

Pitfalls for Planners

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I. INTRODUCTION

When providing estate planning services, mistakes can happen. We work hard to avoid them. But make no mistake about it, mistakes happen. These materials review some pitfalls - some common, perhaps, and some maybe not so common. All are avoidable, yet all will also likely be made by some of us some of the time.

Generally, mistakes (or should we say “potential” mistakes) can be divided into three broad categories. The first category involves pitfalls when taking on a new engagement. The second type of mistakes comes when preparing estate planning documents. The final category are those involving the execution and post-execution phases of the planning engagement.

II. INTAKE-BASED PITFALLS

When taking on, or considering taking on, an estate planning matter, steps you can take before the first meeting will reduce the possibility of mistakes. These steps are part of the all important intake phase of an engagement. Many of these steps are not substantive. The process can be critical in avoid pitfalls when planning an estate.

A. Talk with the Prospective Client on the Telephone.

1. Get a feel before you meet.
 - a. For the needs
 - b. For the personality

2. Caution: When someone else calls “on behalf of” the Prospective Client

B. Give the Prospective Client Homework

1. Send the PC *something* before the first meeting
2. Mutual Representation issues if a husband and wife²

C. First Meeting

1. Ask the right questions
 - a. Listening versus talking
 - (1) With both husband and wife
 - b. Note taking
2. Timing issues
 - a. Describe expected timing of next steps
 - b. Deliver on or before stated dates
3. ALWAYS discuss fees
 - a. Written engagement agreements
 - b. Retainers
 - c. Others
 - d. Estimates
 - (1) Stick to your number
 - (2) If variance expected, let client know immediately

² See Appendix for sample.

D. Existing documents

1. Review
 - a. During meeting
 - b. After meeting
2. Revise or replace

E. Confirming asset ownership and beneficiary designations

1. Degree of diligence
 - a. Accept representation from client
 - b. Rely upon account statements
 - c. Obtain account documentation from financial institution

F. Homestead

1. Review deed for residence before the first meeting
2. Address issues regarding restraint on devise promptly
 - a. Change of ownership
 - b. Homestead waiver³

G. Estate Taxes

1. Portability
2. Inheritances

H. Life Insurance

1. Ownership
2. Beneficiary designation

³ See Appendix for sample.

I. Custodial accounts

III. DRAFTING-BASED PITFALLS

Once the initial meeting is concluded, memorialize the information collected, the issues discussed, and the direction provided by the client. You offer advice and counsel. The client makes decisions. Of course, your bias, admitted or suppressed, will influence the decisions made by the client. Then the work begins - the drafting. First, a couple of substantive legal issues to consider.

A. Elective share

B. Community Property

C. Homestead

Drafting an estate plans include a myriad of decision points. Some of the decisions are binary - either on or off. Some are not. In the end, the plan you draft needs to be administered, and it needs to work. Consider whether you want to be a scrivener or a counselor. At times, when a client insists on a provision, you may be tempted to pick up the scrivener quill. Remember, you are more than that.

D. Outright or In Trust

1. Spouse
2. Children

E. Exercise of Power of Appointment

1. Identify source of the power
2. Consider scope of permissible appointees

F. Fiduciary

1. Siblings

2. Bank or trust company
3. You

G. Durable Power of Attorney

1. Enumerated powers for estate planning

H. Beneficiary Designations

I. Pay on Death Accounts

IV. EXECUTION OF TESTAMENTARY DOCUMENTS

The most careful intake and the most cautious drafting is all for naught if the documents are not properly executed. Ideally, the documents are *never* seen by the client for the first time when arriving at your office for execution. Even if changes are made the day before, consider getting the revised documents to the client by email or hand delivery.

A. Review the Final Version Yourself

1. Residuary
2. Marital disposition, if estate tax issues
3. Fiduciary appointments
4. Signature Pages

B. Changes During Meeting

1. Caution: Substituting changed pages
2. Unintended consequences

C. Formalities, Formalities, Formalities

1. Develop a routine and follow it
2. Discourage/prohibit execution outside of your office

D. Disposition of Executed Documents

1. Retain

2. Return

E. “All Done” letter

V. **CONCLUSION**

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Appendix 1: Consent to Mutual Release

Appendix 2: Post Marital Agreement (Releasing Homestead Rights)

CONSENT TO MUTUAL REPRESENTATION

In connection with the law firm of
Laird A. Lile, P.A.
(the "law firm") representing both of you in connection with your estate planning matters, you should understand the issues pertaining to this mutual representation and the alternatives available to you.

The two of you are requesting one firm to represent and advise you with respect to certain estate planning matters. The representation may include analysis of your existing property and any existing agreements, discussions about the manner in which you wish to dispose of your property, analysis of the tax impact of such dispositions, recommendations for alternative dispositions, and preparation of the documents necessary to carry out your instructions, including the drafting of wills, trusts, and other documents as may be appropriate.

During the course of the estate planning representation, conflicts may arise between you, such as regarding ownership of your property and the disposition that you desire for that property during your lifetimes and at your deaths. If conflicts occur and cannot be reconciled by the two of you, a single law firm cannot continue to represent both of you because of the possibility that its advice to one of you may be influenced by its simultaneous representation of the other.

Each of you have the right to obtain legal counsel independent from each other at the outset of this representation so that a change of counsel will not be necessary if an irreconcilable conflict occurs. Nevertheless, with a full understanding of the advantages of independent counsel, you have requested that this law firm represent both of you regarding your estate plans and related

matters. While the law firm will undertake to represent both of you in a fair and impartial manner, you are proceeding in this matter being fully aware of the possibility that these conflicts may arise.

In the event that any conflict of interest does arise between the two of you of resulting in this law firm not being able to fulfill its obligations to each of you, it shall, at that time, withdraw from further representation of both of you in that matter and advise both of you of its withdrawal. Under those circumstances, the law firm will be entitled to compensation for services rendered, including services after the withdrawal, such as for any consultation with your new attorneys.

You each agree that there will be complete and free disclosure and exchange of all information that the law firm receives from you in the course of the representation and that such information shall not be confidential as between the two of you, regardless of whether this law firm obtains the information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the execution of this consent. You also agree to discuss any issues that may arise with respect to the preparation and execution of any documents in good faith.

Any questions regarding the provisions in this Consent should be discussed by you with a member of this law firm or with any other counsel of your choice.

By signing below, you acknowledge receiving this Consent and indicate your agreement to the provisions of it.

Signature

Date: _____

Signature

Date: _____

POST-MARITAL AGREEMENT
(Releasing Homestead Rights)

THIS AGREEMENT by and between **John D. Client** (hereinafter referred to as “Husband”) and **Mary E. Client** (hereinafter referred to as “Wife”), both of Collier County, Florida.

WHEREAS, Husband and Wife each wish to relinquish the spousal homestead right of a deceased spouse as provided under Article X, Section 4 of the Florida Constitution, and instead Husband and Wife each wish to dispose of his or her respective homestead interests as provided under the provisions of his or her Will or other dispositive estate planning document, each party hereto, for and in consideration of the other party entering into this agreement, and other good and valuable consideration, herein confessed and acknowledged received by each other, hereby agrees as follows:

1. Husband hereby acknowledges that he has made complete financial disclosure of his assets to Wife, and Wife hereby acknowledges receipt of such disclosure, and acknowledges she has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Husband.
2. Wife hereby acknowledges that she has made complete financial disclosure of her assets to Husband, and Husband hereby acknowledges receipt of such disclosure, and acknowledges he has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Wife.
3. **As authorized by Section 732.702 of the Florida Statutes, each party hereby waives, renounces and relinquishes any and all rights, claims or demand in the homestead property, which, except for this Agreement, the marriage of Husband and Wife would confer upon the survivor of them.**
4. Husband and Wife each acknowledges that the release of the homestead rights described herein does not result in the release of any homestead rights that exist during the marriage, but only upon the death of a spouse. As a result of this release, Husband acknowledges that Wife, and Wife acknowledges that Husband, may transfer his or her respective interest in the homestead at death to such persons or entities as the deceased spouse so elects. While it is anticipated that each spouse will utilize his or her interest in the homestead property to accomplish certain mutual estate planning objectives of both parties, this intention is not binding on either party hereto.
5. Husband and Wife each acknowledge that by reason of the relinquishment of the spousal homestead rights, his or her spouse can disinherit such party with respect to

the homestead property and of being informed of this possibility.

6. Husband and Wife each acknowledge that they have been advised that they should seek independent counsel prior to entering into this Agreement. **Laird A. Lile, P.A.** hereby confirms to both parties that it is representing the two of them as joint clients, with respect to this planning and to the waiver of homestead rights and both have previously consented to this mutual representation. After having been advised to seek separate legal counsel, each hereby either waives such right, or has, in fact, discussed this situation with separate counsel, and after having done so, makes a knowing and voluntary waiver and release of such homestead rights.

EXECUTED this ____ day of February, 2014.

Signed and delivered as to both in our presence:

I HAVE READ THIS DOCUMENT AND UNDERSTAND I AM WAIVING IMPORTANT RIGHTS

John D. Client

Type or print name of Witness No. 1

I HAVE READ THIS DOCUMENT AND UNDERSTAND I AM WAIVING IMPORTANT RIGHTS

Mary E. Client

Type or print name of Witness No. 2

STATE OF FLORIDA
COUNTY OF COLLIER

The foregoing instrument was acknowledged before me this ____ day of February, 2014, by **John D. Client** and **Mary E. Client**, who are personally known to me or have produced driver's licenses as identification.

NOTARY PUBLIC:

Sign _____

Print _____

State of Florida at Large
My Commission Expires: