

Top Ten (or so) Hazards for Estate and Trust Professionals

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I. INTRODUCTION

As estate and trust professionals, hazards are all around us. We work hard to avoid them. But hazards exist and mistakes happen. Some hazards are obvious; to others we can be oblivious. These materials review some situations that can lead us into hazards that can be avoided. Some are common, perhaps, and some maybe not so common. All of these are avoidable, yet all of us will also likely find ourselves in a hazard at some point.

We'll start with some important global concepts.

A. Don't Cover-Up

1. Make no mistake, the cover-up is always worse than the mistake. So, you may be wondering, if you aren't supposed to practice your forgery skills, or get the administrator's credentials to erase emails, or revise and backdate memos, what are you to do if you (think you) have made a mistake?
 - a. Call a friend.
 - b. Re-calibrate.
 - c. Own up.

B. Stay on Top of Your (Substantive) Game

1. You may stop attending continuing education programs because you think that you know that material. So, why bother to spend your precious time going to a seminar. Or, you may decide to forego the live, in person seminar, in favor of listening to a podcast or signing on to the zoom broadcast of a live seminar. Those might give you

some exposure to the materials, but those are not a substitute for attending a seminar, in person, laptop closed, phone down, and actively listening.

2. Subscribe to, and timely read, materials that will help you stay on your game. Action Line, from the Real Property, Probate and Trust Law (RPPTL) Section of The Florida Bar, of course. The Florida Bar Journal, particularly articles sponsored by relevant sections, such as RPPTL and Tax. The Probate Practice Reporter. Estate Planning Journal.
3. Keep your library current. Books are expensive. Buying them is not enough. Use them.

C. Engage (with Other Professionals)

1. Similar to staying on top of your game, the final global concept for avoiding hazards is to be engaged with other professionals.

2. Substantive committees at a national (ABA) or state (RPPTL or Tax Sections) provide great opportunities to be engaged.
3. Local study groups and estate planning councils provide local opportunities.

Now, to the hazards.

II. INTAKE-BASED HAZARDS

Not all engagements are good engagements, at least not for you. When taking on, or considering taking on, a new matter, you can take steps *before* the first meeting to 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. Yet, the process can be critical in order to avoid hazards.

A. Hazard #1: Accepting a Sub-Optimal Representation

1. Talk with the prospective client on the telephone, before you meet.
 - a. For the needs

- b. For the personality
- 2. Caution: When someone else calls “on behalf of” the prospective client
- 3. Even More of a Caution: When the first question is “How much will this cost?”
- 4. How did the prospective client find you?
 - a. Google search - not so good
 - b. Existing client - much better
 - c. Other lawyer - can be really good, or might be a warning sign

B. Hazard #2: Accepting Representation of an Un-Engaged Prospective Client

- 1. Send the prospective client *something* before the first meeting
 - a. Be sure there is engagement by the prospective client.
 - b. Mutual Representation issues if a married couple

C. Hazard #3: Fails at First Meeting

1. Ask the right questions
 - a. Listening versus talking
 - (1) With both prospective clients
 - b. Note taking has its place but should not replace active listening
2. Who is interviewing?
 - a. You or the prospective client?
 - b. Both!
3. Address timing considerations
4. Describe expected timing of next steps
5. Deliver on or before stated dates
 - a. Or let the client know why
6. ALWAYS discuss fees
 - a. Written engagement agreements
 - b. Retainers
 - c. Other arrangements

- d. Provide estimates - at the end of the meeting
 - (1) Stick to your number, or range of numbers.
 - (2) If variance expected, let client know immediately.

7. Don't feel overly invested

- a. Be willing to walk away from the engagement - the time to do so will *never* be better.

III. ESTATE PLANNING CENTRIC HAZARDS

During the initial meeting, you collect information and make recommendations, giving your best 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.

Drafting an estate plan include a myriad of decision points. Some of the decisions are binary – either on or off. Others are not. In the end, the plan you draft needs to be administered, and it needs to work. Ambiguity is your worst enemy. Be clear in your thinking and even clearer in your drafting.

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, you are better than that.

A. Hazard #4: Not Taking Into Account Existing Documents

1. Existing documents
 - a. Obtain and review
 - (1) Before meeting
 - (2) During meeting
 - (3) After meeting
 - b. Revise or replace
2. Confirming asset ownership and beneficiary designations

B. Hazard #5: Titling and beneficiary designations

1. Degree of diligence
 - a. Accept representation from client
2. Financial accounts
 - a. Rely upon account statements

- b. Obtain account documentation from financial institution
- 3. Real estate
 - a. Homestead
 - b. Non-Homestead Florida real estate
 - (1) 10% non-homestead cap
 - c. Non-Florida real estate
- 4. Life Insurance
 - a. Ownership
 - b. Beneficiary designation
- 5. Custodial accounts
 - a. Client as custodian

C. Hazard #6: Homestead - enough said

- 1. Address issues regarding restraint on devise promptly
 - a. Change of ownership
 - b. Homestead waiver

D. Hazard #7: Missing Substantive Estate Planning Issues

1. Elective share
 - a. Conditional elective share trust provision.
2. Community Property
3. Homestead

E. Hazard #8: Assuming the Law is Static

1. No Contest Clauses
2. Qualification of Personal representative

F. Hazard #9: Hazards in Execution (of Powers of Appointment)

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

G. Hazard #10: Failing to Obtain Declaration When Named as
Fiduciary

- a. Declaration must be obtained.
- b. Amendment to existing plan with you already
named as a fiduciary.

IV. EXECUTION BASED HAZARDS

The most careful intake and the most cautious drafting is all for naught if the documents are not properly executed. Ideally, the documents have been seen by the client before the client is asked to sign. Even if changes are made the day before the scheduled execution meeting, consider getting the revised documents to the client by email or hand delivery.

A. Hazard #11: Not Reviewing the Final Version

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

B. Hazard #12: Not Watching Page Breaks

1. Caution: Substituting changed pages
2. Unintended consequences

C. Hazard #13: Departing from Routine

1. Formalities, Formalities, Formalities
2. Develop a routine and follow it

3. Discourage/prohibit execution outside of your office

D. Hazard #14: Lack of Clarity regarding Disposition of Executed Documents

1. Retain
2. Return
 - a. Get a receipt

E. Hazard #15: Not Saying Goodbye Clearly

1. You think you know the matter is concluded.
2. Does your client (or former client) know?

V. OTHER HAZARDS

A. Hazard #16: Being Helpful Badly

1. You are not your client's filing cabinet.
2. When your office is requested for a copy of documents years after the engagement has concluded, resist the temptation to be helpful.
3. You could send the wrong version.

4. You could send the document that is requested, even if that is not the document that is needed.
5. Consider sending what you sent previously.
6. Don't be hesitant to decline the request.
7. Instruct your staff on how to respond.

B. Hazard #17: Missing statute-based deadlines

1. 30 days
2. 3 months (not 90 days)
3. 2 years
4. 6 months
5. 4 years
6. Before entry of Order of Discharge

VI. CONCLUSION

- A. Strive for Perfection
- B. Accept (or at least Acknowledge) Shortfalls
- C. Act Accordingly