



Choosing Your Estate Attorney

By Stuart Lucas and Josh Kanter

This article provides a roadmap for choosing an estate planning attorney, asking the right questions and making the right choices. A well designed process will also give you better insights into your own aspirations across the business, financial and cultural dimensions of your family enterprise.

Last year three researchers at the investment firm AQR asked a simple question: “How much is good tax and estate planning worth?” After a thorough analysis¹, they concluded that over a 40 year period, good planning increased the original assets about six turns more than poor planning. With a starting value of 100 and the same exact percentage investment return, poor planning led to a value of 357; with good planning the value grew to 967. We calculate that incremental return to be about 2.6 percentage points every single year for four decades. And that doesn’t count the “soft” benefits of good planning: incorporating your family legacy, purpose, values, and priorities into your wealth planning, helping to educate beneficiaries as stewards of wealth, and creating structures under which future generations can stand tall and thrive, rather than feel guilty or burdened.

Inspired by their research, we asked: how should a prospective user of estate planning services interview estate planning advisors? How can a prospective client gain confidence they are making the right hire, for the near term and for years into the future?

We’ve both experienced firsthand the benefits and pitfalls of long term estate planning. Josh, who is a lawyer himself, defended his father’s estate planning advice all the way to the US Supreme Court... and won. Stuart is a great grandson of the founder of Carnation Company and has both been the beneficiary of good long term planning and a buyer of good planning advice in his own generation. Plus, we each work with many large and complex family

enterprises on long term strategic planning across business, financial and cultural dimensions, including working with clients and their lawyers to build and execute estate plans.

Well chosen advisors should have dozens, even hundreds of plans applicable to your situation

When interviewing potential candidates, what you will ask will depend on how much your family already knows about what they are looking for, how much creativity and guidance you want from your lawyers, who your other advisors are, and what plans are already in place. For example, we help families to craft strategic plans for their enterprises that cut across governance, business, philanthropy, education, investment policy, and financial modeling to help them define and prioritize their estate planning goals. By the time they begin work with attorneys to create estate planning documents, the scope of the work is more precisely and technically defined. In our experience, most attorneys offering good technical expertise aren’t in the business of exploring these broader, strategic issues (there are excellent exceptions). Your choice will depend on your specific needs and circumstances.

Whether a lawyer is part of a large, full-service law firm or a small specialist boutique, we believe that the keys to a successful relationship are the experience of the individual attorneys who are advising you and the chemistry that you can build with them. Collectively

¹ “Integration of Income and Estate Tax Planning” by Nathan Sosner, Joseph Liberman, and Steven Liu; *The*

you will be making decisions and building legal structures that may impact you and your heirs for decades, or even generations. Fulfilling your wishes, while also guiding you to design alternative pathways for your family over 30, 50, 100 years, are key elements to a successful attorney/client relationship in this space. If you're like most people, you've probably had close contact with, at most, one or two fully developed estate plans. In contrast, your well-chosen advisors should have had exposure to dozens, or even hundreds of plans applicable to your situation, plus the wisdom that comes from those experiences.

We encourage anyone who is embarking on building an estate plan and hiring an estate attorney to do their homework and to hire a firm with deep experience in this complex space. You may have existing long term relationships with business or generalist legal advisers but the trust that you have built in those relationships is not a substitute for specific estate planning expertise and the application of that expertise to your situation and the people you love, particularly as you move up the scale of wealth and into a multi-generational timeframe. Trust and tax law is defined both nationally and state-by-state. As such, you are likely to choose a different jurisdiction than the one you are domiciled in – and there are 49 of those, each with special characteristics that may attract or repel you from each particular jurisdiction. You want an attorney who understands these differences and who can help you evaluate the implications for you and your family, currently, and for eventual beneficiaries years, or generations, in the future. You, your children, and their children will appreciate it.

Here is a list of key interview questions and brief explanations of what we would listen for in response.

With that backdrop, while you will, of course, want to address traditional details like fee structures and estimates, as well as the existence of any direct or indirect conflicts of interest, here is a list of key interview questions and brief explanations of what we would listen for in response. We believe the greatest value comes from asking the questions and listening to the answers in real time, ideally face-to-face or on a video call. Except where otherwise

stated, we suggest that these questions be asked of and answered with respect to the specific lawyer or lawyers who will form your team, and not on a firm- or practice-wide basis.

1. Composition, jurisdictional reach and competitive position

- How much of the practice of the lawyer you're interviewing is dedicated to trust and estate work?
- In which jurisdictions, in addition to the one where the lawyer is resident, do they work most extensively?
- What differentiates this firm from its competitors in the trust and estates practice?

Ideally, we want the answer to the first question to be 100%. If you're reading this article, you probably want, need, and deserve someone whose entire practice is devoted to trust and estate work.

The second question is important because while most trust and estate lawyers working with wealthy families should be accustomed to working in their home jurisdiction and nationally, they also likely have their own preferred non-home-state jurisdictions for specific reasons. As such, we tend not to be overly concerned about their state of residence if they meet the rest of the requirements/screens. Their answer to this question should give you a sense not just of the jurisdictions they may favor, but the reasons they favor these jurisdictions, and the family situations that may be typical of their practice - are family members concentrated in a single state, or more widely dispersed across the country or the world?

The third question provides an opportunity to explore the pluses and minuses of large and small trust and estate practices within a full-service law firm, specialist trust and estate boutiques and sole practitioners. Three areas of particular interest are 1) the benefits of scale versus focus, 2) how to coordinate estate

planning with legal issues related to, for example, your business operations, 3) whether the law firm's risk tolerance when giving advice is consistent with your own when implementing it and 4) how the firm manages the continuity of client relationships that can last for decades when periodic turnover of their own personnel is inevitable. For example, Stuart's family has worked seamlessly with the same law firm for over 40 years through four lead relationships.

2. Client profile in the estate planning practice

- What is the median and average range of wealth, and typical number and generations of family members of your estate planning clientele?
- Are the lawyer's clientele characterized by a specific attribute: concentrated positions, active business ownership, financial assets, crypto currency, or other narrow profile?

Finding a partner you like and have confidence in is not enough; you want to know how you fit into their practice – in other words, how many of their clients “look like you”? If their practice is mostly \$5-25mm first generation business-owning families, and you had a \$100mm liquidity event a generation ago, that may not be a good fit. Similarly, working with families in the ten-digit stratosphere requires a different mindset than working with a \$100 million family. In very wealthy families, tax, estate and investment planning can often drive one to divide up assets into lots of small bits to optimize tax efficiency and risk management. But governance, capital allocation and overall enterprise strategy requires a comprehensive view. Balancing theoretical objectives and practical solutions and navigating the complexity/simplicity continuum is itself a special domain. If you have a large estate, ask how the lawyer attacks the balance of these different efficiency and complexity concepts.

3. Incorporating purpose and strategy

- What are the essential near-term and longer-term priorities in an engagement of our size?
- How does this lawyer discern/distill/define the client's priorities?
- How do they incorporate the client's priorities into their process, matching technical solutions with family values and dynamics?
- Do they have an overarching philosophy regarding dynasty and other generation-skipping trusts' design, and jurisdiction selection for these entities?

These questions are designed to understand whether the lawyer is focused merely on tax minimization or whether they have a process to understand and incorporate family purpose, values, governance, family enterprise design, and other priorities. If they don't, you may want to pair their technical excellence with one or more other advisors who will challenge you to think about these strategic, philosophical, and generational wealth issues.

When we are getting to know a family, we discuss these core issues. This often leads to conversations about multi-generational educational funding, or some form of a family bank to support valued interests, activities, philanthropy or entrepreneurship. But then, when we review the same family's legal documents, we often find that these important considerations are not addressed. Listen for how attorneys emphasize tax minimization, avoidance of probate, asset protection, and the usual “hard” answers, versus their use of terms like governance, stewardship, accountability, legacy, and other related “soft” answers.

Other important factors to listen for include the degrees of freedom which should be granted to trustees, versus specific and constraining conditions imposed by the grantor. In the case of irrevocable trusts, how well will the choice of trustees and the way their voting power in an

operating business is allocated across a range of trusts represent the wishes of current and future beneficiaries, especially after the grantor is no longer with us? How are distribution policies designed and communicated from the grantor to trustees and to beneficiaries? How are the interests of current beneficiaries balanced with future beneficiaries? How much discretion will you grant trustees to address these questions in real time rather than imposing fixed rules in the documents? These may sound like minor points, but we have seen how overly loose or overly restrictive policies contribute to undermining family businesses and the lives of individual family members, particularly if family communication is not baked into the design and implementation process. As these discussions evolve and are expressed in formal, written documents, it's critical to think not just about how various provisions could impact family members over the next 5-10 years, but to think about the next 25-50, or even the next 100 years. In the last analysis, no matter how well documents are written, a poisonous family culture will cause irreparable harm.

Another topic to listen for is how an experienced attorney weighs the benefits of doing something now versus doing something later. How would this attorney help us weigh taking a specific action today versus some years into the future when we will know more about the scale of our wealth, the motives of our children, or the state of the tax code – which could become more or less advantageous? Sometimes the reason to act now is obvious, often it's not.

In our view, one of the least helpful answers an attorney can give is simply to offer to do whatever the prospective grantor(s) wants. A well intentioned attorney should have the capacity to take a family through the philosophic complexity of this question, directly or in concert with the family's other advisors, and to help identify potential flash points of future tension.

4. Operations and accountability

- How do they measure the tradeoffs between complexity and efficient execution over the life of the structures they recommend, individually and collectively?
- How can they help their clients to integrate estate planning advice with corporate and personal tax elements of their enterprise?
- How do they help clients maintain strong controls to assure compliance with the structures and transactions designed in the documents?
- How will the lawyer help clients to choose initial and successor trustees and other governors and governance structures?
- How would they design multi-generational family control over leadership selection and governance representation? How is accountability approached in documents and operating processes?

Every estate plan, once designed, needs to be implemented effectively and periodically reviewed to have any value. Too many families and lawyers view this as an administrative matter and do not give it due consideration.

Client direction and business circumstances often cause estate attorneys to focus on the formation and design of individual planning elements one at a time, often driven by immediacies like potential tax law changes or specific liquidity events. As wealth grows, entities tend to proliferate, tax returns multiply, and operational complexity compounds. Each time assets are passed from one person or entity to another, qualifying valuations and clear records are essential tax records. Figuring out how to manage a growing administrative burden while remaining strategic is essential.

This is especially true when families are large and complex. Estate plan design must balance asset and entity fragmentation – which may have specific tax and technical advantages - with operational and governance complexity of the overall family enterprise. It is essential to orchestrate and project forward how the pieces will fit together.

Administering large and long-lived estates can become enormously costly and complex,

particularly as they age. At some point, the complexity becomes counterproductive and the original intent backfires. We don't espouse specific right or wrong answers here, but as you listen to each lawyer's response to these questions, ask yourself how sensitive they are to the long term administrative and strategic implications of complexity. How intentional will they be to help you avoid a costly planning mess that runs the risk of overburdening your heirs rather than empowering them.

Choosing knowledgeable trustees and holding them accountable is essential, whether they are individuals or institutions. Having a workable mechanism to remove and replace them is essential. Equally important is how will you educate and train your beneficiaries to know what to expect from their trustees, how to be good beneficiaries, and how to be good stewards of the wealth they will inherit or steward for future generations.

5. Risk management

- How does this lawyer advise clients to manage the intersection of estate planning risk with the business risk and asset value volatility of the underlying assets in their planning designs?
- What are the best ways to protect against challenges to clients' estate plans from government, family members or others?
- How does the lawyer factor in prospective changes to the law into their advice?

The effectiveness of estate plans is heavily impacted by the characteristics of the assets being incorporated into the plan. How are the assets valued? How volatile are they, and is that volatility across assets correlated? How liquid are they? Do they have stable income streams? Estate planning techniques are also affected by externalities like interest rates, the current tax code and prospective changes to it. Estate planning often introduces an element of rigidity into family enterprises, so you need to project current planning priorities into an uncertain future. Can and will your lawyer help you 'stress test' the plans to look for

unintended results and consequences, including those that might impact family harmony?

Estate planning or implementation decisions driven by emotional or business reasons which contradict trust terms and/or best practices often result in ugly intra-family lawsuits. Is the lawyer sensitive to these possibilities and will they point out when the quality of decisions, the communication about them to interested parties, and/or when checks and balances are dangerously inadequate? Part of a good tax and estate attorney's job is to point out where to take measured risk, where not to, and how to avoid our own worst instincts.

6. Experience and wisdom

- Give examples of some of the most successful generational transitions that have occurred under the planning the lawyer helped put in place, and some of the worst. What led to success or failure?

Technical tax savings is one thing (though not assured to work), but the success of the other purposes of the structure is an entirely different matter, one that involves your loved ones' lives, and their productivity, prosperity, and happiness. These are impactful decisions, the consequences of which can lead to disruptive family litigation or to family harmony for generations. You want someone beside you that fully appreciates – and has experienced – the magnitude, seriousness, and potential implications of these decisions. We strongly believe that such wisdom leads to more and better insight into trustee/beneficiary relationships and what it means to educate grantors, trustees, and beneficiaries successfully.

Conclusion

If you've made it through a process of the type and depth we've tried to describe here, you'll have a pretty good sense of the people you have interviewed and whether you can work well together. In addition, the interview process will give you a deeper understanding of the issues and options before you.

The right decision for you will be predicated on much more than the essential technical skill of your finalist. You will understand how well that choice fits your needs, ambitions, values and approach to risk. Your choice should also have the interpersonal skills to be a good listener and to work well with other family members, senior staff if you have a family office, and advisors. In essence, do you feel compatibility and comfort with your selection? Hopefully the answers

to these questions will help you compare and contrast your finalists in a useful way. To this day, both our lives have been meaningfully impacted by technical and qualitative estate planning advice that was put into practice one to three generations earlier. We know first-hand that this is a critical decision with substantial financial and interpersonal implications for you and your family for a long, long time.

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