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Tips on Drafting Retainer Agreements for Couples

Potential conflicts abound, so beware.

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When a couple starts to work with an advisor to engage in estate planning, it's advisable for the intake process to involve creating an engagement letter and perhaps establishing a retainer. Drafting these documents, however, is often easier said than done.

The intake process is often nuanced, because it's important for the advisor to evaluate whether the engagement is appropriate. Can the advisor meet the needs of the particular prospect? Are there issues to be concerned about the prospect that suggest the engagement should be rejected? Are there any potential areas of conflict or concern? Sometimes, the advisor needs to decide who her client will be when more than one prospect shows up to the meeting. This might be a couple, a married couple, a child bringing a parent and other situations.

Any dissent between a couple who come as prospective clients may lead to the advisor only being able to represent one of them. The advisor should attempt to facilitate an honest discussion, and if one of the parties is hiding something from the other, this can be troublesome.

It's incumbent on advisors, when entering into an estate-planning engagement with a couple, to explain to them that conflicts can arise in regard to the plan, and in particular with respect to funding and operating trusts to which irrevocable transfers might be made. There may be times when clients would prefer to have independent counsel because if an advisor represents a couple she can't counsel one to do something adverse to the interest of the other. This isn't always an easy task.

Early Vetting

Sometimes an advisor starts a process only to discover she can't represent either of the intended clients because there's significant conflict. Early vetting is key. When the first client calls the advisor, obtaining some of the relevant information before they bring in their spouse can sometimes help to pre-identify issues. A waiver letter can really help the client understand so she can make an informed decision.

If SLATs May Be Used

Some married couples may use the common planning tool of nonreciprocal spousal lifetime access trusts (SLATs), which each partner sets up naming the other as the primary beneficiary and thereafter descendants.

SLATs generally shouldn't be mirror images. SLATs need to be differentiated to avoid what's called the "reciprocal trust doctrine." This requires different rights and benefits in each spouse's trust instrument. Thus, each party may not be treated equally under each document, depending on the terms. Clients must understand that differentiating each SLAT helps prevent jeopardizing of the intended tax and creditor implications of the plan. During the process, it's advisable to clarify, in writing, that the SLATs will differ to represent varied interests and not violate reciprocal trust provisions that could cause unintended consequences. Importantly, to use exemption and accomplish the clients' goals, these trusts are irrevocable. Clients should be advised that they may be giving up rights to what would otherwise be assets under their control. It's helpful for the engagement letter to also discuss funding and that a waiver may affect the rights of others.

Some practitioners may use what's called a "floating spouse" provision. If a divorce or death should occur, the spouse beneficiary isn't named individually, but rather the generic term "spouse" may provide benefits to a subsequent spouse. Whoever the client is married to at the time would then be the beneficiary, and the use of the generic spouse term will make the trust accessible to that spouse. Presenting this option isn't always comfortable, particularly if the couple has children together. If one spouse is uncomfortable with this kind of provision, a separate engagement may be required, or perhaps, an additional disclosure confirming the impact and advising the couple as to the scope of the advisor's involvement. In this case, an advisor may be able to represent one only spouse or, at the very least, the other spouse may be advised to hire his own independent counsel.

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