

Trusts and Estates: Avoiding Liability in an Ethical Minefield

By: Richard Pullman and Samuel Kessler
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Trusts and estates attorneys in Texas routinely navigate a complex legal maze. The practice area involves working closely with professionals in the insurance, accounting, tax, and wealth management fields. While the multi-dimensional aspects of trust and estates make for an intellectually stimulating and emotionally satisfying work life, the nature of a trusts and estates practice presents a minefield of ethical considerations attorneys must recognize in order to avoid liability and foster long-term client relationships.

The rewarding aspects of practicing trusts and estates are, perhaps, the underpinning to ethical concerns unique to the practice area. The longer an attorney represents a family, the more likely relationships within that family will change. As a result, interests become less aligned. Much of what we advise our clients to do, for example establishing a trust or the creation of a new legal entity, effectively creates new duties within a family. As estates grow and interests change, these duties complicate how attorneys represent and advise members within a family or entity.

Though duties vary depending on the size and complexity of the estate, attorneys are required to possess a minimum level of competency. The ABA Model Rules of Professional Conduct require the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation. An estate administration can be as simple as a single matter involving a will that directs outright distribution of assets to a single beneficiary. On the other hand, it can be far more complex, illustrated by the distribution of a large estate that includes multiple entities to be distributed to multiple beneficiaries. The latter type of estate administration will require an attorney to understand tax implications, charitable bequests, creditors rights, the rights of a surviving spouse, and more—all of which will increase the complexity of the administration and require a heightened level of competency.

Notably, the ABA Model Rules do not address the issue of specialization nor do they discuss an obligation of counsel to hire or consult a specialist on a particular aspect of administration. The comment to the Rule 101, instead, provides options for attorneys dealing with more complicated administrations. The comment recognizes that lawyers may acquire adequate skills through necessary study or by association with a lawyer of established competence.

A lawyer's duty to effectively communicate with the client is paramount when dealing in trusts and estates. Lawyers must keep clients reasonably informed about the status of a matter, promptly comply with requests for information, and explain a given matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation. The goal is to facilitate the proper conclusion of each matter that arises in the administration of the estate in accordance with the client's expectations. While effective communication may seem rudimentary, the transparency that results provides a shield from liability and significantly reduces the likelihood of malpractice claims.

Clearly identifying the client at the outset of engagement is fundamental in establishing transparency through communication. When the “client” is the estate, the lawyer’s primary duty is to that entity through its personal representative—not to the representative as an individual. The attorney must then distinguish between the estate and the individuals with whom the attorney communicates. There are times when the estate’s interests may be adverse to those of its representative. ABA Model Rule 1.13 suggests that lawyers advise, in writing, that they cannot represent such an adverse constituent, and that the individual should consider obtaining independent representation. It is imperative that the constituent understands that the lawyer for the estate cannot provide legal representation in an individual capacity and that discussions between the lawyer and individual may not be privileged.

Resolving these unique ethical scenarios is ultimately attributable to an attorney’s ability to exercise a high degree of personal and moral judgement. Lawyers who practice trusts and estates are more exposed than others due to the multi-dimensional nature of the practice. As the array of claims available against attorneys continues to evolve, attorneys practicing trust and estates should always identify their client upfront and put all critical decisions and legal advice in writing to the extent possible.

Richard Pullman can be reached at rpullman@kesslercollins.com 214.379.0743

Samuel Kessler can be reached at skessler@kesslercollins.com 214.379.0720