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The Future of Estates and Trusts Legal Practice
After the Crash of 2008 - 2009
and the 2009 Increase of the Estate Tax Exemption

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Estate planning lawyers are going to need to rethink many aspects of their law practice in light of the devastation to the stock market and the economy caused by the current global financial crisis. Goldman Sachs has estimated that \$15 trillion dollars of wealth has evaporated in America since September 2008. The unhappy coincidence that this occurred simultaneously with the January 1, 2009 75% increase in the federal estate tax exemption from \$2 million to \$3.5 million may have, in a matter of months, radically altered client perceptions and expectations of estate planning lawyers, and what clients need from us.

The Bad News

- Approximately 117,000 federal estate tax returns were filed in 2002. It has been estimated that 17,000 will be filed in 2009, a reduction of 85%. And that projection did not take into account the balance sheet deflation our clients have experienced, in which they have seen the value of their homes and retirement plans shrink 30% - 50%. But for the economic crisis, we might have tried to convince ourselves that the increase in the estate tax exemption from \$2 million to \$3.5 million was perhaps an exaggerated inflation adjustment. But it is

undeniable that the modestly wealthy have been financially devastated and, for the present and immediate future, require much less estate and gift tax planning than before, and they certainly do not need generation-skipping tax planning.

- Today, and for at least a few more years, fewer clients will need tax-oriented estate planning. This would be so if only one of these two seismic events had occurred. The incredible and coincidental confluence of both events -- a "Perfect Storm" in the words of a recent article in The Complete Lawyer -- will certainly dramatically reduce the need for two share/credit shelter planning.

- There will be substantially fewer estate plans with tax planning considerations. There will be a significant reduction in the number of federal estate tax returns required.
- It seems likely there will be a material reduction in tax-planned reportable gifts, and thus fewer gift tax returns to prepare.
 - in times of financial uncertainty, people are psychologically insecure and feel vulnerable, whether that is rational or not, and even the truly wealthy are reluctant to give assets away.
 - the annual gift tax exclusion has expanded to \$13,000, and that will shelter most gifts people are going to be willing to give in this financial climate.
 - the applicable federal rates that may be charged on intra-family loans are very low -- in February, we had clients refinance the mortgages of two children by making 9-year loans amortized

monthly at 1.6%! If you can loan at such cheap rates, why would you give property away? Fortunately, there is some legal and tax work to be done on such loans.

- It seems likely that there will be a material reduction in generation-skipping planning because the modestly wealthy, those worth \$5 - \$10 million a year ago and who could be persuaded at that time of the wisdom of GST planning, are now worth 30% less, and such planning makes much less sense.
- It seems likely that there will be a material reduction in tax-oriented charitable planning. Because so many more modestly wealthy, and even very wealthy, individuals feel financially vulnerable and insecure, they will be even more reluctant to give property to charity than to family members. In fact, they may project their own financial insecurities onto their family members, and prioritize bequests to family members over charitable bequests. How many modestly wealthy people, those with \$5 - \$10 million a year ago, are going to be worried about the income tax charitable deduction limits? How many people with a net worth above \$10 - \$20 million are going to be setting up private foundations in the next few years? Such clients will prioritize their own shaken financial security and the financial security of their children and grandchildren over charitable giving.
- Legislative developments in the past few years in all three local jurisdictions have

greatly simplified and expedited probate, and therefore diminished estate administration as a source of profit in our practices.

Counter-balancing these factors, as numerous commentators have noted, the confluence of low IRS-approved interest rates and low values makes this an opportune time to make large outright gifts and GRAT gifts. So some clients, particularly the very wealthy, may be persuaded to take advantage of the favorable gift environment. But the modestly wealthy will not feel financially secure enough to give property away.

The Good News

It has been widely noted by those in our profession, but not completely absorbed into the consciousness of our clients, that the elimination of the need for tax planning by upper middle class clients does not mean that the estate plans of such clients will necessarily be simplified and less expensive.

- Clients with second, third, etc. spouses -- half of our clients -- will still require marital trusts to protect children of a prior marriage. And because the tax law will no longer govern the design of such trusts -- QTIP qualification of marital trusts will not be necessary for non-taxable estates -- they may actually become more customized and complex.
- Trusts will still be required for younger children, disabled, addicted, careless, or spendthrift children, as well as for spouses and parents.
- Revocable trusts will continue to be popular and desirable because their use has little to do with tax planning.
- Pre - and post-nuptial agreements, for those estate planning lawyers who do them, will have undiminished demand.

- Asset protection planning will be in greater demand than ever because of the heightened sense of vulnerability all clients will have and because of the numerous lawsuits the economic crash will spawn.
- The need to coordinate assets passing “outside the will” with our documents will have undiminished importance.
- Elder law planning for baby boomers will enjoy increased demand, especially as changes are made in the next few years to our health care, Medicare, Medicaid and Social Security systems. Clients will be anxious for advice on coping with the new federal entitlement regimes, even upper middle class people.
- There will likely be work in simplifying over-planned estates.
- Both McLean, Virginia and Potomac, Maryland have just been ranked in the top five (5) wealthiest suburbs in America. We have a strong potential client base of high net worth individuals (HNWI) in our area.
- As a Washington Post editorial pointed out about a month ago, Washington, D.C. is going to flourish, prosper and grow, perhaps to some extent at the expense of New York City, as D. C. becomes the financial capital of the United States. The re-regulation of finance by the federal government, the radical changes coming in our health care system, the vast new federal expenditures on green energy, the new federal money going into stem cell research, and the new education initiatives will attract representatives of all of these industries to the D.C. area to lobby, and to seek and perform federal contracts. This development will further secure the future financial prosperity of our region.

Trends

I do not have a crystal ball, and I hope I am not Cassandra, but I have reached the following conclusions after close reading of almost everything I have been able to get my hands on for four months:

- In every discipline represented on our Council there is going to be movement by our clients to new service providers, there will be winners and losers, and we all hope to be winners. Why will clients move? They are angry and afraid. They feel dissatisfied that all of us “let them down” and permitted them to be “victimized” by the market crash. Responsible or not, we will be “blamed” -- asset managers the most -- and the value and quality of our services will be closely scrutinized and re-evaluated. There is going to be a flight to value and a flight to quality in each of our disciplines.
- In terms of value, I suspect there is going to be price pressure upon us. The March issue of Trusts & Estates has an article on estate planning legal fees that is worth reading. The authors, lawyers Louis Harrison and Emily Kuo of Chicago-based Harrison & Held, argue forcefully for fixed fees, rather than hourly billing, in estate planning.
- When I started practicing in 1974 many large law firms had prominent trusts and estates practices. Since then huge national and international law firms have arisen, and Hildebrandt, the leading consultant to such firms, advised them about 12 years ago to divest themselves of their trusts and estates practices (presumably on the theory that large national firms are better suited to represent large national, especially publicly-held, companies). And surveys published in Trusts & Estates demonstrated clearly that HNWI prefer to use boutiques rather

than large firms. Anecdotal evidence suggests that large firms are among those continuing to charge for estate planning on an hourly basis, at high hourly rates typical of national firms, with vertical “leverage” of lawyers and paralegals of various experience levels, and with “word processing” and other miscellaneous charges. Public companies may accept such billing practices with equanimity but individual clients, even very wealthy ones, do not. One cannot help but wonder whether the market crash and consequent frugality of the wealthy will not further the already evident trend for national law firms to get out of the trusts and estates business.

There are certainly a few national firms (McGuire Woods, and McDermott, Will & Emery come to mind) heavily invested in their trusts and estates practices, which are very prestigious and a significant source of the firms’ lofty reputations. And entrepreneurs using large law firms for corporate and real estate transactions, and related tax work, will still want these firms to provide synergistic estate planning services under the same roof. But, as the saying goes, those are the exceptions that prove the rule.

Twelve years ago the estimable Howard Zaritsky advised me to leave my large firm. “You will be happier and make more money.” He was correct. The purpose of this article is not to share my typical and not unusual story. Many members of the Council have left large firms and now happily and successfully practice in smaller firms. Council members practicing at larger firms clearly have that option. It is apparent to any observer of the trusts and estates legal practice across the country that more and more trusts and estates partners are leaving

large law firms and joining or opening smaller firms, and the current market crash may accelerate that trend. Enough said. I hope my observations do not offend my many friends at large firms whose expertise and client base make me jealous.

I will take note of an apparent exception. Many of the surviving national firm trusts and estates practices have strong concentrations in international estate planning, complex cross-border inbound and outbound tax planning for multinational global families, artists, athletes, and investors. By representing HNWI overseas in addition to U.S. clients, such lawyers have a greatly expanded base of wealthy individuals who are prospective clients compared to lawyers with solely domestic practices. The complexity and sophistication (and scarcity) such international tax expertise justifies hourly billing at lofty rates. Moreover, the legal issues presented by such clients frequently require the varied expertise (for example, on international corporate and corporate tax, and expertise in the law and taxes of other countries in which the firm has offices) of large national and international firms. International estate planning is likely to continue to have a comfortable home in the largest national and international law firms.

- Clients are now using the Internet to find us or, more typically, to follow-up on a word-of-mouth referral. Let's be honest, who goes to the library anymore to look at Martindale? People find us or, more often, confirm the credibility of a word-of-mouth referral, online. Estate planning lawyers need to have an effective internet presence. I will speculate based on conversations with my own clients that today 80% of prospective clients referred to us check us out on the Internet

before calling or coming in to see us.

- If you want to have more HNWI clients, make yourself valuable to them by improving your skills and knowledge base, polishing your expertise on, for example, GST planning (Lloyd Plaine has told me she believes there are fewer than 200 lawyers in America who understand it), domestic and offshore asset protection strategies, international tax rules governing inbound and outbound transfers and offshore trusts, GRATs, QPRTs, QDOTs, IDGTs, issues affecting jumbo second-to-die life insurance held in perpetual dynasty insurance trusts, private foundations, and charitable lead trusts. HNWI are going to be looking for sophisticated expertise on these techniques.
- Clients are likely to look harder, in the future, at whether we provide extraordinary service, “high touch,” holistic advice characterized by the “wealth management” and “family office” model in which we assist our clients with “financial solutions.” Of course, lawyers are severely restricted from multi-disciplinary practices, and cannot sell multiple products. But we must recognize that HNWI clients are looking for advice on the full range of investment, insurance, financial planning and tax issues confronting them. Clients are going to demand of us deeper and broader expertise. Are we able to advise our clients on the difference between the “suitability” standard for stock brokers vs. the fiduciary standard for investment advisors, and why it matters? Can we advise our clients on determining the financial strength of life insurance and annuity companies? While we will not and cannot have true expertise on most of these topics, we must be conversant with them, help our clients identify true experts on

these matters, and work in a cooperative and constructive manner on the team with the clients' other advisors. The two leading complaints about lawyers have long been: you do not return calls (now e-mails) at all, or promptly; and you take too long to do the work. To be successful, estate planning lawyers are going to need to distinguish themselves from the pack by their responsiveness. And our staffs must reinforce our commitment in their dealings with our clients.

- If we do not want to be treated as a fungible commodity, to be exchanged for a less expensive lawyer when one turns up, we must offer our clients what other lawyers do not. We must listen better and develop a deep understanding of our clients' objectives. We must invest time to get to know our clients and their businesses better. We must offer our clients truly independent counsel, hopefully seasoned with wisdom derived from years of experience. We must be prepared to disagree with them, to discourage them from imprudent behavior, to encourage them to exercise good judgment, and to ask them tough, awkward questions. If our clients do not want this from us, we may not want them as clients. We should offer perspective and also positive encouragement. We need to put the interests of our clients first, ahead of our own interests. Refer clients to the best professional you know in another discipline, not to the one who sends you business.

Summary

Estate planning lawyers face significant changes in their practices. Some of us may have to tailor what we are doing and/or how we are doing it to stay as busy as we have been. Some of us may prefer to diversify our practices so as not to be so reliant

on this practice, and may want to cultivate deeper expertise in fiduciary litigation, elder law, taxation, business, real estate, or family law. Such expertise will make us better trusts and estates lawyers in any event. Or some of us may want to partner with lawyers with practices different from and complimentary to our own. Some of us will shed the burden, time and software cost of preparing federal estate and gift tax returns, but may want to take up fiduciary income tax returns. Maybe the baby boomers and their wealth will continue to sustain us as they undertake long-deferred estate planning and die with messy estates.

What we are now experiencing is, in fact, nothing new. The one constant in our law practice has long been this: change is constant, adapt to prosper.