

# PENNSYLVANIA BAR INSTITUTE ESTATE & ELDER LAW SYMPOSIUM 2019

Ethical Concerns for the Estate Planner

**STEVENS & LEE**  
LAWYERS & CONSULTANTS

A STEVENS & LEE/GRIFFIN COMPANY 

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# Informed Consent – Rule 1(e)

- “Informed Consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- Comment 7: Obtaining informed consent will **usually** require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

# Communication – Rule 1.4

- A lawyer shall:
  - Promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules
  - Reasonably consult with the client about the means by which the client’s objectives are to be accomplished
  - Keep the client reasonably informed about the status of the matter
  - Promptly comply with reasonable requests for information and
  - A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

# Confidentiality – Rule 1.6

- Cannot disclose without informed consent
- Be careful not to violate rule when dealing with client's non-lawyer advisors (obtain disclosure consents where appropriate)
  - This includes providing draft documents to non-lawyer advisors
  - Intent to share can be implied from circumstances – but be careful
- Various exceptions, including to prevent/mitigate/rectify *certain* criminal acts
- Duty continues after termination of lawyer-client relationship

# Conflicts of Interests – Rule 1.7(a)

- Generally cannot represent client if there is a “concurrent conflict of interest”
  - Representation is directly adverse to another client *or* there is significant risk that representation of one or more clients will be materially limited by:
    - Responsibilities to another client, a former client, or a third person, or
    - A personal interest of the lawyer

# Representation not Withstanding Concurrent Conflict – Rule 1.7(b)

- Reasonably believe you can provide competent and diligent representation to each affected client
- Representation not prohibited by law
- One client is not asserting a claim against another in the same litigation or proceeding before a tribunal
- *Each client gives informed consent*

# Significant Risk of Impeded Representation – Official Comment Paragraph (8)

- Is there a significant risk that ability to consider, recommend, or carry out appropriate courses of action will be limited by responsibilities to others?
  - Will duties to one client limit the lawyer’s ability to make appropriate recommendations to another?
  - Mere possibility of divergent interest does not require disclosure – critical issue is likelihood that divergent interests will arise

## Gifts Solicited by Lawyer – Rule 1.8(c)

“A lawyer shall not *solicit* any substantial gift from a client, including a testamentary gift, *or prepare on behalf of a client* an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client” (emphasis added)

- Related equals spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer maintains a close familial relationship

# Who is paying for services - Rule 1.8(f)(1) ?

- Rule 1.8(f)(1) provides that a lawyer may not be paid by someone other than the client unless:
  - the client gives informed consent;
  - the arrangement does not interfere with the lawyer's independence of professional judgment with respect to the lawyer-client relationship;
  - and client-related information is protected as required by Rule 1.6

## Duties to Former Clients – Rule 1.9

- 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

## Duties to Former Clients – Rule 1.9 (cont'd)

- 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:
  - 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
  - Reveal information relating to the representation except as these Rules would permit or require with respect to a client (i.e., informed consent)

# Disabled Clients – Rule 1.14 (Client with Diminished Capacity)

- Even where client's capacity is diminished, lawyer must, "as far as reasonably possible," maintain normal lawyer-client relationship
- May take reasonably necessary protective actions if lawyer believes diminished capacity could result in physical, financial or other harm
  - Includes consulting with individuals and entities that can protect the client or seeking appointment of guardian
  - ABA Ethics Opinion 96-404 – lawyer for client with diminished capacity may seek appointment of guardian but may not represent others in seeking guardian

# Disabled Clients – Rule 1.14 (Client with Diminished Capacity) (cont'd)

- Confidentiality Rule (1.6) still applies – but implied authority to disclose to those engaged to protect client interests – to the extent reasonably necessary to protect those interests
- May include family members or others where reasonably necessary to assist client in decision-making – no privilege waiver (Official Comment 3)
  - Be careful of undue influence issues when involving others in meetings with impaired client
  - Where third party participation is required, follow-up with separate meeting solely with client to confirm choices

# Statements to Non-clients – Rule 4.1

(a) Cannot make false statement of material fact or law

(b) Cannot fail to disclose material fact if disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by client, unless disclosure is prohibited by Rule 1.6 (confidentiality) – Rule 1.6 exceptions

- Prevent *reasonably certain* death or substantial bodily harm
- Prevent *criminal* act by client that is likely to result in substantial injury to financial or property interests of another
- Prevent, mitigate, or rectify the consequences of criminal *or fraudulent* act in commission of which your services are being or had been used

## Unrepresented Persons – Rule 4.3

- (a) Cannot state or imply that you are disinterested
- (b) Cannot give advice other than to secure counsel if you know or reasonably should know interests of third party are or reasonably may become in conflict with client's interests
- (c) Must correct third party if you know or reasonably should know he/she misunderstands your role

# Fiduciary Exculpatory Clauses

- Must be explained in order to be enforceable
- UTA Section 7788
  - Cannot relieve trustee of breach committed in bad faith or with reckless indifference to purposes of trust and interest of beneficiaries
  - Not enforceable if asserted as a result of an abuse by trustee
- Exculpation clause drafted by trustee is invalid unless trustee proves it to be fair under the circumstances *and* clause is adequately explained to settlor
- Exculpation of executor requires explanation where scrivener or member of scrivener's firm is executor.
  - *Kramer Estate*, 23 Fid. Rep. 2d 245 (O.C. Div. Montg. 2003) (Pre-UTA but applying then-existing trust principles to exculpation clause in Will)
  - *Dentler Trust (No 2)*, 24 Fid. Rep. 2d 329 (O.C. Div. Montg. 2004) (noting *Kramer* is consistent with RPCs regarding conflicts and scope of representation)

# Attorney-Client Privilege When Representing Fiduciaries

- Fiduciary exception to privilege
  - Beneficiary has right to inspection of estate information
- Communications regarding exercise of fiduciary responsibilities and legal decisions concerning estate or trust administration generally are not protected from inquiry by beneficiaries. Follansbee v. Gerlach, 22 Fiduc. Rep. 2d. 319, 321 (Civ. Div. Alleg. 2002); In re Estate of McAleer, 194 A.3d 587, 595-96 (Pa. Superior 2018)
  - Includes legal opinions obtained with respect to administration matters
- Fiduciary can maintain privilege by engaging individually *and paying* counsel with respect to services for benefit of fiduciary

# Derivative Duty to Beneficiaries – Pew Trusts, 16 Fiduc. Rep. 2d 73 (O.C. Montg. 1996)

- Although fiduciary is client, there is derivative fiduciary duty to beneficiaries
  - Lawyer may not take advantage of position to detriment of beneficiaries
- Lawyer may be surcharged for failure to meet standard of care as a lawyer and/or assisting fiduciaries in breach of duties



# Hypotheticals

Thank you to C. Thomas Work, Esquire, for assistance  
in development of hypotheticals

## Plot #1 – “Arnie’s Mind is Slipping”

- Arnie, a widower, has been your estate planning client for years. You also have socialized with him over the years. You know his adult children and you hold them in high regard. You’ve known Arnie to be a conservative investor who is not particularly fond of animals. A few years ago Arnie engaged a home health aid, Cruella, to assist him with activities that he struggled to accomplish on his own due to various physical conditions. You take a call from his daughter Wanda, who tells you that Arnie’s “mind is slipping.” He has short term memory lapses, he sometimes wanders from the house only to be guided home by neighbors, and over the weekend told Wanda he intended to invest all of his money in Cruella’s Dalmatian breeding business. What do you say to Wanda? What are your duties to Arnie? Can you represent Wanda in an action to determine Arnie in need of a guardian and to have Wanda appointed in that capacity? What other ethical issues are present?

## Plot #2 – No Estate Is Ever a Client

Your managing partner, Nathan, enlists your help with settlement of the estate of his long time client, Fred. Nathan, a litigator, wrote the Will. The Will names Nathan as executor and exonerates him from any financial liability for his actions. He tells you that Fred's children, the sole beneficiaries except for a \$50,000 gift to Nathan, are ne'er-do-wells who don't really deserve anything. The arrangement is the usual, in that your fees will be paid from the estate's assets. Your letters to third parties seeking estate information all begin, "I represent the Estate of ...." After a few months Fred's children ask to meet with you, without Nathan, to discuss Nathan's unwillingness "to communicate a thing with them about Fred's estate settlement." How do you proceed? Who is your client?

## Plot #3 – Estate Planning for Spouses and Partners

Casanova and Mildred approach you to do an estate plan for them that is not very complicated – everything to the surviving spouse then to their adult children when the surviving spouse dies. You draft and mail their documents and don't hear back for months. Then Casanova calls to tell you, "in confidence," that a few years ago he had an affair, fathered a child with his mistress, and doesn't want to sign the documents to which he and Mildred agreed. What are the issues? How much of "your" problem might have been lessened by an engagement letter?

## Plot #4 – The Precarious Role of Advisors

Encouraged by her broker, who is a friend of yours, Mary engages you to prepare estate planning documents. You send drafts of Mary's documents to Mary and the broker, in the latter case as a "thank you" to the broker for referring Mary and "to keep the broker in the loop." What have you given up on Mary's behalf?

## Plot #5 – The Future Ex-Son-in-Law

Ebenezer, a long-time business owner client of yours, asks you to discuss estate planning with his daughter Liza. He tells you that he wants to begin transferring the business to Liza, but he is concerned that Liza's betrothed, an "art scene type" whose parents are a couple of beatniks, might end up owning an interest in the business if the marriage goes south or Liza dies prematurely. Ebenezer will foot the bill, but the plan better include a rock-solid premarital agreement and airtight trusts. Ebenezer insists that the soon-to-be son-in-law better not ask for any information about the family corporation because he and his family of hippies aren't entitled to it. How do you proceed?

## Plot #6 – How Long Can a Donor Reach?

Sally and Al set up PUTMA accounts (that is, accounts established under the Pennsylvania Uniform Transfers to Minors Act) years ago as a back-stop to pay for the education of their children. The oldest child, Isaac, has graduated from college and is about to turn 21. Sally calls and asks that you have a “chat” with Isaac with a view toward having him establish an irrevocable trust funded with his PUTMA account having his parents as trustees and distributions over a 20-year period. Sally and Al will pay for you to do this. What issues do you need to discuss with Sally, Al and Isaac?



The End

Thank You!