

# Legal Lingo:

## CLIENT MALPRACTICE!!!

### WHAT'S NEXT?

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We live in a litigious society. It is not uncommon to sue our doctors, accountants, or lawyers if their level of performance does not meet our expectations. We even sue athletic coaches if our children do not get adequate playing time. It is with some hesitation that I now propose a new cause of action which will clog the courts for years: **client malpractice**.

**Client malpractice** is action or inaction by a client during the estate planning process that could make the estate planning lawyer look inept when the client dies. This article will discuss the leading causes of client malpractice in an attempt to reduce the number of occurrences and raise clients' and children's opinion of their parents' lawyer. As of yet, I am unaware of any client malpractice insurance being available but if there is a dollar to be made I am sure someone will be offering it in the future.

**1. Undisclosed Assets.** Probably the leading cause of client malpractice is not disclosing all assets to the estate planning lawyer. This may be a partial interest in real estate owned in another state, dividend reinvestment accounts, collectibles located in the house or in a safe deposit box, or life insurance policies purchased when the client was a minor. If you own real estate in a state other than your state of residence, even if it is only a partial interest, you may be required to open a probate estate in your state of residence and the state where the other property is located. This will result in increased costs and your lawyer having to answer the embarrassing question posed by your children or other heirs: "why wasn't this dealt with during mom or dad's lifetime?". Undisclosed bank accounts, investments or other assets can lead to increased expenses and having to reopen a closed estate if they are discovered after the estate has been closed and the tax returns filed. It is important that you make full disclosure to your attorney so that these issues can be addressed and your estate plan adjusted accordingly.

**2. Undisclosed Liabilities.** As with undisclosed assets, you also need to make full disclosure to your attorney of your

undisclosed liabilities. While you may own significant assets, if they are mortgaged or subject to other financial liens, the estate once thought to have significant value may in fact be insolvent and be unable to pay off its debts. Liabilities disclosed during lifetime may be able to be contested and the amount reduced. Any potential defense you may have will be taken to your grave. This will impact your children's expected inheritance and in certain instances, it may have been possible to structure your estate plan to avoid payment of some expenses.

**3. Problem Children or Other Heirs.** If you have children, grandchildren or other heirs who may have an addiction problem, financial problems or legal problems, they need to be disclosed and addressed in your estate plan. Are you really providing for your alcoholic child or grandchild's welfare by making an outright bequest of a portion of your estate? It may be possible to delay the availability of the assets to the problem child for a period of time until they recover or even provide the funds for their recovery. A more difficult issue to address would be if you have a child who your spouse is unaware of. If this is the case, you may need to seek separate counsel from your spouse because an attorney who is providing estate planning services for both spouses is obligated to fully disclose to each spouse information divulged to them by the other.

**4. Special Needs.** You may have a child who has some special needs and is receiving governmental assistance as a result of their disability. You need to disclose this fact to the estate planner or the future inheritance may result in a loss of benefits. It is possible to prepare an estate plan which would allow the child to continue to qualify for governmental assistance, while at the same time providing them some extras to make their life more enjoyable.

**5. Business Agreements.** During the estate planning process, it is necessary for you to provide a copy of all business agreements including, but not limited to, partnership agreements, buy sell agreements and operating agreements for a limited liability company. If you merely disclose the gross value of your interest in a business without providing a copy of the underlying business agreement which gives your partner or member of the LLC the right to purchase your interest at a reduced value, this could have a negative impact upon your estate plan and the efficient transfer of assets to your heirs. The agreement may contain other terms such as how quickly you must act to have the business interest purchased or what the financing terms may be.

**6. Potential Inheritance.** Do not forget to mention the fact that your elderly parent or other family member may transfer a sizeable inheritance to you upon their death. This may have a dramatic impact upon the type of estate plan you need and in fact, if you have outstanding debts or liens against you it may be prudent for your parent to bypass you directly and have the funds go to your children or possibly

a trust for your benefit which can provide you with a lifetime income stream. The estate planner looks unprofessional when the client receives the inheritance only to have the inheritance confiscated by a creditor and the use of the assets lost when a simple revision to the estate plan could have prevented it.

**7. Out of Date Beneficiary Forms.** Copies of all beneficiary forms need to be provided to the estate planner at the time of the plans development to ensure that the distribution of the assets are consistent. If the will or trust bypasses a problem child you want to be sure that that child is not the recipient of a portion of the IRA or life insurance policy. The planner will look inept and the client's wishes will not be fulfilled. This is particularly troublesome if the beneficiary of the insurance policy was a trust and the trust is subsequently replaced with a new document. In this event, the result may be having to open a probate estate to receive the life insurance benefits which are ordinarily a non-probate asset.

**8. Property Settlement Agreements.** If you are like many people today and may have been a party to one or more marriages and divorces, you will need to provide copies of the property settlement or divorce decree to your planner. The property settlement may contain provisions requiring that the former spouse be provided with benefits at the time of death and these need to be included in your plan. The failure to do so will result in additional litigation and expenses for your estate.

**9. Predeceased Beneficiaries, Executors, Trustees, Etc.** You need to keep your planner advised of the death of any individual named as executor of your will, guardian of minor children or trustee of your trust agreement. Failure to do so could result in the court appointing an individual who you would not wish to serve in that capacity. A problem can arise not only as a result of the individual's death but due to a change in family circumstances. It is not uncommon for a brother-in-law or sister-in-law to serve in one or more of the capacities and in the event of a divorce, the ex-spouse will not be appointed to serve if they are so named but the former brother-in-law or sister-in-law may be appointed. Given the relationship between the former in-laws, they may be inclined to serve if only to accept the appropriate fees.

As you can see now, the sources of client malpractice are many and it is imperative that you be brutally honest with your estate planner to ensure that your assets benefit the individuals you desire in the most efficient manner. An act of client malpractice will result in additional costs to your estate, increased litigation, potential hard feelings between family members, and most importantly your estate planner looking unprofessional.

If your planner does not ask questions attempting to limit your exposure to a malpractice action you should volunteer the information which may limit his or her liability for actual malpractice. - GEZ

## Are the Ups and Downs of the Stock Market Fun for You?



**If Not,**

Tax Deferred Annuities (TDA's) could be an answer for anyone looking for stability in these turbulent financial times.

TDA's are Ideal for IRA's and SEP's deferring income taxes or setting up guaranteed income.

**Contact Ron or Bruce for further details**

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