

# The Estate Analyst®

June 2010

## Estate Planning Malpractice

*A best practices checklist*

*Also: An Interview with Robert G. Alexander*

By Robert L. Moshman, Esq.

Estate planning and estate administration practice go hand in hand. Each time an estate is planned, there is a potential estate that the practitioner may have an opportunity to serve someday. There is also a potential lawsuit if the estate does not fare well.

Let's review how an estate planner can best serve clients...while avoiding liability. Several planning scenarios that can lead to difficulty come to mind. A checklist has also been developed to avoid oversights and protect against claims.

***“Fiduciary liability is a hot issue, and estate planning is now the second or third highest area of new malpractice claims—and growing rapidly.”***

***—Robert G. Alexander***

**Presented With Our Compliments**

## *The Modern Client*

It may be going out on a limb with this prediction, but there appears to be a good chance that the Internet is here to stay. As a result, there are many people who are determined to beat the system by downloading estate planning documents that are free or extremely inexpensive. Some of those people will turn up at an attorney's office anyway and will insist that they want a simple will, that they already have one ready, and that the attorney had better review it in a rapid and affordable way...or else!

However, even modest estates can benefit from sound estate planning, and any estate can experience setbacks that will cause beneficiaries to litigate against professional advisors and drafts people.

Beneficiaries who were not present when their family members planned estates and were not privy to what was discussed can only judge the effectiveness of the estate planner's

efforts by the result. They may not know or care that the estate planner offered advice and solutions and warned of consequences that the testator chose to ignore.

## *A Litigious Trend*

Writing in *Tax Malpractice* in 2002, Robert Feinschreiber and Margaret Kent noted that of 50 published cases on estate tax malpractice claims from the past 30 years, the majority of the cases were from the 1990s. These claims can be in the form of tort or contract claims and may address acts of commission and omission.

There are many planning areas that can provide opportunities for errors. An overreliance on the unlimited marital deduction is an obvious problem that bears special mention.

A number of testators prefer to have the entire estate go to the surviving spouse, and the unlimited marital deduction

---

# The Estate Planner's Best Practices Checklist

**1. Engagement letter.** This is an opportunity to identify what planning is or is not being done.

**2. Client interview questionnaire.** This is an opportunity to determine what planning areas are relevant.

**3. Asset list and family tree.** These are also ways to identify relevant planning areas.

**4. Checklists.** Having a standard operating procedure is one way of demonstrating that all planning areas are raised and discussed during the process.

**5. Memo to file.** This is always a useful step, particularly when there is potential for liability, such as when a client insists on ignoring a planning technique, despite a likelihood of severe tax consequences. Having such a memo printed, dated, and witnessed can further provide credence to the memo.

**6. Disengagement letter.** As a counterpart to the initial engagement letter that outlines the scope of services, a disengagement letter at the conclusion of the process can speak directly to those issues that arose during the process. Such a letter can state what techniques were discussed and not implemented or note that the client was informed of the consequences.

**7. Witnesses.** It is not always possible to have a third party verify a private planning session. For certain estates where there are complex issues, it can be worthwhile to have a

colleague sit in on a session with a client or arrange a meeting at which key issues are reviewed with professionals of various disciplines, such as accountants, insurance agents, brokers, or family planners.

**8. What is not in the plan.** The focus in planning is often on the final plan that remains, how it may work, and what the potential downside could be. However, some documentation should be devoted to those planning approaches that have been discussed and rejected and why.

**9. Specific waiver.** This is useful if there is a clear danger or tax exposure where the client refuses to take important advice. When this occurs and the estate planner feels strongly about it, the advice can be summarized, and the client can be asked to sign a waiver indicating that he or she has been informed and is aware of the consequences.

**10. Family conference.** The malpractice lawsuit that lays dormant in a plan is not set in motion by the client, necessarily, but by his or her beneficiaries. Having them engaged in the planning process, with the permission and consent of the client, of course, may help satisfy concerns and demonstrate that the client made informed choices.

**NOTE:** This checklist was developed for this newsletter. There are undoubtedly many additional valuable ideas that should be included. If you are aware of such concepts or approaches, please send them to the Editor at [bmoshman@optonline.net](mailto:bmoshman@optonline.net).

makes this possible without an initial transfer tax. However, the transfer of the cumulative estate of the surviving spouse could result in a heavier estate tax. Even now, during a transitional period when the estate tax is repealed, there is potential for a surviving spouse's estate to be subject to heavy transfer taxation at the state level, or at the federal level if an estate tax is reinstated.

A bypass trust—or at least a disclaimer trust—can mitigate the issue of a cumulative estate and take full advantage of the available exemptions for both spouses.

A similar issue arises when the beneficiary of an estate has creditors or qualifies for state aid. Failing to limit the beneficiary's access to an inheritance will expose the inheritance to those creditors and negate qualifications for public assistance.

In the current context, estate planners would be wise to re-examine where the greatest tax threats originate. Currently, there is no federal estate tax, but if the estate tax is reinstated automatically due to the failure of Congress to act, the federal estate tax exclusion will be limited to \$1 million, and many estates would suddenly have estate tax exposure. Other estates may have a larger exposure to state transfer taxes rather than federal estate taxes.

The biggest threat to many estates may be capital gains due to the transition to a carryover basis for appreciated assets held at death.

### *Avoiding Malpractice Claims*

Despite the repeal of the estate tax, sound estate planning is more important than ever. Here is a modest checklist of techniques to make sure that estate planning is performed in a thorough manner and to also limit potential liability for the practitioner.

## **Interview with Robert G. Alexander**

It was a rare opportunity to talk with prominent speaker and attorney Robert G. Alexander, JD, LL.M., AEP®, EPLS. Mr. Alexander is not only involved in the actual application of the most sophisticated, cutting-edge estate planning techniques with a Milwaukee law practice, but he also has a front-row seat overlooking American estate planning as Secretary of the National Association of Estate Planners and Councils (NAEPC), which is the nation's largest and fastest growing organization of estate planning professionals ([naepc.org](http://naepc.org)).

Our conversation with Mr. Alexander was about his own perspective and insights into the current state of estate planning, so he was not representing the NAEPC directly, though he did make reference to NAEPC's growing role and influence in the estate planning environment. Our main purpose, however, was to learn more about the area of estate planning malpractice that Mr. Alexander has been working on for a new article.

**Q: Other estate planning organizations have had challenging times trying to retain membership in recent years, but you indicate that NAEPC group numbers are actually on the rise.**

A: Yes, NAEPC has approximately 225 local Councils with between 26,000 and 28,000 individual Council members and is growing. It is an organization with a valuable purpose that is attracting both individual members and organizations.

**Q: What sets NAEPC apart?**

A: NAEPC is a multidisciplinary organization for individual attorneys, accountants, life insurance underwriters, financial planners, trust officers, and local Councils of estate planners throughout the United States. The NAEPC also has the distinction of administering two professional designations, the Accredited Estate Planner (AEP) and the Estate Planning Law Specialist (EPLS).

**Q: So NAEPC is a broad umbrella for professionals. Is there a game plan for what the group is trying to accomplish?**

A: NAEPC's focus is threefold. It encourages local membership, in that an attorney, accountant, or other estate planning professional can join the local Council, and that Council can be affiliated with NAEPC. Secondly, it has a clear vision of providing public and professional education and information. And third, it has the purpose of raising public awareness about estate planning.

**Q: What kinds of programs is NAEPC using to raise estate planning awareness?**

A: NAEPC is responsible for initiating the National Estate Planning Awareness Week that has been implemented in recent years and which is just starting to get attention. This takes place during the third week of October. It also has launched an online resource for estate planning information. Initially, its Website will have approximately 150 articles available to the public ([estateplanninganswers.org](http://estateplanninganswers.org)).

**Editor's Note:** The House of Representatives adopted a Resolution H. Res. 1499 in 2008 that designates the third week of October as Estate Planning Awareness Week. This year, the

event is planned for October 18-24. Local estate planning Councils are encouraged to sponsor an estate planning awareness day. Ironically, the awareness that Congress has endorsed will call attention to the failure of Congress to resolve the uncertainty of the estate tax.

**Q: Does NAEPC also provide resources for professionals?**

A: Absolutely. Networking with financial professionals using Webinars and other tools can be extremely helpful in bringing the top speakers of the profession, and other timely information, directly to all NAEPC members.

**Q: One of the recent developments in several states has involved self-settled trusts. Do you see this as a potential trend that can be adopted by additional states?**

A: Yes. There does appear to be the potential for more states adopting self-settled trusts. More states are certainly paying attention. There are also some constitutional issues involved. Once certain states have provided rights, other states may follow suit.

**Q: One of the driving forces behind self-settled trusts is the need to prequalify estates for Medicaid. Is this type of change a wave that is overtaking Medicaid planning?**

A: Looking at the demographics, planning for an aging population is an extensive concern. The question is always how to pay for long-term care of an elderly person. The possibilities include (1) savings, (2) insurance, (3) lifetime care contracts, (4) elder law planning, and (5) going broke...and the latter is becoming a popular option by default.

**Q: Estate tax legislation has become bogged down, and many estates are in limbo as a result. Many estates not affected by the estate tax per se are now impacted by the carryover basis. Is this not a disservice to a vast number of people who are now unable to effectively plan their estates?**

A: It is the epitome of legislative malpractice, but it has become an emotional election issue. Many people feel that wealth planning has become a political pawn.

**Q: Is NAEPC involved in lobbying Congress about this?**

A: No. There are many individual organizations that are engaged in lobbying efforts. However, NAEPC, being a not-for-profit entity with six different professions represented within it, can't undertake such lobbying legally or practically.

**Q: One of the key objections with the uncertainty of the estate tax repeal has to do with the current carryover basis. What will happen with gray areas like this?**

A: We just don't know. Documenting the carryover basis remains relevant for now, in case it is reinstated. This is another area where there is potential malpractice liability for planners.

**Q: You have been working on an article concerning malpractice. What trends are developing in this area?**

A: Claims are arising much more now than in the past. People are able to get information from the Internet and are willing to take on lawyers. Fiduciary liability is a hot issue, and estate planning is now the second or third highest area of new malpractice claims—and growing rapidly.

**Q: Malpractice issues have arisen in the past as well?**

A: Certainly. There have been a number of articles that have addressed various aspects of malpractice in the estate planning area. I have collected all of these ideas into one article.

**Q: What issues go by the wayside during estate planning in the current context?**

A: At one time, many people had a one-page will. That is no longer the current standard of planning. Critical questions have to be considered. What state should be chosen, if possible, for the domicile? In what state would assets be located? What are the dynamics of wealth preservation within a particular family? There are asset protection inquiries about divorce, creditors, and so forth, and the answers will affect the appropriate planning measures. There are business entities to be established and trusts.

**Q: Do most clients want simplified wills, despite the options?**

A: Most clients want good planning and opt for those plans and techniques that achieve it. When the right plans are explained properly, clients generally choose those plans.

**Q: Where does the malpractice arise?**

A: It is actionable if all of the appropriate planning issues are not brought up and discussed at all.

**Q: How about an estate that is about \$1 million? Or an estate that is less than \$1 million in total assets?**

A: Even a relatively small estate can benefit from more sophisticated planning. The options still need to be discussed.

**Q: How can estate planners protect themselves from malpractice claims?**

A: Discussions with clients need to be documented in some manner, either with an engagement (or non-engagement) letter, with a memo to the file, or both.

*Editor's Note: Many thanks to Robert G. Alexander for speaking with us.*