

Technology, Ethics, and Estate Planning Practice Management

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Caveat and Introductory Comments

Not Suggesting Standard of Practice

- This presentation is not intended to imply that any approach is essential or a standard of practice that everyone should follow. Rather the objective is merely to present points estate and other tax practitioners might consider in managing their practice as with a particular emphasis on technology and some of the ethical issues they raise. The goal is to present issues that some practitioners might wish to address in their practice, e.g. in their form retainer agreement, ancillary forms, procedures, etc.

Retainer Agreements Should Reflect Tech/Ethics Concerns

- It may be advisable for practitioners to periodically review estate planning retainer agreements (engagement letters) to update them to reflect new ethics rules, changing practices, integration of new technology into their practice, and other factors.
- Retainer agreements can be used as a framework for the discussion of a potpourri of estate and tax practice management, technology, ethics and related ideas since many of the ideas in this presentation may warrant addressing in retainer agreements/engagement letters.
- Practitioners should not ignore the changes technology and other developments are having on retainer agreements, practice forms, and related practice management steps.

Great Variability by Practice

- The ideas presented must be adapted and modified for every practice.
- A paperless, cloud based practice will necessarily have to handle these issues differently than a practice that still has yellow pads and Redwelds.
- A practice that predominantly focuses on a large volume of flat fee, smaller wealth, clients will have a different emphasis than a boutique firm serving a limited number of ultra-high net worth clients seeking a different level of service and relationship.
- Ancillary administrative implications of many of the points addressed concerning technology and the state of practice management, evolve at different rates different firms, some practitioners might view something as excessive, while others view it as a mundane task long ago addressed.

Paperless Practice - Audience Survey

- How many attendees would characterize their practice as paperless? **Very small percentage.**
- How many attendees would characterize their practice as paper--less? **Few seem to have adapted this hybrid which might suggest insufficient thought before heading down the paperless trail.**
- How many attendees have eliminated all offsite paper document storage? **Very few.**
- How many attendees have revised their engagement letters to reflect their move towards a paperless or paper—less office? **Many, but more can be done by most.**

Communications

Communication – RPC 1.4

- A lawyer shall fully inform a prospective client of how, when and where the client may communicate with the lawyer.
- A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Ethics Opinion 477

- Ethics Opinion 477 updates Ethics Opinion 99-413 to reflect the now common use of tech such as tablet devices, smartphones, and cloud storage.
- Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties under Rule 1.1 of the ABA Model Rules concerning competency, confidentiality, and communication
- Comment 8 to the rule requires lawyers to be current regarding the benefits and risks of associated with relevant technology.
- Lawyers must take reasonable efforts to ensure that communications with clients are secure and not subject to inadvertent or unauthorized security breaches.

Ethics Opinion 477 (Cont'd)

- Attorneys must use “reasonable efforts” to ensure the security of client information. This is a facts and circumstances. Consider:
 - Sensitivity of the information being transmitted.
 - Risk of disclosure if additional security measures are not taken.
 - Cost of additional measures.
 - The difficulty of adding additional safeguards.
 - Might additional safeguards adversely impact the lawyer’s ability to represent the client.
- Caution – Hindsight is 20/20. Remember mom’s adage: “Better safe than sorry.”
- Lawyers may use unencrypted email when communicating routinely with clients.

Communication – Using Technology

- Use regular monthly billing as a means of communication, not only as a means of billing. **Example:** Footers with information about new tax developments.
- Save covering emails into the client file to corroborate communications.
- Use the calendaring system to document efforts to communicate with clients. For example, if a client cancels a meeting do not delete that meeting entry from the calendar. Rather, mark it as “Cancelled by Client.” Perhaps minimize the calendar entry. Consider excluding historical calendar data from document destruction policies. Save calendar data indefinitely. **Example:** Searching the client name in a case management system, or even Outlook, can provide a history of meetings, attempted meetings, etc.
- Mark all client follow up in the billing system even if as a no charge notation entry to create a history of efforts to communicate with the client. **Example:** Administrative staff calling a client to schedule an update meeting should note the call in the billing system “No charge” so that there is a record of efforts to reach the client.

Communication - Audience Survey

- How many attendees use email blasts to inform clients of new changes in the law? Significant percentage, but this might be weighted toward larger firms. *We should have asked.*
- How many attendees send an email newsletter? *Large number, but might also be weighted to larger firms. It should not be given how cost efficient this is.*
- How many attendees use billing to communicate with footers, enclosed articles or other adaptations? *Just me.*

Communication – RPC 1.4

- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Communication – Using Technology

- Use web meetings to provide an initial and cost effective means to provide clients an overview of complex documents. Document the review to corroborate the fact.
- Provide a summary of key provisions of complex documents. Document generation systems may provide this automatically.
- Use schematics to illustrate transactions. These can readily be created in Excel.
- Email drafts of documents in advance of meetings and signings and save the covering email as proof that the clients were provided documents to review in advance.

Communication - Audience Survey

- How many attendees commonly use web meetings to communicate or meet with clients? **Perhaps half. Why not all?**
- How many attendees commonly use web meetings to communicate with a client's other advisers? **Few. Why?**

Communication – Using Technology

- Use email marketing tools, e.g. MailChimp, to inexpensively and quickly disseminate updates, planning information and other communications to educate and inform clients.
- What if regulations or other change may affect past transactions? What can practitioner do? Attorney has ethical obligation to keep clients informed of significant change in the law. Use client communications above (e.g., MailChimp), footers on bills (see sample provisions), and enclosed articles, sample checklists or memorandum with all bills and references them in the footers in the bills.
- The key is that technology makes it easy and inexpensive to communicate information to clients and to corroborate that you have done so.

Email Retention And Other Policies

Email Retention – Pre Seminar Survey

- I asked 12 practitioners about their email retention policies:
 - One knew and said they keep every email forever.
 - 3 had their IT people get back to me and the policies ranged from 90-days to forever, from emails saved to the DMS to all emails.
 - 7 had no ideas.
 - 1, a partner in a 10 person firm replied “What is an email retention policy.”

Email Retention – Audience Survey

- How many attendees have firm email retention policies? A small percentage. Some destroy all after a period from 90-days to 6 months if not saved to the firm's DMS.
- What are they? Some keep all forever. Some destroy pursuant to general document retention policy (but as per below this is indefinite for many estate planners).

Email Retention Policies

- Software/tech options.
- Litigation considerations.
- From one firm's document retention policy statement:
"For efficient identification, retrieval, and deletion of email and other electronic documents pursuant to this policy, attorneys and staff are required to organize and store all business record email and other electronic documents in separate folders designated for each client matter in the firm's electronic document management system."

Client Property

Safekeeping of Client Property - RPC 1.15

- ABA Model Rule 1.15(a) provides that complete records of client trust account funds and other property shall be kept and preserved by the lawyer for a certain period of time after the termination of the representation. The number of years varies by jurisdiction, e.g. 7 years.
- A lawyer must hold client entrusted property separate from lawyer's property, e.g. client trust accounts, and original documents, e.g. a will. Original documents retained are subject to RPC 1.15, e.g. storing wills.

Client records – File Destruction

- Simply because you can destroy the file after 7 years does not mean that you should. Consider self-protection when deciding to what to do with the file. If there is the possibility of a malpractice claim at some point, might the file be critically important for the lawyer's defense? Or might it be harmful? But the policy should be consistent.
- If any portions of the file are destroyed, care should be taken to preserve the confidentiality of the information contained in the documents.
 - if there is a litigation hold all electronic records should be preserved until the litigation has been concluded.
- An index of the file records that have been delivered to the client or destroyed should be maintained.
- One large firm's retention/destruction policy: "Unless otherwise specified by the Billing Partner, a destruction date equal to ten years from the date the matter is designated closed will be assigned to all files, with the following exceptions...estate plan, estate administration, ...files will be permanently retained."
- See NJ Ethics Opinion 692 and RPC 1.4.

Personal Laptops

- If an attorney or staff member creates or edits an electronic business record using a home computer, laptop, or other device, that person must save the record on the firm's electronic document management system as soon as possible. No firm attorney or staff member is permitted to store electronic business records anywhere other than the firm's electronic document management system.

File Destruction - Audience Survey

- How many attendees retain files longer than 7 years? **Almost all.**
- How many attendees have electronic files deleted automatically after 7 years? **Some after 10 years, few however delete. For estate planning seems an exception to many firm policies regarding destruction.**

Safekeeping of Client Property - Technology

- In a paperless office is there any client property?
- During the process of going paperless care should be taken to avoid accidental destruction of client property. See sample memorandum of taking an estate planning practice paperless.
- Record retention rules evolved in a paper environment. As the cost of electronic storage becomes insignificant (as contrasted with in-office and offsite paper storage) will the ethical rules evolve to require permanent storage of client data?
- Is electronic storage really moving to no cost? Consider the cost of finding relevant information if everything is saved forever.

The Client “File”

- The contents of a client’s file belongs to the client and that, upon request, an attorney must provide the client with the file.
- Rule 1.16(d) governs what a lawyer must do when asked by the client for the file. When a lawyer withdraws from representation he or she must take reasonable steps to avoid foreseeable prejudice to the client’s rights, which includes delivering to the client all papers and property to which the client is entitled. The rule does not specify what papers and property the client is entitled to receive. What is a “client file” in a paperless office?
- Maintaining a client file has historically been an important part of the service counsel provided clients, but electronic storage is essential free for clients as well. So clients can also readily store all their documents permanently.
- If a client has all original documents, has received all memorandum, letters and emails, what is left that the lawyer has that must ever be turned over to the client?

Cloud Storage

- A law firm is permitted to store the electronic materials relating to the client on a remote server under third-party control as long as the law firm carefully selects the third-party company to ensure that the information is kept confidential.
- What should be done to corroborate the selection?
- Attorneys must take reasonable care to protect a client's information in a cloud environment. See NYSBA Ethics Opinion 842 (9/10/10).

Client Property - Audience Survey

- How many attendees have no original client property?
- How many attendees have no in office paper document storage?
- How many attendees have no offsite paper document storage?

Confidentiality

Confidentiality of Information - RPC 1.6

- 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 to carry out the representation, and except as stated in paragraphs (b), (c) and (d).

Confidentiality of Information - Technology

- Consider using encrypted emails, e.g. Sharefile, to transmit documentation with TINs, etc.
- Take precautions to protect the physical office facilities, alarm systems, etc.
- Take precautions to protect the integrity of electronic data. This might include:
 - Encryption and password protection of laptops, smartphones and other equipment.
 - Providing an internet access, password protected, outside the firm firewall, for clients and other visitors.
 - Protect all systems with appropriate virus protection, spam filters, intrusion protection, etc.

Confidentiality - Audience Survey

- How many attendees use secure/encrypted email regularly?
- How many attendees use secure cloud based portals to store client documents (e.g. Sharefile)?
- How many attendees are aware of a Data Loss Policy (DLP) at your firm?

Collaboration and Attorney Client Privilege

Privilege

- Attorneys are obligated to safeguard the confidences of their clients.
- Generally, the attorney is responsible to protect all communications between the client and the attorney from disclosure without the permission of the client.
- The Privilege belongs to the client as opposed to the lawyer. The communication of confidential information and the privilege can both play an important role in a range of estate planning matters. Address, with some specificity, in the engagement agreement and other communications.
- See Model Rules of Professional Conduct (“MRPC”) §1.6 *Cohen v. Jenkentown Cab Co.*, 238 Pa. Super. Ct. 456, 357 A.2d 689 (Pa. Super. Ct. 1976).

Privilege

- Technology has complicated the potential implications of Privilege in designating acceptable forms of communication. Technology has also provided some solutions to these challenges as well. In an age where many routine communications occur electronically, the client might not pause to consider the implications of a mode of communication. For example, a client might communicate with her personal (not business) counsel through her company email account, saving documents on a company file server, or using a company computer to engage in such communications.

Collaboration

- Collaboration might have been merely a footnote not too many years ago.
- Today it warrants prominent consideration and is an integral part of many estate planning practices.
- Estate planning is more complex and intricate considering changing demographics and what seems to be a permanent state of uncertainty as to the tax laws.

Collaboration

- A client intake form might include an authorization to be certain clients understand the importance of collaborative disclosures and provide the relevant contact at the outset of the engagement.
- The mere fact that the estate planner has authorization to collaborate does not mean other advisers have done so. Other advisers may refuse to collaborate until they have authorization from the client.
- Counsel could prepare a letter from the client to all advisers authorizing and directing collaboration that the client can sign and counsel can distribute.

Collaboration and Privilege

- Carefully consider if any exceptions should be made to the waiver of conflicts below. Another approach might be to have another Agent or successor Agent act with respect to a business, for example, in which the Agent holds an interest. Alternatively, the interested Agent could be permitted to act but could be required to give notice of the actions to a successor agent and/or at least one person (or more than one) who could be a beneficiary of the Gift provisions in this Power (presuming that such persons are objects of your largess).
- Consider whether the client is or should be willing to waive the attorney client privilege. If not, there may be an issue with you as attorney disclosing information to the agent which may become essential for the agent to have to act to protect your interests under this Power.

Collaboration and Privilege

- The attorney's duty to represent does not end merely because of your disability. See Model Rules of Professional Conduct 1.14(a). An attorney, as far as reasonably possible, is to maintain a normal client-lawyer relationship. An attorney can take protective actions depending on the circumstances. Model Rule 1.14(b).
- An attorney may reveal confidential information about you when doing so to the extent reasonably necessary. Model Rule 1.14(c). This is generally limited to situations where you are at risk for substantial physical, financial or other harm. Therefore, it may be advisable to authorize greater latitude in order for the attorney to take steps you might wish taken in less onerous circumstances.

Collaboration and Privilege – Power of Attorney

- **Sample Clause**: “By executing this Power of Attorney the Principal agrees and acknowledges that Principal hereby waives the attorney client privilege with the law firm who prepared this document, solely for the purposes of permitting said attorneys and firm, or its employee attorneys and any successor firm (collectively, "Attorney") to communicate with the Agent and Alternate Agents hereunder, including disclosing Principal's confidential information to them, and providing Principal's confidential documents to them with respect to their carrying out their duties hereunder. Attorney shall have the right, but no obligation under any circumstance, to act hereunder (including but not limited to distributing any copy or original of this Power of Attorney). Attorney shall be held harmless for any good faith action, or refusal to act, hereunder.”

Privilege can Affect the Attorney Personally

- Similar issues can also affect practitioners. If the attorney sends personal emails from a work email address, or stores personal documents or communications on a laptop that is a practice laptop, in later litigation, discovery and data searches might reveal the practitioner's personal emails and estate planning documents.
- If a personal laptop is used consider a written policy to save no client work there, transfer it all to the office system to be saved in accord with whatever the firm document retention policy is (see below). Consider documenting the characterization of personal equipment as personal in the firm's technology records.

Billing Rates and Methods and the Impact of Technology

Billing and Technology

- Technology is changing how some practitioners bill.
- Various tasks that use to be quite costly, may be more efficient and routine because of technological changes. Thus, some tasks that had been billed on an hourly basis might now be billed on a flat fee or hybrid basis in order to be fair to the practitioner/client.
- As practices evolve to paperless cloud-based document generation driven models, the traditional paradigms for billing will be unfair to clients in some instances, and unfair to practitioners in others. Modifications to billing practices may continue to evolve over time.
- Assure that the client has a clear understanding specified in a written retainer agreement.

Billing and Technology - Audience Survey

- How many attendees routinely use anything other than hourly billing? **Some but the proportion seems to increase.**
- How many attendees practicing estate planning use document generation software? **Perhaps 20%. Why not more?**
- Of those that using document generation software, how has it changed your billing? **No indication.**

Billing and Technology

- When rates or fee structures are changed, a footer could be incorporated on the bill explaining that an increase or other change has been put into effect. Many billing systems easily accommodate the addition of standard footers to some or all bills to facilitate such communication. In fact, footers designed to appear on all bills can provide an important and no-cost way to communicate important billing, administrative and even tax development information to many clients.
- Firm newsletters and announcements can also be put to similar use. If the latter is done, consider saving copies of all such general client communications in a single file.

Vetting the Prospective Client

Technology Changes Client Vetting

- Some practitioners take steps in advance of being retained. Some refer to these preliminary steps as “pre-engagement.”
- Turning away a bad case or client is important to the security, success and atmosphere of every firm.
- Example, if the prospect has significant assets overseas what issues might this suggest? Has the prospect complied with all the requisite reporting requirements?
- If the engagement involves the potential creation of Domestic Asset Protection Trusts (“DAPTs”) could providing assistance place the attorney at risk of being an aider and abettor?

Technology Changes Client Vetting

- It may be advisable to perform some due diligence on a prospective client before the prospect becomes an actual client.
- The internet has made it easy and, other than staff time, cost free.
- Have staff search the client's names, and business names, prior to accepting the engagement.
- If issues are identified, address them before accepting the prospect as a client.

Technology Changes Client Vetting

- If a prospective client searches raise worries, e.g. a physician prospect who has scores of negative complaints that sound substantive, perhaps the firm should consider whether that reputation risk is something it is willing to take on in the context of estate planning that typically will entail transferring assets into entities and irrevocable trusts. If the firm is willing to accept the client, it might choose to discuss these concerns up front as well as steps and costs of addressing them.
- To avoid any prospective client claiming that for an inappropriate reason they were singled out, it may even be advisable to perform the same procedures for all clients.

Technology Changes Client Vetting - Audience Survey

- How many attendees routine vet clients? **Most do not take formal steps and merely evaluate “gut feel” in phone calls or at an initial meeting.**
- What websites or services are used? Google Search? What else?
- Of those that vet clients how many acknowledge that in their engagement letter? **Few. We do.**
- How else do you inform prospective clients?

Conclusion and Additional Information

Sub-Title



Conclusion

- Technology is evolving and has and continues to change how tax and estate planning attorneys must practice.
- The rapid ongoing tech changes often have surprising ethical implications. These can create traps for the unwary as well as opportunities to more easily serve clients and even meet many ethical obligations.

Additional information

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