By **Sandra D. Glazier** & **Martin M. Shenkman**

Drafting and Updating Your Retainer Agreements

Evaluate and improve certain provisions

The practice of estate planning is evolving at a rapid pace. Practitioners should periodically review estate-planning retainer agreements (engagement letters) to update them to reflect new ethics rules,[1] changing practices, integration of new technology into their practice and other factors. Given the pace of changes impacting the estate-planning arena, an annual, if not more frequent review, may be merited. But, even that alone won't suffice. Retainer agreements are only one component of the many ways firms interact with clients, technology and practice. Thus, you should consider many ancillary practice policies, procurements, forms and client communications as part of the same review process.

While we'll focus on retainer agreement provisions, we'll also comment on other practice considerations that directly or indirectly affect retainer agreement issues. You'll have to adapt and modify our comments to your practice. A paperless, cloud-based practice will necessarily have to handle these issues differently from a practice that's still predominantly based on using yellow pads and Redwelds. A practice that predominantly focuses on a large volume of flat fee, less wealthy 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.

Client Vetting

Some practitioners are taking steps in advance of being retained to evaluate prospective clients. 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. Some firms have a policy that any attorney should have authority to reject a matter if it protects the firm. Instruct administrative staff to inform an attorney about worrisome signs they see. In many instances, problem prospects behave in a less guarded fashion with administrative staff than with attorneys. For example, a prospect may be rude and uncooperative with administrative staff and associates, yet polite and professional with a senior partner. That inconsistency may suggest future problems. Also, if you learn early on that 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?[2]

While you should ordinarily conduct a conflict check, in some circumstances, it may be advisable to perform some additional rudimentary due diligence on a prospective client before she crosses the threshold of becoming an actual client. The Internet has made it easy and, other than the cost of staff time, free. When merited, consider having a staff member search the client's name, and business names, prior to accepting the engagement. If issues or concerns arise, address them before accepting the prospect as a client. To avoid a prospective client claiming that she was singled out for an inappropriate reason, perform the same procedures for all clients. If a prospective client search raises worries, for example, a physician prospect has scores of negative complaints that sound substantive, the firm should consider whether that reputation risk is something it's willing to take on in the context of estate planning that


Sandra D. Glazier is a partner in the firm of Lipson, Neilson, Cole, Seltzer & Garin, P.C. in its Bloomfield Hills, Mich. office, and **Martin M. Shenkman** is an attorney practicing in Fort Lee, N.J. and New York City

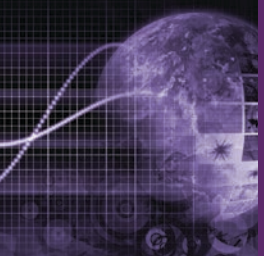
typically will involve transferring assets into entities and irrevocable trusts. If the firm is willing to accept the client, it might choose to discuss these concerns up front, as well as the steps and costs of addressing them. For example, the firm could identify the concerns in a preliminary letter to the prospective client, stating that the issues need to be addressed to the firm's satisfaction prior to the prospect being accepted as a client. Alternatively, the firm may be willing to accept the prospect with those issues, but choose to put the prospect on notice as to the planning implications or incremental costs the prospect may incur as a result of the issues identified.

Another simple low cost vetting process may be to have the prospect complete and sign a simple intake form prior to being retained.[3] Sometimes innocuous questions can identify issues in advance. Depending on the firm's practice, the responses might vary from merely addressing how the issues might affect the planning, advising the prospect that an outside expert consultation (for example, with a care manager) might be necessary, to perhaps even rejecting the representation and referring the prospect to a firm that may be better equipped to address the issues involved. Consider asking the following questions as part of a pre-engagement process or following retention:

1. Did anyone refer you to me and if so, who?
2. Have you previously consulted with an estate planner?
3. Has anyone ever assisted you in planning for the disposition of your assets? If yes, who?
4. Have you ever filed for bankruptcy or been insolvent?
5. Have you ever been, or are you presently, the subject of a lawsuit?
6. Are there currently any outstanding judgments or pending claims against you?
7. Have you ever been convicted of a crime?
8. Are there any current conditions, medical or otherwise, that may impair your ability to sign legal documents?
9. Do you currently take any medications, prescribed or otherwise, that could impair your cognition?
10. If married, is this your first marriage?
11. If you have children, were any from different relationships?
12. Do you retain rights with regard to all of your children?
13. Were you adopted?
14. Are you or have you ever been a party to a civil union or common law relationship?
15. If married, are you contemplating divorce?
16. Are you requesting that we only represent you and not your spouse/partner?
17. Have you filed personal income tax returns for each of the past five years?
18. Have you ever had an Internal Revenue Service audit resulting in adjustments, or are you currently under audit?
19. Are you a U.S. citizen?
20. Do you have any assets or interests located outside of the United States?
21. Are you a current or future beneficiary under the estate plan of another?
22. Do you hold any interests jointly with others, and if so, with whom?

Estate planning is more complex and intricate, considering the changing demographics and what seems to be a permanent state of uncertainty as to the tax laws.

If your firm rejects a prospect, determine whether you should send a letter confirming that your firm wasn't retained. If you determine that a letter isn't necessary, perhaps as a no-cost record, enter a notation in the firm's billing system. For example, the billing system could include a "Client" account named "Prospects," and you could note the rejection or non-retention by each rejected prospect in that account so that you maintain records of all such non-retentions. In addition, consider how such rejected prospects might be reflected in the firm database. For example, you may retain contact



data for such an individual in Outlook (or whatever database is used) or in the firm's contact management system with a notation that the firm opted not to accept this prospect as a client. In this way, there's a record should the prospect raise the issue in the future. It also provides a ready means to avoid having to repeat the process if that prospect contacts the firm again.

A final challenge remains for us all. While it can be advantageous to fully disclose most common situations to clients in a retainer agreement, at some point, clients may view the length and complexity of that agreement negatively. How much content should be included will thus be a matter of varying opinion among practitioners.

If you'll be working with the client's other advisors, such as her accountant or financial advisor, consider including language to reflect the client's permission to do so.

Collaboration

Collaboration might have been merely a footnote to this topic not too many years ago; today, it warrants prominent consideration. Estate planning is more complex and intricate, considering the changing demographics and what seems to be a permanent state of uncertainty as to the tax laws. How and why collaboration may be a more essential consideration can be illustrated when assessing the increasingly more common estate-planning technique of non-reciprocal spousal lifetime access trusts (SLATs).

A keystone of some estate plans may be irrevocable, grantor, dynastic SLATs. When these trusts are funded with assets that appreciate, there may be a benefit to having those assets swapped back into the client's estate prior to death so that the tax basis in those assets can be stepped-up. When the assets involved are marketable securities, it will generally be the wealth manager, as opposed to the attorney, who's monitoring those assets and identifying when a swap may be worthwhile. Once that identification is made, the wealth advisor ideally should communicate with the attorney to assure that the swap is effectuated properly. In many SLAT plans, collaboration with the wealth manager is essential to the optimal funding of the trusts and the proper administration of the SLATs thereafter. For example, asset location decisions (which trust, retirement account or non-retirement account a particular investment is held in) can have a significant impact on the effectiveness of the plan. A key risk that non-reciprocal SLATs may pose is the premature death of one spouse. The premise of SLAT plans is that one spouse can access the other spouse's trust and vice versa, so that together they can continue, within reason, to access most transferred assets. But, if one spouse dies prematurely, the assets of one SLAT will no longer be available. Life insurance is commonly used to mollify this mortality risk. In these instances, the estate planner must collaborate with the client's insurance consultant to effectuate an appropriate plan. Forecasting the potential economic shortfall of a premature death is often a task best addressed by the client's CPA or wealth advisor.

If you'll be working with the client's other advisors, such as her accountant or financial advisor, consider including language to reflect the client's permission to do so. Perhaps, considering how estate planning has evolved, this language might be a default in all retainer agreements. Consider a clause like this:

> Professional Ethics rules require us to keep all information that you disclose to us confidential, which could mean not disclosing it to persons outside the Firm. In many instances, it is not feasible to complete, implement or administer a plan without coordination with your other professional advisers. Therefore, you grant us permission to communicate the information that we, in our professional judgment, deem advisable to any of your advisers, including but not limited to: your accountant, bank trust officer, financial planner, insurance agent and care manager. You agree that we may disclose information to them as necessary to allow us and them to fulfill our respective roles in your estate planning.

With collaboration being so essential, some practitioners may be hesitant to undertake an engagement without such an authorization.

Additional steps may also be warranted. For example, the client intake form, discussed above, might include such an authorization so you can be certain clients understand the importance of collaborative disclosures and provide the relevant contacts at the outset of the engagement. Unfortunately, the mere fact that the estate planner had the foresight to address authorization to collaborate doesn't mean that other advisors have done so. In those instances, other advisors may refuse to collaborate until they too have received authorization from the client. A more expedient approach might be for the attorney to prepare a letter from the client, which he can sign and the attorney can distribute to all advisors authorizing and directing collaboration.

Scope of Engagement

If you've been asked only to modify a portion of a plan or create limited documents, does your engagement letter specify the instruments you've been asked to review, draft or modify? Some practitioners prefer an open ended, less specific engagement letter, as the scope of the engagement may change during meetings with the client or as the work evolves. Others prefer to be specific about what they'll be preparing. Until the outcome is known, it's impossible to tell which approach is preferable. But, there are steps you might consider. At various points in the engagement, it may be beneficial to indicate what documents you've been engaged to review, draft or revise. You could include this in the initial retainer agreement. Even if you prefer specificity about what was agreed to be done in the engagement letter, an open-ended provision could indicate that the scope may change as more information is learned or in response to new decisions by the client. When you send draft documents to the client, the cover letter could reaffirm that because of discussions that took place since the engagement letter was completed, or issues that were identified during the work done, the scope has expanded (or contracted) and why. Thus, emails and subsequent formal letters may all be relevant to confirming what was agreed to and how the scope of engagement has evolved. Practitioners should remain alert to situations in which the scope of the engagement may have changed sufficiently so that you should formally create a new or updated retainer agreement.

Whatever is stated in the engagement letter or in subsequent correspondence, you may wish to indicate whether you've been engaged to handle any funding with regard to trusts created. Clear communications can avoid misunderstandings and subsequent claims that you failed to perform duties that a client (or her heirs) later feel you should have done.

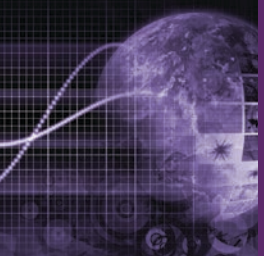
If you'll be preparing deeds as part of a gift or funding, consider stating so. If a title search won't be obtained as a prerequisite to completing a deed, it can be helpful to include language that you'll rely on the documents provided by the client and won't be examining title or otherwise be responsible for the quality of title conveyed as a result thereof.

> Full and complete disclosure by the client is important for your ability to render advice and create a cohesive plan.

Life insurance is a common component of many estate plans. Yet many, perhaps most, estate-planning attorneys don't have the skillset to review and evaluate the underlying life insurance policy assumptions. If a plan for your client will involve life insurance, consider adding a general limitation to all engagement letters stating that while you may advise as to the role of life insurance in the estate plan, you won't provide advice as to insurance policy selection or carrier analysis. This disclaimer is particularly important, considering some of the dismal performance statistics on many trust-owned life insurance policies.

Billing Methods

Technology is changing how some practitioners bill. Various tasks that used 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 to be fair



to the practitioner. As practices evolve to cloud-based models, the traditional paradigms for billing will be unfair to clients in some instances and unfair to practitioners in others. For example, the process of making paperless a firm that's been paper-based for decades is incredibly costly. The process of learning how to work with a document management system can involve a considerable amount of non-billable start-up time. But, the resulting efficiencies might enable the practitioner to prepare certain documents for a fraction of the cost that had been billed in the past. Hourly billing won't permit the practitioner to recoup the investments, and clients after the transition will be under-billed relative to clients prior to the transition. Some type of flat or supplemental fee arrangement may be worth evaluating even for firms entrenched in hourly billing. Modifications to billing practices may continue to evolve over time.

Address planning implications regarding what will happen if the client becomes disabled.

So that the client has a clear understanding, if you bill on an hourly basis, specify this in a written retainer agreement; if you bill on a project or flat-fee basis, indicate what those charges will be and when payment is expected. If you're billing on a flat-fee basis, delineate what's included in that fee and some of the instances in which additional charges will be incurred. If you're billing hourly or don't expect payment until after the estate plan is completed and signed, you may wish to include language that will help establish a claim premised on an "account stated" by including language like this:

> It is our expectation that you will review all monthly invoices issued to you and immediately contact us if you have any questions or concerns regarding the invoice. In the absence of hearing from you within 30 days from the issuance date of any invoice, we agree that you have reviewed the invoice and have no objections.

One dilemma posed by the above language is that in some engagements, the relevance, usefulness or appropriateness of work included on one bill may not be ascertainable by the client until the final work product, or at least a draft of it, is later produced.

The retainer agreement should indicate that fees are revised periodically so that the client is on notice that an agreement from several years earlier doesn't assure that the same hourly rate or fee structure will apply in the future. When rates or fee structures are changed, you can incorporate a footer on the bill explaining that you've put an increase or other change 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 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 or using a common naming convention, so that they can readily be identified in the future should an issue arise. There's no reason not to use "off-label" applications of billing and other routine processes to provide more communication to clients.

Client Responsibilities

Full and complete disclosure by the client is important for your ability to render advice and create a cohesive plan. In the engagement letter, you can alert clients of their responsibilities. Consider indicating:

> You must make complete and accurate disclosure of your financial matters and your intentions concerning the disposition of your estate. Your failure to do so can make it impossible for us to give you proper advice. We cannot be responsible for undesired consequences caused by your failure to disclose information to us.

But, as with so many concepts that are embodied in a retainer agreement, other steps to backstop and bolster the above provision might be useful. A reasonably accurate balance sheet is essential to many aspects of estate, tax and asset protection planning. Consider inserting the following language between a template

balance sheet and a signature line for the clients to sign, attesting to the accuracy of the balance sheet:[4]

> Sign below indicating the accuracy and completeness of the above balance sheet. Your exposure to federal and/or state estate tax, the appropriateness of gift or asset protection strategies, the planning steps that may be recommended or taken, and other aspects of planning, will be based in significant part on this information.

Having a signed balance sheet with some language informing the client of how your advice will be based on that information may provide protection if later issues arise.

The reality is that many clients give different advisors different information. Rarely does one advisor hear everything. This is yet another reason collaboration can be so critical. When all the advisors piece together the information each has been given, a more realistic and complete picture of the client often results.

Privilege and Confidentiality

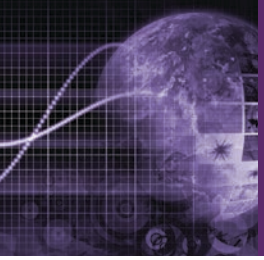
Attorneys are obligated to safeguard the confidences of their clients. Generally, the attorney is responsible to protect all communications between the client and the attorney from disclosure without the client's permission.[5] The obligation to keep a client's confidences private extends beyond information that would otherwise be considered subject to the attorney-client privilege (the privilege). The privilege belongs to the client as opposed to the attorney.[6] The communication of confidential information and the privilege can both play an important role in a range of estate-planning matters and is something that you may wish to address, with some specificity, in the engagement agreement and other communications.

Technology has complicated the potential implications of privilege in designating acceptable forms of communication. Technology has also provided some solutions to these challenges. In an age when many routine communications occur electronically, the client may not pause to consider the implications of a mode of communication. For example, a client may communicate with her personal (not business) counsel through her company email account, save documents on a company file server or use a company computer to engage in such communications. Unfortunately, the privilege may not attach to communications directed to or through the client's company email when the company has notified the employee that privacy won't be afforded to such communications. Because not all clients have or use company email addresses or computers, if you suspect that this type of communication is occurring, it might be prudent to recommend that documents and communications occur through use of the client's personal (as opposed to business) email account and perhaps even on a personal computer (as opposed to a company provided one). In your retainer agreement, you might consider stating:

> If you communicate via a corporate or an employer email account, under some circumstances those communications might not be considered privileged, which may give other persons the right to access our communications. If you own the business and use a business account, in a future lawsuit or claim by the IRS, for example, your personal emails may be accessible. You might wish to provide us with a personal email for use in electronic communications, in lieu of a company provided address, and also consider accessing and originating emails through the use of only your personal computer and not a business or employer computer. If we inadvertently use an incorrect email address please immediately advise us of the correct email address to use, and any email address that we should delete from our system.

Similar issues can also affect practitioners. If you send personal emails from a work email address or store

Maintaining a record of communications with the client can be important should future litigation ensue.



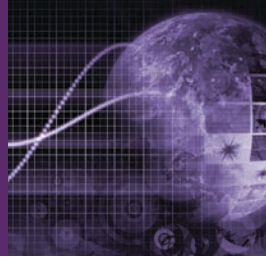
personal documents or communications on a practice laptop, in later litigation, discovery and data searches might reveal your personal emails and estate-planning documents. If you use a personal laptop, consider a written policy not to save any client work there, and transfer it all to the office system to be saved in accord with whatever the firm document retention policy is (see below). Consider documenting the characterization of this equipment as "personal" in the firm's technology records.

Subsequent Client Disability

Address planning implications regarding what will happen if the client becomes disabled. This possibility is a practical certainty for most clients. Consider that the U.S. Census Bureau projects that the population age 85 and over could grow from 5.5 million in 2010 to 19 million by 2050.[7] What might this mean for client capacity issues? Age 50 is presently considered the peak age for financial decision making. By age 60, that ability may decline. Yet, the clients' perception of their ability may not decline, creating a widening gap between perceived ability and actual ability.[8] This gap can, and often is, exploited by elder financial abuse perpetrators. You'll almost assuredly receive a phone call from a client's family member in future years seeking assistance with an aging family member. Unfortunately, without an explicit waiver or instructions from your client, you may have an ethical and/or legal impediment to help in the manner you might feel is optimal. It's preferable to address the impact of confidentiality and other issues in advance, perhaps in the form of a waiver in the retainer agreement, such as the following Waiver of Attorney/Client Privilege and Waiver of Conflict:

> If you provide estate or tax planning services as part of the engagement, you may include language that reflects you don't guarantee that a plan will work as hoped.

> **Waiver of Attorney/Client Privilege:** I have engaged the services of the law firm to assist me and my family in various estate-planning matters. I understand that communications with my attorney are generally confidential and protected from disclosure. However, it is my express intention that should any document or component of my estate plan be contested, following my incapacity or death, whether it relates to the validity of an instrument, transfer or other transaction, enforcement or intent, my attorney shall be deemed competent to testify. The attorney-client privilege which might otherwise attach to our communications shall not be deemed a bar to disclosure of communications which relate to a contest as described above, or a claim by any beneficiary under an instrument which was executed by me, or who would otherwise have been deemed my heir at law. This explicit waiver shall only apply to a claim which would be deemed to be one that emanates through me or my estate as opposed to against me or my estate. If my attorney is called as a witness in such a contest, my attorney shall be entitled to compensation for time expended at his/her then applicable hourly rate.
>
> **Waiver of Conflict:** If I am determined to be incapacitated, or otherwise unable to provide direction or a waiver of the attorney/client privilege to my attorney, copies of my estate-planning documents shall be provided to my Agent, successor or personal representative, as the case may be, and my attorney may discuss my intentions and the administration of such instruments with such persons, and with my Certified Public Accountant or wealth manager (or person with a similar function regardless of title) or those professionals retained by my Agent. I waive any conflict in favor of permitting my attorney to represent and advise my fiduciaries or their successors after my incapacity or demise. It is my express belief that continuity of legal services, if so desired by my Agent or successor, will further and facilitate implementation of my estate planning objectives.



You may modify the language above to reflect the client's desires. Providing clarity with regard to the client's desires for communication with successor agents and representatives can be helpful. Outlining these terms may even generate a conversation that can help identify issues of import to the planning process in addition to providing direction in the event of disability.

The above provisions, even if used, may not suffice in all instances. Which professionals might need to be involved in the event of death or disability? Will the above provisions suffice to waive the privilege for another attorney who's brought into the matter to assist? What about the potential need for coordination of services with the incapacitated client's CPA and other professionals? Consider a broader provision that authorizes you to confer with these other advisors similar to that discussed above in the context of collaboration. These issues might be addressed in documents other than just a retainer agreement. For example, might it be beneficial to include a waiver clause in a durable power of attorney, so that the third parties (such as a bank where accounts are located) are informed of the right to communicate? An intake form might address limited waiver provisions as well.

What if a prior client becomes incapacitated, and an old retainer agreement or other forms used don't address these matters? Perhaps prior authorized communications that include third parties or other advisors, language contained in estate-planning instruments or other statutory or common law waiver theories may apply to facilitate the transmission of some additional communications.[9]

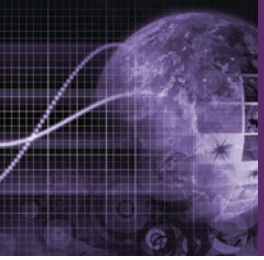
Conflicts of Interest

You may need to address conflicts of interest in estate planning (and certain areas of income tax planning). Do you represent other family members in their estate plans or businesses? While there can be benefits to multigenerational representation that results in cohesive planning and transitions, it may be advisable (or even required) to point out to each client that conflicts of interest (even among the most cohesive of families) can occur. You may use the retainer agreement (or a separate conflict letter) to explain what will happen should a conflict occur. What if one generation indicates a concern about the next or changes its plans? Might it be advisable to address what will or won't be communicated at the inception of the representation? Specific waiver language might help everyone understand the boundaries and what will happen should litigation between the clients ensue (as can happen with families engaged in the same business endeavor).

Client/Fiduciary Representation

The wife may be the settlor of a traditional irrevocable life insurance trust with her husband or a child as a trustee. The trust may have a nominal dollar value bank account to which annual gifts to pay insurance premiums are made. In sharp contrast, a modern trust, such as a SLAT, might have one spouse as the settlor, an institution as the administrative trustee and the other spouse with a swap power. When a swap power exists, the trustee may have an obligation to confirm value equivalency. What if the interest to be swapped is a family business, and the removal of that interest from the trust will result in its disposition in a manner different from the disposition had it remained in the trust? Provisions relating to the power to loan the settlor trust assets without adequate security or the existence of a trust protector with expansive powers may create additional conflicts of interest that you may be obligated to assess and address. Representation of each of these power holders may present a conflict of interest; it's important for the settlor to understand that you may only be able to represent her interests should a conflict arise. Even if interests are aligned, you may consider making it clear that you only represent the settlor. It may also be worthwhile to confirm in writing to the client that you're representing these other individuals. In sharp contrast to traditional trust drafting, if you represent the trustee, a conflict may exist between your fiduciary duties and the

Appellate cases in your jurisdiction regarding attorney's fees, fee disputes and probate can be helpful in the crafting and revising of engagement letters.



desires of the settlor who has irrevocably relinquished control over disposition. In addition, with the plethora of different fiduciary and non-fiduciary positions, you should more carefully delineate who's being represented. For example, if a key power granted to a trust protector is to remove the trustee, it might be a conflict to represent both the trustee and the protector as to each other, but perhaps an identity of interests might exist as to third parties. The growing use of decanting to change trust terms and, more recently, non-judicial modification that can permit even broader changes, may heighten the concerns you face.

Text Communications

Maintaining a record of communications with the client can be important should future litigation ensue. That litigation may involve challenges to the estate-planning documents or a dispute between you and the client. In either event, the integrity of your file may be important. For this reason, you may wish to discourage the use of text messages that are difficult to retain in a client's paper or electronic file. Consider a provision in the retainer agreement that says: "It is not possible for the firm to maintain a record of text messages. You should assume that any text message directed to personnel of this firm will not be received and will not be read." If texts are received, noting the gist of the text message in the billing system may serve to document the communication. Be mindful, however, that in many jurisdictions, bills aren't considered privileged communication.

Document Retention

In the engagement letter, it can be helpful to indicate what will happen with any documents the client provides as well as those you generate. If your firm has a policy not to retain original documents, the retainer agreement should so state. If your law firm is paperless, consider indicating that while information may remain available electronically, there will be a charge imposed to provide (additional) hard copies from your electronic archives.

It's useful to have a formalized retention policy, especially if you still have any portion of your file in paper format or if your electronic records are purged from time to time. This policy can help to avoid a possible negative inference if parties seek documents years later during litigation and those documents have been destroyed. However, if you become aware of litigation before destruction occurs, endeavor to take steps to safeguard the documentation and protect it from automatic destruction to avoid the adverse implications that can result from a spoilation of evidence claim.[10]

No Guarantees

If you provide estate or tax planning services as part of the engagement, you may include language that reflects you don't guarantee that a plan will work as hoped. Consider language like this: "By executing this agreement, you are acknowledging that the Firm has not made any warranties of outcomes. All expressions made by any attorney are a matter of an attorney's opinion only."

Closing Letters

Do you send a closing letter when the estate-planning documents have been completed and executed? Having a clear demarcation date evidenced by a closing letter (and opening a new matter when the client comes back for subsequent revisions) can help delineate when the services engaged in have been completed. Consider opening a new matter number or file when the client returns for further tweaks to her plan. Both actions can be helpful in triggering statute of limitations as well as statute of repose defenses—when and as applicable.

Payment for Attorney as Witness

If a contest or other proceedings relating to the client's intent ensues, you may be one of the most important witnesses in those proceedings. Without an indication that you'll be paid for time involved in preparing to act as a witness and testifying, you may find yourself expending more time and effort than what your initial fee envisioned, especially if your only recourse (without contractual language) is as a "fact" witness in such litigation. Consequently, consider including the following language to contractually bind the client and/or her estate to payment for the time and expense attendant to such future involvement: "If any present, past or future member or employee of the Firm is called as a witness, you agree to pay the then-applicable hourly rate for time expended in the preparation for and attendance of such proceedings."

It's also helpful to remain abreast of appellate

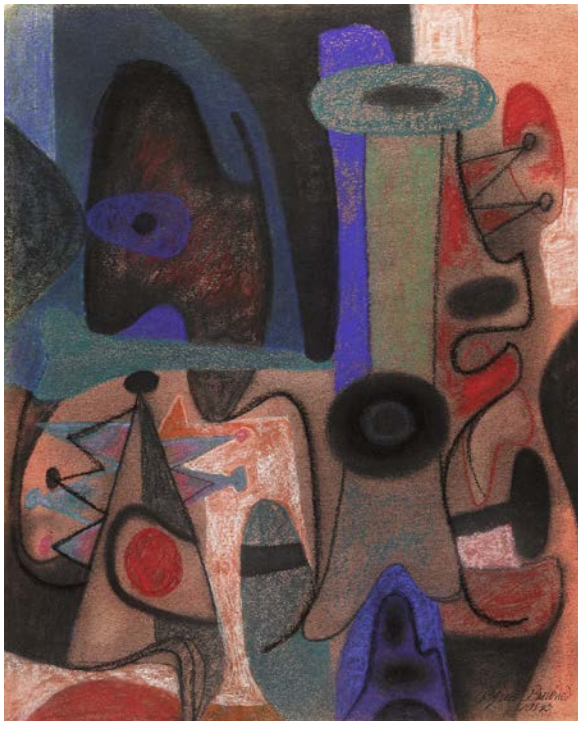
cases in your jurisdiction regarding attorney's fees, fee disputes and probate. These cases can be helpful in the crafting and revising of engagement letters. Through these cases, you may gain insight as to when issues might arise and protections that may be available if properly addressed in the engagement.

Endnotes

1. In 2016, The American College of Trust and Estate Counsel (ACTEC) published the *ACTEC Commentaries* (5th ed. 2016). Some of the recent revisions to the *ACTEC Commentaries* reflect changed attitudes and perspectives with regard to the American Bar Association's Model Rules of Professional Conduct in the realm of estate planning.
2. In some states, the creation and funding of a domestic asset protection trust necessitates a qualified affidavit contemporaneously provided with any qualified disposition. The certification and accurate disclosure of assets and obligations by the settlor may be of significant import and assistance to the drafting of such affidavits and the avoidance of a fraudulent conveyance. *See, e.g.*, MCL 700.1046 and MCL 566.34.
3. Use of such forms doesn't eliminate a planner's need to ask questions at the time the plan is devised, as well as when executed, to assess that the client has the requisite capacity. Often, a family member completes the questionnaire, and as such, the form wouldn't be reflective that the client had a sufficient understanding of his interests.
4. Acknowledgment to Samuel Wiener, law partner in Cole Schotz in Hackensack, N.J., who shared this incredibly valuable and simple idea with one of the authors decades ago.
5. *See* MRPC Section 1.6.
6. *Cohen v. Jenkentown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). *See also* Sandra D. Glazier, "Testimony from Beyond the Grave—The Gravamen of the Attorney-Client Privilege in Will and Trust Contests," *Tax Management Memorandum*, Vol. 57, No. 24, at p. 495 (Nov. 28, 2016).
7. "Aging Statistics," Administration on Aging (May 8, 2013).
8. Serena Elavia, "50 is Peak Age for Financial Decision Making" (Sept. 18, 2015), *http://thetrustadvisor.com/headlines/peak-age*.
9. *See Glazier, supra* note 6.
10. *See* Thomas Y. Allman, *E-Discovery Standards in Federal and State Courts after the 2006 Federal Amendments* (May 3, 2012), fn. 95 and 96, citing *In re Agent Orange Product Liability Lit.*, 506 F. Supp. 750, 751-52 (E.D.N.Y. Feb. 5, 1980) ("[t]he government is under an additional obligation imposed by the Federal Rules of Civil Procedure to preserve documents requested in Dow's notice to produce") and *Beard Research v. Kates*, 981 A.2d 1175, 1185 (Del. Chan. May 29, 2009) ("a party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit"), *www.ediscoverylaw.com/files/2013/11/2012FedStateEDiscoveryRulesMay3.pdf. See Martinez v. Gen. Motors Corp.*, No. 266112, 2007 WL 1429632, at *1 (Mich. Ct. App. May 15, 2007), which recognized that "[e]ven when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." This rule has been heavily litigated in other jurisdictions and lays down a broad duty to preserve. *But see* MCR 2.302(B)(5), which provides that:

> A party has the same obligation to preserve electronically stored information as it does for all other types of information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system.

Consequently, if one has a routine procedure for destruction and the same occurs before there's reason to know of the "potential" for litigation, following such procedures may provide a "get out of jail free" card.



SPOT LIGHT

Facts and Figures

Abstract Composition by Byron Browne sold for $4,375 at Bonhams' recent American Art auction in New York City on May 24, 2017. Because he believed that pure abstraction was impossible, Browne's works are what he calls an "abstracted vision of everyday reality."