By Avi Z. Kestenbaum & Bill Hammer, Jr.

The Quarterback Dilemma

Understanding, communicating and coordinating the roles and responsibilities of the estate-planning team can help prevent important items from falling through the cracks

Estate plans originate in a number of ways, but in every one, early on in the process, the client interacts with at least one "estate planner" who may be an accountant, insurance professional, financial advisor or attorney. Typically, a professional within this group of advisors will introduce the client to the others. This initial process begs the questions: Who is an "estate planner"? What are our individual roles? And how do we effectively work together? The parameters often become confusing because there are so many different aspects and angles in every complex estate plan and no one individual within this group can possibly take on all of the required roles and responsibilities.

We recommend that the role of each estate planner be clearly delineated from the outset, both to the client and within the group of advisors. Additionally, the client must choose the quarterback who ensures that all the work is being organized, synchronized and completed properly. In some cases, an outside independent person might better serve this role. Furthermore, advisors should use checklists to confirm that they didn't miss any items and that there's proper and timely implementation of the estate plan.

Communication is Key

In many complex estate plans, failure to effectively communicate among the different advisors and with the client can cause practitioners to overlook important items that can later cause serious financial detriment and aggravation to clients, their loved ones and other advisors, not to mention liability risks to the practitioners themselves. Furthermore, lack of coordination and cohesiveness among the members of the estate-planning team often leads to a disjointed process and client confusion.

Items that planners sometimes miss or overlook in the estate-planning process because of ineffective coordination and communication among the advisors and with the client include both "big picture" and "compliance" items. Big picture items include:

1) The potential negative impact of the planning and asset transfers on clients' financial statements and credit lines;

2) Confirming there's sufficient liquidity to make the annual grantor retained annuity trust (GRAT) payment and intra-family note payments and trust distributions;

3) The effect of the planning, or lack thereof, on such critical items as minimizing state income taxes and effectively dealing with international tax and estate issues, business structuring, partnership agreements and succession planning;

4) Verifying that clients have sufficient life, disability, accident, property and casualty, homeowners, long-term care and umbrella insurance coverage;

5) Minimizing the potential for future estate disputes by fully understanding and discussing each unique set of family dynamics, challenges and concerns;

6) Understanding the impact of such items as a divorce, sudden death, serious disability and


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complex personal situations and family structures;

7) Providing maximum asset and future creditor protection; and

8) Ensuring that our clients feel that we're their trusted advisors, so they reveal to us all the necessary personal information as well as their true goals, allowing us to properly counsel and help them. In the absence of proper trust and communication among clients and advisors, we run the risk of making inappropriate or cookie-cutter estate-planning decisions.

Compliance items include:

1) Timely electing small business trusts and making qualified subchapter S trust elections when subchapter S corporation shares are transferred to non-grantor trusts or upon the termination of grantor trust status;

2) Advising our clients to update property, casualty and homeowners insurance policies on property transfers;

3) Confirming that proper consents were received from partners, members and directors and that updates were made to partnership and company agreements and corporate books when partnership and membership interests and shares are transferred;

4) Verifying that GRAT annuity and intra-family note and interest payments are being timely made;

5) Advising (and in some cases verifying) that *Crummey* notices will be sent;

6) Making sure a new deed and proper lease are completed when a qualified personal residence trust expires;

7) Confirming transfers are properly documented and dated, entities are timely and properly funded and proper books and records are maintained; and

8) Confirming that any beneficiary and contingent beneficiary forms are updated and correct.

Two Broad Definitions

Clients often don't understand the exact role of the estate planner or the definition of "estate planning." In fact, if one googles the term "estate planner," the first few hits are major financial firms. Insurance companies and financial institutions often bring in their own "estate planners," typically former practicing attorneys, to assist their high-net-worth clients with planning. While this can be helpful and educational to clients, especially those new to the world of trusts and estates, clients may sometimes find this process disjointed and confusing. The estate-planning attorney later brought on board to draft the documents may have different recommendations from the insurance company or financial institution's advisor. That's why it helps to have a team-oriented, educational approach to estate planning with full disclosure and effective communication.

While estate planning is difficult to define, there are two broad definitions that are helpful:

1. "The highest and best purpose of the estate planning process is, for me, to facilitate the effective transfer of an appropriate amount of financial assets to succeeding generations of family members in a way that will improve their life course."[1]

2. "Estate planning may be broadly defined as the process of accumulation, management, conservation, and transfer of wealth considering legal, tax, and personal objective. The goal of estate planning is the effective and efficient transfer of assets. An effective transfer occurs when a person's assets are transferred to the person or institution intended by that person. An efficient transfer occurs when transfer costs are minimized consistent with the greatest assurance of effectiveness. Some estate-planning experts define estate planning more narrowly to include only conservation and transfer, ignoring the accumulation factor in the broader definition above."[2]

If we accept the notion that estate planning has a broad definition, part of the complexity is that no single member of the estate-planning team can ever be aware of all the different items that need to be assessed and completed (for example, insurance, financial, investments, taxes, tax reporting, business planning and succession), let alone provide all the guidance and assistance required. As many of us learned in law school, spotting the issues should be the primary objective; once all the issues are identified, the solutions become obtainable. However, it's typically not possible for any one advisor to spot all of the issues. Therefore, the use of checklists is very important to the estate-planning process.

Define Boundaries

One of the greatest impediments to the estate-planning process is disputes over client control and affection among the advisors. In professional sports, individual stars don't ensure a championship team. In fact, arrogant and stubborn personalities hurt the team. Honest disagreements and conflicting views are productive to any process, as long as there's mutual respect and the clients' best interests are placed ahead of the advisors' own self-interests. Estate planning requires a team effort and all championship teams must work closely together to achieve a common goal.

We must also understand our individual areas of expertise, roles and limitations and explain them very clearly to our clients at the outset of the planning. Warren Buffett often speaks about how one's circle of competence relates to investing. He maintains that "the size of that circle is not very important; knowing its boundaries, however, is vital."[3] Due to this strong belief, Buffett has avoided major mistakes by only investing in the kinds of companies he truly understands. We too may get ourselves and our clients into trouble if we don't clearly define our intellectual and professional boundaries.

Pick a Quarterback

There always must be one quarterback who oversees the process and is held accountable for organization, structure and implementation. Stuart Lucas, who has led a double life as a fourth generation heir to the Carnation fortune and senior executive at wealth management and investment firms, witnessed these issues firsthand:

> I find that some of the biggest problems in implementing wealth management plans are due to poor communication between clients and their advisors. The best legal or tax advice can be rendered null and void if conceived in a vacuum or misaligned with your individual or family wealth management goals or investment strategy. Because wealth management advice is expensive, it pays to have someone ensuring that your advisors are working in tandem to help achieve your wealth management goals.[4]

Having a good quarterback and clear communication is the reason the family office concept proliferated among very wealthy families. However, this notion is helpful even when there's no family office involved and when the client isn't extremely wealthy. Which of the advisors should fulfill the quarterback role? The client must choose. In picking the quarterback, the client may take into account a variety of factors, including:

1. **Billing process.** For example, the attorney and the accountant may bill on an hourly rate, while the insurance and financial professionals may charge a flat fee. So the client's preference for how he's billed and how much he's paying might play a part in whom he picks;

2. **Varying expertise.** Insurance and financial professionals typically aren't as familiar with some of the tax issues as the attorneys and accountants and, likewise, attorneys and accountants typically aren't as familiar with the insurance, investment and personal issues. The client may want to pick a quarterback who's an expert in the key estate-planning strategies being implemented; and

3. **Wisdom and leadership qualities.** Perhaps most important, a client will choose the individual with whom he feels most comfortable and who possesses the ability to lead the team and manage the process. Additionally, this person must have the wisdom to understand personal and family dynamics and the practicality to implement the planning without endless delays.

Independent, Outside Person

If none of the estate-planning advisors are capable of fulfilling the quarterback role for one reason or another (for example, time commitment, lack of expertise or leadership ability), perhaps the future of estate planning is to have an independent outside person, the "planning and team consultant," organize the entire process, select part of the team and act as the quarterback and responsible party. This role is similar to the family office for the moderately (as opposed to the extremely) wealthy client. In fact, this concept already exists and many companies provide this service. However, our experience is that the existing companies that provide this service are typically involved with tax return preparation or insurance and investment product sales, and it would better serve the client and estate-planning team to have a fully independent "planning and team consultant" solely in this quarterback role. This way, the leader is a true independent and experienced specialist so the client and the other team advisors will feel secure that there are no ulterior motives or biases.

Checklist of Items

In addition to specifically delineating the quarterback and the individual roles at the outset of the planning, advisors should prepare a comprehensive and detailed checklist of all the various big picture and compliance items necessary to make sure that they're all identified, completed and synchronized properly.[5] As highly trained professionals, we may balk at the idea of a checklist, but checklists have been proven to deliver superior results, especially in complex areas. In addition to helping our clients, having checklists in place also better protects us, as planners, against liability.

Dr. Atul Gawande, a world-class surgeon and associate professor at Harvard Medical School, performed a comprehensive study a few years ago to determine if the most highly trained medical experts could benefit from checklists. His premise was that medicine had become the "art of managing extreme complexity," since treating a patient can involve hundreds or even thousands of steps that must be performed correctly (and in the proper order). Furthermore, these tasks are typically carried out by a large number of medical professionals with varying degrees of training and expertise, who may not always communicate directly with each other. A single error at any point in the treatment could result in serious complications or death.

Dr. Gawande provided a simple 19-point surgery checklist to eight hospitals around the world, representing a diverse range of demographics and hospital conditions.[6] After six months, he found that these hospitals saw postsurgical complications drop by 36 percent on average and deaths by 47 percent without the hospitals purchasing a single piece of equipment or spending an extra dollar. Dr. Gawande is currently working closely with the World Health Organization in an effort to introduce surgical checklists worldwide.

For a checklist to be helpful, it must include as many potential key items as possible without becoming so lengthy and cumbersome that it's ignored. After the planning is implemented, the advisors should review the checklist once again to confirm that no items on the checklist were neglected. Furthermore, the advisor should review and update the checklist annually. This is the only way the client and advisors can be certain that the planning has been implemented properly and is being continually updated for changing circumstances.

Get Some Sleep

While some portions of this article may sound elementary, we've found that many items are missed in the course of estate planning due to the disjointed estate-planning process. If we as "estate planners" truly want to help our clients, we should re-think the ways that we interact and work with the client and the estate-planning team. We don't contend to have all the answers, as this is a complex field and each client, family and situation is unique. However, as one of our clients once stated, "All I ask from you is to help me and my family sleep better at night." This is our definition of "estate planning."

Endnotes

1. Charles W. Collier, *Wealth in Families* (Harvard University 2006).
2. Michael A. Dalton and Thomas P. Langdon, *Estate Planning for Financial Planners* (ME 2009).
3. 1996 Berkshire Hathaway Chairman's Letter to Shareholders.
4. Stuart E. Lucas, *Wealth: Grow It, Protect It, Spend It, and Share It* (Pearson Prentice Hall 2007).
5. *See* Avi Z. Kestenbaum, "Risk Assessment," *Trusts and Estates* (April 2010) at p. 53; and Avi Z. Kestenbaum, "A Practitioner's Risk Assessment Checklist", *LISI Estate Planning Newsletter,* N. 1636 (May 5, 2010).
6. Dr. Atul Gawande, *The Checklist Manifesto* (Picador 2011).