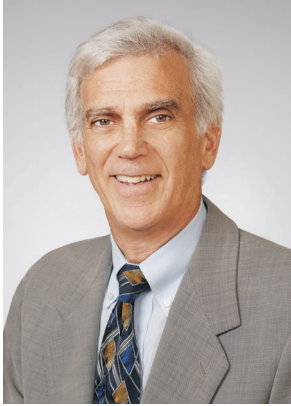


## TAX ANALYSTS EXCLUSIVE

## Conversations: Jeffry Bernstein

By Sam Young — [syoung@tax.org](mailto:syoung@tax.org)



In November Jeffry Bernstein will receive the Joanne M. Garvey Award at the California State Bar Taxation Section annual meeting in San Diego. The Executive Committee of the Taxation Section's award recognizes lifetime achievement and outstanding contribution in the field of tax law.

Bernstein is the senior tax partner at the San Francisco firm of Coblenz, Patch, Duffy & Bass LLP, where he represents businesses, individuals, and families in income, estate, and property tax matters. He has also taught taxation, with stints as a visiting professor at the University of California Berkeley School of Law (formerly Boalt Hall) and as an adjunct professor in the Master of Laws in Taxation program at Golden Gate University.

Bernstein recently met with Tax Analysts legal editor Sam Young to discuss the significance of receiving the Garvey Award, trends during his decades of tax practice, and future issues in taxation in California and at the federal level.

**Tax Analysts:** Congratulations on the Garvey Award. Could you tell us what it means to win the award and to be in the company of previous winners?

**Jeffry Bernstein:** I am very honored to receive the Garvey Award, as it is a recognition of my achievements by my peers in the tax community. It is very special to me because I've been practicing law in California for 31 years with the same law firm. I started practicing tax law in New York in 1971. Then I became a law professor and taught taxation at two law schools, finishing in Berkeley before joining my firm in 1978. That's how I came to the San Francisco Bay area.

I know Joanne Garvey, and she's an excellent tax attorney. To receive a lifetime achievement award and be considered in the same league as Judge Mary Ann Cohen, John Warren, Bruce Hochman, and George Damoose is a wonderful honor. The past Joanne Garvey Award recipients are quite an

august company of attorneys, and I have been witness to some of their contributions.

To receive a lifetime achievement award rewards and recognizes all my accomplishments and contributions to the tax bar, including serving on the Executive Committee of the State Bar, teaching law school, pro bono representation, and many committee memberships.

**TA:** Is there a sense that the award may be premature? How do you feel about a lifetime achievement award when your work isn't finished?

**Bernstein:** I have a lot of years to continue to practice and much work to do. At the Oscars, they give lifetime achievement awards, and the recipients go on still directing and acting. I intend to continue to practice and continue to give back to the tax bar. I don't know if I'll do another 31 years, but I have a very active full-time practice now.

Our firm is about 70 lawyers, with 8 lawyers in our tax group — all practicing in different areas of tax law. We have a few who do income tax with me. I feel that I can continue to practice for many more years and eventually pass the practice on to some very talented partners and associates.

**TA:** So what's next for you? What do you hope to accomplish?

**Bernstein:** I enjoy being a generalist tax lawyer dealing with all sorts of different tax issues, including tax controversy and California tax matters. I'd like to continue providing creative and good representation for my clients. I've developed expertise in areas such as closely held businesses, where we represent entrepreneurs who own their own businesses, and in real estate development. We not only resolve their business tax issues — whether it's corporate or limited liability companies or partnerships — but also address their personal family wealth planning.

I've really enjoyed developing this expertise, particularly when I work with the whole family. I work with the senior generation and their business, and because I have a background in estate and gift planning, I also provide them with planning to transfer the wealth to the next generation. I'm enjoying working with the next generation — working with their goals and their interests. If there is a generation gap, I feel I've overcome that.

**TA:** What makes for a good tax lawyer, in your mind?

**Bernstein:** It's the ability to communicate and explain tax law to your clients and your colleagues in what I would call plain English — not tax legalese. It's one of the most challenging attributes to teach young tax lawyers, and it is one of the most important.

We deal in code sections and regs, and it's a mystery to clients and colleagues unless you can

communicate it in a simple discussion. Teaching law school was instrumental in developing these skills.

**TA:** You mentioned the generation gap. What changes have you noticed in how tax law is practiced during your years of practice?

**Bernstein:** Tax lawyers coming out of law school in the last few years are coming on to a completely different slate than when I started. First of all, they're antibooks, you might say. Everything is computer based. Obviously, as a tax lawyer for over 31 years, I've been wedded to books for research and less to working on a computer for research.

Also, the newer generation is so accustomed to working with computer screens that they miss interrelating with other lawyers. They tend to isolate themselves in their research as opposed to reaching out to more colleagues and contributing to the cross-fertilization of the tax world. The tax lawyers of the next generation need to have more communication with each other on a face-to-face basis, and not through screen messages.

At my own firm, we have a young associate who's doing very well. But we want her to understand where the tax laws came from. It's so important to understand why these changes were made in the tax law, why this statute was enacted or why a ruling was issued, and what the impetus was for doing that. It's very important to understand the background, because if you just pick up a statute or regulation or ruling cold, you don't get the flavor for the provisions.

I remember when the code was one book, and the regulations were one. You know how big they are these days.

The tax law has expanded exponentially. The publications that are out there have expanded; the pronouncements from the government — partially a direct contribution from Tax Analysts, getting the government to release the private letter rulings, the technical advice memorandums, and the general counsel opinions, etc. — provide tremendous information about the thinking of the government, but have added to the enormous burden of reading and keeping current. There's a lot more out there than 31 years ago when I started practicing in California.

Thinking back to 1978, when I was a law professor and teaching tax, there were no personal computers, there were no BlackBerrys, and there were no cellphones.

The practice of tax law has become more specialized and demanding. You can be working on a tax problem or be drafting an agreement and one will send it to opposing counsel instantaneously.

Everybody expects the response to be quick. You don't have the luxury of a two-day turnaround. Your clients are looking for an immediate response,

which means you've got to be at the top of your game to recognize the issues and to be able to resolve their tax problems. It is harder to be a generalist in the tax area, as the trend is to specialize.

**TA:** How has that affected your interaction with tax authorities?

**Bernstein:** It's a mixed bag. In working with the IRS Appeals Office, I've seen some quick responses and I've seen some matters dragging on for a long period of time. I don't think the government has caught up to the private practitioner-client world. Maybe their workload is heavy and they're understaffed, but it seems like they don't have that ability to give a quick response on many issues. The government has made enormous strides in responsiveness, but not in every area. They are using e-mail for better communication.

In private letter rulings, I think they've gotten better in terms of timing, especially if you tell them there's an urgency to it.

I have some pro bono cases, and maybe when you get into offer in compromise scenarios, they're overwhelmed, but delays in providing a response to a taxpayer leaves them with no relief from the situation, particularly if someone owes a lot of money to the IRS and is trying to get a settlement to move on with their life.

**TA:** What are your thoughts on changes in tax policy over the past three decades, both within California and on the federal level?

**Bernstein:** Let's start with California. California tax policy has been really deficient over the years. We don't readily conform to the changes to the code because of revenue concerns. So we have many differences between federal and state tax reporting. There are bills pending now to get some conformity, but it doesn't happen easily.

California has a very outdated tax administrative system. We don't have an independent tax court comparable to the United States Tax Court, or comparable, for example, to New York state, which has an administrative tribunal. We have hearings and appeals handled internally by the same people who work for the same tax agency. Elected officials serve on the State Board of Equalization, but administratively they tend to rule against the taxpayer and to follow the staff recommendation.

When I joined the Executive Committee of the State Bar, which was back in 1989, that was one of the issues on which I was an advocate. It seems to come up regularly — that something needs to be done — but the state hasn't moved. The current system isn't keeping up with forward-thinking tax policy.

On the federal level, I think there's been tremendous interest and discussion on changing the tax

system. There have been many studies done on value added taxes and alternative tax systems, and how to get rid of the alternative minimum tax.

It seems that the policy discussions that are really interesting in the academic community are left in the dust when Congress takes up issues in the tax world. What they look to is “how can we raise revenue?” or “what loopholes do we close?” or “how can we kill a fly with a sledgehammer?”

I don't blame the government lawyers, because they come in with good ideas, but it doesn't seem that Congress is willing to tackle a major policy change in the tax law. We went from the '54 code to the '86 code, and there were certain substantial differences, but since then, things have been pretty stagnant in terms of thinking about how we can improve our tax system.

**TA:** Is that something you think could change? Do you see any potential for a major shift in tax policy?

**Bernstein:** If we lived in an ideal world, I think that there could be some significant policy changes, and we could come up with alternative tax systems, as other governments do.

The government needs a lot of revenue. We ran substantial deficits under the Bush administration. We are going to run even larger deficits with the stimulus and healthcare reform. The government needs the revenue, but I think the way our Congress is so polarized, there doesn't seem to be the compromise we used to have between the political parties to get things done.

Legislation in the 1980s always seemed to get bipartisan support. We now seem to have a situation where you have party-line votes, and in the Senate if you get 41 votes, you pretty much have the vote of the minority blocking any changes.

In California, you have two diametrically opposed groups, one wanting to raise taxes to balance the budget — the Democrats — and the other, Republicans, making a sworn pledge that they won't raise taxes and want to cut services. There is no compromise between the parties, and this led to a budget crisis and a deficit. I think that's what's holding back major changes to tax policy.

I'm not a politician. That's just my reading. There's no bipartisanship in politics these days, and you need that to make substantial changes to the tax system. You need to get the public on board, and the public really only focuses on taxes around tax season or when they hear there might be higher taxes.

**TA:** What do you think is the future of the federal estate and gift tax? What do you expect to see, and what would you like to see?

**Bernstein:** People joke about people waiting to die until next year when there is no tax. Next year the tax is scheduled to be repealed, but I don't see it happening, even as slow as our legislative process is. What I do see happening for next year is a temporary freeze of the current rates. It will be an easy fix to push the issue into the next tax year.

I'd like to see gift and estate tax reunified, because I think separating them has not only created confusion, but I think it undercuts the fairness of the statutes. The current \$3.5 million exemption with a 45 percent rate is a fair estate tax and eliminates probably 97 or 98 percent of the populace from what they call an unfair death tax. They should also make the exemption portable between spouses.

What the opposition never takes into account is that all the appreciated assets are never subject to income tax when they're disposed of. When you get the step-up in basis at death, you never incur an income tax liability. It's not really a death tax. It's really indirectly a tax on your wealth.

Another part of the estate tax program is the social policy of equalizing wealth in the country. There is some merit to this, and I think it's supported by some of the wealthiest people in this country. The opposition seems to be grounded in saying you're going to take away people's farms and businesses, but there are provisions in the code that provide some relief.

If they push [a legislative decision] over into 2010, I think there's a chance that the law may go back to a lower exemption amount. In 2010 it expires, and in 2011 it goes back to the \$1 million exemption. They then could plug that number into the budget and say we'll raise \$X billion at the \$1 million exemption level with the higher tax rate.

So I see a secondary argument popping up for the 2011 year — that they may not hold the exemption at \$3.5 million but it may go down so Congress can raise revenue. I think it will be an interesting congressional battle.

**TA:** Do you expect a 45 percent tax rate regardless of the exemption level?

**Bernstein:** I think it will probably stay about that. I know some Republican senators have pushed for a 15 percent rate, but I think the maximum estate tax rate will probably be in the 45 percent range. ■