

**PRESENTED AT**

The University of Texas School of Law

26<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference

August 8-9, 2024

La Cantera Resort and Spa, San Antonio, Texas

**Estate Planning Best Practices**

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### **Initiation of Attorney-Client Relationship**

While attorneys cannot control who initially contacts them for representation, the initial contact often becomes very important in the event of a will or trust contest. Ideally, initial contact with the attorney would come directly from the potential estate planning client themselves. This helps to establish several things:

1. The client is mentally capable of finding an attorney, using a phone (and possibly the internet) and making contact with an attorney.
2. The client is interested in pursuing estate planning.
3. Increases the probability the client is not being influenced.

When initial contact is not from the client themselves, several best practices should be followed. First, any contact between the attorney and the non-client should be limited to phone contact. This is to prevent the creation of written evidence that may later be requested under Tex. R. Evid. 503, as set forth in detail below. Even taking notes or sending internal emails regarding the contact should be limited. Second, it is critical to limit even phone contact with the non-client and take direction from the client directly. Third, it is generally wise to advise the non-client that the estate planner will not be representing them, only the client, and that the lawyer will have to meet with the client alone regarding planning. Fourth, to avoid any appearance of impropriety, if possible, it is ideal for the client to come to any in-person meetings on their own. For any virtual meetings or calls, the attorney should request that the client conduct the meetings alone and try to verify the client is alone. Fifth, if a contest is anticipated, meetings with the client should be in person and alone, as it is

difficult to discern if a non-client is present on the other end of a call or virtual meeting.

These practices are also best for all ongoing contact through the course of representation. Some of the most damaging evidence this author has seen in will contests is emails from the drafting attorney to a third-party about the client's estate planning (particularly those regarding the client/third party's wishes).

In the initial contact, the estate planner should be thinking about whether the individual seeking planning appears to have testamentary capacity. Testamentary capacity means the testator must have sufficient mental ability to (1) understand the business in which one is engaged (i.e. making a will), (2) understand the effect of making a will, (3) the nature and extent of one's property, (4) know one's family or the natural objects of his/her bounty, and (5) have memory sufficient to collect the elements of the business transacted and hold them long enough to understand their relation to each other and be able to form reasonable judgment regarding them. *Lindley v. Lindley*, 384 S.W.2d 676, 683 n.1. (Tex. 1964). It may take more than one call for the estate planner to determine if testamentary capacity is an issue.

### **Engagement**

Ideally the engagement letter should be sent directly to the client, whether by email or mail. If the estate planner is representing spouses in estate planning, a Conflict of Interest Disclosure and Consent to Joint Representation of Spouses should be used. EXHIBIT A. This makes it clear to the clients that as long as they agree in their estate planning, the estate planner can represent both. However, should they take conflicting courses, the estate planner will

not be able to represent both of them and information as to the two of them will not be confidential as to the other. In other words, an estate planner cannot keep the secrets of one spouse from the other spouse.

The engagement should set forth the scope of the engagement, specifically what estate planning documents will be prepared for the client. A lawyer may limit the scope of their representation with the client's consent. Tex. R. Disc. Prof'l Cond. 1.02(b). For example, if only a will is being prepared, and not ancillary estate planning documents, this should be included in the engagement.

### **Payment**

It is ideal for payment for estate planning services to come directly from the client. This helps establish that the client is able to arrange payment, pay the correct amount, and presumably otherwise manage their finances. In other words, they likely have testamentary capacity.

If the client is not paying the estate planning lawyer, then under Tex. R. Disc. Prof'l Cond. 1.08(e), the estate planner must obtain client consent, must not allow the payment to interfere with the independent and professional judgment of the attorney or the attorney-client relationship and must maintain confidentiality. The best practice is to have the client sign a consent, agreeing to the payment by a third party. EXHIBIT B.

If a contest is anticipated, it will be incredibly suspicious in the contest if a third-party who benefits from the estate plan pays for the preparation of the plan.

### **Questionnaire**

Utilizing a questionnaire that at least covers the following items, is recommended:

1. What fiduciaries the client wants, i.e. executor, agent under power of attorney, trustee, etc.
2. What family members the client has.
3. What assets the client owns.
4. Who the client wants to receive their assets.
5. What prior estate planning documents exist and copies.

Such a questionnaire establishes that the estate planner at least asked the client about all of the most important aspects of estate planning. It also serves as a test as to whether the client can answer the questions asked. If a client does not know their family, what they own or other pertinent information in the questionnaire, their capacity may not be sufficient for estate planning. Further, the questionnaire preserves information. If the estate planner does not remember the client answers, the questionnaire records the answers and establishes that the estate planner habitually asks each client for the same information. A sample questionnaire is attached as EXHIBIT C.

### **Client Documents**

Depending on the client's situation, it may be critical to request additional documents to assist in estate planning. Requesting documents from the client, and the client producing the documents, shows that the client is capable of locating, gathering and providing relevant financial information, which tends to show testamentary capacity.

Examples include:

1. Prior estate planning documents. This is particularly critical if the client is making a drastic change in beneficiaries. It is important for the estate planner to know if a contest is likely.

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First appeared as part of the conference materials for the  
26<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"Estate Planning Best Practices"