CAREFUL HANDLING OF THE ESTATE PLANNING FILE:

WHAT LITIGATORS THINK THE PLANNER SHOULD KNOW ABOUT MAINTAINING CLIENT FILES AND DEALING WITH METADATA AND ELECTRONICALLY STORED INFORMATION

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There are various legal requirements concerning the handling of estate planning files. In addition, lawyers should consider a host of other issues in deciding what should be included in the estate file, and what should be done with that file after the estate plan is completed.

I. APPLICABLE LEGAL PRINCIPLES REGARDING RETAINING ESTATE PLANNING FILES.

Having completed an estate plan, there are various rules that govern the handling of the lawyer's file. These include statutes in the Probate Code, ethical rules, and case law.

With respect to what would generally be the most important documents in an estate planning file--the original will and/or trust--like all parts of any lawyer's file when the representation ends, the client is entitled to these documents, as discussed in more detail below. However, it is not uncommon for estate planners to retain original documents, and in these situations, Probate Code Section 710 provides that lawyers must use "ordinary care for preservation of the document . . . and shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction." The statutes following Section 710 provide a host of rules governing what lawyers are to do if an original document is lost or destroyed, compensation to the lawyer for keeping original documents, and ways to terminate the role as the document repository. For example, Probate Code Sections 731 and 732 provide for various ways lawyers can end their role of guardian of such original documents, such as by returning the original documents to the client, or transferring documents to another lawyer.

In addition to these statutes, the California Rules of Professional Conduct firmly state that the estate planning file, like all legal files, belongs to the client and not the lawyer. Rule of Professional Conduct 3-700, titled, "Termination of Employment," states, in Part D, that when a representation has ended, lawyers are to "promptly release to the client, at the request

of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not."

Accordingly, when an estate planning representation has concluded, upon the client's request, the lawyer must give the file to the client. But even when the client makes no such request, the lawyer may wish to ask the client if the client wants to have the file. Deciding what to do in such situations should be part of any document retention policy at the lawyer's office.

In addition, one fairly recent case provides further guidance for estate planners in connection with estate planning files. In *Moore v. Anderson, Zeigler, Disharoon, et al.* (2003) 109 Cal.App.4th 1287, an estate planner was sued by beneficiaries of the estate plan, who alleged that the lawyer had been negligent in not taking steps to ascertain whether his client had testamentary capacity at the time the lawyer worked with the client in preparing and executing a new estate plan. On the key issue in the case, the Court of Appeal upheld the trial court's ruling that the lawyer owed no duty to ascertain the client's testamentary capacity. In a related holding relevant here, the Court of Appeal further stated that failing to document the client's capacity in the file or preserving evidence on capacity will not give rise to liability for malpractice.

The *Moore* decision is obviously helpful in that it protects estate planners from malpractice claims under certain circumstances. However, as shown below, even when no legal requirement exists to obtain evidence of capacity or other issues, in connection with estate planning it may be the best way to protect the client's estate plan against a future challenge, as discussed in Section III below.

II. LAWYERS NEED POLICIES REGARDING CLIENT FILES.

Aside from legal requirements, lawyers should have policies for their offices concerning the handling of client files. Obviously, all lawyers must have a system in place to keep active client files secure and complete. But once the estate plan has been executed, lawyers also need to have a policy regarding the handling of the file.

This issue is further complicated by the fact that some estate planners believe their representation of an estate planning client ends once the documents are signed, while other estate planners remain in contact with the client, have ongoing relationship with the client, and continue to suggest estate planning ideas and perform further services for the client as the years go on. In the latter situation, such lawyers will likely maintain the files as active matters, even though such matters may be dormant for extended periods of time.

In situations where the lawyer believes the representation has ended, one important document that should be in the file is a closing letter from the lawyer to the client. Such a letter should confirm that the lawyer's representation of the client has ended, so that both parties to the engagement understand this fact. This is not only helpful for both parties, but it

provides the possible additional benefit for the lawyer of starting the clock running for the limitations period for any malpractice claim by the client (subject to the delayed discovery of such a claim and related polling of limitations periods as a result). Upon conclusion of the representation, there is no rule as to how long the lawyer should retain the file (aside from the original documents, as discussed above). Some lawyers, upon the conclusion of a matter, will give the file to the client and consider the issue resolved. In these situations, it is sensible for the lawyer to retain a "shadow file" of copies of key documents, including the engagement and closing letters and the estate planning documents, among possibly others, for future reference if needed.

Other lawyers choose to have a document retention policy such as retaining client files for three or five years, and then destroying files if the client does not wish to receive them at that point. Any such policy should be stated in the engagement letter with the client, in order to confirm that both parties understand what will happen with the file over time.

III. WHAT SHOULD THE ESTATE PLANNING FILE CONTAIN?

In the context of handling client files, a related and important issue for estate planners is what should that file contain? Aside from the original estate planning documents, there are a host of other documents that may be extremely important in any future litigation regarding the estate plan. Such documents include notes or memos concerning meetings with client(s) about the estate plan and the actual execution of the documents, as well as an engagement letter showing precisely what the lawyer is doing for the client or clients in spelling out the obligations of both sides. Contemporaneous notes and memos of the estate planning and execution process can be critical evidence in future trust and estate contests, so such documents should be created and maintained as part of the file.

In addition, there are situations estate planners face that require creative approaches, particularly in the context of trying to protect an estate plan from a future challenge. Although under the *Moore* case discussed above there is no malpractice liability for an estate planner who has not taken steps to ascertain the competence of the testator or kept documents on issues concerning such competence, the estate planner may have concerns about the client's capacity. In such cases, estate planners at times will engage a professional to evaluate the testator's capacity, and assuming the psychiatrist or other competent professional understands the legal guidelines and opines that the testator satisfies such guidelines for capacity, then the lawyer should get a written report of this opinion and maintain it as part of the file. Similarly, some lawyers like to videotape a client meeting concerning the estate plan or the actual execution of the documents, in an effort to show that the testator understood what he or she was doing and was not being forced or pressured to sign the documents. If the estate planner obtains such a videotape, this also should be preserved in the file.

Of course, decisions about hiring a psychiatrist or videotaping the client are made on a case by case basis, and in a later contest, both sides will use any such evidence to make arguments. The contestants will argue that, simply by obtaining an expert report or a

videotape, the lawyer clearly had concerns about capacity, and most estate planners will testify that these actions are not ones they take in the vast bulk of their estate planning representations. The estate planner would also be giving a future contestant a very strong arrow in his quiver if the estate planner obtains an expert opinion or a videotape, but such materials no longer exist at the time of litigation. The contestant will argue that the evidence actually showed a lack of capacity and that is why it was destroyed. Accordingly, if such evidence is obtained, it must be preserved.

IV. CONCLUSION.

In sum, estate planners must be aware of the legal guidelines regarding the handling and safekeeping of client files. Generally, these rules state that any original estate planning documents must be handled with care and under a host of strict guidelines, and that the entire file belongs to the client once the representation has ended. In addition, lawyers should have policies in place which should be set forth in the engagement letter with the client regarding what the lawyer will do with the client's file when the representation ends. Finally, the file should have contemporaneous evidence that would support the estate plan as against a future challenge, even though the failure to have such documentation may not give rise to liability by the lawyer.

METADATA AND ELECTRONICALLY STORED INFORMATION

1. What is metadata?

Metadata is information about a data file (as opposed to information in the file). When documents are created in certain word programs, including Microsoft Office programs like Microsoft Word, and Microsoft Excel, or Corel WordPerfect, the documents include "properties" that reveal such information as the author, document changes, editing time and other metadata. This metadata does not appear on printed versions of the documents, but is accessible in electronic versions of the documents. Typically this information is harmless and even helpful in allowing an author, or multiple authors of a collaborative document, to trace changes and facilitate the progress of ideas reflected in a document.[1]

Third parties can access this information when they have access to the electronic data file. The simplest metadata can be accessed by opening a document, using the "right-click" button on a mouse, and selecting "Properties." Additional metadata can be obtained through more sophisticated software search tools and applications, and forensic investigation.

Metadata is embedded in documents so that the information remains intact as the documents are transmitted electronically. In other words, a document that is sent by email as an attachment will typically retain the metadata information files and that metadata can be viewed or mined by the recipient of the electronically transmitted document.

2. Why do you care about metadata?

Since metadata reveals the history of a document and information about its author, editors, and changes and revisions, a third party, including an adverse party in litigation, can use this information to raise questions about the authenticity of the final version of an estate planning document and whether it accurately reveals the intent of a donor, and the connections between the donor's intent and the drafter's expression of that intent. Releasing metadata can lead to inadvertent waivers of the attorney-client privilege and work product, may violate ethics rules about client confidentiality and could potentially lead to malpractice claims. In addition, information cut from one Microsoft document and pasted into another, for example data from an Excel worksheet pasted into a Word document, can carry with it the entire worksheet, including sensitive information that the author of the Word document may not wish to share. Consider, for example, a trust that is created from a form drafted for a prior client that reveals confidential information about that client; or the embarrassment of a client discovering meta-data in a document reflecting that the document was created in

[1] Depending on the program used to create a document, metadata can include the authors, comments, company name, computer name, document revisions, document versions, embedded objects, fast saves, file location, file properties, headers and footers, hidden text, hyperlinks, initials, linked objects, matching font, network or server name, personalized views, revisions, small font, summary details, styles, template information, tracked changes, undo/redo history, versions. Sheila Blackford, "Metadata: Danger or Delight?", Oregon State Bar Bulletin, May 2008, www.osbar.org/publications/bulletin

much less time or primarily by a paralegal or a junior associate though the client invoice may reflect something different.

3. What can you do to avoid disclosing metadata?

The disclosure of metadata can be avoided in several ways. Some metadata creation may be turned off by selecting appropriate options from the "Settings" tab in the Tools menu. The drafter of the document can also save a document to RTF (Rich Text Format) before the document is attached to an e-mail message. The document can also be printed and scanned or converted to a PDF (Portable Document File) document before it is sent electronically. This sends an image of the document only, so that it cannot be edited, but is free of the original metadata accessible in a Microsoft Word file. (It will probably still contain some metadata such as information reflecting the creation of the PDF file.)

There are software tools which can be used to check documents for the existence of metadata and to remove the metadata information. Microsoft has downloadable utilities that enable the user to "scrub" changes, comments and collaboration data. Other examples of such software include Document Trace Remover by Smart PC Solutions, and Metadata Assistant from the Payne Consulting Group.

4. What can happen to electronically stored information in litigation?

In a will contest, a dispute over a claim for breach of fiduciary duty, or an accounting challenge, various types of electronically stored information may contain potentially useful evidence. Examples of such sources of evidence include:

(1) estate planning files
(2) e-mails
(3) voice mail
(4) text message
(5) internet files
(6) stored/backup information
(7) instant messages
(8) website information

There is no magical distinction between paper and electronic documents in terms of what must be produced in litigation and the obligation to put forth a good faith effort to produce evidence and, especially in federal litigation, to collect and preserve evidence in the early stages of litigation. Generally, a document request determines the parameters of what must be produced. Therefore, there is no reason to produce metadata embedded in an electronic document if a request does not seek such metadata.

5. What are the rules governing the preservation and production of electronically stored information?

a. Federal

i. Statutory

On December 1, 2006, amendments to the Federal Rules of Civil Procedure went into effect. Federal Rule 26(b)(2)(B), et seq. Those amendments define electronically stored information (ESI). The federal rules also distinguish reasonably accessible information from inaccessible information. The party responding to a document request under the federal rules decides whether the information is reasonably accessible, and the responding party is required to move to compel if she disagrees with the responding party's determination. Then the court may order production of any requested information on a finding of good cause.

ii. Caselaw

The most significant case involving electronic discovery is *Qualcomm, Inc. V. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal.); 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan 7, 2008). In that case, Qualcomm, Inc. was ordered by a federal magistrate to pay over $8.5 million in sanctions. In addition, six attorneys were referred to the California State Bar for possible disciplinary proceedings because Qualcomm withheld tens of thousands of responsive documents, including emails and other electronic documents, in discovery. The court found that Qualcomm's attorneys had "participated in an organized program of litigation misconduct and concealment."

b. California -- Statutory

The California Judicial Council proposed amendments to the California Rules of Civil Procedure and Rules of Court to address electronic discovery issues. The proposals passed through the Judicial Council process and through the California legislature. However, Governor Schwarzenegger vetoed the proposed legislation. The legislation proposed modifications to the Code of Civil Procedure but not to the Rules of Court, and included important changes to the procedures for motions to compel discovery and subpoenas.

The California proposal did not adopt the federal rules, two-tiered system distinguishing between "reasonably accessible information" and "not reasonably accessible information." Instead, the proposed California rules put the burden on the responding party to show that it would be burdensome to produce inaccessible data.

Like the federal rules, the California proposal included a "good cause" standard for deciding if a party is obligated to produce not reasonably accessible ESI. Proposed Cal. Civ. Proc. Code §2031.060 (d). The proposed legislation also includes authority for the court, *in*

response to a motion for protective order, to limit the frequency or extent of ESI, even from a reasonably accessible source, if the court determines that there are less burdensome, more convenient or less expensive sources; that the discovery is unreasonably cumulative or duplicative; that the party seeking discovery had ample opportunity to obtain the information by discovery; or the likely burden or expense of the proposed discovery outweighs the likely benefit, considering the amount in controversy, resources of the parties, importance of the issues in litigation, and importance of the requested discovery in resolving the issues. Proposed Cal. Civ. Proc. Code §2031.060(f).

Both the federal rules and the California proposal allow the requesting party to specify the format in which the material must be produced – e.g. as PDF, TIFF, native file format, etc., and while both specify default formats that apply when the requester doesn't make an explicit request, the California proposal does not address what happens when a dispute arises over the format in which ESI must be produced. The federal advisory committee notes, by contrast, indicate that the defaults take precedence when there is a dispute. Jake Widman, "The E-Minefield" California Lawyer, Vol. 28, No. 6, June 2008.

6. What happens if electronic information is not preserved?

The California proposal (like the federal rules) would require attorneys to meet early in litigation to identify ESI sources the case will involve, and estimate the volume of ESI involved. Preservation of metadata is important in the process if clients (and their attorneys) are to avoid claims that they are guilty of spoliation of evidence. Data collection professionals, using specialized software may be justified, particularly in cases with large volumes of discovery, but may also be needed to consult on the preservation of metadata imbedded in various iterations of ESI.

7. Why would an estate planner or counsel to a fiduciary care about these procedural rules for producing ESI?

While the subject of the rules for discovery of electronically stored information may seem largely irrelevant for the estate planner, particularly since the rules in California are still in a state of flux, the careful planner should consider the future. As litigators are developing an understanding of the breadth and depth of information that is accessible in electronic form and discoverable in litigation, they are developing protocols and procedures that are likely to be applied to go after estate planners' files to help shed light on testamentary intent, authenticity of estate planning documents, tampering affecting the efficacy of documents, and communications through emails, text messages and other forms that will help litigators to prove their cases. Similarly, communications by and among trustees, trust officers, beneficiaries and trustors can readily be seen as helpful to establishing whether fiduciaries are acting in concert with their legal duties in administering trusts and estates.

The Electronic Discovery Reference Model project, founded by e-discovery experts, vendors, and end users, provides a guide to e-discovery, dividing it into nine conceptual steps: records management; identification; preservation; collection; processing; review;

analysis; production; and presentation. *See* www.edrm.net. The project is helpful in providing lawyers and their clients with definitions and guidelines for navigating each of the nine steps, including avoiding the destruction of e-discovery.

8. How Can ESI Be Used At Trial in Trust and Estate Litigation Cases?

The familiar California Evidence Code Sections dealing with hearsay and various privileges will apply to the use of electronically stored evidence at trial just the same as any other evidence.

a. Hearsay

-- Ev. Code § 1260
Evidence by unavailable person that he or she has or has not made a will, has or has not revoked a will, or that identifies the person's will is not inadmissible hearsay. (Note: No comparable provision for trust litigation and no California case law applying the section to trust litigation)

b. Attorney-client privilege

– Ev. Code § 957
No privilege as to a communication relevant to an issue between parties all of whom claim through a deceased client

– Ev. Code § 959
No privilege as to a communication relevant to an issue concerning intention or competence of a client executing an attested document if the lawyer is an attesting witness (Note, trusts are generally not attested documents)

– Ev. Code § 960, 961
No privilege as to a communication relevant to an issue concerning a deceased client's intention as to a deed, will or other writing affecting an interest in property, or the validity of such instrument

a. Doctor-Patient Privilege

– Ev. Code § 1000
No privilege as to a communication relevant to an issue between parties, all of whom claim through the same patient, whether by will, intestacy or inter vivos transaction

– Ev. Code § 1002, 1003
No privilege as to a deceased patient's intention concerning a deed, will or other writing affecting an interest in property or the validity of such an instrument

SOME KEY TERMS

ESI	Electronically Stored Information, Fed. R. Civ. Proc. Rule 26
Electronically Stored Information	Information that is stored in an electronic medium. Proposed Cal. Code of Civ. Proc. § 2016.020(e)
Instant Messages	(IMs) Messages transmitted via the internet in real time, often through an account provided by an Internet Service Provider (ISP)
Metadata	Information about a data file (as opposed to information in the file)
PDF	Portable Document Format, file format created by Adobe Document Systems
RTF	Rich Text Format
Text Messages	Written communications sent from one cell phone to another cell phone or handheld device.
TIFF	Tagged Image File Format, file format for storing images, including photographs and line art. Under the control of Adobe Systems

RESOURCES

Primary

Statutory

-- Fed. Rules Civ. Proc. Rule 26 references "Electronically Stored Information" or ESI

-- [Proposed] Cal. Code of Civ. Proc. Sec. 2016.020 (c): "Document" and "writing" mean a writing, as defined in Section 250 of the Evidence Code.

-- California Judicial Counsel Proposal for electronic discovery legislation: http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf.

-- Cal. Evid. Code Sec. 250: "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Case Law

-- *Coleman (Parent) Holdings, Inc. V. Morgan Stanley & Co.* , 2005 WL 679071 and 674885 (Fla. Cir. Ct., march 1 and 23, 2005)

-- *Lorraine v. Markel Am. Ins. Co.* 241 F.R.D. 534 (D. MD 2007) (recognizing Fed. Rule of Evidence 901 as a means to authenticate ESI, including e-mail, text messages and the content of websites.)

-- *Phillips v. Netblue, Inc.* 2007 WL 174459 (N.D. Cal. Jan. 22, 2007), (court noted that potential objects of evidence must be in a party's possession, custody or control in order for duty to preserve to attach. Thus, the court rejected the claim that party should have captured and recorded webpage images and URLs displayed when hyperlinks contained in particular emails were clicked.)

-- *Qualcomm, Inc. V. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal.)

-- *People v. Von Gunten* 2002 Cal.App. Unpub. LEXIS 2361 (Cal.App. 3d Dept. Apr. 4, 2002) (criminal trial court's decision to exclude a text

message lacking sufficient authentication of sender of message).

-- *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I)* (regarding cost-shifting)

-- *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV)* (regarding preservation of evidence, spoliation and sanctions)

-- *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V)* (sanctions and adverse inference instruction)

Secondary

Jake Widman, "The E-Minefield" California Lawyer, Vol. 28, No. 6, June 2008.

The Electronic Discovery Reference Model, www.edrm.net

Sheila Blackford, "Metadata: Danger or Delight?", Oregon State Bar Bulletin, May 2008, www.osbar.org/publications/bulletin/06may/practice.html

Geoff Howard and Erin Smart, "California e-Discovery Proposal Vetoed" http://www.bingham.com/Media.aspx?MediaID=7631

Kristine L. Roberts, "Qualcomm Fined for 'Monumental' E-Discovery Violations – Possible Sanctions Against Counsel Remain Pending," ABA Section of Litigation, Litigation News, May 2008, Vo. 33, NO. 4.

Linda L. Listrom, Eric R. Harlan, Elizabeth H. Ferguson & Robert M. Redis, "The Next Frontier: Admissibility of Electronic Evidence" ABA