



Professor Pennell Warns – Ethics Rules Not Friendly to Estate Planners



By: Mary Merrell Bailey, JD, CPA, MBA, MST, MSA

Have you considered how your state's rules of professional conduct, most often written to protect clients from a litigation perspective, apply to you as an estate planner? What is your ethical duty regarding confidentiality and conflicts of interest as you counsel multiple family members? Jeffrey N. Pennell, the Richard H. Clark Professor of Law at Emory University, recommends that estate planning attorneys avoid ethical breaches by obtaining from clients preemptive, written, informed consents to mutual representation.

What Ethical Rules?

Almost all states have embraced some version of the Model Rules of Professional Conduct. Professor Pennell alerts estate planning attorneys to Model Rule 1.7(a)(1) (representing multiple clients whose interests are directly adverse to each other), Model Rule 1.7(a)(2) (representing multiple clients whose interests are materially limited by each other), and Model Rule 1.9 (representing a new client whose interests are materially adverse to those of a prior client). In particular, Professor Pennell advises estate planning attorneys to remember Model Rule 1.8(f) (informing non-paying client when 3rd party is paying the legal fees), and Model Rule 1.6(a) (confidentiality of client communications and information from or about the client whatever the source).

I Don't Do Litigation. Why Does This Matter To Me?

Professor Pennell mentions several very common estate planning situations that may result in ethical dilemmas. Have you ever prepared an estate plan for both spouses? Potential for conflicts of interest exists no matter how agreeable their marital relationship. Did you suggest a credit-shelter trust that maximizes transfer tax exemptions, but denies title to the surviving spouse? Did you explain that the surviving spouse may have a statutory right to an outright share? Did either spouse display interest in col-

lecting that share despite the deceased spouse's plan? Are there children from this marriage – or other relationships – who are included in the plan to the detriment of surviving spouse?

Perhaps you offer business succession planning and represent an entity. The principals are father, daughter, and granddaughter, and they want the entity to pay the legal fees. Father wants to include son, who is not involved in the business, in his estate plan. Planning for the dynasty might be good for the family overall, but bad for daughter individually.

What if daughter tells you that her marriage is faltering, but that she and her spouse have agreed not to say anything until after the business has been transferred, because she does not want father, a procrastinator, to have any reason to not move forward with the business succession plan? Can you maintain silence, yet continue to represent father, daughter, granddaughter, or entity?

You have a duty of loyalty and a duty of confidentiality to each client. Each client has the expectation that you will use that information for the client's benefit, and the right to be informed of information that has bearing on the client's matter. When these duties and rights are at odds, your only option may be to withdraw from representing any of the parties.

Who Cares? What's the Worst that Could Happen to Me?

Professor Pennell indicates that your state Bar most likely will not fine you as punishment. Ethics violations most often result in a written reprimand, a suspension, or disbarment. Such actions usually are publicized. As credibility is one of an estate planning attorney's most important attributes, your practice may not survive a reprimand or suspension. Could your family survive your disbarment?

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Are Written Informed Consents to Mutual Representation the Solution?

You will better protect yourself from an ethics complaint, and your clients from surprise and dismay, if every one of your mutually-represented clients confirms, in writing, his or her written informed consent to the representation. You must discuss with your clients what common representation implies, how attorney-client privilege is affected, and how your loyalty and their confidentiality may be compromised. Although the consent does not need to be in writing to be valid, Professor Pennell strongly recommends written evidence.

Professor Pennell also believes that estate planners should, as a rule, send an “exit” letter when the assigned tasks are complete. His concern is that, long after the representation, one family member will share a confidence that is adverse to another family member, and you will be in a conflict situation. The exit letter will serve as notice to the clients that the engagement has come to an end.

An estate planner’s client relationship may be on-going, even when certain tasks have finished. Professor Pennell recognizes that estate planning is not as tidy as other areas of law may be when defining the termination of representation, and agrees that the ethical rules have a conflict-resolution-practice bias.

How Does WealthDocx™ Help Me?

Your colleagues at WealthCounsel share your concern. WealthDocx 7 includes an engagement terms template that includes thoughtfully-crafted conflict provisions for dual representation. In addition, the Knowledgebase has sample letters you may adapt to your practice. Ask your peers on the listserv how they proactively manage their risk. Become the expert in your geographic area, and work with your WC state forum to design client engagement, conflicts waiver, and exit letters that comply with your state’s ethics rules. Your practice will be stronger as a result.

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