



## COMMITTEE REPORT: THE MODERN PRACTICE

By **Avi Z. Kestenbaum** & **Jason J. Smith**

# Beware of Hidden Dangers When Taking On New Clients

Practical and ethical considerations to address

**T**aking on a new representation is exciting, to be sure. Not only is there the potential for making money, but also, there's the thrill of validation. To quote Sally Field's acceptance speech for her 1984 Academy Award for best actress in *Places in the Heart*, "You like me, right now, you like me!" The excitement may be so great that it's difficult to stop and think about reasons not to undertake the representation. To be fair, in many trusts and estates matters, the new client is a good one, the representation goes smoothly and there are no concerns. In other situations, however, clients behave badly, they turn out to be different from how they first appeared or conflicts arise down the line and the representation breaks down, sometimes with negative consequences for the attorney as well as the client. With the perfect vision of hindsight, the warning signs of a bad outcome might seem obvious. But, hindsight isn't worth much unless it leads to foresight. With that in mind, below are some of the potential red flags a trusts and estates practitioner should watch for when taking on a new representation and the practical and ethical considerations that should be addressed when they arise.

### The "Mistreated" Client

Have you ever met a prospective client who came to your office complaining about his prior counsel, and you thought to yourself that if you'd been representing this individual, you would have done a better job and would

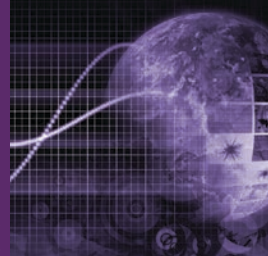
be receiving a glowing review? Then, the prospective client proceeds to complain about almost everyone under the sun, including his accountant, insurance advisor and certain family members, but tells you that he's heard that "you're the best," and he'll be so happy to work with you. Though you might have a nagging sensation that the client, not all of the people he complains of, is the real source of the problem, you ignore it, thinking that you're special—you'll be the savior—and, if you take on this representation, you'll have much better and different results. Call it a hero/martyr complex if you will, many of us like jumping in to help everyone who asks for it. This trait is admirable and works well when applied to deserving clients, but it can lead to our downfall when applied indiscriminately. If this prospective client has a problem with most professionals he comes across, you're likely to be next on that list and should be very careful about taking on the representation. In fact, you should always be listening and watching for warning signs, especially with prospective clients and new clients that you may not know very well, or you could end up finding yourself in a very aggravating representation that may lead to reputational consequences for you when you become the latest professional who's alleged to have done a bad job for the client.

Many of us have a sixth sense regarding the veracity and character of prospective, as well as existing, clients. These feelings are often correct, and you need to be careful not to convince yourself when your "Spidey sense" is tingling that you can still be the hero and get your clients to do the right things and cooperate. A good bedside manner might make a significant difference, and many times, seemingly difficult clients really just want to be provided with good, caring and competent service and will end up being grateful and cooperative. However, sometimes that's not the case, and caution is necessary.

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### The Shifty (or Worse!) Client

Similarly, when you find out during the course of the representation that your client has been hiding certain information from you, such as undisclosed assets and income or prior frauds that he's committed, you need to be extra cautious. While most people deserve a second chance to do the right thing, if you're representing a client who's had prior issues, you need to be diligent that the past isn't repeated, and you aren't brought down or erroneously implicated by your client's future actions. It's one thing if your client is upfront in disclosing data and information to you, even if it involves negative behaviors, but if a client hides information or lies to you, trust is eroded. You have to be willing to emphatically say "no" when the client wants you to validate or whitewash his pattern of unlawful or unethical conduct, and you have to be willing to end the representation if the client won't follow your advice. You should also borrow a page from the financial service industry's playbook and take reasonable steps, such as running credit checks and litigation searches, to "KYC" (Know Your Client) and find out who you're dealing with before representing him to prevent problems for yourself and your firm.

### The Nonpaying Client

You also need to be wary about potential fee issues. Unlike litigation matters, in which court approval is needed before the attorney can fire a client in the middle of a case, it's easier for estate-planning attorneys to drop clients who haven't paid them. You should certainly make sure not to find yourself in a hole of doing many hours of unpaid work, and the terms of your engagement agreements should deal with these issues. It's one thing if you own your firm as a solo practitioner and knowingly take on the risk of being paid, but if you work with partners and employees who rely on your collections, not paying attention to the collection of fees isn't being a "nice guy." In our opinion, a "nice guy" is someone who makes sure his family, partners and employees are taken care of, and precious time that could have been spent with loved ones isn't wasted. You work very hard and shouldn't cheapen or lessen yourself by not being on top of clients paying you. Many of them will take advantage if they see that you don't value your time. That isn't to say that if you have a good client who's met unforeseen circumstances,

you shouldn't be kind and sometimes offer breaks or extensions to pay, if deserved. However, it's okay to fire a client who has difficulty paying all of his providers, not just his attorneys, and has little appreciation for your time and efforts. To avoid taking on the non-paying client from the outset, consider charging a substantial upfront retainer that isn't applied until the end of the representation. If the client balks at paying the retainer, he'll probably balk at paying your bills.

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Similarly, consider rendering monthly and/or multiple progress bills, and check in with your client shortly thereafter to determine whether he has any questions or concerns and when you can expect payment.

### Blended Families

Even with the best client who doesn't present any of the above problems, a conflict of interest may arise that could necessitate certain disclosures and agreements or perhaps lead to limiting and/or declining the representation. For example, it's common to encounter the so-called "blended" family involving children from a prior relationship. While many estate planners may jointly represent spouses in routine situations,<sup>1</sup> spouses in a blended family scenario deserve a closer look. You should ask a number of questions to the spouses before taking on the representation, including:

1. What are the spouses' intentions for their respective estate plans?
2. Is there a prenuptial agreement?
3. Are children from a prior marriage going to be disinherited or provided for unequally?
4. Are stepchildren going to inherit?
5. Will the spouses have substantially different estate plans?



### 6. Will all information that's imparted by one spouse to the attorney be shared with the other spouse?

If the answers provided indicate that the spouses don't have common goals, you should probably choose to represent only one spouse to avoid a concurrent conflict of interest.<sup>2</sup> If you believe that the spouses' goals are mostly aligned, even if not identical, it may be safe to proceed with a joint representation, provided that the clients agree that information shared by one won't be confidential with respect to the other and that both prospectively waive any future conflicts.<sup>3</sup> Keep in mind, however, that if a non-waivable conflict of interest arises later on, it's likely that you'll no longer be able to represent either spouse going forward.<sup>4</sup>


### Multiple Family Members

It's quite common in the estate-planning world to be asked to represent multiple family members, including parents, children and siblings, in their respective estate planning, estate and trust administration and/or other related matters. Whether and how you may ethically undertake such representation depends on the circumstances. At the outset, you should inquire into the goals for the representation and the level of coordination that may be required with respect to the multiple clients, and you should try to uncover possible conflicts. Some conflicts, such as simultaneously representing the fiduciary of an estate and the decedent's widow who may wish to exercise her elective share, or simultaneously representing both the fiduciary and a creditor of the estate, might not be waivable, thus forcing you to decline representation of one or both clients.<sup>5</sup> When there might be a waivable conflict, for example, you're asked to represent one family member as a fiduciary of a trust or estate of which another family member, who you represent in an unrelated matter, is a beneficiary, you should obtain a prospective waiver from all parties. Assuming there are no substantial conflicts among the family members, the next question is how to structure the representation. When coordination is key, such as when a series of common transactions are contemplated or you'll represent co-fiduciaries, the representation should probably be structured as a joint representation with the attendant waiver of confidentiality among the multiple clients. When coordination isn't necessarily required, such as

when the clients seek representation for unrelated matters, the representation may be structured as a separate representation of each client with no waiver of confidentiality. In either case, you should obtain a prospective waiver of any potential conflicts of interest that may arise from the representation.

The importance of identifying and resolving potential conflicts of interest ahead of time can't be overstated. Violations of the ethical rules, including those pertaining to conflicts of interest, can lead to severe consequences for the attorney, including disqualification, warnings, suspensions and in extreme cases, disbarment.<sup>6</sup> An individual attorney is always subject to discipline for her own conduct. However, firms, partners and supervising attorneys may be subject to discipline for another attorney's conduct as well.<sup>7</sup> Accordingly, it's vital for law firms to have thorough conflict checking practices and procedures in place and to follow them consistently.

### Trust Your Instincts

These are just a handful of the myriad practical and ethical considerations that you should address before taking on a new representation. The key takeaway is not to let the thrill of a new representation blind you to hidden dangers. Before you sign on that new client or new engagement, give some careful thought to whether the client is going to be a good one or whether you're going to have to fire him down the line, and what that might mean for you and your firm if you do. While you should always be on the lookout for conflicts of interest, be particularly cautious when asked to represent multiple family members, even if their matters seem to be unrelated at first glance. Trust your instincts—if something seems wrong, it probably is. Take the time to ask questions, analyze the answers and make a solid strategy before moving forward. 

### Endnotes

1. See The ACTEC Commentaries, Fifth Edition (2016) (ACTEC Commentaries), at p. 102.
2. See ABA Model Rules of Professional Conduct (2016) (Model Rules) R. 1.7.
3. See ACTEC Commentaries, at p. 103.
4. See *ibid.*, at p. 105; see also Model Rules R. 1.16.
5. See ACTEC Commentaries, at p. 104.
6. See *ibid.*, at pp. 109-119 (case annotations to Model Rule 1.7).
7. See Model Rules R. 5.1.