ETHICS IN ESTATE PLANNING, PROBATE, AND TRUST ADMINISTRATION[1]

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I. Defining Who Your Client is from the Start:

A. Estate Planning: When drafting estate planning documents, the clients are the individuals who will sign the estate planning documents as the declarants, and not the beneficiaries or fiduciaries who are designated in the documents.[2] Though this seems obvious to the drafting attorney, it may not be clear to the other parties involved. It is critical to define who is and who is not the client, especially in situations where an individual who is not the client either initiates contact with the attorney or agrees to pay the attorney's fees.[3] Adult children commonly initiate contact with an attorney or agree to pay the attorney's fees in an effort to facilitate the estate planning process for their aging parents. In some instances, adult children request that an attorney draft powers of attorney to manage their parents' assets or direct their parents' medical care with the misunderstanding that they, rather than their parents, are the prospective clients.

B. Estate Administration: When an attorney is hired to represent the estate of a decedent, the client is the Personal Representative in his fiduciary capacity.[4]

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[1] Presented on behalf of the National Business Institute on December 6, 2012, in Baltimore, Maryland.

[2] In *Noble v. Bruce*, 349 Md. 30 (2008), the court held that the beneficiary of an estate may not sue the attorney who drafted a will for malpractice because the beneficiary was not the drafting attorney's client.

[3] Comment 13 of Rule 1.7 of the Maryland Rules of Professional Conduct ("MRPC") authorizes payment from a source other than the client "if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client."

[4] In *Ferguson v. Cramer*, 349 Md. 760 (1997), the court held that the beneficiary of an estate may not sue the attorney who assisted the Personal Representative in the administration of the estate for malpractice because the beneficiary was not the attorney's client.

C. Disclosure to Clients and Non-Clients: Every engagement agreement should include language clarifying who the client is and outlining the scope of the representation. In addition, whenever an attorney has verbal or written communications with individuals who are connected to a client matter but are not clients, he should inform such individuals that he does not represent them. Depending on the circumstances, it may be advisable to recommend to such individuals that they retain counsel of their own to represent their interests.

II. Handling Clients with Diminished Mental Capacity

A. Requirement of capacity: Estate planning attorneys frequently encounter this issue when considering representation of elderly clients. A client with questionable capacity raises both ethical and practical concerns.

1. Ethical concern: An attorney should not prepare estate planning documents for a prospective client unless such individual has sufficient capacity to consent to representation and to understand the impact of the decisions that he is making. Rule 1.14 of the Maryland Rules of Professional Conduct confirms that there is no prohibition against representing a client with diminished mental capacity, and provides that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship" with a client who suffers from diminished mental capacity.[5] The first comment to this Rule explains that "to an increasing extent the law recognizes intermediate degrees of competence."

2. Enforceability of documents: Estate planning documents will not benefit a client if they are not enforceable due to the client's lack of capacity. To execute a valid will, a testator must be "legally competent."[6] The standard to be applied is whether the testator has "sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and the nature of the act which he is about to perform, and the names and identity of the persons who are

[5] Rule 1.14(a) of the MRPC, attached hereto as Appendix A.
[6] Section 4-101 of the Estates and Trusts Article of the Annotated Code of Maryland.

the objects of his bounty, and his relation towards them."[7] There is a presumption of capacity in Maryland, and anyone seeking to challenge a will based on lack of capacity bears the burden of proving testamentary incapacity.[8] In *Slicer v. Griffith*, the Court of Special Appeals of Maryland explained that "[i]n the absence of proof of permanent insanity, the caveators must show that the testator was incompetent at the time the will was executed in order to overcome the presumption of sanity." *Id.* at 510.

B. Assessing Client Capacity: Comment 6 to Rule 1.14 of the MRPC provides the following guidance: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

C. Practice Pointers: When meeting with a prospective client who may suffer from diminished capacity, it is important to ask many questions before agreeing to represent such individual. Some questions that may reveal whether an individual lacks capacity include:
   - Where does the individual live?
   - Who are the individual's close relatives?
   - What is the relationship between the individual and such relatives?
   - What does the individual own?
   - Why does the individual want to designate or omit certain relatives or friends from serving in a fiduciary capacity or being named as beneficiaries?

   Although there are cognitive tests such as the Mini-Cog[9] that may be performed to assess mental status, I am not comfortable utilizing these tests because I do not have a medical background. Therefore, to protect against malpractice claims and reduce the likelihood of a successful

[7] *Slicer v. Griffith*, 27 Md.App. 502 (1975) at 510, quoting from *Phelps v. Goldberg*, 270 Md.App. 694 (1974) at 698.
[8] I*d.* at 508.
[9] A description of the Mini-Cog is attached as Appendix B.

challenge to documents that I prepare on behalf of a client, I encourage (and at times require) individuals to obtain certification from their medical provider that they have capacity to understand the types of documents that they are seeking and their implications.[10]

In determining whether to prepare estate planning documents for a potential client with diminished mental capacity, I evaluate the likelihood of future challenges based on whether the individual's proposed plan would seem fair and reasonable to the proposed client's family. I also consider whether the client may be subjected to undue influence in making estate planning decisions. I am much more likely to undertake representation when these factors are not present.

III. Special Considerations for Attorneys Acting as Fiduciaries

A. Attorneys as Fiduciaries: Estate planning attorneys may be asked by their clients to serve in a fiduciary capacity such as trustee, personal representative, or agent under financial powers of attorney. This commonly occurs when a client does not have friends or family that would be suitable as fiduciaries or when the attorney and client have a relationship outside of the attorney-client relationship. Whether or not it is appropriate to serve in such capacity will be discussed in further detail in Section IV. Attorneys serving as fiduciaries are obligated to fulfill their fiduciary duties and comply with additional requirements imposed by the MRPC.

B. Fiduciary Duties Applicable to Specific Roles:
   1. Trustees: Trustees owe a fiduciary duty to individuals or entities that possess an equitable interest in the trust property. This fiduciary duty encompasses the duty to prudently invest and administer the trust, the duty of impartiality, the duty of loyalty, and the duty to keep records and account to beneficiaries. All of these duties must be considered in light of the terms of the trust and the applicability of the governing law. A breach of these duties by the trustee will give rise to a cause of action in equity.[11] In Maryland, many of the fiduciary duties of trustees that developed under common law have been codified in

[10] A sample Physician's Certificate is attached as Appendix C.

[11] The court in *Kann v. Kann,* 344 Md. 689 (1997) held that a beneficiary's claims against a trustee are exclusively equitable in nature.

Titles 14 and 15 of the Estates and Trust Article of the Maryland Code and Title 10 of the Maryland Rules.

2. Personal Representatives: Article 7-101(a) of the Estates and Trusts Article of the Annotated Code of Maryland provides that a Personal Representative is a fiduciary who has a "general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and the estates of decedents law as expeditiously and with and with as little sacrifice to value as is reasonable under the circumstances." It further provides that the Personal Representative shall apply "the equitable principles generally applicable to fiduciaries, fairly considering the interests of all interested persons and creditors."
3. Agents under a Financial Power of Attorney: Article 17-113 of the Estates and Trusts Article of the Annotated Code of Maryland sets forth certain duties of an agent that are mandatory and other duties that may be modified by the principal in his power of attorney.
    a. Mandatory Duties of an Agent: Non-modifiable duties include acting in accordance with the principal's reasonable expectations or in the principal's best interest, acting with care, competence, and diligence for the principal's best interest, and acting only within the scope of the power of attorney.
    b. Modifiable Duties of an Agent: Modifiable duties include acting loyally for the principal's benefit, acting so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest, keeping records of all receipts, disbursements, and transactions made on behalf of the principal, cooperating with a person that has authority to make health care decisions, and attempting to preserve the principal's estate plan if preserving the plan is consistent with the principal's best interest.

C. Applicable Rules from the MRPC: The following Rules are particularly applicable to situations where an attorney is acting in a fiduciary capacity:
    - Rule 1.1 mandates that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
    - Rules 1.7 and Rule 1.8 regarding Conflicts of Interest are discussed in Section IV.
    - Rule 1.15 provides that a lawyer shall "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property…Other

property shall be identified specifically as such and appropriately safeguarded, and records of its receipt and distribution shall be created and maintained. Complete records of the account funds and of other property shall be kept by the lawyer and shall be preserved for a period of at least five years after the date the record was created.

- Rule 8.4 states that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; or engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

D. Heightened Duty for Attorneys Serving in Fiduciary Roles: It is likely that an attorney who serves in a fiduciary capacity will be subjected to higher scrutiny than a non-attorney. With respect to attorneys serving as agents, Article 17-113(e) of the Estates and Trusts Article of the Maryland Code requires that if "an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances." Though there is not a heightened duty imposed by statute on attorneys acting in other fiduciary capacities, a review of common law suggests that such heightened duty exists.

In *McDaniel v. Hughes,* 206 Md. 206 (1955), the Court nullified an agreement between an attorney and his client whereby the attorney loaned money to the client in exchange for the client's agreement to execute a will naming the attorney as the remainderman of the client's testamentary trust. Because the agreement was found to be null and void, the Court further held that the client's will was null and void. The Court explained that "[t]ransactions for the personal advantage of a trustee who is also acting as the attorney for the beneficiaries, who are inexperienced in the law, are even more improper than similar dealings between laymen…In fact, any challenged transaction between an attorney and client is *prima facie* fraudulent and void, and the burden is cast upon the attorney to show that he used no undue influence of deception, that the transaction was fully understood, and that it was fair in all respects. This rule is founded upon public policy, because the confidential and fiduciary relationship enables an attorney to exercise a very strong influence over his client and often affords him opportunities to obtain undue advantage

by availing himself of the client's necessities, credulity and liberality." *Id.* at 633.

In *Attorney Grievance Commission of Maryland v. Sachse*, 345 Md. 578 (1997), an attorney was suspended from practicing law and was ordered to pay restitution to the beneficiaries arising from his conduct as trustee of a testamentary trust. In this case, the attorney/trustee depleted the corpus of the trust by giving the funds to the current income beneficiary to invest in a single corporation without investigating the suitability of such investment. The Court found that this violated Rule 1.1 of the MRPC because he failed to investigate and Rule 1.7 of the MRPC because of a conflict of interest between his loyalty to the current income beneficiary and the trust. The Court quoted from earlier cases involving allegations of attorney misconduct[12] as follows: "[f]iduciaries in general, and attorneys in particular, must remember that the entrustment to them of the money and property of others involves a responsibility of the highest order. They must carefully administer and account for those funds." *Id.* at 591.

IV. Conflicts of Interest

A. Conflict of Interest Rules: Rule 1.7 of the MRPC[13] governs whether an attorney may represent a client if the representation involves a conflict of interest. This rule provides that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." Rule 1.8 of the MRPC[14] describes specific situations in which an attorney is prohibited from acting. In the context of estate planning, Rule 1.8(c) of the MRPC is particularly relevant because it prohibits an attorney from soliciting any substantial gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the attorney or a person related to the attorney any substantial gift unless the attorney or other recipient of the gift is related to the client. Related persons are defined in Rule 1.8(c) of the MRPC to

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[12] *Attorney Grievance Comm'n v. Kramer,* 325 Md. 39 (1991) at 51 (quoting *Attorney Grievance Comm'n v. Owrutsky,* 322 Md. 334 (1991) at 345).

[13] Rule 1.7 of the MRPC is attached hereto in Appendix D.

[14] Rule 1.8 of the MRPC is attached hereto in Appendix E.

include "a spouse, child, grandchild, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship."

B. Potential Conflict of Interest Scenarios

1. Representing spouses or unmarried couples: This is probably the most commonly occurring scenario in estate planning. Usually, spouses have the same interest in providing for one another and then distributing their assets to their children upon the second to die. However, spouses may have sharply conflicting interests, particularly in instances where there are children from prior relationships or animosity between one spouse and the other spouse's relatives. These concerns should be discussed early, ideally before meeting with both spouses. If an attorney agrees to undertake joint representation,[15] it is important to inform clients of the effect of joint representation on confidentiality and the potential for future conflicts of interest if the clients' relationship becomes adverse.[16]

2. Representing parents or children of a current or former client: It is common for clients to seek multi-generational estate planning or to refer other family members to their estate planning attorney for representation. Before undertaking representation of individuals related to current or former clients, the attorney should consider family dynamics to determine if the representation could present an actual or perceived conflict of interest. For example, if a client refers his parents for estate planning representation, the attorney should be wary of undertaking such representation if it seems that such client will be particularly favored or disfavored compared to the parent's other children in the parents' estate planning documents. As a matter of practice, I disclose the potential actual or perceived conflict of

[15] Sample language for retainer agreements involving joint estate planning representation can be found in Appendix F.

[16] In Ethics Docket Opinion 97-27, the MSBA Committee on Ethics advised that a law firm could not represent a husband in a divorce proceeding where the firm had previously represented the husband and wife for their estate planning unless the wife consents after consultation.

interest with all related parties and obtain their informed consent before representing multiple members of a family.[17]

3. Attorney designating himself as a fiduciary in client documents: There is no *per se* prohibition against naming oneself as a fiduciary in client documents, and estate planning attorneys have vastly differing views concerning this practice. Some attorneys routinely encourage clients to name them as Personal Representative (or Co-Personal Representative) or Trustee (or Co-Trustee) in client documents. In fact, I have heard attorneys jokingly refer to these arrangements as "retirement annuities."

   I prefer not to be named in a fiduciary capacity in a client's estate planning documents, and would rather serve as the attorney who advises the fiduciaries. Although the fiduciaries are not obligated to retain my services, I am confident that many will elect to do so if they know that the client was pleased with my services.

   Aside from actual or perceived conflicts of interest, I am hesitant to fulfill certain roles because I think that such roles are too personal to be filled by someone who does not know the client outside of the professional relationship. For example, I am not comfortable serving as a client's health care power of attorney or serving individually as a client's Personal Representative without a family member or close friend serving as Co-Personal Representative. Furthermore, I hope to be retired before many of my clients would need me to fulfill such roles. In the event that a client insists on naming me as a fiduciary in his documents, I make sure to discuss other options with him and disclose my fee structure for serving in such capacity. If he wishes to proceed, I document the basis for the client's decision to select me as a fiduciary in his client file.

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[17] However, in Ethics Docket Opinion 85-18, the MSBA Committee on Ethics responded to an inquiry from an attorney who had represented a son for estate planning and then later learned that a new estate planning client was the son's father. It became apparent that the father and son's ideas regarding the son's inheritance were inconsistent. The Committee on Ethics, with two members dissenting, advised that not only is it not necessary to reveal the dual representation to the father and son, but that the attorney was obligated to keep the identity of the respective clients in confidence.

4. Attorney (or attorney's relatives) being named as a beneficiary: This scenario has given rise to multiple complaints to the Attorney Grievance Commission of Maryland that have resulted in sanctions against the drafting attorneys. I consider these types of situations to be landmines and avoid them at all costs. Below are three recent examples where attorneys drafted documents where they, or their relatives, were named as testamentary beneficiaries:
   - In *Attorney Grievance Commission v. Stein*, 373 Md. 531 (2003), the court upheld the indefinite suspension of an attorney's license based on the attorney naming himself as a substantial residuary legatee in a non-relative client's will without the client receiving advice from independent counsel. The court held that the attorney's lack of knowledge that such rule existed or was not a defense.
   - In *Attorney Grievance Commission v. Sardakis*, 403 Md. 413 (2007), the court upheld the indefinite suspension of an attorney's license where the attorney drafted a will for a non-relative client naming himself as a residuary legatee even though the drafting attorney had another attorney review the will with the client and assess her capacity before she signed it. The court found that this review was not adequate because the reviewing attorney shared office space and had worked on some client matters with the drafting attorney.
   - In *Attorney Grievance Commission v. Lanocha*, 392 Md. 234 (2006), the court upheld a reprimand of an attorney who drafted a will giving a substantial bequest to his adult daughter even though the client had a personal relationship with the daughter and there were no allegations of fraud or undue influence.

5. Attorney recommending professional advisors to clients who also refer business to the attorney: Estate planning attorneys typically develop close alliances with related professional advisors such as accountants, bankers, insurance agents, financial advisors, and attorneys who do not provide estate planning, probate, or trust administration services to their clients. These professional advisors often serve as excellent referral sources for estate planning attorneys.

   It is important for attorneys to protect against actual or perceived conflicts of interest when recommending another professional advisor to a client. At the outset, the referring attorney must be confident that

the referral is in the client's best interest. In addition, the referring attorney should inform the client of the nature of the relationship between the attorney and the professional advisor. As a matter of practice, if a client seeks a referral for another professional advisor, I provide a few options to consider and suggest that the client independently evaluates which professional advisor seems to provide the best fit for him.

6. Attorney continuing representation of an estate when the interests of the Co-Personal Representatives become adverse: In Ethics Docket 93-33, the MSBA Committee on Ethics advised that a law firm could not represent one Co-Personal Representative against another where the law firm had represented them as Co-Personal Representatives even though the other Co-Personal Representative had retained separate counsel. The Committee indicated that the law firm could continue to represent both siblings in their joint capacity as Co-Personal Representatives of the estate with both parties' consent after consultation, but that such representation must be limited to joint actions taken on behalf of the estate and not any adverse actions. It further advised that if one sibling resigned or was removed as Co-Personal Representative, the law firm could continue to represent the estate if the former Co-Personal Representative does not object and the attorney believes that he could impartially perform his duties.