Ethical Issues in Trusts and Estates Practice: A Surrogate's Court Litigator's Perspective for NY Attorneys

McCarthy Fingar LLP

PRESENTED BY

Irma K. Nimetz, Esq.

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Irma Nimetz is a partner in the law firm of McCarthy Fingar LLP, where she specializes in litigation. She is a member of McCarthy Fingar LLP's Appellate Practice, Commercial Litigation, Surrogate's Court Litigation and Trusts & Estates groups. In Surrogate's Court, Irma represents fiduciaries (executors, trustees and guardians) and actual or prospective beneficiaries of estates and trusts in a variety of contested proceedings, including, but not limited to, Will & Trust Contests; Property Turnover Proceedings; Fiduciary Removal Proceedings; Contested Accountings; Spousal Rights Proceedings; Kinship Proceedings; and Will or Trust Construction Proceedings.

Prior to joining McCarthy Fingar LLP, Irma was an attorney with the New York State Attorney General's Office, where she received the Louis J. Lefkowitz Memorial Award for outstanding performance by an Assistant Attorney General. Irma has experience handling governmental investigations against individuals, businesses and not-for-profit organizations, as well as defending actions and Article 78 proceedings brought against the State of New York and its agencies. Irma also has experience as a New York litigator with the Manhattan offices of two global law firms, Winston & Strawn LLP and Fulbright & Jaworski LLP (now Norton Rose Fulbright US LLP), where she handled all aspects of commercial litigation.

Irma is a frequent lecturer to community and professional groups on topics concerning Surrogate's Court litigation, trusts and estates, ethical issues confronting trusts and estates practitioners, and internet safety.

Irma has been recognized as a New York Super Lawyer in the areas of Estate & Trust Litigation, Estate Planning & Probate and General Litigation.

Irma graduated *magna cum laude* from Duke University in 1984 and from Cornell Law School in 1987. She is admitted to practice law in the State of New York, State of New Jersey, and the District of Columbia, and in the Southern and Eastern District Courts of New York.
She is a member of the New York State Bar Association (Trusts and Estates and Elder Law and Special Needs Sections) and a Vice-Chair of the Estate Litigation Committee of the New York State Bar Association, a member of the House of Delegates of the New York State Bar Association, a member of the Board of Directors of the White Plains Bar Association, and a member of the Westchester County Bar Association (Executive Committee, Trusts and Estates Section), and the Westchester Women's Bar Association.
You can contact Irma at inimetz@mccarthyfingar.com or at (914) 385-1029.

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Surrogate's Courts in New York State – Introduction

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Surrogate's Courts in New York State

- There is a Surrogate's Court in every one of New York's 62 counties
- Judge is called the Surrogate
  - Two Surrogates in New York County
  - Two Surrogates in Kings County
- Elected to 10-year terms
  - 14-year terms for New York and Kings County Surrogates

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Jurisdiction of Surrogate's Courts

- **Constitution of State of New York (adopted in 1961, effective September 1, 1962), Article VI (Judiciary), § 12 (Surrogate's Courts)**
  - Article VI, § 12(d)
    - Jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.
  - Article VI, § 12(e)
    - Shall exercise such equity jurisdiction as may be provided by law.

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Applicable New York Statutes and Court Rules

- Estates, Powers and Trusts Law (“EPTL”)
- Surrogate’s Court Procedure Act (“SCPA”)
  - Uniform Rules for Surrogate’s Court (Part 207)
- Civil Practice Law and Rules (“CPLR”)
  - Uniform Civil Rules for the Supreme Court and the County Court (Part 202)

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Grounds for Will Contests (Surrogate's Court) and Trust Contests (Surrogate's Court or Supreme Court)

- Objections to Probate
  - Lack of Capacity
  - Lack of Due Execution
  - Undue Influence
  - Fraud/Duress

- Action/Proceeding to Set Aside a Trust
  - Lack of Capacity
  - Lack of Due Execution
  - Undue Influence
  - Fraud/Constructive Fraud

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New York's Rules of Professional Conduct
(effective April 1, 2009)

- Rules promulgated by OCA and New York Courts
- Comments are explanatory, not mandatory
- Rules are a combination of Old New York Code of Professional Responsibility, ABA Model Rules and old ABA Model Code
- NYSBA Committee on Professional Ethics answers inquiries from attorneys and provides advisory opinions concerning an attorney's proposed conduct

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Letters of Engagement

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Letters of Engagement

- Regulation: 22 NYCRR 1215 (Part 1215 of Title 22, Judiciary, Compilation of Codes, Rules and Regulations of the State of New York)
  - Applies to all departments within Appellate Division
  - Section 1215.1.Requirements
  - Sections 1215.2.Exceptions

Letters of Engagement (22 NYCRR 1215.1)

Section 1215.1. Requirements

(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 impractible; 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.

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Letters of Engagement (22 NYCRR 1215.2)

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.

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Letters of Engagement – Checklist

- Prepare engagement letter including:
  - Explanation of scope of legal services
  - Explanation of attorneys' fees to be charged, expenses and billing practices
  - Client's right to arbitrate fee disputes under Part 137 of Title 22, "Fee Dispute Resolution Program"
- Establish identity of the client:
  - Is your client the adult child of an elderly parent?
  - Is it the elderly parent himself?
  - Who will you be representing?
- Perform a proper conflict check (if not already completed)

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Letters of Engagement – Scope of Legal Services

For example:

- Preparation of Last Will & Testament
- Preparation of Trust Agreement
- Preparation of Health Care Proxy and Living Will
- Preparation of Powers of Attorney
- Estate and Tax Planning
- Business Succession Planning
- Real Estate Matters
- Representation of Fiduciaries

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Letters of Engagement – Additional Considerations

- Representation of spouses or partners
  - Lack of attorney-client privilege
  - Obtain written waivers
- Transmittal
  - To whom?
    - Who is the client?
    - What if the client has limited technological aptitude?
  - By what method?
    - Via Email?
    - Via Mail?

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Letters of Engagement – Examples from Practice

- Client requests a “simple” will for a flat fee of less than $3,000 – should you draft an engagement letter?
- Client does not have a computer and/or smart phone – should you send engagement letter via email to client’s child?
- Client signed engagement letter with your firm for a separate matter and asks you or your colleague to draft a will “as a favor” – should you send a separate engagement letter?

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Confidentiality of Information and Informed Consent

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Rule 1.6 of New York Rules of Professional Conduct, “Confidentiality of Information”

(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) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
(5)(i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(d) or 1.18(b).

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Informed Consent Under Rule 1.6

New York Rule of Professional Conduct 1.0(j):
(j) “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.

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Importance of Rule 1.6 of New York Rules of Professional Conduct, "Confidentiality of Information"

- "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 (2023).

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Confidentiality and Informed Consent – Examples from Practice

- Undue Influence Scenarios
  - Initial Client Meeting
    - Who is present?
    - Did you receive informed consent from your client as to others present?
  - Digital Communications with Third Parties (e.g., adult children, significant others)
    - Emails
    - Texts
  - Sending Drafts of Wills/Trusts to Third Parties
  - Informed Consent….in writing!
- Electronic Devices and Potential Breaches of Attorney-Client Privilege

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Conflicts of Interest with Current Clients

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Rule 1.7 of New York Rules of Professional Conduct, “Conflicts of Interest with 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
(4) each affected client gives informed consent, confirmed in writing.

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Comment to Rule 1.7, “Nonlitigation Conflicts”

Comments to Rule 1.7, “Nonlitigation Conflicts”

“[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 2023).

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

“[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 1.4. 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’s 2023).

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Rule 1.4 of New York Rules of Professional Conduct, “Communication”

(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.

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Conflicts of Interest with Current Clients – Considerations for a T&E Practitioner

- Representing spouses or partners

- Divorce
  - *Feighan v. Feighan*, 180 A.D.3d 873, 118 N.Y.S.3d 674 (2d Dep't 2020)

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Rule 1.7 – Conflicts of Interest Among Family Members

- NY Ethics Op. 1253 (N.Y. St. Bar Ass'n Comm. Prof'l Ethics), 2023 WL 2352333, Opinion No. 1253, February 27, 2023
    - Fact Pattern Discussed
    - Questions Presented:
        - May lawyer represent daughter/executor of father's estate in sale of separate, unrelated parcel of real property in father's estate?
        - May lawyer represent daughter as executor of father's estate?
        - May lawyer continue to represent daughter, as executor of father's estate, and son as defendants in real estate litigation?

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Rule 1.7 – NY Ethics Op. 1253 (continued)

- Conclusions
  - Lawyer who represents executor and simultaneously represents beneficiary of the estate in unrelated matter does not have a concurrent conflict of interest.
  - "Differing interests" (defined in Rule 1.0(f)) may arise where lawyer simultaneously represents both an estate's executor/beneficiary and a co-beneficiary as co-defendants in civil litigation for damages – if so, lawyer may not continue representation of both co-defendants unless lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent in writing.
  - If executor instructs the lawyer to file a cross-claim against her co-beneficiary in the civil litigation, conflict is non-consentable.

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Witness – Advocacy Rule

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Rule 3.7 of New York Rules of Professional Conduct, “Witness-Advocacy Rule”

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
(1) the testimony relates solely to an uncontested issue;
(2) the testimony relates solely to the nature and value of legal services rendered in the matter;
(3) disqualification of the lawyer would work substantial hardship on the client;
(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
(5) the testimony is authorized by the tribunal.
(b) A lawyer may not act as advocate before a tribunal in a matter if:
(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

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Witness-Advocacy Rule – Considerations for a T&E Practitioner

- Will contest on will you drafted
  - Do you represent the fiduciary of the estate on administration proceedings?
  - Do you retain counsel for the probate proceeding?
  - Can you prevail on a summary judgment motion?

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Surrogate's Court Litigation Scenarios and Ethical Pitfalls

- What to Avoid
  - Sending letters of engagement to someone other than client
  - Receiving payment of retainer fees from someone other than client
  - Communications with someone other than client (i.e., a child and/or beneficiary) concerning client's estate plan
  - Communications and meetings between attorney-drafter and family members without the presence of the testator
  - Sending drafts of estate planning documents to family member/third party and receiving comments directly from family member/third party
  - Conflicts of Interest

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Contact Information

Irma K. Nimetz, Esq.
McCarthy Fingar LLP
711 Westchester Avenue, Suite 405
White Plains, NY 10604
Email: inimetz@mccarthyfingar.com
Telephone: (914) 385-1029

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