PROTECTING YOUR OWN ASSETS: ANATOMY OF A MALPRACTICE CLAIM

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The following outline addresses some of the issues dealt with in the program, in roughly the order that they arise in the hypothetical.

I. Ethics v. Malpractice

A. Ethics

1. Ethical rules are not amorphous philosophical principles. They are rules that a jurisdiction adopts to govern the practice of law.

2. Ethical rules are enacted to provide guidance for lawyers, to promote the public's faith in the profession, and to provide rules that disciplinary agencies can use for regulating lawyers' conduct.

3. Ethical rules were not designed to provide a basis for civil liability or to impose duties that would necessarily give rise to a malpractice claim. (ACTEC Commentaries on the Model Rules of Professional Conduct, at p. 13).

4. In general, the disciplinary arm of the appropriate state bar enforces the ethical rules that are codified in that jurisdiction. After receiving a complaint from the client or a member of the public, the disciplinary agency investigates and then decides whether to prosecute. If so, the matter proceeds to a formal charge and hearing on whether the attorney violated that jurisdiction's ethical rules, with the discipline ranging from a fine for lesser violations to suspension or possible disbarment for violations of a more serious nature.

B. Malpractice

1. This term refers to the cause of action alleging that an attorney has failed to perform services in accordance with the professional standard of care.

2. This cause of action is usually framed as negligence or breach of contract and in general requires proof of the following elements: existence of a duty; breach of that duty; proximate causation; and resulting damage.

C. Distinctions Between Ethical Violations And Malpractice

1. Ethical violations are redressed by disciplinary authorities; malpractice claims are brought by plaintiffs.

2. The violation of an ethical duty is the wrong in itself. The disciplinary agency does not need to show resulting harm, though that may be the factor that determines whether the agency bothers to pursue the matter. A malpractice claim, however, requires causation and resulting damage; without these, there is no malpractice.

3. An ethical duty may overlap with a legal duty that would give rise to a malpractice claim, but they do not necessarily coexist.

   a. Some cases hold that ethical duties set the attorney's standard of care and thus form the basis for negligence per se.

   b. Other cases hold that ethical duties do not necessarily set the attorney's standard of care but that they are admissible and that the trier of fact can consider them when determining that issue.

II. Conflicts Of Interest And The Estate Planner.

A. Current Conflicts: A lawyer shall not represent a client if the representation involves a concurrent conflict of interest, unless the lawyer first obtains informed consent. (Model Rule Of Professional Conduct 1.7).

1. A concurrent conflict of interest exists if either:

   a. the representation of one client "will be directly adverse to another client" (MRPC 1.7(a)(1)); or

   b. there is a "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." (MRPC 1.7(a)(2)).

2. Notwithstanding a concurrent conflict of interest, a lawyer may represent a client if all of the following are established:

   a. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

b. the representation is not prohibited by law;

c. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation;

d. each client gives informed consent, confirmed in writing.

3. Special rules pertaining to conflicts of interest (such as entering into a business relationship with the client, soliciting gifts from the client, etc.) are set forth in MRPC 1.8.

B. Conflicts With Former Clients: A lawyer who formerly represented a client in a matter shall not represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing. (MRPC 1.9).

1. The lawyer who has formerly represented a client in a matter shall not thereafter use information from that representation to the disadvantage of the former client, except as the rules otherwise permit or require. (MRPC 1.9).

C. Application Of The Conflict Rules To Estate Planners.

1. The ACTEC commentaries to the Model Rules of Professional Conduct support the proposition that in most instances, an estate planner should be able to represent multiple family members without being deemed to have a conflict of interest. The commentaries note that in the estate planning context, multiple representation is generally appropriate because the clients' common objectives and desire for cost-effectiveness often predominate over their limited inconsistent interests. The commentaries do not dispense with the provisions of Model Rule 1.7 but note that they should be applied in light of the fact that estate planning and administration are usually non-adversarial.

2. The case law is favorable to estate planners. The cases generally hold that in the absence of suspicious circumstances, the current representation of another family member does not create a conflict of interest for the estate planner.

a. *Matter of Estate of Koch*, 849 P.2d 977 (Kan. 1993) (no conflict of interest since estate planner did not discuss the will provisions with the other family members he represented at the time).

b. *Chase v. Bowen*, 771 So.2d 1181 (Fla. 2000) (no conflict of interest when estate planner was allegedly representing the disinherited beneficiary on other matter).

c. But see *Haynes v. First Nat. State Bank of New Jersey*, 432 A.2d 890 (NJ 1981) (estate planner was deemed to have a conflict of interest when he simultaneously represented the testatrix's daughter on another matter; became the new attorney for the testatrix; and then drafted a will that radically changed the estate plan in favor of the daughter).

d. See also *Pascale v. Pascale*, 549 A.2d 782 (NJ 1988) (attorney had conflict of interest when he represented both father and son when one transferred stock to the other).

3. The case law generally holds that former representation of a beneficiary does not give rise to a conflict of interest for the estate planner.

   a. *Blissard v. White*, 515 So.2d 1196 (Miss. 1987) (estate planner did not have conflict of interest when he formerly provided estate planning for the beneficiary).

   b. *Matter of Estate of Ross*, 462 A.2d 780 (Pa. 1983) (same as above, though the court noted that the beneficiary was not even told by the estate planner that the will was being drafted).

4. When determining if the estate planner had a conflict of interest, the courts will look at factors that include those set forth below. If the question is whether to shift the burden of proof in a contest rather than just determine if the attorney committed an ethical violation, the courts will be inclined to use a "down to earth, real world, functional approach." (*Estate of Koch, supra,* 949 P.2d at 995). Courts have looked at these factors:

   a. the duration and intimacy of the lawyer's relationship with all affected clients (*Estate of Koch, supra,* 949 P.2d at 996 [see also its discussion of *Haynes*]);

   b. whether there was a radical change in the estate plan (*Haynes, supra*, 432 A.2d at 897);

   c. whether the lawyer discussed the estate plan with the other clients (*Estate of Koch, supra,* 949 P.2d at 996; *Matter of the Estate of Ross, supra*, 462 A.2d at 785);

d. whether there is further indicia of pressure or undue influence by the lawyer's other clients (*Haynes, supra*, 432 A.2d at 897);

e. the function being performed by the lawyer (*Estate of Koch, supra*, 949 P.2d at 997);

f. the likelihood of actual conflict and prejudice (*Ibid*.);

g. whether the lawyer had a personal interest at stake (MRPC 1.7(a)(2));

h. the practical consequences of extending the holding as a rule (*Estate of Koch, supra*, 949 P.2d at 998).

D. Informed Consent. If there is a conflict of interest, what must the attorney disclose in order to obtain informed consent for the representation?

1. Informed consent requires that the lawyer communicate "adequate information and explanation about the material risks of and reasonable alternatives to the proposed course of conduct." (MRPC 1.0(e)).

2. Informed consent must be confirmed in writing. (MRPC 1.7(b)(4)).

3. Consent must be obtained from all affected clients. (*Ibid*.)

4. The attorney must reasonably believe that the conflict will not affect the representation, i.e., sometimes informed consent is not enough. (See MRPC 1.7(b)).

E. Possible Effects Of The Conflict In Subsequent Litigation

1. In a will or trust contest, the contestant may argue that the attorney's conflict of interest shifts the burden of proof to the proponent. (See *Matter of Estate of Koch*, 849 P.2d 977 (Kan. 1993); *Haynes v. First Nat. State Bank of New Jersey*, 432 A.2d 890 (NJ 1981)).

2. The conflict of interest might constitute malpractice if the will was invalidated as a result (for example, if the court shifted the burden of proof as a result of the conflict and then found that the proponent failed to satisfy that burden), or if it caused the proponents to pay out more in settlement than they otherwise would have. (*Viner v. Sweet*, 30 Cal.4th 1232, 1241 (2003) [malpractice plaintiff must prove that she "would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred"]).

3. Even if the conflict is not deemed to be a conflict of interest for ethical purposes, the attorney is not necessarily immunized from a malpractice claim or a claim of intentional wrongdoing, since the ethical rule might not be accepted as the standard of care.

4. A conflict of interest can damage the estate planner's credibility and may also constitute evidence of intentional wrongdoing.

F. Defense Considerations For The Estate Planner.

1. Determine if the alleged conflict involved a former client rather than a current one. It is easier to avoid a conflict if the lawyer falls under MRPC 1.9 than MRPC 1.7.

2. If the alleged conflict is concurrent, argue that it does not rise to a conflict of interest under MRPC 1.7.

3. If it does, argue that the requirements of MRPC 1.7 were satisfied, if it is possible to do so.

4. If Rule 1.7 is not satisfied, argue that the violation is technical only and did not cause harm and thus, in the litigation context, it should not shift the burden of proof.

III. Possible Liability For Delay In The Preparation Of Instruments

A. The Estate Planner Has No Duty To Make The Client Execute Estate-Planning Documents That Were Prepared And Transmitted.

1. Radovich *v. Locke-Paddon*, 35 Cal.App.4th 946 (Cal 1995) (attorney provided draft will to the client but the client delayed for five months and then died without signing; the attorney could not be held liable for malpractice).

2. *Gregg v. Lindsay*, 649 A.2d 935 (Pa. 1994) (attorney brought will to deathbed but could not find subscribing witnesses and agreed with the client that he would return the next morning, but the client was moved to another hospital that night and died the next afternoon; attorney was not liable for failure to have the will executed).

B. But The Estate Planner May Face Liability For Failing To Prepare Instruments Within A Reasonable Time Or Within The Time Set By The Client, Depending On The Circumstances.

1. MRPC 1.3 provides that "A lawyer shall act with reasonable diligence and promptness in representing a client."

2. From the ethical perspective, an attorney is usually responsible for complying with time deadlines that the attorney and client have agreed upon. (ACTEC Commentary on MRPC 1.3 ["it is usually desirable, early in the representation, for the lawyer and client to establish a timetable for completion of various tasks. Insofar as consistent with providing the client with competent representation, the lawyer should adhere to the established schedule and inform the client of any revisions that are required, whether attributable to the lawyer or to circumstances beyond the lawyer's control."]).

   a. However, the commentary warns that a lawyer should not agree to the imposition of time limits that may prevent the lawyer from consulting fully with the client or giving the matter the attention it should receive.

   b. Furthermore, the lawyer should warn the client of the risks of pursuing the matter on an abbreviated time schedule.

3. In holding that the attorney was not liable for delay in execution, *Gregg v. Linday, supra,* noted that the client had agreed to it.

4. For possible authority to the effect that the attorney should not face liability for delay in the preparation of estate-planning documents, see *Krawczyk v. Stingle*, 543 A.2d 733 (Conn 1988). Like *Radovich v. Locke-Paddon, supra*, this case held that the attorney could not be sued for negligent delay in execution, but in this instance the attorney did not complete the drafts in time. (543 A.2d at 734).

IV. Possible Insurance-Related Issues

A. Issues Regarding Insurance Coverage Almost Invariably Demand A Review Of The Policy Language, Which Can Vary. Furthermore, the number of coverage-related issues, the complexity of those issues, and the distinctions between the various states, far exceed the scope of any program of this length. But the estate planner should keep issues such as the following in mind.

B. Potential Lack Of Coverage For Acting As A Fiduciary Rather Than A Lawyer. The policy might (1) require that services be rendered to

"others," which could exclude fiduciary activities; (2) it might expressly exclude fiduciary activities; or (3) it might provide dual coverage to the extent that the insured would be liable as an attorney. (See *Transamerica Ins. Co. v. Keown*, 451 F.Supp. 397 (D.C.N.J. 1978).

C. Delay In Tender. Depending on the language of the policy and applicable statutes in the jurisdiction, an unexcused failure to give timely notice may result in a loss of benefits.

1. The policy may require more than just prompt notice of a lawsuit. It might require notice of an act or omission that might reasonably be expected to be the basis of a claim or suit. (*Home Mutual Insurance Co. v. Presutti*, 433 NYS2d 896 (1980).

   a. Ignorance might excuse the failure to give prompt notice, if it is reasonable, i.e., the attorney should not be responsible for failing to give notice of an issue that the attorney does not even perceive. (See *Sager v. St. Paul Fire & Marine Insurance Company*, 461 S.W.2d 704 (Mo. 1971).

2. Depending on the law of the particular jurisdiction, the insurer might have to show prejudice from the delay in order to deny coverage. (See *Mark A. Varrichio and Associates v. Chicago Insurance Co.*, 783 N.E.2d 895 (NY 2002) (New York follows the no-prejudice rule, but the question was certified for review; case settled before decision)).

D. Avoiding Gaps In Coverage. The policy may cover an occurrence within the policy period even though the claim does not arise until after the policy has expired. These policies normally require that the attorney provide written notice of the occurrence before the policy's expiration. If the attorney changes insurers, the new policy often has a clause excluding coverage for prior acts or omissions that were reasonably foreseeable, which may create a gap in coverage.

E. Lack Of Coverage For Fraud And Intentional Wrongs. In general, most policies exclude coverage for fraud or willful acts of dishonesty. (See *Humphreys v. Niagara Fire Insurance Co.*, 590 A.2d 1267 (Pa. 1991) (under fraud exclusion, insurer had no duty to defend RICO claims brought against attorney)).

1. In general, the insurer must still provide a defense if there are any covered claims.

2. The insurer might reserve its rights to deny coverage.