Defensive Estate Planning: Practical Strategies

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A KEY ESTATE PLANNING GUIDE

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Practice Environment

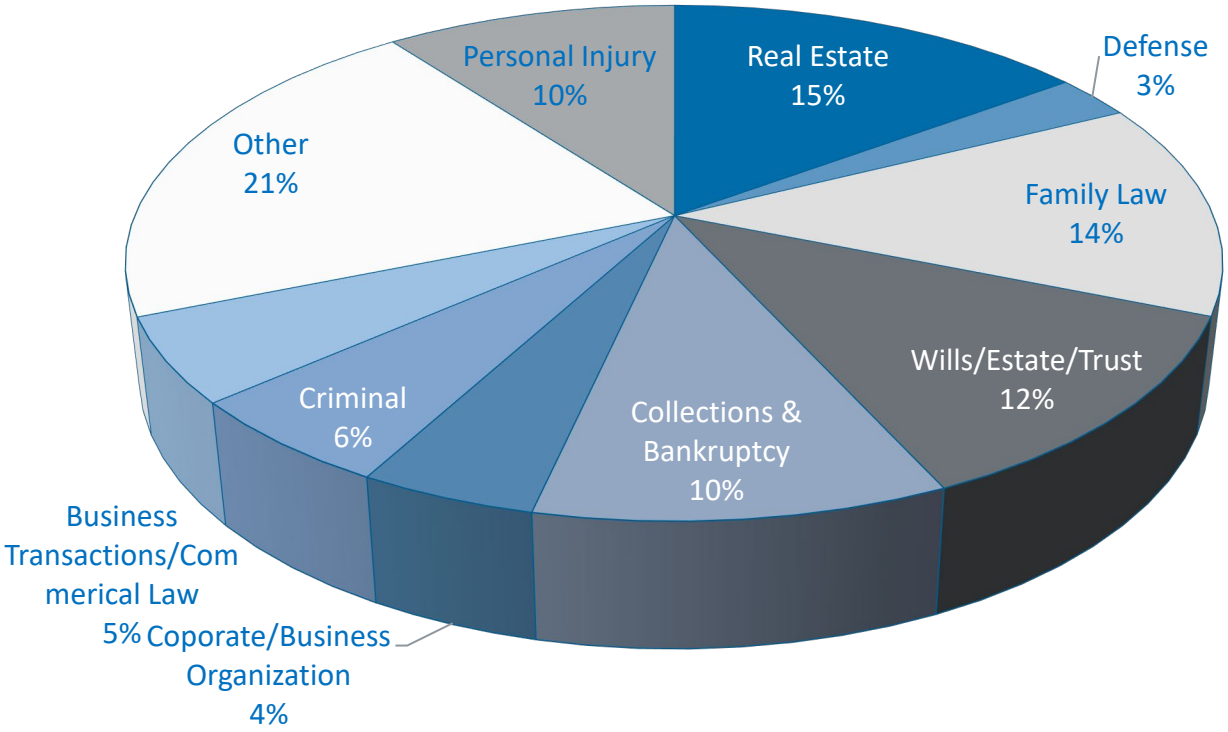
Suits Against Estate Planners; Malpractice Coverage

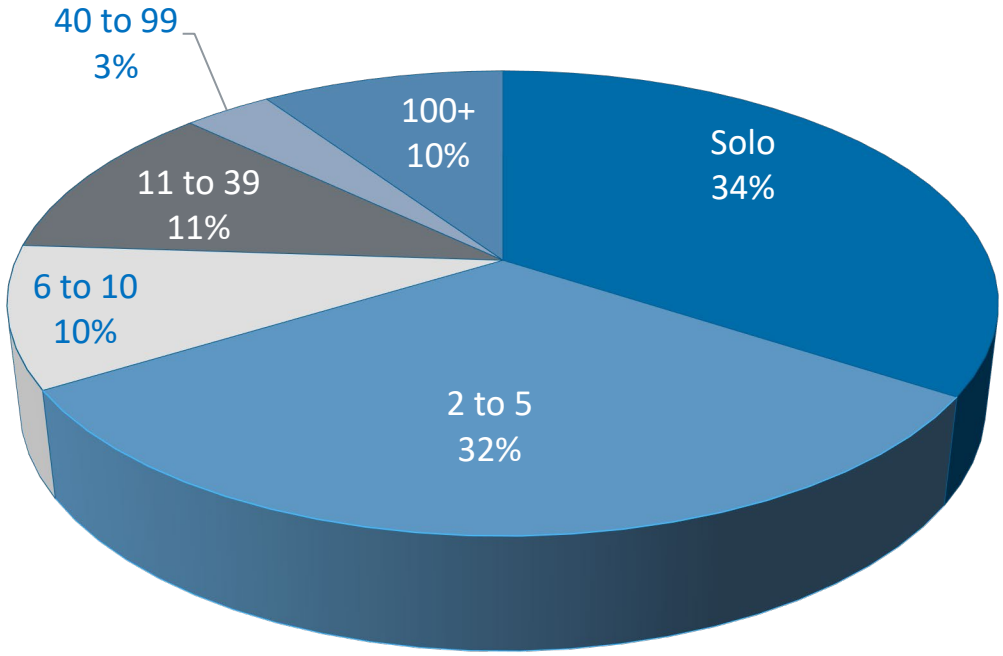
Comment from Malpractice Insurance Broker

- “Estate work has been one of the highest-rated areas of law practice in the past few years. Typically, when wills and estate plans are contested, or clients sue because of negligent estate work, it becomes very costly to defend and results in high claim payouts. Of course, the larger value of estates handled the harder and more expensive insurance is to find and purchase. I can’t see this trend going away anytime soon.”

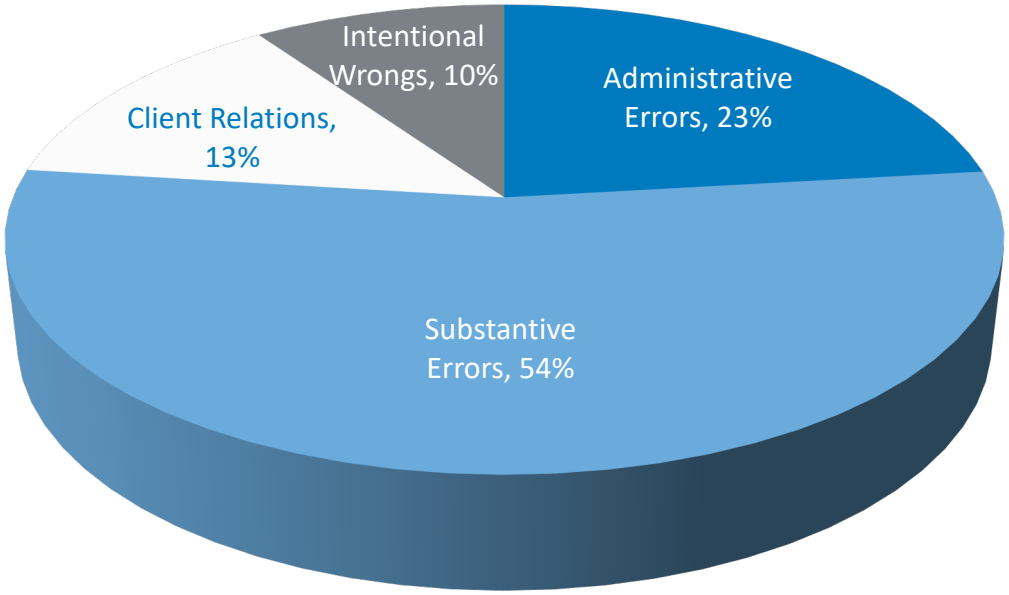
Stats on Malpractice Claims

- There have been several recent, high-profile trusts and estate malpractice cases. The challenges in those cases are worrisome, even apart from the worsening malpractice claims statistics.
- According to the Ames & Gough LPLI 2022 Claims Survey, the largest number of malpractice claims stem from three key practice areas. At the top of that list is Trusts & Estates.
  - The most common claimed legal malpractice error related to conflicts of interest.
  - At least two of 11 insurers surveyed reported the average cost to defend a claim exceeded $500,000.
- According to the ABA's 2020 Standing Committee on Lawyers' Professional Liability, which publishes a Profile of Legal Malpractice Claims study every four (4) years, the percentage of claims involving payouts of $2 Million or more was substantially on the rise.


Personal Injury
10%
Real Estate
15%
Defense
3%
Other
21%
Family Law
14%
Wills/Estate/Trust
12%
Criminal
6%
Collections &
Bankruptcy
10%
Business
Transactions/Com
merical Law
5%
Coporate/Business
Organization
4%



USI AFFINITY


Intentional Wrongs, 10%
Administrative Errors, 23%
Client Relations, 13%
Substantive Errors, 54%

Common Issues

Be Alert to Issues Raised in Recent Cases

Common Issues

- Several recent high profile malpractice cases against estate planners contain some common allegations, such as:

- The client wasn't **advised of the risks of the plan** (e.g., those relating to grantor trust status, relinquishing a swap power, and loss of basis step-up on assets in an irrevocable trust);
- The client **didn't understand** what they were signing, or claims that they did not understand what they were doing;
- The attorney recommended the technique and **pushed the client** to use a technique; or,
- The attorney had **conflicts of interest** that negatively impacted the advice provided or information shared impairing the client's ability to make an informed decision.

Don’t Sell

- **Be careful about over-selling** or marketing particular planning techniques. Try to avoid only stressing the advantages of a plan and downplaying the disadvantages.
- **Clients' memories can be selective and creative**. Documenting, even generally, that a discussion was held regarding the potential income tax consequences of saving on estate taxes may be helpful.
- A discussion of **options** with the client might deflect marketing claims. If options are provided, then it might be more difficult for a client to argue the plan was pushed or marketed to them. Remind clients that there is often no perfect solution, and they retain the right not to engage in the plan and to explore other alternatives.

Inform Clients of Risks

- **Uncertainty is part of the fabric of the estate planning process**. It may be advisable to consider including practices that might help place clients on notice of risks which might be attendant to a plan and later corroborate that an explanation of the risks were provided to the client.
- Any form of tax planning is always subject to the **risk of changes in the law, the economic assumptions underlying the planning, that client goals or family dynamics might evolve, and a myriad of other assumptions involved in any plan**.
- A change in interest rates or investment performance can have a dramatic impact on the ultimate tax consequences of a GRAT or a charitable remainder or lead trust. If the donor/settlor of a GRAT dies during the annuity term, one often assumes that the transaction has failed, but in reality, if both the value of the trust assets and prevailing interest rates have risen sufficiently, only part of the trust assets may be included in the decedent's gross estate. No practitioner has any control over the value of the assets or interest rates.

Recent Significant Cases

- *"Raia v. Lowenstein Sandler, LLP," LISI Estate Planning Newsletter* #2725 (May 16, 2019),
- "*Wellin v. Nixon, Peabody, LLP," LISI Estate Planning Newsletter* #2934 (Jan. 20, 2022) and on subsequent appeals in *LISI Estate Planning Newsletter #3039 (May 26, 2023),*
- "*Scott v. Rosen," LISI Estate Planning Newsletter* #2979 (Aug. 28, 2022).

General Defensive Steps

Be Alert;

Change Practice Procedures

Defensive Steps – Corporate Transparency Act

- The Corporate Transparency Act (CTA) will require 32 million closely held businesses to file reports on the entity and for each Reporting Company's Beneficial Owners. The law can be simple for many but incredibly complex for some. Many people required to report may not wish to do so.
- Clients may mistakenly believe that the attorney who set up an entity, or who is currently representing them, or their entity will handle CTA reporting. Communicate clearly to clients what role you will or will not serve.
- Many advisers expressly disavow in writing any responsibility to file amendments to reports as it can be difficult or impossible to know and track when a Beneficial Owner's home address, name, etc., change.
- Consider that if you review a trust and/or entity documents for a "simple" CTA filing, the client might try to hold you responsible for issues with the documents unrelated to CTA filings or problems with the administration of the trust and/or entity. Clearly indicate what you will or will not do in the scope of any engagement.

Defensive Steps - Collaborate

- Evaluate practices to see if there are **protective steps** that you might incorporate into your practice to avoid a claim or at least provide better defenses in the event of a claim. These will vary depending on the nature of your practice. For example, the practices of a firm that focuses on estate planning documents for non-taxable estates will differ from those that focus on Medicaid planning or those that focus on taxable estates.
- The use of a **collaborative team** of advisers may "help" reduce some of the risks to the estate-planning attorney. Note that communications by an attorney with other advisers, e.g., a CPA, may taint the attorney-client privilege unless the attorney retains those other advisers under a Kovel arrangement (assuming that is feasible). US v. Kovel, 296 F.2d 918, 62-1 U.S. Tax Cas. (CCH) P9111, 9 A.F.T.R.2d (RIA) 366, 96 A.L.R.2d 116 (2d Cir. N.Y. Dec. 5, 1961)
- Unlike CPAs, appraisers, and other advisers, attorneys cannot limit their liability to fees earned.

Defensive Steps – Market Carefully

- **Review firm marketing materials** and evaluate statements made. There may be a tendency, especially if your marketing personnel prepare the materials, to use terminology like “provide optimal estate tax savings,” “help you find the best technique for your family business,” or “provide maximum tax reduction.” Try to avoid loaded words like “optimal,” “maximum” or “best.”
- Can there ever really be a “best” succession plan, given the complexities and dysfunction of most family dynamics? Can you ever achieve “optimal” or “maximum” tax savings? Modify “marketing” language to use more balanced terms and eliminate qualifiers or any terms that might be interpreted by a client as a guarantee or boast.
- There’s almost always a trade-off of income versus estate tax savings for any planning technique. And even if you could determine the most tax efficient strategy, what’s the likelihood that the facts or the law, or both, won’t be changed (perhaps multiple times) before the strategy plays out. It could be helpful to **point out these risks in written communications to clients**.

Defensive Steps – Risk Factors

- Consider pointing out some risks in each client letter: the introductory letter sent to a new client, the letter forwarding a memorandum or discussion of the plan, the letter with draft documents, and the letter forwarding final documents. Each form letter can include a few risks or issues appropriate for the timing of the communication. In that way, each communication has some indication of limitations and risks. That may make it more difficult for a client to argue that they were not informed of issues and their responsibilities if the communication process throughout the engagement informed them of issues.
- Also, incorporating some points into each form letter will remind professionals to remember these points when communicating.

Defensive Steps – Risk Factors

- **Written List of Risk Factors**. Consider providing clients with a written, list of risk factors. Giving clients who wish to engage in various estate planning endeavors (such as DAPTs, SLATs, IDGTs, GRATs, etc.) a "Listing of Some Risk Factors that May Affect Your Plan" might prove helpful. For expediency, this might start with a somewhat generic, somewhat customized template.
- Such a list could also communicate to the client that there are risks involved in every estate plan. No legal or ethical rule requires a practitioner to lay out all the risk factors in writing. There may be reasons not to provide the IRS (and perhaps other creditors) with a roadmap to the purposes and intentions behind an estate plan, but proving that a client was advised of risks, particularly after the client has died or becomes incapacitated, may be difficult without some level of contemporaneously created documentary evidence.

Defensive Steps - Assumptions

- **Highlight Assumptions** in Illustrations. Consider highlighting underlying assumptions to any illustrations provided, especially if the illustrations reflect recent changes in the law or anticipate future changes in the law, or an individual client's circumstances. Illustrations can be helpful in demonstrating the potential impact of specific assumed factors (interest rates, cash flow, etc.) on a plan. Still, practitioners might consider how allied professions handle similar projections. It is standard practice for wealth advisers, trust companies and insurance consultants to include disclaimers on each forecast page and a page or more of express caveats and limitations at the end. Should estate planners consider doing the same?
- If you, for example, prepare a forecast, point out the limitations of a linear projection if that is the approach used.

Defensive Steps – Communications Generally

- Consider pointing out some risks in each client letter: the introductory letter sent to a new client, the letter forwarding a memorandum or discussion of the plan, the letter with draft documents, and the letter forwarding final documents. Each form letter can include a few risks or issues appropriate for the timing of the communication. In that way, each communication has some indication of limitations and risks. That may make it more difficult for clients to argue that they were not informed of issues and their responsibilities if the communication process throughout the engagement informed them of issues.
- Also, incorporating some points into each form letter will remind professionals to remember these points when communicating.
- Review firm forms like organizers, etc. **Consider the language used, adding caveats and disclaimers**, etc.

Defensive Steps – Firm Culture

- **Foster a defensive practice environment** and culture.
- If you conduct periodic firm or department meetings, consider making defensive practice steps, not merely tax updates, part of the agenda.
- If you're part of a small firm or are a solo practitioner, consider participating in one or more periodic **study groups** and making defensive practices part of that agenda by keeping safety front of mind.
- Consider the potential benefit of having safer practices permeate the firm's internal documentation and culture.

Defensive Practice Steps by Phase

Step by Step Protect Your Practice

Pre-Engagement

- Defensive practices can start as soon as a prospective client makes an inquiry.
- Consider the use of a consistent practice of **initial due diligence on every prospect**. This can help to deflect a challenge by a prospect who claims they were for some, perhaps inappropriate reason, singled out and rejected.
- Consider conducting an **online search** for general information that might be available on the prospective client and any business, or other names you're aware of. Consider whether it might be helpful to make this part of your practice, so no particular client feels they were singled out for such review.
- Conduct an internal **conflict check**.
- If any issues are identified, **determine at that juncture whether to avoid representation and whether a waiver of conflict is possible and attainable**.
- Identify the need to make **further inquiry** of the prospective client for clarification, explanation or additional information.

Pre-Engagement

- **Retainer Agreement**: Get a signed written retainer agreement to protect the firm. **Don't make promises** to clients in retainer agreements (or any other communications) that may not be achievable.
- Forms for New Clients: Your firm **organizer, questionnaire** and other initial documentation can help to identify potential problem clients so that the engagement can be evaluated. Language can also be added as to client responsibilities to the estate planning process.
- Initial Communication: In many cases, before a client is willing to proceed, some type of preliminary communication may be necessary. Whether it occurs via a phone call, web meeting, or physical meeting, be careful to **avoid any ambiguity as to the status of representation**. If free consultations are offered, the parameters for the consultation should be clear.

Accepting the Engagement

- As you evaluate the scope of the engagement, honestly assess if the requested work is within your firm's scope of competency.
- Can you reasonably obtain **competency** in an appropriate time frame for the engagement? If not, can you recommend a co-counsel to fill any skill gaps?
- Are staff available to properly handle the engagement? With the pressure on generating billable hours and origination, it may be difficult to reject a potential engagement. But rejecting an engagement that you realistically don't have the time, expertise, or interest in handling may be one of the most important defensive steps you can take.

Rejecting the Engagement

- Rejecting the Engagement: If you don't accept an engagement, consider sending a **communication** that confirms that you weren't engaged. If the matter entailed a deadline you might add: "There could be time sensitive deadlines on your matter so be certain to hire other counsel to address them." Consider saving these communications so that they can later be retrieved if a prospect ever asserts a claim, e.g., for example, that you missed a deadline, etc.

Initial Consultations

- While the focus may be on impressing the client, remember to understand and identify the engagement's initial scope and gather information.
- It's also an opportunity to **continue vetting the client. Be alert to issues that may be identified in these initial discussions**. Don't let the pressure for new business and billings impact your objectivity or alertness to a potential problem.
- If the new clients are a couple, do you detect any undercurrents or other potential issues that didn't arise during initial discussions?
- As you refine and detail the client's **objectives, are any inherently unreasonable**?
- What language and tone does the client use?
- If any areas of concern are identified, you might reconsider whether you should continue the engagement, or modify the scope.

Memorandum/Follow up Letter

- Consider whether to follow up a meeting with a **letter and/or memorandum confirming the discussions, decisions and risks that the client was advised of**, and so forth.
- Even routine and basic estate planning may involve a **unique circumstance** or issue for a particular client, a nettlesome family matter, tax consideration or other nuance. Remember, what you consider as **basic planning may be complex or confusing to the client**.
- Maintain **contemporaneous notes** regarding meetings, who made the initial contact (if it was someone other than the client), as well as any observations or concerns you may have regarding client vulnerabilities.

Memorandum/Follow up Letter

- Consider including a standard **disclaimer noting risks and that there are no guarantees in estate planning results.**
- Inform the client that all **planning will rely upon information the client provides,** so it's important that the information provided by the client be complete and accurate.
- **Offer options**. Even if in the client meeting it appeared, for example, that a Clayton qualified terminable interest property trust (QTIP) approach was preferable, discuss other options that might be available, such as the use of an all-to-marital with disclaimer provisions to a credit shelter trust. Giving the client options that they choose from is also a defensive practice.
- If issues might require more follow-up or research, consider indicating the limitations of what was done at this stage.

Memorandum/Follow up Letter

- It might be helpful to point out some of the key **risks** with planning options and considerations. Consider noting that there are likely other risks that cannot be identified.
- If there are matters outside your expertise (e.g., evaluating life insurance and long-term care coverage to address financial risks of a non-reciprocal spousal lifetime access trust ("SLAT") plan), it might be prudent to note that you have not been retained to evaluate those issues and recommend that the client seek outside assistance.

Update Engagement Terms/ Retainer Agreements

- While you may be able to identify and clearly define the scope of an engagement at the outset, e.g., “Drafting a pour over will, revocable trust, power of attorney, living will and health proxy,” for many clients it may initially be difficult to determine the specific scope of work as that may evolve as meetings and planning unfolds.

- Following the initial engagement, the use of a written follow-up communication that better defines the scope of work may be protective.

- The key point **is to document if the scope of work changes**.

Billing

- Evaluate firm billing practices. Some practitioners prefer to bill when a matter is completed. Others generally bill monthly. Consider the possible **benefits of billing every client every month**. Billing can be an important means of confirming the status of the work for the client and, the amount of any retainer used, etc. If a dispute later arises, a series of bills clearly informing the client of the progress (or lack thereof) on the engagement may be protective and may help in collection efforts by creating an "account stated."
- Educate all professionals and staff on appropriate **and protective items to document in bills, and the type of language and descriptions they might use**.
- Billing can document when a memorandum was sent, if there was a follow-up email requesting information and when drafts were sent, etc. which may all be protective of the practitioner.
- Finally, consider using **footers on bills/text in letters/emails that accompany bills** that alert clients to new tax or other developments and firm policies (e.g., for example, any complaint on a bill must be communicated within thirty 30 days of the date of the bill).

Draft Documents

- **Send draft documents to the clients in advance of any signing** and save proof (e.g., a PDF of the cover letter or a copy of the email) evidencing that the drafts were sent.
- It's more difficult for a client to claim they didn't understand the contents of a document if it was sent to the client a reasonable time before the signing so that they had time to review the document **and ask questions if they wished to do so**.
- **Use a cover letter** (for many client matters these can be standardized to be easier and cost efficient to generate) **covering common issues with draft documents** (e.g., cautioning a client to review all aspects of the documents, ask them to confirm the names and contact information of every person named in each document, and indicate that a convenient date to finalize the documents will only be set once they have let you know they are comfortable that the drafts reflect their estate planning wishes).

Review and Signing Documents

- If you change documents following a review by the client, save notes reflecting the concerns or changes the client desired. Consider keeping a copy of the draft document and any additional drafts provided to the client, together with a copy of the final estate-planning documents.
- If changes were requested or needed, email or mail the client copies of the final documents before the signing. The goal is to **give the client the opportunity to confirm that the revisions comport with their wishes**.
- Before a client signs a document, **have them state in front of the witnesses** that they've reviewed the documents, they understand them, they had an opportunity to discuss any questions they had with counsel, they're comfortable that the documents accurately reflect their desires, and that no one is forcing them to sign the documents. Also, don't forget to ask questions that address capacity at the time of signing and the rationale for any significant change from a historical plan.

Returning Signed Documents or PDFs to Client

- When documents are signed, the next steps will depend on whether you retain or return the originals.
- If originals are maintained, it may be helpful to keep a log of documents held, and if they represent the only original of a document, ensure that they are protected in fireproof and locked cabinets.
- If the originals are returned to the client following the signing, consider having the client sign a written acknowledgment that they received the originals or otherwise reflect in writing when the documents are provided that they have the only originals.
- It may be beneficial in all cases to save a PDF of the executed documents in the client's file and provide it to the client through a secure client portal.

Engagement Closing Communication

- When the final documents, copies of them, or PDFs of them, are provided to the client, consider using a **standard cover letter** that can then be tailored to the specific client as necessary.
- Caution the client that the documents need to be revisited if there are changes and that it is the **client's responsibility to inform you of any changes in circumstances**.
- Consider using this letter as a means of **closing the file**. Some practitioners are uncomfortable formally closing a file, but that may be the only means to end the matter so that the statute of limitations begins to run. If language like "your file is now closed" is uncomfortable, consider instead something like: "We have completed all matters you have requested. We would be pleased to assist you again in the future and would be happy to open a matter at that time."

Final Bill

- When the final bill for the matter is sent, if the billing system permits, **close that matter** so that any new matter will be under a new billing code or matter number.
- Consider also including some indication in the final bill (or the cover letter providing the signed documents or copies of the documents) that the **work requested has been completed**.
- Another approach to demonstrate this is to open a new billing matter for the client if the client returns. Practitioners might even create multiple billing matters for the same client simultaneously, e.g., one for core documents and another for SLATs, etc. In that way, when any particular matter is concluded, that billing matter can be closed while the other matters continue.
- These steps may support an argument that the statute of limitations has run on a specific matter.

Sample Language

Consider Statements Concerning Guarantees and Audits

No Guarantee Language

- **No Guarantee**: Results of any plan aren't guaranteed. Aspects of many estate and related plans are uncertain and could be subject to a wide spectrum of different views by other advisers, the courts, the IRS, and other authorities. Most strategies have negative consequences (e.g. save estate tax but lose basis step-up). Many common strategies, techniques and transactions are subject to tax as well as other legal, financial, and other risks and uncertainties. While we endeavor to identify some of the risks of a plan, all risks and issues with each component of a plan may not be possible to identify or advisable to communicate in writing. Creating a collaborative team may help identify more issues. Further, the fact that we communicate verbally or in writing certain risks should never be interpreted as an indication that any such listing or communication is a comprehensive listing or communication of every risk involved.

Risk Language

- **Risks**: The risks of any transaction can be further compounded by: improper administration of the plan, a failure to regularly review and update the plan in order to address changes in the tax and other laws that may reduce hoped for benefits or even result in more costly results then had no planning been pursued, as well as the potential implications of changed goals, desires and family and business dynamics or objectives. Annual or other meetings with a collaborative advisor team may help identify existing or new risks and help to identify provisions of the plan (or its administration) that may be beneficial in addressing changes in the law and mitigation of risks, but even such vigilance will not provide certainty. A failure to regularly revisit and evaluate the plan, with the assistance and input of a collaborative team of advisers, may have adverse consequences and result in your plan not meeting your estate planning objectives.

Audit Language

- **Audit Risks**: To the extent that you engage us, or engaged us in the past, to perform tax, estate, asset protection and other planning, which may include, or may have included, estate, gift, wealth preservation and/or wealth transfer planning and other services, we may have suggested several strategies, and may have assisted in implementing strategies, that the IRS or state tax authorities, or others, might challenge. Possible challenges could be asserted even though we communicated several of the risks associated with such strategies and despite such strategies having been formerly recognized as acceptable techniques. Possible challenges could be asserted also for risks that were not discussed, including challenges by the government that could cause inclusion in your taxable estate of assets previously transferred out of your estate. Assets transferred out of your estate as part of a recommended strategy will generally not be adjusted to a date of death value and could result in the imposition of capital gains tax, possibly a depreciation recapture tax, and/or a negative capital account recapture liability. You agree that we shall not be liable for any assessments of tax, interest, or penalties resulting from the implementation of any recommended strategy, to the extent permitted by applicable law.

Sample Language – Draft Irrevocable Trust Cover Letter

In furtherance of our estate planning discussions (during which various options were discussed in an effort to address your estate planning goals), enclosed is a draft irrevocable trust. Please review it carefully to confirm that it accurately reflects your estate planning desires.

Please note that the trust has been drafted to take advantage of what is known as "grantor trust status" for income tax purposes during your lifetime. Once you transfer an asset to the trust, you will no longer own it, even though the income tax consequences attendant to that asset (and the sale thereof during your lifetime) will remain your personal responsibility during your lifetime and will need to be reported on your individual income tax return. Under the terms of the trust, you will lose control of the asset when it is sold. While the trustee has the discretion to reimburse you for such income tax consequences, the trustee is not obligated to do so. Under current tax laws, the fact that you will be taxed for the income tax consequences attendant to the trust during your lifetime may help reduce the value of your taxable estate without incurring additional gift or estate tax consequences.

Sample Language - Draft Irrevocable Trust Cover Ltr. - Cont.

If the formalities of administration are followed, based upon current tax laws, appreciation in the value of assets after transferred to the trust" is presently contemplated to avoid estate taxation upon your death. As a result, those assets will not be afforded a step-up in basis at the time of your death. The ability to swap assets of equal value may permit you to swap a low-basis asset with an asset having a higher basis in an effort to mitigate the income tax consequences that might be associated with a loss of the ability to obtain a step-up in basis for assets held by the trust at the time of your death. To avail yourself of such opportunities, it is important that you consult with your financial and tax advisors on a regular basis and, in particular, should you be diagnosed with a terminal illness or anticipate that death is on the horizon. Properly exercising the swap power requires analysis and can take time, so plan accordingly.

Conclusion and Additional Information

Practice Defensively

Conclusion

- Consider implementing defensive practices.
- Stay alert to new cases on planning concepts, malpractice cases, and changes in the law that might indicate a practice re-evaluation is warranted.
- Communicate clearly and regularly to clients.
- Continuously re-evaluate and revise retainer agreements, standard or general communications, organizers, form letters, etc.
- Continue to review and re-evaluate processes.

Additional information

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