

# ***Ethics for Estate Planners***

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# Protecting Yourself

# Something Unexpected Happens

If something unexpected happens to you today, what happens to your clients?

# Protections to Consider

- Emergency plan for practice
  - Access to computer, phone, bank account, etc.
- Emergency plan for office

# Mental Health

- What are you doing to maintain good mental health?
- Missouri Lawyers Assistance Program  
(800) 688-7859

# Protecting Your Practice

# Malpractice Insurance

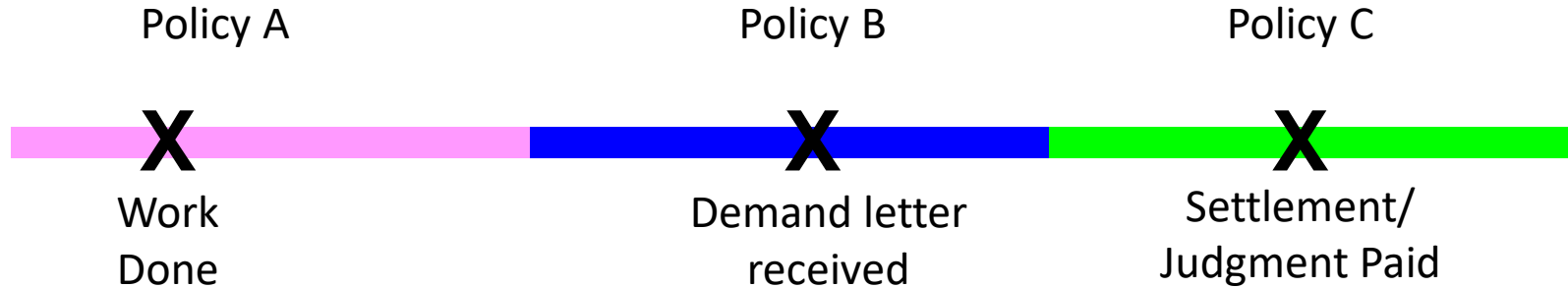
- “Claims-made” policies
- Most insurance is “occurrence” insurance

# Have Insurance – and Report Claims

- Malpractice insurance can be purchased for about \$100 per month
- "Claims made" policies – when claim is made, not when malpractice occurs
  - "Claim" is very broad
    - Demand letter
    - Lawsuit
  - "Pre-claim" coverage varies greatly by policy
    - Many policies \$0
    - Some policies \$25,000 or more



# "Claims"-Made Policies



- If you leave your firm (coverage source), you may lose coverage for subsequent claims
- A "tail" policy may be available

## News Release

### **LAW FIRMS FACE UNRELENTING CHALLENGES OF LATERAL MOVEMENT, CYBER THREATS, AI RISKS AND FRAUD**

New Survey Finds Legal Malpractice Claim Severity at All-Time High

**WASHINGTON, DC, May 15, 2024** – In their efforts to sustain and grow their business

Notably, 11 of the 13 insurers polled have participated in a claim payout in excess of \$100 million in the past two years and the same number has paid two claims of that size. Meanwhile, five insurers surveyed paid a claim between \$150 million and \$300 million and four paid a claim over \$300 million.

Conflicts of interest remain the single largest cause of legal malpractice claims with nine of the insurers polled ranking it first or second most common error. Next was scrivener or clerical errors, which ranked first or second by four of the insurers.

For multiple years, the survey has found the same three practice areas generating the largest number of legal malpractice claims. Among insurers polled this year, 62 percent identified Trust & Estate, while Business Transactions was identified by the same percentage, followed by Corporate & Securities (46 percent). In the current survey, however, two additional practice areas – Insurance Defense and Personal Injury Plaintiff's work – saw continued growth in claims activity.

# Who Can Bring Claims

- Clients
- (Alleged) clients
- Beneficiaries – *Donahue v. Shugart Thompson & Kilroy PC* (Mo. 1995)

# Nature of Claims

- Legal malpractice
- Breach of fiduciary duty – potential separate cause of action – *Klemme v. Best* (Mo. 1997)
- Cyber-related claims

# Most Common Claims

- Conflicts of Interest
- Case management errors
  - Failure to gather sufficient information
  - Believing client without verification
  - Neglecting communications with clients
  - Undue influence by potential beneficiaries

# Drafting Errors

- Over-reliance on standard forms
- Using/intermingling imprecise terms
- Not discussing contingencies
- Omitting provision desired from former plan
- Not addressing changes in law that may result from client moves
- Unmarried couples, etc.
- Failing to coordinate/conform documents
- Failing to properly effect testator's intent

# Other Errors

- Problems in will execution
  - Lack of/problems with execution “ceremony”
  - Capacity issues
- Errors of/change in law
- Fraud, overreach, self-dealing



# Managing Risk – Engagement Letters

- Who is the client
- What will be done for the client
- Joint representation – conflict waivers
  - “Zeal”
  - Confidences
- Implementation of estate plan

# Documenting of File

- What are main purposes of the plan
- What strategies has the client rejected – and why
- Why has client chosen unusual strategies
- *“Memo to file” may never reach client*

# Continuation of Representation

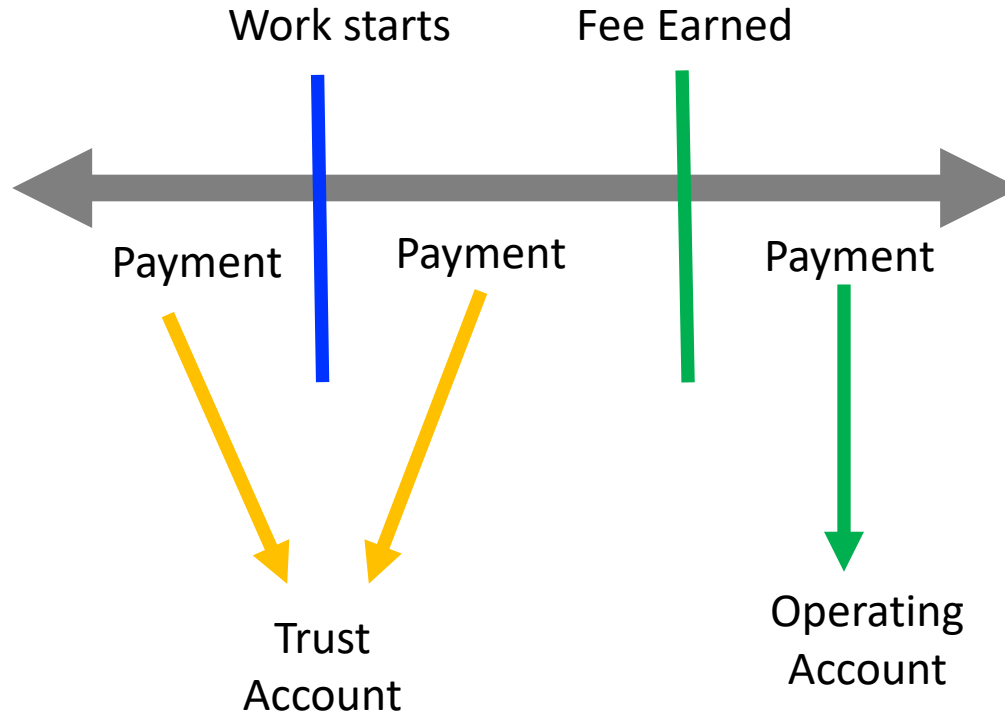
What are lawyers' duties after plan is executed?

# Money Issues

# Estate Planning – Fixed Fee

- Pat asks you to prepare estate plan
- You tell Pat you will charge hourly and want a \$1500 advance
- Pat advances the \$1500
- *Where do you put the money?*

# Basic Rule on Handling Funds Paid for Legal Services



# Estate Planning – Fixed Fee

- Pat asks you to prepare estate plan
- You tell Pat you will charge a \$1500 flat fee
- Pat advances the \$1500
- *Where do you put the money?*

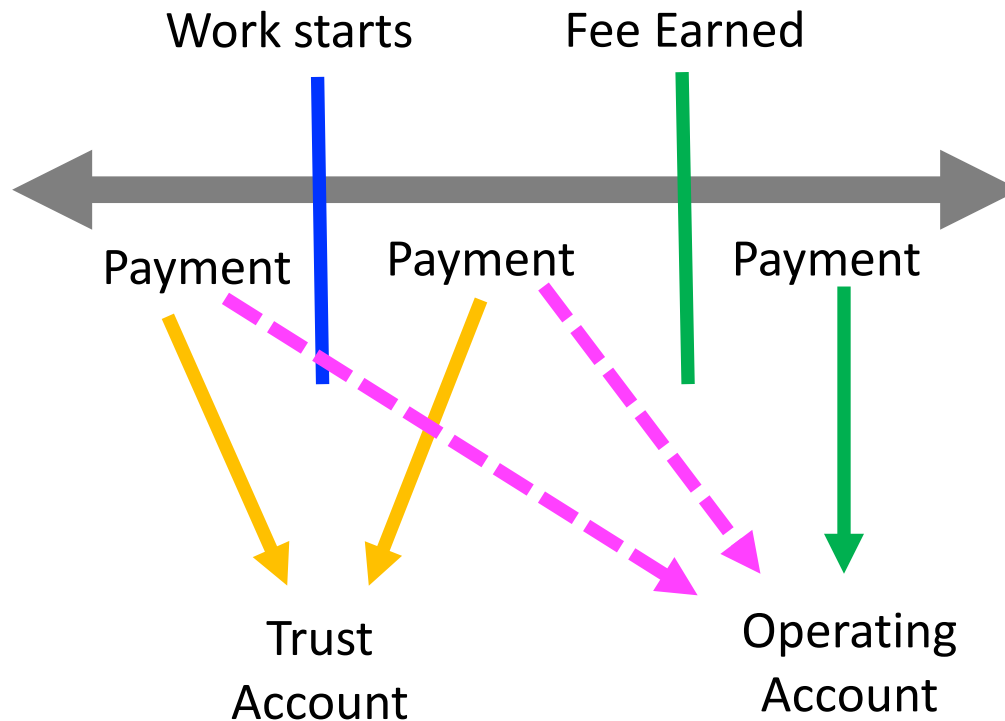
# Exception to “Basic” Trust Account Rule

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that *an advanced flat fee which does not exceed \$2,000 is exempted from this requirement and may be deposited into another account.*

Rule 4-1.15(c) (effective January 1, 2019)



# \$2,000 or less FLAT/FIXED FEE exception



# How Long Must Funds Be Held?

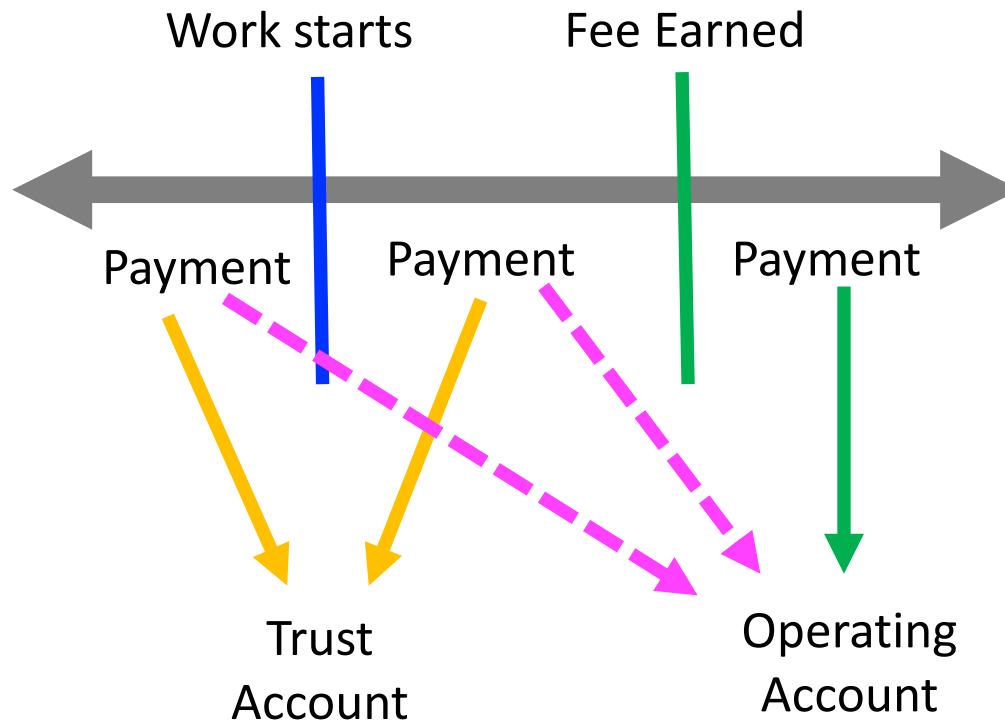
- Until the funds are actually received by the bank – they are “good funds”
  - Presumption – 10 days
  - “Available” is not “good”

# Scenarios

# Estate Planning – Fixed Fee

- Pat asks you to prepare estate plan
- You charge Pat a \$2000 fixed fee
- Pat advances the \$2000 and \$500 in other fees by a single check
- You spend five hours on the work
- Pat discharges you before you incur the other fees
- *What do you do with Pat's money? Does it matter whether you gave Pat a draft of the documents?*

# \$2,000 or less FLAT/FIXED FEE exception



# Prospective Client

- Pat contacts you about preparing an estate plan
- Pat meets with you for an hour and shares information about assets and desires
- Pat leaves, and you never hear from Pat again
- Chris contacts you about challenging Pat's estate
- *Can you represent Chris? What can you tell Chris about your meetings with Pat?*

# Rule 4-1.9

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

# Estate Plan for Another

- Pat brings Chris to your office and asks you to prepare an estate plan for Chris
- *How do you deal with Chris? With Pat?*
- *Does it matter who is paying for work?*



## Rule 4-5.4(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

# Power of Attorney

- You are contacted and asked to send Pat a financial power of attorney for Chris to execute, naming Pat as POA
- *What concerns should you have?*

## Rule 4-5.4(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

# Marital Planning

- Pat and Chris are married
- Pat and Chris ask you to prepare estate plan
- Do you need a conflict waiver?

# Rule 4-1.7(a)

Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

# Notice of an Error

- You realize that Pat's estate plan has an error
- Do you need to notify
  - Pat if still a client
  - Pat if a former client
  - Others if Pat has died

# Rule 4-1.4

- (a) A lawyer shall:
  - (1) keep the client reasonably informed about the status of the matter;
  - (2) promptly comply with reasonable requests for information; and
  - (3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# Rule 4-1.7(a)

Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.



# Deceased Client

- Pat was your estate-planning client
- Pat dies
- Chris asks for information concerning Pat's estate plan
- *What can you tell Chris? What documents can you provide to Chris?*

# Rule 4-1.9(c)

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

# Rule 4-1.6(a)

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

# Deceased Client (continued)

- Pat was your estate-planning client
- Pat dies
- You receive a subpoena for Pat's file
- *What do you do to respond to the subpoena?*

# Rule 4-1.6(b)

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (4) to comply with other law or a court order;
- (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

# Trustee Misconduct

- You create a Trust for Pat
- Chris becomes the trustee of the Trust
- You advise Chris on matters relating to the Trust
- *You become concerned with Chris's conduct. What can/should you do?*

# Rule 4-1.6(b)

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (4) to comply with other law or a court order;
- (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

## Rule 4-1.2(f)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.



# Rule 4-1.16(a)

Except as stated in Rule 4-1.16(c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

# “Hacked” Information

- You learn someone has gained unauthorized access to your client work files, including files for current client Pat and former client Chris
- *What do you do?*

## Rule 4-1.6(c)

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.

# Thank you



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