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ODDITIES AND CHALLENGES IN PROBATE LAW

ADDRESSING PERPLEXING ETHICAL ISSUES

A. When the Client's Diminished Capacity Becomes Apparent

Since this Seminar deals with general problems in probate law, I see three possibilities of a "client" with diminished capacity:

1. The Executor or Administrator is your client. If you are representing the Executor of the Will, or the Administrator of the Estate (hereafter "the fiduciary"), and you see that your client now has diminished capacity, I believe that you must urge your client, the fiduciary, to resign his or her appointment. Whether the diminished capacity is severe mental or physical disability, I believe that an effective fiduciary must be mentally and physically fit to undertake the serious responsibility of settling an estate and withstanding the physical and emotional stress that this task entails.

2. The beneficiary of the Estate, or an objectant to the Will, is your client. If you are representing a beneficiary of the Estate, or an objectant to the Will, and you see that your client now has diminished capacity, I would urge that client to execute a durable power of attorney naming an attorney-in-fact (a trusted relative or friend) who could handle decision making in the estate matter if he or she becomes mentally incompetent. In addition to the standard statutory language contained in a durable power of attorney, I would include specific language that the attorney-in-fact has the power to prosecute, settle, and compromise all matters relating to this estate, as well as the power to execute all documents relating to the estate matter. In the event that the client has suddenly suffered severe mental incapacity (such as a stroke) and cannot execute a durable power of attorney, then I could not continue to represent this client until he or she had a court-appointed Guardian to make estate-related decisions in his or her place and stead. In such case, I would notify the Surrogate's Court of my client's sudden disability,

and ask for a stay of the proceedings until a Guardian was appointed, or for such other relief as the Court may deem appropriate.

3. A person "interested" in the Estate (although not your client) suffers diminished capacity. Within the meaning of the Surrogate's Court Procedure Act, an "interested" person would be a beneficiary or distributee of the estate (SCPA Section 103(39)). In the course of your representation of any individual or entity in an estate matter, if it comes to your attention that an "interested" person now has diminished capacity, you have an affirmative duty as an attorney to advise the Surrogate's Court of this situation. The Court may then make inquiry into the matter and, if necessary, appoint a guardian ad litem to represent the impaired individual's interest in the estate.

B. Identify the Client — The First Step to Avoiding Conflicts of Interest

To "identify 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.

As shown by the above example, 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.

C. Privileged vs. Non-Privileged Communication — What Can Happen If You Don't Know the Difference

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 estate, 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).

D. Your Obligation to Keep the Client Informed

Communication is the basis of the professional relationship between the attorney and the client. The most frequent complaint that clients have about their attorney is the lack of communication. A client needs reassurance that the case is proceeding smoothly. A client needs reassurance that you are working on their case.

In other words, take the client's telephone call; reply to the e-mail message. If you cannot respond today, respond within 24 hours. If a client resents you for not communicating with them, it will hurt your professional relationship, and that will ultimately damage the case.

I find that the best way to communicate with the client is to send them a copy of every letter or pleading or other correspondence that I prepare on their behalf. This way, they are kept up to date on the progress of the case, and they know that you have them in mind.

Practice Tip: Any time there is an important decision to be made in a case, whether a litigation strategy, a settlement offer, or otherwise, always communicate in writing with the client so that they actively participate in the decision-making and accept responsibility for the decision. Ideally, you want their participation in the decision to be in writing, and to be part of your file. If their input to the decision-making process can only be verbal, then be sure to write a memo to your file, detailing the date of the discussion and other pertinent facts surrounding their support of the decision ultimately agreed upon.

E. How to Make Notice Rights a Non-Issue

In New York probate practice there are three instances where notice issues may arise. These are as follows:

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1. Waiver and Consent vs. Issuance of Citation

Whether the case involves the probate of a Will, or the distribution of an intestate estate, the Surrogate's Court Procedure Act (SCPA) requires that all of the "distributees" (close legal heirs) of the decedent be brought within the jurisdiction of the Court. If the distributee is agreeable to the probate or administrative proceeding, he or she signs and has notarized a "Waiver and Consent" form, waiving their right to appear in Court, and consenting to the appointment of the nominated Executor or Administrator.

If the distributee is not agreeable to the proceeding, or simply does not bother to sign and have notarized the "Waiver and Consent" form, then the SPCA dictates that they must be served with a "Citation", giving the distributee a date to appear in Court if they have any objection to the proceeding. If they fail to appear, the Court will assume that they have no objection to the proceeding.

A serious obstacle can occur in a probate or administration proceeding when distributees of the decedent simply cannot be located. Until all the distributees are brought within the Court's jurisdiction, the proceeding cannot move forward. This often necessitates costly and time consuming use of genealogists and other forms of kinship research before the proceeding can continue.

Practice Tip: If you have an estate planning client, and you see that they have very vague or no knowledge of their blood relatives, seriously consider whether a revocable living trust, or joint or "in trust for" asset accounts, may be their best estate planning vehicle. All such options avoid the probate process, and therefore also avoid the Surrogate Court's due diligence requirements to locate missing or non-existent distributees.

2. Notice of Probate

All beneficiaries mentioned in the decedent's Will, and all distributees who will receive a portion of the intestate estate, are entitled to a Notice of their bequest or inheritance. This is simply sent to the individual's last known address, and rarely delays the settlement of an estate.

3. Mailing of Accounting with Release and Receipt Agreement

Any beneficiary of an estate who is receiving a fraction or percentage of an estate (rather than a specific dollar bequest) is entitled to an accounting of how their "residuary" share of the estate was computed. The accounting indicates all assets collected, all expenses and debts paid, and shows the individual's portion of the net estate. The accounting is usually accompanied by a "Release and Receipt Agreement", whereby the beneficiary acknowledges "receipt" of the inheritance (before it is in fact paid to him or her) and "releases" the Executor or Administrator of the estate from any further liability.

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