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The "Slow Evolution" of the Estate Planning Profession

Alan F. Rothschild Jr., Esq.

As a history major in college, I was taught that, to make sense of the present, you first have to understand the past. Stepping back to get some historical perspective on our profession will help us better understand where the estate planning profession is today and where the profession may be going in the future. Hopefully, this information will not only help practitioners address current matters more effectively, but will also get us thinking, and taking action, to ensure that our practices remain viable, whether the estate tax exemption is $1 million, $3.5 or $5 million, or for that matter, whether there is an estate tax at all.

Looking Back at the Profession

For most of us, whether an estate planning attorney in private practice or in-house with a financial institution, accountant or financial adviser, much of our estate planning work has been driven by the major pieces of transfer tax legislation enacted during our careers. Depending upon your age, these are:

1. 1976 Act's unification of the estate and gift tax,
2. 1981 Act's unlimited marital deduction,
3. 1986 Act's enactment of the generation-skipping transfer tax, or
4. The 2001 Act's escalation of the transfer tax exemptions and one-year repeal.

While these laws have kept us busy updating the tax-driven provisions of our clients' documents, or developing and implementing tax saving strategies, few of us stop to consider that even though we've had an estate tax for over 90 years, until the late 1960s or early 1970s, most lawyers to whom we trace our roots were "probate lawyers" and their practices consisted of drafting basic wills and trusts, probate and estate administration, and routine real estate transfers, but very little estate tax planning work.

Looking back even further, there is plenty of evidence that a significant number of wills drafted well into the 1970s (and even many nontaxable estates today) have much in common with documents drawn hundreds, maybe even thousands, of years ago.

Who has not noticed the similarities between "simple wills" of today with English sheepskin deeds and wills from the 1850s that hang in our offices, or circa 1950 onionskin copies buried in our estate planning files? An English translation of an Egyptian will dating from 2548 B.C., one of the oldest wills known to the modern world, states in part:

> I, Uah, am giving a title to property to my wife, Shefta, . . . all things given to me by my brother . . . she shall give to any she desires of her children she bears me.

Even though this will is more than 4,500 years old, this phrase would be familiar to both an 1850s English will draftsman and a World War II–era American probate lawyer. By restricting to whom his wife could transfer the bequeathed property, Uah, the testator, even created what we know today as a limited power of appointment—a device which is common, but certainly not routine, in modern estate planning documents.

Not only is much of the everyday language of our trade not as novel or evolved as we may like to

think, neither are many of the solutions that we've developed for the human challenges we face.

For example, William Assheton, the Rector of Buckingham in Kent, England, lyrically addressed one such situation in his 1556 text, *A Theological Disclosure of Last Wills and Testaments*:

> If your children and relations are notoriously vicious and debauched . . . do not abdicate or cast them off . . . but make provision for them in trust in such manner and with such circumstance, as may relieve their necessities, but not their lusts.

This succinct 450 year old phrase, "in such manner as may relieve their necessities, but not their lusts," arguably provides better guidance to a trustee dispensing funds to certain problem beneficiaries than many of the more detailed provisions developed since.

The Modern Evolution of the Estate Planning Profession

As evidenced above, for decades or perhaps even for centuries, even though we have had an estate tax since World War I, the work of most probate lawyers evolved very little. Around 1970, however, the modern evolution of our profession began as a larger number of wealth advisers began devoting significant energies to estate tax planning.

This evolution may be traceable to the transfer tax law changes in the 1969–1976 era, really the first significant modification of our estate tax laws since World War II, or it may be more broadly reflective of what was happening in the general practice of law.

Prior to the early 1960s, most lawyers were not specialists and the lack of demand for specialization was reflected in the size of law firms at the time:

- In 1960, only three New York City commercial law firms had 100 or more lawyers (the largest—125).
- Outside of New York City, only 17 firms had 50 or more attorneys.
- In Atlanta, the largest commercial law firm of the day had only 21 lawyers (and 17 of those were partners).[1]

Whatever the cause, beginning around 1970 the estate tax planning field grew rapidly, both in the number of specialists and their level of sophistication. Yet, while the decade of the 1976–1986 Acts would appear to be the heyday of opportunity due to the regular and significant changes to our transfer tax laws, there is plenty of evidence from the period that the state of our profession was not as secure as it may have seemed.

First, although the 1969–86 Acts created significant tax work, negative developments in the probate field, traditionally a significant source of work (hence the name "probate lawyer"), threatened to offset the new tax planning opportunities.

These developments included standardized probate forms and reduced judicial oversight of the probate and administration process—all of which meant less lawyering was required.

Second, even though the increasingly complex tax legislation created opportunity, these laws also accelerated a significant increase in the exemption from the tax:

- The 1976 Act increased the exemption level from $60,000 to $175,000 between 1976 and 1981.
- OBRA 1981 continued this trend, raising the exemption equivalent from $175,000 to $600,000 over the next five years.

One of the leading thinkers on the impact of these developments on the estate planning profession was Tom Eubank of Baker & Botts in Houston, who later chaired both the American Bar Association's Real Property, Probate and Trust Law Section and the American College of Trust & Estate Counsel.

In writings and seminars from the mid-1970s to late 1980s, Eubank and participants in panels he organized issued a number of predictions and recommendations for the profession that are just as relevant today as they were two and a half decades ago. This should probably come as no surprise for a profession that has evolved as slowly as ours.

As early as 1974, Eubank wrote, "The future for estate lawyers is uncertain and perhaps bleak, unless the practice of estate law is changed significantly."[2]

Two of the most significant challenges that Eubank and his colleagues identified were:

- the increased competition from non-lawyers for work that had traditionally been done by estate planning lawyers and
- the increased estate tax exemption, which would reduce the number of clients in need of sophisticated estate tax planning to only a wealthy few.

From my perspective as Chair of the ABA's Real Property Trust & Estate Law Section, Eubank may have been early in his predictions, but with the

bursting of the technology, financial, and real estate bubbles in the last decade, coupled with exemption levels in the $3.5, or possibly even $5 million range, not to mention reduced expectations for future investment returns, his predictions are now being realized.

I believe this is happening because the estate tax exemption in the mid-1970s had gotten so far behind the growth in our clients' real wealth that the percentage of decedents subject to the estate tax was four times greater than the post–World War II average.

The estate tax planning profession was granted a reprieve by the bull market of the 1980s and 1990s. This raised many individual estates back over the new exemption thresholds. Table 1 illustrates the steady decline in the number of estate tax returns filed between 2001 and 2007 (from 108,000 in 2001 to 38,000 in 2007, a period in which the exemption was $2 million and before the S&P 500's 37 percent decline in 2008):

With the 75 percent increase in the estate tax exemption to $3.5 million in 2009, I predict the number of Form 706 filings for 2009 decedents will fall to around 14,000 returns. At this exemption level, over 99 percent of adults dying in the U.S. will not be subject to estate tax. Compare the present situation to 1977, when over 200,000 estate tax returns were filed, representing 10.5 percent of all adult deaths for the prior year.

This downward trend in Form 706 filings illustrates that there are real challenges to the typical estate tax planning practice, one which proved so professionally rewarding to many of us since the mid-1970s.

As Eubank and his colleagues suggested, it is time to reassess the direction of our practices—both their focus and marketing—to ensure that we maintain healthy and rewarding professional careers.

Unless you think the estate tax exemption is going to $1 million permanently in 2011, uncertainty generated by "repeal" in 2010 is likely only a short-term business driver. Assuming we, as professional advisers, can figure out how to be fairly compensated for all the worrying we're doing on our clients' behalf, our production for 2010 and 2011 may look very good indeed.

As noted earlier, while Eubank and his colleagues offered a cautious outlook for the future of estate tax planners, they also suggested developing and broadening our practices by adding complimentary areas of expertise which take advantage of anticipated demographic and societal trends.

Many of the suggested practice areas still merit consideration, including the following:

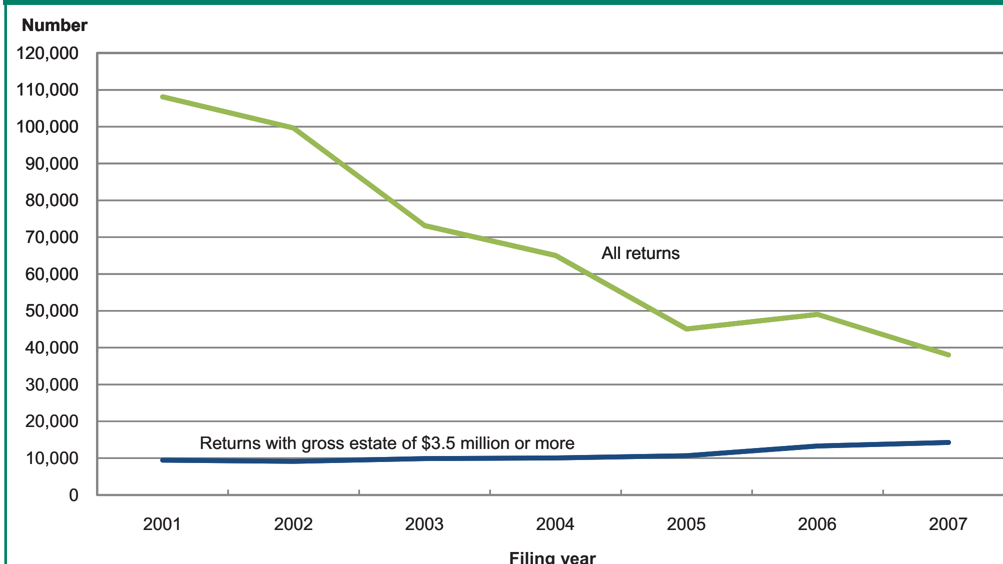
- income tax planning
- corporate and partnership law
- tax controversy
- charitable giving and exempt organizations
- divorce and marital planning
- probate and fiduciary litigation
- elder law

Based on more recent developments, I would add asset protection planning, international tax, and non-tax wealth counseling to the list.

Demographic and Societal Trends

Let's now take a look at some of the trends that make these other areas of practice such potentially

Table 1
Number of Estate Tax Returns Filed, All Returns and Returns with Gross Estate of $3.5 Million or More
Filing Years 2001-2007



rewarding compliments to our estate tax planning practices.

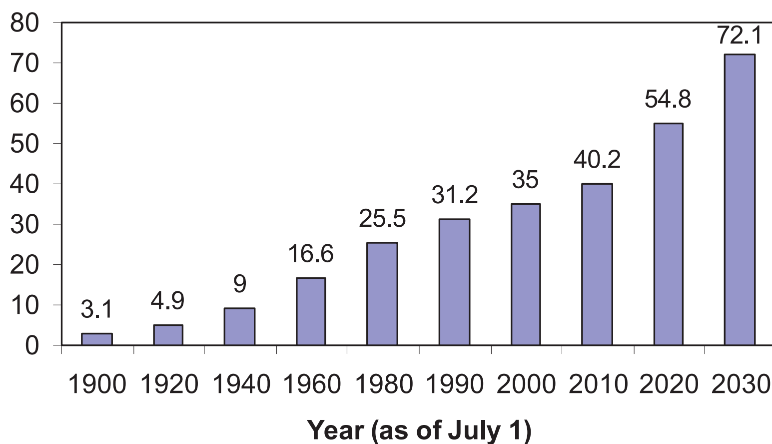
One of the most powerful forces affecting the wealth advisory profession is our aging population. Today, 1 in 8 (12 percent) Americans is over 65. In Florida, the number is even greater—18 percent. In ten states, including my home state of Georgia, the over-65 population has grown by more than 20 percent in just the past decade.

As presented on Table 2, the over-65 population numbers 40 million today, and is estimated to increase 36 percent to 55 million by 2020, and over 72 million by 2030.

Not only is the elderly population increasing dramatically, today's 65 year old has a life expectancy of 19 years. Because of this increased life expectancy, it is estimated that the "super elderly," those 85 and older, will number 6.6 million by 2020. Statistics show that 50 percent of these super elderly will suffer from some type of cognitive impairment during their lifetime.

While we've long dealt with, "When it is time to take Momma's car keys away?" these super-elderly will present us with new challenges, such as when to take her checkbook, prescription medications, or even house keys (and house!).

Table 2
Number of Persons 65+ Years Old 1900-2030 (numbers in millions)



Note: Increments in years are uneven.
Sources: Projections for 2010 through 2050 are from: Table 12. Projections of the Population by Age and Sex for the United States: 2010 to 2050 (NP2008-T12), Population Division, U.S. Census Bureau; Release Date: August 14, 2008. The source of the data for 1900 to 2000 is Table 5. Population by Age and Sex for the United States: 1900 to 2000, Part A. Number, Hobbs, Frank and Nicole Stoops, U.S. Census Bureau, Census 2000 Special Reports, Series CENSR-4, Demographic Trends in the 20th Century. The figures for 2007 are from the Census Bureau 2007 population estimates.

A second trend having a significant impact on our client base is their increased mobility and globalization. International estate planning was once nearly the exclusive domain of large, urban firms. Today, rural communities are home to multi-national manufacturing companies.

Noncitizen spouses and nonresident aliens with U.S. property holdings are quite common. While more mobile clients will create significant multistate and unauthorized practice of law issues, they will also need legal advice on issues such as domicile, multi-state probate, state taxation, and property rights.

I broadly label a third significant trend as "divorce, blended and modern families." Over 50 percent of today's marriages end in divorce (and most divorcees, particularly men, get remarried).

The role of women as wealth creators and financial decision makers has changed dramatically over the last 25 years. Same-sex marriages and same-sex adoptions, like international estate planning, is no longer something only planners in the "big cities" need to understand.

Medical developments such as frozen sperm and embryos and posthumously conceived children have created new challenges for the estate tax planning profession that few have recognized, much less thoughtfully addressed.

A fourth trend is the growth in both the value and percentage of wealth in nonprobate assets, particularly qualified retirement accounts. As both retirement assets and the estate tax exemption have grown, the income tax on these assets is becoming the new estate tax for many middle-class and upper-middle-class Americans. Perhaps one solution is the new opportunity presented by Roth IRAs due to the lifting of the income limits on conversions in 2010.

Another trend—one that comes with both cautions and opportunities—is our increasingly litigious society, and, in particular, the rise in fiduciary litigation. The present chaos in the estate tax system and recent financial meltdown will likely be short-term drivers of even more litigation.

Long term, aging clients will certainly create opportunities for more will contests, guardianship proceedings and the like. The prevalence of blended families will also increase the likelihood of litigation, as will the media attention to celebrity estate litigation such as the Brooke Astor case and the Michael Jackson estate.

Although the American College of Trust & Estate Counsel began forming substantive

law committees in the early 1970s, its Fiduciary Litigation Committee was organized only in 1991. Even though a latecomer, it is one of the College's largest and most active committees today.

Perhaps as a corollary to the growth in litigation, asset protection planning has become a sub-specialty in great demand, particularly among high-risk professionals like physicians, highly leveraged real estate developers, and veterans of prior divorces who are headed back to the altar.

The Terry Schiavo case will not be the last in the area of patient rights and end-of-life decision-making. Recent developments in life-extending medical treatment, cryogenics, and patient self-determination will present novel issues filled with great emotion for future courts to decide.

These developments should leave most of us with the realization that: (1) our estate planning questionnaires, wills and trusts, and advanced directives need a lot of work to catch up with what is happening in both medical science and this emerging field of law; and (2) this "new biology" presents tremendous opportunities for both litigators and estate planners to develop specialized expertise to grow their core practices.

At the 2010 University of Miami Heckerling Institute on Estate Planning, Doug Chalgian shared how he has used his elder law expertise to expand his general estate planning practice. He noted that although his firm already has four offices in Michigan, it has the business to justify opening two more. His assessment really stands out in this economy when most law firms are reducing headcounts and consolidating offices.

For those tracking trends, this is not surprising. When 5,000 attorneys participating in the 2007 Wealth Counsel Industry Survey were asked, "What will be the primary shift in the estate planning industry over the next five years?", nearly 40 percent responded the growth in elder law planning.

Another presenter at the 2010 Heckerling Institute, Carlyn McCaffrey, is recognized as one of the finest estate tax planners practicing today. However, she has also long been recognized for her expertise in a complimentary area of law—tax planning for marriage, including pre- and post-marital agreements and divorce agreements.

This estate planning sub-specialty will likely continue to prosper as long as our divorce and remarriage rates remain high.

Some Thoughts on the Future

In his disarmingly titled book, *The End of Lawyers? Rethinking the Nature of Legal Services*, British author Richard Susskind poses the following question:

> What parts of your current practice could be undertaken more quickly, cheaply, efficiently, or better . . . using different methods?[3]

Susskind states that the challenge for lawyers is to identify our distinctive skills and talents, those that cannot be replaced by advanced systems, less costly workers, or by people armed with online self-help tools.

As Chair of the ABA's Real Property Trust & Estate Law Section, I often receive estate planning inquiries from various media outlets, usually national publications such as *Newsweek*, the *New York Times*, and *The Wall Street Journal*. The most frequent reporter inquiries are not about the estate tax situation or even celebrity estate litigation. The calls predominately relate to upcoming articles on do-it-yourself estate planning.

How can we effectively get the word out that attempting to draft your own will is similar to wiring your own house? You certainly are capable of going to Home Depot and purchasing an instruction guide, tools, wire, and light switches.

If you do it just right, when it's all done and you flip the switch, you've got lights. But if you screw it up, there are some really serious downsides—including electrocuting yourself or burning down your house.

We often compare our processes and procedures to those in the medical profession. How can we more effectively communicate that the will itself is only the end product of the estate planning engagement, much like a doctor's prescription? What clients (and in many cases, the press) do not realize is that they are really paying for our legal judgment and experience, something you don't get with do-it-yourself products.

We cannot change the path of technology or the mass marketing of estate planning advice, but we must proactively embrace the available technologies that can add value and efficiencies to our current practices.

Being "slow evolvers," many estate planning attorneys were dragged reluctantly into the computer age, first with standalone word processors, then dedicated on-line research, tax calculation and tax return preparation software and, finally, e-mail and the Internet.

Today, nearly every estate planner uses some kind of document assembly program, although we do so in different ways and with differing levels of commitment. There are two basic types of document assembly programs: (1) traditional word processing programs with automated assembly functions or add-on programs such as Hot Docs, and (2) expert "off the shelf" systems.

The advantage of the first type is that it allows a firm to automate its existing estate planning documents. However, such custom automation requires great effort and patience to create and requires a tremendous on-going commitment to maintaining both the technology and content. While past efforts to create expert systems faced numerous technology hurdles and often did not contain robust forms, this is not the situation today.

In the American Bar Association's Legal Rebel series, Paul Lippe, one of the foremost legal technology thinkers, noted that lawyers (and most other professionals) do five things:

1. read
2. create documents
3. research
4. communicate
5. think

The Internet and other technologies have dramatically streamlined the first four tasks. We must use this technology—such as expert document assembly programs—so that, as Richard Susskind says, we can do what only we can do—solve complex legal problems.

Another practice issue that needs attention is the long-standing challenge of being fairly compensated for trust and estate services. Even as tax planning became a significant part of the estate planning process by the mid-1970s, many firms still viewed the drafting of estate planning documents as a loss leader for at least three reasons:

1. Non–estate planning partners did not understand or appreciate our area of practice.
2. Generous statutory probate and administration fees would recoup "loss leader" estate planning fees.
3. Similarly, estate planning was viewed as a generator of more profitable work paid for out of the corporate, rather than the individual, pocket.

Even for those who convinced their colleagues to stop treating estate planners as stepchildren, the standard method for billing for most legal services, the hourly rate, proved to be a rather unsatisfactory way to bill for much of what we do.

Not only is the hourly billing method a poor reflection of the value delivered in an estate planning engagement, the learning curve for implementing new estate planning techniques, time spent staying current, updating forms and acquiring the latest technology are difficult to reflect in hourly rates.

To be fairly compensated for the value interest in an estate planning project, we've got to move our billing away from the hourly rate method to alternative billing arrangements such as flat fees, hybrid arrangements, retainers, and similar value billing techniques. In addition, we've got to better illustrate the value our work delivers—and not just in terms of tax savings.

Summary and Conclusion

As the estate planning profession continues to evolve, indications are strong that there may be less estate tax planning work to go around.

However, demographic and societal trends present tremendous opportunities for estate planning practitioners who develop and market their expertise in complimentary areas of practice, utilize technology to practice more efficiently, and develop ways beyond the hourly rate to be compensated for both their legal judgment and resulting work product.

Notes:

1. Michael H. Trotter, *Profit and the Practice of Law: What's Happened to the Legal Profession* (Athens and London: The University of Georgia Press, 1997).
2. J. Thomas Eubank, Jr. "The Future for Estate Lawyers," *American Bar Association Real Property Probate and Trust Journal*, Vol. 10:223, Spring 1975.
3. Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (London: Oxford University Press, 2008).

Alan F. Rothschild, Jr., is a partner with Hatcher, Stubbs, Land, Hollis & Rothschild, LLP, based in Columbus, Georgia. He has practiced estate planning, taxation and general business law with Hatcher Stubbs for more than 25 years. Alan presently serves as Chair of the American Bar Association's Section of Real Property, Trust & Estate Law and is a Fellow of the American College of Trust and Estate Counsel. He is past Chair of the State Bar of Georgia's Fiduciary Law Section. Alan can be reached at: ar@hatcherstubbs.com.