

An Overview of Ethical Issues in Estate Planning

Bill Ambrunn, Esq.

Law Offices of Bill Ambrunn
1906 Market Street, #938
San Francisco, CA 94102
(415) 724-0498
ambrunnlaw@yahoo.com

Course Outline

1. Introduction
2. Roles and Duties of Attorney
3. Establishing Attorney/Client Relationship – Who is the Client and When?
4. Client Confidentiality
5. Representing Multiple Parties
6. Conflicts of Interest
7. Written Informed Consent
8. Duties to Client
9. Scope of Representation and Fees
10. Mental Capacity
11. Elder Abuse and Undue Influence
12. Other Attorney Duties
13. Questions/Answers

Attorney Resources

- Complete Plans for Small and Mid-Size Estates (Cal CEB)
- California Powers of Attorney & Health Care Directives (Cal CEB)

Consequences of Violating Rules or Standard of Care

- State Bar discipline
- Invalidation of client's estate plans
- Civil liability for malpractice
 - duty of care owed to client/testator as well as beneficiaries and intended beneficiaries; see *Schick v. Bach* (1987) 193 CA3d 1321, 1330
 - damages can include lost testamentary gifts, loss of trust principal for probate expenses, etc.; for recent case dealing with these issues, see *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 946
 - Attorney can even owe duty to disqualified beneficiary (Probate Code Section 21350 et seq.); *Osornio v. Weingarten* (2004) 124 CA4th 304

Role of Attorney

- Attorney is more than a scrivener
- Representation can include advice, guidance in areas such as intestacy, testamentary gifts, probate procedures and costs, family law and community property, tax law, agency and other areas
- Rules can be found in California Rules of Professional Conduct, as well as Business & Professions, Evidence, Probate, Penal and Welfare & Institutions Codes

Establishing Attorney/Client Relationship – Who is the Client and When?

- Who is contacting you and why?
- What is the scope of the representation sought and/or needed?
- If joint representation sought, is there a potential or actual conflict of interest?

Attorney's Duties to Client

- Duty of loyalty
- Duty to maintain client confidences (Bus. and Prof. Code Section 6068(e))
- Duty to avoid actual and potential conflicts of interest (Cal. Rules of Prof. Conduct 3-310)
- Duty to perform services competently and diligently including duty to consult with experts (Cal. Rules of Prof. Conduct 3-110); and not charge unconscionable fees (Cal. Rules of Prof. Conduct 4-200(A))
- Duty to communicate with client (Cal. Rules of Prof. Conduct 3-500)
- Duty to not allow third party paying for legal fees to interfere with lawyer's independent judgment (Cal. Rules of Prof. Conduct 1-600(A))

Creation of Attorney-Client Relationship

- Attorney-Client relationship is created by contract (express or implied) and governed by the general rules of agency; conduct of both parties must indicate offer and acceptance; see Witkin, California Procedure, Attorneys Sections 68 – 69 (4th ed. 1996)
- Arises without formality, fee payment or fee agreement between parties. See Miller v. Metzinger (1979) 91 CA3d 31, 39
- Does not exist merely because party believes that an attorney is representing his or her interests. See Fox v. Polack (1986) 181 CA3d 954,959

Client Confidentiality

- Purpose of rules is to encourage complete candor between attorney and client, to ensure every aspect of relationship will further the client's interests
- Non-verbal communications are included
- Broader than definition of "attorney-client privilege" in Evidence Code Section 952
- If the information would be embarrassing or detrimental to the client if divulged to a third party, it is a protected communication (California State Bar Formal Opinion No. 89-112)

Client Confidentiality – Typical Problem Situations

- Attorney represents multiple clients either jointly or separately
- Attorney has represented a couple jointly during their marriage, their marriage is dissolved, and both former spouses wish to continue using the attorney separately for estate planning purposes
- Attorney is approached to represent the fiduciary of an existing client when the client appears to have lost some mental capacity
- Entire family is involved in meetings and other communications, and the client's identity may be ambiguous

Representing Multiple Clients

- May not represent multiple clients with actual or potential adverse interests unless there is informed written consent. Cal. Rules of Prof. Conduct 3-310-(c)(1) and (2)
- If a potential conflict becomes an actual conflict, attorney must get additional informed written consent.

Explaining and Managing the Roles of Multiple Parties

- Distinguishing the Roles of Testator v. Trustee v. Beneficiary
- Family members as agents or advisors in estate planning transactions
- When family members become clients
- Probate Code Section 21350 problem when family member actively participates in procuring services and is a beneficiary but is not considered a “related person” – Certificate of Independent Review may be required to carry out client’s intent

Conflicts of Interest

- Attorney for Client as Testator
- Attorney for Client as Fiduciary
- Attorney as Beneficiary of Client's Estate

Conflicts of Interest – Attorney as Fiduciary

- Conflicts arising out of disagreement between attorney and client regarding investment of trust assets or proper exercise of discretion; exercise of authority as conservator or when client lacks capacity
- See Cal. Rules of Prof. Conduct 3-310(E), Business and Prof. Code Section 6068(e), Probate Code Section 15642(b)(6) and Probate Code Section 21350

Obtaining Written Informed Consent

- Should be used when there are issues of client confidentiality, conflict of interest; duty of loyalty especially when representing clients jointly (Cal Rules of Prof Conduct 3-310)
- Representing multiple parties, either jointly or separately
- Representing married couples or RDPs
- Representing client and using family members as designated agents
- Must make required disclosures (Cal Rules of Prof Conduct 3-310(A)(2))
- Separate informed consent required if potential or actual conflict develops after initial engagement
- Client's decisions should be documented in engagement letter and notes in attorney file

Scope of Services and Fee Issues

- Defining Scope of Services – Bus. and Prof. Code Section 6148(a)(2); scope should include duration and termination of services
- Written Agreement Required for more than \$1,000 - Bus. and Prof. Code Section 6148; attorney who does not comply is limited to quantum meruit recovery
- Fees may be paid by third party with full disclosure and written consent of client as long as attorney assures that third party does not interfere with representation (Cal. Rules of Prof. Conduct 3-310(F))
- Other Rules regarding legal fees – Probate Code Sections 2645, 10804, 15687 (restricting dual compensation for attorney/fiduciary) in probate matters; Cal. Rules of Prof. Conduct 3-320 (prohibiting fee-sharing agreements in most circumstances) and 3-310(F) (regarding fees paid by third parties)

Determining Capacity to Enter Into Attorney/Client Relationship

- Codified in Due Process in Competence of Determinations Act (DPCDA) – Probate Code Sections 810 – 813, 1801, 1881, 3201, 3204
- Different standards for contract, conveyance, marriage, health care decisions, execution of wills and trusts
- DPCDA creates rebuttable presumption that all persons have capacity to make decisions and be responsible for their acts and decisions (Probate Code Section 810(a))
- “Unsound Mind” or “Lacks Capacity” = mental/physical disorder diagnosis + evidence of deficit in mental function
- Frequency, severity and duration of periods of impairment may be taken into account (Probate Code Section 811(c))
- Mere diagnosis of mental disorder is not enough to prove lack of capacity (Probate Code Section 811(d))

Capacity to Contract/Retain Counsel – Probate Code Section 812

- A person lacks capacity unless he/she has ability to
 - communicate, verbally or by any other means, the decision, and
 - understand and appreciate the decision to the extent relevant
- Understand rights, duties and responsibilities created or affected
- Understand probable consequences of decision for the decision-maker and/or other persons effected by decision
- Understand significant risks, benefits and reasonable alternatives involved

Capacity to Make Health Care Decisions, Create Will, Trust

- Capacity to Make Health Care Decisions (Probate Code Section 813)
 - Respond knowingly, intelligently to questions about treatment
 - Participate in treatment decisions through rational thought process
 - Understand nature and seriousness of illness, nature of recommended treatment, probable degree/duration of benefits/risks, consequences of lack of treatment, availability of reasonable alternatives
- Testamentary Capacity not sufficient if (Probate Code Section 6100.5(a)):
 - Individual cannot:
 - understand nature of testamentary act, or
 - cannot understand/recall nature of situation of individual's property, or
 - cannot understand/recall individual's relationships to living descendants, spouse, parents, and others whose interests are affected by the will

Capacity to Make Medical Decisions, Create Will, Trust

- Standard for capacity to create trust debated; not codified; See Section 2.51, Complete Plans for Small and Mid-Sized Estates (Cal CEB 2006)
- Capacity to Contract – Hess, Bogert & Bogert, The Law of Trusts and Trustees (3d ed 2000)
- Capacity to transfer property – 13 Witkin, Summary of California Law, Trusts Section 25 (10th ed 2005); Walton v. Bank of Cal. (1963) 218 CA2d 527, 541
- Capacity to contract = capacity to appoint agent (Probate Code Section 4120)

Determining Capacity – Attorney’s Role

- Attorney’s duty to determine capacity before going on with the estate planning process
- Attorney is prohibited from seeking appointment of a guardian or conservator for an apparently impaired client, or even seeking consultation with physician, without client’s written consent; see Cal State Bar Formal Opinion No. 89-112 – rule is contrary to ABA Model Rules and majority of other jurisdictions

Elder Abuse and Protecting Client from Other Types of Harm

- What is Elder Abuse?
- What is attorney's responsibility when elder abuse is alleged or suspected?
- What should attorney do if a conservatorship is needed for a clearly impaired client?

Certificate of Independent Review

- Intended to prevent undue influence by persons in unique position to take advantage of senior or adult with diminished capacity
- Probate Code Section 21350 et seq.
- Requires a CIR when testamentary gift to prohibited individuals

Other Attorney Duties

- Is there a duty to maintain client documents?
- What if the attorney offers to maintain client documents and is there a difference between maintaining originals versus copies?