

Client Intake in Estate Planning

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Overview of Estate Planning Services

Common Estate Planning Services Include:

- ▶ Preparing wills, trusts, living wills, powers of attorney, and other related documents;
- ▶ Reviewing financial holdings and life insurance;
- ▶ Providing guidance on family issues;
- ▶ Assisting the client with asset transfers;
- ▶ Transferring a business interest;
- ▶ Facilitating lifetime gifting;
- ▶ Minimizing estate taxes;

Overview of Presentation

- ▶ Initial Consultations
- ▶ Engagement Letters
- ▶ Joint Representation
- ▶ Rules of Professional Conduct
- ▶ Who is the Client?
- ▶ Capacity Issues
- ▶ Storing & Protecting Client Information

Why is Client Intake Procedure So Important?

- ▶ Sets the tone for your relationship;
- ▶ Having an established intake procedure avoids problems that can otherwise arise. Problems such as:
 - ▶ Fee Disputes;
 - ▶ The Scope of Work;
 - ▶ Timeframe;
 - ▶ Who You're Representing;
 - ▶ Conflict Issues;
 - ▶ What are you planning for?

Initial Consultation

- ▶ In most cases, this is the first meeting between the attorney and the client.
- ▶ A good first impression is essential to building a lasting relationship.
- ▶ How much time does it take to make a first impression?
 - ▶ About 30 seconds.
- ▶ A bad first impression can take hours to rectify, and the attorney is rarely given the chance.

Initial Consultation

- ▶ Let the client do the talking at first and adapt your style to the client.
- ▶ Watch your body language!
- ▶ REMEMBER: “No one cares how much you know until they know how much you care.”
- ▶ Should you use a form client intake questionnaire?

Initial Consultation

- ▶ What types of information should be gathered.
 - ▶ Family Information
 - ▶ Names, Relationships, Family Tree
 - ▶ Dates of Birth
 - ▶ U.S. Citizenship
 - ▶ Marital status
 - ▶ Contact Information
 - ▶ Other Professionals (e.g. accountants, investment advisors, etc.)
 - ▶ Financial Information
 - ▶ Real Estate
 - ▶ General “Non-Qualified” Assets (e.g. bank and brokerage accounts)
 - ▶ Retirement Accounts (e.g. IRA, 401(k), Pensions)
 - ▶ Life Insurance

Initial Consultation – Client Financials

Prepare a Spreadsheet:

Asset	Spouse 1	Spouse 2	Joint
House (Equity)			\$650,000
Checking/ Sav	\$45,000	\$17,500	\$10,000
Brokerage		\$25,000	\$385,000
IRA/401(k)	\$200,000	\$400,000	
Life Insurance	\$1,000,000	\$250,000	
Total	\$1,245,000	\$692,500	\$1,045,000
Total	\$2,982,500		

Initial Consultation (cont.)

- ▶ Significant Debts
- ▶ Whether they are expecting an inheritance
- ▶ Medical/ Health Information
 - ▶ Burial or cremation?
 - ▶ Religious Laws or doctrines?
- ▶ Estate & Inheritance Taxes
- ▶ Charitable inclinations
- ▶ Review procedure and timeline
- ▶ Review Probate Assets vs. Non-Probate Assets
- ▶ Review the types of documents that you're recommending (e.g. wills, trusts, powers of attorney, etc.)

Engagement Letters

- ▶ Best practice is to require a signed agreement for legal services.
- ▶ Essentials to include:
 - ▶ Identify the Client
 - ▶ Joint Representation?
 - ▶ Detail the Scope of Work
 - ▶ Consider specifically excluding any work not included
 - ▶ Fees & Expenses
 - ▶ Billing & Retainers
 - ▶ Termination

Scope of Work

- ▶ Included: We understand that, initially, our engagement will be to assist you in preparing a comprehensive estate plan for you. This will include the preparation of new wills, powers of attorney, living wills, an irrevocable life insurance trust, and various testamentary and/or lifetime trusts deemed necessary from time to time. Our services will also include estate tax planning, asset protection planning, and trust planning for your family.
- ▶ Excluded: It should be understood that we are not investment advisers or insurance analysts. So, we will not undertake to review or analyze your investment or business activities, the suitability or diversification of your investments and other holdings, or the financial standing, operating policies or solvency of the firms or institutions with or through which you maintain accounts, insurance policies, contracts, or assets.

Fees & Expenses

- ▶ Hourly Rates or Flat Fees?
- ▶ In addition to legal fees, you may be required to pay for extraordinary expenses incurred in our representation. Such expenses include messenger service, expedited or registered mailing, photocopying and postage, recording fees, and any other necessary expense. Any costs incurred by us not previously advanced are your responsibility and you will be advised of all such costs incurred. In addition, in the event we are forced to initiate collection proceedings in any court, administrative hearing, or otherwise, you agree to pay all costs and attorneys' fees, plus interest, incurred in any such collection effort.

Retainer

- ▶ It is our policy to require that our clients provide us with an initial retainer and expense deposit which has been established at \$_____ for this matter. Fees and expenses will be billed to you each month and we will anticipate monthly payment of those amounts so that the retainer can be maintained throughout the engagement. Any balance at the end of the representation will be applied against payment of the last invoice on the matter and any remainder will be refunded to you.

Payment of Invoices & Interest

- ▶ If you want the ability to charge interest on unpaid bills, you must indicate that in the agreement.
- ▶ Each invoice is payable upon receipt. Any unpaid balance not paid within thirty (30) days of the billing date may incur interest upon such balance at the rate of 1.5% per month. In the event we receive a payment from you at a time when more than one invoice is outstanding on any one or more matters, we will apply that payment to any such invoice(s), unless the payment is accompanied by the remittance copy of the invoice(s) being paid or by some other written indication from you directing how the payment is to be applied. It is the policy of the Firm to discontinue representation in a manner in accord with the Rules of Professional Responsibility for any client whose account is more than forty-five (45) days in arrears, unless special arrangements are made.

Termination

- ▶ Every client has the right to terminate our representation at any time for any reason. We have the same right upon giving the client reasonable notice so that suitable arrangements can be made by the client to obtain alternative representation, in accordance with the Rules of Professional Responsibility.
- ▶ Following termination by us, we will continue to provide representation in the matter for a reasonable time, at the client's request, until arrangements can be made for alternate representation. However, our services will consist of only those necessary to protect the client's interests and prevent prejudice.

No Guarantees

- ▶ We will act on your behalf in a courteous, conscientious, and diligent manner at all times to achieve solutions that are reasonable and just for you. However, we do not guarantee or predict what the final outcome of this matter will be. Furthermore, we are not responsible or liable for errors or omissions by any third party engaged by you (e.g. other attorneys, CPAs, financial advisors, appraisers, etc.) or for any taxes, interest, penalties or expenses incurred as a result of such work.

Joint Representation

- ▶ Two specific duties owed by a lawyer are implicated:
 - ▶ Duty to avoid conflicts under RPC 1.7
 - ▶ Duty to protect confidential information RPC 1.6
- ▶ Best practice is to include language in the engagement providing disclosure and seeking written consent.
- ▶ Also, see the decision in A. v. B. v. Hill Wallack, 158 N.J. 151 (1999)

Joint Representation (cont.)

- ▶ It is common for a husband and wife to employ the same attorney to assist them in planning their estates. You have taken this approach by asking us to represent both of you with your estate planning. It is important that you understand, because we will be representing you both, that collectively you both are considered our client. Accordingly, any matter that one of you might discuss with us may be disclosed to the other. Ethical considerations prohibit us from making any changes to either of your estate plans without your mutual knowledge and consent.
- ▶ If a conflict should arise between you during the course of your planning or if the two of you have a difference of opinion concerning the proposed plan for disposition of your property, or on any other subject, we can point out the pros and cons of your respective positions or differing opinions. However, ethical considerations prohibit us, as the attorney for both of you, from advocating one of your positions over the other. Furthermore, we would not be able to advocate one of your positions versus the other if there is a dispute at any time as to your respective property rights or interests, or as to other legal issues between you.
- ▶ If actual conflicts of interest do arise between you of such nature in our judgment it is impossible for us to perform our ethical obligations to both of you, it would become necessary for us to cease acting as your joint attorney.

Ethical Issues to be Considered

- ▶ Estate planning is usually not adversarial.
- ▶ The attorney provides advice, not advocacy.
- ▶ New Jersey attorneys are subject to the New Jersey Rules of Professional Conduct (“RPC”), and several are noteworthy in this context.

RPC 1.1 Competence

- ▶ A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ▶ In the Estate Planning context, this can mean:
 - ▶ Attending seminars & performing research
 - ▶ Understanding the forms you have clients execute
 - ▶ No such thing as “Form Language”
 - ▶ Taking on matters that you’re comfortable with, and involving co-counsel, or simply referring matters that involve specialties outside your practice area

RPC 1.2 Scope of Representation

- ▶ Generally, a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.
- ▶ A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- ▶ Example: drafting a will without first reviewing the client's assets

RPC 1.5 Fees

- ▶ A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - ▶ the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - ▶ the fee customarily charged in the locality for similar legal services;
 - ▶ the time limitations imposed by the client or by the circumstances;
 - ▶ the nature and length of the professional relationship with the client;
 - ▶ the experience, reputation, and ability of the lawyer or lawyers performing the services;
- ▶ When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

RPC 1.6 Confidentiality of Information

- ▶ A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.
- ▶ Cornerstone of this duty is exercising reasonable care in protecting the client's information.
- ▶ Reasonable care, however, “does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access.” —NJ Eth. Op. 701

RPC 1.6 Confidentiality Cont.

- ▶ Estate planning attorneys routinely work with or are brought in by accountants, financial planners, investment advisors, insurance agents, etc.
- ▶ The attorney must obtain the client's consent before information can be shared, even when you might otherwise think that such consent is implied.
- ▶ If significant accounting or tax work is needed, consider drafting a Kovel Letter to bring the accountant within the framework of attorney-client protection.

Electronic Storage

- ▶ NJ Ethics Opinion 701:
- ▶ “The touchstone in using “reasonable care” against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then “reasonable care” will have been exercised”.
- ▶ Password protect whenever possible!

RPC 1.8: Conflict of Interest

- ▶ A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.
- ▶ Related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

RPC 1.8: Conflict of Interest (cont.)

- ▶ A lawyer shall not accept compensation for representing a client from one other than the client unless:
 1. the client gives informed consent;
 2. there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
 3. information relating to representation of a client is protected as required by RPC 1.6.
- ▶ Best practice is to avoid this entirely and require that fees be paid directly by the client.

RPC 1.9: Duties to Former Clients

- ▶ A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.
- ▶ Example: Attorney represents parents in the preparation of an estate plan. This plan includes lifetime trusts for children. After parents die, adult child seeks engage attorney to terminate the trust and to have the balance paid to him outright. What result?

RPC 1.14: Client Under a Disability

- ▶ When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

RPC 1.14: Client Under a Disability

- ▶ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian?

RPC 1.18: Prospective Client

- ▶ A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.
- ▶ A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client, and if no client-lawyer relationship is formed, is a former prospective client.

Who is the Client?

- ▶ Manny and Patricia have been clients for several years. You have prepared wills, trusts, and other basic estate planning documents for them. One day you get a call from Patricia telling you about her mother, who the day before suffered a minor stroke and who is now resting at home. Patricia wants to update her mother's will and arrange for her to be her mother's attorney-in-fact with the power to make lifetime gifts.
- ▶ Can you prepare documents for Patricia's mother?
- ▶ What legal considerations are implicated?

Who is the Client?

- ▶ What if Patricia's mother had also been your client for several years?
- ▶ What if Patricia's request constitutes a change from the estate planning you have performed for her mother?

Issues about Capacity

- ▶ One of the most common grounds to contest a will is to challenge the testator's capacity at the time of execution.
- ▶ Under N.J.S.A. 3B:3-1, any person at least 18 years of age who is of "sound mind" may make a will.

Issues about Capacity

- ▶ Sound Mind can be understood as a very general understanding of (a) the nature of the act of making a will, (b) the distributions contained within the will and the natural objects of the testator's bounty, and (c) the relationship of these factors. – see In re Blake's Will, 37 N.J. Super. 70 (App. Div. 1955) *rev'd on other grounds*, 21 N.J. 50 (1956).
- ▶ A very low capacity is needed. – see In re Landsman, 319 N.J. Super. 252 (App. Div. 1999)

Issues about Capacity (cont.)

- ▶ The law presumes the testator had the requisite capacity to execute a will. – see Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981).
- ▶ The burden is on the contestant to prove, generally by clear and convincing evidence, that the testator did not have capacity.
- ▶ Someone who has been declared mentally incapacitated may still have the requisite capacity to make a will. – see In re Frisch, 250 N.J. Super. 438 (Law Div. 1991).

Attorney as Fiduciary

- ▶ An attorney may properly prepare a will naming himself or herself as fiduciary, and may properly be paid for services in both capacities.
- ▶ See also N.J.S.A. 3B:18-6. “If the fiduciary is a duly licensed attorney of this State and shall have performed professional services in addition to his fiduciary duties, the court shall, in addition to the commissions provided by this chapter, allow him a just counsel fee.”
- ▶ N.J. Eth. Op. 487 (Dec. 1981)
- ▶ N.J. Eth. Op. 683 (Sept. 1996)

Terminating the Attorney-Client Relationship

- ▶ The engagement letter or agreement should address terminations.
 - ▶ Client may be unresponsive;
 - ▶ Client may withhold payment for services rendered;
 - ▶ Client may engage in conduct that places the attorney at risk;
- ▶ Attorney still has a duty of confidentiality. (See RPC 1.6)
- ▶ Attorney still has a duty not to engage in representation that would be adverse. (See RPC 1.9)
 - ▶ May be a good idea to obtain advance consent at the time of the engagement.

Destroying Client Documents

- ▶ A closed file may be destroyed after 7 years: “[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties.” 163 N.J.L.J. 220, 221 (January 15, 2001) and 10 N.J.L. 154 (January 22, 2001)

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