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**WHEN A GOOD OFFENSE IS  
THE BEST DEFENSE**

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# WHEN THE BEST DEFENSE IS A GOOD OFFENSE

By Marilyn G. Miller

Most clients need, and deserve, more than a mere scrivener to develop a thoughtful estate plan. The attorney must be an investigator and a counselor as well as a legal advisor to help fashion a strategy for managing all of the moving parts. There are any fine articles and treatises that go into detail on the components; this presentation is designed as an overview of how to design your client's plan to avoid or defend a challenge.

## A. Preliminary Considerations

1. Essential Documents: Every attorney who practices in this area should have a toolbox of documents that serve as the foundation of a client's estate plan. An inventory of such documents might include the ones found in Exhibit "A". This list is not exhaustive, but it will give you a place to start.
2. Develop or Invest in good templates. You need a set of suitable "go to" master documents that incorporate current law and contain the standard administrative language. Past that, however, you must actually read those documents and *know* what *they contain*. There is no penalty for drafting a thirty-five page "simple will" but including federal estate tax planning trusts in a modest estate plan, for example, is unnecessary and may lead to more complicated administration. Conversely, do not omit provisions that you believe are important because the client tells you they are not necessary. See discussions below.
3. Understand your role. The client has come to you with a stated goal – planning for lifetime asset management and transfer of wealth at death. Your job is not to act as a mere scrivener, but to ferret out factors that may impact the orderly execution of the strategy then to craft the appropriate documents put that strategy into place. Some clients are not shy about telling you their family stories, but some clients will withhold important information. It is your job to root out as much of this information as possible. After this is determined, planning for future wealth management and transfer can be done with the "big picture" in mind. Keep in mind, however, that actions taken to ameliorate one set of concerns can drastically impact other planning areas. Inventory the trees, but don't lose sight of the forest. Only a careful analysis of all of the client's needs, desires and motivations together with the other factors at play, enables you craft an appropriate strategy.

**B. Investigate: You Can't Fashion a Cure if You Don't know the Disease**

1. Family and other dynamics. *"Every family's cooking pot has one black spot"* Chinese proverb. When interviewing clients it is important not to make assumptions and to remember to actively *listen*. It is a rare client in this situation that comes right out and confides in you any unattractive family circumstances. The client may be embarrassed or may not believe that such information is necessary for you to analyze to his or her situation. Quite the opposite is true. The advisor needs to know which family members may be trusted to be stewards of assets if transfers are part of a plan, or which family members may need to be protected from themselves or others. Sometimes you only get hints of this information indirectly in the course of a conversation ("Yes, our son Billy finds Huntsville lovely this time of year" may lead to a discussion about what the children are doing with their lives) so it's important to listen carefully what the client says - and perhaps what she doesn't. Also be ready to go outside your list of standard questions if necessary. Before you spend a lot of time in the details of the finances and assets, find out whether there are any of the following present:

- a) Adult children living at home and not contributing financially that may be adding to overall expenses;
- b) Adult children using Mom and Dad as an ATM (or other means of financial exploitation);
- c) Alcohol or drug habits that can't be controlled (clients or other family members);
- d) Excessive spending, either due to a mental condition or other cause;
- e) Financial dependency on a caregiver or child that may cause the client to mask problems;
- f) Things the client ABSOLUTELY, POSITIVELY will not give up.

If you find any of these sorts of factors it means that there are other forces at work that the client may not be able to, or may not want to, fix. Address these issues early in the engagement; how the client is willing to deal with any of these issues is critical to your recommendations.

2. Assets. Knowing what assets your client has and how those assets are to be treated is a vital component of creating an estate plan that can be defended if necessary. Ask the client to bring in a list of assets at a minimum; copies of account statements and signature cards, deeds and other incidents of ownership will help you advise the client on how to structure the ownership of these assets to achieve the established plan.

**C. Address Areas of Particular Concern When Drafting**

1. Sibling Rivalry: This is often seen in wealth transfers, both in and out of probate, and there is a "scientific" explanation. Psychological research has shown, and

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