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Five Ethical Issues of Estate Planning

It is the estate planner's worst nightmare. An error, unhappy clients, financial damages, litigation, bad publicity, and a great big ethical violation to permanently stain one's professional career.

Can these situations be neutralized ahead of time? Yes, but if it were easy or simple we would all carry around checklists, avoid problems, and ethics review boards would close up shop. It is not just as simple as following "the rules." Just identifying all the sources of rules is a challenge.

Entering The Matrix

Ethical standards are imposed from every direction—statutory rules of "compliance," legal issues for which case law precedents may exist, and professional rules of conduct which are administered by a variety of different associations and courts.

In addition to attorneys and accountants, there are actuaries, appraisers, bankers, investment managers, fundraisers, financial planners, and insurance agents.

Presented With Our Compliments

And for each profession, there are one or more professional associations, each with professional standards of conduct and ethics.

Can anyone make sense of it all? In 1998, to their great credit, the Philadelphia Estate Planning Council assembled a comprehensive “matrix” of how each profession approaches “the Five C’s,” i.e., compensation, competence, compliance, confidentiality, and conflicts of interest/disclosure.¹

Yet even this magnificent effort is, in the authors' own words, only “a starting point.” Another article compared the subject of legal ethics to “the Milky Way galaxy” and chose the Model Code of Professional Conduct (MCPC) as a starting point.

The MCPC is from the American Bar Association (ABA) and is now adopted in 40 states, but has to be understood in the context of (1) the ABA's previous approach, the Model Code of Professional Responsibility, which was adopted with certain variations in the remaining states; (2) the 1999 commentaries on the MCPC adopted by the American College of Trust and Estate Counsel (ACTEC) which addressed inadequacies in the MCPC; (3) the 2002 amendments to the MCPC that the ABA adopted in response to the ACTEC commentaries; and 4) the 4th edition of the ACTEC commentaries.²

We are no closer to seeing enough trees to see the forest, but rather than dwell on the bigger picture, let us look at five of the larger trees in the forest since these are the issues that arise most often.

Unauthorized Practice of Law

An attorney is practicing in a state that has decoupled from the federal estate tax and which imposes a separate state estate tax. The attorney advises a wealthy client who has property out of state to switch domiciles. But now the will which the attorney is preparing for that client is going to end up being probated in another state.

Could drafting such a will constitute the unauthorized practice of law? Yes, quite possibly. The laws of the other state would have to be researched. Associating an attorney from the other jurisdiction to complete the documents is an easy solution.³

Attorneys marketing estate-planning documents may also run afoul of ethical restrictions on the unauthorized practice of law. State courts and bar associations impose strict limitations on such marketing by attorneys and non-attorneys.

“Because of the severity of the restrictions placed upon a nonlawyer's ability to market and prepare estate planning documents, virtually any involvement with a nonlawyer in those types of activities can be interpreted as assisting the nonlawyer with the unauthorized practice of law, along with many other collateral ethical violations.”⁴

Note: Swapping referrals as a quid pro quo is to be avoided. An attorney who promotes estate-planning documents which are being marketed and sold by a non-lawyer in return for client referrals may be aiding and abetting in that non-attorney's practice of law.

Representing Spouses

You plan the estate of Armand in 1999. He leaves his wife, Babette, a life estate in his house and, upon her death, the house is to go to his daughter from a previous marriage.

Five years later, Armand is in a nursing home, afflicted with Alzheimer's. Babette approaches you. “Will I be forced out of my home if Armand dies?” she asks. She asks if you would help her prepare a new will because hers is out of date. Your response:

- a) I'm sorry, but I am not at liberty to disclose the contents of my client's documents.
- b) Under the terms of the will, you are entitled to remain in the house for your lifetime.
- c) I can only represent you if your husband Armand gives his consent.
- d) I cannot represent you due to a conflict of interest.

The right answers vary with the circumstances. An attorney who has dealt exclusively with Armand cannot be certain who is privy to the will and cannot discuss it with anyone, including Armand's spouse. The existence of a child from a previous marriage suggests a conflict that precludes joint representation, but even that requires closer examination; a couple may have jointly raised that child, provided for her in a separate trust, and insist on joint representation.

An attorney approached by spouses can represent both spouses in circumstances where...

- the representation of both spouses commences at the same time;
- there is no adverse interest; each spouse is the beneficiary of the other, the wills are reciprocal in nature, the objectives are mutual;

- there is disclosure that each spouse is entitled to separate representation but has consented to joint representation;
- there is full disclosure that confidences from either spouse will not be protected from the other;⁵
- clients are informed up front that in the event of divorce or separation, it is possible that the attorney may be unable to represent either spouse without the consent of the other.

Posthumous Disclosures

Before his death Client confides in his attorney about some important matter. It is well settled that the attorney-client privilege remains in place after death with as much sanctity as it was entitled to during Client's lifetime. But it is not an absolute bar to all disclosure because the attorney-client privilege is just one of many competing ethical concerns that dictate when it is ethically required for the attorney to breach the attorney-client privilege.

A survey of several states reveals all kinds of variations. Here is a brief summary of circumstances where there would be some consideration of allowing or requiring an attorney's posthumous disclosure of a client confidence.

a) A government agency requires the information to prevent injury to the public and will not publicize the information or utilize it in a manner adverse to the client's interests.

b) The disclosure involves health information that is needed for the treatment of a member of the client's family or some person who may have come in contact with the client and precautions are taken to protect the confidential information beyond the specific purpose that compels its disclosure.

c) The decedent's executor requires the information to effectively administer the estate and would be disadvantaged without the information to an extent that it would certainly have warranted disclosure from the client, were he or she alive to do so.

d) The disclosure is necessary to carry out the client's primary intentions and failure to disclose would defeat the purpose of the client's estate plans.

Marketing Hyperbole

Marketing any estate-planning technique has the potential to run afoul of a variety of laws and rules. Here, we focus on marketing of the living trust, but not

to red flag the living trust in any way. On the contrary, it is the fact that the living trust is so versatile that it has become ubiquitous. As a result, there are more written opinions concerning living trusts than other arrangements even though the same planning considerations are applicable.

What could go wrong with a trust technique that is so popular? Let us count the ways. An attorney in New Jersey was using a marketing flyer about living trusts to generate business. A grievance was filed and triggered an investigation that revealed that other attorneys were utilizing the same flyer. This demonstrated the need for an ethics opinion that provides a unique analysis of where marketing language can go astray.

In 1997, New Jersey Ethics Opinion 25 of the Committee on Attorney Advertising, a body appointed by the New Jersey Supreme Court, determined that an advertisement focusing on the benefits of living trusts had gone too far. In particular, the flyer was promoting a trust as a means of avoiding probate and was then making probate out to be a horrific experience.

The flyer had language about the terrible cost and time involved in the probate process. The committee estimated that the typical probate process in New Jersey would cost \$74 and take about two weeks.

The flyer also described an invasive probate court controlling an estate. The actual New Jersey process involves the County Surrogate's Court which does not impose invasive controls over estates.

A New York court reviewed New Jersey's actions regarding this case:

"The underlying order of the Supreme Court of New Jersey, entered April 29, 2002 (171 NJ 470, 795 A2d 849 [2002]), reprimanded respondent based upon his admitted violation of rule 7.1 (a) (1) of the New Jersey Rules of Professional Conduct (RPC) and Opinion 25 of the New Jersey Committee on Attorney Advertising (153 NJLJ 1298, 7 NJL 2250, 1998 WL 687419 [1998]), based upon statements respondent made in an advertising flyer he published in newspapers in New Jersey in October, 1998, which provided general information about living trusts and invited the reader to attend a free public seminar."⁶

Finding New York's Code of Professional Responsibility DR 2-101 (a) (22 NYCRR 1200.6) to be similar to New Jersey's rule on false advertising, and that no intent need be proven, New York censured the attorney as well.

Two variables must be noted. First, the preceding opinion was written about New Jersey. The same flyer may be treated as accurate if circulated in another jurisdiction such as California, where probate has not been streamlined and can be longer and more expensive.

Second, it isn't the distribution of the flyer that is objectionable per se. Consider New York's efforts against Norman Dacey, in which the New York Appellate Division reversed a criminal contempt of court against the author and publisher of "How to Avoid Probate," the 1965 book that had sold 600,000 copies by the time of the suit and thereafter sold millions. Dacey's criticism of what he considers the high cost of probate is a right of speech to which he is entitled.⁷

Misleading The Client!

In ethical terms this may fall under false advertising or is just part of general business ethics, but common sense dictates that estate planners not allow unrealistic expectations to foster. People hear what they want to hear and sue their attorneys and other financial professionals when they are disappointed. The client who is the most impressed by marketing hyperbole will also be the most disappointed to learn that most of the benefits aren't applicable to their own circumstances. Modern litigants also include many third-party beneficiaries.

Claims about what any given technique can accomplish can be misleading as applied to a specific estate or assets. A retainer agreement is an opportunity to establish in writing what expectations are reasonable under the circumstances.

There is a big difference between revocable and irrevocable living trusts with regard to reducing transfer taxes. Timing and context are so important; a trust intended to reduce estate taxes could end up being irrelevant in an estate covered by high estate-tax exemptions.

Right From Wrong

Estate-planning professionals take great satisfaction in helping people and take pride in upholding the ethics of their profession. With the surge in multidisciplinary practices in recent years, there has been a greater awareness of how professional collaborations may create unexpected ethical issues such as deciding which rules apply.⁸

But making the right call in a given hypothetical is not an exact science. These things can start off with a casual transaction among longtime friends for whom a handshake is the basis of understandings, and retainer agreements are neglected rather than offend such a familiar client. It is all done with the best of intentions. But, of course, one could pave a wide highway with such intentions; you can guess the destination.

The factual context has many variables. Ethical rules vary from one profession to another and from one state to the next. Yet there are a few basic conclusions to be drawn:

Utilize retainer agreements even when not required by state laws and utilize them to rebut any unrealistic expectations.

Establish who is and is not the client and explain the ground rules to spouses, mother and daughter, or whatever participants are involved.

Scrutinize referral arrangements and beware of quid pro quos.

While good client communications are the best solution, attorneys preparing an estate plan can protect themselves from future accusations by putting these communications in writing. Where there are risks involved in a given technique, it may be advisable to include a description of the risks in the client's retainer agreement, demonstrating that the client was made aware of potential risks.

TECHNICAL REFERENCES

1. Trusts & Estates magazine published the PEPC's first matrix in the September, 1998 issue. A revised version appeared in the June, 2004 issue at p. 40, see Kazan and Wilusz, *Do the right thing*.
2. Gibbs and Beller, *Counsel thyself*, Trusts & Estates, p. 65 (June, 2003).
3. *Ask the ethics expert*, Trusts & Estates, p. 62 (June, 2003).
4. Ng, *The ethics of marketing estate planning documents*, Trusts & Estates, p. 20 (Jan., 1996).
5. Abendroth, Bieber and Hodgman, *Managing the risk of liability in an estate planning practice*, 30 Estate Planning 8, p. 373 at 379 (Aug., 2003).
6. *Matter of Power*, App. Div., NY Slip Op. 19234 (2003).
7. *New York County Lawyers' Association v. Dacey*, 383 NYS2d 984 (1967). A previous case in Connecticut against Mr. Dacey successfully blocked publication of a 30-page booklet about the Dacey Trust.
8. Moshman, *The debate on multidisciplinary practice*, The Estate Analyst (Sept., 2001); Moshman, *Emerging fiduciary issues of the attorney-client privilege*, The Estate Analyst (Nov., 2004).