

# SELECTING THE RIGHT PEOPLE

## SELECTING AN ATTORNEY

### Duties of the Attorney

The duties of the attorney will depend on the client's stage in the estate planning cycle-accumulation, conservation, or distribution. In actuality it is sometimes difficult to know where one stage ends and another begins. Clearly, the attorney must be aware in each stage of the implications of what is done at that stage for the other two stages-and of the consequences to the client and his beneficiaries. For instance, it may be easier and less expensive in the planning stage of the cycle to draft a simple will than a series of more complex trusts. However, the client's family may have fared better in the later stages had the attorney done a more extensive estate plan.

An estate planning attorney must gather data regarding the client and his family or other potential beneficiaries and their circumstances; the client's sources of wealth, income, liabilities, and expenses; and the client's financial goals and fears. The attorney must then assemble this data and relate each of these objective facts and subjective feelings to each other and be able to ascertain the client's current position and the extent of his weaknesses in the following areas:

1. Liquidity- Will the client during his lifetime and his executor at his death be able to pay taxes and other expenses without the need for a forced sale? Is there sufficient life insurance, is it of the right type, and is it properly arranged?
2. Disposition of assets- Are they going to the right person at the right time in the right manner?
3. Adequacy of capital and income- Does the client have enough capital and income in the event of death or disability, or at retirement, or for special family needs such as the care of a handicapped child, or for charitable bequests?
4. Stability and maximization of value- Has the client first put a floor under and then maximized the value of the assets he currently owns? For instance, the value of a business without adequate liability or fire insurance or business continuation coverage has not been stabilized; the value of a partnership without a fully funded buy-sell plan has not been maximized. Absent adequate disability income coverage, a client's income floor has not been assured.
5. Excessive transfer costs- Is the client paying too much in income taxes, or will the client's estate pay an unnecessary amount of estate or other death taxes or transfer costs?
6. Special needs- Does the client have special needs or desires that must be met, such as making gifts to a charity, supporting a poor relative, or protecting a spendthrift spouse?

An estate planning attorney must not only understand these problems and their solutions but also be able to communicate them to the client in a manner that will allow the client to make informed decisions.

Often the attorney must organize and captain the entire estate planning team. Always the attorney should work with the client and the client's other professional advisors in establishing an order of priorities and responsibilities and make sure each aspect of the plan is completed in a timely manner.

Only the attorney can draft the appropriate documents. These range in complexity and length from a simple durable power of attorney, which may run nine or ten pages, to the recapitalization of the client's business and the complete restructuring of the nature of the client's estate plan, which may take hundreds of drafted pages.

## **Attributes of a Good Attorney**

Many of the same attributes important in the selection of an executor or trustee are also of key importance in the search for an attorney. For example, an attorney with business experience who is also familiar with the client's business can be invaluable. The major attributes that should be considered in the selection of an estate planning (or administration) attorney are competence, compassion, clarity, and affordability.

### **Competence**

The level of competence necessary depends to a great extent on the nature and extent of the client's wealth and the complexity of the client's situation. Most general practitioners are competent to draft a power of attorney or simple will. This may be all that is necessary in smaller estates where all the parties involved including the beneficiaries are self-sufficient adults and there are no unusual assets, objectives, or problems.

### **Compassion**

The single most important distinction between a truly good estate planning attorney and the average practitioner is not a superior knowledge of the tax law, nor is it the sense of combativeness that makes winners out of litigation attorneys: it is an attitude of being counselor rather than advocate. The estate planning attorney will be keenly sensitive to the importance of the client's business, for instance, not only as figures on a ledger sheet but also as a personification of the client and as part of a goal-striving behavior. Such an attorney will be extremely conscious of the circumstances, needs, hopes, and fears of the client and of his intended beneficiaries.

### **Clarity**

An estate planning attorney must be able to communicate. Often, the attorney will captain the estate planning team. This means he or she must be able to request information from other professionals, explain to them what each member of the estate planning team is doing and what remains to be done. The attorney must also be able to communicate clearly with nonprofessionals, such as the client or the client's family, the nature and extent of problems the client may not have known existed.

Clarity encompasses not only transferring information but also the urgency of deciding and then acting. The estate planning attorney must be able to convey the importance of the client's doing certain things (such as signing a will, obtaining adequate amounts of life or disability insurance, or establishing a buy-sell agreement) now!

### **Affordability**

Malpractice premiums for estate planning and administration attorneys are among the highest in the profession. This is indicative of the complexity of the practice and of the potential for making expensive mistakes. The point is: selecting the right attorney is a cost-saving factor. The lowest fee may be far from the least expensive.

Most states require the attorney to send a detailed engagement letter outlining the scope and limitations of his or her duties and the fees which will be charged for the services offered.

There is one more important consideration involving the relationship of an attorney to the estate of a deceased person. In most cases the attorney who drafted a will or trust or other estate planning document should be employed to help execute it. That attorney will probably know the client and his intentions better than anyone else. However, if the personal representative of a deceased person is not satisfied with the deceased person's attorney or if the decedent gave no indication of his or her choice of

attorney for the estate, the personal representative should, in practically every instance, make his or her own independent selection of an attorney qualified in the area of administering the decedent's estate.

Since the executor has the full responsibility if something goes wrong, the executor has the right and responsibility to personally select the estate's attorney—regardless of which attorney drew the decedent's will. In fact, a number of states protect that right with specific legislation.

### **Finding an Estate Attorney**

Once the estate reaches the size at which federal estate taxes may be imposed, or if the client or any of the client's beneficiaries are under a legal, physical, mental, or emotional disability, or if there is any unusual fact pattern, or where the situation is precarious, e.g., a blended family situation, or it is best to find an attorney who specializes in estate planning and administration, and consideration should be given to the existence or competence of the attorney's paralegals since he or she can accomplish most of the administration at a much lower hourly rate than the rate charged by the attorney. The question is how do you find an attorney in the estate planning field, and then how do you ascertain his or her competence? Some of the ways to locate attorneys practicing in the estate planning field are discussed below.

1. Call the county or city estate planning council. Ask for a copy of the membership directory. This should contain lists of not only attorneys but also CPAs, CFPs, CLUs and ChFCs, trust officers, and other key members of the estate planning team. Consider also The American College of Trust and Estate Counsel ("ACTEC"), to which practitioners who are leaders in the estate planning field are subject to a nomination and screening process ([www.actec.org](http://www.actec.org)). This list, of course, does not ensure any specific level of competence, but most estate planning councils require peer nomination for entrance, and membership fees help eliminate those who do not spend substantial time in the practice of estate planning. More important, estate planning councils make continuing education and in-depth seminars available to their members. The best attorneys active in the estate planning and administration field tend to be members of an estate planning council and often are the speakers or elected leaders.
2. Many states now certify attorneys in selective areas of practice. Texas, for example, examines an attorney through a rigorous additional state bar-administered examination in the estate planning area. Attorneys who have earned the right to specialize in estate planning through certification will usually signify that in their telephone book listing and on their business cards, V-cards, websites and stationery.
3. Trust officers are excellent sources for finding attorneys active in estate planning. Visit three or four banks with large trust offices. Ask for the names of two or three most competent attorneys. If the same name is mentioned favorably by more than one bank's trust officer, he or she might be a good choice. CLUs, ChFCs, CFPs, and CPAs are also excellent sources for the names of competent attorneys who specialize in estate planning.
4. Attorneys who specialize in estate planning often lecture at business meetings or adult education courses. After attending one or two sessions, a person should find it easy to tell if the attorney can communicate complex legal matter effectively.
5. Practicing attorneys who teach estate planning in law schools, in the tax masters' programs at business schools, and especially those who have taught the American College's estate planning courses for several years are excellent candidates.
6. Some attorneys write in professional journals such as *Taxation for Accountants*, the *Practical Lawyer*, *Estate Planning Magazine*, *ACTEC Journal*, *BNA Estates Gifts and Trust Journal*, *The Journal of The Society of Financial Service Professionals*, *Trusts and Estates Magazine*, *The Practical Accountant*, or the *Journal of Accountancy*. Some write regular news columns and blogs or hold radio talk shows on estate planning. Many have informative public websites. Some attorneys put

instructional videos on services like Youtube. Some of the top estate planners in the country are commentators who write for LISI (Leimberg Information Services, Inc).

7. Attorneys with an LL.M. (masters) in taxation generally have higher than average expertise in the estate planning area.
8. Friends and business associates may be able to provide referrals.
9. Bar association referral services and local law schools with tax masters programs are also good sources of estate planning attorneys. Also, since many Bar associations provide continuing legal education to member attorneys, it is a good idea to visit the website of the Bar associations to see which attorneys are lecturing to the other attorneys.

**Compassion.** The single most important distinction between a truly good estate planning attorney and the average practitioner is not a superior knowledge of the tax law, nor is it the sense of combativeness that makes winners out of litigation attorneys: it is an attitude of being counselor rather than advocate. There is a difference between being an estate law technician and being an “estate planner,” and it is knowledge of the human side of estate planning. The good estate planning attorney will be keenly sensitive to the importance of the client’s business, for instance, not only as figures on a ledger sheet but also as a personification of the client and as part of a goal-striving behavior. Such an attorney will be extremely conscious of the circumstances, needs, hopes and fears of the client and of his intended beneficiaries.

**Clarity.** An estate planning attorney must be able to communicate clearly. Often, the attorney will captain the estate planning team. This means he or she must be able to request information from other professionals, explain to them what each member of the estate planning team is doing and what remains to be done. The attorney also must be able to communicate clearly with nonprofessionals, such as the client or the client’s family, the nature and extent of problems the client may not have known existed.

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Clarity implies the ability to carefully listen to both the client and to the client’s other advisors and assimilate and re-communicate their thoughts and concepts.

**Affordability.** Malpractice premiums for estate planning and administration attorneys are among the highest in the profession. This is indicative of the complexity of the practice and of the potential for making expensive mistakes. The point is, selecting the right attorney is a cost-saving factor. The lowest fee may be far from the least expensive in the long run.

Clients should demand a written and signed statement of the attorney’s hourly fee or an estimate of the overall cost for planning or administering the estate-before allowing work to begin, and a competent attorney will be able to provide an engagement letter explaining the scope, responsibilities, and limitations of the relationship and an estimate of the fees and costs.

There is one more important consideration involving the relationship of an attorney to the estate of a deceased person. In most cases, the attorney who drafted a will or trust or other estate planning document should be employed to help execute it. That attorney will probably know the client and his intentions better than anyone else. But if the personal representative of a deceased person is not satisfied or for any reason is personally uncomfortable with the deceased person’s attorney or if the decedent gave no indication of his or her choice of attorney for the estate, the personal representative should, in practically every instance, make his or her own independent selection of an attorney qualified in the area of administering the decedent’s estate.

Since the executor has the full responsibility if something goes wrong, the executor has the right and responsibility to personally select the estate's attorney-*regardless* of which attorney drew the decedent's will. In fact, a number of states protect that right with specific legislation.

### **Other Members of the Estate Planning Team**

**Accountant.** An accountant, who often is a Certified Public Accountant (CPA), is a very valuable member of the client's estate planning team because the accountant usually has an intimate knowledge of the client's personal and financial picture. Additionally, because the accountant usually has regular interaction with the client because of doing bookkeeping and tax returns for the client, the accountant usually has the most intimate relationship with the client, even more so than the lawyer for most clients, which makes the accountant a great candidate to be the quarterback of the estate planning team.

**Financial planner/investments professional/life underwriter.** In today's world, where the distinctions between financial products and life insurance have blurred almost beyond recognition, we group life insurance agents and investments professionals and financial planners who sell products together. Because of the sales training that most of them get, they tend to be good action motivators, usually far better than both attorneys and accountants. These professionals often are the impetus for the estate planning, so they are valued and valuable members of the estate planning team. Generally, financial planners and life insurance agents who have or who are working on a CLU, ChFC, or CFP tend to be much more knowledgeable and dedicated to professionalism than those who do not have or who are not working toward completing those designations.

**Planned giving consultant.** If the client is charitably inclined, it is not unusual for a planned giving consultant or even a director of planned giving at a charity to be consulted during the estate planning process.

**Family business consultant/family wealth coach.** Sometimes, communication between the players during the estate planning process is not optimal, particularly where there are several generations involved or where the principal asset in the estate consists of an interest in one or more family businesses. It is not unusual for forward thinking clients (or their advisors) to bring in professionals who excel in the qualitative or "soft" "people" side of estate planning.

**Trust professional.** It is not unusual to see a trust professional be involved in the estate planning process, whether it is the private client group at a bank or trust company or even from a family office. These professionals also can be key members of the client's estate planning team.

**Valuation Professional.** Quite often it is all about the value of property. Whether it is the value of property for transfer tax purposes or valuations for non-tax reasons such as for funding trusts, it is not unusual for a valuation professional to be involved in the planning and/or administration of an estate or trust. It is important that all valuation professionals be qualified by designations, education and experience to value the property in question and that they be independent of all of the fiduciaries.

### **Summary**

The selection of an attorney who specializes in estate planning should focus primarily on identifying someone who has competence, compassion, the ability to communicate clearly with other professionals and with clients, and who is willing to work at a price that is in line with a client's means.