

Some Things to Consider When Planning Estates

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INTRODUCTION

While some lawyers love the excitement of litigation and trials, most estate planning attorneys are perfectly happy to remain far away from a courtroom. However, litigation among beneficiaries as estates are probated is increasing, and malpractice claims against estate planning attorneys are on the rise. This article raises some talking points to help you minimize your exposure to the courtroom in your estate planning practice. Take a few moments to think about the issues raised in the italicized hypotheticals, and incorporate the ideas discussed throughout the article, to reduce your malpractice risk.

COMMUNICATION

Pennsylvania Rule of Professional Conduct 1.2

Pennsylvania Rule of Professional Conduct 1.4

You have done corporate work for Joe for several decades, and now he has asked you to help him out as he administers his father's estate. You go over his role as personal representative, including mentioning that the estate will need to file federal and state tax returns. Since you have never done tax work for Joe before, you don't intend to start now. You just wanted to make him aware that he needs to file taxes on behalf of his father's estate. Some time later Joe calls to ask you why the IRS is saying the estate didn't meet its tax filing obligations – didn't you do what you said you would do?

Pennsylvania Rule of Professional Conduct 1.2 addresses the scope of representation and allocation of authority between a client and lawyer. Pursuant to Rule 1.2(c), a lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Pennsylvania Rule of Professional Conduct 1.4 requires “reasonable” communication between a lawyer and a client to allow the client to effectively participate in the representation. The duty imposed by Rule 1.4 includes the duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. This means that even if the client comes to the lawyer with what the client believes to be a simple question, the lawyer should analyze all aspects of the situation to be certain that important issues are not overlooked.

Here, it appears that the lawyer analyzed the situation and informed the client that the client's role as personal representative would require him to ensure that the estate file federal and state tax returns. However, the lawyer arguably did not meet his burden under Rule 1.2 or Rule 1.4 because he did not work with the client to develop a plan for how to address tax issues relating to the administration of the estate. The lawyer intended to limit the scope of his

representation to eliminate representation relating to tax issues, but the lawyer failed to adequately communicate this to the client or obtain the client's consent as required by Rule 1.2.

It is important to communicate what you are agreeing to advise a client on and what you are not. For example, if your client is the personal representative of an estate, you might agree to provide advice concerning administration of the estate, probate of the will, preparation of court inventories and accountings, distribution of estate assets (including when, how much and to whom), and publication of notice to creditors. However, there are likely limits to your expertise and the scope of your advice. Be clear about the boundaries of your representation. For example, (if it applies) make it clear that you are not an investment advisor and cannot provide direction on how the personal representative should invest estate assets. Get this understanding in writing, preferably in a document signed by the client.

Clearly delineate who will do what. Set forth, in writing, exactly which tasks you are agreeing to complete and which you are not agreeing to complete. In the hypothetical above, the engagement letter could have resolved all ambiguity by including a statement such as this: "The law firm is not responsible for preparing or filing estate tax returns and we are not responsible for any deadlines associated with the filing of such returns or the payment of any estate taxes. You should immediately retain a qualified tax professional to handle these matters."

Some questions to address before you begin representation include:

- Has the client determined how he wants his estate to be planned and merely retained you to draft documents reflecting his intent?
- Has the client retained you to advise him on how best to plan his estate?
- Are you competent to provide advice concerning investments or tax analysis?
- Have you been retained to actually file estate taxes?
- Have you been retained to fund and/or monitor a trust or merely to draft the trust documents?
- If representing a couple, have you explained how conflicts might arise and what will happen if they do?

GATHERING INFORMATION

Pennsylvania Rule of Professional Conduct 1.1

Pennsylvania Rule of Professional Conduct 1.3

An elderly woman who was never married and has no children comes to you asking to prepare her will. She tells you she doesn't have much in savings, but regardless her will should be simple because she wants to leave everything to her only nephew. You drafted a simple will and considered your work done. However, after her death you find that her "minimal savings" are actually worth almost \$10 million....and you didn't do any tax planning for the estate, resulting in a significant hit to the nephew's actual inheritance.

Being competent and diligent go hand in hand. Pennsylvania Rule of Professional Conduct 1.1 requires a lawyer to provide competent representation to a client, and Rule 1.3 requires a lawyer to be diligent in that representation. Here, it doesn't appear that the lawyer necessarily took on representation that was beyond his expertise, but he arguably was not diligent in the representation because he didn't gather enough information to determine how to achieve the best result for his client. The lawyer's lack of diligence created a situation in which he did not competently represent his client.

It is impossible to give appropriate advice when you only have some of the information, and this is even more apparent in estate planning. It is essential that you gather all of the information necessary to properly advise your clients on how best to plan their estate. It is good practice to have clients fill out a form asking for information about all possible assets and debts, and describing various familial relationships. Be sure to get actual copies of important documents like deeds, beneficiary designations, and documents showing ownership of accounts. Be sure you understand whether your client owns an asset outright or rather as a tenant in common or some other shared interest.

Be certain that your clients understand the consequences of specifically designating an asset to go to an individual as opposed to designating a certain percentage of the estate for that individual. If the client no longer owns an asset upon death, or if the values of various assets have changed significantly, there could be unintended and disproportionate distributions that could result in a malpractice claim.

While it can be awkward, it is important to have the "hard discussions" with your clients. Address family dynamics, especially if the estate plan is unequal toward similarly related beneficiaries. Discuss how stepchildren factor into estate plans, and be sure to plan for contingencies depending on which spouse predeceases the other. Be sure to fully understand and document all discussions and decisions to disinherit a natural beneficiary, or to provide significant assets to a charity or non-family member.

DETERMINING CAPACITY AND AVOIDING UNDUE INFLUENCE

Pennsylvania Rule of Professional Conduct 1.6

Pennsylvania Rule of Professional Conduct 1.14

Your client has three children, but has been estranged from two of them after a major disagreement ten years ago. He asks you to prepare an estate plan that specifically disinherits the two estranged children and leaves his entire estate to the other. After you have begun drafting the documents but before they are fully executed, your client has a stroke and his doctors say he is no longer competent to make decisions and has less than a month to live. What do you do?

Pennsylvania Rule of Professional Conduct 1.14 addresses a lawyer's ethical obligation when dealing with a client with diminished capacity. A lawyer is to maintain a normal client-lawyer relationship with the client as far as reasonably possible, and when a normal client-lawyer relationship is not possible the lawyer may consult with those who have the ability to take action to protect the client and seek the appointment of a guardian ad litem, conservator or guardian. In talking with others about the representation of a client with diminished capacity, a lawyer must also be aware of his ethical duties under Rule 1.6, which addresses confidentiality of information.

Here, the client's capacity was diminished after the substantive representation was essentially complete. This means that the way the lawyer handled the representation and documented the client's intentions before the diminished capacity is very important. This also means that the lawyer should carefully assess his obligations to the client with diminished capacity under Rule 1.6 in deciding whether and how to take action to protect the client's interest. Especially when the lawyer may be working directly with a relative of the client or a guardian or conservator, the client must be aware of the potential for undue influence.

Appropriately documenting files is invaluable, especially in situation where a client's capacity is later diminished. While you cannot prevent disgruntled disinherited heirs from being angry or even from filing suit against the estate, you can take steps from the beginning of the representation to protect your own interests. When documenting the file, it is not enough to simply state what decision was made by your client. Be sure to fully document the questions asked (by you and by your client or anyone else present), summarize the discussions, information and advice given, and indicate all reasons behind decisions made and choices rejected. Having the client sign a summary of what was discussed and decided can go a long way toward proving intent after the client can no longer testify due to incapacity or death.

Technological advances make it relatively easy to conduct business without ever being in the same room. Avoid this temptation when preparing estate planning documents. It is imperative that you meet with your clients face to face, especially if there could be any allegation of undue influence or lack of capacity. Be sure to fully document the file, and consider having another lawyer or staff member present to summarize each meeting. It is good practice to fully investigate issues of mental capacity, and even obtain a doctor's evaluation and opinion before preparing an estate plan. Pay special attention to concerns about mental capacity or undue influence if a natural beneficiary is being disinherited, or if a non-family member is to receive a large percentage of the estate.

Undue influence can refer to a beneficiary putting pressure on the testator, but it can also relate to a beneficiary pressuring the lawyer. Be careful not to succumb to pressure to administer an estate too quickly. Beneficiaries may pressure you to distribute funds early on, before all of the assets are accounted for or portions of the estate's liabilities are fully settled. If a mistake is made and a distribution is made in error, it can be difficult or impossible to recoup those funds,

and beneficiaries who were harmed by the erroneous distribution will look to you (or your insurer) for their share.

WHO IS THE CLIENT?

Pennsylvania Rule of Professional Conduct 1.4

Pennsylvania Rule of Professional Conduct 1.6

A man comes into your office with his elderly mother, explaining to you that she wishes to prepare a will and other estate planning documents. While the testator seems to be competent, her son does the majority of the talking and she defers to him before saying anything herself. Her estate is to be left entirely to her son. At the end of the meeting the son writes a check from his personal account for the retainer. He provides his telephone number and email address, saying it is best to communicate through him since his mother is hard of hearing and averse to talking on the phone and using a computer. Who is your client? Have you assumed a relationship with an intended beneficiary? Do you have a duty to protect the rights of that beneficiary?

Pennsylvania Rule of Professional Conduct 1.4 addresses a lawyer's duty to communicate with a client. In situations where the client is accompanied by a friend or relative, or where the client prefers to communicate through an intermediary, this duty can become murky. It is important to remember who your client is, to document who your client is, and to carefully consider your duties to that client under Rule 1.6, which sets forth a lawyer's duty to protect the confidentiality of a client's information. It can be equally important to document who your client is not.

In some jurisdictions, estate planning attorneys can be sued for malpractice under theories of breach of fiduciary duty to non-clients (like the son here) who are intended beneficiaries of trusts and wills, or under tort theories because the lawyer harmed the rights of foreseeable beneficiaries.

Non-client beneficiaries have successfully sued lawyers for errors such as failing to avoid or minimize tax consequences in estate planning, drafting errors or ambiguities that opened the door for costly litigation that would have not been necessary absent the malpractice, or failing to otherwise advise beneficiaries or executors and protect the assets of the estate.

One way to reduce the risk of malpractice claims from non-clients is to be very clear in engagement letters who the client is (and is not), document the file thoroughly, and be absolutely certain to deal directly with the client and not through a non-client relative or friend. If it is not possible to communicate directly with the client, be sure to take steps to determine competency to create estate planning documents.

In some cases, a lawyer might represent beneficiaries of an estate in entirely unrelated matters. Be clear in retainer agreements what you have undertaken to do for each client, and what you have not. A beneficiary who claims you are actually *her* lawyer (instead of just her now deceased father's) may argue – successfully – that you should have been looking out for and protecting her interests.

ADDRESSING CONFLICTS **Pennsylvania Rule of Professional Conduct 1.7**

Your best friend and her husband of 20 years ask you to prepare their estate plans. They each have children from previous marriages, but have been married to each other for so long they consider themselves one big happy family. Most of your communication is only with your best friend, but you assume she has spoken with her husband about everything. Everyone is busy and an engagement letter never gets signed, but there is really no need to be so formal with friends, right?

Actually, there is always a need to be clear about issues that could arise if the worst scenario happens. For example, it is good practice to address potential differences of opinion between spouses when drafting estate planning documents. Should significant disagreement occur, it may be necessary for the lawyer to cease representing both spouses relating to an estate plan.

Pennsylvania Rule of Professional Conduct 1.7 sets forth the general rules relating to conflicts of interest. A lawyer shall not continue to represent a client if there is a significant risk that the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, unless the lawyer obtains informed consent.

Many malpractice allegations derive from perceived or actual conflicts of interest. It is best to address any potential conflict directly from the outset, and make the relationships between and among interested parties clear in engagement letters. Some conflicts can be waived, and it is important to get such waivers in writing along with a clear explanation of the conflict and a statement that the client understands what rights are being waived. Some conflicts cannot be waived – be sure to consult your local rules or ethics board if you are unsure.

CONCLUSION

It is impossible to eliminate all malpractice risk, but being smart about your relationships with clients and non-clients, asking the tough questions, and being thorough when documenting your files can go a long way toward either avoiding malpractice claims or defending them should they arise.