COMMITTEE REPORT:
THE MODERN PRACTICE

By **Avi Z. Kestenbaum**

When Should Practitioners Express Disagreement With Clients?

The exact role of estate planners may be difficult to define

Often, like other estate planners, I grapple with defining my exact role. Am I mostly a scrivener who writes down the wishes of my clients even if at times I disagree with them? Or should I be strong and opinionated as to what I feel is right and wrong with my clients' wishes and documents and let them know exactly how I feel even if not explicitly requested by them? This issue is less prominent with the tax planning aspects of our job, which usually isn't as personal in nature when deciding which specific techniques and structures to choose. The straightforward goal is typically to save the maximum amount of taxes. However, when it comes to document provisions, moral and ethical-based issues can arise such as whether to treat children unequally or punish a descendant with a different religious belief or political outlook.

Two Options

One reasonable position is that the attorney should always respect their clients' wishes and not attempt to change their opinions unless the clients specifically asks for the attorney's advice. After all, it's the clients' estate plans and not their own. It isn't the attorney's job to tell clients how to parent or what to do with their assets. Just the opposite. The attorney's role is to represent their clients and not themself.

However, another rational view is for the advisor to speak up, even if unsolicited by the client, because the attorney may actually know better than the client, and the client may end up appreciating the advice. For example, if the client truly understood the long-term ramifications of punishing a loved one, which includes potentially fracturing family relationships and dynamics in perpetuity, and causing severe mental anguish and suffering, perhaps the client wouldn't be pursuing this path. Furthermore, and to take this one or two steps further, if the attorney believes that their client is plain and simply wrong with detrimental and harmful planning terms, should the attorney even be assisting and playing any role as a scrivener, even if their client is adamant in including these harmful terms? In addition to this moral dilemma, at stake is the professional reputation of the attorney who drafted the documents, which potentially helped destroy the family relations.

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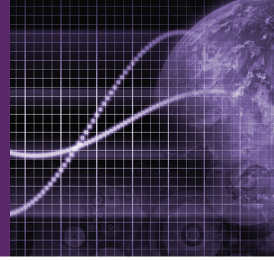
Lawyer vs. Attorney

When I was in law school, one of my sagacious professors pointed out the difference between a lawyer and an attorney. A lawyer practices law. An attorney is an advisor to whom the client "turns" to for advice. For some of our clients, we more often play the role of the lawyer, explaining the probate, tax and trust laws and drafting documents that comply and conform with these laws. Other clients, however, seek our wisdom and guidance, including our business judgments and experiences that transcend well beyond what's codified in any statute or derived from precedents in legal cases.

It's also possible that this distinction is less client-centric and more attorney-centric. An experienced and wise attorney will likely offer guidance even when not specifically requested, and this is often the very reason the attorney is hired. Typically, this approach comes with



significant experience and the requisite confidence and intelligence to understand how best to handle complex situations. A less seasoned attorney may not have the fortitude and courage to take contrary positions to their clients and render advice, especially in front of strong willed and intimidating clients, who likewise may have deliberately retained a "yes" person. These distinctions are by no means all about the ages and experiences of the clients and the attorneys. Some younger attorneys have the required wisdom, intelligence, empathy and confidence to advise clients who are much older than they are. Other attorneys, who are older and far more mature than their clients, may lack the skills, courage and temperament to take strong positions with their clients and may simply follow what they're told to do.

Be Candid

My view is that estate-planning attorneys by definition render advice related to the "estate," even if sometimes non-legal or non-tax per se. Therefore, if the guidance provided will affect the ultimate disposition of the estate assets or the preservation of family harmony, it's incumbent on the planners to be candid with their clients. Obviously, advisors still have to speak in a sensitive, respectful and empathetic manner to have a constructive and influential impact and not to disenfranchise the clients. However, moral dilemmas still include: how far should this candor go; whose ethos decides what's right or wrong; and at what point should the attorney refuse to assist in the planning if they feel it's unambiguously wrong and will create far more harm than good?

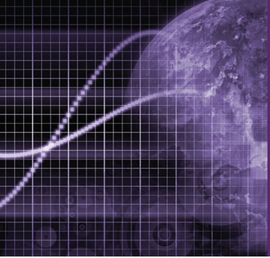
Every individual, family and estate-planning situation is unique, and clients certainly have the right to make their own decisions. But if a client chooses a path that the attorney feels the client wouldn't be selecting if the client truly understood the long-term ramifications, how forceful should the attorney push back? Let's consider a planner's approach if a client states that they're disinheriting a child for one of the following reasons, bearing in mind that each situation in the real world would obviously be far more complicated, with very intricate and complex sets of facts and circumstances:

1. Differing religious or political beliefs;
2. Disrespecting the parent;
3. Failing to adequately visit or care for the parent;
4. Disapproving of the child's spouse; and
5. Being concerned about the child's spending and use of the inheritance.

Disinheriting a child simply because of a differing political view or religious belief, or due to disapproving of the child's spouse, would feel rather harsh and perhaps distasteful to many people. After all, the child might be a very good person who didn't do anything morally wrong or purposely hurt the parent per se. Further analysis is always required as each case and situation is unique. For instance, if due to these factors the inheritance would be at risk to be used in a way that would be abhorrent to the client and go completely against their values and principles, that would seem less offensive and more understandable. If the disinheritance isn't being implemented to punish the child but rather to stop an objectionable use of the funds by the child or their spouse in the eyes of the parent, that would feel more understandable and less cruel. Of course, there are other and perhaps more effective ways to mitigate these risks, such as the use of restrictive trusts, instead of the more extreme act of disinheritance.

> If the attorney feels that morally and ethically the planning might be the wrong course for the client to pursue, they should at least have the confidence to raise the issues with the client.

An alternative view is that legally, a parent isn't required to leave any assets to their children. Therefore, it shouldn't be a moral or ethical concern for the attorney to assist with disinheritance planning no matter the reason, and even if it seems cruel and



distasteful on its face. Certainly, in the examples above when the parent is concerned about the child blowing their inheritance (which again could be mitigated with the use of trusts) or the child has disrespected the parent or alienated themself from the parent, it wouldn't seem objectionable to me for the attorney to assist with the documents and provisions.

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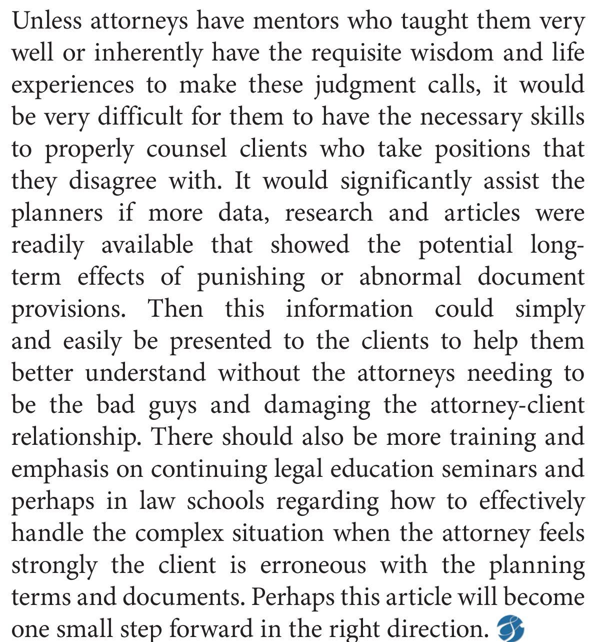
However, if the attorney feels that morally and ethically the planning *might* be the wrong course for the client to pursue or if they feel it will create more harm than good, they should at least have the confidence to raise the issues with the client. They should warn the client that once they're deceased and the planning is final, there's no going back on the potential physical and psychological damage it might cause for generations and the fracturing of their descendants' relationships with each other. Therefore, they should think long and hard about atypical or punitive document provisions.

More Research Needed



Unless attorneys have mentors who taught them very well or inherently have the requisite wisdom and life experiences to make these judgment calls, it would be very difficult for them to have the necessary skills to properly counsel clients who take positions that they disagree with. It would significantly assist the planners if more data, research and articles were readily available that showed the potential long-term effects of punishing or abnormal document provisions. Then this information could simply and easily be presented to the clients to help them better understand without the attorneys needing to be the bad guys and damaging the attorney-client relationship. There should also be more training and emphasis on continuing legal education seminars and perhaps in law schools regarding how to effectively handle the complex situation when the attorney feels strongly the client is erroneous with the planning terms and documents. Perhaps this article will become one small step forward in the right direction.

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