

Starting Inheritance Disputes

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Mahoning County Bar Association

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Overview

- Assessing the value
- Identifying the client(s)
- Type of case
 - Factual background
 - Documents involved
- Gameplan
 - Authority to act
- Pleadings

Questions for Potential Clients

1. What information do you have that would give rise to a reasonable belief that a bad actor exists?
2. What do you believe the global wealth of the individual was in terms of reasonable estimated value?
3. What percentage of the global wealth would you have expected to transfer to you?
4. What mechanisms do you believe were involved in the scheme to disinherit (such as a will, trust, beneficiary designation, or gifting)? and,
5. What might it cost to pursue, including is the cost of pursuit even predictable?

Assessing the Value

- What is the dispute over?
- Amount in controversy?
- When did this occur?
- Liquidity and collectability?
 - Is there money in the estate/trust?
 - Is the “defendant” collectable?
- Litigation costs vs. payday
 - Expert witnesses required?

Accessing the Value

- What does the person not know?
- Think in terms of global wealth
 - Places to look:
 - Employer
 - Old bank statements
 - Financial advisors
 - Accountants
 - Estate planning counsel

Identifying the Client

- Who is calling?
- Prof. Cond. R. 1.18 – Prospective Client:
 - (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to a former client.
 - (c) ...shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter...

Identifying the Client

- Representing fiduciary:
 - Fees typically paid from estate or trust.
 - Include specific scope of representation language in engagement letter.
 - Do not represent beneficiaries.
 - Cannot represent him/her to maximize their individual share.
- Role of client can change, especially in the contested matters.
- Attorney sanctioned for representing executor as fiduciary, and individually in exceptions to Inventory. *Cincinnati Bar Assn. v. Robertson*, 145 Ohio St.3d 302, 2016-Ohio-654.

Identifying the Client

- Representing fiduciary (cont.) – dealing with next of kin and beneficiaries:
 - Clarify that you do not represent them.
 - Include limitations on representation orally and/or in writing.
 - Suggest they obtain legal counsel.

Identifying the Client

- Representing next of kin and beneficiaries:
- Attorney fees not ordinarily paid from the estate or trust
- The short game:
 - Enforce client's rights.
 - Request appropriate information – even if not enforceable.
- The Long Game:
 - Make your case for removal.
 - Benefit the entire estate – possible to get fees paid.

Identifying the Client

- Representing multiple clients:
- Prof. Cond. R. 1.7 “Conflict of interest: Current Clients”
 - (a) a lawyer’s acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
 - (1) the representation of that client will be directly adverse to another current client;
 - (2) there is a substantial risk that the lawyer’s ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer’s responsibility to another client, a former client, or a third person or by the lawyer’s own personal interest.
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Identifying the Client

- Representing multiple clients (cont.):
- Directly adverse conflicts in litigation:
 - Where one client is asserting a claim against another client of the lawyer.
Can never represent these co-clients.
 - When the effective representation of a client who is a party to a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit.
 - Absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated

Identifying the Client

- Representing multiple clients (cont.):
- **Material limitations conflicts in litigation:**
 - When a lawyer represents co-plaintiffs or co-defendants in litigation and there is:
 - A substantial discrepancy in the clients' testimony;
 - Incompatible positions in relation to another party;
 - potential cross-claims; or,
 - Substantially different possibilities of settlement of claims or liabilities in question.

Identifying the Client

- Representing multiple clients (cont.):
- Conflicts can develop, not always apparent at the outset of the representation.
- Problem areas:
 - Overall estate plan (power of attorney, will, and trust)
 - Interpretation of documents.
 - Inheritances.
 - Settlement preferences.
 - How to dispose of assets (I.E., distribution, sales, etc.);
 - Whether to pursue claims against third-parties.

Identifying the Client

- Representing multiple clients (cont.) – Informed consent:
- “Informed consent” denotes:
 - Agreement by a person to a proposed course of conduct;
 - After the lawyer has communicated adequate information; and,
 - Explanation about the material risks and reasonably available alternatives to the proposed course of conduct.
- Confirmed in writing - may consist of a document signed by the clients or the lawyer promptly records and transmits to the client following an oral consent (writing includes electronic transmission).

Type of Case

- Validity vs. activity
 - Validity
 - Lack of capacity
 - Undue influence
 - Activity
 - Breach of fiduciary duty
 - Concealment/conversion

Validity - Testamentary Capacity:

1. What information do you have that would give rise to a reasonable belief that a bad actor exists?
 - Testamentary Capacity – Whether the person has sufficient mind and memory:
 - To understand the nature of the business in which he or she is engaged;
 - To comprehend generally the nature and extent of his or her property;
 - To hold in his mind and memory the names and identities of those who have natural claims upon his or her bounty; and,
 - To be able to appreciate his or her relation to the members of his or her family.
 - Ohio Courts have recognized that the test of testamentary capacity can also be used as the standard for mental capacity to execute a beneficiary designation.

Validity - Undue Influence

- Undue Influence – Essential elements are:
 - A susceptible testator;
 - Another's opportunity to exert influence on the testator;
 - The fact of improper influence exerted or attempted; and,
 - A result showing the effect of the influence.
- Must so overpower and subjugate the mind of the testator as to destroy his free agency and make him express the will of another rather than his own, and the mere presence of influence is not sufficient.
- The undue influence must be present or operative at the time of the execution of the will resulting in dispositions which the testator would not otherwise have made.

Activity – Breach of Duties

- A "fiduciary relationship" is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.
 - A fiduciary owes the utmost loyalty and honesty to his principal.
- R.C. 2305.09 Four year statute of limitations.
- A cause of action for breach of fiduciary duty arises when the act or commission constituting the breach of fiduciary duty occurred.
- The "Discovery Rule" does not toll the statute of limitations for a breach of fiduciary duty claim.

POA – Breach of Duties

R.C. 1337.34 “Agent’s duties” - Power of attorney duties:

1. Act in accordance with reasonable exactions to the extent actually known and, otherwise act in the principal’s best interest.
2. Act in good faith.
3. Act only within the scope of authority granted in the power of attorney.
4. Attempt to preserve the principal’s estate plan to the extent actually known by the agent if preserving the plan is consistent with the principal’s best interest.
5. Shall act loyally for the principal’s benefit.
6. Avoid conflicts of interest that impair the agent’s impartiality.
7. Act with the care, competence, and diligence ordinarily exercised.
8. Keep records of all transactions made on behalf of the principal.
9. Cooperate with health-care agent.

Trust – Breach of Duties

R.C. chapter 5808 “Trust Administration”:

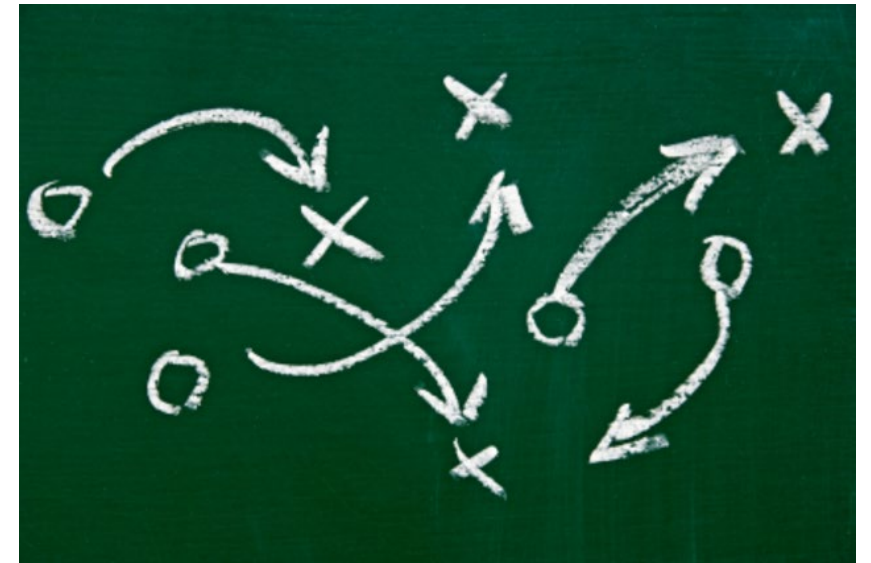
1. Administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries.
2. Administer the trust solely in the interest of the beneficiaries.
3. When multiple beneficiaries, trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective rights.
4. Administer the trust as a prudent person would, exercising reasonable care, skill, and caution.
5. Incur only costs that are appropriate and reasonable.
6. Trustee shall use special skills or expertise he or she has.
7. Shall take reasonable steps to take control of and protect trust property.
8. Shall keep adequate records of administration.
9. Shall keep trust property separate from the trustee’s own property.
10. Shall take reasonable steps to enforce the claims of the trust and to defend claims.
11. Shall take reasonable steps to collect trust property.
12. Shall keep the beneficiaries reasonably informed.

Other Common Claims

- Fraud
- Concealment
- Unjust enrichment
- Tortious interference with expectation of inheritance
- Constructive trust
- Injunctions

Discovery Game Plan

- Asset information
- Client file
- Medical records
 - Identify who has information
 - Contact them - always ask.
 - Send preservation of evidence letters.
 - Use these in the future
- Subpoenas and Paper discovery



Legal file:

“(A) lawyer’s file related to the representation of a client constitutes the ‘papers and property’ of the client.” Adv. Op. 2019-6, at Syllabus.

- These materials include, but are not limited to, all significant correspondence, investigatory documents and reports the client has paid for, filed or unfiled but prepared pleadings and briefs, and all materials supplied by the client. (emphasis added). Adv. Op. 2019-6, at Pg. 2.
- The file also includes, “client papers and property” and all “items reasonably necessary to the client’s representation”. *Id.*
- The Ohio Supreme Court found that a lawyer’s notes regarding facts about the case will most likely be an item reasonably necessary to a client’s representation.

Privilege:

R.C. 2317.02(A)(1). An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client.

- Common law privilege applies:
 - (1) where legal advice of any kind is sought;
 - (2) from a professional legal adviser in his capacity as such;
 - (3) the communication relating to that purpose;
 - (4) made in confidence;
 - (5) by the client;
 - (6) are at his/her instance permanently protected;
 - (7) from disclosure by himself or the legal advisor;
 - (8) unless the protection is waived.

Privilege (cont.):

- Party claiming privilege must show it exists – on a document-by-document basis.
- Exceptions vs. Waivers:
 - Exceptions – situations in which the privilege does not attach to the communications from the start.
 - Waiver – involves the client’s relinquishment of protections once they have attached.
 - See: *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161 (2010).

Privilege (cont.):

- Relevant statutory waivers and exceptions:
 - By the express consent of the client, surviving spouse, or the fiduciary of the estate;
 - If the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context.
 - Disputes between parties claiming through deceased client involving competency, fraud, undue influence, or duress when executing documents.
- Courts are reluctant to establish judicially created waivers – especially where matter is covered by statute.

Medical Records:

- Health Insurance Portability and Accountability Act (“HIPAA”).
- Restricts “covered entities” from disclosing information.
 - Applies for 50 years after death
- Can be waived by representative.
 - 45 CFR 164.502(g)(1) – “a covered entity must...treat a personal representative as the individual for purposes of this subchapter”
 - 45 CFR 164.502(g)(4) – “If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or individual’s estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

Medical Records (cont.):

R.C. 2317.02(B)(1) A physician, advanced practice registered nurse, or dentist may testify or may be compelled to testify, in any of the following circumstances:

- (a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:
 - (i) If the patient or the guardian or other legal representative of the patient gives express consent;
 - (ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;
 - (iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

Medical Records (cont.):

- 45CFR § 164.512, states in relevant part:
- (e)(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
 - (i) In response to an order of a court or administrative tribunal.
 - (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
 - (B) The covered entity receives satisfactory assurance, that reasonable efforts have been made by such party to secure a **qualified** protective order.

Paper Discovery and Subpoenas:

- Subpoenas:
 - Include waivers where applicable
 - Check with Court regarding issuance
 - General vs. specific
 - The more specificity the greater the “burden”
 - Electronically stored information – Recorded calls, photos, etc..
 - Prepare to fight for legal file:
 - Request privilege log
 - Work product
 - Ordinary fact “unprivileged fact” work product (i.e., witness statements and facts – lesser protection). Released for good cause.
 - “Opinion work product” (i.e., the attorney’s mental impressions, opinions, conclusions, theories, etc..). Near absolute protection.

Paper Discovery and Subpoenas:

- Paper discovery:
 - Interrogatories
 - Requests for production of documents
 - Requests for admission
- Timing – Start Early:
 - Before or after answer
 - Avoid multiple parts to Interrogatories
 - Be specific and include documents
 - Request accountings

Pleadings

- Necessary Claims
- Necessary Parties
- Jurisdiction



Necessary claims:

- In the context of res judicata, for two suits to be based upon the same transaction, there must be a common nucleus of operative facts.
 - If the two suits share a common nucleus of operative facts, then a plaintiff cannot bring the second action even though the plaintiff is prepared:
 - (1) To present evidence or grounds or theories of the case not presented in the first action, or,
 - (2) To seek remedies or forms of relief not demanded in the first action.
 - "A valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."
- Exceptions: will contest and concealment.

Necessary claims (cont.):

- Attach all necessary documents Civ.R. 10(D).
- May include jury demand – but subject to
 - R.C. 2101.31 “Determination of questions of fact”. All questions of fact shall be determined by the probate judge, unless the judge orders those questions of fact to be tried before a jury or refers those questions of fact to a special master commissioner...
 - R.C. 2107.72 (B)(1) – Each party to a will contest action has the right to a jury trial of the action.
 - Will contest raise the single and ultimate issue whether the writing produced is the last will or codicil of the testator.

Necessary parties:

- Civ.R. 19(A) - A person...shall be joined as a party in the action if:
 - (1) in his absence complete relief cannot be accorded among those already parties, or,
 - (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or
 - (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.
- Fiduciary
- Beneficiaries
 - Not necessary in actions to collect property for the trust/estate
- Financial institutions
 - Especially where requesting injunction.
- Estate

Jurisdiction:

- Proceedings in probate court are restricted to those actions permitted by statute and by the Ohio Constitution, since the probate court is a court of limited jurisdiction.
- R.C. 2101.24 (A)(1) – probate court has exclusive jurisdiction – 31 exclusive matters
- R.C. 2101.24 (B)(1) – probate court has concurrent jurisdiction with general division
 - Any action that involves an inter vivos trust; a power of attorney, designation or removal of a beneficiary to life insurance policy, annuity contract, retirement plan, brokerage account, security account, bank account, real property, or tangible personal property.
- R.C. 2101.24(C) “The Probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.