

Unedited transcript of

Estate Planning Ethics Hypotheticals

from **Estate Planning: MCLE BasicsPlus!®**

Recorded 08/02/2021

Speaker(s)

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>>: So, another ethics hypothetical. This is a little bit of overlap with what we talked about with Jim and Rachelle, but ethics is really woven into basically everything that we do. We need to be mindful that we are zealous advocates, right. I think that's what it said in the personal liability or whatever that exam is that you have to take in law school. We have to be zealous advocates of our clients, and we have to know who our clients are, and we have to work on their behalf. Sometimes the water gets muddy, and we saw evidence of that yesterday when we were talking about the few cases with Jim and Rachelle, and it is particularly muddy, I think, in the estate planning space. You have a duty to perform ethically no matter what area of the law you're practicing in. But it seems to get real muddy, more so in estate planning, because of the intersection of estate planning with real life. I think I said yesterday that this is intensely personal. This is people's families, the skeletons in their closets, their personal finances, all of those kinds of things, and things that they hold near and dear and are super important. So sometimes it's hard. Even when we think we're doing the right thing, we need to make sure that we're mindful of all of the circumstances, and could that be spun as maybe we're not doing the right thing. So I've been contacted by woman named Marie, on behalf of her mother Sophia. Marie indicates that she found your name online and that her mother wants to update her estate plan. Specifically, Marie indicates that Sophia wishes to remove her two sons, Marie's brothers, as beneficiaries. Marie tells you that Sophia's health is declining and that she recently moved into Marie's home. Sophia no longer drives, so Marie will be bringing Sophia to meet with you in your office. Okay, so a lot of questions for discussion here. We'll sort of tackle them one by one. Who is

your client? What steps do you take in the meeting with this client to make sure that you are verifying the client's wishes? How much involvement do you allow Marie to have in the meetings with Sophia? How do you verify Sophia's capacity to alleviate any concerns that Marie is influencing her decisions? And how do you handle the execution meeting of Sophia's new documents? So this scenario is going to happen a lot, and a lot of the time it's going to be well meaning children. They are the primary caretaker, they're doing right by mom or dad, and they know mom needs to do some updates, and so they call you and they want to set up a meeting. It's going to happen a lot. So your awareness is going to be heightened by a few things, which doesn't necessarily mean that you shouldn't move forward with this client, but it means you need to be aware. So first and foremost, you're being contacted by not who's going to be your client but by their daughter, right? So if you're going to be preparing documents for Sophia, Sophia is going to be your client, not Marie. Flag number one is someone else is calling on behalf of this person, which again, doesn't necessarily mean something faulty is going on. This is going to happen a lot, and a lot of times it's legit, but you're just going to have a heightened sense of awareness. Another thing, she indicates that she found your name online and that her wish is to update -- mom wants to update her estate plan. We all talked about referral sources and the internet being a wonderful thing and social media now, which obviously many years ago attorneys couldn't advertise, and when social media first came out we were frowned upon if we had a presence there. So this is a different space, certainly, than it was years ago. But where the client is coming to you from should also sort of have you have a heightened sense of awareness. So years ago I would call these yellow page clients. Before the internet, when people found you in the yellow pages. If someone called me and said that they found me in the yellow pages, I almost immediately knew that this might not be a client that I want for a whole host of reasons. They might not be legitimate, they might be just shopping around, they might have bad intentions, they might be great. You don't know. And certainly, like I said, we're in a totally different sort of realm now with the internet and social media than we were before. But your best clients are going to come from your best referral sources, which are going to be your other clients and your centers of influence. So your other planning professionals you work with all the time, professional organizations you're part of, that's where your nice solid

referrals are going to come from. It doesn't mean you're not going to get a great one off the internet every now and then. Just be aware. Okay, so Marie indicates that Sophia wishes to remove her two cents as beneficiaries. Another red flag. And even if Sophia just calls you and not Marie, if anyone wants to make major changes to their plan that are vastly different from prior plans, including omitting beneficiaries, you want to paper your file with very clear evidence from Sophia about why she is doing that, right, and they may have very legitimate reasons, and this happens a lot where you are going to have clients ask you to specifically omit, but you are going to want to make sure the file is papered because you can probably bet that that omitted beneficiary will call when that person has passed away and say, what's going on. And you're going to be even more aware when it is the sibling of those potentially omitted beneficiaries that's making that instruction. She tells you that Sophia's health is declining and that she's recently moved in with Marie and that she's not driving anymore, so Marie will bring her to the meeting. You have that a lot, too. You have elderly clients particularly that may not be mobile, they may not be comfortable, they might want one of their adult children to come with them. That's fine. But if that adult child is the one that made initial contact and is suggesting that that drastic change has happened to their plan, again, which may be all above board, but you need to be very mindful of that. So who is your client? Your client is going to be Sophia. If that's what Sophia indicates. So what steps you take meeting with the client to independently verify her wishes? We talked about this a little bit yesterday, and Jim and I were talking about a case that we had many years ago. This will happen a lot where adult children attend meetings, like I said. In order to ensure that the client, Sophia, is giving you very objective thoughts, in context, you need to meet with Sophia alone. So you often may have to say to the Maris of the world, I need to chat with mom independently just for a few minutes, and during that time you will confirm her wishes and you will make sure that everything is okay. In the client scenario that Jim and I were talking about, client had a very different demeanor when his daughter was not in the room than he did when she was, and so those kinds of things, your awareness, again, is going to be heightened. But that's how you want to make sure that you're getting an objective opinion from clients when they're speaking with you independently. You're going to watch their social cues, you're going to see

if things change and you're going to paper your file with all kinds of notes. How much do you allow Marie to be involved in your meetings with Sophia? If you find that her demeanor is vastly different when Marie is in the room versus not, you might suggest and should suggest that Marie is not involved in the meetings other than to sort of drive mom back and forth. And again, you're going to paper your file about that. How do you verify Sophia's capacity to alleviate any concerns that Marie is influencing her decision? So number one, you're going to have conversations with Sophia alone about whatever she wants to do. Even if Marie called and said, yep, we're going to remove so and so and this is what mom wants to do, and even if Marie says that when mom is in the room. Marie leaves the room, you ask Sophia. What would you like to do with your estate plan? This is what it says now. Are we going to make any changes? Who do you want to be your beneficiaries? Who do you want to be your fiduciaries? Let's walk through it. And then that way, that information is coming to you out of Sophia's mouth and not Marie's and you can see if there's any sort of outside chatter that's influencing her decision. If you have concerns about her capacity, you are going to ask for a physician's opinion as to her ability to execute a document. Or you are just not going to do those documents. A question came in yesterday that we didn't get to that said, what if you're worried about capacity from the get-go? You do not plan in that instance. If you have concerns about this client's ability to understand what you are doing, what you are saying, the impact of what you are doing, you are not going to plan for that client. That is a lawsuit waiting to happen. So sometimes we do need to verify capacity. That is also why Heidi was saying that you don't remember every signing that you've ever had or will have because you'll have thousands of clients over the course of your career. You cannot possibly remember all of the nitty-gritty details of all of them. But if you handle all of your signings the same way, you can say, I don't -- I can't with any servitude tell you what Mrs. So-and-so was thinking that day, but I can tell you that every document that I sit down with clients, I say, do you know that today we're here to sign your X, Y, Z; I am here to make sure that you're of sound mind. Are you of sound mind? Is anyone twisting your arm? Are you over the age of 18? Those kinds of questions. A lot of other practitioners will also ask questions like, do you know who the president is? Do you know what the date is today? Those kinds of things. Whatever you're doing, do it the same way every time, and that way

-- you may not be able to say with certainty whatever their capacity was that day, but you can certainly say this is your process and that you would never have anyone execute documents if you were concerned about their capacity. And so handling the execution meeting, again, you're going to -- you're going to follow that same execution pattern that you follow for every single client. You're going to ask all of those questions. You're going to paper, paper, paper your file, especially if you think this is going to be challenged. Even if you have no concerns about capacity or influence or any of those kinds of things, if there is any kind of adverse situation going on in the family, you are right to assume that it may be challenged when that person passes away. Anybody can run to the probate court and challenge something. It doesn't mean that it has merit, but it is time and expense to respond. So if anybody runs to the court to challenge things, you want to make sure that your file is totally papered with all of the evidence to support that this is 100 percent legit, your client has 100 percent capacity, it was properly executed, properly witnessed. You have all of the notes in your file to indicate that these were her wishes, and maybe you make a note in the file about capacity. Maybe you make a note about sharing with the client that you understand that this may be challenged at some point. You can't prevent documents from being challenged. All it takes is one beneficiary getting their nose out of joint to run and complain about something. It happens. It happens a lot. But the burden of proof is on them. It's on them to prove that there was undue influence or there was a lack of capacity, and so it's a hard hill to climb, particularly when there was no legitimate evidence to support it, so that's why you want to do your due diligence and your job to make sure that there is evidence to support it. Okay, so question came in here, if you decide not to take on the work after determining the client lacks capacity, how do you handle it, and what do you say? So you simply say, I'm not comfortable executing -- engaging in this relationship. It's my opinion that you, Sophia, or you, Marie, that mom lacks adequate capacity to understand what we're doing here. Sometimes you have to have those discussions, even with long-standing clients that you've known for a long time. Maybe they want to make changes for other reasons. Maybe they're trying to do some gifting planning right before they pass to mitigate the size of their estate. Maybe they just want to change who their personal representative is or the trustee or maybe they want to change the tax

provisions in their documents, whatever it is, so a lot of times there's going to be legit reasons why they want to make changes, but they've waited too long. And so at that point you can't do anything, and so you're having conversations with the family that say, look, we should have done this a little while ago. Mom doesn't have capacity to sign these documents anymore, and we're out of luck. That happens, too. And so in that instance, you also want to have papers in your file that show that you sent letters to the client indicating additional planning methods that might make sense in that for whatever reason they decided not to do that and they decided to contact you when it was too late. You will have those conversations probably a fair amount in your career. They're not always terribly comfortable, but you get more comfortable with them over time. Speaking of time, we're at two minutes until 12:30. So any last-minute lingering questions, feel free to type them up. Otherwise you have my contact information and you have, I think, all of the prior presenters' information. So always feel free to reach out if there are questions that didn't get answered. You are stuck with me again tomorrow, but we do have some additional presenters, so we're going to close out the week with some equally important planning and estate planning content, and so we will tackle that again tomorrow. I just had one more question come in. What is the standard for capacity, and how do you deal with someone who exhibits age-related memory issues that can understand at that time, but he may forget later. So capacity can actually vary, depending on what you're doing. So the capacity that's required to execute a will is the highest standard of capacity. Less so perhaps to execute a power of attorney, although I think that makes no sense. Or a lot of times you'll see in a revocable trust it'll say when this person lacks the capacity to manage their finances, then so and so steps in. So there are several definitions of capacity that are floating around. It differs depending on the document. It differs depending on what you're trying to do. It differs depending on the state that you're in. But there are a lot of times where people just are more lucid in the morning versus the afternoon. And so you will have clients like that, and so if there's a clear pattern of that and you have evidence from a physician that that happens and that you're meeting with them and you feel that they understand they know what they're doing at 9:00 every morning but perhaps by 3:00 every day they don't know what their name is, you're probably okay as long as there's a clear pattern. But really the best way to

be clear on this is to have a physician say with their certainty whether they think this person has the capacity to execute legal documents. And if they say no, don't do it. If they say yes, go right away, you have a physician's statement that says that they knew what they were doing. But slippery slope for sure, and something that I think is getting a lot more traction. This year at Heckerling, which is a big estate planning conference that's held every year, for those of you that are not familiar, it's a fabulous program, this year they had a program on diminished capacity and all of these kind of things, which they haven't historically had. I think that's telling of how much this is going to be a growing concern for those of us that practice in this area. All right, so we will close it out with that question. I will see everyone back here tomorrow at 9:30, and good segue into capacity, right. The first thing we're going to tackle tomorrow is Medicaid and long-term care planning, where this is often a big concern when clients come in to meet with you. Until tomorrow, everyone have a great afternoon. I'll see you tomorrow at 9:30.