Unedited transcript of

Estate Planning: Ethics Hypotheticals

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>>: So we are going to jump into some ethics hypotheticals. And for many years when we did this program, we sort of wove the ethics discussion in and out of each section. The last couple of years, we've had to do dedicated ethics sections I think in order for folks to get proper credit for this. There has to be a certain amount of ethics time. And we do want to give it due credit because this is -- this is a big part of your practice, right? Many of us entered this profession because we wanted to help people. We have to be mindful that what we do is intensely personal for these clients, right? It's their money; it's their families; it's the skeletons in their closet. We often joke that we should moonlight as psychologists because of all the discussions we find ourselves entertaining with clients, but we have to be careful, right? This profession particularly is also ripe for litigation because of all these things that we touch. So Jim and Richelle are going to run through some hypotheticals. We'll do some more later in the week to help us keep ourselves out of hot water.

>>: We just have a couple of cases that we pulled together, but, you know, once we get through those, Jim and I and Katie can chime in on some other interesting stories that we've encountered along the way over the years. So our first case, a financial advisor tells you that he has referred a married couple to you for estate planning. Your legal assistant schedules a phone conference and sends the firm's questionnaire and worksheet to the contact information provided. On the initial call, only the wife is present and advises the husband will call the office later. The wife reviews her assets and estate planning goals with you. She then mention a brokerage account

with $500,000 balance that she would like to leave to an environmental conservation charity. She states her husband has no knowledge of this account and she wants you to keep that information confidential. On the call with the husband, he reveals the wishes to leave his hunting cabin to his son from a previous marriage. He states that this would upset his wife and asks you how this can be kept from her. Jim?

>>: All right. So you might think this is far-fetched, but I almost came to this exact situation, just a couple of years ago. A woman was referred to us. I ended up meeting with her myself, going through her estate planning. She was married. She did not have any children as a result of this marriage. So she had ideas on where she wanted to leave her assets. She indicated at that initial meeting she wasn't sure if she was actually going to -- going to be asking me to do estate planning just for her or to include her spouse at that point. So a little time went by after I had met with her, and then the husband had reached out, so she had given the husband our information. He ended up having an initial call with my associate attorney, and based upon both conversations, it was evidently clear they were not on the same page as to their estate planning at all. They both made some comments, you know, similar to this, where I don't want it to be shared, and so in that situation, we had both of the clients in, both myself and my associate met with them, explained to them that, you know, if we're going to represent both of them, everything has to be on the table. So there cannot be any side, confidential conversations. Everybody has to know exactly the assets, where they're going, if we're going to represent both of them. And at that point, you know, they had consented to it. We put in our engagement letter right away that any discussions between -- with us, whether from one spouse or another, if we're doing a joint representation, we have to share that with the other spouse. So there's not going to be any sort of confidential conversations going on to the detriment of the other spouse. So that's a situation we made sure that they knew right off the bat that if we're doing it, that they're both going to have to know and it took a little while. We eventually did their planning. We took bets in the office as to who's going to kill who by the end of the next couple of years. So it was a strange situation, but these definitely come up. But that was the r that was the most blatant one which was almost the exact case study here where they initially wanted to keep things separate and you can't do that

on a joint representation. So here are the conflicts of interest that you want to be looking at, and obviously, forbidding any sort of conflict that can. So if there's going to be any sort of thing that I would err on the side of not undertaking the representation in those situations. Katie, I'm sure you've seen some of it as well?

>>: Absolutely. So this happens a lot. And I know you and I had many discussions about these kinds of things over the ten years that we practiced together. But yeah, it comes up quite a bit. And so it comes up -- a lot of times where we have blended minerals, right? So it could be a second marriage for one or both of them, and so they're coming at it with very different ideas, but sometimes, it's not, and they've been married for a number of years and maybe one of them has had an affair and they want to benefit the woman on the side. There is the child that was born out of wedlock that they want to benefit from, but they want the other spouse to know nothing about it, right? So if you're taking on these clients as a couple, you have to very clearly state that there are no secrets; that you have an obligation to share all of that information if you're representing both; and then, of course, as Jim mentioned in your engagement letter, you're going to put that conflict of interest language in there that states that you're representing both of them, and there are plenty of times where married couples will have separate representation, right? They'll go to two different firms and that's just fine, and that's sometimes in instances like this where they don't want to share, that has to be -- that has to be the result.

>>: Right and similarly we sent out a questionnaire that is going to have, you know -- have them both fill it out as joint, so you know, maybe some assets, and it's a second marriage, maybe they're keeping assets separate. So maybe they're going to have different beneficiaries on the road, which is -- which is fine. Usually in those cases, we're going to be doing separate revocable trusts for them, but it all has to be disclosed, all the assets, you know, we share with both of them because we want it there and that's a common one, especially on second marriages, is how they want their assets to go and I've had the conversation, you know, they know they had to get their planning done and whatnot and they come in and I ask you just got married, in your second marriage are you going to be

taking care of and providing for each other first and then going to children if you have children from the previous marriage? Or are you just going to have it go right to your children? And so you know, it doesn't matter to us as we're doing the planning, but we want to make sure that they're aware of these different things and most of the time, any of it can be changed if we're doing revocable trust planning, but if they're going to keep their assets separate and a lot of times we'll be doing those separate revocable trusts where they may or may not provide for the spouse in that case, and then they want their assets to go to maybe their children from the first marriage.

>>: And we had a question come in. It said you can't have joint representation, what about on a single representation, would you take only one client on in this type of scenario, knowing these details? So yes. We can represent couples jointly and you often will. You just need to make sure that that conflict of interest language is in your engagement letter and be clear with both of them that there are no secrets, and then you certainly can take -- have -- represent them separately. And then a follow-up to that same question. Is it an issue that they have a prenup that already defines what is joint and what is not joint? In other words, if this was already disclosed ahead of the second marriage and they agreed to it? So prenuptial -- I think Heidi touched on this yesterday. But that's one of the questions you're going to ask your clients when they come in to meet with you. It probably should be on your questionnaire, right? So if they have a prenup in place, you need to have a copy of that prenup before you do any planning because chances are that prenup needs to be referenced in the plan itself and there may be provisions that are required that are in those plans. So even if all of this is disclosed ahead of time, and they're both aware of it, you still need to have those discussions with your clients. And as long as they're -- as long as they're sharing information with each other and they know the consequences of the information sharing and that they're going to do separate plans, then you're fine. Like as Jim said, particularly in blended marriages, they may have separate trusts that benefit their children first before anything goes to a spouse or it may have an income interest to that spouse for their lifetime, but ultimately, everything's going to go to their two sets of children. That's all fine as long as all of that information is properly disclosed in the course of the

representation.

>>: And it's so important if you can get the prenup agreement and also in the case if people are divorced is to get the divorce decree before you do planning because a lot of times, they may or may not be aware of it, but there might be requirements in their divorce agreement, which is going to provide for, you know, their children or for the ex-spouse or some sort of policy, life insurance policy for them, so you want to make sure that your planning dovetails in agreement with their -- whether it's prenuptial or their divorce.

>>: Exactly.

>>: Case two?

>>: I think so.

>>: Okay. So case number two. You have just received your -- and have decided to open up your own shop. The first client to walk in the door makes you feel it's time to get -- she tells you her net worth is somewhere around $20 million and she's anticipating an inheritance of an additional $10 million in the future. The client was told by her CPA she should lower her estate and federal tax liability so she gets roughly million dollars to her grandchildren and favorite charities. The client owns several small businesses and is being sued by a supplier. What do you do?

>>: Might want to call counsel in that case. So we have competency slide on it, but could an attorney do that? There are a gazillion different issues on case two. So a lot of times, I would not advise a new attorney to be taking on a client like that. Obviously, to have the experience to go through all the different issues and to spot all the different issues, you would want to be practicing for a long time. So in those situations -- we handle -- we have been cocounseling with a number of attorneys that are more in the beginning stages of estate planning or, you know, they may be comfortable up to $1 million, but they don't feel comfortable handling any estates that are over that. So sometimes, we'll just get referrals in those cases or we'll co-counsel with them. I've had a few recent, which right in that same

ballpark, 17 to $20 million, and the attorney referring it over, co-counseling, is more sole practitioner, hasn't had some of the experience on the tax side, you know, so they want to make sure that it's handled correctly and you definitely don't want to be taking on anything where, as Katie has alluded to, it's a very litigated field, estate planning, so you don't want to take on cases where there's going to be malpractice in there. So you definitely want co-counsel or work with somebody if you are just that new and starting out, because there's a lot of legal issues, tax issues that are included in that case two study.

>>: Yeah. You have -- you have to know what you don't know, right? So for folks that are just starting out, you have to be fully aware of what you're capable of doing and what you're not. And it doesn't mean that you're not great at your trade if you have to pass off more complex cases to more Sunday professionals. I think that's what a good lawyer does. They know their limitations. Similarly those of us that specialize in estate planning, there are some folks that are what I would call a jack-of-all-trades, right? So they'll do your will and they'll do your divorce and they'll set up your business and they'll do your bankruptcy. Maybe they're good at those things, maybe they're not. I think a great practitioner is one that really hones their skills and focuses on one particular practice area. As we've shown in just the last two mornings, there's so much that comes under the umbrella of estate planning, even within estate planning. There are some practitioners that never touch this complex stuff, right? They only do simple planning. There are some practitioners that only do elder law planning. There are practitioners that only do succession planning. So you have to know your limits; you have to know what you're good and you have to know when to partner with others because if you take on things like this, right? And there are missteps or mistakes or there are things that weren't offered that should have been, this client will come calling back and say why don't you do this? Or when they pass away, their kids will come back and say why didn't you do this? So important to know what you don't know.

>>: Exactly. And that's what I do. I say right in the field here, any sort of even litigation, I've had some background in it, but I try to stay where I'm good at so any litigation comes up I'm happy to pass that off to a litigation attorney. Real estate, any different things, I'm happy to pass that off,

because you're not going to do it efficiently, first of all, if you've never done it. It's going to take you a lot longer to do, and it's better to kind of stay with what you're good at and work in that field. And, as I said, I get a good amount of referrals from other practicing estate planning attorneys just because they're not comfortable at certain levels and you can still get a lot of referrals from different types of attorneys and we do a lot and I'm happy to give out those ones that I'm not good at.

>>: It can be really hard to turn a referral away, especially when you're starting out, because it's exciting, you're building your practice, but, you know, hopefully, you surround yourself, your build yourself a network around you, and it's an opportunity for you to make a referral, which is going to come back to you tenfold in the future. So you know, the bottom line is you've got to serve the clients and if you're not capable of doing that, you want to put them in touch with someone who can.

>>: Absolutely. We had a follow-up question come in for the first scenario. So for the couple, would you still take -- so for A and B, would you still take on spouse B, even though you knew information about A that B does not know? I think that's a slippery slope, right? So even if you're not representing both and only one of them, if you know something about the other spouse, I'm not sure that you can adequately represent them without a conflict existing. Jim, chime in if you feel differently. But I think if anything seems like it's not a good idea, it's not a good idea. [Laughs]

>>: Yeah. I agree fully. Again, that situation, I said to my associate before I'm like all right if there's any hesitation, then we're letting both of them walk because I'm not -- I'm not undertaking that where, you know, we had talked to both of them. And as Katie alluded to earlier, I do have a couple of clients, not too many, but I will -- in one case, there's more money on the wife's side, she wanted to get her planning done. We had done planning for her and have not on the husband. But that's because she wanted to get it done. She didn't get into any specifics about their marriage or anything so you can certainly do it in that case. I had never spoken to the spouse. We just did planning for the wife in that case. In this situation where we had spoken to both of them, I would have just walked away otherwise, because it is -- it's too much of a slippery slope and I don't want to be sued

in that case. So it's good to stay away from being sued.

>>: Yes. I agree with you. Absolutely. All right. So we have one more case to go through.

>>: We do. Five years ago, you drafted an estate plan for a client which included a living trust, healthcare proxy and durable power of attorney. The client is a single man with no children who had roughly $5 million in total assets at the time, named his niece as the successor trustee, healthcare proxy and attorney in fact with his nephew as a backup agent. At the time, of the signing, the client was competent and in good health. However, after suffering a stroke, the client is now not able to communicate. You receive a call from his nephew that the niece has purchased a new car, taken several trips, and is renovating her home. The nephew further states that his uncle is living alone with limited support and he is concerned for his safety. What do you do?

>>: So that's certainly a tricky one in that. You had done the drafting. Your client is obviously the uncle in this case. You don't represent the power of attorney. You don't represent the backup power of attorney in that case. So you have to be extremely careful in that regard. So if you can, we've included some of the diminished capacity. So we definitely see it in this area quite a lot with estate planning. Somebody does have diminished capacity, so you want to be -- tread lightly as to who your client is and what your duties are to your client. In this, it mentions that you can -- in order to protect him -- if somebody's being taken advantage of, there's certain elderly groups that we might want to contact or have the nephew contact in that regard to make sure that those things are -- in this case, the niece isn't actually taking advantage of him. But yeah, it's definitely something in estate planning where we see -- most of the time thank goodness, it's all on the up and up, but you definitely have to be very careful. You may have family members calling the office disclosing certain things and you have to make sure that you remember or you only give out information in who you represent because you don't want to be giving out confidential information to somebody that might be related to them, but, you know, you might not know what the nephew is after as well without having all the information.

>>: Right. Right. You always have to know certainly who your client is and be clear with these folks whether they have good intentions or not, who your client is and it often means you may make recommendations to them that they seek counsel and as Jim mentioned too, you don't always know what their intentions are, and so sometimes, what they have claimed is not accurate, right? And they're doing so just because they have their feathers ruffled over something. So I know Jim and I had a family that we worked with a few years back, and that was exactly it. So there was the daughter that had been named in some capacity and she was doing a great job on behalf of dad. There was another daughter who didn't care that she wasn't in this capacity and she had a number of issues of her own, and so she filed a complaint with elder services against her sister and actually her brother to say that they were not doing what they were supposed to, which was not the case, right? But it was a nightmare for all of them, and so sometimes, people just don't have good intentions when they're making those complaints as well. So you just have to know your clients and have to -- if it isn't your client, let folks know if they have concerns what they should do and certainly, in this same context, be mindful of just diminished capacity in your clients in general, because if you know that they are beginning to have diminished capacity and they come to you to change documents, or it seems like their son or daughter is in their ear, influencing them what to do or carving someone out of a document, you need to be mindful of that as well because that's all ripe for litigation and those questions when we're notarizing documents, are you under undue influence? You have to affirmatively say that this person knew what they were doing. If you don't think that client has the capacity to sign that document or make those changes, don't do it. And if they're doing something that is a drastic change from their plan before, make a note of it in your file, paper your file and cover your butt.

>>: And actually going back to that same client, I think it's sometimes very important to speak alone with your client and make sure that they understand. Because sometimes, they act differently if one of the kids is in the room, which I think was that case, Katie. Their intention is much different when that person leaves. So it's important just as an overall practice to speak to your client alone, even if a family member has brought aunt Gertrude in to do her estate planning and we want to make sure we

speak to the client alone to make sure they're understanding, and a lot of times it's benefiting maybe the person that's coming in with them. They may be the beneficiary, and if it's challenged down the road from other cousins or something along those lines, we want to be able to make sure that we spoke to the client alone. This is what their free act indeed was and this is what they intended to with the estate planning.

>>: -- we do a lot of accounting in this area, just to document the money coming in, the money going out, and that can be contention on whether or not the document, you know, gave the beneficiaries the right to an annual accounting or, you know, if that leads to legal proceedings. I was involved in a huge case years ago, I think we did like 15 years of back accounting and the niece in this situation was embezzling money from the grandfather. So you know, while he was not being cared for. So she was removed, a guardian was appointed to the grandfather, and, you know, I think it's potentially still going on today.

>>: We had another question come in. What should you do when you learn that an attorney has created new planning documents for a former client whom you know to have diminished capacity? And that is a tricky one, right? That is a tricky one. And I know that I have encountered that before and I believe Jim has, as well. And, you know, do you represent that client anymore, is the question, and then do you have a duty to report that practitioner to the BBO? I think that can be a slippery slope, as well. And often can be retaliatory. So I think you need to be careful and at the end of the day, if there is no harm, no foul, that's okay. But that may be hard to determine. But if there is wrongdoing that is going to result from that, you may have a duty to report that.

>>: Yeah. I think the BBO, Katie, do they have like a call center where if you do face sort of ethical dilemmas to maybe run back as to what your proper procedure should be in those cases where you know you don't have to disclose anything in writing at that point, but at least run that by somebody there so that you know what the best course of action is.

>>: Absolutely. All right. That brings us to the end of our -- now, that we're all scared. [Laughs] Scared to go out and do this. But Jim and Richelle

have been doing this for a long time and we promise it's worthwhile. In any event, thank you both so much for doing this for me one more time. And we're going to take another short break, and then we are going to jump into a deeper dive into succession planning, which we started talk about yesterday in the insurance discussion so Jim and Richelle thank you both so much.

>>: Thank you.

>>: A quick five-minute break and we'll hop back on in five minutes with Amy.