of the doctrine. It indicated that:

> For guidance purposes and to avoid misapplication of judicial estoppel, it should be made clear that the concept should only be applied when the party maintaining the inconsistent position did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position. Stated another way, the concept of judicial estoppel takes into account not only what a party states under oath in open court, but also what that party knew, or should have known, at the time the original position was adopted. Thus, the knowledge that the party possesses, or should have possessed, at the time the statement is made is determinative as to whether the person is playing "fast and loose" with the court.[xv]

Courts also apply judicial estoppel to prevent a party "'from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.'"[xvi] Judicial estoppel is a doctrine " 'intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.'"[xvii] Essentially, "judicial estoppel is widely viewed as a tool to be used by courts in impeding those litigants who would otherwise play 'fast and loose' with the legal system."[xviii]

Judicial estoppel has been applied as an equitable doctrine to prevent a party from taking a position in a later proceeding that is inconsistent with a position that party took successfully in a prior proceeding.[xix] In *Paschke v. Retool Industries*,[xx] the Michigan Supreme Court adopted the "prior success" rule, meaning "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true."[xxi] In short, judicial estoppel applies "where a party attempts to invoke the authority of a second tribunal 'to override a bargain made' with a prior tribunal."[xxii]

In another case applying the judicial estoppel doctrine, Michigan's appellate court rejected an attempt by a litigant, who settled a civil litigation matter and then sued his attorneys, from trying to "override a bargain made" in regard to the settlement of the underlying matter.[xxiii] The facts in that case are extensive, but suffice it to say the appellate court applied the "prior success" rule. Accordingly, the "judicial estoppel doctrine" barred defendant from "invok[ing] the authority of a second tribunal to 'override a bargain made' with a prior tribunal" – in this case, a final settlement of the underlying case.[xxiv] As a result, the client/litigant was prevented from pursuing a counter-claim for legal malpractice that was inconsistent with the settlement and the testimony that led to the settlement. The court found that although the case settled and the damage theory propounded in the initial case was not litigated to its conclusion, the civil settlement between BCBSM and the client/litigant was a bargain made with a prior tribunal.[xxv] As a consequence, application of the judicial estoppel doctrine prevented the client/litigant from changing the position he took in the prior litigation, namely, his assent to the validity of the economic damage theory presented by the defendant law firm on his behalf – a theory the client/litigant also affirmed in trial testimony.[xxvi] In short, the court determined that judicial estoppel applies where (i) a litigant has taken a verifiable and known position in a prior action, based upon all the attendant circumstances, even if the position is not litigated to a conclusion, and (ii) the litigant then agrees to settle the civil suit, thereby "making a bargain with the tribunal" to end the matter. Having done so, the litigant cannot maintain a position inconsistent with prior testimony made in court post-settlement.

> While the doctrine of judicial estoppel is factually dependent and won't always be applicable, it is important to recall its existence and raise it as an affirmative defense when a litigant has taken a position in court proceedings which is accepted by the tribunal (whether through testimonial or written affirmations in settling a matter and communicated on the record to a tribunal (such as by stipulation and order or otherwise)). In such cases, courts may well recognize and enforce the "bargain with the tribunal" and bar the litigant from taking an inconsistent position in a second lawsuit or proceeding.[xxvii]

<u>Income Tax Considerations in *Wellin*</u>

It appears that the primary focus of the claims against Counsel related to the income tax consequences associated with the 2009 transaction and the sale of Partnership assets during the grantor's lifetime. The 4th Circuit Court of Appeals also appears to have placed some emphasis on the mere "potential" of estate tax savings.

<u>Practice Considerations</u>:

- *Statements regarding the mere "potential" of estate tax savings may emphasize the potential benefit of planners documenting the assumptions utilized to form the basis of advice provided to the client and the importance of reflecting that a change in any of the underlying assumptions, or the manner in which the plan is implemented, can have a significant impact on the potential effectiveness of a proposed plan*.

- *Perhaps the inclusion of a tax reimbursement clause when drafting an IDGT might mitigate some income tax concerns. When including such a clause, there should be no compulsion or pre-existing understanding that reimbursement will occur (if the assets of the IDGT are intended to be deemed outside of the grantor's estate for estate tax purposes). The use of a tax reimbursement clause might help to mitigate the consequences* *of a sale of assets during the grantor's lifetime. Additionally, such a provision might be utilized to address concerns that arise should the burn of grantor's estate related to the grantor's ongoing responsibility for the income tax consequences of the IDGT create an undue or unanticipated diminishment in the grantor's ability to sustain his or her lifestyle. Even if a projection of anticipated income tax consequences is created (similar to the projections utilized for insurance policies), the facts upon which a projection is based often prove to vary from the realities presented.*

- *Some commentators have gone so far as to suggest that failure to include a tax reimbursement clause itself could give rise to a claim of malpractice. That is not a fair nor reasonable statement. Including a tax reimbursement clause could be viewed as increasing the risk to the estate planning objectives of the transaction. There are instances where application of the tax reimbursement clause undermines a transaction. The mere inclusion of a tax reimbursement clause doesn't guarantee that the trustee will (or should) exercise it in the grantor's favor. Use of the clause must be left to the discretion of the trustee to avoid estate inclusion. Moreover, the trustee's duty of loyalty runs to the beneficiaries and not to the grantor. In the Wellin case (which did not appear to mention whether or not there was a tax reimbursement clause, so it would seem that there was not one), it seems unlikely that the children acting as trustees would have exercised their discretion to reimburse the grantor, their father, for the taxes incurred. It is even possible that the children (as trustees) engaged in the lifetime sale to intentionally trigger the need for the grantor to bear the income tax consequences, given the grantor's efforts to unwind the transaction and deprive the children of the benefits of the grantor's initial plan. Given these uncertainties, and the risks attendant to the inclusion and utilization of a tax reimbursement clause, perhaps the safest practice is for practitioners to apprise clients of the options and issues and let the client make an informed decision. None of the options discussed above is without risk or potential issue, and that is similar to most actual estate plans.*

Damages

In the context of a malpractice case, the plaintiff will have to show that the damages suffered were the direct result of the professional's malpractice. This is often referred to as the "case within the case". One might therefore query (1) whether more taxes were incurred because of the 2009 transactions and (2) whether it was possible for Mr. Wellin to take steps to turn off grantor trust status and whether his new counsel, in 2013, identified avenues for doing so. However, one would not get to the analysis of the "case within the case" if it is ultimately determined that the claim is otherwise barred by the statute of limitation, laches or another affirmative defense. It is for this very reason that a review of office practices may be merited.

Since "Counsel" in the Wellin case included not only the lawyer and the law firm with whom he was associated, it also included Nixon Peabody Financial Advisors LLC, which appears to be an advisory firm which manages $176.43 million of regulatory assets for 115 client account and provides financial planning services, portfolio management for individuals and small business, consulting, tax planning and preparation,[xxviii] with regard to those professionals which are not providing legal services, it may be possible to shorten or otherwise limit the time a client may bring a cause of action, to as little as one year[xxix] and limit the extent of damages recoverable.[xxx]

Language contained in the appellate court's decision in *Aaron v. Deloitte Tax LLP*[xxxi] may provide some guidance. With regard to the claim against the accounting firm, the court found that:

> The engagement letter, which stated that it covered a period of seven months, provided that any action brought relating to the engagement must be commenced within one year of the accrual of the cause of action. The accrual of plaintiffs' accounting malpractice claim was on January 21, 2009, the date decedent signed the last document that was part of the estate tax plan formulated by defendant. This action was not commenced until September 2015, and is untimely.
>
> Plaintiffs may not avail themselves of the continuous representation tolling doctrine because the limitations period was contractual, not statutory, and was reasonable. The engagement letter indicated that decedent, a sophisticated and

> experienced businessman, and defendant, did not necessarily expect the representation to continue after the plan was in place, since the engagement expressly ended approximately seven months after the agreement was signed.
>
> Equitable estoppel is equally inapplicable because the engagement letter made clear that any estate tax plan defendant formulated was subject to challenge by taxing authorities. Moreover, the complaint alleged that in April 2009, within the limitations period, defendant advised plaintiffs that the estate plan would likely be closely scrutinized by the IRS.
>
> (Internal citations omitted)

Allied Professionals and Steps Counsel Might Consider to Limit Liability

While not every state permits the limitations identified in *Aaron v. Deloitte* to be applied, the use of a thoughtful well-crafted engagement letter that addresses the scope and duration of the engagement and that also addresses any limitations that might be permissible merits consideration.

A complex estate plan for a wealthy client generally involves a planning team consisting of the attorney, CPA, wealth adviser and depending upon the transaction an appraiser. Unfortunately, the attorney generally will not be able to limit the amount of liability potentially incurred under the rules governing attorney ethics[xxxii], but that does not negate the importance of defining who is the client, the scope of the engagement, and its intended duration. The CPA and appraisers (and financial advisors) may be able to impose stringent limitations on their liability. The professional (other than legal counsel) may be able to limit the dollar value of their liability to their fees earned, or perhaps even just to a portion of the fees involved. Those professionals might also be able to limit the period during which a claim can be brought, providing them with further protection. The wealth adviser may attempt to limit its liability by stating clearly that it does not provide legal or tax advice thereby perhaps shifting the burden back to the attorney and CPA (with the CPA but not the attorney having the ability to limit its liability to the fee it earns). As a result, the attorney may become the last defendant standing, further emphasizing the importance of a well thought engagement letter, coupled with written confirmation when the services covered under the engagement have been completed.

Unlike the limitations that an allied professional might impose under the terms of engagement, RPC 1.8(h)(1) provides: “A lawyer shall not: “ . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.” The question therefore arises as to whether, for a new engagement, a prohibition exists against a lawyer including the same limiting language in their agreement with a new client, provided, the client is advised to obtain and has the opportunity to seek separate counsel to review the engagement agreement. The extent to which this approach may be available may be state dependent.

In addressing the model rules of professional conduct, the ABA provided some guidance in 2002 under ABA Formal Opinion 02-425, which provided in pertinent part:

> a provision in a retainer agreement requiring "the binding arbitration of disputes concerning fees and malpractice claims" did not violate ABA Model Rule of Professional Conduct 1.4(b), "provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.". According to the ABA Opinion, under Model Rule 1.4(b), a lawyer's fiduciary "duty to explain matters to a client" encompasses "the duty to advise clients of the possible adverse consequences as well as the benefits that may arise from the execution of an agreement" that includes an arbitration provision. Thus, the lawyer must "'explain' the implications of the proposed binding arbitration provision 'to the extent reasonably necessary to permit the client to make (an) informed decision' about whether to agree to the [provision's] inclusion" in the retainer agreement. The scope of the disclosure will depend on "the sophistication of the client." Ibid. The lawyer, however, "should make clear that arbitration typically results in the client's waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal." Ibid. A lawyer "also might explain that the case will be decided by an individual arbitrator or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration."

> Additionally, the ABA Opinion recognized that a mandatory arbitration provision in a "retainer agreement [that] insulates the lawyer from liability . . . to which she otherwise would be exposed under common or statutory law" would contravene ABA Model Rule of Professional Conduct 1.8(h). To illustrate that point, the ABA Opinion explains that "if the law of the jurisdiction precludes an award of punitive damages in arbitration but permits punitive damages in malpractice lawsuits, the provision would violate Rule 1.8(h) unless the client is independently represented in making the agreement."
>
> ***
>
> Some jurisdictions require lawyers to advise their potential clients to seek the advice of independent counsel before signing a retainer agreement containing an arbitration provision. See, e.g., Pa. Ethics Op. 97-140, at 3 (1997) ("[T]he client [must] be advised and given an opportunity to seek the advice of independent counsel."); Va. Legal Ethics Op. 638, at 1 (1984) (stating that an arbitration provision in a retainer agreement is permissible "provided that the client consents after full disclosure of the effect of such a provision and after the client is advised to seek independent counsel in regard to the advisability of such a provision"). Going even further, Michigan Ethics Opinion RI-257 (1996) bars a provision in a retainer agreement to arbitrate future disputes unless "the client obtains independent counsel concerning the advisability" of agreeing to the arbitration provision. At the far end of the spectrum, the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline has advised that a client's retainer agreement "should not contain language requiring a client to prospectively agree to arbitrate legal malpractice disputes."[xxxiii]

The extent to which this approach may be available may be state dependent. By way of example, the *Sills Cummis*[xxxiv] case in New Jersey created a substantial standard for a firm to meet just to include an arbitration clause in a retainer agreement. In *Sills Cummis,* Delaney (who is described as a sophisticated businessman), retained the Sills firm under a 4 page retainer agreement. The agreement contained an arbitration provision stating that any dispute about the firm’s legal services or fees would be determined by arbitration through a private arbitration and mediation organization known as JAMS and such proceedings would remain confidential. By agreeing to arbitrate, the agreement disclosed that Delaney waived his right to a trial by jury. The agreement also advised Delaney that the arbitration award would be final and non-appealable. An attachment to the agreement provided more information about arbitration through JAMS. It reflected that the parties would be equally responsible for the cost of the process, where the arbitration would take place, the substantive law that would be applied and a hyperlink to JAMS' 33 page set of rules with regard to arbitration through that organization. A hard copy of the JAMS' rules was not provided to the client at the time the retainer agreement was presented. The agreement also contained provisions that would preclude imposition of punitive damages and contained broad language that would require submission of any form of dispute between the client and the firm to arbitration, but did not specifically identify that a claim of malpractice would be governed by the provision. A supplemental retainer letter was later provided reflecting (among other things) advise of additional retainer funds that were then required, made no reference to the arbitration provisions. Ultimately, the attorney client relationship broke down. The firm sued for fees owed and Delaney sued claiming professional malpractice, raising the issue of whether and to what extent the arbitration clause was enforceable. The trial court held the provision enforceable, but the appellate court found that the failure to provide Delaney with a hard copy of the JAMS rules and terms limiting damages "rendered the arbitration provision unenforceable under the Rules of Professional Conduct". The New Jersey Supreme Court held that

> …for an arbitration provision in a retainer agreement to be enforceable, an attorney must generally explain to a client the benefits and disadvantages of arbitrating a prospective dispute between the attorney and client. Such an explanation is necessary because, to make an informed decision, the client must have a basic understanding of the fundamental differences between an arbitral forum and a judicial forum in resolving a future fee dispute or malpractice action. See RPC 1.4(c).[xxxv]
>
> An arbitration provision in a retainer agreement is an acknowledgement that the lawyer and client may be future adversaries. That the retainer agreement envisions a potential future adverse relationship between the attorney and client --

> and seeks to control the dispute-resolution forum and its procedures -- raises the specter of conflicting interests. An arbitral forum and judicial forum, and their accompanying procedures, are significantly different.
>
> We do not make any value judgment about whether an arbitral or a judicial forum would be more beneficial to a client if the client and attorney part as adversaries. We conclude, however, that an attorney's fiduciary obligation mandates the disclosure of the essential pros and cons of the arbitration provision so that the client can make an informed decision whether arbitration is to the client's advantage. See RPC 1.4(c). That obligation is in keeping with an attorney's basic responsibility to explain provisions of a retainer agreement that may not be clear on their face. Accordingly, the disclosures required of an attorney in explaining an arbitration provision in a retainer agreement stand on an equal footing with the disclosures required in explaining other material provisions in the agreement. Such comparable treatment does not offend the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 to 16, or the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -36.
>
> The arbitration provision in this case satisfies the requirements for a typical consumer or commercial agreement. The heightened professional and fiduciary responsibilities of an attorney, however, demand more -- an explanation of the differences between an arbitral and judicial forum. That explanation may include, for example, that in arbitration the client will not have a trial before a jury in a courtroom open to the public; the outcome of the arbitration will not be appealable and will remain confidential; the client may be responsible, in part, for the costs of the arbitration proceedings, including payments to the arbitrator; and the discovery available in arbitration may be more limited than in a judicial forum.
>
> That information can be conveyed in an oral dialogue or in writing, or by both, depending on how the attorney chooses best to communicate it. …

Ultimately, New Jersey’s Supreme Court held that if mandatory arbitration is to apply to a malpractice action, it must so specify and not be left to the generalities of a term such as “any dispute” and cannot bar damages to which a client might otherwise be entitled if tried in court, because a lawyer may not prospectively limit liability to the client for malpractice (citing MRC 1.8(h)(1). The court also found that

> The Sills attorney did not explain the advantages and disadvantages of arbitrating a malpractice action. He did not explain, for example, that in the judicial forum Delaney would have access to broad discovery, the right to a jury trial in an open courtroom, the right to speak freely on the subject matter without confidentiality restrictions, and the right to appeal an erroneous ruling. He did not explain that in a judicial forum Delaney would not have to pay a high filing fee or for the services of the judge.
>
> We acknowledge that Delaney was a sophisticated businessman and not unfamiliar to litigation, but we cannot ascribe to him the knowledge of attorneys whose training and experience make them keenly aware of the fine distinctions between an arbitral and judicial forum. To be sure, the detailed arbitration provisions in the Sills retainer agreement easily meet the standard for an arbitration provision in a typical commercial contract. But, as we have repeatedly noted in this opinion, lawyers are held to a higher standard under the RPCs in the fulfillment of their fiduciary obligations to their clients.[xxxvi]

While the dispute over the fees was permitted to be governed by mandatory arbitration, the client's claim with regard to the firm's alleged malpractice was not. Certainly, in New Jersey, and perhaps elsewhere, courts might hold lawyers to a high standard to permit such a limitation to be respected.

Practice Considerations:

- *If you wish to include an arbitration provision in a retainer agreement, be sure to discuss the advantages as well as the disadvantages that may be associated with such an arrangement and do not attempt to limit an element of damages that the client would be entitled to seek if the matter was resolved through court processes. Moreover, while it might be prudent to include broad language regarding what may be subjected to mandatory arbitration, it may be important to also specifically address* *areas that such language is intended to cover (such as a fee dispute and claims of malpractice, etc.). Not only should you discuss the types of issues identified in Sills (which can provide a roadmap to practitioner of the categories of issues that may be prudent to discuss or outline in written format), it may be prudent to advise the client that they have the right to and should have the agreement reviewed by independent counsel. Whenever practical, consider sending the agreement to the client in advance so that they have an adequate opportunity to fully review the agreement in advance of execution.*

- *Consider including a specified time during which the client must raise any questions or objections to fees and costs set forth in any billing statement rendered. This may help to establish an "account stated" in the event the client fails to timely question a charge or raise an objection.*

Defining and Limiting the Scope of the Engagement

Documenting the scope of the engagement, its duration, the client's responsibilities, the extent to which communications with other professionals and family members may be permitted, the prospective waiver of potential conflicts and then sending a communication documenting when the engagement has been completed are strong risk management tools available to lawyers to defend against a claim of continuous representation that might otherwise delay commencement of a limitations period and bar claims that might be outside the scope of the engagement. By way of example, if the income tax and valuation issues claimed by the Estate in *Wellin* were specifically excluded from the scope of Counsel's engagement, and identified as falling within the purview of an appraiser and Mr. Wellin's accountant, might at least some of the claims been subject to summary disposition on grounds other than those related to the statute of limitations?

As a reality check, while limiting the scope of the engagement to the extent feasible may be helpful, it is no guarantee of avoiding suit. A client or other adviser may pursue the estate planning attorney even with such limitations and even when clear and express exclusions are provided. Including exclusions in a retainer agreement, and reminding clients of limitations in billing entries and other communications can be helpful, but there is often no way to avoid becoming entangled.

<u>Practice Considerations</u>:

- *Consider including, when feasible, in the engagement agreement a clear statement as to when the engagement ends (i.e., when the client becomes a former client). For example, "this engagement concludes upon execution of planning documents and thereafter client will have to enter into a new engagement for law firm's assistance with funding or other matters". Practically speaking delineating such a point is not always easy. Also, many practitioners might be worried about saying to a client, especially in writing, "your file is closed." Perhaps, there are less off-putting (to the client) ways to communicate the same point: "We are not aware of any other work you have requested of as at this time" or "all services contemplated under the estate planning engagement have been completed"."*

- *Limiting language may also avoid claims by beneficiaries who never hired the lawyer. For example, "this engagement is between lawyer and client only and is not directly or indirectly intended for the benefit of any third party including without limitation any named beneficiaries." This can be crafted into the retainer agreement to indicate, for example, that if retained by a trust, counsel is only representing the particular trustee who retained counsel, not other fiduciaries or beneficiaries.*

- *However, even gratuitous language in a closing letter to the client about specifics may be enough to trigger the statute of limitations.*

- *Attorneys should be mindful of the fact that they may be the only professional adviser who has not limited their liability on a particular client engagement. That exposure might motivate a greater effort by estate planning attorneys to insist on providing protective memorandum*

> *and other steps. The playing field of advisers is far from level.*

The importance of clearly defining the "scope" of engagement in terms of establishing the pertinent statute of limitations was recently highlighted in the case of *Tubbergen v. Dykema Gossett, PLLC, et al.*[xxxvii] In *Tubbergen*, the engagement letter referenced that the scope of representation related to the government's "investigation" of *Tubbergen,* and there was no reference to representation throughout the entirety of potential criminal proceedings. While the trial court granted summary disposition on the basis of the alleged malpractice claim being barred by the statute of limitations, the appellate court held that the terminology used to define the scope of the engagement was subject to interpretation, as a criminal investigation may not end at the time an indictment is issued.

> The Michigan Court of Appeals noted in its analysis that:
>
> Special rules have been developed in an effort to determine exactly when an attorney discontinues serving the plaintiff in a professional . . . capacity for purposes of the accrual statute. For example, representation ends when the client or the court relieves the attorney of the obligation to serve the client. A legal malpractice claim also accrues when the "attorney sends notice of withdrawal as his or her final act of professional service[.]" However, it is not necessary that an attorney receive or send a formal notice terminating the professional relationship. Instead, accrual occurs on the last day that the attorney renders professional services to the client. In other words, "'[a] lawyer discontinues serving a client . . . upon completion of a specific legal services that the lawyer was retained to perform.'"
>
> Internal citations omitted.[xxxviii]

Tubbergen attempted to extend the accrual period by analogizing Dykema's legal representation to the "last treatment rule" outlined in a Michigan accounting malpractice action entitled *Levy v. Martin.*[xxxix] In *Levy,* the Michigan Supreme Court concluded that a claim of malpractice relating to the accountants' preparation of 1991 and 1992 tax returns was not time barred by the statute of limitations because the accountants continued year after year in the preparation of returns for the client and it was "clear … that [the] plaintiffs, rather than receiving professional advice for a specific problem, were receiving generalized tax preparation services from [the] defendants."[xl] The court noted, however, that the result could have been different if the accountants had established "through documentary evidence that each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions".[xli]

Estate planning engagements (and those related to implementation of such plans) may be analogized to the type of accounting services provided in *Levy.* Therefore, the importance of crafting specific engagement letters that clearly indicate the scope and duration of the representation, coupled with the opening and closure of matters when the services rendered under the engagement are completed and a new engagement letter (and assignment of a new matter number or file in those instances where file numbers are used by the practitioner) when responsibility for a new engagement commences, can help to more clearly define when the statute of limitations might accrue.

> ***Practice Consideration****: Practitioners might consider having clients sign a new engagement letter in each calendar year and provide that signing the new engagement letter closes the prior representation and starts a new representation, especially in those instances where annual reviews are contemplated to occur.*

For those not well versed in the implications of the statute of limitations in an estate planning context, it may be important to note that different jurisdictions have different statutes of limitations. In *Wellin* the South Carolina's statute of limitations imposed a three-year statute of limitation from the date of the service that caused the injury or from the date when the injury was or should have been discovered, whichever is later[xlii]. While many states provide for both starting points for purposes of determining the statute of limitations, it isn't uncommon for the period from date of discovery to be shorter than that applied based upon when the service was rendered. Michigan, by way of example, has a two-year statute of limitations for professional malpractice but only a potential six month extension from the date of discovery.[xliii] MCL 600.5838 provides in pertinent part that:

> (1) . . .claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity **as to the matters out of which the claim for malpractice arose**,

> regardless of the time the plaintiff discovers or otherwise has knowledge of the claim

Or

> (2) . . . within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection is barred.

Because discovery in the context of an estate plan may not occur for years and, perhaps, not until the client dies, when "discovery" of the claim may extend the period when a claim may be brought, the existence of a "statute of repose" can assist in establishing a hard stop to the period during which a claim must be brought, whether or not the injury was not, or could not, as yet been discovered. Michigan has a six-year statute of repose (with some exceptions for claims brought for breach of contract).[xliv] Unfortunately for estate planners, not every state has enacted a statute of repose, and a proactive approach to the issues may be enhanced in those jurisdictions.

When, as in *Wellin*, multiple claims are made premised upon the same facts, as a basis for recovery against an attorney, such as "breach of fiduciary duty" while another (premised upon the same facts) claims "malpractice" and the breach actually arises out of the attorney-client relationship,

> …the attorney should put their carrier on notice. In some instances, costs of defense and coverage may be afforded under a malpractice insurance policy … A motion to strike redundant and duplicative claims may be appropriate,[xlv] especially when such claims would otherwise be subsumed by the malpractice claim.[xlvi] [xlvii] While there are times when both malpractice and breach of fiduciary duty claims are not subsumed, sensitivity to the analysis of this issue can be important in identifying potential defenses (as well as resources for defense). When appropriate, an early motion to strike may be particularly important especially if the failure to do so results in the potential extension or expansion of a shorter statute of

limitations (either pursuant to a statute of repose or statute of limitations for legal malpractice).[xlviii] [xlix]

Practice Considerations:

- *Perhaps, including language which indicates "It is recommended that the client consult with his/her accountant, financial advisor or other allied professionals with regard the potential tax ramifications, impact and operation of any options identified and/or implemented as a result of this engagement. The client agrees to do so timely, but no later than [x period] from the implementation of any plan or transaction". Use of such a language might provide a basis for limiting the application of a "knew or should have discovered" extension to tolling of the statute of limitations and/or provided a contributory negligence defense.*

- *What if there were a provision that required the client to obtain an estate planning review every year of number of years. Perhaps this might provide a basis for a comparative negligence defense to a malpractice claim. Practitioners might consider including this recommendation expressly in a retainer agreement and mention it in other communications as well.*

- *Beyond the importance of the engagement letter, utilization of conflict waivers (where and as appropriate) and defining the extent to which information might be shared with other generational family members who are also clients may be advisable.*

- *The utilization of at least a "Risk Factor Memorandum" (or reference to some or all of those risks in the engagement letter or other communications) might prove beneficial. When appropriate, a Risk Factor Memorandum might be enhanced or otherwise tailored to the client's specific situation. Whether included in the engagement letter or a separate memorandum identified as being "subject to attorney-client privilege", it is important to note that not every risk can be identified and that uncertainties in the effectiveness of any planned course of conduct will generally exist. Wellin provides a clarion call regarding the potential importance of making clients aware, at* *least generically (and in certain instances specifically) of potential risks and the uncertainties involved with any proposed plan.*

- *It is also important not to assume that one size fits all. Provide clients with planning options from which they might select what they deem to be best suited to the potential implementation of their desires. In this regard, professionals should try not to oversell the benefits of a singular plan. Give the client choices.*

- *If the practitioner communicates a general or generic list of risks, to the extent that listing can be tailored to reflect the circumstances or plan of the particular client, it may provide some level of protection. Clearly, informing clients that the outcome is not fully predictable puts the client on notice that they assume some level of risk, and that risk is inevitable with estate planning. The planner is not a guarantor of outcome, but rather a professional who attempts to integrate the client's stated desires with available options selected by the client, just as the client would determine for any other business endeavor or decision. Therefore, caution on the part of the client is always in order*

- *Consider the following as some of the "risk factors" one might disclose, especially if an irrevocable grantor trust is a component of the plan:*

    1. *Absent further action, assets transferred to irrevocable trusts may not be included in the grantor's gross estate and if not included in the grantor's estate may not be afforded a new adjusted basis at the grantor's death.*

    2. *A power of substitution in a trust that is not monitored and exercised at the right time may not achieve the optimal basis for income tax purposes at the grantor's death.*

    3. *Powers of substitution (commonly referred to as "swap powers") are inherently risky. If the valuation of the assets swapped or substituted is*

not identical, the IRS may challenge the transaction. If a swap power substituting assets is exercised in a manner that can shift benefits among the trust beneficiaries it may trigger tax problems.[l] *When a power of substitution is exercised in a manner that changes who ultimately receives an asset (such as a closely held business interest), some of the goals and estate planning objectives of the grantor may be thwarted and/or it may trigger estate tax inclusion.*

4. Several tax cases have expanded the risk of estate inclusion of assets where the decedent "in conjunction with" others could control the use or enjoyment of the assets or its income. The scope and reach of these cases are still unclear, but it could potentially be very broad.[li]

5. An irrevocable grantor trust under Section 673 et seq. (often referred to as an intentionally defective grantor trust or IDGT) may not be taxed as part of the grantor's gross estate for estate tax purposes, but the trust income will be taxed to the grantor during his or her lifetime. Such treatment may enhance the transfer tax savings of the trust, but it can deplete the grantor's estate over time and possibly cause cash flow and other financial hardships.

6. Grantors who seek to toggle off "grantor trust status", even if expressly authorized by the trust instrument, may face objections and even litigation from the trustee and beneficiaries, who prefer that the grantor continue to pay the taxes. Such litigation can be very expensive.

7. The attorney only represents the grantor in this matter and not the current or future beneficiaries or the fiduciaries.

8. Provisions within an IDGT that provide for the potential reimbursement of income tax *consequences incurred by the grantor due to the trust's grantor trust status are subject to the exercise of the trustee's discretion. There is no guarantee that such discretion will be exercised in grantor's favor, as the trustee's fiduciary duty will generally be owed to the beneficiaries of the trust (and not the grantor).*

9. The attorney recommends that the client have a forensic analysis done to corroborate that the transfers to the trust aren't fraudulent conveyances. [Where appropriate, add "but the client has elected not to do so"].

10. The attorney recommends that the client have an actual life analysis conducted with regard to each grantor by an independent actuarial firm, to document estimated life expectancies based upon the grantor's actual health and lifestyle factors, as opposed to reliance on standard life expectancy tables (which are often out of date from their inception). This may be relevant to having the IRS respect various components of the transaction, such as the validity of any promissory notes and the length of the trust terms. This may also be important to the time frame for financial forecasting rather than using an arbitrary assumption of say age 90.

11. The client is advised not to hold any power or control over entities held by the trust with regard to decisions to make distributions or to liquidate or sell underlying assets, because retaining such powers, whether officially or informally, could have an adverse impact upon the effectiveness of the plan.

12. We are admitted to practice only in [list jurisdictions] and have relied on local counsel for advice about the law in other jurisdictions, to the extent applicable.

13. A gift tax return must be filed adequately disclosing all aspects of any gifts or other *irrevocable transactions and whether any discounts were applied in arriving at the value of a transaction or the statute of limitations on an audit and tax deficiencies will not run. We are not responsible for the filing of such a return unless we are separately engaged to do so.*

14. Gift tax returns may need to allocate GST exemption [or opt out of automatic allocation]. The attorney is willing to prepare or review these returns, but cannot take any responsibility for returns that the attorney neither prepares nor reviews.

15. Any defined value mechanisms used in the transaction to deflect a valuation challenge by the IRS may not be respected by the IRS or the courts. The IRS has challenged these and may again do so, though some forms of these mechanisms have been sustained by various courts.

16. You should always expect a gift tax audit. While an audit doesn't always occur, when it does it will entail significant additional professional fees none of which are included in the fees billed to date and a separate engagement for such services, accompanied by additional fees, will be required. In anticipation of an audit, we have suggested that assets be formally appraised. [When applicable add: "you have elected not to do so"]. An audit may require the involvement of (additional) appraisers, litigators, and others and the failure to supply an appraisal may have an adverse effect on your ability to defend the gift tax return (or a charitable deduction). The result of an audit can be costly and unpredictable. While you should always expect a gift tax audit, again not all returns are audited. Sometimes you get lucky.

17. If a GRAT is considered or implemented as part of your estate plan, GRATs must be administered precisely in accordance with the *regulations, including but not limited to the time for proper payment of the periodic annuity payment and not making additional gifts to the trust after its initial funding. The IRS may argue that a "spillover" of value into the GRAT, as part of a defined value mechanism, is a second prohibited contribution and not respect the defined value mechanism or the GRAT. If there is a valuation adjustment due to a spillover to a GRAT, it may be used to by the IRS to argue for disqualification of the entire GRAT if the appraisal was incorrect. We will not monitor or record such payments unless you request in writing that we do so and sign a new retainer agreement to that effect; consequently, you or another adviser must do so, to the extent applicable.*

18. The IRS may not respect the use of an incomplete gift trust as part of a defined value mechanism.

19. The terms of notes in installment sale transactions must be adhered to strictly; interest must be paid in accordance with the terms of the note. We will not monitor or record such payments unless you request in writing that we do so and sign a new retainer agreement to that effect; you or another adviser must do so.

20. The value of assets may not increase as anticipated undermining the goals for the transactions.

21. If you die while your grantor trust owes you part of the sales price under an installment sale transaction, the IRS may argue that the remaining gain on that note is includible in gross income on death. Many commentators disagree with this position and there is no binding precedent to the effect that death is not a recognition event, but there is no assurance how an audit of this might conclude.

22. If you transfer negative basis interests to a grantor trust, any cessation of grantor trust status during your lifetime might trigger taxable gain. Many commentators disagree with this position, but there is no assurance how an audit of this might conclude.

23. If the trustee of an irrevocable grantor trust sells assets during your lifetime, while the trust enjoys grantor trust status for income tax purposes, the grantor will be responsible for the income tax consequences associated with such transactions. While the trust is treated as a grantor trust for income tax purposes, all income and taxable transactions will flow through and be reportable on the grantor's personal income tax returns such that the grantor will bear responsibility for all income and tax related obligations. You should consult with your accountant in determining any estimated payments that may be recommended with regard to such tax obligations.

24 The IRS could challenge the valuation of assets and any valuation discounts claimed, even though you have one or more independent professional appraisals. The IRS almost certainly will challenge such valuation and discounts if you do not have at least one or more independent professional appraisals. Also, the risk of penalties for an incorrect valuation greatly appreciates if you do not have a qualified appraisal by an independent appraiser.

25. The tax laws are almost guaranteed to change during the course of your life and/or these transactions and it is impossible to anticipate how those changes may affect your planning. We will be happy to discuss any such changes in the law, but such discussions are a new engagement and require a new retainer agreement. We have not undertaken the obligation to keep you abreast of *changes in the law even if we send you periodic communications, such as newsletters or email blasts. This is one reason why we suggest that you consider and you initiate annual reviews of your estate plan, any and each of which will represent a new and separate engagement of counsel.*

26 Family dynamics, such as your relationship with various family members and the capacity of various family members to handle financial and business assets, can change, and those changes may render parts or the entirety of a plan undesirable or less than optimal.

27. You may wish to inform all heirs of the overall nature of the plan so that they understand the trusts involved and the potential impact on any future inheritance. We strongly urge that, if you wish to do so, you schedule a meeting with the heirs and your attorney in which the plan and its risks and expected benefits can be accurately discussed. Such a meeting is a new engagement and requires a new retainer agreement with you as the client. Despite the presence of your heirs, any such engagement is for your benefit (not theirs) and you will be the only client represented.

28. We are not guarantors of results. All the planning undertaken faces an array of tax, legal, and other risks. We do, however, promise to use our very best efforts to provide you with options which endeavor to meet your estate planning goals and answer any questions you may pose (in light of current law and your present circumstances) to the best of our ability.

29. There are other risks and issues that we have not identified in this partial listing. This listing is not intended to supplant or otherwise undermine other verbal, email, and written communications we have provided during the course of the engagement that identify additional risks and considerations.

30. If you name your spouse as a beneficiary of a grantor trust, it is generally difficult to turn off grantor-trust status for income tax purposes during your lifetime. If you divorce you may remain responsible for income tax consequences generated by assets held by the trust even though you are no longer married to the beneficiary.

31. The effectiveness of the options we have discussed may be adversely impacted by the manner in which your planning is implemented and administered. Therefore, it is important to carefully consider the fiduciaries you nominate to act, the manner in which you engage with them and/or interests transferred to the fiduciary's control, how assets are titled and the potential impact a change of beneficiary (whether in status or in designation) may have upon the plan.

32. Various tax proposals have been proposed by members of congress, some of which may still be enacted or perhaps resurrected in the future. Many of these proposals had the potential to have a considerable and adverse impact upon planning options we have or may discuss. It is impossible for us to predict whether any of these or any other changes will be ultimately enacted or the potential impact that any such change may have on the effectiveness of your plan. It is imperative that you obtain a professional review of your estate plan every year to confirm your goals and to evaluate any possible changes in the law.

- *Consider providing a written re-cap to the client of the options discussed and/or implemented by the client. While a general risk factor listing is helpful, when feasible consider communicating client specific risks that might not be identified in generic communications.*[lii]

- *Because estate planning is fraught with risks, it may be advisable not to under-estimate the time and level of* *experience that is required to provide competent counsel and to factor that into the fee to be charged for services rendered.*

- *Also, of import is to avoid, to the extent possible and practical, attempts to shortcut steps during the planning process that may be critical to the client making an informed decision unless instructed by the client to do so (in which case documentation of such instructions may prove important). The realm of estate planning has become increasingly more complex especially where it intersects with potential income tax considerations. If not well versed in the potential income tax implications of the various options being discussed with a client, consider teaming up with an accountant or another professional who is, so that issues which might be important to providing the client with the ability to make an informed decision can be addressed.*

Additional Food for Thought: What Standards Should Apply to Very Wealthy Clients?

Many may find the standard the court applied in *Wellin*, and to which the experts testified, disturbing. The standard in *Wellin* was: “whether a person of common knowledge should have been aware that the attorney had given incorrect or misleading tax advice…” How can a person with the wealth level to undertake such complex and sophisticated planning, that had either created or maintained so much wealth, be governed by a standard of “a person of common knowledge?” Perhaps “common knowledge” is more akin to a Suzie Orman level of estate planning (no disrespect to Suze just an illustration of the sophistication level of the person of common knowledge). Should that standard apply and does it make sense when a client of significant wealth engages in estate planning? Note that in the in *Aaron v. Deloitte Tax LLP* case discussed above that court noted that the party was a “sophisticated and experienced businessman.”

The typical person worth tens of millions of dollars (and in the case of Mr. Wellin much more) generally has an array of sophisticated professional advisers. One might argue that such a standard is unfair to practitioners and perhaps inappropriate for clients with business acumen and experience beyond that of the average person. Certainly, Mr. Wellin had to understand something of how the grantor trust would operate from an income tax perspective because he experienced no gain at the time of his sale to the trust of the FLP owning highly appreciated Berkshire Hathaway stock. He also understood that he had sold his interest, thereby relinquished control, but still reported income from the FLP on his personal income tax return in the years following the transaction and would not have reported the interest relating to the note during that period on his personal income tax return. Surely, a taxpayer of Mr. Wellin's wealth level understood that in normal circumstances selling an appreciated asset triggered gain and under other circumstances the interest paid him under a promissory note would generate ordinary income tax consequences. He proceeded with the transaction, experienced those tax consequences for a number of years, but could not understand that a later sale by the trust would trigger gain reportable by him? Shouldn't those with wealth that places them at the pinnacle of the wealthiest of Americans be charged with a different level of financial sophistication than "a person of common knowledge"?

Mr. Wellin was a person of considerable wealth. Only 1.1% of all adults in the world had a net worth in excess of $1 Million as of November, 2020.[liii] At that time, only 215,030 persons worldwide (of which 114,380 were located in North America) were reported to be individuals of ultra-high net worth (UHNW) (those being defined as persons having assets of in excess of $50 Million).[liv] Of those UHNW individuals, only 68,010 adults worldwide were worth in excess of $100 Million[lv] With a world population believed to approximate 7.8 billion people as of November, 2020[lvi] and a population of 331,002,656 located in the United States[lvii], Mr. Wellin would be placed at the pinnacle of wealth and appear somewhere in the range of the top 2.8 percent of individuals worldwide and 2.05% of individuals in the United States. Given those statistics should one assume that Mr. Wellin is a person of only "common knowledge" or that he lacked a cadre of advisors (such as accountants and other financial advisors) who might have provided input and/or guidance on the potential implications of the 2009 transaction?

Also, consider the level of care which such cases appear to impose on counsel. Are counsel in *Wellin* and in *Raia* to be presumed to have failed their duties merely because they failed to document every risk of a transaction? What is the standard of practice engaged in by the average estate-planning attorney? Is it even realistic to believe that in *Raia* and *Wellin* well respected practitioners, in well-respected firms, would fail to provide the most basic of explanations? Is it reasonable that the standard of care of the attorney be measured against such a high standard while the measure of knowledge of an incredibly wealthy client in the wealthiest 1/10th of 1% of the American population be measured against the low standard of "a person of common knowledge?" A person of common knowledge does not have the wealth of someone in the wealthiest 1/10th of 1%. Perhaps someone in the wealthiest 1/10th of 1% should be charged with the knowledge of those with substantial wealth.

COMMENT:

While *Wellin* focuses on whether or not the statute of limitations would operate to bar claims of breach of fiduciary duty and malpractice by the attorney involved in wrapping marketable securities in a FLP and the sale of interests in the FLP to an IDGT in return for a promissory note, facts discussed in the brief opinion nonetheless provide fertile ground for the review and re-assessment of defensive practices that might be considered and perhaps implemented into a planner's practice.

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

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Jonathan G. Blattmachr
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[i] Estate Planning Newsletter #2725 (May 16, 2019).

[ii] *Raia v. Lowenstein Sandler LLP and Eric D. Weinstock*, Superior Court Of New Jersey Law Division: Civil Part Bergen County, Docket No. Ber-L- , 02/01/2019 ("Raia").

[iii] *Wellin v. Nixon Peabody, LLP*, 2021 WL 5445968 (11/22/21, 4th Cir. US Ct App).

[iv] Practitioners should be mindful at the outset that the *Wellin* case involved the wrapping of marketable securities in a family limited partnership (FLP) or limited liability company (LLC), followed by a sale to a grantor trust for a note. The contribution of marketable securities to a FLP or LLC structure was the transaction that won the day for the taxpayer in the *Holman* case. In *Holman v. Comm'r*, 130 T.C. No. 12, the funding of Dell stock to a FLP a mere six days prior to a gift of units in the FLP provided an effective mechanism for securing a discount in valuation. The Holman-wrapper is not dissimilar to the FLP wrapper used with regard to the stock in *Wellin*.

The sale of an interest in a FLP or LLC to a grantor trust has been the subject of many cases, and just like the FLP wrapper in *Holman*, is a fairly common planning technique. In, *Estate of Marion Woelbing v. Commissioner, T.C*. No. 30260-13 (pet. filed 2013: settled Mar. 24, 2016); Donald Woelbing sold his non-voting stock in Carma Laboratories to grantor trusts in return for promissory notes from the trusts, while the *Woelbing* case was settled, it nonetheless demonstrates the potential benefits of utilizing this type of transaction in effectuating estate and gift tax reductions. A similar note sale strategy was successful in another high profile case called *Karmazin v. Commissioner*, Docket No. 2127-03 (filed February 10, 2003). *Karmazin,* also resulted in a settlement being reached with the IRS that resulted in significant estate tax savings to the grantor's estate. *Woebing* and *Karmazin* involved similar sales planning techniques to those used in Wellin.

[v] Further discussion of attorney-client privilege and work product doctrines is beyond the scope of this article.

[vi] In 2009, one could argue it was not foreseeable that proposals made in 2021 that could result in significant adverse implications to grantor trusts might be enacted or that in 2017 a grantor trust would still be considered taxable to the grantor, when the spouse was a beneficiary, in the event of divorce.

[vii] https://www.law.com/njlawjournal/2019/08/23/appeals-court-nixes-mandatory-arbitration-in-sills-cummis-malpractice-lawsuit/

[viii] Acknowledgements to Howard Zaritsky, Esq. who has often cautioned of the risks of attorneys seeking to maximize business by "selling" a plan.

[ix] [ix]Sandra D. Glazier, *No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Bank" Defending Breach of Fiduciary Claims in the Context of Trust and Estate Administration,* Bloomberg BNA Tax Management Estates, Gifts and Trusts Journal, Vol. 42, No. 4, p. 212 (July 13, 2017).

[x] *See Dykema v Ajluni,* 273 Mich. App. 1,6, 730 N.W.2d 29 (Mich. App. 2006) (which found that judicial estoppel applies where "party attempts to invoke the authority of a second tribunal 'to override a bargain made' with a prior tribunal").

[xi] *McKay v Owens*, 130 Idaho 148, 937 P.2d 1222 (Idaho 1997.

[xii] *Id.* at p. 1225.

[xiii] *Id.* at p. 1228.

[xiv] *Id.* at p. 1228.

[xv] *Id.* at p. 1229.

[xvi] *Griffith v. Wal-Mart Stores, Inc*., 135 F.3d 376, 380 (6th Cir. 1998), quoting *Teledyne Industries, Inc. v. Nat'l Labor Relations Bd*., 911 F.2d 1214, 1218 (6th Cir. 1990).

[xvii] *Opland v. Kiesgan*, 234 Mich. App. 352, 364, 594 N.W.2d 505 (Mich. App. 1999), quoting *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992).

[xviii] *Paschke v. Retool Industries*, 445 Mich. 502, 509, 594 N.W.2d 505 (Mich. 1994).

[xix] *Id.* at p. 509-510.

[xx] *Paschke*, *supra*.

[xxi] *Id.* at p. 510.

[xxii] *Opland*, *supra* at p. 365.

[xxiii] *Dykema*, *supra* at p. 6.

[xxiv] *Id.* at p. 6.

[xxv] *Dykema, supra*.

[xxvi] *Id.*

[xxvii] *No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Bank" Defending Breach of Fiduciary Claims in the Context of Trust and Estate Administration, supra.*

[xxviii] https://wallmine.com/adviser/225427/nixon-peabody-financial-advisors-llc

[xxix] See LISI Estate Planning Newsletter #2724 (May 16, 2019).

[xxx] *Aaron v. Deloitte Tax LLP*, 149 AD 3d 580 (2017).

[xxxi] *Id.*

[xxxii] See ABA Model Rules of Professional Responsibility1.8 Comment (14), which provides:

> Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability

[xxxiii] Internal citations omitted. *Delaney v. Dickey*, 244 N.J. 466 (486-489), 242 A.3d 257 (2020).

[xxxiv] *Delaney v. Dickey*, 244 N.J. 466, 242 A.3d 257 (2020).

[xxxv] *Id.* at p. 472-473.

[xxxvi] *Id*. at p. 499-500.

[xxxvii] *Tubbergen v. Dykema Gossett, PLLC, et al,* unpublished Mich. App. *per curiam* decision, no. 355795 (Dec. 16, 2021).

[xxxviii] *Id.*

[xxxix] *Levy v Martin,* 463 Mich 478; 620 NW2d 292 (2001).

[xl] *Id.,* at 489*.*

[xli] *Id.* at 489 n. 19.

[xlii] [What Is the Statute of Limitations in SC? | Learn the South Carolina Statute of Limitations for Personal Injury and Malpractice Cases (statutes-of-limitations.com)](). Also see SC Code Section 15-3-530 (2017).

[xliii] MCL 600.5805

[xliv] MCL 600.5827. It's worth noting that Statutes of Repose for Legal Malpractice are rare. .

[xlv] *See* MCR 2.115(B).

[xlvi] *See Henry v. Dow Chem. Co.,* 473 Mich. 63, 78-79, 701 N.W.2d 684 (Mich. 2005).

[xlvii] *See Taylor v. Kochanowski*, unpublished Mich. App. *per curium* decision 289660, 2010 WL 2696675 (July 8, 2010) holding that the lower court properly dismissed the breach of fiduciary duty claim as redundant to the legal malpractice claim because plaintiff did not allege "that defendants breached any duties that arise outside the attorney-client relationship"); *Alken-Ziegler, Inc. v. George Bearup, Smith, Haughey, Rice & Roegge, P.C.*, unpublished Mich. App. *per curium* decision 264513, 2006 WL 572571 (Mich. App. March 9, 2006) (dismissing plaintiff's breach of fiduciary duty cause of action premised on an alleged breach of a power of attorney when the defendant already owed a duty as a result of the prior/existing attorney-client relationship); *Sharma v. Giarmarco,* unpublished Mich. App. *per curium* decision 248840, 2004 WL 2176786 (Mich. App. September 28, 2004) (dismissing breach of fiduciary duty and other claims because the "gravamen of plaintiff's claim is professional malpractice"); *Fritz v. Monnich*, unpublished Mich. App. *per curium* decision 235262, 2003 WL 21186652 (Mich. App. May 20, 2003) (granting defendants' motion per to MCR 2.116(C)(7), (8) and (10), and stating that "[p]laintiff alleged that defendants violated their fiduciary duties by failing to exercise reasonable care in representing plaintiff. The gravamen of plaintiff's allegations concerning the alleged breach of fiduciary duties sounded in legal malpractice; therefore, the fiduciary duty claim cannot constitute a separate cause of action and was subsumed by the malpractice claim"); *Melody Farms, Inc. v. Carson Fisher, P.L.C.*, unpublished Mich. App. *per curium* decision 215883, 2001 WL 740575 (Mich. App. Feb. 16, 2001) (affirming the lower court's holding that "plaintiffs' claims for breach of contract and breach of fiduciary duty were

subsumed by the legal malpractice claim. The two breach claims merely allege negligence by defendants, stating that defendants failed to 'properly and adequately' perform the duties for which they had contracted"); *McKenzie v. Berggren*, 99 F App 616, 621 (6th Cir. 2004) (holding that plaintiff's breach of contract and breach of fiduciary duty claims were duplicative of plaintiff's legal malpractice claim and finding that *Melody Farms, Inc.*, 2001 WL 740575, stands for the proposition that "a claim for breach of fiduciary duty is redundant with a claim for legal malpractice").

[xlviii] *See* Fred K. Herrmann, *It Must Be a Duck: Honoring the Attorney Professional Negligence Statue of Limitations,* 59 Wayne L. Rev. 671 ©2013*.*

[xlix]*No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Bank" Defending Breach of Fiduciary Claims in the Context of Trust and Estate Administration, supra.*

[l]See Revenue Ruling 2008-22.

[li] *Estate of Powell v. Commissioner*, 148 T.C. No. 18.

[lii] Adapted and excerpted from LISI Estate Planning Newsletter #2724 (May 16, 2019).

[liii] Credit Suisse Global wealth report 2021, June 2021 at p. 18, global-wealth-report-2021-en.pdf.

[liv] *Id.,*at p. 22.

[lv] *Id.* at p. 22.

[lvi] https://worldstatistics.live/population

[lvii] *Id.*