



Ethics in Estate Planning

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The area of estate planning is filled with ethical concerns for the attorney and the client. The ethical issues could fill a book and vary from state to state. We will address some of the common issues that can affect decision-making in your estate planning process and beyond.

Our legal system is an adversarial process; that is, in theory, with zealous representation on both sides of a dispute, the courts will arrive at the correct answer to a dispute. This works well in many areas but it poses some unique problems in the area of estate planning. Often estate planning is done with a team of people striving to develop the best possible plan for the client. This is a cooperative process, not adversarial. If you understand the ethical rules your attorney is required to follow, it will help you make decisions regarding your team and other important issues. Rules differ from state to state; therefore, the rules discussed here are general and apply to California.

The first question your attorney may ask himself or herself when you contact his or her office is: “Who is my client?” You might think this is obvious; if you walked into the office, you are the client. But this is not the case. Sometimes a family member will contact the office on behalf of a loved one. This can be for a number of reasons. Some of these reasons may be in the interest of the person for whom an estate plan is being contemplated and some of those reasons may not. It is important for you to know that just because someone pays the bill, it does not mean that he or she is the client or has a right to any information, or to direct the work of the attorney.

One problem estate planning attorneys often see is the personal and financial losses which result when a non-attorney attempts to direct the creation of the estate plan. At its worst, this is done in what is known as trust mills. In such circumstances, typically an insurance salesperson, accountant, or financial planner contacts the client with the intent to sell financial products. The trust is offered as a means of persuading the potential client to reveal his or her financial interests, thereby making it easier for the salesperson to sell products. If there is an attorney involved, the client may never see the attorney and if the client does, the estate planning goals

are being driven by the salesperson, not the client. Many of these trusts are done cheaply to attract the client, and at the same time, keep the practice away from the awareness of law enforcement. If an attorney is working for a trust mill, he or she has breached his duty of loyalty to the client. Many mills will simply get a plan off the internet or have one created and apply it to all the customers without any legal counseling to assure it is the correct plan for the client. Usually problems with these trusts are only detected when the client dies. In some cases, the family is left to probate an estate because the trust failed or worse yet, the estate ends up in litigation because the way the trust was created caused conflict or aggravates pre-existing conflict in the family.

Some of these same tactics are being used by those offering to help clients apply for public benefits such as Medicaid or, in California, Medi-Cal. Typically, in this situation, products such as annuities, life insurance and/or long-term care insurance may be sold and, unlike in the case of a sale of a trust, very high fees may be charged for the application with the promise to represent the client in any dispute. Any layperson can represent you in a hearing but only an attorney can represent you in court. Only an attorney can be sure that the qualification and application process does not adversely affect the overall estate plan.

Your attorney has a duty of loyalty to you, the client, not the referral source. This includes your accountant, financial planner, insurance or annuity salesperson, and family members. To protect yourself, first, be sure you see the attorney in person. Second, ask the attorney how many referral sources of this type they have. The more referral sources they have, the less they are dependent on one source for business and the more independent they can be for you.

Your attorney also owes you a duty of confidentiality. You have a right to expect that the confidences you share with your attorney will be kept private. You, not your attorney, are the holder of the attorney/client privilege. For this reason, only you can decide if you want your attorney to share private information with others. Sharing information with reputable professionals of your choice can be a big benefit to you. This creates a team of people who will bring their expertise to solving your unique problems.

However, when the attorney/client privilege is waived by the client, information shared may be accessed in litigation if litigation later occurs. This may or may not be a good thing. It would help to establish your intent if there is any question after you pass away. However, it could mean that information you intended to be kept from the public eye could be revealed. Most estates do not result in litigation after the fact if you create a reliable team and put a good estate plan in place.

Other members of your team may be family members or very close friends, what I will call, family of choice. One of the benefits of a trust is that the trust is a private document. However, problems can occur if the person designated to hold your power of attorney or who becomes the successor trustee if you are unable to serve, is not informed concerning the duties he or she has with regard to your estate and personal wishes. Some of this can be spelled out in the estate plan but if your

key support people in your family of choice must take on responsibilities and be required to learn what their duties are and how to fulfill them in a time of grief, the responsibility can be overwhelming.

Disclosing your reasoning for your estate plan to family members can help to avoid future litigation that is emotionally driven. Typically, if your family knows in advance why you chose a particular person as a fiduciary, it can reduce conflict later. This is a counseling issue you should discuss with your attorney. Here again, you would be waiving your right to confidentiality if you allow your attorney to work with family members.

Ideally, you will have a lifelong relationship with your estate planning attorney, revising your plan as your situation, goals, or the law changes. This can create some difficult ethical problems for your attorney as you age. Within the confines of the law, your attorney must zealously represent your wishes. Your attorney may not supplant his wishes for yours. As we age, it is common for our reasoning abilities to slow down. This can make the older client susceptible to undue influence by unscrupulous people. Sometimes this influence may come from caregivers, family members, or sales people. Financial and physical abuse of the elderly has become such a problem that some states have enacted laws that allow attorneys to receive three times the amount of the money lost and other expenses if they win a case against an abuser. However, by the time the abuse is recognized, the money may no longer be there to retrieve. Worse yet, it can be very embarrassing to admit someone has been able to take advantage of you.

If the client refuses to allow the attorney to report an abuser, either financial or physical, to law enforcement, the attorney may not disclose the information. This is because the law values and protects the special trust that clients place in their attorneys. However, some other professionals, such as bankers and doctors, are actually required to report abuse, with or without the client's permission.

One way to avoid a number of these difficulties is to develop a reliable team in advance. If you begin training your successor trustee to take over the responsibilities of the position while you are still at your peak, mentally and physically, you are more likely to have a trained person you trust in place when the time comes to turn the responsibility over to that person. The problem for an attorney comes when the client is not aware that the time has come to make that transition. Most of us know of situations where family members have driven their car long after they should have given up the keys to the car. This can be true of dealing with financial affairs also. However, if you have trained your successor trustee, the loss of control is not so much of an issue.

Your attorney is faced with an ethical dilemma if you refuse to turn over control and a family member feels, often in your best interest, that it is time. At this point, your attorney must follow your direction, even if he believes it is not in your best interest in his opinion. If your attorney has done estate planning for other members of the family involved in the dispute, your attorney will likely be required to remove

himself as counsel for all the parties because of a conflict of interest between his representation of you and the other family member.

What can you do to be sure you are dealing with a competent and ethical attorney? First, be sure you are dealing with an attorney. Look the attorney up with your state bar. Be sure he or she is licensed and in good standing. Your state bar may tell you if the attorney belongs to any special areas of the state bar or has received any specialized training. Second, keep in mind the issues we have discussed here and ask questions. If you choose to create a team, make sure it is your team. Only you will know whom you trust, and with a little research, you are likely to put together a very good team that will serve you well.

The Law Office of Hawk & Downing practices in the area of estate planning, elder law, real estate, and insurance defense.