

**Avoiding the Trusts and Estate Traps:
The Top 10 Ethical Dilemmas Faced by Practitioners**

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Estate planning poses significant ethical hazards rarely appreciated by those not experienced in the field. It's easy to see these issues as only academic until they blossom after the death of the client.

Disagreements or underlying tensions among surviving relatives could lead to litigation. Lapses by the attorney involved in the estate planning will then be examined closely by the counsel for disappointed family members. Ethical problems may then be the basis for overturning the planning or for a malpractice claim.

There are several significant issues on which even the authorities disagree. Hereafter follows an itemization of ten of the thorniest issues:

1. **Naming the Attorney as Fiduciary.** Canon 5-6 of the ABA Code of Professional Responsibility states it is improper for an attorney to "consciously influence" a client to name the attorney as executor or trustee.

In New Jersey, Professional Ethics Opinion No. 683 makes clear that it is not improper for an attorney to draft a will in which he or she is named as fiduciary, but it suggests that the attorney clearly document the manner in which the testator arrived at the decision. This Opinion states that an attorney who prepares a will naming himself as fiduciary does not violate Rule of Professional Conduct (R.P.C.) 1.8(c), which prohibits an attorney from preparing a will which names the attorney as a beneficiary, other than when the attorney is a family member of the testator.

A statute in New York provides that if the attorney is named as a fiduciary, but has not obtained a signed statement from the client indicating the client's awareness of the possibility of naming another person as fiduciary, then the attorney-fiduciary's commissions will be reduced by half. N.Y.S.C.P.A. Section 2307-a.

In any state, an attorney is best advised to obtain a signed statement indicating an awareness that another person could be named, and describing the manner in which the testator came to the decision. If this statement shows that it was the idea of the testator without any prior

suggestion by the attorney, this will be strong protection from later complaints by family members.

Alternatively, such a statement might indicate that the attorney suggested himself or herself, but only after the client indicated that he or she could not think of another person to name. It would also be helpful if the attorney suggests a variety of friends, relatives or other professional advisors, before proposing himself or herself.

The statutory commissions for serving as executor of a \$1 million estate are \$28,000, without taking into account the 6% commission on income earned during administration. An attorney-fiduciary will also be entitled to legal fees for legal services rendered to the estate. N.J.S.A. 3B:18-6.

- 2. Direction to Retain Attorney During Administration.** Some New Jersey firms have routinely inserted a provision in the Will which directs the executor to retain the law firm to assist in the estate administration. This poses some of the same problems as naming the attorney as a fiduciary.

The executor or administrator has the right to retain legal counsel to assist and advise the fiduciary. Since all persons have the right to select their own legal counsel, a clause directing the fiduciary to retain a particular attorney is not enforceable. See Clapp & Black, Wills and Administration, Section 996, Note 4.

It may be improper for the attorney to insert such a requirement in any will, even if done at the insistence of the testator. Such a statement could be considered to be a false representation to the non-client fiduciary that the attorney must be retained. R.P.C. 4.1. A recommendation or request would be proper, however.

- 3. Representation of Spouses.** Although attorneys routinely draft wills and do other estate planning for a married couple, it is possible that the spouses may have differing interests. There may also be issues of the disclosure of information regarding each client.

If either spouse has a child from a prior relationship, then a will which leaves everything to the surviving spouse could result in the ultimate disinheritance of the children of the first spouse to pass on. \\\Even if the wills are a mirror-image of each other, and provide for ultimate bequests to children of one of the spouses, it is always possible that the surviving spouse could choose to change their will.

Providing for the children is possible through an actual contract, or a trust for the benefit of the surviving spouse, or via non-probate transfers

such as life insurance. The attorney should document the possible conflicts in interest, and indicate the alternatives which have been made available to the clients.

If an attorney represents both spouses in estate planning, and later receives information regarding one of the spouses, does the attorney have the right or obligation to disclose this information to the other spouse?

In the very recent New Jersey Supreme Court case of *A. v B.* (April 15, 1999), a law firm represented both husband and wife in estate planning. It later learned of a paternity action against the husband which he had not disclosed to the wife or the law firm.

The Court held that the information was relevant to the wife's estate planning, and that the firm had the right to disclose it to the wife. The Court did not reach the more difficult issue of whether the firm had an obligation to disclose the paternity action to the wife.

This case will cause New Jersey attorneys to more carefully examine the ethical issues in representing spouses. Determining the application of the case will be difficult. The Court held that the nondisclosure of the out of wedlock child constituted the use of the law firm to work a fraud upon the wife, which lifts from the attorney the usual obligations of confidentiality. R.P.C. 1.6(c)(1). Faced with the possibility of making disclosure, an attorney will have to consider whether nondisclosure would constitute a fraud.

Currently, there are two competing schools of thought among the authorities on ethics in estate planning. Some hold that separate representation of spouses is possible and preferable, under which the attorney does not have the authority to disclose all confidences to the other spouse. Others recommend joint representation under which all information must be shared. The only point of agreement is the importance of providing a written statement to the clients as to the attorney's understanding of his or her responsibilities on these issues.

Apart from questions of confidentiality, there may be conflicts of interest between the spouses relating to retirement plan distribution elections, gifts or bequests to the children of one spouse, the use of one spouse's estate and gift tax unified credit, and the disposition of assets in the event of a family common disaster. Any such conflicts should be disclosed, preferably in writing.

- 4. Responsibilities of a Fiduciary's Attorney.** In *Albright v. Burns*, 206 N.J. Super. 625 (App. Div. 1986), an elderly man signed a general power

of attorney in favor of his nephew. The nephew then used the power of attorney to make a loan to himself for his business.

The attorney for the nephew followed the nephew's instructions to sell stocks of the uncle. The Court held that even if the attorney was not representing the uncle, he still had an obligation to the uncle not to assist in the nephew's act of self dealing, which ultimately caused a loss to the uncle's estate.

The Albright opinion is hazy in its analysis for holding the attorney liable. Nevertheless, it is consistent with the approach in numerous other states as to the obligations of an attorney for a fiduciary. Clearly the line is drawn upon any self-dealing or misappropriation. Other jurisdictions also place limitations on attorney-client privilege for a fiduciary's counsel.

At one time in New Jersey, the attorney for the executor or administrator was commonly referred to as a "proctor", implying a responsibility to supervise the fiduciary. Estate of Herbert, 130 N.J.Eq. 595 (1942); Estate of Ryan, 138 N.J.Eq. 527 (1946). This term is no longer used in New Jersey, with the exception of some old forms in the Surrogate's Court of certain counties.

- 5. The Infirm Testator.** When an infirm or ill person decides to make a will, it is common for a family member or other caretaker to contact an attorney. This poses significant professional hazards for the lawyer.

Often the testator wishes to favor the caretaker. This may be perfectly natural and appropriate, or this may be the result of subtle pressure from the caretaker family member or friend. The truth may also lie anywhere in between.

When a will favors a caretaker upon whom the testator is dependant, or there is some other "confidential relationship", and if there is also present "suspicious circumstances", then undue influence will be presumed, and the person favored by the will bears the burden of proof to show that there was no undue influence.

If the scrivener attorney previously represented the caretaker, then a presumption of undue influence will arise. Haynes v. First National State Bank, 87 N.J. 163 (1981).

Anytime a lawyer previously represented a proposed beneficiary, the attorney must make full disclosure, advise the testator to seek independent counsel, and obtain the informed consent of the testator. This is difficult or impossible to accomplish and establish when the

testator is dependent upon the caretaker-beneficiary. In re Doyle, 146 N.J. 629 (1996).

The testator's interests, including the ultimate disposition of his estate according to the expressed wishes, will cause any careful attorney to decline to represent an infirm person who is dependent upon an existing client.

Under New Jersey law, the failure of any attorney to adequately establish a lack of undue influence or incapacity can serve as the basis for a malpractice claim by the beneficiary, even if the beneficiary wins a will contest and merely seeks the reimbursement of legal fees. Rathblott v. Levin, 697 F.Supp. 817 (D.N.J. 1988).

If the attorney is first contacted by a caretaker, the attorney must make clear that only the testator is being represented. The attorney should take great pains to meet alone with the testator, and keep the caretaker at arm's length. Ideally, the caretaker should never be present for any meetings, and should never receive a copy of the will, even from the testator.

The caretaker should not be the person paying the attorney's fee. Under R.P.C. 1.8(f), payment may not be accepted from a person other than the client, with limited exceptions.

If the sincere desire of the infirm testator is to benefit the caretaker, the attorney should advance the client's wishes by laying down firm defenses against later claims of undue influence.

6. Actions Contrary to a Deceased Client's Wishes. An attorney's obligations do not end upon the death of the client. After a testator's passing, an executor or trustee often retains the same lawyer to assist in the administration.

The beneficiaries may wish to use disclaimers or agreements among themselves to terminate trusts or alter the testamentary plan. The attorney may be called upon to advise as to how to achieve this.

The Courts will not approve the termination of a trust, even if all beneficiaries consent, if it would be contrary to the testator's intent. Heritage Bank-North v. Hunterdon Medical Center, 164 N.J.Super. 33 (App.Div. 1978). An attorney for an executor does not commit malpractice by failing to advise beneficiaries of the tax advantages of a disclaimer, as it would be inconsistent with the duty of the executor to follow the wishes of the testator. Barner v. Sheldon, 292 N.J.Super. 157 (App.Div. 1996).

When a fiduciary or beneficiary seeks to achieve a goal contrary to the deceased client's wishes, the attorney may have too great a conflict. The line may be difficult to draw, and if all the beneficiaries agree, there will usually be no one else to complain.

- 7. Crossing State Lines.** If a client domiciled in another jurisdiction is in New Jersey when the will is executed, then the New Jersey attorney may prepare the will.

This commonly occurs when a client moves to another state, but still wants to use a New Jersey attorney.

On some issues, the laws of other states are different. One example is that Florida will not allow a non resident to serve as executor or trustee unless the appointed fiduciary is an immediate relative of the decedent. Care must be taken when the client's final place of domicile may be in another state.

- 8. Bond Letters.** When the decedent dies intestate, or there is no available executor named in a will to administer the estate, the responsibilities will pass to an administrator. This type of fiduciary is ordinarily required to post a bond provided by an insurance company.

Insurance companies and agents commonly demand a letter from an attorney stating that the attorney will be retained to advise the administrator during the entire course of the estate administration.

It is difficult or impossible for an attorney to make this promise, since the attorney can be discharged at the whim of the administrator. The implication that the attorney is somehow promising to supervise the administrator could cause a liability problem for the attorney.

The best course for a lawyer in this position may be to provide a letter, but made clear that the attorney can be discharged at any time, and that the attorney is not assuming any liability for the actions of the administrator. This hopefully will satisfy the local insurance agent that he has obtained a letter as demanded by the insurance company.

- 9. Multiple Representation in Estate Administration.** During an estate administration, the fiduciary may retain an attorney to provide assistance and counsel. This lawyer is commonly referred to as the "attorney for the estate".

Beneficiaries usually assume that this lawyer is also representing them. The attorney may fail to clarify this relationship, or lack thereof. This

may cause the attorney to have obligations to these beneficiaries. An attorney's acceptance of representation need not be articulated, and may be inferred from the conduct of the parties. In re Palmieri, 76 N.J. 51 (1978).

In the event of a disagreement with the executor, the beneficiaries may claim that they acted under the belief that the attorney also represented them. This could allow the beneficiaries to disavow the release and refunding bond at the conclusion of the administration, or begin a malpractice action against the attorney.

10. Competency of the Client. There may come a time when an attorney has doubts as to the client's competency to make a will or make similar arrangements. This may cause the attorney to decide to withdraw from the representation.

Under R.P.C. 1.14, when a client is under a disability, the attorney shall attempt to maintain as normal a relationship as possible. This rule does provide that the attorney can take action to have a client declared incompetent.

So long as the client claims, or would claim to be competent, it appears that the attorney has no obligation to withdraw, though of course the attorney is always free to withdraw whenever there is no pending court action.

On the other hand, it appears that the attorney could perform estate planning for a client, even if the attorney subjectively believes that the client's competency is questionable. This should never be attempted if the attorney has any professional or other significant relationship with the named beneficiaries, or to the heirs at law who would take by intestacy.

It is possible or even likely in such situations that the attorney will ultimately be required to testify as to his own subjective opinion as to the client's competency, and make disclosure of otherwise confidential information.

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