

Ethical Issues for Trusts and Estates Practitioners

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Introduction to speakers – 5 minutes

I. Ethical Issues Concerning Letters of Engagement

A. The Regulation: 15 minutes

1. Part 1215.1 to Title 22 of the Official Compilations of Code, Rules and Regulations of the State of New York provides:

(a) “Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impractical; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term *client* shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

2. Section 1215.2 Exceptions

This section shall not apply to:

- (a) Representation of a client where the fee to be charged is expected to be less than \$3,000;
- (b) Representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;
- (c) Representation in domestic relations matters subject to Part 1400 of this Title; or
- (d) Representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

B. Check list regarding engagement letters:

- 1. Define who the client is;
- 2. Was a proper conflict check performed?
- 3. Engagement Letter "shall provide":

- a. Scope of legal services;
 - b. Attorneys' fees to be charged, expenses and billing practices
 - c. Client may have right to arbitrate fee disputes under Part 137
4. Scope of legal services: What work will be undertaken on behalf of the client?
 - a. Preparation of Last Will & Testament;
 - b. Preparation of Trust Agreement;
 - c. Estate and Tax Planning;
 - d. Business Succession Planning;
 - e. Real Estate Matters;
 - f. Estate planning and tax issues concerning businesses and/or real estate;
 5. If there are conflicts of interest, use the letter of engagement to disclose facts and obtain waivers;
 6. Discuss with clients and insert language in engagement letter such as lack of attorney-client privilege between spouses;
 7. Are there issues to discuss regarding potential clients?
 8. Transmit engagement letter to client, and only to client.

C. Hypotheticals – Ethical Issues in connection
with Engagement Letters

II. **Attorney-Client Privilege: Litigation Scenarios Concerning Breaches
Of Duty of Confidentiality**

A. New York Rules of Professional Conduct 1.6,
“Confidentiality of Information,” in part, states: 15 minutes

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

B. New York Rules of Professional Conduct 1.0(j)
defines “Informed consent” as follows:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the

lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

C. Basic rule: duty of confidentiality

1. “Rule 1.6 is arguably the most important single rule in the Rules of Professional Conduct. It embodies the basic duty of confidentiality, which is fundamental to an understanding of loyalty, conflicts of interest, and the adversary system.” Roy D. Simon, Jr., *Simon’s New York Rules of Professional Conduct Annotated*, § 1.6:1 (2021).

D. Undue influence litigation scenarios on transmitting drafts of wills/trust agreements/other confidential communications to anyone other than the client and having discussions with such nonclients:

1. Communications with lawyer on initial meeting;
2. Meeting with third parties at initial meeting;
3. Digital Communications (Emails/Texts/Cell phones) with third parties;
4. Sending drafts of estate planning documents to third parties;
5. Sending executed estate planning documents to third parties.

E. Informed consent: a client’s waiver of attorney client privilege

1. Should you even ask a client to waive (e.g., nonclient stays in office conference)?
2. How does the client waive?
 - a. Oral
 - b. Writing

3. Communications with client as to waiver

F. “Electronic” devices in which potential breaches of privilege take place:

1. Email
2. Facetime
3. Zoom
4. Texts
5. Cell phones

III. Conflicts of Interest with Current Clients 15 minutes

A. New York Rules of Professional Conduct 1.7, “Conflict of Interest: Current Clients”

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

- (2) the representation is not prohibited by law;
 - (3) 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 other proceeding before a tribunal; and
- (3) each affected client gives informed consent, confirmed in writing.

B. Comments to Rule 1.7, “Nonlitigation Conflicts”

1. Comment [27]: “For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. *See* Comment [31].” N.Y. Rules of Prof'l Conduct, Rule 1.7, Comment 27 (McKinney's 2022).

C. Comments to Rule 1.7, “Special Considerations in Common Representation”

- 1. Comment [31]: As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and

the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4¹. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.” N.Y. Rules of Prof’l Conduct, Rule 1.7, Comment 31 (McKinney’ 2022).

¹ Rule 1.4 provides: Rule 1.4, “Communication” provides:
(a) A lawyer shall:
(1) promptly inform the client of:
(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
(ii) any information required by court rule or other law to be communicated to a client; and
(iii) material developments in the matter including settlement or plea offers.
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with a client's reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

D. “The lawyer's avoidance of conflicts of interest with clients is an ethical responsibility of long standing that goes hand in hand with the protection of the client's confidential information and secrets that is discussed in the Commentary for Rule 1.6. Although these obligations to some extent may operate differently, they spring from the similar principles. The lawyer serves the client, in furtherance of which the client must be protected from misuse of the information by the lawyer or by others and, rather than advancing competing interests of other clients, parties or even self-interests, the lawyer must give primacy to the client's interests.” Kevin Anthony Reilly, 2021 *Practice Commentaries* (McKinney’s 2022).

E. Decisions for discussion

15 minutes

1. *Feighan v. Feighan*, 180 A.D.3d 873, 118 N.Y.S.3d 674 (2d Dep’t 2020);
2. *Newman & Newman, P.C. v. Mali*, 2021 N.Y. Misc. LEXIS 2546, 2021 N.Y. slip op. 31618(U) (Sup. Ct., New York Co. 2021).

IV. **Ethical Duty of Insuring That Clients Understand Complex Estate Planning Documents**

15 minutes

- A. Transmittal letters/emails re explanation of documents
- B. Deliberation on drafts of wills/trust agreements and letters of explanation: send them as far in advance of date of execution of documents as possible
- C. Client’s capacity to sign will/trust agreement
- D. Complex transactions involving real estate, businesses (corporations, partnerships, LLCs) and estate planning

V. **Select Litigation Scenarios Involving Ethical Failures In Estate Planning**

1. Letters of Engagement

- a. Sending letters of engagement to someone other than client (via email/mail)
- b. Payment of retainer fee by someone other than client

2. Attorney-Client Privilege

- a. Communications with someone other than client about client's estate planning documents
- b. Family member of testator/third party attends meetings between attorney and testator and communicates with attorney-drafter directly without testator
- c. Attorney sends drafts of estate planning documents to family member of testator/third party and receives comments directly from that party

3. Conflicts of Interest

4. Expert Witnesses in Litigation

Questions and Conclusions 10 minutes