

ESTATE PLANNING

BY MARVE ANN M. ALAIMO



Six ways you can bolster your clients' testamentary capacity

Clients tend to defer attention to their estate planning desires until they reach advanced age or experience health crises. When clients of advanced age or with significant illness enter into plans that deviate from the norm, their estate planning can be open to challenge if disinherited or disgruntled heirs believe that the creator of a will or trust lacked the capacity to properly enter into an estate plan.

Although estate plans are drafted by lawyers, financial advisors often have more opportunities to discuss estate-planning intentions with clients. As advisors working with clients, you can help ensure that your clients' estate plans are as defensible as possible. This article explores six steps you can take to help "bullet-proof" your clients' estate plans.

1. Understand the test for testamentary capacity. Generally, the legal test for "testamentary" capacity (i.e., the capacity needed to make a will) is a low threshold. In many states, a client will be deemed capable of making a will or trust if the client

(a) is aware of his or her family members, (b) is generally aware of his or her assets, and (c) understands the function and importance of a will or trust.

Financial advisors typically have long-running relationships with their clients and, during the course of those relationships, learn intimate facts about their clients' families and assets. Proactively and regularly conversing with your clients about their families, assets, and estate-planning wishes is helpful in confirming your clients' testamentary capacity. Documenting those discussions and, with permission, sharing that information with your clients' lawyers helps to build a base of evidence that could be used to defend your clients' estate plans.

2. Broach the topic of future incapacity with your client. As your clients age or suffer illness, their ability to handle legal and financial affairs can change. Changes can be slight or significant, and vary from client to client. Again, because financial advisors have long-term relationships with their clients, they are often in a

better position than lawyers to see changes in their clients' capacity.

Do not be shy about addressing these changes with your clients, particularly if you notice a marked decrease in physical or mental abilities, significant memory loss, or increased dependence on others. Early in your relationship with your clients, ask if they have designated trusted individuals to assist them in the event of incapacity. If your clients have designated agents under powers of attorney, encourage them to provide you with copies of those documents or to share the identity of their designated agents. If your clients allow it, ask for an introduction to those agents.

3. Create a comfortable environment. Meet in a comfortable environment to discuss estate-planning wishes with clients. Aging or ill clients may be more comfortable talking with you in their homes than in your office. They may be less intimidated, be more relaxed, and have more mental clarity in their own surroundings. Consider your style of dress and opt for business casual attire when possible. Set your client meetings at a time

of the day when your client is most likely to be fully alert. Some clients are best in the mornings, others in the evenings. Some are more alert before having a meal, others after they have eaten. Ask your clients (or their caregivers) to tell you at what times of the day they feel they are at their best. Avoid long meetings that can be physically and mentally exhausting.


4. Keep third-party participation to a minimum. Aging or ill clients can feel overwhelmed in a group conversation. Also, keep in mind that challenges to estate plans can be based not only upon lack of capacity but also upon claims of undue influence by third parties. Any participant who becomes a beneficiary of your clients' estate plan could become a target of an undue influence claim. Thus, it is best to keep client meetings small and to involve only the professionals who are key to your clients' planning efforts. Excluding potential beneficiaries from client meetings can help to diffuse any accusations of undue influence. It also allows you to reaffirm with your clients the confidential nature of the matters they discuss with you. Do not be afraid to discuss any concerns of undue influence, financial exploitation, or elder abuse with your clients. Bear in mind that state laws may require you to report

suspected elder abuse to your local adult protective services agency.

5. Simplify explanations. Complex presentations filled with technical jargon may be mentally taxing for an aged or ill client. As much as possible, simplify the way you present information to your clients so you can be sure that they properly process that information. Sharing information in a casual and conversational manner will make it easier for your client to retain and understand the information. Use relatable analogies or basic visual aids when discussing estate-planning strategies. Straightforward flowcharts and executive summaries can often help.

6. Reaffirm and document client intentions. In estate planning, it is always important to reaffirm your clients' wishes to ensure that you and they have a mutual understanding of their intentions. It is particularly critical when planning with aging and ill clients. Thus, at the end of every client meeting, you should briefly reaffirm any estate planning decisions made by your clients and summarize any open questions to be answered in brief bullet-pointed lists—preferably in writing. Follow up all meetings with written summaries of the decisions made and those still unresolved.

Use large-font type for visually impaired clients. Document client discussions for your own files and, in doing so, make particular note of discussions that would be useful in confirming testamentary capacity (e.g., discussions about family, investments, and estate-planning documents).

Financial advisors are important members of their clients' estate-planning teams. As the team member who often has the most contact with the clients, you are in a unique position to track your clients' capacity and to help them take steps that will bolster their estate plans. Following these steps will not only help you provide better service to your clients, but will also help to build the documentary evidence your clients' lawyers may one day need to defend your clients' estate-planning wishes. 

Marve Ann M. Alaimo is a partner in the Naples, FL, office of Porter Wright Morris & Arthur LLP. She holds a master of laws in estate planning and is a Florida Bar board certified wills, trusts & estates lawyer.

The opinions, conclusions, estimates, projections and descriptions of specific market trends are in whole or part based on current market conditions and therefore, subject to change without notice. The reprint above is from an article originally appearing in the March 2018 issue of the NAPFA Advisor Magazine. All Rights reserved. The National Association of Personal Financial Advisors, Chicago, Illinois.