Terminating an Estate Planning Prospect or a Client

By Martin M. Shenkman

Introduction to Client Termination

Terminating a client relationship is rarely an easy or pleasant topic. No attorney wants to intentionally lose a client relationship and the billing stemming from that relationship. But the reality is that bad clients can present substantial challenges. They can drain a practitioner's energy and time and create more stress in what is an already stressful profession. Bad clients can represent write-offs of fees earned for work done, the increased potential for malpractice claims, and worse. So, firing clients is unfortunately a necessary part of any practice. The common occurrence of terminating clients does not make the ethical considerations simple, as attorneys owe certain ethical duties to clients. There is unfortunately little law on point, especially as to the nuances of when and how to terminate an estate planning client. This article will explore what are believed to be practical, ethical and other considerations in common estate planning scenarios where the issue of client termination might arise. But many of the discussions are hypothetical discussions intended to raise issues that practitioners should consider broadly in the context of terminating an estate planning client.

There are situations when counsel must withdraw. If the firm does not have the capability to handle the engagement, or the bandwidth to do so, or if the attorney handling the matter develops a health or other issue that prevents properly discharging their functions as counsel, withdrawal may be required. These situations are not addressed in this article, but certainly must be considered if applicable. Instead, this article will focus on permissible withdrawal, or termination of an estate planning client.

Risky Environment

Attorneys cannot limit their liability on a client matter. But in sharp contrast to that, the other members of the client's estate planning team (certified public accountant (CPA), wealth advisor, and appraiser) routinely can and do limit liability they face on a case. Attorneys should consider the worsening malpractice environment for estate planners, and especially for attorneys engaged in estate planning. Consider significant malpractice cases[1] such as *Raia*,[2] *Wellin*,[3] and *Rosen*.[4] Recently the *Overdeck* case was filed.[5] This environment should be a factor firms consider in evaluating whether to terminate a client that they view as worrisome. This environment may also be a factor in the determination as to whether the client may create an "unreasonable financial burden on the lawyer" under the Model Rules, as discussed below.[6]

Be Alert to Issues

Practitioners and staff should all be trained and reminded to be alert to bad client red flags. When these are observed, even by administrative staff, the partner in charge of the matter should be alerted. Sometimes staff see the issues that senior attorneys are shielded from. Sometimes clients selectively vent inappropriately. So, while one lawyer may have seen one issue, in the aggregate the issues seen by all firm members could be quite material and worrisome.

- A common red flag is needing something under a time pressured deadline that does not have a legal or tax basis supporting the purported deadline. What is the reason the plan needs to be completed so quickly?
- Another classic red flag is how many estate planners the client had before coming to your office. Perhaps that question should be part of every client intake process. With this factor it may be best to not accept the prospect as a client, so as to avoid the legal obligations due once the person becomes a client.
- The client is rude and disrespectful to administrative staff and perhaps associate attorneys, but respectful to the partner. For some reason that conduct seems to foreshadow worse problems.
- In estate planning, a client that is unreasonably seeking the "maximum" tax savings, to know which is the "optimal" planning technique, to have the "best associate" working on the matter, etc. may raise concern. As all practitioners are aware, there is rarely an assured "best," "optimal," or "ideal," of anything in an estate plan. Every technique has variations. There are often one or more alternative planning approaches. Almost every planning technique has potential negative consequences (e.g., removing an asset from the taxable estate may save estate taxes, but also may prevent a basis step up on death). Clients with unrealistic demands may indicate other future client issues. It is not as clear that these types of demands would give rise to a situation under the Model Rules where "[t]he client insists upon taking action that the lawyer . . . has a fundamental disagreement."[7]
- Every bill is an issue and cause for complaint.

If a client matter keeps the practitioner awake at night, is it worth the stress? Such stress might well be a harbinger

of potential worse problems that may come. It may just not be worth it. Often there is an underlying reason for those sleepless nights, or other attorney angst, and those should be identified and discussed internally in the firm.

Some practitioners do an annual inventory and review their client list. Rather than terminating a client at a moment when things are going wrong, some adopt a practice of simply focusing at least once a year on clients that are in the category of ideal client and those that are problematic. Several practitioners fire their worst clients each year. Do you follow such a process? Is that really a reasonable approach? One thing such an annual review does is it forces practitioners to assess their client base to identify problematic clients. Often, difficult clients do not improve. But identifying them at least puts the issues front and center so that they can be monitored to determine when they have crossed "the line" and should be terminated.

Termination is not only for bad clients. Practitioners, especially solo and small firm practitioners, should consider their actual capacity to serve the entirety of their client list. If you are overloaded, it is a reasonable decision, and ethically required, to limit your practice so that you can provide competent timely service. Culling "bad" clients annually may facilitate addressing this. Informing the client that certain aspects of their representation are beyond your ability or skillset may not be a joyful task, but it is prudent and may even be required by the ethical rules.

Easiest Termination: Reject Prospect

All practitioners want new clients. Every firm requires, especially in what is often a transactional practice like estate planning, new client matters to keep the pipeline full. But never let that zeal taint your view of evaluating new prospective clients. The simplest and safest approach to "terminating" a "client" is not to accept the prospect as a client. While there are limited ethical duties to prospects, like not disclosing any information they provided you with, they are less than the duties due to that prospect once they become a client. There are no ethical obligations on the attorney regarding refusing to accept a prospect that has not yet become a client. Once that prospect transforms into being a client, ethical duties will be owed which may make terminating that client difficult.

Some of the due diligence steps practitioners may consider before accepting a prospect as client may include the following.

Perform background searches: Google the prospect, the prospects business, company, etc. This perhaps should be done uniformly for all prospects regardless of the referral source or nature of the matter. If this is made a routine practice it is less likely to be overlooked in the haste to onboard a new client. Also, if it is done uniformly for all prospects, it may be more difficult for a prospective client to argue that you have singled them out for analysis because of their race, religion or other characteristics. While anyone may have some bad posts online, consider the quantity and nature of any items indicated. Is there a significant and negative pattern that is worrisome? Consider the nature of negative information relative to the proposed engagement. If the prospect indicated they were seeking professional services for asset protection and there are a large number of complaints or issues, that may raise a particularly acute concern. Consider the nature of the website and the client's description of their business endeavor for which they were seeking estate planning guidance. If the client indicated a net worth in their family business of $100 million but their website is unprofessional and appears to have been quickly put together by an amateur, might that suggest questions about the claimed nature or value of the business?

Evaluate whether the client's "story" makes sense: Listen carefully to what the prospective clients both say and do not say. Does the story add up? Are they asking for things or trying to reach goals that do not make sense relative to their circumstances? Are there worrisome gaps in what they describe? If you ask questions, do their answers make sense? If a prospect calls anxious to immediately get asset protection planning addressed, but then states that there are no particular issues or worries, why are they so anxious to get planning done quickly?

Inform prospects that you must receive a signed retainer agreement and an upfront payment before representation can begin: If a prospect never comes through with the requested signed retainer agreement and initial payment, why are you still speaking to them? Confirming your process to the client via email or in writing may avoid the issue of a person you view as a prospect viewing themselves as already having become a client. Simple steps like these can avoid problem prospects before they become clients.

Be alert to difficulties created by a prospective client: An unwillingness to cooperate or adhere to firm policies before representation really begins. If you set up initial meetings or calls are they timely? Have they rescheduled an unusual or unreasonable number of times? A step as simple as not deleting rescheduled appointments from your calendar but rather indicating that the "prospect rescheduled" can enable you to later search and identify how many times the prospect has re-scheduled.

Another issue to be alert for is evasive answers. For example, a prospect called for estate planning and indicated that they had sold their business for a substantial sum months earlier, but could not remember the name of the law firm that represented her in the largest transaction of her life? The pieces just do not fit.

Evaluate the scope of the work requested: Assure it is a reasonable fit for your skill set, etc. Sometimes prospects calling for what they describe to be an estate planning engagement have such strong matrimonial, litigation or other elements that may not fit your firm's skills, you may choose at the outset to insist on co-counsel or refer the matter out.

Discussions With the New Prospective Client

Use the initial call with a prospective client not only to explain what you might do to assist, but to explain how you work so that if the prospect is not a good fit that may be discerned before anyone proceeds with forming a client relationship. Depending on the nature of your practice you might explain some of the following to a prospective client.

What type of work is the prospect seeking and does that comport with how you practice? For example, if the prospect pushes for a flat fee for work or insists that all they need is a [fill in the blank], and that is not how you practice, be forthright to explain how you practice. For example, if you do not focus on cookie cutter work, documents or planning, explain that. If because of that you bill only hourly for work, and not on a flat fee basis, explain that. Some prospects want a free initial consultation and a flat fee for the work done. Some practitioners work in that manner, others do not. While it never feels good to turn away business, if the client's objectives or wishes for the relationship are materially different from the prospective firm, that may be preferable. "We do not provide estimates of fees or time, neither calendar time to complete the project nor hours to perform tasks." If the prospect is seeking a professional relationship that you are not comfortable providing, it is better for both of you to be upfront about that and not pursue the relationship. Termination before the prospect crosses the line to becoming a client should not raise ethical or other issues.

Will the Client Terminate Counsel?

Your client may terminate your representation at any time, for any or no reason. You might request in your retainer agreement that if the client will terminate you that they agree to give prompt notice of termination. But nothing can be done to restrict the client's right to terminate.

While attorneys have obligations due to clients, even bad clients, as discussed below, a client can terminate counsel at their whim. When a client makes demands that are unacceptable to counsel, whether they are demands for reductions in bills, late payment of bills, demands to handle the client's matter using an approach that the firm is not comfortable doing, etc., the firm might simply "draw the line" and advise the client that further work cannot be done unless the client changes their conduct. In some cases, the client may terminate counsel. That avoids any of the potential ethical issues the firm might face if they instead opted to terminate the client to resolve the situation.

In some situations, if counsel clearly indicates that certain conduct is not acceptable, or that certain positions or steps will not be taken by the firm, the client may "get the message" and change their conduct. That may be the ideal approach. In some situations, when a client realizes that the position they are demanding is so uncomfortable to counsel that counsel is refusing to proceed in that manner, they realize that perhaps the position is not worth the risks that might be involved. In other situations, the client will not accept that interpretation and wants to proceed in the manner that they wish. That may leave the firm reiterating their position so that the client may have to terminate counsel and proceed with another attorney.

However, pushing the client to the point of terminating counsel is not always an ideal approach. Will the client appropriately interpret the communications of what the firm indicated is not acceptable and terminate counsel? Will pushing the client to that point be more antagonistic than the firm being proactive and direct and terminating the client? Will the situation drag to resolution such that the timing becomes more problematic for the client?

Example: The client hired the firm to create an estate plan to shift the value of a private equity interest out of the estate before any agreement is reached with a potential acquirer that might fix the value at a higher level. The client has become a problem as to billing, work demands, tax positions the firm is uncomfortable with, etc. How long might the approach of encouraging the client to terminate the relationship and hire new counsel take? Would the more direct approach of terminating the client be more time efficient so that the client can hire other counsel to complete the plan the current firm is not comfortable with? How might the timing of these different paths relate to the potential for a letter of intent or other step occurring that might negate some of the planning objectives?

Model Rule of Professional Conduct 1.16(b)

The American Bar Association's Model Rules of Professional Conduct (MRPC) address termination of a client. These must be considered in taking any action to terminate. Also, the rules of professional conduct should be con-

sidered in planning provisions in retainer agreements, how billing is handled, the nature of letters and other client communications, etc. Termination must consider the client. Once counsel's relationship with the person involved transcends that of a prospect to become that of a client, additional duties are owed.

Counsel may permissively withdraw from representation under MRPC 1.16(b) in the following instances:

(1) Withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) The client has used the lawyer's services to perpetrate a crime or fraud;

(4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) The client fails to substantially fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.[8]

Material Adverse Effect: What is a material adverse effect on the interests of the client? What is "material"? What is "adverse"? Also, how these terms are defined in the context of an estate planning engagement might be different than how they could be defined in other types of legal representation. That could be important to estate planning practitioners. Unfortunately, there is little guidance on this. The case studies and discussions below will suggest possible considerations. But given the limited guidance on some common situations, and the wide spectrum of possible fact patterns, practitioners in many situations may have to make their own determinations. Hopefully the questions raised will provide a framework to evaluate common estate planning scenarios in this context.

There are several situations where adverse harm might be a concern for a client in common estate situations. If, for example, a client is struggling with dementia or other cognitive or health issues, and there is a concern that an agent under the client's durable power of attorney, or successor trustee under the client's revocable trust, or other perpetrators, is or might abuse the client, counsel may not be able to withdraw without potential for material adverse harm to the client. The wide continuum of challenges a client may face may make this a fact-specific decision. This article will not address these types of issues.

Fundamental Disagreement: When might an attorney have a fundamental disagreement with a client? About what matters might a disagreement occur that are sufficient to raise the specter of termination? If counsel disagrees with planning steps the client wishes to take might that suffice? For example, the client reads about self-settled domestic asset protection trusts (DAPTs) online and demands that the spousal lifetime access trust (SLAT) that was under discussion instead be drafted as a DAPT. While counsel was comfortable creating a SLAT, given that the client lives in a jurisdiction that does not have legislation permitting self-settled trusts, counsel is not comfortable completing a DAPT. Is that a fundamental disagreement sufficient to support termination? The client hired counsel to handle a parent's estate. The parent died with significant appreciated assets inside a grantor trust. The client insists that counsel adjust (step-up) the basis of assets inside the grantor trust despite the assets being outside the decedent's estate. Counsel explains that the Treasury position is contrary to that approach as evidenced in Revenue Ruling 2023-2. However, the client persists in demanding this approach based on an article or webinar that they found online in which a practitioner suggested that the Revenue Ruling was incorrect, and the position could still be taken. If the practitioner is uncomfortable taking that position, does that arise to the level of a fundamental disagreement with a client sufficient to support termination?

Obligation to the Lawyer: Failure of the client to make payment for legal services rendered would seem to be both failures to substantially fulfill an obligation to the lawyer and present an unreasonable financial burden. What degree must payment issues rise to in order to support termination? Certainly, as suggested below, setting parameters of what is acceptable in the retainer agreement so that the client agrees upfront to what the arrangements are might support a termination of representation for failure to pay.

Retainer Agreements Should Address Withdrawal from Representation by Counsel

The retainer agreement firms use for clients might set forth provisions that might help support a later termination should that become necessary. No provision will

change the ethical obligations or duties practitioners owe a client, but expressly addressing not only termination but client responsibilities and other matters might be helpful. Make it clear to the client that there are responsibilities and obligations that the client has to the attorney-client relationship. That may avoid issues as it will be clear to the client some of what is requested of them. If that does not suffice and the client violates the commitments they agreed to, counsel would seem to be in a better position to terminate the client for violating an express requirement that was agreed to by the client to create the relationship.

- "Bills are due and payable within 30-days of the date emailed to you. Your failure to pay any bill, in full, on a timely basis as set forth in this Agreement shall constitute a material breach of this Agreement." No attorney wants to work without being paid. Failure to pay bills in full on a timely basis is certainly a factor that would support a decision to terminate a client.
- "The undersigned hereby confirms that they understand that clear and responsive communication is essential to representation and that if they fail to reasonably, accurately and timely, communicate, the firm may terminate representation." It is not possible to represent a client who does not communicate. All practitioners have had to deal with clients that do not respond to emails, memorandum and other communications. At some point, a lack of responsiveness makes it impossible to properly represent a client. The context will also matter. The lack of timeliness of communications for an estate plan in early 2024 may be quite different then the lack of timeliness of client communications in late 2025 when counsel is trying to complete a plan before the scheduled reduction of the exemption in 2026.
- "While we endeavor to identify conflicts of interests before beginning an engagement, that is not always feasible. In some situations, it may not be possible to identify a conflict of interest until further into an engagement. In some cases, the conflict may not exist until a later date. Should an actual conflict arise or become apparent during the course of our representation the firm reserves the right to take, in its discretion, any action it deems appropriate, including the termination of representation."

Sample Provision To Consider for a Retainer Agreement: "Subject to our ethical obligations as attorneys, we reserve the right to terminate, in our reasonable discretion, our representation of you at any time. Our decision may be based on any factors we believe appropriate which may include, by way of example, your deliberate failure to make timely and complete payments of bills rendered unless you have raised within thirty (30) days of the date of such bill a question that is reasonably and timely handled. Your failure to communicate and cooperate with our efforts to represent you may, in our reasonable discretion, be a basis for termination. Should you pursue a course of action or inaction that we disagree with, or for any other reason permitted by law, we may choose to terminate our representation. If we terminate our attorney-client relationship, we will provide you prompt notice of same. Termination will not affect your obligation to pay for all services rendered and expenses incurred by us on your behalf prior to termination. In addition, you agree to be responsible for services we render and expenses incurred after termination that are reasonably necessary to complete the termination and to transition representation to new legal counsel of your choosing. If upon termination there are unused funds we will promptly refund same to you."

Withdrawal during litigation will raise additional issues than termination during a planning or drafting engagement. Termination may have to be handled in accordance with the applicable rules of the court governing attorney withdrawal. Should a firm determine to withdraw during the course of litigation the client may have to obtain substitute counsel to facilitate withdrawal. The firm may have to file a motion with the court to request termination.

Proactive Billing May Support Counsel's Right To Terminate

How firms handle billing may also support a later termination of a client. For example, structuring an engagement in separate components or steps may make termination easier than if instead the engagement were handled as, and billed as, a single matter. For example, an attorney should generally complete any representation undertaken, especially when not doing so would be problematic for the client. But, if withdrawal would not have any material adverse effect on the client's interests, the lawyer should be able to unilaterally terminate. However, if a smaller engagement is concluded and the new separate matter has not yet begun, then termination may be less likely to raise any issue. If the client will not complete future/next planning perhaps that may constitute the end of the project and a natural end to the representation. If that is the case, there may be no issue in terminating the representation if the lawyer wishes.

The automatic termination at the end of an engagement suggests crafting narrower engagements. Creating a new

billing matter, e.g., 2024 Core Documents, 2024 SLAT, etc. may permit closure of those matters and moving forward to new matters thus permitting termination at an earlier point and also facilitating the tolling of the statute of limitations on claims. More narrowly crafting engagements may also make termination easier. From a business perspective some clients find the complexity of the estate planning process less daunting if it is divided into separate steps. At the "end" of the engagement consider sending an email stating: "We have completed all the matters you have requested of us. [If applicable for a narrowly defined engagement specify . . . all matters requested of us concerning [then delineate the specific matter involved.] If you would like further assistance on this or other matters in the future we would be pleased to open a new matter and again assist you." Some practitioners are uncomfortable with the phrase "Your file is now closed." But the same point may be communicated and documented in a manner that may not put off the client yet close the engagement at that point.

Example: If the practitioner was engaged by the client to complete estate planning, termination of representation may be simplified and ethical implications may be reduced or even avoided by breaking the planning into process-oriented steps. Consider the following matters:

- "Smith, Jane – 2024 Will/Rev Tr"
- "Smith, Jane – DAPT"
- "Smith, Jane – Succession Planning"

If, after completing Jane's will and DAPT, counsel chooses to terminate representation and the succession planning has not begun, the manner of billing may make termination less nettlesome.

Carefully document issues in the time entries, such as requests, and repeated requests, for information, or cautions not to proceed in a particular matter. That may corroborate that the client has not communicated reasonably, or that the client was not heeding counsel's advice. Include footers on bills that may be protective.

It is important to consider that properly terminating a matter, even if the client is not terminated, could be critical to protecting the practitioner. Failing to close a completed matter could result in a situation of ongoing or continuing representation which could prevent the statute of limitations from tolling or expose the practitioner to conflict or other claims.[9]

Sample Billing Language To Consider: "Any question concerning a bill must be raised within 30 days of the date the bill is sent. A failure to pay on a timely basis may result in a 'stop work.'" Billing monthly rather than at the end of an engagement may support termination. If the client raises issues early on in billing, then the representation may be appropriate to terminate. In contrast if billing is only rendered at the end of the engagement documentation of the client's actions, such as not responding to requests for critical information, will not be corroborated in billing sent to the client regularly. In addition, billing monthly may bring to the fore a client issue (or a client that is an issue) sooner than if you bill only at the end of the engagement. Practically, it may be easier to terminate a bad client earlier than later, e.g., when there is a bigger bill for the client to dispute.

How To Terminate a Client

Once the decision is made to terminate, the firm should take steps to implement the termination. Carefully consider the steps to be taken in terminating a client. At minimum confirm the termination in writing to avoid any ambiguity. Consider sending a formal letter, even if transmitted by email, rather than merely sending an email. A formal letter is more likely to receive the concentration and thought this process deserves. The risk of an email being sent, the language of which was not fully evaluated, should be avoided.

Provide sufficient information so that the former client, or new counsel, cannot later claim that they were not informed of a deadline or step that should have been taken. It may be worthwhile to provide a detailed letter listing open items and/or issues so that the former client cannot claim that he or she was not advised about these matters. Also, providing a summary of open points or follow-up items might provide some goodwill at what is likely to be an awkward at best, or worse, an antagonistic, point in a relationship. Indicate which items might be followed up with successor counsel. Also, successor counsel may well appreciate getting a termination letter that identifies the current status of matters, and especially matters that might require quick attention. Even if the former client refuses to pay for a transition letter, it may nonetheless be a worthwhile policy.

Should the termination letter indicate why termination occurred? There are differing views on this point. Some suggest that consideration should be given to documenting the reasons for closing the files in a non-antagonistic way just to confirm the reasoning, and to create a record supporting the decision. Others suggest that the firm should only document the reasons for the termination in a memorandum to the file, not to the former client. The determination as to which approach to take may depend on the reason for the termination. If the client is being terminated

for consistently being late paying bills, or for negotiating the amounts to pay, there may be no harm in documenting that reason, but there may be no benefit in doing so either.

Consider, perhaps even as a firm policy, offering to help transition the file matter to new counsel. If that is done, consider whether you wish to charge for that time. While it is likely to be a benefit to the client, that does not mean that a client will be willing to pay for the work. Also, consider that some reasonable effort to transition a file may, as discussed above, be a worthwhile goodwill gesture. But how far that gesture should go in terms of hours of non-billable time may also be a matter for a firm policy.

Confirm the status of the client's file. If there are paper records, or client property, that need to be returned, indicate that in the letter and return those items by appropriate means (e.g., with tracking). If the file has previously been returned, indicate that clearly. The concept of what constitutes a client file, and what may need to be returned, has evolved as firms have gone paperless. In a paperless environment there may be nothing to return to the client being terminated. If the client holds all original signed documents and has received via email all communications and memorandum, what is left to return of the "file?" Whatever the status is, that should be clearly indicated as that may not be the expectation of successor counsel, the client, etc. It seems as if the law and professional literature have not kept pace with the technological evolution of the practice of law. Therefore, practitioners will have to exercise caution in interpreting what should be provided to a client being terminated. In all cases, it may be advisable to clarify in writing what precisely was returned to the client and when to avoid any ambiguity.

Sample Paragraph: *"On [date] we returned all your original documents. We retain no original documents. The document return completed the provision to you of all documents that constituted your client file that we held. If you believe there is anything that we may have that you may now in the future need, please let us know immediately."*

Confirm the status of billing. If there are fees due, include a copy of the final bill reflecting them. If no fees are due, indicate that. If a future bill may be rendered with transition fees, indicate that as well.

Can Representation Be Made Unreasonably Difficult by the Client?

"Yes, but I read online that . . . " What can or should a firm do with a client that "researches" their own issues online and constantly questions/challenges what counsel recommends? If the client demands approaches or language that require substantial additional discussion to explain, will the client be willing to pay for the costs they are creating? How far can that go without the status of the professional relationship needing to be examined? At what point does that render representation unreasonably difficult? Clients might render representation unreasonably difficult in myriad creative ways – failure to communicate, failure to provide requested documentation or information, rescheduling every call and appointment a significant number of times, and so forth. It might be better for the firm to politely put the client on notice of the concerns raised and indicate that change is necessary for representation to be effective or efficient; only after some number of infractions would the possibility of termination be addressed. Whether notice should or needs to be given, and how and what steps should be taken, will all be fact specific. Considering whether or not representation has been made unreasonably difficult by the client is a judgment call that each attorney reviewing the scenario may conclude differently.[10]

Client Insists on Steps Practitioner Disagrees With

Practitioners all want their client's planning to succeed and to make a valuable contribution to the client's situation. When a client will not take steps that the practitioner believes are important to take towards the success of the plan, it makes sense for the practitioner to consider documenting what advice was given, in writing, to the client. It may be advisable to also document what alternative action the client opted to take, against advice of counsel, and the potential negative consequences of that approach. That way, should an issue ever arise in the future, the practitioner could be protected by corroborating that advice was not heeded. An unfortunate theme of many of the recent malpractice cases has been that the clients claim that their counsel did not communicate to them risks or issues of the planning.

Merely refusing to follow a recommended strategy in and of itself may not constitute a sufficient reason for a practitioner to terminate the representation of the client. But if the client's non-compliance is sufficiently concerning to the practitioner, the practitioner may evaluate terminating the client. The Model Rule provides that a client can be terminated, if there is no material adverse harm to the client, if "[t]he client insists upon taking action . . . with which the lawyer has a fundamental disagreement."[11] When might refusal to heed advice rise to that level to support termination? That is certainly a fact-specific decision that will vary depending on the attorney involved, the importance of the client, and other client actions. Perhaps counsel may tend more toward terminating a client if the failure to adhere to counsel's advice seems to create a certainty that if there is an audit or suit that the plan will

fail. The practitioner may feel that a protective letter to the client documenting the failure to follow advice is sufficiently protective. In other situations, counsel may believe that if the plan is so poorly implemented in contravention to the advice given, counsel may be better off terminating the relationship.

Example: A client couple has hired counsel, and the decision is made to create two non-reciprocal SLATs. After much back-and-forth discussion, the client decides that: "[We] want a 5/5 power and health, maintenance, education and support distribution standard in favor of the beneficiary spouse in both SLATs." While there are many different views of what similarities and differences should exist between two different SLATs to differentiate them for purposes of the reciprocal trust doctrine, the above request may be beyond the comfort level of counsel to accept. Then the question for counsel is whether, even if a warning letter is sent, counsel should draft the SLATs based on the demands of the client. Is the preparation of trust documents the lawyer is confident will fail if examined protected by a letter cautioning the client that counsel disagrees with the plan? Is that worth the risk to counsel of potentially becoming embroiled in a later claim if the plan fails and having to rely on whether the letter was sufficient protection? If instead of terminating, consider if the client's counsel refuses to draft trusts documents with technical terms dictated by the client. Perhaps the client themselves might move to a more malleable attorney? What if the client had formulated the plan and discussed key aspects of the SLAT plan with their wealth advisor, excluding the attorney. Does that level of outside interference create a more worrisome situation? Is it possible for counsel to effectively represent a client when another advisor is usurping the attorney's role and perhaps doing so without the requisite background?

The Non-Paying Client

The MRPC permit terminating a client when "the representation will result in an unreasonable financial burden on the lawyer."[12] What is an unreasonable financial burden? It is not clear that the term "unreasonable financial burden" requires some quantum of write-offs to be "unreasonable" or a "burden." If the firm involved has other work, is it reasonable to accept any write-offs simply because a client demands it? While a firm may choose to tolerate certain demands, it would seem reasonable for any firm to be able to insist on full payment when the services were rendered as requested and the work was done in accordance with professional standards. The reality is that when a client questions a bill, or demands write-offs, it is not only the financial loss of the billing that goes unpaid that is incurred. Often, that same difficult client exhausts lawyer and staff time dealing with the billing demands and attendant issues. Finally, in many such cases the stress that such a client causes the firm creates further inefficiencies and distractions. The toll of that it would seem should also be considered in the context of determining whether the client is creating an "unreasonable financial burden on the lawyer."

How frequent and demanding are the client's billing questions? Certainly, any firm would entertain a legitimate and reasonable billing question. Mistakes are sometimes made and if the client catches the oversight or clerical error, it can and should be corrected. But that is quite different from the client that questions the lawyer's invoices almost every time a bill is sent. It also differs from a client raising unreasonable questions simply to negotiate reduced fees. Whatever the facts, do the complaints result in the lawyer writing off more than is appropriate or fair? Is writing off anything appropriate if the work was done well and efficiently? At what point might or should the attorney consider terminating the client?

The 'Bad' Client

Clients, even good clients, may at times push the edge of what counsel is comfortable with. When that client conduct, or client demands, "go too far" such that counsel may consider termination, it is a judgment call based on the firm's interpretation of the situation, the degree of the questionable conduct, the dollars involved, the potential impact on third parties, and myriad other circumstances. Because it will generally be a judgment call, different firms will take different views of the same situation. "Bad" conduct may occur which may not clearly arise to the level under the Model Rule of " . . . a course of action . . . that the lawyer reasonably believes is criminal or fraudulent."[13] Might it arise to: " . . . action that the lawyer considers repugnant, or with which the lawyer has a fundamental disagreement?"[14]

Example: The client engages counsel to handle a particular estate planning matter. When the firm requests financial data and valuations for the assets involved in the plan, the client provides financial data reflecting the assets valued at $100x. Some months later, as part of pursuing an update of the client's overall estate plan, counsel requests a full balance sheet. The client provides a copy of a personal financial statement that has been given to third-party lenders and partners in connection with various loans and guarantees. The same assets recently indicated to be $100x are listed at $400x. Can counsel withdraw? Should counsel first insist that the valuation amounts be reconciled and disclosed to all involved? If counsel determines to terminate the client, is there any obligation to the third parties?

Is counsel prohibited from informing third parties of the issue? If counsel has advised the client to inform third parties, does counsel have further obligations? MRPC 1.6 has been modified to permit disclosure where the attorney's services have been facilitated by the client in committing a fraud that could cause substantial injury.

Example: The firm has been retained to assist with a probate matter, but the client persists in handling critical aspects on their own for the stated reason of keeping professional fees to a minimum. The personal representative prepares an informal accounting refusing counsel's recommendation to have counsel, or a CPA firm that has particular expertise in trust accountings, prepare a formal accounting. Counsel is requested to file the accounting with the court and then learns that the "accounting" prepared by the personal representative has material errors or omissions. The attorney files the personal representative's "accounting" with the court and only then learns of the mistakes. Counsel requests that the personal representative correct the mistakes in the accounting and have a correction prepared by a professional. The personal representative refuses to do so. Can the firm withdraw from representation? Must the firm withdraw? Under these facts is it appropriate or safe for the firm to continue representation? Likely, unless the errors were immaterial, the firm should withdraw. Then the question arises, does counsel have any obligation to inform third parties of the issues? What if there is no court proceeding? Would the firm have any obligation to inform beneficiaries who are relying on the accounting?

Example: Counsel is retained by spouses to jointly represent both of them. One spouse confides a secret to counsel, and she indicates that it is not intended to be conveyed to the other spouse, her husband. Attorney ethics prohibit keeping information confidential that one spouse discloses, from the other spouse, in a joint representation engagement.[15] Must counsel withdraw? Must counsel disclose the information to the other spouse despite the admonition not to disclose it? The retainer agreement could address the issue by cautioning before the representation begins that there is no confidence between and among joint clients. If that were done, does it have any impact on the actions the firm should or must take?

SLAT Client Termination Hypotheticals

As we approach 2026 when the exemption is scheduled to be cut in half, practitioners are likely to be called upon to prepare more SLAT or SLAT-like estate plans. The different views of SLATs and variations fill a wide spectrum. The risks of the reciprocal trust doctrine, and the uncertainty over what actually is advisable to differentiate trusts is quite broad. Also, as more clients pursue this type of planning, the need for one or both clients to have access to trust assets grows, especially at more moderate levels of wealth where a large percentage of overall client wealth is being transferred into irrevocable trusts (of any type). That will raise issues as to how much wealth can be transferred without raising the specter of a fraudulent conveyance or a client losing ready access to wealth that may be needed to support lifestyle expenses. It will raise issues as to the incremental risk that integrated DAPT or so-called hybrid-DAPT provisions into the plan, or special power of appointment trust (SPAT) provisions, etc. There is a wide spectrum of views on the efficacy and risks of these and other techniques.

This and the following hypotheticals were created by the author. These are not based on any cases, ethics guidance, or other sources. The objective is to help practitioners identify possible issues and scenarios that might become common as we approach 2026, and wherein the practitioner may begin to question continuing representation. Some of these scenarios were experienced by practitioners toward the end of 2012 when it was similarly anticipated that in 2013 the exemption would decline substantially. Because of the lack of authority practitioners might consider the questions raised, but caution should be exercised in interpreting or applying any of the information following. The objective is to raise questions about termination of representation, and ethical obligations in the specific context of SLAT-like estate planning as 2026 gets closer.

SLAT Scenario: Transferor Facing Lawsuit

As with many estate plans, the steps include the transfer of material assets to trusts for others, such as a SLAT. After a SLAT plan is implemented counsel learns that the client is a principal in a business deal that may face a material lawsuit over an event that occurred before the transfers were consummated. None of the professional advisors were informed of the event. The balance sheet the client provided did not list any potential claims or liabilities. What action might the advisor take? Consider what due diligence was done, or what could have been done, before the transfers? If the client signed a solvency affidavit stating that she was not aware of any potential claims, claims, etc. does that change the result?

SLAT Planning and Whether Material Adverse Harm Might Occur to the Client

A client may not be terminated unless "[w]ithdrawal can be accomplished without material adverse effect on the interests of the client."[16] What is the timing of the plan and the withdrawal? What are the circumstances involved? Whether termination of the representation by the lawyer

has a material adverse effect on the client would seem to depend on the facts and circumstances. Have the client and the lawyer already spent a significant amount of time in the estate planning engagement? Would it be unduly burdensome on the client to have to engage new estate planning counsel at this particular point? Are there pressing time concerns or other important reasons to complete an engagement? In 2024 there may be no pressing time issue as there is ample time to plan for 2026. However, what of step-transaction and other issues? If the client spent significant planning time with a current advisor and then has to change counsel, what of the education, knowledge and information provided by the former attorney? Those are not useless and perhaps it is reasonable to determine that the planning process the client engaged in before being terminated was valuable advice having been received. If that is a reasonable interpretation of the situation, then perhaps there might be no material adverse effect on the client if counsel terminates.

The decisions and situations are very fact sensitive and there are likely as many opinions as practitioners.

Practitioner Does Not Agree With Client Demands for SLAT Terms

The client and the lawyer already spent a significant amount of time in the estate planning engagement. How might this arise to a material adverse effect to the client? Assume that after much discussion, the clients only were willing to gift $5 million to each of two SLATs in which each spouse would be a trustee of the other SLAT. The clients are not willing to pursue the recommendation of funding just one larger SLAT (or a SLAT and a separate ILIT to own life insurance to address the risk of premature death of the spouse funding the SLAT), or to use independent trustees. Counsel is concerned about the risks inherent in the planning if the plan proceeds as the client insists, specifically about each spouse serving as the sole trustee of the other spouse's trust, and that no bonus exemption will be preserved, which was the clients' initial goal.

Perhaps all that is necessary is to document in writing the concerns counsel has with the plan. Some practitioners are perfectly comfortable naming spouses as trustees of non-reciprocal SLATs. Others are not. So, even though counsel disagrees with that approach, that may not be a basis for termination. Funding two SLATs each below the bonus exemption amount that will expire in 2026 may not be beneficial to preserve bonus exemption. However, the clients may be more comfortable with equal SLATs in case of divorce. The clients may also be concerned about malpractice or other liability exposure and hence wish to fund two separate trusts rather than one. While the plan may raise concerns over application of the reciprocal trust doctrine, the law is not fully clear on what is required to differentiate trusts.[17] Also, counsel within the confines of the plan the client wishes will be able to integrate other material differences into each SLAT. But how many deviations from the recommended plan should counsel accept before considering termination? How many deviations must counsel accept before the Model Rule provision: "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement?"[18] Considering the malpractice environment that estate planners face, what if counsel views merely providing a letter documenting the deviations from the lawyer recommended plan as insufficient to prevent a future claim if the plan fails? Might that arise to the level of the Model Rule: "the representation will result in an unreasonable financial burden on the lawyer."[19]

One of the concepts is that termination is permissible if the material adverse effect on the client is exceeded by harm to the lawyer. The lawyer perceives that any harm to the client in terms of possible loss of legal fees already paid is outweighed by the risk to the practitioner of advising the client as to implementing a plan that the practitioner believes has a substantial risk of failure. When does that suffice to support termination?

Why is paying legal fees for advice the client received ever a material adverse effect on the client? Perhaps the question might be phrased as "is paying legal fees for advice the client requested and received ever a material adverse effect on the client?"

SLAT Plan With Draft Trust Prepared

Does the possibility of termination arising past the planning stage, and after a draft SLAT has been created, change the analysis as to whether there is a material adverse effect on the client?

Example: Continuing the above example, counsel prepared a draft SLAT for the clients. It was the discussion of the terms of that draft trust that crystalized the clients concerns and comfort levels. Legal fees incurred for planning meetings, letters, memorandum, and a draft SLAT have totaled $20,000. If the client is terminated, it may not be likely that a new counsel would continue working with the same trust document. Does that suggest that termination might result in a "material adverse effect" on the client? Does the determination change if new counsel is willing to work from the draft trust prior counsel created? Should it matter? The client received valuable advice for each dollar spent on former counsel and it was only that process that resulted in the client realizing what their level of comfort with planning decisions was. Should the fact that the SLAT is not completed constitute a "material adverse effect" or has the client received valuable planning

advice and services even though the plan was not implemented/concluded? Some practitioners would argue that the latter is correct.

Example: Continuing the two above examples. Further, how might the term "material adverse effect" be defined in the following context? Certainly, in the context of representation of a client accused of a criminal act, if the lawyer terminated prior to trial and the client could not retain new counsel that could digest the case file fully before trial, there is potentially a material adverse effect on the client. In the context of the above estate planning examples, if the client paid $20,000 in fees on a plan that involves $10 million of assets and the client's net worth is $25 million, is there any touchstone by which the legal fees earned and paid could constitute a "material adverse effect" on the client? The amounts seem immaterial by any touchstone. But what touchstone is to be used to determine whether a "material adverse effect" has or may impact the client? Perhaps there is an issue of quantum meruit doctrine, what counsel has earned, what is the value of the services provided.

For example, have the client and the lawyer already spent a significant amount of time in the estate planning engagement? Would it be unduly burdensome on the client to have to engage new estate planning counsel at this point? Is the client being required to engage new counsel and incur additional fees to bring new counsel up to speed, loss of time, and information such as appraisals becoming stale really constitute a material adverse effect? How many dollars must be involved to be material? What is "material" defined in relationship to? Is merely having to hire new counsel really a material adverse effect? How can the advice the client was given not support the fee billed if the fees were billed for time actually spent with the client and working on the client matter, all in accordance with the terms of the written retainer agreement the client signed? What if no retainer agreement were signed?

Might the answer differ if the practitioner was billing a flat fee for planning and the trust document, and the trust was not completed? Perhaps in the latter situation the flat fee would have to be fairly apportioned as to what was done and what promised work was not done.

SLAT Client Termination Before Completion of the Plan

In 2021 there was anticipation or worry that the estate tax rules could have been changed in a dramatic and harsh way at any moment based on various democrat proposals. Some believed that any law change would take effect January 1, 2022. Others were concerned that some of the proposals included changes effective the date of enactment or even back to the first day of 2021. That environment may have been somewhat unique. How would that impact a decision to terminate a client? In different years there were different concerns and assessments of the potential for major restrictive estate tax law changes.

Example: It is late 2021 and the client retained the estate planner to complete an irrevocable SLAT/trust plan to use a portion of her exemption before a change in the law might occur. At that point in time termination may be inherently problematic as the law might have changed at any time and it may have been difficult, if not impossible, to find new counsel to complete the trust and desired transfers before the end of the year, or a law change with an earlier effective date. The potential harm to the client may have precluded termination without significant issues. But as noted above, is that really an impediment?

Example: Counsel terminated the client in late 2021 given the discomfort counsel had with unreasonable demands being made by the client, inappropriate and rude comments by the client, and the unreasonable billing complaints. The client could not find new counsel to complete the planning in 2021. Was the termination improper? It appears that the requirement is for the withdrawal to occur without material adverse effect on the interests of the client. Since the law did not change, does that negate any potential issues of counsel having fired the client? Assume that there was no actual material adverse harm to the client as the law did not change. Does that suffice even if at the time of termination, the client may have perceived the possibility of a material adverse effect?

Example: In 2023 the client retained the estate planner to complete an irrevocable trust plan to use a portion of her exemption before the scheduled reduction in the exemption in 2026. In that environment, in contrast to that in 2021, it is difficult to imagine a material adverse effect on the client under various scenarios. Whatever discussions, memorandum, etc. had occurred with the client helped educate the client and helped or will help the client make decisions as to their planning. What if, despite a widely held belief that no estate tax law legislation would be enacted, legislation restricting grantor trusts was enacted? If it was not possible for counsel to envision a material adverse effect at the time of termination, but one occurred because of an unexpected tax law change, is counsel somehow responsible for that? That would not seem reasonable or fair.

Example: In 2023 the client retained the estate planner to complete an irrevocable trust plan to use a portion of her exemption before the scheduled reduction in the exemption in 2026. In that environment, in contrast to that in 2021, it is difficult to imagine a time urgency. Counsel provided a draft irrevocable trust to the client, and it

has been reviewed and revised. If counsel terminates the client at that juncture, if the client can transition to new counsel to finalize the trust plan under the terms the client demanded, there may be no material adverse effect on the client. However, if the client cannot find a new attorney willing to complete the plan without a detailed review of the trust, perhaps it may be argued that there is an adverse impact on the client in terms of new fees. However, if the plan was for the trust to receive a gift of the entire exemption of more than $13 million, do the incremental legal fees constitute a "material" adverse effect on the client? If a new attorney reviewing the matter adds new thoughts to the planning is there an adverse impact?

Conclusion

Terminating a client is rarely simple or easy but by taking proactive and protective steps from before the engagement begins practitioners may reduce the risk of issues. Be alert to a problem client as earlier termination may be easier than later termination. Always consider the ethical obligations the practitioner owes the client.

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Endnotes

1 *See* Sandra D. Glazier, Martin Shenkman and Jonathan G. Blattmachr, *The Ongoing Saga of Wellin v. Nixon, Peabody, LLP - Case Lessons on Defensive Practice*, LISI Estate Planning Newsletter #3039 (May 26, 2023) *at* http://www.leimbergservices.com.

2 *Raia v. Lowenstein Sandler LLP*, Docket No. L-000921-19 (N.J. Super. Ct. Law Div. Feb 01, 2019).

3 *Wellin v. Nixon, Peabody, LLP*, 2021 WL 5445968 (11/22/21, 4th Cir. US Ct App).

4 *Scott v. Rosen*, Docket No. CACE20000868 (Fla. Cir. Ct. Jan 16, 2020).

5 *See Overdeck v. Steyer*, Docket No. L-007017-23 (N.J. Super. Ct. Law Div. Oct 26, 2023).

6 Model Rules of Pro. Conduct r. 1.16(b)(6) (Am. Bar Assn, 2020).

7 Model Rules of Pro. Conduct r. 1.16(b)(4) (Am. Bar Assn, 2020).

8 Model Rules of Pro. Conduct r. 1.16(b)(1 - 7) (Am. Bar Assn, 2020).

9 *Overdeck v. Steyer*, Docket No. L-007017-23 (N.J. Super. Ct. Law Div. Oct 26, 2023); Sandra D. Glazier and Martin M. Shenkman, Overdeck v. Steyer and Seward & Kissel, LLP: *The Importance of Addressing Potential Conflicts of Interest*, LISI Estate Planning Newsletter #3080 (November 15, 2023), *at* http://www.leimbergservices.com.

10 Sandra D. Glazier, Martin Shenkman and Jonathan G. Blattmachr, *The Ongoing Saga of* Wellin v. Nixon, Peabody, LLP - *Case Lessons on Defensive Practice*, LISI Estate Planning Newsletter #3039 (May 26, 2023) *at* http://www.leimbergservices.com.

11 Model Rules of Pro. Conduct r. 1.16(b)(4) (Am. Bar Assn, 2020).

12 Model Rules of Pro. Conduct r. 1.16(b)(6) (Am. Bar Assn, 2020).

13 Model Rules of Pro. Conduct r. 1.16(b)(2) (Am. Bar Assn, 2020).

14 Model Rules of Pro. Conduct r. 1.16(b)(4) (Am. Bar Assn, 2020).

15 Sandra D. Glazier and Martin M. Shenkman, *Joint/Dual Representation*, Trusts and Estates, Aug 2017, p. 24.

16 Model Rules of Pro. Conduct r. 1.16(b)(1) (Am. Bar Assn, 2020).

17 Steiner and Shenkman, "Beware of the Reciprocal Trust Doctrine," Trusts and Estates, Apr. 2012, p. 14.

18 Model Rules of Pro. Conduct r. 1.16(b)(4) (Am. Bar Assn, 2020).

19 Model Rules of Pro. Conduct r. 1.16(b)(6) (Am. Bar Assn, 2020).

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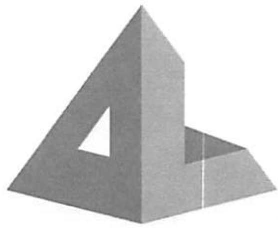

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