

Terminating a Prospect or a Client

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Terminating a Prospect or a Client

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General Discussion of Client Termination

**Liability Concerns,
Red Flags, How to
Terminate and
More**

Liability, Malpractice and Client Termination

- Consider that **attorneys cannot limit their liability** on a matter whereas the rest of the estate planning team (CPA, wealth adviser, and appraiser) routinely can and do limit liability they face on a case.
- Consider the **worsening malpractice environment**, especially for estate planners and especially for attorneys engaged in estate planning. Consider significant recent cases such as Raia, Wellin and Rosen.

All Practitioners AND Staff Should be Alert to **Red** Flags

- A common red flag is needing something under a **time pressured deadline** that does not seem to have a legal or tax basis supporting the purported deadline. What is the reason the plan needs to be completed so quickly?
- Another classic red flag is how **many estate planners has the client had before coming to your office**. Perhaps that question should be part of every client intake.
- Rude to everyone may not be as bad as rude and **disrespectful to staff but respectful to the partner**.
- **What other red flags might the panel suggest practitioners be alert to?**

Sleepless in Seattle

- If a client matter keeps the practitioner awake at night, is it worth the stress?
- Such stress might well be a harbinger of potential worse problems that may come. It may just not be worth it.
- When should you fire a bad client?
- Some practitioners do an annual inventory and review their client list. Rather than terminating a client at a moment when things are going wrong, some adopt a practice of simply focusing at least once a year on clients that are in the category of ideal clients for you and those that are problematic. Several practitioners fire the worst [fill in the number] of clients each year.
- **Do you follow such a process?**
- Consider your actual capacity to serve the entirety of your client list. If you are overloaded, it is a reasonable decision, and ethically required to limit your practice so that you can provide competent timely service. Culling “bad” clients annually may facilitate addressing this.

Easiest Out: Reject Prospect

- There are no obligations on the attorney regarding not accepting a prospect that has not yet become a client.
- What steps can you suggest planners take before accepting a prospect as client?
 - Background searches. Google the prospect, the company, etc.
 - Does the client “story” make sense?
 - Does the request for the particular work assignment make sense?
 - Get a signed retainer agreement.
 - Get an upfront payment.
- Be alert to difficulties created by a prospective client, an unwillingness to cooperate or adhere to firm policies.
- Evaluation of the scope of the work requested to assure it is a reasonable fit for our skill set, etc.

Initial Prospect Discussion

- Use the initial call with a prospect not only to explain what you might do to assist, but to explain how you work so that if the prospect is not a good fit that may be discerned before anyone proceeds with forming a client relationship. Depending on the nature of your practice you might explain some of the following:
 - We must have mutual trust for the relationship to succeed. You must trust our competence and caring. We must trust you to be honest, participate as a partner in the planning, that you will follow up on your role in the planning, that you will administer your plan, that you will treat us professionally and pay our bills timely and without difficulties.
 - We do not focus on cookie cutter work, documents or planning. We do not provide estimates of fees or time, neither calendar time to complete the project nor hours to perform tasks.

Initial Prospect Discussion

- If you are seeking standard documents at a fixed fee, we are not the appropriate firm for you. **OR** the opposite depending on the nature of your practice.
- We are only comfortable working on an overall plan that holistically and comprehensively addresses your planning goals. We are not willing to work on an isolated component of your planning. **OR** whatever criteria you have for how you practice.
- We are only comfortable working on an estate plan in a collaborative manner with all your advisers engaged. **OR** whatever approach you are comfortable with and is the typical approach in your practice.
- If you do not want a comprehensive, holistic and collaborative plan, we are not the appropriate firm for you. **OR** You only handle estates of a large size requiring complex plans **OR** you focus on documentation preparation.

Retainer Agreements

Terms For Possible
Inclusion

Use a Protective Retainer Agreement

- The groundwork for a possible future termination should be built in a carefully crafted **retainer agreement** that makes it clear to the client that there are **responsibilities and obligations that the client has** to the relationship.
- Consider listing some or many of the client responsibilities.
- State clearly that you as the attorney reserve the right to terminate.
- Consider listing some or many of the factors for which you may terminate the relationship.

Termination by Client

- You may terminate your relationship with us at any time, for any reason. If you do terminate, you agree to give us prompt email or other written notice of termination.

Firm Withdrawal By Counsel

- Subject to our attorney ethical obligations, **we reserve the right to terminate our representation of you at any time**, including, without limitation, **by reason of** your deliberate disregard of your obligations to make payment of amounts due to us, your failure to communicate, or your failure to cooperate, your insistence on a course of action or inaction that we disagree with, or for any other reason permitted by law. If we terminate our relationship, we agree to give you prompt notice of the termination. Upon termination, you will remain obligated to pay for all services rendered and costs or expense paid or incurred by us on your behalf before the termination (as you will have derived the benefit of all services rendered on your behalf to that date), or which are reasonably necessary thereafter to effectuate such termination and/or to transition representation of you to new legal counsel. On termination if there is an unused balance of funds, we hold we will make a prompt refund to you after any time incurred to close your file.

Firm Withdrawal During Litigation

- In accordance with the applicable Rules of Court governing attorney withdrawal, in its sole discretion, the Firm shall have the right to withdraw from further representation on your behalf.
- Should the Firm elect to exercise this right during the course of ongoing litigation involving a court of competent jurisdiction, upon its request you shall cooperate with the Firm's withdrawal by either promptly retaining substitute counsel or executing an appropriate Substitution of Attorney indicating that you are representing yourself going forward. If you do not cooperate in this regard, and the Firm must seek withdrawal by filing a motion with the Court, you shall be responsible for the reasonable attorney's fees and costs incurred by the Firm in doing so. The fees charged shall be pursuant to the range of hourly rates heretofore set forth in this Agreement, depending on the attorney handling the collection effort.

Support Right for Counsel to Terminate

- Your failure to pay any bill on a timely basis as set forth in this Agreement shall constitute a material breach of this Agreement.
- You understand that your clear and responsive communication is essential to our representation and if you fail to communicate, we may terminate our representation.
- If a conflict of interest arises, or what was a potential conflict becomes an actual conflict, we may terminate representation.

Billing System

**Billing May Be
Support the Right
to Terminate**



Separate Engagement Into Steps

- A lawyer should generally complete representation undertaken to completion especially when not doing so would be problematic for the client. But, if withdrawal would not have any **material adverse effect** on the client's interests, the lawyer should be able to unilaterally terminate.
- If the client will not complete future/next planning perhaps that may constitute the end of the project and a natural end to the representation. If that is the case, there may be no issue in terminating the representation if the lawyer wishes.
- **Example:** If the practitioner was engaged by the client to complete estate planning by breaking the planning into process-oriented steps, termination of representation may be simplified, and ethical implications reduced/avoided. [1] Review facts, discuss goals and develop a plan. [2] Complete core documents. [3] Complete one SLAT. [4] Consider further planning. The practitioner can likely terminate representation as the practitioner has provided the service identified. The retainer agreement may backstop this right of counsel by clarifying different steps to the engagement.

Billing Matters

- Create narrower billing matters, e.g. instead of “Smith, Jane” use:
 - “Smith, Jane – 2024 General”
 - “Smith, Jane – DAPT”
 - “Smith, Jane – Succession Planning”
 - Etc.

Billing Entries and Footers

- Carefully document issues in the time entries, such as requests, and repeated requests for information or cautions not to proceed in a particular matter. That may support the client's not communicating, not responding, or not heeding advice.
- Include footers on bills that may be protective, e.g. any complaint on a bill must be provided within 21/30 days of the date the bill is sent. Note that failure to pay may result in a "stop work."

Bill Monthly/Regularly

- Billing monthly (or on some other interval) may bring to the fore a client issue (or a client that is an issue) sooner than if you bill only at the end of the engagement.
- It may be easier to terminate a bad client earlier than later, e.g. when there is a bigger bill for the client to dispute.

How To Terminate

**Once the Decision
is Made to
Terminate Take
Steps**



Termination Steps

- Carefully consider the final steps in terminating a client.
- It may be worthwhile to provide a detailed letter listing open items and/or issues so that the former client cannot claim that they were not advised about these matters. Also, providing a summary of open points or follow up items might provide some goodwill at what is likely to be an awkward or less than comfortable point in a relationship. Indicate which items might be followed up with the successor CPA.
- Consider documenting the reasons for closing the files in a non-antagonistic way just to confirm/create a record supporting the decision, assuming it was made by the attorney. Consider whether this should only be in a memo to your file.
- Consider offering to help transition the file and whether you wish to charge for that time.
- If litigation is involved transition to new counsel may be essential and court approval may be necessary.

CPAs Client Termination Suggestions

- The following suggestions may be useful to all advisers. See <https://www.cpai.com/Education-Resources/my-firm/Acceptance-Continuance-and-Termination/Client-Termination-Letters>
- Confirm termination in writing to avoid any ambiguity.
- Consider not including a statement as to why services were terminated.
- Inform the client of steps they must take given your termination: e.g., tax filing deadlines, payments, etc. Provide sufficient information so that the client cannot later assert that they did not know of a deadline or step that they should have taken.
- Make it a clean break, do not conclude other matters once termination notice is given.
- Try to avoid terminating the client close in time to a tax or regulatory deadline.

CPAs Client Termination Suggestions

- Clarify the status of work. If there is no work in process state that. If there is work in process describe what work there is and the status of it. If there is work in process, what documentation will you provide the terminated client? It may be permissible to withhold work product on incomplete work. See AICPA Code of Professional Conduct §1.400.200.
- Confirm the status of billing. If there are fees due include a copy of the bill reflecting them. If no fees are do, so state.

MRPC 1.16(b)

**Termination Must
Consider the Client**



When Can You Permissively Withdraw: MRPC 1.16(b)

- (1) withdrawal can be accomplished without **material adverse effect on the interests of the client**;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer **has a fundamental disagreement**;
- (5) **the client fails to substantially fulfill an obligation to the lawyer regarding the lawyer's services** and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an **unreasonable financial burden on the lawyer** or has been rendered **unreasonably difficult by the client**; or
- (7) **other** good cause for withdrawal exists.

Let's Discuss the terms from MRPC 1.16(b)

- What is a **material adverse** effect on the interests of the client?
 - What is “material”?
 - What is “adverse”?
- When might an attorney have a fundamental disagreement? About what?
 - If counsel disagrees with planning steps the client wishes to take might that suffice?
- Other than payment when might the client fail to substantially fulfill an obligation to the lawyer regarding the lawyer's services?
 - The retainer agreement might list client responsibilities.
- How might representation be **made unreasonably difficult by the client**?

Bad Clients

**Examples To
Illustrate Practice
Scenarios – Expect
Different Views**

Other Advisor is Adversarial

- The **client's other advisors constantly question the lawyer's recommendations** because the advisors feel that the lawyer's proposals are too risky. ***Example:*** You recommend a hybrid-DAPT and the client's advisors feel it is too risky because the IRS always challenges hybrid-DAPTs (or that there is no law on hybrid-DAPTs).
- When another unskilled adviser undermines the practitioner's advice, what might that suggest for future issues?
- Consider **AI's impact** on this. AI can be used by those with limited estate planning knowledge to provide summaries of complex legal documents, planning suggestions and more. If that is used as a tool to open discussion with a client great. If it is used in an uninformed way to undercut the planner is that different?
- **What action might the attorney consider?**

Client Won't Take Steps Practitioner Believes Should be Done

- Practitioners all want clients planning to succeed and to make a valuable contribution to the client's situation. Caution should be exercised. It is a risky to push a client to proceed with any action, or even being perceived as doing so. No matter how zealous a planner feels about a client taking a particular planning step, **avoid selling a planning technique**.
- **If a client will not take steps that the practitioner believes are important to take**, it makes sense for the practitioner to consider documenting what advice was given to the client in writing to the client.
- It may be worth evaluating if the communication should also document what alternative action the client opted to take and the potential negative consequences of that. That way should an issue ever arise in the future the practitioner could be protected. An unfortunate theme of many of the recent malpractice cases has been that the clients claim that their counsel did not communicate to them risks or issues of the planning.
- Merely refusing to follow a recommended strategy in and of itself may not constitute a sufficient reason for a practitioner to terminate the representation of the client. But if the **client's non-compliance is sufficiently concerning to the practitioner**, the practitioner may evaluate terminating the client.
- **When might refusal to heed advise rise to the level that termination should be considered? What steps might you recommend be taken?**

The Bad Paying Client

- The client questions the lawyer's invoices every time a bill is sent.
 - The questions are not reasonable and simply seem like attempts to negotiate reduced fees.
 - Whatever the facts, the complaints result in the lawyer writing off more than is appropriate/fair.
- Is writing off anything appropriate if the work was done well and efficiently?
- At what point might or should the attorney consider terminating the client?

“Yes, But I Read Online That....”

- What to do with a client that “researches” their own issues online and constantly questions/challenges everything the adviser recommends?
- Example: “I want a 5/5 power and HEMs distribution standard in both SLATs.”
- What of a client that discusses key aspects of representation with another adviser and not only were you excluded from the discussions but the advice the other adviser gave was wrong?
- What steps might the practitioner consider? At what point might termination become a consideration?

Bad Executor

- The Executor repeatedly says that they “will handle” various matters but they don’t.
- Other beneficiaries are complaining about the lack of progress and/or information and the Executor refuses to heed your advice to send update/status letters to those involved?
- The Executor self-prepares an accounting (not heading your advice to have counsel or their CPA prepare an accounting), and their work has material errors or omissions. The attorney files the Executor’s “accounting” with the court and only then learns of the mistakes. Is that sufficient basis to terminate?
- You ask the Executor to correct the errors but the executor refuses?
- **Can you withdraw from representation? Must you withdraw?** If you identify any type of material error and the client refuses to correct the problem, can you or why would you, continue representation?

Bad Executor

- [Must you inform the court/IRS \(or other third party\) about the problem?](#) Or is a “quiet” withdrawal sufficient where you withdraw with no notice to others and perhaps with no documentation even to the Executor of the reasons for termination?
- What if there is no court proceeding. If there is no court (or IRS) to report the matter to, does your answer about withdrawal change?
- MRPC 1.6 has been modified to permit disclosure where the attorney’s services have been facilitated by the client in committing a fraud (breach of trust is at least a constructive fraud) causing “substantial injury” to person or property.

Joint Representation Example

- You as an attorney represents a couple (joint or dual representation). A secret confidence is told to you as counsel by one client, e.g., the wife, which she specifies is not intended to be conveyed to the other spouse, her husband.
- Ethics rules prohibit keeping information confidential that one spouse discloses to you in joint representation.
- [Is withdrawal required?](#)
- What about disclosure to the other client (e.g., in a joint estate planning representation client husband tells lawyer that she has conceived a child secretly and does not want his wife to know about it.).
- The retainer agreement could deal with the issue by cautioning before the representation begins that there is no confidence between and among joint clients.

Termination After Basic Plan/ILIT

- Example: Counsel prepared an ILIT, will, power of attorney and health care documents for the client then terminated the client. Even though the client may have viewed the planner as their counsel, and although ongoing administration of the ILIT may be required it is difficult to imagine a material adverse effect on the client.

SLAT Client Termination Hypotheticals

**Examples To Illustrate
Practice Scenarios
Approaching 2026**

SLAT Hypothetical

- The following hypotheticals were created by the author/speaker. There are not based on any cases, ethics guidance or other sources. Therefore, exercise caution in interpreting or applying any of the information following. The objective was to raise questions about termination and ethical obligations in the specific context of estate planning. The focus is on issues that existed in 2012 representation before the exemption may have declined dramatically in 2013 and to use this as a basis to discuss issues that may be all to real as planning approaches the 2026 drop in the exemption amount by half.
- As every estate plan transfers assets to trusts for others, such as a SLAT, the advisor later learns that the client is a principal in a business deal that may be sued in the future.
- **What action might the advisor take?**
- Consider, what due diligence was done, or should have been done, before the transfers?

SLAT Case Study Series

- Ask whether termination of the representation by the lawyer would have a **material adverse effect** on the client would seem to depend on the facts and circumstances.
- Have the client and the lawyer already spent a significant amount of time in the estate planning engagement? Would it be unduly burdensome on the client to have to engage new estate planning counsel at this point? Are there pressing time concerns or other important reasons to complete an engagement?
- In 2024 there may be no pressing time issue as there is ample time to plan for 2026. However, what of step-transaction and other issues?
- If the client spent significant planning time with a current advisor and changes the education, knowledge and information provided are not useless and should not be viewed as a detriment to the client, at least in this writer's view.
- The decisions and situations are very fact sensitive and **there are likely as many opinions as practitioners.**

SLAT Case Study Series: Practitioner Doesn't Agree with Client Demands for SLAT Terms

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

SLAT Case Study Series: Practitioner Doesn't Agree with Client Demands for SLAT Terms

- Document in writing the concerns with the plan. **But how many deviations from the recommended plan should counsel accept before considering termination?**
- One of the concepts is that termination is permissible if the material adverse effect on client is exceeded by harm to the lawyer. The lawyer perceives that any harm to the client in terms of possible loss of legal fees already paid is outweighed by the risk to the practitioner of advising the client as to implementing a plan that the practitioner believes has a substantial risk of failure. **When does that suffice to support termination?**
- Why is paying legal fees for advice the client received ever a material adverse effect” on the client?

SLAT Case Study Series – Draft Trust

- **Example:** Continuing the above example, counsel prepared a draft SLAT for the clients. It was the discussion of the terms of that draft trust that crystallized the clients concerns and comfort levels. Legal fees incurred for planning meetings, letters, memorandum, and a draft SLAT have totaled \$20,000. If the client is terminated, it may not be likely that a new counsel would continue working with the same trust document. Does that suggest that termination might result in a “material adverse effect” to the client?
- The client received valuable advice for each dollar spent on counsel and it was only that process that resulted in the client realizing what their level of comfort with planning was.
- Should the fact that the SLAT is not completed constitutes a “material adverse effect” or has the client received valuable planning advice and services even though the plan was not implemented/concluded? This author would argue that the latter is correct.

SLAT Case Study Series – Are Professional Fees Incurred A “Material Adverse Effect”?

- Example: Continuing the two above examples. Further, the how might the term “material adverse effect” be defined in the following context? Certainly, in the context of representation of a client accused of a criminal act, if the lawyer terminated prior to trial and the client could not retain new counsel that could digest the case file fully before trial, there is a material adverse effect on the client. In the context of the above estate planning examples, if the client paid \$20,000 in fees on a plan that involves \$10 million of assets and the client net worth is \$25 million, is there any touchstone by which the legal fees earned and paid could constitute a “material adverse effect” to the client? The amounts seem absolutely immaterial by any measure.

SLAT Case Study Series – Are Professional Fees Incurred A “Material Adverse Effect”?

- For example, have the client and the lawyer already spent a significant amount of time in the estate planning engagement? Would it be unduly burdensome on the client to have to engage new estate planning counsel at this point? Is the client being required to engage new counsel and incur additional fees to bring new counsel up to speed, loss of time, and information such as appraisals becoming stale really constitute a material adverse effect? How many dollars must be involved to be material? What is “material” defined in relationship to? Is any of this really adverse to merely have to hire new counsel?
- How can the advice the client was given not support the fee billed?
- Might the answer differ if the practitioner was billing a flat fee for planning and the trust document, and the trust was not completed? Perhaps in the latter situation the flat fee would have to be fairly apportioned as to what was done and what promised work was not done.

SLAT Case Study Series – 2021

SLAT

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

SLAT Case Study Series – 2021

SLAT

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

SLAT Case Study Series – 2023 Plan

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

SLAT Case Study Series – 2024

SLAT Plan

- **Example:** In 2023 the client retained the estate planner to complete an irrevocable trust plan to use a portion of her exemption before the scheduled reduction in the exemption in 2026. In that environment, in contrast to that in 2021, it is difficult to imagine a time urgency. Counsel and provided a draft irrevocable trust to the client and it has been reviewed and revised. If counsel terminates the client at that juncture, if the client can transition to new counsel to finalize the trust plan there may be no material adverse effect on the client. However, if the client cannot find a new attorney willing to complete the plan without a detailed review of the trust, perhaps it may be argued that there is an adverse impact on the client in terms of new fees. However, if the plan was for the trust to receive a gift of the entire exemption of more than \$13 million, do the incremental legal fees constitute a “**material**” adverse effect on the client? If a new attorney reviewing the matter adds new thoughts to the planning is there an adverse impact?

Conclusion

**Summary and
Practical
Recommendations**



Conclusion

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

Additional information

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