

# **RICHLAND COUNTY BAR ASSOCIATION ETHICS CLE**



**AMY W. MCCULLOCH  
PROBATE JUDGE**

# PROBATE COURT



- Probate Court deals with everything from estate administration, estate litigation, conservatorships and guardianships to mental illness and chemical dependency
- People from all walks of life
- Cases range from seemingly trivial to highly emotional
- Fighting over a stamp collection to exhuming a body
- In the Probate World the ordinary is extraordinary

# ETHICAL ISSUES

“Typically you are not the one creating the ethical issue, instead the ethical issue finds you and how you choose to react to it is what defines you as an ethical lawyer or not.”

Jesse Near, 1 of my favorite law clerks!

# **WAYS TO AVOID ETHICAL ISSUES IN PROBATE COURT**

- **COMMUNICATE CLEARLY**
- **KNOW WHEN TO KEEP IT CONFIDENTIAL**
- **TELL THE TRUTH, EVEN IF IT HURTS**
- **DON'T STEAL MONEY, NO REALLY DON'T STEAL MONEY**
- **BE RESPONSIBLE AND PROACTIVE**
- **PRACTICE CIVILITY**
- **KNOW HOW TO DEAL WITH MISCONDUCT**

# COMMUNICATE CLEARLY



- Lawyers are required to keep a client reasonably informed about the status of a matter. *S.C. Mod. Rules of Professional Conduct §1.4.*
- Communicate clearly with the personal representative and help them understand the probate process.
- Encourage the personal representative to keep all heirs informed.
- Set a goal of answering phone calls and returning emails within 24 hours.

# **PROBATE ISSUE #1**

**In estate planning, you should only meet with your client because here is one scenario...**

**A lawyer represents a client in estate planning matters. The lawyer meets with the client and the client's daughter to discuss changes to her estate plan. The lawyer subsequently receives an inquiry from the client's other children about the meeting. Can the lawyer reveal information about the meeting?**

# KEEP IT CONFIDENTIAL



- Lawyers should not reveal information relating to the representation of a client unless the client gives informed consent. *S.C. Mod. Rules of Professional Conduct §1.6.*
- Communications between the lawyer and the fiduciary are subject to attorney-client privilege unless waived by the fiduciary.  
*S.C. Code Ann. § 62-1-110 .*
- The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

# ON THE EDGE OF CAPACITY

- You've known the client forever
- You see diminished capacity
- Client wants to name spouse as agent under POA
- You know this will be the best for your client

**IT IS IMPORTANT TO KNOW WHAT YOUR INVOLVEMENT IS IN THE EXECUTION OF A LEGAL DOCUMENT, LIKE A POA SAYS HISTORICALLY ABOUT WHEN YOUR CLIENT HAD CAPACITY TO MAKE DECISIONS AT OR AFTER THIS TIME.**

# SO KNOWING THAT...

- What if the daughter is the Power of Attorney for her mother?
- How do you determine if your client still has appropriate capacity?
  - To allow her daughter's presence?
  - To waive the attorney client privilege?

# RECOGNIZING THE SIGNS OF DIMINISHED CAPACITY

**The ABA recommends that the lawyer consider and balance such factors as:**

- the client's ability to articulate reasoning leading to a decision;
- Variability of the client's state of mind;
- Client's ability to appreciate consequences of a decision;
- the substantive fairness of the client's decision; and
- the consistency of the decision with the known long-term commitments and values of the client. *S.C. Mod. Rules of Professional Conduct §1.14 Comment [6].*

# **PROBATE ISSUE #2**

**You represent a married couple for their estate planning. The husband tells you, in the presence of his wife, that he wants a will drafted in which the wife will get everything. The husband then later tells you privately to draft a will that excludes his wife and he asks you not to reveal this change to the wife. Can you keep the contents of a client's will a secret from the client's spouse, who is also a client?**

# **BEFORE YOU AGREE TO REPRESENT A COUPLE...**

- You must discuss the potential conflicts that could occur
- You must include in your retainer agreement that you discussed them and have an agreement that deals with “should a conflict occur...”
- Know when to walk away from representing both of them!!! The money isn't worth the risk.



- Do not bring frivolous claims before the Court. *S.C. Mod. Rules of Professional Conduct §3.1.*
- Always be honest and truthful when communicating with the Court and completing probate forms. *S.C. Mod. Rules of Professional Conduct §3.3.*

# AFFIDAVITS

- Please don't sign an Affidavit swearing to what your client would swear to...have them do their own. (EVEN WHEN THEY LIVE IN ANOTHER STATE AND MAILING IS INVOLVED)
- When assisting your client with a sworn statement, you may need to see any and all documents that support the statement. BANK STATEMENTS, MORTGAGE STATEMENTS, CAR TITLES, DEEDS, CANCELED CHECKS...

# ACCOUNTINGS

- ALWAYS make your clients bring you the bank statements...not just some...all.
- Don't use "their numbers", look at the supporting documents.
- Make sure they really used their personal money when they are claiming reimbursements.

# DON'T STEAL MONEY



- Attorney fees and expenses in estate litigation should be reasonable *S.C. Code Ann. §62-3-720*
- The personal representative takes a 5% fee of the value of personal property in the probate estate, plus 5% of the net value of real estate sold within probate. *S.C. Code Ann. §62-3-719.*
- Properly distribute estate funds.

# \$\$\$ MONEY \$\$\$

- What if the attorney is serving as the Personal Representative – should he charge the 5% commission, fees by the hour, or both?
- What if you represented the estate in a wrongful death action and received 1/3 of the settlement and now you are assisting in the estate administration – should you charge additional fees?

# PROBATE ISSUE #3

**A client instructs you to draft a will to include leaving a gift to you in his will.**

**Lawyers are prohibited from soliciting gifts from a client or from preparing an instrument on behalf of a client that includes such a gift. S.C. *Mod. Rules of Professional Conduct §1.8.***

EASY SOLUTION – If they are adamant about including you in the will, send them to another lawyer to prepare the document. NO, you should not be a witness or the notary.

# **PROBATE ISSUE #4**

**You represent a Personal Representative who inherits  $\frac{1}{4}$  from the Estate along with his 3 siblings. You discover that your client has been paying his own mortgage, water and electricity bills with estate funds.**

**You also find out that your client has not distributed equal amounts to his siblings to compensate for his personal bills.**

# Does it matter that...

- There is more than enough money in the estate account to equal the distributions to the siblings later?
- The Personal Representative is living in the estate residence during the administration of the estate and the bills are associated to some degree with estate property?

# BE RESPONSIBLE AND PROACTIVE

STATE OF SOUTH CAROLINA  
 COUNTY OF: \_\_\_\_\_  
 IN THE MATTER OF: \_\_\_\_\_  
 ONLY COMPLETE IF FILING PETITION FOR FORMAL TESTACY AND/OR APPOINTMENT

IN THE PROBATE COURT  
 CASE NUMBER: \_\_\_\_\_

Petitioner  
 vs.  
 Respondent(s) (if applicable)

APPLICATION FOR FORMAL (check any that apply)  
 PROBATE OF WILL  
 APPOINTMENT

PETITION FOR FORMAL  
 TESTACY  
 APPOINTMENT

Applicant/Petitioner:  
 Address: \_\_\_\_\_  
 Telephone: \_\_\_\_\_

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. Give your relationship to the decedent, if any, and your interest in this proceeding.  
 \_\_\_\_\_

2. Decedent Information  
 Name: \_\_\_\_\_  
 Last Four Digits of Social Security Number: \_\_\_\_\_  
 Date of Birth: \_\_\_\_\_  
 Date of Death: \_\_\_\_\_  
 Age at date of death: \_\_\_\_\_  
 Domicile at date of death: \_\_\_\_\_ (county) (state)

3. Venue for this proceeding is proper in this county because:  
 Decedent was domiciled in this county at date of death.  
 Decedent was not domiciled in South Carolina, but property of Decedent was located in this county at date of death.  
 Decedent has a right to take legal action in this county because:  
 \_\_\_\_\_

- Complete the required forms to probate an estate completely and accurately.
- If more explanation is needed – use additional pages.
- If there is a blank on a form – fill it in, even if the answer is none or not applicable.

# **BE RESPONSIBLE AND PROACTIVE**

- **Don't rely on your secretary or paralegal to do everything**
- **Open your own mail**
- **Make reasonable efforts to expedite estate litigation and close the estate in a timely manner. *S.C. Mod. Rules of Professional Conduct §3.2.***
- If they draft, you still must edit – especially orders!
- Especially bank statements – reconcile your accounts
- Calendar your hearings.
- Create to do lists – use your reminders.

# PROBATE ISSUE #5

**A lawyer represents a client in estate planning matter. After the client shows signs of dementia, the client's children approach the lawyer and ask him to file a guardianship petition on their behalf.**

**Can the estate planning lawyer for the allegedly incapacitated person (AIP) appear on behalf of the AIP's children who now seek to be appointed the AIP's guardian?**

**- A lawyer can not represent a client if the representation involves a concurrent conflict of interest.**

**- A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client. *S.C. Mod. Rules of Professional Conduct §1.7.***

# PROBATE ISSUE #6

**Could the lawyer, on his own behalf, seek the appointment of a guardian for his client?**

***- Rule 1.14, a lawyer should not do so without giving the matter thoughtful consideration that takes into account the wishes, values, and, of course, best interests of the client.***

# PRACTICE CIVILITY



- **Be respectful, kind, and courteous to all Probate Court employees.**
- **This includes everyone from the Judge to the front desk receptionist.**
- **Remember you only get one chance to make a first impression**

# EX PARTE

- communication outside of the presence of the opposing party or the opposing party's attorney.
- **Avoid missteps by keeping communication procedural in nature**



# MISCONDUCT

- You find out that your client who is serving as the Personal Representative lied on a sworn form filed with the Probate Court?
- You discover that your client who was the POA for their now deceased mother used her money for her own benefit?

# QUESTIONS & CONCERNS

- **Contact the Richland County Probate Court:**



- **Visit: 1701 Main Street Room 207**
- **Via phone (803) 576-1961**
- **Website: [www.rcgov.us](http://www.rcgov.us)**
- **More Information on South Carolina Probate**  
**[www.judicial.state.sc.us](http://www.judicial.state.sc.us)**