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Getting Grounded On Ethical Dilemmas

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CARVEL ESTATES

A few years ago, I became involved in an estate litigation well after the will had been admitted to probate. It was astounding to me that none of the following issues had been raised in the probate proceeding:

LAWRENCE NEWMAN

• The will was drafted by an attorney who never met the decedent, or even spoke to him on the telephone. Rather, communications were between the decedent's corporate attorneys and the draftsperson of the will.

AGNES CARVEL

• The will purportedly was part of a larger estate plan for the decedent and his wife, yet no attorney ever spoke to the wife, literally until the documents — including her mirror will — were executed.

• The wife was never advised to seek separate counsel, and never asked to consent to joint representation.

• The attorney supervising the execution of the documents was not an estates practitioner, and had not been involved in any of the estate planning discussions, yet he was charged with "explaining" the documents, which were not simple, to the wife.

• The wills named several executors, two of whom were corporate attorneys involved in the estate planning process, although they were not the ultimate drafters of the documents. One of these lawyers also was named as a beneficiary.

HERBERT ROTH

Although these events occurred several years ago, they serve as a useful jumping off point for a review of basic ethical precepts that should inform the day-to-day practice of estates practitioners. [1]

It is a truism that a lawyer must exercise independent professional judgment on behalf of a client, and may not be influenced by the interests of other people (DR 5-107; EC 5-21). At a minimum, one would think a lawyer has an obligation to speak to a client when performing personal services. Although actual client interaction is not required by the Disciplinary Rules, the Ethical Considerations and the Model Rules of Professional Conduct (MRPC) come close to mandating direct communication. See EC 7-8, which requires an attorney to "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations," and which encourages the attorney to initiate the decision-making process, and MRPC 1.4 directing the attorney to keep her client reasonably informed regarding the status of a matter and to provide explanation to the extent necessary to enable the client to make informed decisions.

Joint Representation

Despite the absence of a rule on point for basic representation, for a lawyer engaged in a joint representation, or representation of multiple clients with possible conflicts, person-to-person discussions are essential, at least for disclosure purposes. DR 5-105(C) requires that clients have "full disclosure of the implications of the simultaneous representation and the advantages and risks involved." DR 5-105(C) [§1200.24(C)]. [2]

DR 5-105(A) [§1200.24(A)] provides that "A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests." Although one does not, intuitively, think of mutual estate planning between spouses as implicating the conflict rules, to some extent, every time a couple approaches you for estate planning, the possibility must be considered. If the plan is essentially to follow the rules of intestacy, then no conflict exists. If the plan varies the intestacy rules, the issue of conflict must at least be addressed.

The American College of Trust and Estate Counsel (ACTEC) advises that when taking on a joint representation of spouses, the disclosure conversation should be had at the beginning of the client relationship, in order to give the clients the opportunity to define the scope and nature of the representation. See, ACTEC, Commentaries on the Model Rules of Professional Conduct, 3d Ed. 1999 (ACTEC Commentaries), Commentary on MRPC 1.2.

In joint representation, the understanding is that no confidences exist that may not be shared with the other spouse, or considered when making estate planning decisions. The ACTEC model retainer agreement for joint representation includes a form disclosure, and requires that the clients sign their consent. [3] Best practice rules include a review of the document with the client, specific advice that each client may utilize separate counsel, and in some situations even advising the clients to take the consent document home to consider the implications. Written consent not only helps to ensure informed consent, it also protects the lawyer — at a later date — from a claim of impropriety, and protects the ultimate documents from claims of overreaching.

Once written consent has been obtained, the attorney's obligation to ensure lack of conflict continues throughout the course of the representation. Thus, DR 5-105(B) [§1200.24(b)] precludes you from continuing multiple representation of clients "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing different interests . . . "

What sorts of situations, in estate planning, bring these rules into play? Potential drafting conflicts arise most often, but not solely, when one or more spouses has been previously married, or has children outside the marriage. They can also arise where one spouse owns

a close corporation or a partnership, or simply when one or the other has a close relationship with his or her family, or wants to ensure that family money does not go to the in-laws. Many lawyers forget to consider conflict issues when dealing with close friends or family, or long-term client relationships. That oversight should be avoided at all costs.

One issue that arises in the joint representation of spouses relates to gift-splitting. Let's say John, your long-term client, has been in the habit of gifting part of his business to his children on an annual basis, taking advantage of valuation discounts and the annual exclusion. He has always limited himself to the annual gift exclusion amounts under the Internal Revenue Code, so when he remarries, it seems to make sense to increase the amount of those gifts, and split them with Mary, even to the point of taking advantage of Mary's available unified credit allowance. John tells you he thinks this is a great idea, but he neglects to tell you that Mary has children of her own. However, if John follows your advice, Mary may be using up her available unified credit, which she may or may not have intended to use for future gifts to her own children, either during life or after death.

By preparing a gift-tax return for Mary's signature, you are, in effect, representing her. DR 5-105(C) [§1200.24(C)] requires "full disclosure of the implications of the simultaneous representation and the advantages and risks involved" in representing multiple clients. Certainly, under any situation involving gifts as tax and estate planning tools, the attorney must review these issues with both clients. Moreover, the attorney must ensure that the gist of the information is imparted to both parties, even though one may be far more fluent in the ins and outs of such matters than the other. If you never actually speak to one of the spouses until the date the instrument is to be executed, the opportunity to explore potential conflicts may be lost. Obviously, the same applies if the attorney's practice is to transmit documents like gift tax returns through one spouse, without explaining the implications to the other.

Executors and Beneficiaries

Estates lawyers surely spotted the *Putnam* and *Weinstock* issues in the scenario set forth at the top of this article, but for the uninitiated, a brief review is in order. [4] In *Matter of Weinstock*, the Court of Appeals denied letters testamentary to attorneys who had drafted a will for an 82-year-old woman, where the will nominated the lawyers as executors, although the testator's first interaction with the lawyers was when they drafted her will. The Court's reasoning was based on EC 5-6, which states that an attorney should not consciously influence a client to name the attorney as a fiduciary in an instrument.

In response to *Weinstock*, the Legislature enacted Surrogate's Court Procedure Act (SCPA) §2307-a in 1995, [5] requiring disclosure to the testator, prior to executing the will, regarding commissions and legal fees and requiring written acknowledgment by the testator, in the presence of a witness, of such disclosure. SCPA §2307-a was amended recently [6] to provide that the written acknowledgment be in an instrument separate from the will (although it may be attached to the will) and it must contain a provision that, absent execution of the acknowledgment, commissions are limited to one-half the commissions allowed by statute, thus eliminating any excuses by the attorney for failing to provide

disclosure to the client.

Matter of Putnam involved a bequest of the testator's residuary estate to her attorney, who was also the draftsperson of the will. There, the Court of Appeals upheld the bequest, but admonished attorneys to have the will drawn by another attorney if their clients intend to leave a bequest to the attorney or the attorney's family. Underlying that admonition is the concern that, based on the confidential nature of the attorney-client relationship, in a situation where an attorney is named as a beneficiary in a will, he is "peculiarly susceptible to the charge that he unduly influenced or overreached the client." (EC 5-5)

Maintaining Confidences

Conflict issues often present a much more benign appearance than we imagine. Assume the following situation: Your 50 year-old client who is worried about his recently widowed 80-year-old mother asks you, with what appears to be the best intentions, to review Mom's will and update her estate plan. In particular, Sonny is worried that Mom's plan, which was a typical one mirroring Dad's — to spouse for life and then to children — does not adequately cover anticipated expenses for Sonny's sister's disabled daughter, Dolly, and has no tax-saving bells and whistles. Sonny tells you just to add the cost of services to Mom to his bill.

Sonny describes Mom as eccentric, and says she lives with 10 cats, but he stresses that she has all her marbles. Sonny also tells you that, although Mom understands that she is "rich," Dad always handled the family finances through his business accountant, and Sonny doubts whether Mom really understands the enormity of her $15 million in assets. Sonny also says that Mom has become quite deaf, so he suggests you have the preliminary conversations with him, and then speak to Mom only later.

A number of issues could surface in this scenario, the first being addressed by DR 5-107(A), which prohibits an attorney to accept compensation for legal services from one other than the client, without consent after full disclosure. Accordingly, you send Mom a retainer agreement, with full disclosure of your representation of Sonny, and she signs it.

A week later, you meet with Mom. You follow all the rules. You meet with her alone. You tell her that the will you are proposing is essentially the same as the wills she and Dad did years ago, except that instead of leaving everything to Sonny and his sister, outright, you are creating sprinkle trusts for the children and grandchildren, with special provisions for Dolly. Mom looks at you and says "My children are wealthy. They don't need the money, and their children will be well provided for." She further explains to you that, although she went along with Sonny's suggestion that she retain you, she has already been to see her neighbor's lawyer-daughter, and executed a will leaving her estate to the Foundation for Homeless Cats. She tells you this organization is important to her, because it will take care of animals who may be the "brothers and sisters" of her own cats.

Besides addressing issues surrounding Mom's capacity to create a new will, what do you do? You may not reveal the estate plan to Sonny, or to anyone else. DR 4-101(B)

[§1200.19(B)] prohibits you from revealing a confidence or secret of a client, except under very specific circumstances not present here. Your obligation to Mom to hold her confidence is not tempered by the fact that you also represent Sonny, or even by the fact that you have ongoing estate planning discussions with Sonny, including aggressive gift planning for Sonny and his wife, premised on the expectation that they will succeed to a good share of Mom and Dad's wealth.

The situation, here, is markedly different from the case with John and Mary, where you also represent two parties. Why? Because with John and Mary you were engaged for a joint representation and, if you followed ACTEC's recommendation, you explained to them at the outset that you would consider all communications with each of them to be devoid of confidentiality with respect to the other, and you obtained signed consents from them to proceed on that basis. Here, in contrast, you represent Mom separately.

Nor are you relieved of your obligations of confidentiality because Sonny is picking up the bill for Mom. DR 5-107(B) prohibits an attorney to allow "a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101(B)." If you feel you have learned something that impairs the interests of another client, you have the right to refuse the representation, or to withdraw, but the confidentiality requirement still exists. Even when it appears that breaching the confidentiality would do no harm, and would serve what you consider to be a better good, the attorney's obligation is to maintain the confidence.

Administration of Estates

MALCOLM WILSON

Conflict situations arise in estates practice during the administration of an estate, as well. Returning to the case described at the beginning of this article, after the will was admitted to probate, during the early stages of administration of the estate, the income beneficiary of the testamentary trust was represented by the same lawyer who represented the remainder beneficiary, a not-for profit entity, and also was a director of the remainder beneficiary. Is this necessarily a precluded representation? Probably not, to start. Indeed, ACTEC notes that it is often appropriate for an attorney to represent multiple clients with common interests in estate or trust administration, emphasizing that estate administration is usually nonadversarial in nature. See, ACTEC Commentaries, Commentary on Rule 1.7. Assuming nothing unusual is happening, and the clients consent, this type of dual representation should be OK. However, in the case cited, the added wrinkle is that the lawyer is a director of the remainder entity. Therefore, the representation may implicate DR 5-101 [§1200.20] which states:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

Here, there may have been a business interest the lawyer had, as director of the remainder, that was at odds with the income beneficiary's interest.

While one might take the position that the interests of income and remainder beneficiaries of a residuary trust are aligned, such is not always the case. Their interests may diverge, for example, if the executors and trustees retain underproductive property that is expected to greatly appreciate by the time the income interest terminates, but yields little or no income for the income beneficiary. Similarly, if the lawyer has an interest in the remainder, she may not fully scrutinize investment decisions of the trustee, in terms of whether there is an emphasis on income versus growth.

Notwithstanding that New York statutory law addresses a fiduciary's duty to all beneficiaries via the Principal and Income Act [7] and the Prudent Investor Act, [8] the focus here is on the attorney's ability (observed objectively) to exercise professional judgment on behalf of a client who has a different interest in the same subject matter in which the attorney has an interest. EC 5-3 states in part that "[t]he self-interest of a lawyer resulting from ownership of property in which the client also has an interest or which may affect property of the client may interfere with the exercise of free judgment on behalf of the client." The Ethical Considerations suggest that the attorney either decline or withdraw from representation unless the client consents after full disclosure. Another implication of this relationship is the requirement that an attorney "strive to avoid not only professional impropriety but also the appearance of impropriety." EC 9-6.

Although it may seem less substantive than actual impropriety, lawyers need always be alert to the appearance of impropriety. We need to ask ourselves, 'if I were one of these clients, and I received an unwanted result, would I question the lawyer's integrity?' Moreover, when representing multiple clients, we must remind ourselves that the conflict analysis is not static, but must be reviewed regularly. If you find yourself in doubt, call for help. Most bar associations have ethics hotlines that will help you find your way.

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Endnotes:

1. Reference is made to New York's Code of Professional Responsibility, adopted by the New York State Bar Association on Jan. 1, 1970. The Code contains Canons, which are the underlying precepts for conduct; Ethical Considerations (ECs), which serve as aspirational guides for attorneys; and Disciplinary Rules (DRs), which are rules to be observed and which provide a basis for disciplinary actions against attorneys who fail to follow them. New York has not adopted the Model Rules of Professional Conduct (MRPC) issued by the American Bar Association, but its Code has rules corollary to the MRPC.

2. Bracketed sections refer to the Disciplinary Rules of the Code of Professional

Responsibility promulgated as joint rules of the Appellate Division of the Supreme Court and set forth in Part 1200 of Title 22 of New York Codes, Rules and Regulations (NYCRR).

3. See, ACTEC Engagement Letters: A Guide for Practitioners, ch. I at <u>www.actec.org/</u> publicInfoArk/comm/engltrch1.htm

4. Matter of Putnam, 257 N.Y. 140 (1931); Matter of Weinstock, 40 N.Y.2d 1 (1976). It would behoove the uninitiated to familiarize themselves with these cases and their practical effect in dealings with the Surrogates' Courts.

5. L. 1995, ch. 421.

6. L. 2004, ch. 709, effective Nov. 16, 2004.

7. Estates, Powers and Trusts Law (EPTL), art. 11-A.

8. EPTL §11-2.3.