

Lapse in Tax Law May Have Estate Lawyers Hustling for Nothing

The lapse is creating new demand for a specialty that has slowed in recent years because higher tax exemptions left fewer people in need of sophisticated estate-planning advice

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On Jan. 5, after it sunk in that Congress hadn't reinstated the federal estate tax that lapsed on Dec. 31, Chicago lawyer Thomas Handler sent an e-mail to about 2,000 clients for whom his firm provides estate-planning services.

"This situation is a very real mess, which leaves millions of Americans unnecessarily at risk," he said in the e-mail. "In the event that anyone does not wish to live with this current risk, a stop-gap provision can be put in place."

Handler, whose Chicago-based boutique, [Handler Thayer](#), focuses on will, trust and tax planning for wealthy individuals, families and their businesses, received more than 20 e-mail responses and a dozen phone calls from clients within 24 hours.

For Handler and others who specialize in trusts and estates law, the year has started with a rush. Lawyers across the country are scrambling to field calls from clients worried about how the one-year lapse in the estate tax affects their legal documents. They're sifting through client files to pinpoint those at greatest risk of facing complications and contacting clients by e-mail, phone and letter. They're preparing to revamp wills, trusts and wealth-transfer documents.

Congress stunned trusts and estates lawyers by not enacting a new law last year that would have extended the estate tax beyond the long-scheduled Dec. 31, 2009, expiration date. That meant that the 45 percent tax last year on estates of more than \$3.5 million simply went away this year. For the moment, the House of Representatives has passed a bill that would reinstate the 45 percent rate, but senators are still at odds, with the Republicans pressing to lower what they call the death tax. The rate will snap back to 55 percent in 2011 if Congress does nothing this year.

"It's almost like a lawyers relief act because clients have to examine their documents to figure out if they're protected or not," said Andrew Gelman, a Chicago partner at [Holland & Knight](#). "I don't want to call it chaos, but everything is in limbo," he said.

The lapse of the estate tax, and related levies such as the generation-skipping tax, is creating a burst of demand in a legal specialty that has slowed in recent years because higher tax exemptions have left fewer people in need of sophisticated estate-planning

advice. The current demand is likely to last at least a year, lawyers say. They also predict a surge of litigation, which could last several years, as family fights break out over the lack of clarity in documents for those who die this year.

Handler pointed to one client couple who face what is probably the most common problem. The couple, including a husband in poor health, have a \$35 million estate. In the event of his death, their estate plan grants their children as much money not covered by the estate tax as possible, with the wife receiving the remainder. As of Jan. 1, that means the children will get everything and the wife will get nothing if the husband dies this year. Aside from that key issue, a host of complicated formulas for calculating the most advantageous distribution of funds have been thrown off by the lapsed tax.

Although trusts and estates lawyers generally are seeing longer hours that will result in more billing, most don't expect there to be enough work in the end to merit hiring more attorneys.

Max Gutierrez, a [Morgan, Lewis & Bockius](#) partner in San Francisco, laments that some clients will end up rearranging their plans only to have those changes become obsolete or prove needless if Congress acts this year. "It's going to create a windfall, but I hate to take money from clients for no real purpose," he said.

Gutierrez and other lawyers point out there will also be many hours for which they cannot bill, including time spent reviewing files that don't lead to clients needing or requesting document changes.

Carol Harrington, the Chicago partner who leads [McDermott Will & Emery](#)'s 45-lawyer private client practice group, is reviewing a 125-page list of clients who might need services. "This is a huge time-waster," she said. "We're going to spend hundreds of hours just trying to figure out what it all means."

The reviewing and rewriting may continue even beyond enactment of a new law. If Congress makes any of the tax revisions retroactive to the beginning of this year, as many suspect it will, there will inevitably be legal challenges, leaving clients uncertain of the final impact as the court action plays out.

CLIENT DROP

The current whirlwind of activity is also unlikely to change the real bottom line for trusts and estates practice groups. Although many major firms might have been hustling to advise clients on estate tax issues some 30 years ago, today the practice area has mainly become the domain of smaller specialty firms.

Partners tend to bill on average \$500 to \$600 an hour. For instance, Handler Thayer's partner rates start at \$350 and average \$550, Handler said. At a bigger firm, Gutierrez of Morgan Lewis charges \$725 an hour. Some of the best-known New York lawyers are charging \$1,000 or just more than that.

But even at firms where lawyers charge top rates, the pool of wealthy individuals who need these services -- generally those with estates worth at least \$7 million -- is so small that the practice doesn't add up to the kind of revenue that big firms typically target. The Internal Revenue Service says that, from 2001 to 2007, the number of estate tax returns dropped from more than 108,000 to about 38,000. Of those who filed for 2007, slightly less than half actually paid estate tax.

To the extent that large firms still offer the services, they tend to do so through practice groups of fewer than 15 lawyers. McDermott Will and Holland & Knight are two of the few big firms with groups of more than 40 lawyers.

Large firms kept a modicum of such services available to meet the personal legal needs of executives at big corporate clients, said Carlyn McCaffrey, a partner who chairs the estate-planning practice at New York's [Weil, Gotshal & Manges](#). There are about nine lawyers in the area at her firm, she said, and it's been about that same number for the 35 years that she's been there, even as other groups have grown.

At a Jan. 7 meeting of the Chicago Bar Association's Estate and Gift Tax Committee, Handler said one attorney got a laugh when he quipped that it's fun to finally be in a "hot" area of the law. That fact may also make it easier to put through the 5 percent rate increase that Handler has planned for March 1.