ABA Fall Meeting
October 21, 2011

Ethics in Estate Planning
Issues Raised when Attorneys are asked to Serve as Fiduciaries for Clients

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Serving as Fiduciary

As estate planning attorneys, we realize:
•Our country has an increasingly aging population which can add an element of consideration when discussing planning.
•There will be trillions of dollars projected to transfer from the baby-boomer generation to the next generation, which likely means increased demand for planning.
Serving as Fiduciary

• Compare the increase in numbers of high net worth clients, with the status of the previous candidates to serve as fiduciary, ie: financial institutions, who may be:
  – Contracting, declining in number, or
  – Unwilling to assume the role as a fiduciary, especially where the investment portfolios are modest, or
  – Unable because they no longer offer trust services.

Serving as Fiduciary

• These factors lead to the conclusion that a trusted advisor, perhaps the estate planning attorney, will be asked to serve in the role as fiduciary for clients.
Does a Conflict Arise?

• An issue arises when the client engages the lawyer for estate plan drafting, *and also* is engaged by the client for non-legal services to act as an executor or trustee.

Does a Conflict Arise?

• Is there a financial interest that the drafting attorney has in the fiduciary fee charged?
• Is there a conflict of interest?
Does a Conflict Arise?

- This point can be magnified by the fact that many of these clients may be elderly when entering into the initial planning engagements.
- Or worse, the client may be deceased when the lawyer begins to perform his or her duties.
- The risk of overreaching by the lawyer could be problematic given the age and/or lack of sophistication of many estate planning clients.

Applicable Rules

- Do the Model Rules allow a lawyer to act as a trustee for a client created trust, or as the executor or personal representative in the client’s will?
Short Answer

From the Mezzullo outline:
• There is no per se prohibition against an attorney being nominated by his or her client to be executor or trustee of the client’s estate.
• It is inappropriate in every circumstance, however, for the attorney to solicit such a nomination.
  — See Discussion of LEO 1515 at Section III.E.2.a. of the Mezzullo outline.

Applicable Rules

• Do the Rules also subject this type of attorney-client transaction to the conflicts of interest provisions of Rule 1.7 only if the lawyer decides that his or her financial interest in the transaction will impair his or her independent advice to the client on the best candidate for fiduciary?
Applicable Rules

Rule 1.7 Conflict Of Interest: Current Clients
• “A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”

Applicable Rules

Rule 2.1 Advisor
• “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”
Applicable Rules

Rule 1.5 addresses Fees
• The relationship between an lawyer and client is also obviously a business relationship. The client engages the attorney to provide legal advice in exchange for the attorney's fee.

Applicable Rules

• Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules
• “(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
• (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
Applicable Rules

• Rule 1.8 Conflict Of Interest: (continued)
• (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
• (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.”

Representation

• Where the lawyer is named as a fiduciary, the lawyer stands to gain financially not only from his or her role as the lawyer, but also in the separate role as fiduciary.
Representation

• Is the lawyer compelled to inform the client that other individuals, such as family members or financial institutions, may also be good candidates for the position of executor or trustee?
• Could the potential financial gain by the lawyer in being appointed affect the likelihood that the lawyer will have this conversation?

Voluntary Representation?

• The reality is, that in many cases the lawyer may not have been seeking to act as the fiduciary, and rather did so at the client’s request.
• And we all know, an attorney or other advisor must always exercise independent judgment when advising clients despite divided loyalties and economic interests.
Practice Tips - Documentation

• Should the lawyer incorporate into his or her practice additional documentation when acting as fiduciary?
• Should the lawyer include documentation supporting that the designation as trustee or executor was not the product of undue influence?

Practice Tips - Documentation

• In New York, the Surrogate's Court requires the filing of a statement at the time of probate disclosing:
  – that the named fiduciary is an attorney,
  – whether the attorney will be estate counsel, and
  – whether the attorney was the drafter.
Practice Tips - Documentation

• Other Rules require the filing of an affidavit as to commissions and legal fees if the attorney is either the sole executor/administrator and also the estate attorney, or is a co-fiduciary and the estate attorney when there is no other fiduciary who is not an attorney.

Practice Tips - Documentation

• The surrogate may also inquire into why the attorney was named and whether the client was aware that the attorney would be paid commissions and legal fees.
### Practice Tips - Documentation

- I, (Client), have voluntarily named as executor and trustee in my will and trust, (Attorney), who prepared the instrument in his/her capacity as my attorney. Mr./Ms. (Attorney) did not promote himself/herself or consciously influence me in the decision to name him/her as executor and trustee. In addition, Mr./Ms. (Attorney) has disclosed the potential conflicts which he/she thinks might arise as a result of his/her serving as both executor and trustee and as attorney for the estate and trust. An explanation of the different roles as fiduciary and attorney, an explanation of the risks and disadvantages of this dual representation, an explanation of the manner in which his/her compensation will be determined, and an opportunity to seek independent legal advice were provided to me prior to my signing this consent.

### Practice Tips - Disclosure

- See, Mezzullo, Appendix B for a sample client letter informing client of issues surrounding the appointment of lawyer as fiduciary.
Practice Tips - Policy

• Consider a law firm policy to deal with firm attorneys who will be acting as a fiduciary:
  – Family or clients
  – Review process by committee
  – Periodic audit of fiduciary engagement

Case Law Commentary

From the Mezzullo outline:
• *In re Estate of Thron*, 530 N.Y.S.2d 951 (Surr. Ct. 1988), where the client appointed two lawyers from the same firm as co-executors. The court was not impressed: “The appointment of **two or more members from the same law firm** as co-executors in double commission cases, in almost every instance, can only be the product of gratitude, greed or ignorance.” Id. at 955.
ACTEC COMMENTARIES

• California by statute prohibits lawyers who are serving as fiduciaries from collecting dual compensation unless such dual compensation is specifically authorized by the court in the conservatorship, guardianship or estate context or, in the case of inter vivos trusts, following advance notice to the beneficiaries and no objection by the beneficiaries. A purported waiver of these provisions in any instrument of transfer is void as against public policy.

ACTEC COMMENTARIES

• In the Matter of Wayne H. Eisenhauer, 689 N.E.2d 783 (Mass. 1998). Lawyer was retained to draft revocable trust which named lawyer as trustee and contained a provision giving lawyer veto power over the naming of any successor trustee. These provisions were “highly unusual” and “solely for the benefit” of the lawyer. There was no evidence that lawyer had disclosed the conflict of interest to the client-settlor or that the client had affirmatively consented to it.
ACTEC COMMENTARIES

• *In re Discipline of Martin*, 506 N.W.2d 101 (S.D. 1993). In this case a lawyer was suspended for two years for multiple infractions including preparation of a will that named the lawyer as executor and trustee, which would allow him to manage the estate, including his debts to it. Lawyer never advised aged client to obtain independent advice.

ACTEC COMMENTARIES

• Missouri: Informal Advisory Op. 970130 (1997). If an attorney drafts an irrevocable life insurance trust for a client and the client requests that the attorney serve as the primary trustee of that trust, then the attorney may serve the primary trustee, but he must comply with all the requirements of MRPC 1.8.
ACTEC COMMENTARIES

- New Hampshire: N.H. Op. 1987-88/9 (1988). With proper disclosure to a client, a lawyer may serve as fiduciary and as counsel to the fiduciary, provided the fees charged are reasonable.

ACTEC COMMENTARIES

- South Carolina: Op. 92-12 (1992). An attorney may draft a will which names himself as personal representative with the power to sell the home and pay himself at his regular hourly rate. He should not pay himself the personal representative’s statutory fees on top of his attorney’s fees or vice versa. The attorney should explain the situation to the client as reasonably necessary. Although the attorney would not be prohibited from witnessing the execution of the will, he would be well advised to obtain independent witnesses.
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