Death Is Just The Beginning - Ethical Issues With Estates and Guardianships

Presented by Inner Temple

SCENE 1:

Attorney Greenhorn’s office

Question #1: Should Young Attorney Greenhorn decline to represent MaxiMultiMillion Senior based on his inexperience in the area of wills?

A. No

B. Yes

C. Maybe

Reasoning: Rule 4-1.1 requires that “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” The comments to the rule further state “In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.”

In this scenario, Attorney Greenhorn should consider whether or not he has the required level of expertise to competently draft a complex will and whether or not Attorney Greenhorn will have the ability to consult with more experienced counsel.

Question # 2: Who is the client?

A. J. Harold MaxiMultiMillion Senior

B. J. Harold MaxiMultiMillion Junior

C. Both Senior and Junior

First, the attorney should address competence, given MaxiMultiMillion's age (92 years old). Rule 4-1.14(a) Maintenance of Normal Relationship - When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. Under the comments sections, the normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions.

The attorney should also address concerns of undue influence based on MaxiMultiMillion's Son contacting the attorney. Then, the attorney must be careful to address conflicts of interest and confidentiality concerns among the different individuals within larger family groups. Some situations will present conflicts of interest and require the clients' informed consent.

A lawyer is ethically obligated to maintain in confidence all information relating to the representation of a client. Rule 4-1.6. A lawyer, however, also has a duty to communicate to a client information that is relevant to the representation. Rule 4-1.4. These duties of communication and confidentiality harmoniously coexist in most situations..

The lawyer-client relationship is one of trust and confidence. *Gerlach v. Donnelly*, 98 So.2d 493 (Fla. 1957). Rule 4-1.6 recognizes a very broad duty of confidentiality on the part of a lawyer. Save for a few narrow exceptions set forth in the rule, a lawyer is prohibited from voluntarily revealing any "information relating to the representation" of a client without the client's consent. Rule 4-1.6. The duty of confidentiality "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source" and "continues after the client-lawyer relationship has terminated." Comment, Rule 4-1.6.

Question #3: Should Mr. Greenhorn allow J. Howard MaxiMultiMillion to change his will and what actions should Mr. Greenhorn take?

A. Advise Anna and Mr. MaxiMultiMillion to seek a competency evaluation;

B. Refuse to make the change and send Mr. MaxiMultiMillion out the door without taking further action;

C. None of the Above

Reasoning: A lawyer cannot make a determination of competency. The comments under Rule 4-2.1 states: "Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts. See also Ethics Opinion 73-25 (April 18, 1974) & Ethics Opinion 85-4 (October 1, 1985)

However, a lawyer may seek appointment of a guardian or take other protective action when the lawyer reasonable believes that the client cannot act in his or her best interest, Ethics Opinion 85-4 cites Rule 4-1.14 (b). The opinion then says the lawyer in that case should protect the client's interests & seek judicial determination of competency. The distinction here may be that the lawyer should not act solely on his impressions from this one event, especially given the reference to "since the fall." The lawyer might press Anna about the fall and recommend JHM be seen by a doctor. Since most likely Anna would object and simply go try to find another lawyer, it would seem the lawyer needs to take some sort of affirmative action before dimply refusing to do the will.

SCENE 2

A will contest has been filed by Anna Nicole Jones against the estate of her late husband Mr. MaxiMultiMillion Senior. The following scene is a hearing on Anna Nicole's motion to compel testimony and documents from Marshall's probate attorney.

Location: Probate Courtroom.

Question #4: Does the attorney's duty to preserve client confidences survive the death of the client?

A. Yes

B. No

C. Sometimes

Florida Rule of Professional Conduct 4-1.6 addresses a lawyer's duty to maintain confidential information of a client. That rule states:

CONFIDENTIALITY OF INFORMATION (a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

The Commentary on Model Rule of Professional Conduct 1.6 by the American College of Trust and Estate Counsel (ACTEC) states, "*Obligation After Death of a Client.* In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information [i.e., any information relating to the representation] following a client's death."

Question # 5: If a lawyer's client is deceased, who is the client? Who can legally represent the deceased client's interests?

A. The Estate

B. The Beneficiaries

C. The Personal Representative

D. Whoever Has the Most Money

In Florida the principle of confidentiality is given effect in two related bodies of law: (1) the rules of confidentiality established in professional ethics; and (2) the attorney-client privilege in the law of evidence, which applies after litigation has commenced. The evidentiary privilege in Florida Rule of Evidence 90.502 protects against compelled disclosure of a confidential client communication and makes it clear that after a client has died, it is the personal representative who may claim the privilege. That rule states:

Florida Rule of Evidence 90.502 Attorney-Client Privilege.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence.

INSERT PICTURE OF WILL

Question #6: Can the drafting attorney testify on the formalities of execution of a will without waiving privilege or violating his duty to maintain his client's confidential information?

A. Yes

B. No

C. Sometimes

An estate planning lawyer who is an attesting witness to a will or trust may testify regarding the circumstances surrounding execution of the instrument, including opinions on the issue of the client's competence at the time. Such testimony is generally not "confidential communications" since the purpose of attesting witnesses are to be able to disclose that the requirements of execution were met. Florida Evidence Code 90.502(1)(c).

Florida Rule of Evidence 90.502 Lawyer-Client Privilege states:

(4) There is no lawyer-client privilege under this section when:

* * *

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

Question # 7: Should the drafting attorney be permitted to testify about his meetings with Mr. MaxiMultiMillion Senior and Anna Nicole Jones?

A. Yes

B. No

C. Maybe

Another exception to the duty to claim evidentiary privilege exists when a lawyer has represented both the decedent and his or her surviving spouse in planning their estates. In litigation between the decedent's estate and the surviving spouse, otherwise confidential communications will not be privileged if they fall within the "common interest" exception.

Florida Rule of Evidence 90.502 Attorney-Client Privilege states:

(4) There is no lawyer-client privilege under this section when:

* * *

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

Question # 8: Should the drafting attorney be ordered to disclose the other drafts of the will?

A. Yes

B. No

C. Maybe

Another exception to the lawyer's ethical duty to claim confidentiality exists for information that serves the client's interests, as long as the client did not expressly forbid its disclosure. Rule 4-1.6(c)(1) contains this exception:

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

When Does Disclosure Serve a Client's Interest?
The ACTEC commentary on the rule states that "[a] lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would *promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention.*"
American College of Trust and Estate Counsel Commentary on Model Rule of Professional Conduct 1.6.

SCENE 3

Anna Nicole is meeting with her attorney to discuss the outcome of the will contest litigation.

Location: Anna Nicole’s attorney’s office

Question # 9: What are Attorney's options with regard to dealing with his client?

A. He must withdraw if he believes that his client cannot make her own legal decisions.

B. He should try to maintain a normal relationship with the client if possible. If that becomes impossible, he may seek the appointment of a professional guardian for the client.

C. He can ignore whatever potential incapacity he may have observed because he's not a psychiatrist, and all clients are crazy anyway.

D. He must institute a guardianship and have the court determine the client's capacity. This should be done as soon and as often as possible, and certainly in any case where the client questions the attorney's bill.

Rule 4-1.14 Client under a Disability and see The ABA Committee on Ethics and Professional Responsibility Opinion 96-404 on August 2, 1996. The opinion addressed the ethical issues that arise when a lawyer believes that the lawyer's client is no longer mentally capable of handling his or her legal affairs. That representation is recognized in Rule 1.14(a) of the Model Rules of Professional Conduct (1983, as amended). The rule directs that a lawyer in that situation should try to maintain a normal relationship with the incompetent client. Rule 1.14(b) permits a lawyer to seek the appointment of a guardian or take other protective action with respect to a client when the lawyer believes that the client cannot adequately protect his or her own interests. The typical attorney- client relationship presumes that there can be effective communication between the client and the lawyer and that the client, after consulting with the lawyer, will be able to make the decisions necessary to obtain the objectives of the representation. When this ability is diminished, maintaining an ordinary relationship may be difficult or impossible. If the client becomes incompetent, Rule 1.14(b) applies only when the client cannot act in his or her own best interests, but not necessarily when the lawyer considers the client's decisions to be in error. Rule 1.14(b) must be exercised with caution and in a very limited manner.

Question # 10: May the attorney seek the guidance of a physician without violating client confidences?

A. No. You have an ethical duty to your client not to call them crazy, or let anyone else know they are crazy.

B. No. Your ethical duty to keep potentially disparaging information regarding your client's medical or mental condition confidential means that you cannot disclose this information to anyone.

C. Yes. The Attorney may seek guidance from an appropriate diagnostician.

In assessing the client's condition, Comment 6 to Rule 1.14 suggests that it is appropriate for a lawyer to seek guidance from an appropriate diagnostician. ABA Informal Opinion 89-1350 states that a discussion of the client's condition with a diagnostician does not violate Rule 4-1.6 regarding confidentiality of information. Limited disclosure of the lawyer's conclusions about the client's behavior to the client's family or other interested persons who are in a position to aid in the lawyer's assessment may also be made within the meaning of disclosures necessary to carry out representation authorized by Rule 1.6. This narrow exception does not permit the lawyer to discuss general information relating to the representation. Additionally, although Rule 1.14 permits a lawyer to take protective actions in these situations, it does not compel a lawyer to do so. Withdrawal
is ethically permissible as long as it can be accomplished without a material adverse affect on the interests of the client under Rule 1.15(b).

Question # 11: May Jr. Associate seek to be appointed as the guardian of the client?

A. Yes. He was directed to do so by Senior Partner, therefore it cannot be unethical if Senior Partner signs off on it.
B. Yes, so long as it is disclosed to the court and all interested parties consent to the appointment.
C. No. There is a conflict of interest that cannot be overcome by waiver or consent.
D. No. A lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to be appointed guardian except in the most exigent of circumstances, when irreparable harm will result from the slightest delay.

If the lawyer chooses not to withdraw, the Committee concludes that a lawyer with a disabled client should not attempt to represent the third party petitioning for guardianship of a lawyer's client. That representation would have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a). The Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to be appointed guardian except in the most exigent of circumstances, when irreparable harm will result from the slightest delay. Before the person has been adjudicated incompetent and a guardian has been appointed, any expectation that the lawyer may have of future employment by the person the lawyer is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer has a duty of candor to the tribunal and special responsibilities to the disabled client. See Rules 1.7(b), 3.3. The lawyer should also disclose any knowledge he or she may have concerning the client's preference for a different guardian. For a discussion of the duties owed to an incapacitated ward by the guardian's attorney, see Hurme, *Attorneys for Guardians Have Duties Toward Incapacitated Persons*, 9 Elder L. F. 11 (May/June 1997) (excerpted from 7 Elder L. Att'y 15 (New York State Bar Ass'n) (Spring 1997)). *The Florida Bar v. Betts*, 530 So.2d 928 (Fla. 1988), involved an attorney who got into ethical trouble by substituting his judgment for that of his elderly client. In *Betts*, the attorney had been retained to prepare a will for his client.

Thereafter, the client's mental competency and physical health began to rapidly decline. During this time, the attorney prepared a first codicil, in which the client removed his daughter and son-in-law as beneficiaries. After the execution of the first codicil, the attorney spoke with the client on several occasions in an effort to persuade him to reinstate his daughter. Subsequently, the attorney prepared a second codicil to reach this result. However, when the second codicil was presented to the client, he was in a comatose state. Moreover, the second codicil was not read to the client, the client made no verbal response when the attorney presented the second codicil to him, and the second codicil was executed by an X that the client marked on the document with a pen that the attorney placed and guided in the client's hand. In concluding that a more severe sanction than that which was recommended by the referee was warranted, the court stated as follows: Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third parties. It is undisputed that respondent did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own. *Id.* at 929.

Final Thought…

"Animals have these advantages over man: they never hear the clock strike, they die without any idea of death, they have no theologians to instruct them, their last moments are not disturbed by unwelcome and unpleasant ceremonies, their funerals cost them nothing, and no one starts lawsuits over their wills."

--Voltaire, French author (1694 - 1778).