

ESTATE PLANNING

Prof. Gerry W. Beyer

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ESTATE PLANNING ETHICS¹

This handout contains the materials to accompany six videotaped vignettes which raise a variety of ethical concerns relating to an estate planning or probate practice. One section is included for each scenario.

I. MULTIPLE REPRESENTATION AND CONFLICT OF INTEREST

A. Summary

Connie Simpson (a CPA who is a life-long friend and client of Seth Richards, a solo practitioner) brings in her father, Ed Simpson, for Seth Richards to plan his estate. Ed's wife has died several years before and Ed has recently had bypass surgery. Connie is rather pushy and has her own ideas about how her father's estate should pass at his death.

B. Questions

1. *Is Seth in a true conflict of interest with regard to representing Ed?*

1. No. Seth can represent Ed after Connie has left Seth's office.
2. Yes. Seth should refer Ed to another attorney because Seth has a conflict in representing Ed and Connie since they disagreed on Ed's estate plan.
3. No. Seth should get each to sign a waiver of the conflict of interest as a precaution.
4. No. Seth can represent Ed and continue to represent Connie's corporation.

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5. Yes. It can be cured if Seth prepares two estate plans: one Ed's way and one Connie's way. If Ed dies first, follow Connie's version; if Connie dies first, use Ed's version. No one's the wiser!

2. *Who is Seth's client?*

1. Connie is. She is paying the fees to have Ed's estate documents drafted.
2. Ed is. Seth is drafting the documents for him.
3. Ed, Connie, and Connie's corporation are clients.
4. Seth has never met a non-client.

3. *What are Seth's obligations regarding the retainer check from Connie?*

1. Seth keeps the check; he performed services by drafting Ed's estate plan.
2. Seth should return the check because he refused to allow Ed to sign the documents which Connie liked.
3. Seth represents Ed. He should return Connie's check and get Ed to pay his bill.
4. Seth should return the check and charge no one for his time.
5. Seth should keep the retainer, use it to expand his parking lot, and hope in the future there is adequate parking.

II. INCAPACITY OF A CLIENT

A. Summary

Adult child of an elderly person brings in her parent to see you to do a Will and powers of attorney. You have represented the adult child on other matters in the past, but have not ever seen the parent. The parent has a taxable estate and some estate planning needs to be done to avoid a significant payment going to the IRS at the time of the parent's death. Your former client advises you that her parent wants to leave everything to his children and grandchildren. You have serious questions as to the parent's ability to execute a Will or a trust. What should you do? Additionally, what are the responsibilities of the Notary Public and the Witnesses when they have questions as to a person's capacity.

B. Questions**1. *Should Seth draft a Will and powers of attorney for Frank?***

1. Yes, so that he can name Susan as agent to control her father's affairs and as executrix of his Will.
2. No, because it does not appear that Frank has testamentary capacity or the capacity to sign powers of attorney.
3. Yes, as long as Seth is careful to leave Frank's property in equal shares to all of Frank's surviving children.
4. No, because Seth has represented Susan and representation of Frank would be a conflict of interest.
5. No, Susan can draft the Will and powers of attorney using forms she found on the Internet.

2. *Should Seth determine whether Frank is incapacitated?*

1. Yes, Seth should send Frank to a doctor to have his capacity determined.
2. No, Frank has not retained Seth to draft the documents and Seth will not do so.
3. No, Seth should call Adult Protective Services of the DHS and let them investigate.
4. No, Susan did not ask Seth to make that determination. She only wanted him to draft a Will and Powers of Attorney.
5. No, Seth should book Frank, Susan, and Sam on the Jerry Springer show.

3. *Supposing Seth drafted the documents, what would be the ethical duties of witnesses and the Notary if they feel that the client is not of sound mind?*

1. They should witness and notarize, and then file a complaint against Seth with the State Bar.
2. They should witness the documents unless they are provided with a statement from a physician stating Frank is incapacitated.
3. They should question Frank to determine his mental capacity.
4. They should refuse to sign the documents.

5. They should witness and notarize the documents with their eyes and ears closed, thus giving them plausible deniability.

III. IMPROPER ACTIONS BY A FIDUCIARY — CONFIDENTIALITY VS. DISCLOSURE

A. Summary

Seth Richards had drafted wills for Steve and Lisa Thornton after their marriage. Since it was a second marriage for both Steve and Lisa, each wanted to create a trust in which property would pass to their children from their first marriage. Steve and Lisa named each other as trustee of the trust for one another's children.

After Steve's death, Seth helped Lisa with the administration of Steve's estate and tells her he will be glad to help her with her duties as trustee under Steve's will. Steven will created a trust for the benefit of Alan and Julie (Steve's two children from his first marriage). Lisa does not contact Seth about her duties under the trust until two years after the estate has been administered when she got a demand for an accounting from Alan's lawyer. When Seth and Lisa meet, it is apparent that Lisa has been using trust funds improperly for the benefit of Bill (her own child from a prior marriage).

B. Questions

1. *Should Seth tell Alan and Julie that Lisa has improperly used assets from the bypass trust for her and her son's benefit?*
 1. No, because Lisa has given Seth confidential information which cannot be disclosed to a third party without Lisa's permission.
 2. Yes, because Lisa is committing an illegal act.
 3. No, because of attorney/client confidence unless Lisa's conduct amounts to a continuing fraud on the beneficiaries.
 4. Yes, because Steve was Seth's client and he wanted his kids to receive his separate property.
 5. Yes, because Seth secretly hates the practice of law and wants to get disbarred so he can do something else with his life.

2. ***If Seth does not reveal the misapplication of the trust funds, can the beneficiaries recover against Seth if they discover his prior knowledge and failure to disclose?***
 1. No, the Barcelo case will protect Seth from suits by a beneficiary of a trust if there was no privity of contract between Seth, Alan, and Julie.
 2. Yes, because Seth had a duty to disclose Lisa's conduct and failed to do so.
 3. No, because Seth is prohibited from disclosing Lisa's conduct under the Disciplinary Rules.
 4. Yes. Because Lisa failed to affirm that she would stop taking money from the bypass trust, there could be a continuing fraud upon her stepchildren which was disclosed to Seth.
 5. No, because Seth was clever enough to insert a provision in the wills that any beneficiary who tries to sue him forfeits all rights in any trust.

3. ***Suppose Seth had represented Alan and Julie in their estate planning at about the same time he did Steve's and Lisa's plan, would he be obligated to tell Alan and Julie of Lisa's improper actions regarding the bypass trust?***
 1. Yes, because he has a duty to keep a client reasonably informed, and should disclose Lisa's conduct.
 2. No, Lisa, as the current client, has advised Seth that he should not tell Alan and Julie. Seth may not disclose the information he has learned from Lisa to his former clients.
 3. Seth can keep quiet because the bypass trust was only created out of fear that Alan and Julie would "blow" their inheritance by their immature behavior.

4. ***If Seth had represented the beneficiaries in the past, can Seth continue to represent Lisa as trustee?***
 1. Yes, as long as he gets Alan's and Julie's written permission to represent Lisa.
 2. No, Seth should withdraw from representation of Lisa because a conflict clearly exists between Lisa and Alan & Julie, which conflict cannot be waived by the parties.
 3. Yes. Seth has no conflict if Alan and Julie are no longer his clients.
 4. Yes. Seth is bipolar, allowing a distinct personality to represent each client, thus shielding him from any conflicts problems.

IV. CONFLICT OF INTEREST AND CONFIDENTIALITY

A. Summary

Seth Richards has represented Charlie and Sylvia Phillips, husband and wife, for years. Recently, Charlie was promoted to executive vice-president so Charlie and Sylvia went to see Seth to do some estate planning for them. They agree on a plan and signed new wills. Two weeks later, Charlie goes to see another attorney, Herb Anderson, to redraft his will. Charlie and Seth bump into one another when Charlie is leaving Herb's office. Charlie tells Seth he has redone his will to make his girlfriend, Rebecca, a significant beneficiary of his share of the estate and that Seth cannot tell his wife, Sylvia, because he told him in confidence. Seth goes to see a leading ethics expert, Jeremy Dorfman, to get advice on what to do.

B. Questions

1. *Did Seth have a duty to disclose to Sylvia that Charlie had changed his will?*

1. Yes, because Charlie had told him he hired a new attorney.
2. No, Seth cannot tell Sylvia because Charlie told him not to.
3. No. Seth should have kept his mouth shut. When Seth represented Sylvia and Charlie, there was no conflict between them.
4. Yes, Seth has a duty of loyalty to Sylvia and an obligation to keep her reasonably informed.
5. Yes, but only after helping Sylvia find someone else for her to "take up with."

2. *Is Seth prohibited from disclosing Charlie's new will to Sylvia?*

1. Yes. One cannot use confidential information from a client to that client's disadvantage without that client's consent.
2. No. Charlie tried to perpetrate a fraud upon Sylvia with the new will.
3. No, Charlie and Sylvia impliedly consented to disclosure because they knew a potential conflict of interest could arise.
4. Yes. Disclosure would likely lead to a messy divorce between Charlie and Sylvia.

5. No, but to be safe, Seth should call Sylvia and pretend to be Herb (Charlie's new attorney) so Herb can take the heat for this mess.
3. ***What should Seth have done to avoid the problem created by the need to 1) disclose to Sylvia and 2) keep Charlie's confidence?***
1. Seth should have refused to draft both wills. He could have drafted Charlie's and sent Sylvia elsewhere.
 2. Seth should have contacted the Professional Ethics Committee for an ethics opinion before deciding how to proceed.
 3. Seth should have disclosed the potential conflict of interest between the two, and established rules regarding confidentiality in the initial meeting, which would have been incorporated into the written retainer agreement.
 4. Seth should have sent a certified letter to Charlie advising him that Seth has a duty to tell Sylvia since Seth no longer represents Charlie.
 5. Seth should have suggested to Sylvia and Charlie that each "take up with" someone else.

V. SERVING AS EXECUTOR AFTER DRAFTING THE WILL

A. Summary

Seth Richards, a practitioner in the field of estate planning and probate for 15 years and Adam Gray, a relatively new associate, are discussing what to do about probating the will of Carol French. Carol was a long term client of Seth who recently passed away. Seth is named as the executor in Carol's will. The attorneys are discussing the fact that the will does not identify who are "my nieces and nephews."

B. Questions

1. ***Is it appropriate for Seth to act as Carol's executor?***
 1. Yes, because a lawyer always makes a better executor than a lay person.
 2. Yes, because he is named in the Will as such.
 3. No, because the firm is a creditor of Carol's estate.

4. No, because Seth may have to act as a witness in the declaratory judgment action.
 5. No, because Seth has never had “executor” lessons.
2. ***If Seth found a list of nieces and nephews in his file but was unable to locate another relative to testify, can his firm represent Carol’s estate?***
1. Yes. An attorney ad litem can be appointed to represent the nieces and nephews, and Seth’s firm can represent the estate.
 2. In an independent administration, a declaratory judgment to determine who the beneficiaries are is not necessary.
 3. No. Seth’s firm should decline representation because Seth will be a witness regarding the identities of the beneficiaries.
3. ***Assuming the Will provides the executor can receive compensation, can the firm collect executor fees AND charge legal fees for Seth’s services under the Will?***
1. Yes, because Seth will be acting in a dual capacity and the firm can receive fees for his acting in both capacities.
 2. No. Seth can only receive fees as executor because he is acting as the executor, although he may also use his skills as an attorney.
4. ***Assume the Will provides the following bequest: “I give to my life-long friend and attorney, Seth Richards, all of my interest in my Dell Computer stock.” Is Seth prohibited from receiving such property?***
1. No. Seth can receive stock since Carol wanted him to have it.
 2. Yes. Seth should not take the stock and act as both the attorney and executor.
 3. Yes. Seth is prohibited from receiving the stock because a gift to a lawyer in a will is void.

VI. SOLICITATION AND UNAUTHORIZED PRACTICE OF LAW

A. Summary

Attorney, Seth Richards, and Insurance Agent, Gordon Mitchell, have been friends since college. Gordon calls Seth with a name of a doctor whom he has just met who needs some estate planning. Gordon tells Seth that Gordon's company will do a living trust for the doctor and that Seth should call her about a will and powers of attorney.

B. Questions

1. *Was it improper for Seth to call Dr. Walker to set up a time to meet with her and her husband?*

1. No, because Gordon advised Dr. Walker of Seth's name and that he was an attorney and a friend of Gordon's.
2. No, because Seth did not try to coerce or use undue influence in order to get Dr. Walker to meet with him.
3. No, because the legal services Seth is offering do not come from an injury or event which occurred to Dr. Walker or her husband.
4. Yes. Dr. Walker has not sought Seth's advice, and his primary reason for calling her is for his own pecuniary gain.
5. Yes. Seth should first have broken the ice by sending Dr. Walker the new FTD floral bouquet, "I Want To Be Your Lawyer--Call Me!"

2. *Can Seth assist Gordon in creating an estate plan for the Walkers if Gordon prepares the living trust?*

1. Yes, as long as Seth reviews and approves the language of the living trust before the Walkers execute it.
2. No, because Gordon and his company are engaged in the unauthorized practice of law.
3. No, because Seth's advice might be that a living trust is not necessary and the Walkers' assets are better protected under a marital deduction will.
4. Yes, if Seth explains all estate planning options to the Walkers and they choose the living trust.

5. Yes, but to avoid a claim that Gordon is practicing law, Seth should hire him as his legal assistant to prepare the living trust.