CHAPTER FIVE

Watch Out for Attorneys

I will make two points in this chapter: the role of attorneys in preparing your estate planning and their role in wrapping up your estate at your death. Both require careful consideration on your part to avoid complications, time delays, and excessive cost to you and your heirs.

Attorneys play a vital role in planning your estate, and it would be a mistake to try to avoid them. True, you may be able to put together a trust from something you download off the Internet or from forms you buy at the office supply or book store, but you would have no assurance that what you have done is going to be legally sufficient and accomplish the goals you have in mind. In particular, the online forms may be specific to the state in which they are sold, and you have no idea who created them or if they will work for you. I am always amazed that people will risk everything they have acquired by putting it into a form from a book—without having expert legal advice—in order to save a bit of money. The old penny-wise-pound-foolish mistake.

The need for independent legal advice is why I have not included fill-in-the-blank forms in this book. There is no one trust that is right for everyone. We all have differing intentions, goals, finances, family relationships, and problems. In my office, I use computers of course but have developed about sixty separate trust formats for differing situations. Even so, I always have to adapt each one for each client's particular circumstance. I have included a comprehensive decision-making form in the appendix, which will be invaluable to your attorney because it customizes your decisions to your

particular situation so that your documents fit you perfectly.

How to choose the attorney and what to watch out for are very important. I see too many people who do not ask questions, assuming that because the attorney has a law license she will not only know about trusts and estate planning but will treat them fairly. Sometimes true but not always. I see a lot of very poorly made trusts done by attorneys who I am sure the clients paid in good faith. I also see the same trust brought to me by different clients for review, so I know they are using a template. Sometimes the template trust is outdated and contains references to laws and legal situations that no longer exist. So be careful with whom you deal.

There are also advantages to having the guidance of an attorney through all phases of your lifelong estate planning and in assisting your family in wrapping up your estate. With regular contact, the attorney (if he is doing the right things for you) can be sure that your trust reflects your current wishes, takes care of you in case of disability, and provides for an orderly and efficient distribution of your assets at your death. These services come with a cost, but a good lawyer will make the investment worthwhile. Of course, you have to have a good lawyer to begin with and would be wise to know what to watch out for in hiring one, so here are my tips and warnings, gathered from having an inside view since 1975 of attorney practices.

WHAT ARE LEGAL SERVICES?

Lawyers charge a lot of money for what they do, but for the legal things that only a lawyer can do, these fees are not necessarily unreasonable. Only a licensed attorney can give specific legal advice, represent a person in court, or prepare legal documents. For these services, attorneys receive years of training and education, which justify the fees charged. They also assume responsibility for the rightness of their legal services and can be sued for attorney malpractice if they are wrong.

Nonattorneys cannot legally do any of those three things for other people. The problem in the estate planning area is that many of the services attorneys charge for are not legal services—they are clerical services. You pay for the attorney’s time whether she is in court or just talking to you on the telephone, so your legal fees for the trust could be inflated because of these additional charges. For example, assistance in funding your trust is not all legal in nature. Changing the beneficiary on life insurance so that the trust is the beneficiary rather than a person can be done by anyone. Should you pay

hundreds of dollars an hour to have an attorney request a beneficiary change form from the insurance company and fill it out for you? This is clerical work, not legal work. I suggest that when you interview your attorney, you ask to do some of the nonlegal work yourself if you want to save some money. Same with changing beneficiaries on retirement accounts and annuities—you can do this yourself with no legal assistance.

I know attorneys who will do all the trust funding for a client and charge the normal attorney fee rate for doing it. They have the client sign a power of attorney allowing them to access their financial affairs, then they contact the client's banks, credit unions, brokers, and insurance companies to see that all the assets get into the trust. This is a great service but not something you cannot do yourself with the right instructions. I provide my clients with trust-funding instructions so they can do the funding without paying me extra.

Trusts are so common nowadays that the financial institutions know what you need to do and will in most cases do the funding paperwork for you. Trust service companies can assist in the funding as can your financial planner or accountant. You do not have to pay the lawyer to do these things. If saving money on attorney fees is not important to you, then go ahead and let the lawyer do it—but know that you are paying attorney fee rates for clerical services.

WHEN YOUR WILL IS WORTHLESS

Clients often call the lawyer's office because they have been told that they should have a will. Everybody should have a will, people say, and if you do not have one, it is because you are procrastinating or are negligent or uncaring toward your family. That is the common feeling, but of course it is not necessarily true; in fact, few people actually need a will. Many need a trust, as we know from the information in this book, but wills are often superfluous if there is no trust.

The most common example I see is the situation where a lawyer prepares a will for a client, which is of no value at all. State laws have what they call laws of "intestacy." This means a set of laws that determine who inherits a person's property if he dies without a will or trust.

Typically, if a person dies leaving no spouse, his children share equally in whatever the deceased owned at death after all expenses are paid. If a will is made out saying that all the assets are to be divided equally among the children, then the will has accomplished nothing. Whether with a will or

without, the estate would have to go through probate. Having a will does not make probate simpler, cheaper, or shorter. So in this case, the attorney who makes a will that mirrors the intestacy laws is charging the client for nothing. A married couple usually own everything jointly so that the surviving spouse automatically inherits everything without any court involvement, so there is nothing to probate at the death of one of them.

A trust can take care of every estate planning decision a person might want to make, whereas a will can be "broken." As we have already covered, a surviving spouse has a right to choose between what a will gives him and what state law would give if there was no will. So you can't disinherit your spouse in most states with a will, but you might be able to do so with a trust. The value of a will is that it gives directions as to the disposition of your estate that may be different than what the state law would do. *But* a trust is better because it does not have to be probated.

Some things may be put in the will that would not be covered by intestacy, which would make the will valuable, such as an unequal distribution among children or disinheriting a child. As explained earlier, a will can contain all the provisions to set up a testamentary trust. But wills have to be probated and trusts do not, so there is no advantage to the will.

I had a client come in asking for advice about her mother's trust. After that was finished, I asked her what plans she had made for her own estate. She said she was all set—she had a will. After I explained the difference between wills and trusts, she said she had originally asked the lawyer for a trust but he told her that all estates had to be probated, so a will was all she could get. I was astounded at the incorrect advice and prepared a trust for her. I suspect that the attorney knew nothing about trusts but did know about wills and probate and did not want to lose a client. I also think his advice constituted legal malpractice.

HOW MUCH SHOULD A TRUST COST?

Putting a suggested cost for a trust into this book would not be a good thing to do. The cost of legal services varies by where you live, what services are actually being provided, and the attorney who is doing the work. Any price I might put in this book will not necessarily be accurate either where you live or when you read this, though some other books on trusts do give estimates ranging around $3,500, which may be right for your area—but may also be higher or lower than the average where you live.

The important point is for you to know in advance what you are paying and what services are being performed for that price. You should be able to get a flat fee for a set amount of services. If you require more services than are agreed upon, expect to be charged more. If there are parts of the process you can do yourself, such as getting beneficiary change forms or doing other parts of the trust funding, then you should expect to save some money. And be sure all the other documents that go along with a trust are included. These include a pour-over will, durable powers of attorney, medical directives, living wills, do-not-resuscitate directives for those who want them, transfer deeds, trust certificates, and letters to the named successor trustees. I have always used a flat fee, which also included instruction to the successor trustees so they would know what to do on the death of the trust maker. Those instructions are included in the appendix.

It is unlikely that a lawyer will tell you over the telephone what he charges for a trust, since there are so many different things that may enter into a price determination. That being said, certain trust service companies and financial planners have informal agreements with attorneys to reduce prices for referred clients with the understanding that the financial planner will provide some of the nonlegal services such as information gathering, notarization of documents, and trust funding. It is worth looking into.

Also, watch out for a practice I've seen used once in a while: a fee based upon how much the lawyer saves you in estate taxes. There are attorneys who use the standard marital "A/B" trust, which automatically doubles the estate tax exemption at the death of one spouse. They then run a calculation showing the estate taxes that would occur without that kind of trust and then base their fee on a percentage of the savings.

Sort of sounds okay if you figure estate taxes would be $250,000 without the trust and nothing with the trust. So paying the lawyer $25,000 to save $250,000 is a good deal, right? Wrong. The A/B trust being used to get this saving is the same one used by most attorneys charging a flat rate of $2,500. There is no special expertise being offered by the lawyer working on a percentage, and in my view, the big fee is excessive and unethical. But it still happens and most clients are none the wiser.

SELECTING A LAWYER TO DO YOUR TRUST

A referral from a satisfied client or a trusted financial planner is the best way. If you do not have either of those, then you need to interview your attorney

based on the following factors.

Find an expert. While legally any attorney can prepare your trust, very few have any expertise in this area. In some states, the Bar Association can certify attorneys as experts or specialists in certain areas. Other states, like Michigan, do not accredit specialties at all. Get a specialist if you can.

It is possible for a nonspecialist to create a good trust. It is also a gamble on your part. The lawyer who tries to handle everything, including divorces, bankruptcies, criminal cases, real estate, personal injury, and estate planning is not likely to be as familiar with trusts as is the attorney who only does trusts and probate. The specialist can determine what you need, give you the right advice, and prepare your documents faster and usually cheaper than can the nonspecialist, who may have to research unfamiliar (to her) areas of law for you. Do not pay for the lawyer's education; find someone who already knows what to do.

Part of my legal practice is reviewing trusts prepared by other attorneys and writing opinion letters based on the review. I tell the clients what is right and wrong with their trust and, if there are problems, what needs to be done to correct them. I have reviewed hundreds of trusts over the years drafted by other attorneys, and frankly I am appalled by the poor quality of legal work that goes on.

My experience is that many attorneys are using fill-in-the-blank trust programs that they receive from bank trust departments, buy from legal document companies, or are given to them at seminars they attend. These are computer programs where the attorney fills in the names of the client, their children, the trustees, and other things specific to the client and then prints it up. Sometimes the programmed trust chosen by the attorney is not at all appropriate for the client's needs.

I remember several years ago a client brought her trust into my office and dropped it on my desk with a loud thump. It was in a large three-ring binder, about 350 pages long, all boilerplate. When I looked at it, I pointed out to her that the only places in the whole document where her name or the names of her children and trustee appeared were on page 1 and page 350. The rest was basically just filler. She wanted a new one she could understand. The new trust I prepared for her was twenty-seven pages long, and she understood it.

Some of the trust formats I see again and again. A local bank used to hand out computer disks and manuals with the trust they wanted attorneys to use. A lot of attorneys took them and still use them today. Of course the document

named the bank itself as a cotrustee, but it was possible to edit that out of the document. One of the priciest attorneys in town used this trust and charged what I consider outrageous attorney fees for something she did not even write.

I am not suggesting that trusts prepared in this way are never any good. They may work perfectly well, and in fact, some of them were developed by experts in the field who are sharing these with other attorneys in the hope of improving the quality of legal work out there. I am just letting you know that your trust was likely not written just for you, and you should keep that in mind when you write the check.

There is no specific format for a trust. I can write a perfectly legal trust on one page, though I do not do that for a number of reasons. Trusts do not have to be notarized or even witnessed in some states (though we usually do both of these), so trusts can be made overly simple or overly complicated. I like to make them complete enough to cover what is reasonably likely to happen but not so complex as to make them incomprehensible and unusable.

Ask outright how many trusts the attorney has done in the past and how many he typically creates in a month. Ask him how many wills he makes. The wills should be a small fraction of the trusts if you are talking to the right attorney.

ADVERTISING AND WEBSITES

A lawyer's advertisement is written by the lawyer or his staff. It is an advertisement, not an endorsement by anyone. The lawyer with the biggest ad is not necessarily your best choice. I was one of the first attorneys to advertise in the United States back in 1977. It made the newspapers, since lawyers were previously prohibited from advertising. I had two years' experience and did a little of everything. Business boomed. I did not profess to be an expert and instead just listed the kinds of cases I could do. Other lawyers were furious, saying I was demeaning the legal profession. Actually, I think they did not like to see the apple cart upset. That all changed. The lawyers that criticized me for advertising began advertising themselves and now have the big full-page color ads for their firms.

Thirty-five years later when I retired, I no longer advertised. I had one line with my name and telephone number in the telephone directory, and that was all. My print directory had about twenty pages of full-page ads for other lawyers and hundreds of smaller display ads. None of those were in any way

an indication of the quality of the attorney running the ad. What you can learn from the ads, though, is information such as how long the lawyer has been in practice and whether she concentrates on just estate planning or tries to do everything. Armed with that information, you can then proceed to interview to decide if she is right for you—kind of like dating.

Websites are another form of advertising. The Internet is a dangerous place to get information. I recently ran across an attorney website filled with information on trusts. The attorney advised that trusts could not reduce taxes (wrong), that lawyers still had to be paid at death (wrong again), that many people were better off with a will due to statute-of-limitations issues (wrong in many states), and that probate still had to be done in many cases to cover personal property (wrong in most states).

For the most part, lawyers' websites are written by lawyers, and the information in them may be true in the particular jurisdiction where the lawyer is located but probably does not apply to everyone everywhere. The lawyer, in fact, may be wrong in her facts altogether. Nobody checks the accuracy of these sites.

Sometimes I think some of them are written to steer people away from trusts and toward wills and probate, where the real money is. But viewing biographical information about the lawyer herself can be helpful in making a choice.

The lesson for you is not to take what is listed on a website as necessarily accurate information, even if it is a lawyer website.

TRICKS

Well, maybe not tricks, but practices attorneys engage in that may not be in your best interests.

"My lawyer said I do not need a trust. A will is just fine for me."

I hear this fairly often from clients who have been referred to me by financial planners and others. There are two reasons, I think, why an attorney would tell a client they do not need a trust.

The first is ignorance. Many attorneys have had no training in trusts at all, as they most likely only took one course on trusts and estates while attending law school. Trusts are a small part of that, and the course may have focused primarily on the history of trusts and the tax reasons for having a trust. Thus, the attorney might truly and honestly believe that trusts are for wealthy people who need to minimize or avoid estate and inheritance tax. They have

not read chapter 2 of this book and do not realize the importance of trusts for most people.

The second reason is related to the first in a sense. Attorneys know how to make wills and how to probate an estate. Most do not know about trusts and have never settled an estate using a trust or acted as a trustee—I actually prepare trusts for other attorneys who are not familiar with them, giving them the document based on information from their clients. I am sure they take my name off everything when they present the package to the client.

There may be an element of self-interest in trying to develop and maintain a probate practice with some attorneys. As I stated in my introduction, attorneys are taught to build their probate practice with a will file and will safe. It may be cynical to suggest that a lot of attorneys specifically steer people toward probate rather than trusts just for the money involved, but I can assure you that some do.

How do you keep clients and build up your probate practice (which is very lucrative)? One traditional method is to have a will safe (a locking file cabinet where clients' original wills are kept). After the will-signing ceremony, the lawyer gives the client a nice photocopy and holds the original for safekeeping. At the death of the client, the executor has to go back to the lawyer to get the will for probate and nine times out of ten will hire the lawyer to do the probate. Good business. Some attorneys even have themselves written into the will as attorneys for the estate or as executors. Why do you think the will envelope has the law firm name, address, and telephone number on it? So the family will know who to call to do the probate. Again, good business.

Those attorneys who want to specialize in estate planning are better served by developing trust expertise so that they do the best job for their clients who in turn should refer others to them. This is becoming much more common as continuing education programs for attorneys are now focusing on using trust-based estate plans in many states.

MY WILL DOES NOT HAVE TO GO THROUGH PROBATE

I hear this a lot, particularly from older clients (my age). For some reason, a lot of people believe that a will does not have to be probated. Well, in some cases that may be true—for example, if one spouse dies and the couple's property is all jointly owned, there may be nothing separately owned by the deceased to probate. But at the death of the survivor, probate would be

absolutely necessary for all the assets left in the survivor's name.

I had a client point out to me the specific language in the will that clearly said it did not have to be probated. Here is the paragraph:

"It is my strongest intent that my estate not be subject to supervised probate court administration, and I therefore direct that such intent be followed as permitted by the Michigan Estates and Protected Individuals Code, or as may be available under current law."

Sounds like no probate. But that is not what it really says. It says that the client does not want "Supervised Probate Court Administration." In Michigan, there are two basic ways to probate an estate: an informal procedure and a formal procedure. Saying you do not want the supervised administration just means that you want the unsupervised form. It is still probate, it still takes a long time, and it still costs a lot of money. Unsupervised, though, is easier for the lawyer. I think clients interpret this paragraph to mean what it seems to say rather than what it really means.

THE ATTORNEY ANNUAL REVIEW

I said before in the trust services section that an annual review is a good idea to keep the trust funded and up to date with a client's wishes. That was said in the context of a service, which provided that review for your lifetime for a one-time flat fee.

Paying an attorney for an annual review is not always necessary. I know there are attorneys who act like dentists, setting annual appointments for all their clients to go over their estate planning. In most cases, nothing needs to be done. That will be $300—see you next year!

But keeping your documents up to date and in line with your current circumstances is very important. It just doesn't have to be done annually. You should contact your attorney in the following situations:

1. Someone involved in the trust has died or has become disabled and is receiving governmental benefits.
2. You have changed your mind about who will get what after you die.
3. You have changed your mind about who will be in charge of your trust at your death or upon your disability.
4. You have new real estate to transfer into your trust and need to have a deed prepared (see chapter 8 on funding the trust).
5. Your financial situation has dramatically changed or you are starting a

new business.

Most of the time, this is not going to be an annual event. You may have several years go by during which you need no changes to your legal documents. The forced annual review is typically not needed. A good lawyer will let you know if there are changes in the law that necessitate a change in your documents and planning.

THE WILL AS A WAY TO FUND THE TRUST

One of the really reprehensible things I have seen done (this is my opinion, attorneys, so don't sue me) in trust practice by lawyers is using the pour-over will as a way to fund the trust with no attempt to fund it during the client's lifetime.

A "pour-over will" is a will that says if there are assets left in your name at your death that are not either in your trust or that pass to your trust under some sort of beneficiary or pay-on-death designation, you want those assets to be given to your trust after probate is complete—in other words, to "pour over" into your trust to be handled like any other trust asset. So it is meant as a backup document, just in case you forget to fund your trust with something. To repeat: if your trust is fully funded, the pour-over will is never used.

But some lawyers view the pour-over will as the funding mechanism for the trust. They put nothing at all into the trust during your lifetime. It is unfunded. Then, at your death, they probate the pour-over will and transfer the assets to the trust, before taking care of settling the trust.

This is a great deal for the lawyer. She can charge for creating the trust, creating the will, probating the estate, and settling the trust. There are a lot of attorney fees there—it's like getting paid twice for the same thing.

When properly done, you should have a completely funded trust with no assets in the name of the deceased at death, and therefore no probate should be necessary. With the instructions to the trustee I have included in the last chapter, your trustee should not need a lawyer at all at your death and should have no legal expenses beyond the creation of the original trust and any amendments that were made since that time.