# CLIENT-DRIVEN ESTATE PLANNING
## A Different Approach to Estate Plan Design



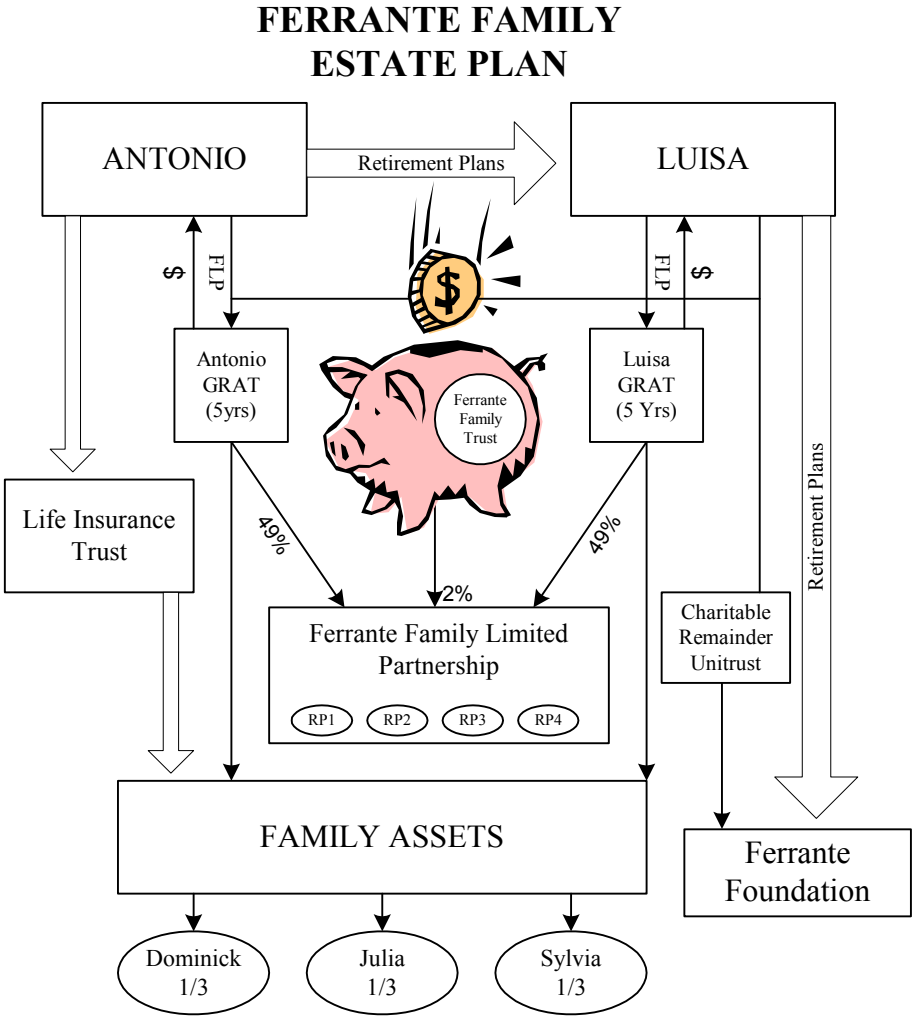
Recently a new client came to my office for a review of his estate plan. He was an Italian man in his late 60's who had done very well in the construction business despite having come from a poor family and having quit school after the ninth grade. His net worth at the time he saw me was over $10 million and growing.

The plan he handed me was about two inches thick and had been prepared by a prominent Los Angeles law firm. As he put it on my desk, he looked at me with obvious frustration and said, testily, "What does this goddamn thing say?"

That Mr. Ferrante (not his real name) was confused by his plan is understandable. There was a 50-page revocable trust, of course, with elaborate provisions designed to avoid or minimize income, estate and generation-skipping taxes. Then there were the usual pour-over wills, powers of attorney and advance health care directives. Also, there was a family partnership, portions of which had been transferred to grantor retained annuity trusts for Mr. Ferrante and his wife. In addition, there was a life insurance trust, a split-interest trust and a family foundation.

Somewhere in the middle of all this, hopefully, were a few sentences telling us what would happen to Mr. Ferrante's assets in the event of his death. However, finding this crucial information was so beyond Mr. Ferrante's 9$^{th}$ grade reading ability that he had to hire an attorney (me) to find it for him.

The late cartoonist Rube Goldberg was famous for designing absurdly complicated machines to perform simple everyday tasks. Regrettably, Mr. Ferrante's estate plan and indeed many of today's most sophisticated estate plans could be models for Mr. Goldberg's cartoons. The diagram I prepared of Mr. Ferrante's plan looked like this:




The problem with Mr. Ferrante's estate plan was not that the documents were legally defective or that the tax planning was inappropriate for a $10 million estate. Rather, the problem was that the lawyer who designed it was so busy dealing with tax and legal issues that he forgot about Mr. Ferrante and his need to understand what it said. The end result was an unhappy client because the plan, whatever its technical merits, failed to meet the client's subjective, but very real need to put his affairs in order.

Cases like that of Mr. Ferrante are common, and suggest that the process by which we design estate plans needs to be revisited. Our clients pay our bills, after all, and if they are not happy with our work then it is incumbent on us to find out why and address their concerns. If we don't, they will not continue to be our clients for very long. Hopefully the discussion below will suggest some of the things that we need to do.

## 1. Listening to Client Needs

Lawyers tend to think of an estate plan in terms of its objective goals, which typically include some or all of the following:

- Providing financial benefits for spouses, children or other loved ones;
- Contributing to favorite causes;

- Disinheriting unloved relatives;
- Avoiding or minimizing transfer taxes and administration expenses; and
- Appointing a trusted person to administer the estate upon the death or incapacity of the client.

These things are at best indirect benefits for the client, however, because they all take place only after the client dies. The immediate benefit, and the driving force behind the client's desire to do an estate plan, is subjective -- i.e., the peace of mind that comes with the knowledge that his (or her) wishes on these important matters will be honored. Mr. Ferrante was unhappy with his plan because it failed to give him closure or peace of mind − he couldn't understand it, and he was afraid that his executor might not understand it either when the time came.

The thesis presented here is that we need to understand what our clients' needs are, listen to those needs and make the satisfaction of those needs an explicit goal of the estate planning process. This may mean, among other things, that we need to rewrite our trusts to make them more concise and more understandable. It may mean that we advise the client to forego some advanced tax planning strategies for the good and sufficient reason that the client does not understand them. Lastly, it means that we should take extra care to explain the plan design and its complexities in terms that the client can understand.

The idea that the design of a product or service should take account of the subjective needs of the customer is not new. The auto industry has been known to sell cars for their sex appeal or as status symbols and not simply on the basis of economy, safety or the size of the back seat. For years, IBM sold computers which were technically inferior to competing products at premium prices because it had a more sophisticated understanding of what it was selling. One writer observed:

> "IBM understands. What does IBM really sell? Hardware? Software? Solutions? They sell all of those – and none of them. An old IBM advertisement says it all. "At IBM, we sell a good night's sleep."
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> "IBM sells certainty. In a chaotic world, with too many technological choices, no one ever got fired for buying IBM. . . . I bought certainty and a good night's sleep. I willingly paid a premium for it. . ."[1]

What may be new, or at least insufficiently discussed in legal literature, is the notion that these time-tested business concepts apply to attorneys, i.e., that we are in a service business, that our clients are our customers, and that we need to design and deliver our services in a way that satisfies them.

We owe our clients a duty to be competent in our drafting and tax planning, of course. But if we allow tax planning strategies and drafting techniques to complicate our plan documents to such an extent that the client is uncomfortable with them, then we have failed to meet one of our client's most important needs. We may have benefited the client's relatives by minimizing estate taxes, but that is secondary because it is not their

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[1] Belasco and Sayer, *Flight of the Buffalo* (Warner Books 1993), p. 106

money and they did not hire us. The client did, and we had best never forget that central fact.

## 2. Design Trade-Offs; Perfection vs. Readability

Once we acknowledge that producing client-friendly, readable documents is an important goal, we will notice that this goal may conflict with other planning goals. For example, we may want to include encyclopedic powers clauses in our trusts so that the trustee will not have problems dealing with third parties (e.g., brokerage houses). However, these provisions add pages of boilerplate to the trust document and often confuse the client.[2] A sensible compromise might be to provide that the trustee has all powers granted by the law of the state of administration, plus any specific additional powers deemed necessary for administration of a specific trust.[3]

Compromise, in any event, is inherent in the design of trusts or indeed of virtually any legal document. None of us has ever drafted a trust document that dealt with every conceivable problem – if we had, no one would have the time to read it, much less understand it. What actually happens is that we prepare a document that we believe deals with the most obvious problems, and hope that it expresses the client's intent well enough so that interpretation and applicable law will cover the matters we leave out. What is being proposed here is merely that we should make this design process and its inherent

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[2] The author's trusts have generally included very comprehensive investment powers out of concern that the trustee might not otherwise be permitted to operate a brokerage/cash management account. This boilerplate authorizes the trustee, among other things, to

> "Buy and sell on margin and effect short sales, to write covered and uncovered securities options on recognized options exchanges, to buy back covered and uncovered securities options listed on such exchanges, to buy and sell listed securities options, individually and in combination, employing recognized investment techniques such as but not limited to spreads, straddles, and strips; and to execute such agreements and other documents as the trustee deems advisable, including margin agreements with securities brokerage firms in connection with the establishment of accounts in which option and/or margin transactions will be effected."

Fortunately, most clients do not bother to read this. A significant percentage of those who do read it want the language omitted or modified because they construe it as blessing options trading by the trustee.

[3] For example, we could provide:

> "The trustee shall have all powers now or hereafter granted to trustees by the laws of the State of California or by the laws of any other state under which the trust is administered from time to time. In addition, the trustee shall be authorized to:
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> 1. Authorize persons other than the trustee to sign on trust accounts;
> 2. Delegate investment decisions to investment advisors whom the trustee reasonably believes are qualified;
> 3. Retain [designated assets] whether or not such [designated assets] would otherwise be permissible under applicable law, and without regard to diversification."
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> Nothing in this paragraph shall relieve the trustee from the fiduciary duties imposed on the trustee by this instrument and applicable law."

compromises explicit, and that, in general, we should tilt our design decisions in the direction of producing simpler, more readable documents.[4].

## 3. Toward Client-Driven Estate Plans

Once it is recognized that the client's comfort level is an important goal of plan design, there are a number of steps which can be taken to increase the level of client satisfaction with the plans we prepare. Some of these are outlined below.

### A. Find Out Who the Client Is

If our goal is to deliver peace of mind, we need to understand just who our client is and what his or her level of comfort is with complex legal arrangements. The most important variables are probably the client's interests and his or her level of education. Is the client an accountant with a graduate degree in finance, a real estate developer like Mr. Ferrante with a grammar school education, or a right-brained, intuitive type who doesn't understand numbers? In many cases plan designs should be different for these people even if their assets and family trees are similar.

### B. Use the Simplest Possible Plan

If the client is an artist who doesn't understand taxes or financial statements, it is probably better to forego very elaborate tax planning strategies even if otherwise warranted by the size of the estate – family limited partnerships with interests held by grantor retained annuity trusts would be a typical example. The tax savings resulting from such strategies are difficult to quantify anyway because they depend on future events and conditions which are unknown, e.g., rates of return, dates of death, sale dates for estate assets, and changes in capital gains and transfer tax rates.

Unless the benefits of a tax planning strategy are very clear, the planner can, and in appropriate cases should decide that a given strategy is simply not worth its cost in terms of the client's comfort level with the plan. As noted above, the point at which that decision is appropriate will vary depending on the client's interests, educational background and familiarity with complex legal arrangements.

### C. Simplify Documentation

Once the basic plan design is settled, every effort should be made to implement it with documents that are as short, simple and readable as possible. If boilerplate on the trustee's powers is really critical, then try relegating it to an appendix so that the important terms of the trust appear in the first few pages. If a tax formula clause is needed for a marital deduction trust, make it short and simple, e.g., "the trustee shall allocate to the marital trust the minimum amount necessary to eliminate Federal estate tax on the deceased spouse's estate or to reduce that tax as much as possible."[5]

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[4] It does not follow from this that our documents need to be shorter and simpler for *all* clients. Most of us have at least some clients who want to save every nickel of tax money possible, regardless of complexity, and give us clear directions to that effect. It is submitted, however, that *on average*, our clients would prefer that we be more concise than we are now.

[5] The marital deduction formula clause which the author used for many years read as follows:

It is the author's view that the word-count of most estate planning documents can be cut by at least 70% without sacrificing much, if anything, in terms of substance. If the effect of a given clause is marginal, e.g., a provision authorizing the trustee to buy flower bonds, do not leave it in on the theory that it won't do any harm. If it makes the

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> "Share Allocated to the Marital Trust. The Marital Trust shall consist of the minimum pecuniary amount necessary to entirely eliminate (or to reduce to the maximum extent possible) any federal estate tax at the deceased settlor's death, after taking into account all factors relevant to this estate tax objective, including but not limited to:
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> All deductions claimed and allowed in determining the estate tax payable by reason of the deceased settlor's death;
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> All credits allowed for federal estate tax purposes other than any credit allowable under Internal Revenue Code section 2011, unless and to the extent that death tax would be payable to the state or states regardless of the federal credit, as long as no credit that results in disallowance of the marital deduction is taken into account in determining the size of the Marital Trust.
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> The net value of all other property included in the deceased settlor's gross estate, whether or not it is given under this instrument and whether it passes at the time of the deceased settlor's death or has passed before the deceased settlor's death to or in trust for the surviving settlor, so that it is included in the deceased settlor's gross estate and qualifies for the federal estate tax marital deduction. If the surviving settlor disclaims any property that would otherwise qualify for the federal estate tax marital deduction, this disclaimer shall be disregarded.
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> Assets Allocable to Marital Trust. The trustee shall satisfy the amount allocable to the Marital Trust so determined in cash or in kind, or partly in each, and shall allocate to the Marital Trust only assets of the deceased settlor contributed or added to the trust that are eligible for the federal estate tax marital deduction. Assets allocated in kind shall be deemed to satisfy this amount on the basis of their net fair market values as finally determined for federal estate tax purposes.
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> Limitation on Marital Trust. Assets qualifying for the federal estate tax marital deduction shall be transferred to the Marital Trust only to the extent that the transfer reduces the federal estate tax otherwise payable by reason of the deceased settlor's death. No assets for which a credit for foreign death taxes is allowed under the federal estate tax law applicable to the deceased settlor's estate shall be allocated to the Marital Trust, unless that estate contains insufficient other property to fully fund the Marital Trust. The trustee shall select property to satisfy the pecuniary amount constituting the Marital Trust so that any appreciation or depreciation that has occurred in the value of this property between the applicable valuation date and the date of allocation shall be fairly apportioned between the Marital Trust and the Exemption Trust.
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> Marital Trust Assets to Be Productive. The surviving settlor shall have the power to compel the trustee to dispose of any assets in the Marital Trust that fail to provide a reasonable income to the surviving settlor as income beneficiary. This power shall be exercised by the surviving settlor in a written instrument delivered to the trustee.
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> Marital Trust to Qualify for Marital Deduction. It is the settlors' intention to have the Marital Trust qualify for the marital deduction under Internal Revenue Code Section 2056 and the regulations pertaining to that section or any corresponding or substitute provisions applicable to the trust estate. In no event shall the trustee take any action or have any power that will impair the marital deduction, and all provisions regarding the Marital Trust shall be interpreted to conform to this primary objective."

Most of the problems addressed by these provisions are now covered by state law, at least in California. See Cal. Prob. Code §§ 21520-526. This would suggest that all or most of this language should either be eliminated entirely or relegated to an appendix which we instruct the client not to read unless he/she has trouble sleeping.

document longer while accomplishing nothing then it will be harmful because it will make the document harder for the client to understand.

### D. Use Summaries

Another helpful strategy is to prepare a summary of the basic terms of each estate plan. This should cover such fundamental matters as who the trustee/executor is, who the agents are on powers of attorney/advance health care directives, what their powers are and who gets what when the client dies. A sample of such a document is appended to this article as Appendix A.

One important use of summaries is to document the client's instructions to the estate planner. This is important for internal control purposes because it can be used to verify the content of estate planning documents before they are finalized and sent to the client. A summary may also be useful for purposes of defending any litigation which may arise from the documents since it is a written record of the client's intentions.[6] For this reason, some practitioners ask the client to sign a plan summary before signing the documents themselves.

Summaries are particularly useful in cases where advanced tax planning is indicated and where the financial consequences of not doing it may be significant. In these cases, a good summary can let us have the best of both worlds – a plan that the client understands at least at the summary level and the best and latest tax documentation.

### E. Educate Clients about the Estate Settlement Process

One source of high anxiety about estate plans is clients' unfamiliarity with the process of estate settlement. Most clients, for example, have heard that probate is arduous processes but know next to nothing about it, at least if they haven't been through it with the estate of a friend or relative. They also seem to know very little about how trusts are terminated, and have often received a lot of wrong information about how this occurs.[7]

The obvious response to this is to provide some basic orientation for clients at the time their plans are signed about what will be involved in settling their estates. If the plan involves a revocable trust, this should cover such things as reviewing titles to assets, preparing a date-of-death inventory, filing tax returns and preparing distribution agreements. The briefing should also include some basic information about how long settlement of the estate would take and how much it would cost based on the attorney's current settlement procedures.

Such briefings increase clients' comfort level with their plans because they understand at least in a basic way what their documents are about and how they will be used when the time comes. Also, and not incidentally, these briefings are a very good opportunity to market the planner's estate settlement services.

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[6] See discussion of professional liability issues, *infra*.

[7] Many of the so-called "trust mills" have generated articles telling their prospective customers that settlement is automatic ("you have nothing to do from a legal standpoint"), and/or that trusts settle in a matter of hours or perhaps a week. See, e.g., heritagelivingtrust.com. Many clients sense that this is inaccurate but are afraid to ask how the process really works. Enlightenment is therapeutic.

## 4. Professional Liability Issues

At least one speaker at every MCLE event for estate planners warns us that we may be liable for failure to use the latest tax-minimizing techniques in our estate plan designs. With all due respect, this is very doubtful.

In *Lucas v. Hamm* (1961) 56 Cal. 2d 583; 364 P.2d 685; 15 Cal. Rptr. 821; cert. denied 368 U.S. 987, 7 L. Ed. 2d 525, 82 S. Ct. 603 (1962), the California Supreme Court held that an attorney has a duty to the intended beneficiaries of an estate plan to exercise reasonable care in the drafting of estate planning documents.[8] See also *Biakanja v. Irving* (1958) 49 Cal.2d 647, 320 P.2d 16; *Heyer v. Flaig* (1969) 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225. However, to prevail in such cases the plaintiff must establish not only that there was a duty of care but also that the duty was breached and that the plaintiff was damaged as a result.[9] This ordinarily requires evidence (1) that the results of the plan were other than what the client intended, and (2) that the attorney failed to follow some standard practice that a qualified attorney would have followed in that situation or, at a minimum, failed to make an informed decision about what to do based on adequate research.[10]

In *Heyer v. Flaig*, *supra*, the defendant attorney failed to mention his client's spouse in her will, with the result that the spouse received an intestate share of her estate under the post-testamentary spouse provisions of the Probate Code. Since the client's alleged intent was to give her entire estate to her daughters, the court held that the complaint was sufficient to state a cause of action.

This should be contrasted with the result in *Lucas v. Hamm*, *supra*, where the court held that, although the plaintiffs had standing to sue, preparation of an instrument which allegedly violated the rule against perpetuities did not constitute actionable negligence as a matter of law:

> "The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers. [Citations omitted] These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract
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> "In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold

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[8] Overruling *Buckley v. Gray* (1895) 110 Cal. 339.

[9] See, e.g., *Ishmael v. Millington* (1966) 241 Cal. App. 2d 520, 523; 50 Cal. Rptr. 592, 593: "Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, proximate cause [and] damage." [Citations omitted]

[10] See note 12, infra.

> that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise." [11]

These precedents may well mean that failure to use a bypass trust for a large estate is potentially actionable, because the technique is fairly simple, use of it among professional planners is sufficiently widespread to be regarded as standard practice, and the losses arising from failure to use it are more or less quantifiable.[12]

On the other hand, whether failure to use more advanced techniques, e.g., irrevocable trusts or family partnerships, could ever be the basis of a solid malpractice claim is problematic at best. The plaintiff would have to show that the practitioner failed to exercise "reasonable care," i.e., failed to follow a procedure which a qualified practitioner would have followed at the time, and also that some reasonably definite and quantifiable damages arose from that failure. Both of these showings would be difficult as applied to advanced techniques, because their use is not standardized and also because damages from failing to use them are typically difficult to quantify.[13] As noted in *Lucas v. Hamm*, *supra*, the attorney ". . . is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers."[14]

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[11] [56 Cal.2d 583, 591-2; 364 P.2d 685, 689-90, 15 Cal.Rptr 821, 825-26].

[12] See *Buquet v. Livingston* (1976) 57 Cal. App. 3d 914; 129 Cal. Rptr. 514. At least this was true prior to the Economic Growth and Tax Relief Reconciliation Act of 2001[P.L. 107-16], which provided for repeal of the estate tax. In the current environment, damages would be difficult to forecast because a bypass trust would produce no benefit if the estate tax did not apply to the estate of the surviving spouse. In fact, use of a bypass trust could be detrimental due to the loss of income tax basis adjustments which would have been allowed for assets owned outright by the surviving spouse.

[13] For example, a grantor retained income trust is beneficial only if (1) the grantor outlives the term of the trust, (2) the rate of growth in the value of trust assets is greater than the discount rate which was used to compute the taxable gift at the time of funding, (3) the transfer tax savings resulting from use of the trust are worth more than the loss of income tax basis adjustments which would be allowed if the trust assets were owned outright by the grantor at the time of death, and (4) the costs of setting up and administering the trust are less than the net tax savings. As previously noted, tax savings from the use of such devices are speculative in the current environment because of the possibility that the estate tax may be repealed.

[14] 56 Cal.2d 583, 591 364 P.2d 685, 689, 15 Cal.Rptr 821, 825. See, e.g., *Banerian v. O'Mally* (1974) 42 Cal. App. 3d 604; 116 Cal. Rptr. 919: "In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step [citations omitted]." 42 Cal. App. 3d 604, 613; 116 Cal. Rptr. 919, 925.

See however *Aloy v. Mash* (1985) 38 Cal. 3d 413; 696 P.2d 656; 212 Cal. Rptr. 162, *Horne v. Peckham* (1979) 97 Cal. App. 3d 404; 158 Cal. Rptr. 714, and *Smith v. Lewis* (1975) 13 Cal. 3d 349; 530 P.2d 589; 118 Cal. Rptr. 621, which require the attorney to make reasonable research efforts and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem even where the law is unclear.

See also *Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946; 41 Cal. Rptr. 2d 573, which declines to hold an estate planning attorney liable under the principles of *Lucas v. Hamm, supra* where the decedent fails to execute the documents, and *Moore v. Anderson* (2003) 109 Cal. App. 4th 1287; 135 Cal. Rptr. 2d 888, holding that an estate planning attorney does not have a duty to determine the client's testamentary capacity. And see Fogel, Attorney v. Client--Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning (2001), 68 Tenn. L. Rev. 261, in which the author argues that, because of the attorney's primary duty of loyalty to the client, beneficiary claims against estate planning attorneys should be allowed only where established by clear and convincing evidence.

Moreover, the client may authorize the attorney to forego advanced tax planning techniques even if there are clear adverse financial consequences to the heirs. This is no different conceptually than the client directing the lawyer to prepare documents leaving part or all of the estate to charity or the government, i.e., non-actionable even though the financial consequences to the heirs are severe. The lawyer's only duty in such cases is to be sure (1) that the client is adequately counseled on planning options, (2) that the advice is clearly documented, and (3) that the final plan documents follow the client's intentions. A sample client letter documenting such advice with respect to family partnerships is attached to this article as Appendix B.

## 5. Conclusion

Clients buy estate plans because they want the peace of mind which comes with knowing that their affairs have been put in order. Helping them achieve that sense of closure is critical to good client service and should be a central and explicit goal of the estate planning process.

Good tax planning for the benefit of family members and other heirs is also important, but should be subordinate to the primary goal of satisfying the client's needs. This means that simpler estate plans and shorter documents are better than complicated plans and longer documents, all else being equal. It also means that, where complex planning is otherwise indicated, the planner must assess the client's level of sophistication and comfort with complex arrangements and reject planning arrangements which the client cannot understand. The needs of the client, in other words, must drive the design of the plan.

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