

The Hazards of Ethical Lawyering: Perspectives from a Planner and a Litigator

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Today's Outline of Topics

- I. Who is the Client?
- II. Creating the Attorney Client Relationship
- III. Common Conflicts of Interest and Waivers Thereof
- IV. The Attorney Client Privilege and the Duty of Confidentiality
- V. Client Capacity Issues
- VI. Maintaining Competence
- VII. Ending the Attorney Client Relationship

Resources for Practitioners:

- ▶ Connecticut Rules of Professional Conduct (CRPC) including the official commentary thereto
- ▶ American Bar Association's Model Rules of Professional Conduct (MRPC) including the official commentary thereto
- ▶ American College of Trusts and Estate Counsel (ACTEC) Commentaries
- ▶ Relevant federal and state case law

I. Who is the Client?

- ▶ A prospective client is defined as “ *[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship.*” Rule 1.18. [Duties to Prospective Client].
- ▶ We should perform due diligence before agreeing to representation.
 - ▶ This may include:
 - ▶ Social media searches
 - ▶ Internet searches
 - ▶ Party names on court websites
 - ▶ Searches on the land records
- ▶ Once we are satisfied with the bona fides of our potential client, we must ask who is our client? This answer is crucial in determining the legal and ethical duties of loyalty, and confidentiality we owe our client.

- ▶ Does the duty of confidentiality apply to prospective clients?
 - ▶ Rule 1.18 confirms that even if no attorney client relationship is formed, an attorney has a duty not to reveal information learned in consultation.
 - ▶ *“A lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation except as Rule 1.9 [Duties to Former Clients] would permit with respect to information of a former client.”* (Rule 1.9 prohibits a lawyer from using information relating to the representation of a former client to that party's disadvantage until the information has become generally known.)

- ▶ How do conflict-of-interest rules apply to prospective clients?
 - ▶ Rule 1.18 imposes duties on us that offer substantial protection to the prospective client and provides a certain degree of flexibility for the lawyer.
 - ▶ For example, a lawyer who had discussions with a prospective client is disqualified from a subsequent representation that is adverse to the prospective client only when “the lawyer received information from the prospective client that could be significantly harmful to the person in the matter.”

▶ Representing Multiple Parties

- ▶ There are instances where it is often appropriate to represent more than one member of the same family in connection with their estate plans.
- ▶ Their common goals and cost efficiency makes representation by the same attorney appropriate and reasonable.
- ▶ When representing multiple parties, pay close attention to Rule 1.7. [Conflict of Interest: Current Clients].

▶ Representing Spouses

- ▶ It is generally cost effective to represent both spouses under these circumstances and ethically appropriate, provided, professional responsibilities are extended to each and to both.

▶ Joint Representation of Multiple Clients

- ▶ Multiple clients refers to more than one beneficiary with a common interest in an estate or trust administration matter or co-fiduciary of an estate or trust. It is important to determine what information is protected by the attorney-client privilege and be clear on the professional responsibilities to each family member.

▶ Separate Representation of Multiple Clients

- ▶ In some instances, it is preferable to represent multiple parties as separate clients. In a separate representation of parties (for example, spouses), we treat each spouse as a separate client. We do not share information between the two clients, except to the extent that it fosters the purposes of each. When representing as separate clients, each client must give his or her informed consent to the lawyer's representation of the other party.
- ▶ In multiple client representations, each client must provide his/her informed consent to representation of the other party.

- ▶ There are times when an attorney will represent the fiduciary.
 - ▶ When representing a fiduciary, the attorney must be clear as to whom he/she owes the duty of loyalty.
- ▶ In Connecticut, an attorney for a fiduciary represents only the fiduciary.
 - ▶ Thus, the attorney's legal duty extends only to the fiduciary and not the beneficiaries.
- ▶ In other jurisdictions that do not follow Connecticut's rule, courts draw a distinction between whether an attorney represents a fiduciary generally on behalf of an estate or whether an attorney represents the fiduciary individually.
 - ▶ In these jurisdictions, the attorney's professional duties extend to the beneficiaries.

II. Creating the Attorney Client Relationship

- ▶ Once we have determined who the client is, the next step is to define the scope, the objective, the timetable, and the basis upon which the fee will be determined. All of this should be set forth in the engagement letter.
- ▶ Rule 1.5 [Fees] requires an attorney memorialize for the client, in writing, "*before or within a reasonable time after commencing the representation,*" three important items: (i) the scope of the representation; (ii) the basis or rate of the fee; and (iii) the expenses for which the client will be responsible.

- ▶ It is crucial to define and limit the *scope of work*.
 - ▶ “*The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.*” Rule 1.2 cmt. [Scope of Representation of Authority Between Client and Lawyer].
 - ▶ A simple yet effective risk management tool is drafting a specific scope of the work the attorney will be performing.
 - ▶ If representation expands beyond the original scope in the initial engagement letter, draft a new engagement letter or amend the original agreement.
 - ▶ The letter should make note of the confidential conflicts that may arise and how that confidential information will be conveyed to other clients.
 - ▶ Never guarantee a particular result in the engagement letter.

- ▶ The engagement letter should include the *basis or rate of the fee and expenses* for which the client will be responsible.
 - ▶ Rule 1.5 states that “*[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client.*”
 - ▶ Under Rule 1.5, the fee structure may be:
 - ▶ Hourly Rate: The rate should be specified and an increase in the rate must be communicated to the client before it is changed.
 - ▶ Contingent Fee: (e.g. Probate litigation)
 - (i) be in writing;
 - (ii) be signed by the client;
 - (iii) set forth the method for calculating the fee and the percentage of the recovery to be kept by the lawyer in the event of settlement, trial or appeal;
 - (iv) state whether the client is responsible for court costs and litigation expenses and if so, whether such expenses are to be deducted before the contingent fee is calculated; and
 - (v) set forth the expenses, if any, the client is liable for regardless of whether the client is the prevailing party.

► Under Rule 1.5 (see also *Hayward v. Plant*, 98 Conn. 374 (1923); Rule 39 Probate Court Rules of Procedure), reasonableness is determined by following a non-exclusive list of factors:

(i) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(ii) the likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(iii) the fee customarily charged in the locality for similar legal services;

(iv) the amount of fee involved and the results obtained;

(v) the time limitations imposed by the client or by the circumstances;

(vi) the nature and length of the professional relationship with the client;

(vii) the experience, reputation, and ability of the lawyer or law firm; and

(viii) whether the fee is fixed or contingent.

- ▶ The engagement letter should also spell out the consequences of the failure to pay in a timely manner the legal fees invoiced to the client.
- ▶ Include definition of the expenses for which the client is responsible. This includes court costs, litigation expenses, copying, telephone charges, and how and when these expenses are to be deducted.
- ▶ The engagement letter should also include a document retention policy which advises the client of the duration for which copies of the file will be held. This avoids disputes later regarding whether an attorney kept or did not keep documents for a specific period of time.

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III. Common Conflicts of Interest and Waivers Thereof

- ▶ Generally, an attorney cannot represent a client when that client's interest is adverse to another client.
 - ▶ Rule 1.7 [Conflict of Interests: Current Client] provides that an attorney shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (i) the representation of one client will be directly adverse to another client; or (ii) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person, or by a personal interest of the attorney.

- ▶ Waivers
 - ▶ Clients can waive a conflict of interest under Rule 1.7.
- ▶ A client who is adequately informed may waive a conflict.
 - ▶ Effectiveness of the waiver is determined by the extent to which the client understands the material risks the waiver entails.
- ▶ Thus, it is in the attorney's best interest to clearly explain the material risks that come with a waiver.

- ▶ Generally, an attorney may represent a client notwithstanding a conflict, however, some conflicts are so serious that informed consent is insufficient to allow representation. These conflicts are referred to as non-waivable conflicts.

- ▶ An attorney may represent a prospective client notwithstanding a potential conflict:
 - (i) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (ii) the representation is not prohibited by law;
 - (iii) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and
 - (iv) each affected client gives informed consent, confirmed in writing.

- ▶ Under Rule 1.9 [Duties to Former Clients], attorneys owe a continuing duty to former clients.
 - ▶ This issue can arise when an attorney has represented a husband and wife jointly in connection with estate planning matters, but have since divorced.
 - ▶ Rule 1.9(a) *"A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a 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."*
- ▶ If the attorney receives informed consent (waiver) confirmed in writing from one party, the attorney can continue representing the other party. If the attorney, however, does not receive consent, the attorney cannot represent the other party in any matter that is substantially related to the attorney's prior joint representation in which one party's interests are now materially adverse to the other's interests.
- ▶ But, if the matter is unrelated to the attorney's prior joint representation and does not implicate (i) any interest that is adverse to one party or (ii) confidential communications related to the prior joint representation, the attorney may represent that party.

- ▶ Rule 1.10 [Imputation of Conflicts of Interest] is intended to apply the principal of loyalty to the client vicariously to attorneys who practice in a law firm. The rule treats all attorneys in a firm as one attorney for purposes of applying principles of loyalty to a client. The rule states that all attorneys in a firm are disqualified from representing a client when one attorney associated with the firm is disqualified.

- ▶ There are exceptions, however, that allow representation to take place if:
 - ▶ (i) the prohibition is due to a personal interest and does not present a serious risk to the other attorneys in the firm representing the client or
 - ▶ (ii) if the conflict arose from the attorney's affiliation with a prior firm.

- ▶ To satisfy the rule, the prohibited attorney:
 - ▶ (i) must not participate in the matter
 - ▶ (ii) be screened from participating in the matter including fees, and
 - ▶ (iii) written notice must be given to any affected former client

IV. The Attorney-Client Privilege and the Duty of Confidentiality

- ▶ “The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011).
 - ▶ Its purpose is to encourage open and honest communication between client and attorney to enable the attorney to provide sound and informed legal advice.
 - ▶ The privilege belongs to the client and can be asserted by the client.
 - ▶ In Connecticut as under federal law, the attorney client privilege is the product of common law and is also codified in the Code of Evidence. Conn. Code. Evid. § 5-2.
 - ▶ Rule 1.6 [Confidentiality of Information] states that the attorney may not reveal information relating to the attorney's representation without the client's informed consent.
 - ▶ In Connecticut, the attorney-client privilege protects both confidential advice provided to a client as a legal advisor and the information provided to the attorney by the client that allows the attorney to provide advice.
 - ▶ The privilege survives the client's death.

- ▶ There are differences between the duty of confidentiality and the attorney-client privilege.
- ▶ Generally, the duty of confidentiality is broader than the attorney-client privilege. All information relating to the representation of a client is confidential.
- ▶ The attorney client-privilege might arise from a situation where the privilege may be raised such as a judicial proceeding where an attorney may be called as a witness or be required to produce evidence regarding a client whereas the duty of confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. It applies not only to matters communicated in confidence to the client, but also to all information relating to the representation, regardless of its source. For communication to be confidential, it is not necessary that it be marked "confidential". This is only a factor that a court may consider in determining confidentiality.
- ▶ The attorney-client privilege extends to communications between agents of both the attorney and the client.

- ▶ There are exceptions to the attorney-client privilege.
 - ▶ One is the fiduciary exception.
 - ▶ The fiduciary exception makes confidential communications and materials exchanged between the attorney and the fiduciary-client discoverable by the beneficiaries.
 - ▶ Connecticut does not recognize the fiduciary exception to the attorney client privilege. Accordingly, beneficiaries do not have a right to review confidential attorney-fiduciary communications.
 - ▶ Another is the probate exception.
 - ▶ In Connecticut, an exception exists in a will contest in which an attorney who prepares a will may be required to disclose what the attorney knows about the testator's state of mind at the time of the execution of the will.
 - ▶ *See Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico*, 273 Conn. 315, 327 (2005) (“When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator’s will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent’s interests. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator’s state of mind.”).

- ▶ In some instances, the attorney-client privilege can be waived.
 - ▶ Waiver can be voluntary.
 - ▶ Waiver can be involuntary by inadvertent disclosure to third party recipients outside of the privilege including advisors, experts, consultants or by email to opposing counsel.
 - ▶ If an attorney is representing two clients jointly, a client may unilaterally waive the privilege to his or her own communications with the attorney, so long as those communications concern only the waiving client. The client may not unilaterally waive the privilege to any other joint client's communications.
 - ▶ In some instances, the court can require attorneys to waive the privilege and produce attorney client privileged documents. See *Bria v. U.S.*, 89 A.F.T.R.2d 2002-2141, 2002 WL 663862 (D. Conn. 2002) (Co-executors of an estate retained counsel but were terminated while preparing a tax form. The IRS investigated whether the co-executors understated the value of the estate on the tax form. The IRS issued a summons to the former attorneys for the co-executors and an objection was raised based on the attorney-client privilege. The court ordered the attorneys to answer questions and produce documents as to certain areas including joint bank accounts that would otherwise be protected by the attorney client privilege).

V. Client Capacity Issues

▶ Rule 1.14 Client with Impaired Capacity

(a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client is unable to make or communicate adequately considered decisions, is likely to suffer substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a legal representative.

(c) Information relating to the representation of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- ▶ The first step is to ascertain your client's capacity.
 - ▶ The standard test for testamentary capacity is often easy (the knowledge of one's estate and the natural objectives of one's bounty and an understanding of the consequences of the intended disposition) but the impact of diminished testamentary capacity can be difficult to assess.
 - ▶ Presumption of capacity satisfied by submitting proof of the executed will and self-proving witness affidavits.
 - ▶ Presumption of capacity can be rebutted by evidence of the testator's unsound mental condition at the time of execution.

- ▶ While the current commentaries seem to suggest that freedom of testation should take precedence over a lawyer's subjective doubts as to a client's capacity, or that resort to court-supervised estate planning may be desirable in some cases, an estate planning representation for a client with diminished capacity frequently arises in a complicated and/or an urgent factual context.

- ▶ Nevertheless, even in a crisis, a consultation with a knowledgeable physician or mental health professional may serve the client's and the lawyer's best interests.

- ▶ We represent competent adults in estate planning matters, and we provide our clients with information regarding how to protect their interests in the event of their diminished capacity. The obvious challenge arises when the clients themselves can no longer take protective actions and there is a risk of substantial harm to the client.

- ▶ Under subsections (b) and (c) of Rule 1.14, we have an implied authority to make disclosures of otherwise confidential information and take protective action when there is risk of substantial harm to our client. Before we make such disclosures, we must consider:
 - ▶ The client's wishes;
 - ▶ The impact of our actions on potential challenges to our client's estate plans;
 - ▶ The impact of our ability to maintain the client's confidential information; and
 - ▶ The impact on our clients right to privacy and physical mental and emotional well being.

- ▶ As far as possible, we must accord our client with diminished capacity the status of “client” and maintain as many of the tenets of that relationship as reasonable under the circumstances.
- ▶ In keeping the client's interests foremost, the client may wish to have a family member present during meetings. We must rely on our client's directions under the circumstances and not the inconsistent direction of family members. And we must always consider the impact of a joint meeting between client and family members on the attorney-client evidentiary privilege.

- ▶ It is important to employ safeguards to determine the true intent of the client. These might include:
 - ▶ Even if a family member is present during the meetings, the attorney must rely on client's directions and not the family members.
 - ▶ When capacity is borderline, the attorney should take steps to preserve evidence regarding client's capacity.
 - ▶ Examine the testator's physical and mental capacity.
 - ▶ Scrutinize unexpected gifts and/or significant changes to a longstanding estate plan.
 - ▶ Look for isolation and opportunities where a third party had the opportunity to exercise undue influence.

- ▶ Attorneys must be aware of potential undue influence:
 - ▶ Attorney must be careful and evaluate the amount of interest and participation other members of the family exhibit when assisting with the creation of a trust or drafting a will.
 - ▶ The document must reflect the client's will and not that of someone who influenced the client.

- ▶ Representation of client after diminished capacity is established.
 - ▶ If we represented the client prior to the client suffering diminished capacity, we may be considered to continue to represent the client after a fiduciary is appointed.
 - ▶ Although incapacity may prevent a person from entering into a contract or legal relationship, if we represented the person with diminished capacity prior to the incapacity, it may still be appropriate to continue to meet with and counsel the client.
 - ▶ Also, we may represent the court appointed fiduciary of the current or former client, provided the representation of one will not be directly adverse to the other.

- ▶ We can also consider, if a client has been adjudicated incapable, procedures for obtaining court supervision of the estate plan, including substituted judgment proceedings.
- ▶ Estate planning with court approval is premised on the concept of substituted judgment, upon notice, petition and good cause shown, the court continues to have broad powers to approve estate planning which benefits not only the incapacitated person, but also his or her family, members of the household, friends and charities in which he or she was interested.

▶ Lifetime Gifts:

- ▶ If the court is satisfied that assets exist which are not required for the maintenance, support and well-being of the incapacitated person, it may adopt a plan of giving which minimizes current or prospective taxes and/or which carries out a lifetime giving pattern. The court may consider any ascertainable testamentary or inter vivos intentions of the incapacitated person. Such gifts may be made outright or in trust.

▶ Trust Amendments:

- ▶ The court may approve the amendment of a revocable trust created by the incapacitated person as the court deems advisable due to changes in tax laws.

▶ Creation of Revocable or Irrevocable Trust:

- ▶ The court may approve the creation of a revocable or irrevocable trust for the benefit of the incapacitated person or others, which may extend beyond the incapacitated person's disability or life.

▶ Exercise, Release and Disclaimer of Powers and Interests

- ▶ The court may approve the exercise, release or disclaimer of powers held by the incapacitated person, including but not limited to powers held as a fiduciary and powers held as donee of a power of appointment.
- ▶ The court may also approve the exercise, release or disclaimer of the incapacitated person's interests in property, including but not limited to contingent interests, marital property rights, rights of survivorship in joint tenancies or tenancies by the entirety, elective share interests in the estate of deceased spouse, any testate, interests in intestate or inter vivos transfers, options to purchase and rights under life insurance policies, annuity contracts or other contracts providing for payment to incapacitated person or others after his or her death.

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VI. Maintaining Competence

- ▶ Pursuant to Rule 1.1 [Competence], “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- ▶ Commentary to Rule 1.1 provides in part: *“To maintain the requisite knowledge and skill, an attorney should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the attorney is subject.”*

▶ A Case Study: The internet of things (IOT)

- ▶ The IOT is comprised of everything connected to the internet linked through wired and wireless networks around the globe and generates trillions of gigabytes of data per year.
- ▶ This can include data that a user might actively input into a device such as name, email, address, height, age, weight and eating habits. The data can also include GPS mapping, heartrate, geolocations of photos taken on a smart phone, the types of exercise one engages in, and sleep schedules. It also includes discrete cameras, smart doorbells, Google Home or Amazon Alexa.
- ▶ Data can also be gathered by our smart phones, wearable such as Fitbit or Apple watches, connected toys, smart home goods, and smart vehicles.

- ▶ This data can potentially be used in discovery to prove or disprove allegations. It can be used to help determine the credibility of witness testimony. For elderly clients with memory or mobility issues, smart devices can assist by providing notifications about appointments or when certain bills may be due, while cleaning appliances such as the Roomba vacuum clean the house without requiring manual labor. The information collected by these devices will become more available and sought after in discovery, specifically in cases where wills, guardianships, and mental competence is being challenged.
- ▶ There remains the question, however, of whether these devices are infallible. Because they are imperfect machines, they may not always be reliable and provide perfect data.

VII. Ending the Attorney-Client Relationship

- ▶ The first step is to close your file. This includes sending a closure letter.
 - ▶ The closure letter should clearly terminate the scope of representation. By sending one, the attorney avoids any issues under Rule 1.16 [Declining or Terminating Representation] regarding whether a client is characterized as a former or current client.

- ▶ The letter should include specific language explaining that the attorney's representation of the client has concluded. It should include events, dates, and the circumstances that terminate the representation.
 - ▶ It should also include how the attorney will withdraw and what will happen to the records. Specifically to whom they will be sent and for how long and where they will be stored.

- ▶ This does not mean that the attorney cannot represent the client in the future nor that the client is no longer a client of the attorney. It simply means that the attorney no longer represents the client in that specific matter.

- ▶ It is beneficial for an attorney to send a closure because:
 - ▶ It informs the client when representation on the matter has concluded.
 - ▶ It fixes the accrual date for the period limitations.
 - ▶ Establishes the point at which the client becomes a former client for conflicts of analysis purposes.

- ▶ Rule 1.16 provides: *“A written statement to the client confirming the termination of the relationship and the basis of the termination reduces the possibility of misunderstanding the status of the relationship. The written statement should be sent to the client before or within a reasonable time after the termination of the relationship.”*

- ▶ A client whose representation is dormant becomes a former client if the attorney or the client terminates the relationship.

Questions?