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THE PROBATE PROCESS FROM START TO FINISH

MAINTAINING AN ETHICAL BALANCE IN PROBATE PRACTICE

A. Performing Competent Legal Services

Probate practice encompasses many areas of law, and the practitioner must have a working knowledge of several different specialties. First, the practitioner must have a familiarity with the two principal codifications of law covering Surrogate's Court practice: the Surrogate's Court Procedure Act (SCPA), and the Estates, Powers and Trusts Law (EPTL). Secondly, the probate practitioner must be familiar with federal and New York State tax law relating to personal income tax, estate tax, and fiduciary (estate) income tax. In addition, a knowledge of real estate law and practice often is necessary when, for instance, the decedent owned a house, condominium, or cooperative apartment that must be sold. If the decedent owned a business, there may be issues relating to corporation or partnership law, business contracts, buy/sell agreements, insurance issues, and other relevant matters.

It is a well known ethical precept that a lawyer should always strive to render competent representation of the client. See generally, Canon 6 of the Lawyer's Code of Professional Responsibility, and the "Ethical Considerations" contained therein. Furthermore, it would be foolhardy for any practitioner to presume that he or she can meet every conceivable challenge presented in every probate proceeding without outside assistance. Even experienced attorneys will associate themselves with other professionals in a variety of situations including the following:

1. Certified appraisers or valuation experts to determine the value of real estate, business interests, artwork, jewelry, stamp collections, and other valuable estate assets.

2. Accountants for preparation of complex personal income tax returns, estate tax returns, corporate returns, and fiduciary (estate) income tax returns.

3. Licensed real estate brokers to determine and secure the best market price for the decedent's residence(s) and/or business properties.

4. Experienced litigation counsel if a probate proceeding or related estate matter will be going to trial, and the probate attorney is not an experienced trial attorney.

5. Genealogists if the Surrogate's Court requests extensive family background information as part of the probate process.

6. Investment counsel to determine how best to invest the estate's holdings during the probate proceeding.

B. Identifying the Client

"Identifying the client" may seem obvious, but to a probate attorney may present perplexing problems. For instance, let us take the following example:

You are the attorney who prepared a Will for a client several years ago. That client has died, and a family member telephones you to say that all seven members of the family would like to meet with you to discuss the Will. The individual who called you is named as the Executor in the Will, and some of the family members coming to meet with you were named as beneficiaries in the Will, and some were not. In addition, one of the legatees (beneficiaries) under the Will has developed Alzheimer's disease since the Will was signed, and is now mentally incompetent, and resides in a nursing home.

This example presents a number of ethical challenges for the attorney which will impact on who he or she may represent as a client:

1. The attorney will be meeting with family members who may have adverse interests to each other. For example, the family member named in the Will as Executor will seek to enforce the Will, and those excluded from the Will may seek to contest (invalidate) the Will.

2. The mentally incompetent beneficiary under the Will cannot be present at the meeting in your office, and yet has a right to be represented also.

3. Since you are the attorney who drafted the Will and supervised its execution, you have an affirmative duty to support the Will in the face of possible challenges by the excluded family members.

4. As a member of the legal community, you also have an affirmative duty to seek compromise and settlement between the adverse parties, rather than have them resort to litigation.

5. Due to the conflicting nature of the family members' positions, you must be very careful as to what information about your deceased client or the Will you divulge at the family meeting.

Given this example, I believe that the practitioner should preside over a meeting among the family members in an effort to effect a peaceful resolution to a scenario that could easily become a litigated situation. However, the practitioner must be careful not to divulge any information which could weaken the named Executor's efforts to probate the Will. In my opinion, the attorney in this example could only represent the proponent of the Will (the Executor), and in such capacity would provide whatever facts are within the attorney's knowledge about the deceased client and the execution of the Will to support the Will's admission to probate.

In my opinion, the attorney in this example could not accept the disinherited family members as clients because their interest would be to invalidate the Will that the attorney had drafted and supervised in its execution.

Similarly, this attorney could not represent the mentally incompetent legatee since the attorney is already representing the Executor.

C. Avoiding Conflicts of Interest

As shown by the above example in Section B of this text, probate practice often involves family situations, which frequently give rise to possible conflicts of interest. In addition, situations may arise where previous personal relationships impact on an attorney's ability to represent a client in a current probate proceeding.

For example, a situation might arise where an attorney has represented a family member in his or her business dealings for many years. Presently, this attorney is called upon to represent another family member who is the Executor of a Will in which

the attorney's long-time client has been disinherited, and plans to contest the Will. Since the attorney in question has extensive personal knowledge of the business and finances of his long-time client, the business owner, it is clear that that said attorney cannot now represent the Executor and litigate against his other client.

D. Distinguishing Between Privileged and Non-Privileged Communication

A proper functioning of the legal system, as well as the fiduciary (confidential) relationship between a lawyer and a client (or a prospective client) requires the preservation of confidences and information imparted to the lawyer by the client. See generally, Canon 4 of the Lawyer's Code of Professional Responsibility, and the "Ethical Considerations" contained therein. Clearly, any information given to the attorney by the client which relates to the probate proceeding, the decedent's assets, liabilities, and claims for or against the state, and the circumstances surrounding the testator's physical condition and mental health at the time of the Will execution is privileged communication which cannot be disclosed by the attorney to any third parties.

Interestingly, however, the Civil Practice Law and Rules (CPLR) of New York State gives a contestant to the Will broad latitude in deposing the attorney who drafted the Will, and the attesting witnesses to the Will, when these individuals are questioned pursuant to Section 1404 of the Surrogate's Court Procedure Act.

In an effort to assist the contestant, or possible contestant, to the Will in establishing the likelihood of success or failure in a Will contest proceeding, the contestant may properly question the above individuals at their depositions with regard to statements made by the testator as he or she was signing the Will, the apparent physical and mental health of the testator, and any other facts surrounding the attestation ceremony. In addition, the contestant has the right to examine the decedent's estate planning file and to question the attorney-draftsman regarding the contents of the file. See SCPA Section 2104(6).

E. Establishing Reasonable Attorney's Fees

The amount of attorney's fees in probate matters, as in all legal matters, must be determined in accordance with the following factors:

1. The professional time and labor required, the difficulty of the case involved, and the skill required to perform the legal services in a proper and timely manner.

2. The fee customly charged in the community for similar legal services.

3. The size and complexity of the estate involved. For instance, are there unknown family members, or overseas assets? Are there unusual issues concerning the business interests of the decedent?

4. The likelihood of a contested probate proceeding and protracted litigation.

5. The experience, professional reputation and ability of the lawyer performing the legal services.

These elements involved in the determination of a reasonable legal fee are set forth in greater detail in Disciplinary Rule 2-106 of the Lawyer's Code of Professional Responsibility.

Some attorneys prefer to bill the client on an hourly basis. Others prefer a flat fee, to be paid in installments, as the estate is settled. If a flat fee is established with the client, it is prudent to provide for an additional hourly rate in the event that unforeseen litigation arises. Every probate matter, as all legal matters, must begin with a "written letter of engagement", signed and delivered to both attorney and client, in order to avoid misunderstandings at a later time.

This requirement of a written letter of engagement was adopted by the Appellate Divisions of the New York Supreme Court, effective March 4, 2002. This Order was codified in Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York. Pursuant to this Order, the written letter of engagement must address the following matters:

1. An explanation of the scope of the legal services to be performed;

2. An explanation of the legal fees to be charged, as well as the procedure for reimbursement of expenses, and the lawyer's billing practices; and

3. An explanation of the client's right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator of the Courts.