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What Strategies Are Experienced Estate Planners Recommending? Evidence From Survey Data

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Responses from 124 experienced estate planning attorneys in 33 states reveal the frequency with which their 1991 clients undertook over forty estate planning techniques commonly promoted in practitioner literature. Nearly 83 percent of their clients had a net worth of at least $600,000, implying the need for careful consideration of these strategies. Among the most popular techniques implemented include the durable power of attorney for property, durable power of attorney for health care, living will, credit shelter bypass plan, standard QTIP trust, revocable living trust, and nonsimple will. Among the least popular techniques include flower bonds, private annuity, grantor retained unitrust, large custodial gift, and grantor retained annuity trust.

I. Overview

Many financial services academics are likely to view estate planning as the most esoteric subject in the financial services curriculum. Its practice is dominated by experienced attorneys with whom they share little in common. Its subject matter is quite technical, and almost entirely legally related. Few financial services academics have had formal education in estate planning; not many have taken an actual estate planning course, either in law school, in a Ph.D. program, or in preparing for the CFP. Finally, financial academics have little convenient access to estate planning literature. While there is much written in the legal and trade journals, little of it appears in the traditional finance publications.

Although not very well understood, estate planning constitutes a major, integral subject within the area of individual financial management; financial services academics cannot ignore it. Estate planning deals with too many financial

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planning-related problems encountered by individuals, particularly those actively planning in anticipation of their eventual death.

This paper seeks to help finance academics become more acquainted with the principles of estate planning. By summarizing data obtained from the first survey of its kind, it will shed light on the frequency with which experienced estate planners recommend or use many of the estate planning techniques commonly promoted in practitioner literature. And by describing each of these techniques a bit, it should provide the finance academic with a general overview of estate planning principles, as well as an update of recent developments in the estate planning field.

Information about the Attorneys and Their Clients

Any major attempt at tracking estate planning practices must focus on attorneys. While financial planners, accountants, life underwriters and other financial services professionals may offer clients general estate planning recommendations, only attorneys are permitted to render legal advice and, more importantly, only they can draft the documents that implement most estate planning techniques.

Attorney skills in estate planning vary widely, from the modest ability of the general practitioner who drafts a few simple wills a year, to the careful work of the expert, skilled in tax law, who limits his or her practice solely to estate planning matters and counsels many wealthy clients each year. This study focuses on attorneys more likely to fall in the latter, expert category. All are authors of estate planning articles in trade journals. In fact, that's where their names were obtained: from the previous ten year's issues of the industry's two leading national trade publications: *Estate Planning* and *Trusts and Estates.* Many of these attorneys have also written other professional articles and have spoken at leading estate planning institutes such as NYU, USC, Miami, UCLA, Practicing Law Institute, Southern California Tax and Estate Planning Forum, and Notre Dame.

Four-hundred-two attorney-authors were mailed a 59 question survey during a month long period in December, 1991 and January, 1992. One hundred thirty nine responded (35 percent), and 124 responses were found usable. All questions requested information about their practices during the preceding year, which for most, represented all of 1991. The respondents come from a total of at least 33 states and the District of Columbia: California: 24 attorneys; New York: 18; Illinois: 11; Missouri: 7; Texas: 6; Massachusetts and Pennsylvania: 5; Colorado, Georgia and Michigan: 4; Maryland: 3; two attorneys from: District of Columbia, North Carolina, Nevada, Ohio, Oregon, Rhode Island, and Virginia; and one each from: Arkansas, Connecticut, Delaware, Florida, Hawaii, Iowa, Mississippi, Montana, New Jersey, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and West Virginia. Four attorneys did not reveal the state in which they conduct their main practice. Table 1 summarizes other, miscellaneous data about these attorneys. The actual survey is reproduced in the appendix.

TABLE 1
Miscellaneous Attorney and Client Data

	Range	*Interquartile Range*	*Mean*	*Std. Dev.*
Attorney data:				
Years experience as EP attorney	4–40	13–25	19.0	8
Age	29–68	40–52	46.6	10
% of entire practice is planning and drafting	1–100%	37–72%	54.0%	23%
% of entire practice is planning, drafting, and administration	10–100%	50–100%	73.9%	27%
% of planning, drafting, and administration practice is planning and drafting	5–100%	60–90%	73.5%	19%
No. partners and associates in firm, including themselves	1–600	5–130	90.7	130
Client data:				
Total number of clients in last 12 months	3–300	40–108	90.0	70
Number of clients with net worth greater than $600,000	3–275	28–100	73.2	58
% of clients with net worth less than $600,000	0–85%	5–25%	17.2%	19%
% of clients with net worth between $600,000 and $1,200,000	0–80%	14–40%	26.3%	18%
% of clients with net worth greater than $1,200,000	0–100%	30—80%	56.5%	28%
Total of clients			100.0%	

Years in Practice

Measured by number of years in practice, this is truly a group of experienced estate planners. The average attorney has spent nineteen years in the field. The range extends from four years to 40 years, and the interquartile (IQ) range is 13 to 25 years. Ages of the respondents range from 29 to 68 (IQ range: 40–52), with a mean of 46.6. Ten percent are female.

Degree of Specialization

Measured by degree of specialization, these planners also show great experience. Before discussing the data, it may help to describe what skilled estate planning entails. Speaking narrowly, the practice of estate planning involves planning and drafting wills, trusts, powers of attorney and other legal documents. However, in part to meet the additional needs of their clients, experienced estate planners must do more than just planning and drafting. First, as a direct consequence of and adjunct

to their planning, they will agree to administer trusts and estates before and after the client's death. Unlike estate planning, this administrative work largely involves more routine paperwork and simple financial management in the handling of a client's legal affairs. Second, estate planning attorneys also practice in the area of business law, since many of their clients have acquired the bulk of their wealth through business pursuits. Finally, because most estate planning strategies are at least partly tax driven, they practice tax law, preparing tax returns, giving tax advice and representing clients before the I.R.S. and in court.

Thus, while estate planning attorneys can be expected to specialize in planning and drafting, they are also likely to engage in other related work. The group in this sample is no exception. Sixty-six percent devote at least half of their entire practice time to the specific work of planning and drafting. The average respondent devotes 54.0 percent of total work time to these two challenging tasks. Ninety-six percent also practice probate and trust administration. Combined, the typical respondent works 73.9 percent of the time in estate planning, drafting, and administration, and devotes nearly three quarters (73.5%) of this combined time in planning and drafting, while about one quarter (26.5%) in administration. The remaining 26.1 percent of the typical attorney's time is spent in other, mostly related areas. For example, seventy six percent devote some of their practice to at least one of the following areas: business law (28% of attorneys), taxation (21%), general practice (7%), and family law (4%).

The Clients They Advised

This survey asked several questions about number of clients advised and estimated client net worth. Table 1 also summarizes client data.

Number of Clients Advised. Most respondents gave estate planning advice to a sizable number of clients during 1991. The group's average number of estate planning clients was 90.0, and three fourths of these attorneys advised at least 40 clients. Unfortunately, the survey neglected to ask respondents to treat couples as one client, thus making the figures somewhat ambiguous. While some attorneys probably treated couples as two clients, others likely assumed them to be one. The upshot is somewhat of a bias in the estimate of number of clients advised.

Client Net Worth. As one would expect, most of this group's clients are quite affluent. For any one attorney, the number of clients whose net worth exceeds $600,000, putting them in a position to have a potential federal transfer tax liability, ranged from three to 275 (I.Q. Range: 28–100), with the average attorney having counseled 73 such clients. In terms of *percentages*, a mean of 17.2 percent of all clients were reported to have a "smaller" estate size (net worth of less than $600,000), 26.3 percent had a "medium" size estate ($600,000 to $1,200,000), and 56.5 percent had a "larger" estate (greater than $1,200,000). Thus, nearly 83 percent of all clients advised by the average surveyed attorney had a net worth of more than

$600,000, large enough to need careful death tax planning help. Three quarters of all attorneys surveyed had at least 30 percent of their clients having a net worth of more than $1.2 million, an amount large enough to consider lifetime transfer strategies to further reduce the death tax. Summarizing, this group of attorneys has a clientele generally well off enough to require consideration of all of the estate planning techniques popularly discussed in the literature.

II. Basic Document Preparation

Overview

Individuals commonly employ four distinct general methods of transferring property to their survivors: joint tenancies, simple will, non-simple will, and revocable living trust. Each will be described briefly.

Joint Tenancies

Title by joint tenancy with right of survivorship is a relatively automatic and inexpensive method of property disposition. However, it has the disadvantages of lack of flexibility, uncontrolled disposition, likely estate administration at the death of the surviving cotenant, premature loss of asset control, and possible greater income, gift and estate taxes. For these and other reasons, most estate planning attorneys are well known not to recommend joint tenancies except for a few of their least wealthy clients.

Simple Will

A simple will is a written will prepared for a family having a relatively small estate where death tax planning is not a significant concern. It usually leaves all property outright to the surviving spouse, if alive, otherwise outright to the children. It provides for no trusts, and contains no provisions designed to save taxes. It is more flexible and usually less tax costly than joint tenancies, and is frequently prepared for less wealthy clients, particularly by more inexperienced attorneys, who may (ill-advisedly) use it for other, wealthier clients, as well.

Nonsimple Will

A non-simple will is a longer, more carefully constructed will prepared by more skilled attorneys and designed especially for wealthier clients facing a potential death tax liability. It includes many provisions designed to both minimize taxes and arrange for more involved, non-outright distributions of property. In most situations, it provides for the creation of one or more trusts at the client's death.

Revocable Living Trust

Finally, a revocable living trust is often established during the client's lifetime, primarily to minimize the cost of estate administration during incapacity and at death. Its dispositive provisions are usually similar to those of the nonsimple will, and, after the client's death, it can be just as effective as the nonsimple will.

Current Use of These Four Transfer Devices

The attorneys in this survey were asked to describe what percentage of their clients used each of these four planning arrangements as the *principal method of asset disposition*. Their responses are summarized in Table 2.

Joint Tenancies. For joint tenancies, no attorney indicated that greater than 50 percent of his or her clients used joint tenancies as the principal method of asset disposition. Slightly less than one half (47 percent) had no clients using them, and only 25 percent (highest quartile) reported that greater than five percent of clients used them. The typical attorney reported 4.5 percent of clients using joint tenancies. This evidence supports the general belief that most experienced estate planning attorneys hardly ever recommend joint tenancies as the principal method of asset disposition.

Simple Will. Given the experience level of these attorneys and the sizable wealth of most of their clients, it is no surprise that most don't recommend the simple will much, either. Although 88 percent did draft the simple will for at least one client, the average attorney used it for only 13.8 percent of his or her clients. Combining the figures for both joint tenancy and simple will, 18.3 percent of the average respondent's clients used joint tenancies or simple wills. This closely relates to the finding mentioned above that 17.2 percent of the average attorney's clients have an

TABLE 2.
Response to Question: *"What percentage of (all of your clients) used each of the following planning documents as the principal method of asset disposition?"*

Planning Document	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
Joint Tenancies	0–50%	0–5%	4.5%	47%	11%
Simple will	0–80%	5–15%	13.8%	12%	16%
Non-simple will	0–100%	10–60%	36.6%	9%	30%
Revocable living trust	0–100%	15–75%	45.1%	8%	32%
Total of clients			100.0%		

estate size small enough not to need tax planning. Joint tenancies and the simple will are used more frequently for these clients.

Nonsimple Will and Living Trust. The data confirms that these two complex instruments represent the experienced estate planning attorney's primary asset disposition vehicles. The typical attorney in this survey used both documents combined for 81.7 percent of clients, with nonsimple wills prepared for an average of 36.6 percent of clients and living trusts an average of 45.1 percent. Interestingly, while attorneys are generally perceived to be strongly preferential to one of these documents over the other, nine percent or less of the respondents to the survey indicated they used only one of the two of these *exclusively* for all wealthier clients. Only nine percent did not draft any nonsimple wills and only eight percent did not draft any living trusts. Thus, while most attorneys probably prefer to recommend one of these documents over the other, most will draft the less preferred one at least occasionally. Apparently, most of these attorneys either unbiasedly select the instrument that more closely meets the client's needs, or are in fact biased towards one or the other instrument, but nonetheless at least occasionally yield to the wishes of their more opinionated clients.

III. Death Tax Planning with Marital Deduction and Bypass Provisions

Several questions were asked to reveal the popularity of alternative deathtime transfer techniques commonly used to reduce death taxes. The discussion that follows will assume planning for a married couple. In determining the preferences of attorneys and clients in this general area, the survey focused on two major aspects: bypass planning, which addresses the *amount* of property left to parties other than the surviving spouse (called the nonmarital share), and marital deduction distribution planning, which deals with the *manner* in which the marital share is left to the surviving spouse. In the discussion below, each is first described in general, and then analyzed in terms of the survey results.

Bypass Planning

Bypass planning seeks to reduce death taxes by arranging for the first spouse to die to leave an amount of property to a nonspouse so as to reduce taxation at the surviving spouse's later death. This property is said to 'bypass' the surviving spouse's estate.

Overview of Bypass Planning

In general, bypass estate planning offers three alternative deathtime transfer choices for married couples. They differ in the amount left to the nonmarital, bypass share: 1) no bypass (all to surviving spouse); 2) $600,000 to the bypass share (and

the rest to the surviving spouse); and 3) an amount greater than $600,000 to the bypass share (and the rest to the surviving spouse).

The first, no-bypass strategy takes total (and unnecessary) advantage of the unlimited estate tax marital deduction, under which a spouse can transfer an unlimited amount of property, free of federal death tax, to the surviving spouse. For spouses selecting this alternative, a relatively large tax hit will occur at death of the second spouse, when the entire family estate, which is now owned by the surviving spouse, will be taxed at marginal rates effectively starting at 37 percent and rising to as high as 55 percent, for estates exceeding $2.5 million.

The second strategy, the perceived most popular alternative to leaving everything to the surviving spouse, has the first spouse to die leaving all but approximately $600,000 to the surviving spouse. As implied above, property passing to the bypass share is said to bypass the surviving spouse's estate because it will escape estate taxation at his or her later death. A bypass of $600,000 is called a *credit shelter bypass* because $600,000 is the amount of the exemption equivalent of the federal unified credit; the first spouse to die can leave the first $600,000 tax free to anyone other than the spouse because every estate is entitled to a tax credit that effectively exempts this amount from tax.

The third strategy makes the bypass share an amount greater than $600,000, and can often further reduce total estate taxes, despite the tax on the estate of the first spouse to die. The lower tax at the second death may more than offset the higher tax at the first death, particularly for estates that appreciate rapidly.

Regardless of its size, the bypass share is typically left *in trust* rather than outright, for the benefit of both the spouse and the children. The spouse is given a lifetime interest in all of the bypass trust income and power to invade the principal in certain events, while the children are given the remaining principal at the surviving spouse's death.

Use of These Bypass Strategies

The data on the use of these strategies is summarized in Table 3. Attorneys were asked to answer these questions *only* with reference to those clients sufficiently wealthy to have a potential estate tax liability.

The typical respondent indicated that only 5.8 percent of wealthier clients preferred strategy 1, all to spouse with no bypass. Seventy-five percent of these attorneys reported that no more than five percent of their clients chose it. In fact, more than one half of the attorneys had no clients at all choosing it. On the other hand, twenty one attorneys had at least 10 percent of their clients selecting this strategy, with the median attorney in this subset using it for 20 percent of clients, and two attorneys using it for 75 and 90 percent, respectively. The upshot is a skewed, somewhat bipolar distribution, which explains why the mean of all respondents exceeds the third quartile level. Two different groups are believed to represent this distribution: a large number of discriminating experts who use strategy 1 only

TABLE 3.
Use of Bypass Planning Strategies
(percentage of those clients having a potential estate tax liability)

Planning Strategy	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
No bypass	0–90%	0–5%	5.8%	51%	14%
$600,000 bypass	10–100%	85–100%	88.1%	0%	18%
Larger bypass	0–50%	0–10%	6.0%	50%	10%
Total of clients			100.0%		

for smaller estates, and several other, less experienced attorneys who use it for far more clients.

Of the remaining 94 percent of clients advised by the typical attorney, 88.1 percent (out of 100 percent) selected strategy 2, credit shelter bypass of approximately $600,000 (I.Q. range: 85–100%). The other 6.0 percent chose strategy 3, a bypass exceeding $600,000 (I.Q. range: 0–10%).

Summarizing, planners are recommending strategy 2, the credit shelter bypass plan, to the overwhelming majority of their clients. This confirms the perceived general attitude widely held by the estate planning community that strategy 1 is too tax costly to elect, and strategy 3 is not popular because most clients do not want to incur a death tax during either their or their spouse's lifetimes.

Marital Deduction and Distribution Planning

As implied above, selection of a bypass amount more or less automatically determines the amount passing to the surviving spouse. How the marital share can be distributed to that spouse is the subject of the next discussion.

Overview of Planning for the Marital Share

Clients can dispose of the marital share in several different ways and still qualify for the estate tax marital deduction. They can leave it outright. Or they can leave it in one of several trusts, of which the most common are the QTIP trust and the power of appointment trust. Both of these trusts require the trustee to distribute currently all trust income to the surviving spouse for life. The unique characteristic of the *QTIP trust* is its ability to totally deprive that spouse from exercising any control over use or disposition of the trust principal. The *power of appointment trust* is unique for just the opposite reason: it can extend to the surviving spouse an unlimited power to dispose of trust principal to anyone during his or her lifetime or at death. Other less used marital dispositions include the estate trust, qualified domestic trust and a generation-skipping type of QTIP trust.

TABLE 4.
Disposition Of Marital Share To Surviving Spouse
(percentage of those clients having a potential estate tax liability)

Planning Strategy	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
Outright	0–80%	5–50%	28.3%	19%	24%
Standard QTIP trust	0–100%	20–60%	43.5%	7%	26%
Power of appointment trust	0–100%	0–14%	14.0%	40%	24%
Estate trust	0–90%	0–0%	2.9%	85%	12%
Qualified domestic trust	0–20%	0–5%	3.3%	34%	4%
Reverse QTIP election trust	0–100%	5–35%	24.3%	27%	27%
Any two marital trusts	0–100%	0–30%	19.9%	26%	25%
Any three marital trusts	0–80%	0–0%	3.2%	22%	11%
Any four marital trusts	0–100%	0–0%	1.5%	92%	11%

Attorney Practices in Disposing of the Marital Share

Attorneys were asked about the frequency with which their wealthier clients used these dispositions of marital deduction property. The results are shown in Table 4. The most popular disposition was to a standard QTIP trust, with the typical attorney incorporating it in the plans of 43.5 percent of clients (I.Q. range: 20–60%). Twenty-eight point three percent of the typical attorney's clients provided for an outright disposition to the surviving spouse (I.Q. range: 5–50%), while 14.0 percent incorporated a power of appointment trust (I.Q. range: 0–14%), 2.9 percent an estate trust and 3.3 percent a qualified domestic trust. In addition, 24.3 percent of clients used a generation-skipping QTIP trust incorporating a "reverse election" (I.Q. range: 5–35%). Finally, since it is possible to include more than one marital disposition in a single plan, the survey asked about that and discerned that the typical attorney included two of these marital trusts in 19.9 percent of client estate plans (I.Q. range: 0–30%), three of these trusts in 3.2 percent of client plans, and four of these trusts in 1.5 percent of plans. In view of the fact that efficient planning for the generation-skipping transfer tax often requires the use of multiple marital trusts, it is somewhat puzzling to learn that these experienced planners did not use at least two marital trusts in larger numbers.

IV. Postmortem Tax and Liquidity Planning

The survey asked several questions relating to other deathtime planning techniques. Attorneys were asked to answer these questions only with reference to those decedent-clients for whom a federal estate tax return was filed during the preceding twelve months. The results are shown in Table 5.

TABLE 5.
Postmortem Tax and Liquidity Planning
(number/percentage of clients for whom a federal estate tax return was filed)

Planning Strategy	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
Number of estate tax returns filed by anyone	0–50	4–10	8.8	N/A	8
Estate tax returns actually prepared by respondent or respondent's firm	0–100%	22.5–100%	68.5%	11%	41%
Flower bonds	0–20%	0–0%	.6%	94%	3%
Section 6166 deferral	0–100%	0–10%	10.0%	50%	20%
Section 2032A valuation	0–100%	0–0%	2.4%	85%	10%
Alternate valuation date	0–67%	0–20%	10.7%	50%	15%

Federal Estate Tax Return Preparation

A federal estate tax return must be filed for any decedent whose taxable base exceeds $600,000. One hundred seven out of 120 attorneys (89 percent) reported having at least one client who died during the previous twelve months for which an estate tax return had to be filed. The number of returns filed by either the attorney, the firm, or others, ranged from one to fifty (I.Q. range: 4 to 10 returns). The typical attorney had 8.8 decedents for which returns were filed, and that attorney or his or her firm actually filed 68.5 percent of these returns.

Flower Bonds

Only seven out of 122 attorneys (6%) reported purchasing flower bonds for their tax return decedents. Flower bonds are certain U.S. Treasury bonds purchased on behalf of the client shortly before death at discount and redeemed at face value in payment of the estate tax. During current periods of low interest rates, flower bonds are not attractive because their purchase discount is minimal. During 1991, that discount averaged only about five percent.

Section 6166 Deferral

Section 6166 offers qualifying estates of closely held business-owning decedents a method of paying the estate tax in 10 annual installments beginning four years after death. Forty-six percent of attorney respondents indicated they elected Section 6166 deferral for at least one of their estate tax return decedents, and eighteen percent so elected for twenty or more percent (I.Q. range: election made for 0–10 percent of clients). The typical attorney made this election for 10.0 percent of this subset of clients.

Section 2032A Special Use Valuation

Section 2032 special use valuation enables the estate to value, for death tax purposes, the real estate of a farm or other qualifying business at its present use value (e.g., as a family farm business) rather than at its highest and best value (e.g., as property suitable for hi-rise development). Only fifteen percent of responding attorneys reported electing Section 2032A Special Use Valuation for any decedents. And it appears that most of these fifteen percent filed for no more than one or two decedents.

Alternate Valuation Date Election

The federal estate tax return preparer may value assets as of date of death or as of alternate valuation date, which is exactly six months after date of death. One-half of the attorneys reported *not ever* electing the alternate valuation date for any of their decedent-clients during the most recent twelve months. For the other 50 percent, the range so electing was from one percent of their decedents to two-thirds, with a median of twenty percent of their clients. In view of the rapidly appreciating 1991 stock market, it is understandable that for many estates the later (alternate valuation) date would probably be rejected because it probably generated higher taxable values.

V. Planning for Closely Held Businesses

The survey asked several questions relating to planning for closely held business clients. Table 6 summarizes the results. The average attorney surveyed counseled 20.5 closely held business estate planning clients during the year.

S Corporation Election

On average, of these business clients, the typical attorney made a subchapter S corporation election for an average of 23.3 percent of them, or approximately five

TABLE 6.
Closely Held Business Planning
(number/percent of closely held business clients)

Planning Strategy	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
Number of C.H.B. clients	0–100	7.5–25	20.5	N/A	20
Subchapter S election	0–100%	0–40%	23.3%	35%	30%
Estate freezing recapitalization	0–100%	0–0%	4.0%	78%	12%
Partnership capital freeze	0–50%	0–0%	2.1%	85%	7%
Business buyout agreement	0–100%	10–40%	29.3%	14%	29%

clients. An S election is often undertaken so that the corporate business owner is able to enjoy lower individual tax rates and to be able to deduct business losses on his or her individual tax return.

Estate Freezing Recapitalization

An estate freezing recapitalization is a recapitalization of corporate stock under which the client receives shares (such as preferred stock) that are not expected to appreciate substantially, and the client's younger generation beneficiaries, typically the children, receive common stock, which is expected to appreciate rapidly. In this way, the client may be able to "freeze" the death tax value of the business at its current value.

Twenty-five out of those 113 respondents answering the question (22 percent) indicated that they implemented at least one corporate estate freezing recapitalization. Of these, the median percent of these clients doing this was 10 percent, meaning that on average, only about two business estate planning clients (10 percent of 20.5 business clients) undertook a recap for each of these 25 attorneys. The results are about the same for partnership capital freezes, with only 17 out of 113 attorneys (15 percent) undertaking at least one and the typical attorney in this small group doing about two of them. The passage of the greatly inhibiting Internal Revenue Code section 2701, effective October 8, 1990, explains in part why these percentages are so low. Actually, it is surprising to learn that some attorneys continued to do even that many freezes after that date.

Business Buyout Agreements

A business buyout agreement is a contract obligating another party to purchase the decedent-client's interest in a business at his or her death, or at some other event which could precipitate the client's withdrawal from the firm. Advantages include liquidity and a guaranteed market. Ninety-five out of 111 attorneys (86 percent) had at least one client undertaking a business buyout agreement, and the average attorney arranged a buyout for about six clients (29.3 percent of 20.5 business clients).

VI. Lifetime Transfers

Respondents were asked to indicate the percentage of all of their estate planning clients that undertook the following lifetime transfers in the past year. Table 7 summarizes the results.

Noncharitable Outright Annual Exclusion Gift of $10,000

This is a gift tax-free transfer often undertaken by wealthier clients to reduce future death taxes, and by many clients simply to assist a child or other family member. No gift tax return need be filed if total gifts in a calendar year to any one

TABLE 7.
Lifetime Transfer Planning
(percentage of all clients)

Planning Strategy	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
Nonchar. outr. $10K gift	0–100%	10–40%	29.2%	2%	22%
Nonchar. custod. $10K gift	0–95%	2–15%	12.1%	24%	17%
Nonchar. outr. >$10K gift	0–25%	0–10%	5.5%	24%	6%
Nonchar. custod. >$10K gift	0–50%	0–0%	1.3%	83%	5%
Nonchar. gift in trust	0–90%	5–30%	19.1%	17%	18%
Irrevocable life insurance trust	0–80%	10–30%	22.4%	7%	17%
Installment sale	0–40%	0–3%	2.1%	65%	5%
Private annuity	0–10%	0–0%	.6%	85%	2%
Grantor retained annuity trusts	0–20%	0–2%	1.6%	68%	3%
Grantor retained unitrust	0–15%	0–0%	.8%	80%	2%
Joint purchase	0–25%	0–0%	.4%	92%	2%
Char. outr. gift at least $5K	0–80%	1–15%	11.5%	25%	15%
Char. split interest gift	0–35%	2–5%	4.9%	39%	7%

donee do not exceed $10,000, the amount of the annual gift tax exclusion. All but two attorneys had clients undertaking these gifts, with the typical attorney having 29.2 percent of clients making them (I.Q. range: 10–40%).

Noncharitable Custodial Annual Exclusion Gift of $10,000

Custodial gifts are irrevocable gifts to a custodian for the benefit of another person, usually a child, and are designed to fall under the provisions of the client's state's Uniform Gifts to Minors Act or Uniform Transfers to Minors Act. Such gifts are much less complex than trusts to create and administer, but are far less flexible. Ninety-three out of 123 attorneys who answered the question (76 percent) indicated they had at least one client making such a custodial gift, with the average attorney having 12.1 percent of clients making them (I.Q. range: 2–15%).

Noncharitable Outright Gift Exceeding the $10,000 Annual Exclusion

Large outright gifts are made by wealthier clients primarily to freeze their death taxable estate. Seventy-six percent (94 attorneys) had at least one client making these gifts, with the typical attorney having 5.5 percent of clients making them (I.Q. range: 1–10%).

Noncharitable Custodial Gift Exceeding the Annual Exclusion

Only twenty one attorneys, or 17 percent, had clients undertaking larger custodial gifting, and of these few attorneys, the percentage of total clients involved was about five percent. The mean for all attorneys was 1.3%.

Noncharitable Gifts in Trust

One hundred two of the attorneys (83 percent) had clients making noncharitable gifts in trust, with the typical attorney having about 19 percent of clients making them (I.Q. range: 5–30 %). For these gifts, an average of sixty percent of the trusts included a Crummey demand provision, while an average of six percent included a Section 2503(b) provision, and 13 percent a Section 2503(c) provision. These provisions are designed to qualify a future interest gift to a minor for the $10,000 annual gift tax exclusion.

Irrevocable Life Insurance Trust

An irrevocable life insurance trust is a trust which is owner and beneficiary of a policy on the life of the client. After the client's death, the proceeds are retained by the trust for the benefit of the client's spouse and children. Its major advantage is exclusion of the policy proceeds from the death tax estate of both the client and the client's spouse. One hundred fifteen attorneys (93 percent) helped clients draft these popular trusts, with the typical attorney arranging them for 22.4 percent of clients (I.Q. range: 10–30%).

Installment Sale

By transferring appreciating property, an installment sale can offer the client a constant income stream for a fixed period and reduce death taxes. Forty-three attorneys (35 percent) reported having clients who undertook an installment sale. Of these, the average attorney reported an installment sale completed by five percent of their clients (for all attorneys: I.Q. range: 0–3%; mean: 2.1%).

Private Annuity

A private annuity involves the sale of an asset, usually to a family member, in exchange for the right to an annuity for life. It is a specialized technique, designed for a specific set of facts which usually apply to only a few estate planning clients. Only 19 attorneys (15 percent) reported any clients engaging in a private annuity, and of these, the average was 2 percent of clients (mean for all attorneys: .6%).

Grantor Retained Trusts

The next two lifetime transfers are examples of grantor retained trusts, in which the client creates and transfers property into an irrevocable trust, retaining a specific amount of income for a period of years. If the client dies within the period, the trust assets revert to the client's estate and the trust will have not helped reduce the death tax. On the other hand, if the client survives the period, the assets vest in the "remaindermen," typically the client's children, and the clients death tax gross estate will not include the date of death value of the assets. Thus, these transfers in trust are designed to freeze a portion of the client's estate, and they must conform

to the detailed rules under Internal Revenue Code section 2702, which became effective in October, 1990.

Grantor Retained Annuity Trust (GRAT)

A grantor retained annuity trust is a grantor retained trust paying the client a fixed dollar annuity amount. Forty attorneys (32 percent) had clients undertaking a GRAT, and of these, the typical number of clients was about five percent (for all attorneys: I.Q. range: 0–2%; mean: 1.6%).

Grantor Retained Unitrust (GRUT)

A grantor retained unitrust is a grantor retained trust paying the client an annuity of a fixed percentage of the current fair market value of the trust property. Only twenty-six attorneys (20 percent) had clients undertaking a GRUT, and of these the typical number of clients was about two percent (mean for all attorneys: 0.8%).

Joint Purchase of a Life Estate/Remainder Interest

Surprisingly, in spite of recent devastating tax legislation, 10 attorneys (8%) reported clients undertaking a joint purchase, and of these, the median number of clients was three percent.

Outright Charitable Gift of at Least $5,000

Most attorneys (75 percent) had at least one client making large outright charitable gifts, and of these, the average attorney had ten percent of his or her clients making this type of transfer (for all attorneys: I.Q. range: 1–15%; mean: 11.5%).

Charitable Split Interest Gift

Common types of charitable split interest gifts include the charitable remainder annuity trust, charitable remainder unitrust, pooled income fund, and charitable lead trust. Seventy-five attorneys (61 percent) reported clients making split interest gifts to charity, and of these the typical number of clients was five percent (for all attorneys: I.Q. range: 10–30%; mean: 4.9%).

VII. Planning for Incapacity

Estate planning offers two specialized non-trust techniques for helping clients plan for their own incapacity. Both involve a variation of the general legal document called durable power of attorney. One variety is designed for management of the client's property, while the other promotes efficient medical care decision making. Table 8 summarizes the results.

TABLE 8.
Planning for Incapacity
(percentage of all clients)

Planning Strategy	*Range*	*Interquartile Range*	*Mean*	*% Not Using at All*	*Std. Dev.*
Dur. pwr. att'y. for property	5–100%	75–100%	79.8%	0%	26%
Dur. pwr. att'y. for health care	0–100%	75–100%	81.0%	1%	24%
Living will	0–100%	0–90%	51.3%	29%	42%

Durable Power of Attorney for Property

The durable power of attorney for property authorizes another person as agent to make financial decisions on behalf of an incapacitated client. The typical attorney surveyed prepared durable powers of attorney for property for 79.8 percent of clients. Every single one of the attorneys drafted them, and a full three quarters of respondents prepared them for at least seventy five percent of clients.

Durable Power of Attorney for Health Care and Living Will

A durable power of attorney for health care authorizes another person to make medical decisions on behalf of an incapacitated client. It often also includes a statement describing certain "heroic" life sustaining procedures the client does not wish to be undertaken. This statement can also be included in a separate document, called a *living will.*

The figures on frequency of planning with the durable power of attorney for health care were nearly identical to those for the durable power of attorney for property, suggesting that health care powers have become nearly universally accepted. The typical attorney prepared these durable powers for 81.0 percent of clients and three quarters of the respondents drafted them for 75 percent of clients.

Along with this durable power, most attorneys surveyed were found to also draft a separate living will for clients. Only 29 percent of attorneys indicated they did not draft separate living wills for any clients. Those who did typically prepared them for nearly 88 percent of their clients (for all attorneys: mean = 51.3%).

VIII. Conclusions

This article has described the major techniques used by experienced estate planning attorneys, in the context of a summary of the results from a recent survey revealing the frequency with which each technique has been used. Financial services academics may now have a better understanding of them, and a greater awareness of the relative importance of each of these techniques to individual financial management.

APPENDIX

Survey Questionnaire

SURVEY OF ESTATE PLANNING ATTORNEYS

Conducted by Chris J. Prestopino, Ph.D.
Professor, California State University, Chico

For each question, please place in the appropriate space a number from 0 to 100, representing the *approximate percentage of your clients whom you advised in the last year* use each of the following strategies. Estimates are acceptable. Your response is anonymous. All identifying information will be held in the strictest confidence. Results will only be reported for groups. Thanks for sharing your valuable time.

A: BASIC DOCUMENT PREPARATION How many estate planning clients have you advised in the past year? _____clients

What percentage of these clients use each of the following planning documents as the *principal method of asset disposition*? (Note: all four answers should total 100%)

1. Joint tenancies (whether recommended or not)? _____%
2. Simple will (no trusts; if both spouses alive, then conditional outright disposition between them, otherwise to children, etc.)? _____%
3. Non-simple will (any other type of non-pourover will incorporating trusts or other more complex arrangements)? _____%
4. Revocable living trust with pourover will? _____%

Should total-------100%

B: LIFETIME TRANSFERS What percentage of *all* your estate planning clients advised in the past year undertook the following lifetime transfers?

1. Noncharitable *outright* annual exclusion gift of $10,000? _____%
2. Noncharitable *custodial* annual exclusion gift of $10,000? _____%
3. Noncharitable *outright* gift exceeding the annual exclusion? _____%
4. Noncharitable *custodial* gift exceeding the annual exclusion? _____%
5. Noncharitable gift *in trust?* _____%
   FOR THESE TRUSTS, how often did they contain:
   a. A *Crummey* demand provision? _____%
   b. A 2503(b) provision (mandatory annual income distribution)? _____%
   c. A 2503(c) provision (mandatory corpus distribution at age 21)? _____%
6. Installment sale? _____%
7. Private annuity? _____%
8. Grantor retained annuity trust (GRAT)? _____%
9. Grantor retained unitrust (GRUT)? _____%
10. Joint purchase of a life estate/remainder interest? _____%
11. Outright *charitable gift* of at least $5,000? _____%
12. Charitable split interest gift _____%
13. Irrevocable life insurance trust _____%

C: MARITAL DEDUCTION AND BYPASS PLANNING How many of your clients advised in the past year were sufficiently wealthy to have a *potential estate tax liability*? _____clients

1. What percentage of these wealthier clients will use each of the following *bypass* planning strategies, in planning for the death of the first spouse. (Note: all three answers should total 100%)
   a. No bypass (i.e., unlimited marital deduction)? _____%
   b. A bypass of approximately $600,000? _____%
   c. A bypass *larger* than $600,000? _____%

   Should total-------100%
2. What percentage of these wealthier client's documents had a provision for a *disclaimer* to potentially increase the bypass? _____%
3. With regard to the property qualifying for the *marital deduction*, what percentage of these wealthier client's documents incorporate the following marital dispositions? _____%
   a. *Outright* disposition of bulk of marital deduction property to surviving spouse? _____%
   b. Power of appointment marital trust? _____%
   c. Marital estate trust? _____%
   d. Standard Q-Tip marital trust? _____%
   e. Generation-skipping Q-tip trust with "reverse election"? _____%
   f. Qualified domestic trust (QDT- for non-citizen spouses)? _____%
   g. Any two of the above marital trusts in the same plan? _____%
   h. Any three of the above marital trusts in the same plan? _____%
   i. Any four of the above marital trusts in the same plan? _____%

D: OTHER TAX AND LIQUIDITY PLANNING In the past year, how many federal estate tax returns were filed (by you or others) for your deceased clients? _____returns

For what percentage of these tax return decedents did you or your office undertake the following?

1. Purchase flower bonds? _____%
2. Elect Section 6166 deferral? _____%
3. Elect Section 2032A special use valuation? _____%
4. Actually prepare the federal estate tax return (you or your firm)? _____%
6. Of the federal estate tax returns you prepared or reviewed, approximately what percentage elected the *alternate valuation date*? _____%

E: PLANNING FOR CLOSELY HELD BUSINESSES How many *closely held business* estate planning clients have you have had in the last year? _____clients

For what percentage of these closely held estate planning clients did you implement the following arrangements?

1. S corporation election? _____%
2. Corporate estate freezing recapitalization? _____%
3. Partnership capital freeze? _____%
4. Business buyout (buy-sell) agreement? _____%
   a. For what percentage of these *buyout plan clients* did you use the following? (Note: should total 100%):
      1) A *cross purchase* agreement? _____%
      2) An *entity* agreement? _____%

      Should total-------100%

F: PLANNING FOR INCAPACITY In the past year, for what percentage of *all* your estate planning clients did you prepare the following documents?

1. Durable power of attorney for *property*? _____%
2. Durable power of attorney for *health care*? _____%
3. Living will (as a separate document—not as part of a durable power of attorney for health care)? _____%

G: CLIENT PROFILE During the past year, what percentage of *all* your estate planning clients fell into each of the following three *net worth* categories? (Note: Combine husband and wife's assets. All three questions should total 100%):

1. Smaller estate (under $600,000)? _____%
2. Medium size estate ($600,000 to $1,200,000)? _____%
3. Larger estate (greater than $1,200,000)? _____%

Should total-------100%

H: PERSONAL INFORMATION (*will be held in strict confidence*)

1. State in which you conduct your main practice _____
2. Your age: _____
3. Your gender (circle one): F M
4. Number of years experience as an estate planning attorney: _____years
5. Percent of your entire practice devoted to estate planning and probate: _____%
6. Your *other* most frequently practiced area (check only one):
   _____none _____family law
   _____business law _____personal injury
   _____general practice _____other (please specify:)_____
7. Of the time you devote to estate planning and probate, what percentage is spent doing *estate planning*, rather than probate: _____%
8. Total number of partners and associates in your firm (include yourself): _____

I: COMMENTS This survey may have failed to capture some of your important thoughts about the practice of estate planing. If so, please feel free to comment below: