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ETHICAL CONSIDERATIONS IN ESTATE PLANNING AND ADMINISTRATION

WESTERN WATER, AG & ENVIRONMENTAL LAW CONFERENCE



ATTORNEY-CLIENT PRIVILEGE

AND

CONFIDENTIALITY

Model Rules of Professional Conduct, Rule 1.6

- Rule 1.6 – Confidentiality of Information

- (A) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted by paragraph (b).
- The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Model Rules of Professional Conduct, Rule 1.6

- The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.
- The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.
- A lawyer's duty to preserve client confidences continues after the client-lawyer relationship has concluded.
- However, a lawyer may disclose a deceased client's confidential information if reasonably necessary to effectuate the client objectives.

***Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)**

PRIVILEGE GENERALLY SURVIVES DEATH

- Key Facts:

- Client had met with his attorney nine days prior to committing suicide.
- During the meeting, the attorney took handwritten notes.
- In subsequent litigation, opposing counsel sought to obtain those notes.

- Holding:

- Attorney-client privilege survives the client's death, and the notes remained protected.

- Reasoning:

- Regarding posthumous application, the client may not have made the disclosures to his attorney at all in the first place.
- The American Law institute recommends that the privilege is withheld when the communication bears on a litigated issue of pivotal significance and has suggested that the courts balance the interest in confidentiality against any exceptional need for the communication.

In re Estate of Rabin, 474 P.3d 1211 (Colo. 2020)

PRIVILEGE WAIVED AS NEEDED TO ADMINISTER ESTATE

- Key Facts:

- The decedent's ex-wife filed a claim against his estate seeking payment on two promissory notes.
- In response, the estate issued a subpoena to the decedent's former attorney, requesting access to the decedent's legal files.

- Holding:

- The court held that the decedent impliedly waived the attorney-client privilege as to communications necessary for administering the estate.

- Reasoning:

- A decedent's lawyer generally may not disclose decedent's files, even to an estate's personal representative, except as necessary to settle the estate.
- However, an attorney may disclose information relating to representation of deceased client if doing so would effectuate client's estate plan.
- Additionally, when a current client inherits property from a former (deceased) client, the attorney is impliedly authorized to share relevant information to carry out the deceased client's intentions regarding the inheritance.

Moeller v. Superior Ct., 16 Cal. 4th 1124, 947 P.2d 279 (1997)

SUCCESSOR FIDUCIARIES MAY ACCESS PREDECESSOR INFORMATION

- **Facts:**

- Moeller became the successor trustee of a trust and asserted the right to access confidential attorney-client communication related to the prior trustee's administration of the trust.

- **Holding:**

- Attorney-client privilege does not allow a predecessor trustee to withhold documents related to trust administration from their successor trustee.

- **Reasoning:**

- Although the Moeller trust instrument didn't expressly bestow on its trustee to claim the attorney-client privilege, it did broadly confer all powers provided to trustees under the law.
- Since the trustee acts on behalf of the beneficiaries, communications regarding trust administration are not protected from disclosure to a successor trustee.

Newport Pacific Inc. v. County of San Diego, 200 F.R.D. 628 (S.D. Cal. 2001)

PRIVILEGE APPLIES TO ORGANIZATIONAL REPRESENTATION

- **Facts:**

- A developer sued a county board of supervisors, alleging that its failure to approve a permit violated the California Fair Housing Act and the Civil Rights Act.
- During discovery, the developer sought to compel the production of certain documents.

- **Holding:**

- A letter from the county's project manager to county counsel was protected by attorney-client privilege.

- **Reasoning:**

- Attorney-client privilege applies to: (1) communications, (2) made in confidence, (3) by the client, (4) in the course of seeking legal advice, (5) from a lawyer in his capacity as such, and applies only, (6) when invoked by the client and, (7) not waived.
- Organizations, including government entities, may assert this privilege.
- The burden of proving that the privilege applies rests with the party asserting it.

Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981)

ATTORNEY NOTES

- **Facts:**

- Thomas, who served as Plaintiff's Vice President, Secretary, and General Counsel, conducted an internal investigation into the company's activities, including any payments made to foreign governments.
- The IRS later began its own investigation and sought access to Thomas's notes.

- **Holding:**

- The notes and related information were protected by the attorney work-product doctrine.

- **Reasoning:**

- The material consisted of notes reflecting oral statements made by others, which revealed the attorney's mental impressions and legal strategy, not communications with a client.

Who Can Waive Attorney-Client Privilege After Death?

- Going to depend on State Evidence Code
- **Example:**
 - Idaho Rule of Evidence Rule 502. Lawyer-Client Privilege.
 - (c) Who can claim the privilege?
 - Can be claimed by the client or for the client through the client's lawyer, the guardian or conservator, or by the personal representative of the deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the lawyer or lawyer's representation to do so is presumed in the absence of evidence to the contrary.
 - (d) Exceptions. There is no privilege under this rule.
 - (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

**CLIENT
WITH
DIMINISHED CAPACITY**

Model Rules of Professional Conduct, Rule 1.14

- Rule 1.14- Client with Diminished Capacity

- (A) When a client's capacity to make adequately considered decisions in connection with a representation is **diminished**, whether because of **mental impairment or for some other reason**, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- Comment [1]
 - Normal attorney-client relation is based on the client, when properly advised, is capable of making decisions about important matters.
 - A lawyer representing a client with diminished capacity is required, to extent reasonably possible, to communicate with that client, work with them, and comply with their objectives concerning representation.

Model Rules of Professional Conduct, Rule 1.14

- Rule 1.14- Client with Diminished Capacity

- (B) When a lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, **financial or other harm** unless action is taken and cannot adequately act in the client's own interest, the lawyer may take **reasonably necessary protective action**, including consulting with individuals or entities that have the ability to take action or protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- If necessary, a lawyer may seek the aid of others to assess the client's capacity. This extends to **consulting client's family**, assistance from social service agency to determine if guardian needed or other interested persons who can help assess client's capacity.
- A client's **poor judgment does not suffice to warrant protective action**.

Model Rules of Professional Conduct, Rule 1.14

- Rule 1.14- Client with Diminished Capacity

- (C) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

In re Flack, 272 Kan. 465, 33 P.3d 1281 (2001)

DIRECT CONTACT AND RELATIONSHIP WITH CLIENT IS A NECESSITY

- **Facts:**

- Attorney failed to:
 - Meet individually with clients and explain estate planning.
 - Maintain a direct relationship with the clients.
 - Follow the clients' estate planning objectives.
 - Promptly deliver funds owed to estate.
- The attorney partnered with a company to solicit clients for trusts, wills, powers of attorney, and asset transfers.
- A disciplinary action was brought against the attorney.

- **Holding:**

- The attorney's association with the company and involvement in its activities warranted a two-year probation.

- **Reasoning:**

- The attorney used the company to solicit legal business that only a licensed attorney could lawfully perform.
- This violated professional rules prohibiting lawyers from assisting non-lawyers in the unauthorized practice of law.

Hall v. Kalfayan, 190 Cal. App. 4th 927, 118 Cal. Rptr. 3d 629 (2010)

CAPACITY DECLINING DURING COURSE OF REPRESENTATION

- **Facts:**

- An attorney was retained to draft a new will for a client.
- The will was eventually prepared, but by then the client was unable to sign it.
- The client died a short time later without having executed the new will.
- A family member sued the attorney for legal malpractice, claiming the attorney's failure to timely perform his duties deprived her of an intended inheritance.

- **Holding:**

- The unsigned will was not enforceable, and the attorney was not held liable.

- **Reasoning:**

- Too many uncertainties could have occurred between the drafting and the potential signing of the revised will.
- Extending attorney liability to a third party, the niece, would place an unreasonable burden on attorneys.

CONFLICT OF INTEREST CONSIDERATIONS

Model Rules of Professional Conduct, Rule 1.7

- Rule 1.7 – Conflict of Interest: Current Clients

- (A) Except as provided by paragraph (b), a lawyer shall not represent a client if the representation involved a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of **one client will be directly averse to another client**; or
 - (2) there is **significant risk** that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rules of Professional Conduct, Rule 1.7

- Rule 1.7 – Conflict of Interest: Current Clients

- (B) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Model Rules of Professional Conduct, Rule 1.7

- **Rule 1.7 – Conflict of Interest: Current Clients**
- Nonlitigation Conflicts
 - Conflict question may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.
 - In estate administration the identity of the client may be unclear under the law of a particular jurisdiction.
 - Under one view, the client is the fiduciary.
 - Under another view, the client is the estate or trust, including its beneficiaries.
 - In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Model Rules of Professional Conduct, Rule 1.8

- Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules

- (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.
 - Related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship.
- This rule does not prohibit a lawyer from seeking to have the lawyer or partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position.

ABA Formal Ethics Op. 02-426 (2002)

- Lawyer may act as fiduciary under will or trust prepared by lawyer; absent any special circumstances, lawyer acting as fiduciary may appoint self or other firm lawyer to represent lawyer in that capacity if compensation is reasonable.
- Lawyer must not allow personal self-interest to interfere with the exercise of professional judgment in recommending to the client the best choices for fiduciaries.
- When there is significant risk that the lawyer's personal judgment will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing.
- When a lawyer serves as a fiduciary and concurrently represents a beneficiary or creditor of the estate or trust, he must, in accordance with Rule 1.7, resolve any conflicts of interest that may arise.

In re Shay, 756 A.2d 465 (D.C. 2000)

ATTORNEY ACTING AS FIDUCIARY

- **Facts:**

- An attorney named herself as the executor of client's will, thinking it would be a quick fix to the client's legal problems.
- The attorney drafted the couple's wills, aware that the husband was married to someone else at the time.
- The couple never divorced, the situation turned into a mountain of ethical issues.
- The attorney never withdrew from the representation and remain involved for over six years.

- **Holding:**

- The court recommended a ninety-day suspension for the attorney's violation of a per se conflict of interest and ongoing dishonesty that lasted more than six years.

- **Reasoning:**

- The client was exposed to significant legal and emotion harm over an extended period.
- She was misled into believing she was legally married when she was not and was deprived of proper and ethical legal representation.

Idaho State Bar v. Frazier, 136 Idaho 22, 28 P.3d 363 (2001)

ATTORNEY ACTING AS FIDUCIARY

- **Facts:**

- Attorney kept decedent's jewelry in a briefcase under his office desk and later found out that some of the items had been stolen.
- The attorney failed to deposit all the funds paid to the estate into the trust account.
- The attorney also charged the estate a fee of \$101,562.50 for closing the estate.

- **Holding:**

- The attorney's license was suspended for one year.
- After suspension, he was required to fulfill certain requirements before being reinstated.

- **Reasoning:**

- When an attorney represents both a trust and its beneficiaries, charging trust fees and costs to the beneficiaries' estate does not violate Rule 1.7, as long as there is no evidence of conflicting interests or compromised representation.

Matter of Est. of Smith, 164 Idaho 457, 432 P.3d 6 (2018)

ATTORNEY ACTING AS FIDUCIARY FOR A FAMILY MEMBER

- **Facts:**

- The decedent's son, an attorney, drafted a holographic will that named himself as the sole beneficiary and disinherited his sibling.
- Attorney was also the power of attorney.
- The disinherited son challenged the will and petitioned for intestate administration, alleging that the will was the result of undue influence by his brother.

- **Holding:**

- The court found that all four elements of undue influence were established.

- **Reasoning:**

- Undue Influence elements:
 - (1) a person who is subject to influence;
 - (2) an opportunity to exert undue influence;
 - (3) a disposition to exert undue influence; and
 - (4) a result indicating undue influence.

Matter of Mulrow, 241 A.D.2d 7, 670 N.Y.S.2d 441 (1998)

ATTORNEY DRAFTING GISTING INSTRUMENT TO HIMSELF

- **Facts:**

- An attorney drafted a will for two elderly clients, naming himself as a beneficiary.
- The will was improperly drafted, allocating fifty percent of the trust's principal to the attorney.
- To avoid a conflict of interest, the attorney asked a colleague to represent the elderly couple during the will's execution.
- Despite this, the attorney received a substantial cash gift from one of the clients.
- The attorney also misled the couple into believing he was actively working on their lawsuit when he was not.

- **Holding:**

- Attorney was disbarred.

- **Reasoning:**

- The attorney accepted legal representation under circumstances that compromised his professional judgment.
- The attorney also engaged in an extended scheme to convince the elderly couple that he was actively pursuing their lawsuit.
- He exploited the trust of elderly clients for person gain.

Matter of Disciplinary Proceeding Against Gillingham, 126 Wash. 2d 454, 896 P.2d 656 (1995), amended (July 11, 1995)

CAUTION AGAINST ATTORNEY BEING BENEFICIARY

- Facts:

- The attorney and client had a longstanding attorney-client relationship that eventually formed into a friendship.
- Client persisted that attorney draft her will and be a named ten percent beneficiary.
 - Attorney abided by the clients wishes after her persistence.
- Attorney received and paid back loan from client of \$25,000 at 10% interest.
- Attorney was then taken off the will.

- Holding:

- Attorney was suspended from practicing law for sixty days.

- Reasoning:

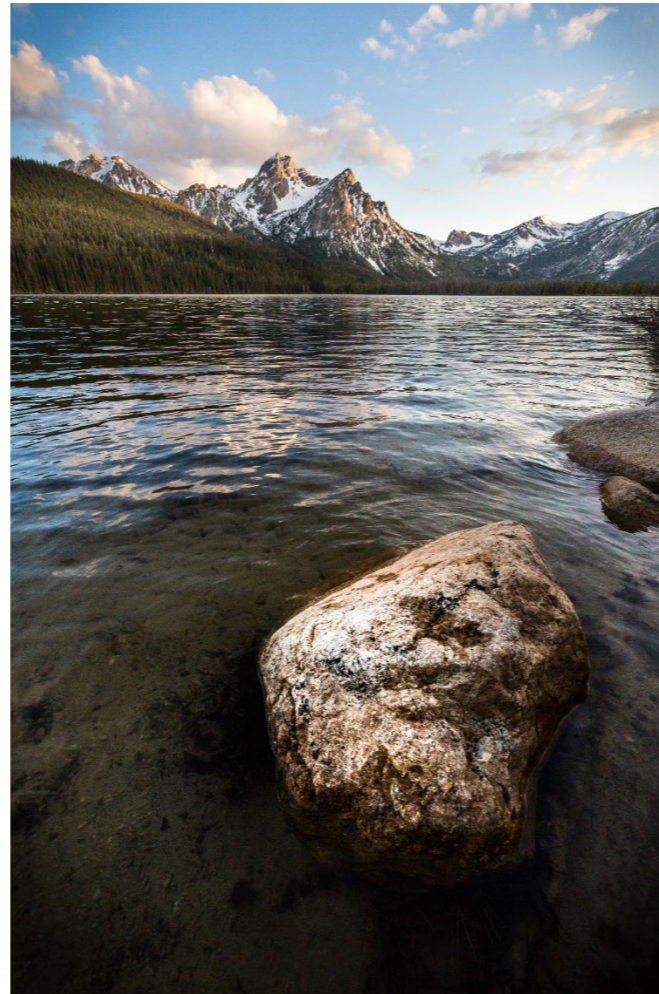
- A lawyer who is representing a client in a matter: (a) Shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
 - (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) The client consents thereto.

**OTHER
ETHICAL
CONSIDERATIONS**

Be Mindful of Other Ethical Rules

- Rule 1.13 – Organizational Representation
 - Clear understanding of attorney role – represent an equity member, or represent the organization
 - If both, conflict of interest analysis is required
- Rule 3.4 – Fairness to Opposing Party and Counsel
 - Testamentary instruments should be made available to interested parties, even if not beneficiaries [after death]
- Rule 4.3 – Dealing with Unrepresented Person
 - Clearly explain attorney role and identify client
 - Cannot provide legal advice

QUESTIONS ?



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