ETHICAL ISSUES IN ESTATE PLANNING

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RULES APPLICABLE TO ESTATE PLANNERS

- Duty to have a written contract - Bus. & P C §6148(a).
- Duty to avoid actual and potential conflicts of interest - Cal Rules of Prof Cond 3-310.
- Duty to maintain confidentiality – Bus & P C §6088(e).
- Duty to perform services competently and diligently - Cal Rules of Prof Cond 3-110.
- Duty to avoid third party interference with the attorney’s independent judgment – Cal Rules of Prof Cond 1-600(A).
- Duty to communicate with your client – Cal Rules of Prof Cond 3-500.
- Duty not to charge unconscionable fees- Cal Rules of Prof Cond 4-200A.
- Duty to segregate a client’s trust fund moneys – Bus & P C §6211(a).
Disciplinary Proceedings by the California State bar.
- Suspension to Disbarment.
- Other ethical grounds such as an estate planner becoming involved in preparing trusts in conjunction with a marketer who hold seminars urging attendees to obtain a trust. See California State Bar Formal Opinion 1997-148.
- *In re Flack* (Kan 2001) 33 P.3d 1281, in which the Supreme Court of Kansas imposed discipline on an attorney for participating in a trust mill in which the attorney did not meet with clients or supervise non-attorneys who met with clients. Analogous California rules which might be implicated in such an arrangement include Cal Rules of Prof Cond 1-300 (Unauthorized practice of law), 1-320 (Financial Arrangements with Non-lawyers), 1-400 (Advertising and Soliciting), 3-110 (Failing to Act Competently), 3-110 (Avoiding the Representation of Adverse Interests), and 3-500 (Communications)
CONSEQUENCES OF VIOLATING RULES

- Estate Planning Documents declared invalid. An ethical breach by an estate planning attorney can result in the unraveling of the client's Estate Plan. In *Haynes v. First Nat’l State Bank* (NJ 1981) 432A2d 890, the attorney prepared an estate plan for the client's mother. Under the plan, the mother essentially disinherited her other child, leaving the entire estate to the child who was the attorney’s client. After the mother’s death, the NJ Supreme Court set aside the estate plan on the grounds of undue influence, partly because the mother had not been advised of the conflict of interest inherent in the attorney’s representation of both the daughter and the mother.

- Civil Liability for malpractice.
  - Attorney can be held liable for substandard tax planning, such as the failure to set up an A-B Trust. *Bucquet v. Livingston*, 514 (Al Ct. App. 1976).
  - Specific causes of action could include, but are not limited to; errors in drafting; errors in execution; errors of law; failure to accomplish testator’s intent; failure to update an estate plan based on new law or facts; failure to investigate heirs and assets; allowing execution when the testator lacks testamentary capacity; delay in the implementation of an estate plan and missed deadlines.
ROLE OF THE ATTORNEY

- Attorneys are more than just scriveners. Rarely is there any legal job that requires just a simple and straightforward estate plan.
  - The attorney needs to explain the merits of a trust as opposed to a will.
  - An attorney should address the other estate planning documents, like a POA, Advanced Health Care Directive, HIPAA release.
  - An attorney should be prepared to advise clients how to properly title assets such as retirement plans and annuities.
  - An attorney should advise clients how to hold title to real estate.
  - When an attorney disclosed confidential information to an outside agent, such as an appraiser, it is a good idea to obtain written authorization from the client.
Confidentiality issues may arise when the parents want their children involved. The attorney should discuss the role that the child is to play and this should be documented by the attorney and signed by the client.
DUTY TO AVOID CONFLICT OF INTEREST

- Duty to Avoid Conflicts of Interest
  - Along with the duty of confidentiality and the duty to act competently, the duty to avoid conflicts of interest is the third pillar of the attorney-client relationship. California Rules of Professional Conduct 3–310 regulates, but does not bar, the representation of adverse interests. Under Cal Rules of Prof Cond 3–310(E), an attorney may not accept employment adverse to a client or former client if the attorney has confidential information material to the employment, except with the informed written consent of the client or former client. Informed written consent is also required if the attorney concurrently represents (or intends to represent) clients whose interests conflict or potentially conflict. Cal Rules of Prof Cond 3–310(C).

- Rule 3–310 reads in part:
  - (A) For purposes of this rule:
    - (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
    - (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure.
  - (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
    - (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
DUTY TO AVOID CONFLICT OF INTEREST

• (2) The member knows or reasonably should know that:
  • (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
  • (b) the previous relationship would substantially affect the member’s representation; or
• (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
• (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

• (C) A member shall not, without the informed written consent of each client:
  • (1) Accept representation of more than one client in a matter in which the interest of the clients potentially conflict; or
  • (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.
  • (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
  • (D)... [Settlement of claims]
  • (E) A member shall not without the informed written consent of the client or former client accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.
The first step in avoiding a conflict of interest is to first identify who your client is.

After you identify who your client is, you then need to identify what hat the client is wearing.
- If a client is both a beneficiary of a trust and the trustee, in what capacity are you representing that client?

What Services are Expected?
- If you are doing a FLP, are you going to be representing the FLP? Are you going to file the 709 gift tax returns? Prop 58 forms?

If you are engaged to do a certificate of independent review – narrow the scope of the engagement limiting it to ensure that the transfer if not of fraud or undue influence, but that the attorney is not assuming responsibility for the plan itself.
WHO IS THE CLIENT

- After this decision is made, meet privately with the client when all crucial decisions will be made. Keep in mind the following:

- (1) Even if the client claims to be "more comfortable" with an adult child present, insist on meeting privately with the client, even if only to confirm the client's wishes outside the child's presence;

- (2) Explain to the client that the purpose of the private meeting is to make it more likely that the client's wishes will be carried out;

- (3) It is absolutely critical to determine whether there is any undue influence by meeting with the client alone for a significant period and, if still uncertain, several more times; and

- (4) If the client requires outside assistance, the first clue as to incapacity or undue influence has been presented, and the resulting analysis must occur with a clear focus on the client alone.
WHO IS THE CLIENT

- If you need an interpreter, hire an outsider individual.
• Distinguish between potential and actual conflict.
  • The Official Discussion to Cal Rules of Prof Cond 3–310 states that if a potential conflict becomes actual, the lawyer must obtain further informed written consent under Cal Rules of Prof Cond 3–310(C)(2), which forbids new or continued representation of multiple clients whose interests actually conflict.
  • If there is a potential conflict, you must obtain the written informed consent of each client.
    • Many conflict situations cannot be resolved by consent. If the clients' relationship is such that consent by one may be seen as unduly influenced by the other, or the situation is so complex that any consent might not be informed, the attorney should simply tell the clients to retain separate counsel.
In obtaining the clients' consents, the attorney's hardest task is ensuring that the consents are "informed." Written disclosure by the attorney is required before a client can give informed written consent. Cal Rules of Prof Cond 3–310(A)(2). To meet the disclosure standard, the attorney should explain the potential for conflicts in at least the following areas:

- Ownership and characterization of property;
- How property should be held;
- How property should be disposed of; and
- Who should serve in fiduciary capacities (e.g., executor, trustee, guardian).
THE IMPAIRED CLIENT

• A client whose mental capacity is apparently impaired or questionable presents a difficult problem. Diminished capacity may be the result of a mental impairment, such as dementia, or some other cause (e.g., substance abuse). With elderly clients, the attorney is often among the first to detect the client's diminishing capacity. Diminished mental capacity, greater susceptibility to undue influence, or a combination of the two can make competent representation impossible if the client cannot understand and intelligently evaluate the advice being given.

• The attorney is bound by the duty of loyalty, the duty to maintain the client's confidences, the duty to avoid conflicts of interest, and the duty to vigorously advocate for the client's interest. Note that an attorney's duty is to represent the client's interest, which may be different from representing the client's best interest. (What constitutes a client's best interest is a subjective judgment based on society's standards overlaid by the attorney's personal morals.) On one hand, the attorney does not want to prevent a client from effectuating his or her lifetime or testamentary donative goals. On the other hand, the attorney does not want to assist the client in doing something that may be the result of diminished capacity. This problem is particularly acute when the attorney knows that the client's proposed course of action diverges from past practices, differs widely from that customarily done by people in similar circumstances, or seems suspiciously like the product of undue third party influence.
California has no rule specifically addressing the duty (or options) of an attorney representing a mentally impaired client. The authority that does exist, contained in ethics opinions, essentially states that an attorney is prohibited from seeking appointment of a guardian or conservator for an apparently impaired client, or even seeking the consultation of a physician, without the client's written consent. This position is contrary to that of a majority of jurisdictions in the United States and the ABA Model Rules. The following ethics opinions deal with the subject:

- California State Bar Formal Opinion No. 89–112, which states that an attorney who institutes conservatorship proceedings on a client’s behalf without the client’s consent violates the duties to protect client secrets and to avoid conflicts of interest.

- Los Angeles County Bar Association Ethics Opinion No. 1988–450, which states that an attorney cannot seek a conservatorship for his or her own client, because a conservatorship proceeding would be adverse to the client and, therefore, the attorney would be representing conflicting interests.

- San Diego Bar Association Ethics Opinion No. 1990–3, which states that an attorney must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence. Once the issue of capacity arises in the attorney's mind, the attorney should schedule an extended interview with the client alone, keep a detailed and complete record of the interview, and, if the attorney is still not satisfied that the client has capacity and is free of undue influence and fraud, decline to act and permit the client to seek other counsel or recommend a conservatorship.

- Legal Ethics Committee of the Bar Association of San Francisco Opinion 1999–2, which concludes that if an attorney reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, the attorney may, but need not, take protective action with respect to the client’s person and property, including recommending appointment of a trustee, conservator, or guardian ad litem. The opinion also states that the attorney has the implied authority to make limited disclosures necessary to achieve the client’s best interests.
Mom and Dad come into the Attorney’s office to consult on doing an estate plan. Both are in their 80s and appear to have capacity. Dad has three children—one, his sole son, who is estranged, and two daughters both he and his second wife have a good relationship with. Even though they have a good relationship with the daughters, they want to leave 2/3 of their estate to Jane, the daughter living with them, and 1/3 to Mary, the other daughter. Their son has children, who they see only on Thanksgiving. Their estate is approximately $5,000,000 which consists of their home worth $1,000,000 and 3 rental properties worth $4,000,000. The parents live off their social security and rental income. The parents believe that Mary is financially set, as she is married, and that is why they only want to leave her 1/3 of the estate. Jane, on the other hand, is bipolar and takes her medication from time to time, but is incapable of holding down a job and has never applied for government benefits, even though she would be entitled to same. Mom and Dad have been married for 20 years and everything they own is community property.
Before you accept any engagement, what conflicts of interest do you see?

Mom and Dad first tell you that they want the property to be given to the survivor and then to the children in the manner set forth above. What conflicts do you see?

They want their daughter Jane to be the trustee. What do you tell the clients? What if they insist that she acts as Trustee anyway as it will give her something to do?

You have talked the clients out of appointing Jane as trustee and now they want you to act as trustee. Can you draft the trust naming yourself as a successor trustee? What must you do to become a successor trustee in California?

You suggest using a Special Needs Trust for Jane and suggest that Jane apply for State and Federal benefits. Dad doesn’t want a SNT, but Mom thinks it is a good idea. What do you tell the clients to do?

Jane calls you up and demands to know what her parents spoke about. What do you do?
Jane finds out there is a trust and wants a copy. Can you give it to her?

Jane gets the consent of her parents and you send her the trust. After reading the trust Jane tells you that is not what her parents wanted. She indicates that she was to receive the entire estate. You then receive a call from Dad who makes an appointment to come in and he tells you he wants to leave the entire estate to Jane. What do you do?

Assume that no changes were made to the trust, but Dad dies. Assume an ABC Trust. Mom is now the trustee and wants to hire you as her attorney. Is there any conflict? Should you advise Mom to send out the 16061.7 Notice to Beneficiaries?

Assume that the ABC trusts were funded properly and Jane brings Mom to the office because Mom was just diagnosed with Alzheimer's. Assume that the Bypass Trust and the Martial Trust are irrevocable but gave Mom a limited Power of Appointment with her being able to give the share to Dad’s children. Mom now wants to leave everything to Jane because Jane is acting as her caregiver. What is your duty to the client and what do you suggest?

Assume that you amended the trust to give all the property to Jane, and Mary contests the validity of the amendment under capacity and undue influence and alleges Elder Abuse. Assume the trustee is a Professional Trustee. Can you represent the Professional Trustee?
• What would be your answer if Jane were the trustee?

• Assume you represent the Professional Trustee and the amendment is invalidated, but the Professional Trustee is still named under the original trust to act. May the Professional Trustee act as trustee under the original trust? Can you still represent the Professional Trustee?
Sabrina, who is 25, brings John, age 71, in for estate planning and tells you that John wants to leave her his entire estate after they get married. Sabrina is John’s current caregiver. You meet with John alone in your office and discover that John has 2 children whom he has a great relationship with and he gives you a copy of his current trust which leaves his house and his brokerage accounts to his children, which represents his entire estate. Dad is head over heels with Sabrina and tells you that he is the happiest he has been in a long time and that the sex he is having is mind-blowing. You soon discover during your interview that John has problems remembering what you are discussing with him. What do you do?

- You send Dad to Dr. Incompetent who tells you that Dad scored a 21 on the MME and has capacity to understand what he is doing if it is explained to him, but may not remember what he did a few hours later. Can you amend the trust? If so what must you do.
HYPOTHETICALS

- Dad tells you confidentially that he is getting married this weekend, but doesn’t want his children to know about it. What can you do?

- Dad gets married and now wants to amend his trust. Should you amend the trust? If you amend the trust, is there anything else you must do?

- The trust is amended and John mysteriously dies of a heart attack during one of their sexual escapades. Sabrina is now the acting trustee. Can you represent Sabrina as the trustee and the beneficiary?

- Assume that John is alive but the children file a conservatorship proceeding to nullify the marriage. Can you represent John?