POSSESSION IS NINE-TENTHS OF THE LAW ISN'T IT? THE ETHICAL, LEGAL, AND PRACTICAL CONSIDERATIONS INVOLVING THE FINANCIAL EXPLOITATION OF SENIORS (PART 2)

STUART C. BEAR is a partner, shareholder, and the president of Chestnut Cambronne and holds a national reputation for providing the highest level of succession planning services for individuals and businesses; including single individuals, married couples, domestic partnerships, blended families, and seniors. His practice specializes in wills, trusts, disability planning, powers of attorney, living wills, asset protection, and Medical Assistance planning. A native of Superior, Wisconsin, Stuart received his B.A. from the University of Minnesota, Phi Beta Kappa, and his J.D. from William Mitchell College of Law.

MARY F. RADFORD is a Professor of Law Georgia State University. She joined the College of Law faculty in 1984. Her teaching areas are Wills, Trusts & Estates; Estate Planning; and Law & the Elderly. She was the president of the American College of Trust & Estate Counsel (ACTEC) in 2011-12. She served as the reporter for the Georgia Trust Code Revision Committee (2005-10), the Georgia Guardianship Code Revision Committee (1997-2004) and Georgia Probate Code Revision Committee (1992-96) of the State Bar of Georgia. She was the principal draftsperson for Georgia's newly enacted Trust, Guardianship, and Probate Codes. She was the 2004 Chair of the AALS Section on Donative Transfers, Fiduciaries, and Estate Planning. She is the author Georgia Trusts & Trustees; Guardianships & Conservatorships in Georgia; the sixth and seventh editions of Redfearn: Wills & Administration in Georgia; and numerous law review articles. Radford frequently gives presentations on estate planning and guardianship topics at local, national, and international seminars. In 2009, she was awarded the Verner S. Chaffin Career Service Award by the Fiduciary Law Section of the State Bar of Georgia. In 2002, she was awarded the Treat Award for Excellence by the National College of Probate Judges.

FRANCIS J. (FRANK) RONDONI is a Partner and Shareholder at Chestnut Cambronne PA. Frank has been a trial attorney and litigator for more than 35 years, with a diverse practice. He concentrates his practice in the areas of Commercial Litigation, Estate Litigation, Class Action Litigation, Tort Litigation, Personal Injury, Business Representation, and Governmental Representation. Frank's Civil Trial work represents about 90 percent of his time. Frank is a frequent lecturer on topics such as Trial Tactics, Evidence, Emerging Case Law, and Estate Litigation. Frank sits on the Hennepin County Criminal Justice Task Force (CJTF). He is a member of the Minnesota State Bar Association, the Minnesota Association for Justice, the Hennepin County Bar Association, and is the current President of the Suburban Hennepin County Prosecutors Association (SHCPA). Frank is an Arbitrator for the American Arbitration Association, has an AV rating with Martindale Hubbell, and has been named a Minnesota Super Lawyer by Super Lawyers magazine.

The authors wish to thank Ryan Prochaska for his invaluable assistance in writing these materials. Portions of this material were prepared for the 51st Annual Heckerling Institute on Estate Planning, presented January 9-13, 2017 in Orlando, Florida. They are reprinted here with the permission of the Heckerling Institute and the University of Miami School of Law.

IX. TRUSTEE SUED BY TRUST BENEFICIARIES

CASE STUDY: But I Was Abiding By the Trust Terms.

William and Mary were married in 1959. William had four children and Mary had three. William adopted Mary's children. Together, they had twin sons, Timothy and Patrick. William was a successful businessman and investor and accumulated a substantial fortune.

William created a Trust and made his son, Timothy, the trustee. William was the beneficiary during his lifetime. The remainder beneficiaries were Mary, who was entitled to the benefits of the trust during her lifetime, and then the nine children, who would share equally in what remained after both William and Mary were deceased.

The trust document provided that during William's lifetime, the Trustee shall distribute to William the

net income and principal as William directs and in the event of incapacity as the trustee deemed appropriate to support William's "accustomed manner of living."

William invested $4 million into a company his son, Patrick, founded. William's shares of the corporation were titled into the trust. William died shortly after and the investment went badly, and the trust's interest in the company was worth very little.

Four of William's children sued Timothy in his capacity as trustee of the trust for breach of his fiduciary duties. They alleged that Timothy had squandered William's life savings for his and Patrick's benefit, depriving the other seven children of their benefits from the trust.

A. Uniform Trust Code §802: Duty of Loyalty

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) …a transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005 (one year);

(c) A transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(2) the trustee's descendants, siblings, parents, or their spouses;

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

B. Uniform Trust Code §803: Impartiality

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

C. Uniform Trust Code §804: Prudent Administration

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

D. Uniform Trust Code §813: Duty to Inform and Report

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of

the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (b)(2) and (3) do not apply to a trustee who accepts a trusteeship before [the effective date of this [Code]], to an irrevocable trust created before [the effective date of this [Code]], or to a revocable trust that becomes irrevocable before [the effective date of this [Code]].

E. Uniform Trust Code §1001: Remedies for Breach of Trust

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) compel the trustee to perform the trustee's duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) order a trustee to account;

(5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided in Section 706;

(8) reduce or deny compensation to the trustee;

(9) subject to Section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

F. Uniform Trust Code §1002: Damages for Breach of Trust

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

G. Uniform Trust Code §1006: Reliance on Trust Instrument

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

H. Lawyers Representing Trustees and Other Fiduciaries

1. Who is the Client?

a. Majority view: Lawyer represents ONLY the fiduciary

State Statutes: South Carolina Stat. § 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

"Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose

upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created."

See also New Hampshire Rev. Stat. Ann. §§ 564-B:2-205 (trusts) and 556:31 (wills) (attorney-client privilege applies to communications between the fiduciary and the lawyer for the fiduciary); Ohio Rev. Code § 5815.16 (2007); Nev. Rev. Stat. Ann. § 162.310 (2015) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal." "Principal" is "any person to whom a fiduciary as such owes an obligation.")

Bar Opinion—ABA Formal Opinion 94-380: Lawyer for the fiduciary only represents the fiduciary. Lawyer must maintain confidentiality and may not disclose breaches of duty by the fiduciary.

"The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties."

State Cases: See, e.g., Goldberg v. Frey, 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990), Linth v. Gay, 190 Wn. App. 331, 360 P.3d 844 (2015) (citing Trask v. Butler, 872 P.2d 1080 (1994)): "[A] duty is not owed from an attorney hired by the personal representative of an estate to the estate or the estate beneficiaries."); Roberts v. Feary, 986 P.2d 690 (Ore. 1999), Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994): Attorney-client relationship existed between personal representative of the estate and the lawyer she hired and the attorney has no liability to a third party absent fraud or malice.

b. Minority View: Lawyers may owe duties to the beneficiaries of the fiduciary relationship

1. Fla. A.G. Op. 96-94 (1996): "… [A]s the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian."
2. Torian's Estate v. Smith, 564 S.W.2d 561 (Ark. 1978): Citing Francis v. Turner, 67 S.W.2d 211 (Ark. 1933) (overruled on other grounds, Morris v. Cullipher, 816 S.W.2d 878 (Ark. 1991)) for the proposition that "an attorney for an estate represents the heirs and distributees and legatees to the extent that it becomes his duty, where the value of the estate is material to those interested in dealing between themselves or others, not only to refrain from making any misrepresentation or concealment, but to also fully disclose the value of the estate and its probable assets so that all interested may exercise an informed judgment," the Torian's Estate court held that the attorney-client privilege did not apply to conversations between the estate's attorney and the executor because the executor and the beneficiaries were "joint clients" of the attorney.
3. Morales v. Field, Degoff, Huppert & Macgowan, 99 Cal. App.3d 307, 160 Cal. Rptr. 239, 244 (1979): "An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary."
4. Charleson v. Hardesty, 839 P.2d 1303, 1306-07 (Nev. 1992): "We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law." (But see, Nev. Rev. Stat. Ann. § 162.310, enacted in 2015 to overturn this holding).
5. Elam v. Hyatt Legal Services, 541 NE.2d 616 (Ohio 1989): "A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."
6. Branham v. Stewart, 307 S.W.3d 94 (Ky. 2010): Lawyer represented guardian of a minor child who dissipated the child's funds. When sued for malpractice by the child, the lawyer argued that there was no privity because his client was the guardian, not the minor child. The court disagreed: "The

attorney retained by an individual in the capacity as a minor's next friend or guardian establishes an attorney-client relationship with the minor and owes the same professional duties to the minor that the attorney would owe to any other client." The court distinguished the guardian-minor relationship from other fiduciary relationships (such as executor-beneficiaries and trustee-beneficiaries) in which there might be multiple beneficiaries with multiple interests who are capable of watching out for their own interests. See also, In re the Guardianship of Karan, 38 P.3d 396 (Wn. App. 2002).

7. Biakanja v. Irving, 320 P2d 16 (CA 1958): This decision established a frequently-used balancing test used to determine whether a lawyer is liable to an individual who is not in privity of contract with the lawyer. The elements of the test include:

   h. The foreseeability of harm to the plaintiff;

   i. Whether the plaintiff in fact suffered harm;

   j. The closeness of the connection between the negligent act and the harm;

   k. The public policy in preventing future harm.

12. Fickett v. Superior Court of Pima County, AZ, 558 P.2d 988 (AZ. Div. 2 1976): Applying the Biakanja test: "We are of the opinion that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If, as is contended here, petitioners knew or should have known that the guardian was acting adversely to his ward's interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward. In fact, we conceive that the ward's interests overshadow those of the guardian."

2. Representing a Trustee Who Is Accused of Breaching Fiduciary Duty

a. Privilege

1. Some courts recognize a "fiduciary exception" to the attorney-client privilege under the theory that the beneficiary is the "real client":

   Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976): Trustee asked his lawyer to prepare a legal opinion memorandum about a pending petition for instructions in anticipation of potential tax litigation. A year later, the beneficiaries filed a surcharge claim against the trustee and requested a copy of the memorandum. The trustee and lawyer refused to deliver the memorandum, citing attorney-client privilege.

   "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust…The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees. In effect, the beneficiaries were the clients of Mr. Workman as much as the trustees were, and perhaps more so."

2. Other states resolutely refuse to recognize this exception: See, e.g., Wells Fargo Bank v. Superior Court, 22 Cal.4th 201, 990 P.2d 591 (2000).

3. Even if the fiduciary exception is applied (and note that it is not recognized in many states), consultations between the lawyer and the client pertaining solely to a lawsuit against the fiduciary remain protected.

b. Is the Lawyer Liable when the Client Breaches Fiduciary Duty?

Restatement of the Law Governing Lawyers, § 51(4) provides that a lawyer owes a duty of care to certain "nonclients" if: 1) the lawyer is representing a trustee, guardian, executor or other fiduciary; 2) "the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;" 3) "the nonclient

is not reasonably able to protect its own rights;" and 4) the duty "would not significantly impair the performance of the lawyer's obligations to the client." In an example given in the comment to this Section, a lawyer for a trustee is liable to the beneficiaries if the lawyer knows that the trustee is going to embezzle the trust funds and "takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting."

Pederson v. Barnes, 139 P2d 552 (Alaska 2006): Lawyer represented a man who was his niece's guardian. One year into the guardianship, the niece's therapist wrote the court that there were indications that the guardian was spending the niece's money on himself. The guardian told the lawyer that his high standard of living was due to investments made by an investment company that eventually was proved to be a sham. The guardian was convicted to theft and, in a civil action, the lawyer was charged with 40 percent of the damages caused to the guardianship estate. The appellate court adopted the approach of the Restatement § 51(4) and upheld the denial of summary judgment to the lawyer. The appellate court interpreted the language of element #2 not as requiring that the lawyer have actual knowledge but as meaning that "the lawyer knows or has reason to know" that action is necessary. The court stated that there was ample evidence that the lawyer had "reason to know" of the thefts given the "incredibly high" rates of return on the purported investments, the suspicious appearance of the account statements that the lawyer had received from the sham investment company, and the fact that, according to a supplemental report filed by the lawyer for the guardian, the guardian had "forgotten" to report one asset of the estate that comprised one-half of the guardianship funds.

c. Continuing Representation When the Fiduciary is Sued: Conflict of Interest?

Cincinnati Bar Ass'n v. Robertson, Slip Op. No, 2016-Ohio-654: Executor retained lawyer to represent her as Executor of her father's estate. Other beneficiaries sued to remove her and lawyer agreed to represent her individually. Lawyer failed to explain to executor the potential for a conflict of interest. "Specifically, the board found that "[t]o the extent the claims of the Lewallen's [sic] other family members implicate[d] potential wrongdoing that would diminish the estate, Respondent [could] not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer." Accordingly, the parties stipulated and the board found that Robertson's dual representation of Lewallen in her individual capacity and in her role as fiduciary of the estate violated Prof. Cond.R. 1.7(b) (prohibiting a lawyer from accepting or continuing representation of a client if a conflict of interest would be created, unless the affected client gives informed consent in writing)."

X. CRIMINAL INVESTIGATIONS INTO FINANCIAL EXPLOITATION AND HOW IT IMPACTS AN ESTATE CONTROVERSY

CASE STUDY: All My Shares to My Trusted Employee.

Al owned a graphic design company called "Graphic Design, Inc." One of Al's five employees, Mark, had been with the company since day one. Al always considered Mark to be the son he never had. Although Al's capacity began to diminish he worked until the day he died. In recognition and appreciation of Mark's hard work over the past 20 years, Al devised his company shares to Mark in his will.

During probate administration the value of the Graphic Design, Inc. was determined to be $500,000; the business account on Al's death was $200,000. While reviewing the business account bank statements, the probate attorney discovered that Mark transferred the entire balance of the business account to his new business and was steering clients to his new business.

The legal issue is whether the transfer of company shares includes: 1) everything the business owns, including the funds within the business account, which represents profits earned by the owner, or 2) everything, but the money within the business account.

A. Everything, Including the Business Account

Because the Will did not specify how the funds within the business account should be distributed, one could argue the funds are a business asset and should be distributed along with the other assets and shares.

1. Property Distributed to Person Named in Will

Section 3-101 of the Uniform Probate Code states, "Upon the death of a person, his [or her] real and

personal property devolves to the persons to whom it is devised by his [or her] last will.

2. Income During Administration of Estate

Section 201(1) of the Uniform Principal and Income Act states, "The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

Section 401(b) of the Uniform Principal and Income Act states, "Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

Therefore, absent a specific provision in the Will or Trust instrument any money earned by company during the administration of the estate is owned by the beneficiary receiving the company shares.

B. Everything, but the Business Account

The counterargument is the business owner's estate had legal title to the profits and income earned by the business owner, which remained in the business account.

1. Civil Theft

A person who steals personal property from another is civilly liable to the owner of the property for its value when stolen plus punitive damages.

2. Conversion

Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control is that the actor may justly be required to pay the other the full value of the chattel.[17]

3. Violation of Uniform Trade Secrets Act

A Claimant is entitled to recover damages including actual loss caused by the misappropriation of trade secrets and unjust enrichment caused by the misappropriation of trade secrets.[18]

Misappropriation is the acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that the discloser's or user's knowledge of the trade secret was

i. derived from or through a person who had utilized improper means to acquire it;

ii. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

iii. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of the discloser's or user's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[19]

A trade secret is including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[20]

XI. DISCORD AMONG CLIENTS AND COUNSEL WHEN PERSONAL ISSUES OVERRIDE COMMON SENSE

CASE STUDY: It's Not About the Money.

Mrs. Finuken comes in to retain you because her mom recently died. Mrs. Finuken is a long-time client of your firm's and you have known her for a long time to be a person of impeccable integrity. Mrs. Finuken was largely responsible for taking care of her mom in the years before her death; she acted as her mother's attorney-in-fact and assisted her mother in all of her financial affairs during mom's later years when she was suffering from dementia. Your client, Mrs. Finuken, is named personal representative of the Will.

Immediately after filing the probate, Mrs. Finuken's two siblings, Sue and Jane, object to Mrs. Finuken being appointed as personal representative and pepper their responsive pleadings with salacious allegations. They allege among other things that Mrs. Finuken has illegally removed and stolen property of their mother's, misused the power of

attorney for her own financial gain prior to mom's death, and make other allegations in the nature of a personal attack.

You look into the matter and determine that as far as you can tell, Mrs. Finuken has done everything right, was a good daughter, and took care of her mother. Further, Mrs. Finuken has left you with impeccable financial information indicating no wrong-doing. It seems that Sue and Jane harbor a very strong dislike to their favored sister, and are now using the probate process to vent long-held grudges. It quickly becomes apparent that the parties are not going to be able to come to much of an agreement and that the issues involved really have very little to do with the actual assets of the estate.

In order to break through the difficult situations, counsel agrees to an early mediation between the parties. However, the mediation falls apart when Sue and Jane accuse Mrs. Finuken of theft of property without real evidence, accusations of a broken antique, and missing jewelry.

To make matters worse, opposing counsel comes out in the hall to talk to you, and you quickly learn that opposing counsel has now taken the same attitude as their clients, calling your client, Mrs. Finuken, salacious names, accusing her of being a fraud and a thief, and making both civil and criminal threats to you regarding your client. Despite your best efforts, dealing professionally with opposing counsel seems to be totally ineffective.

A. Model Rules of Professional Conduct

1. Frivolous Claims

MRPC 3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
>
> Comment [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. *The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.*

2. Truthfulness

MRPC 4.1 states:

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

3. Respect for Rights of Third Persons

MRPC 4.4 states:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

4. Misconduct

MRPC 8.4(d) states:

> It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

B. Model Rule of Professional Conduct Ethics Canons

Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

EC 7-37: In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC7-38: A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

C. Benefits of Professionalism Between Opposing Counsel

Clients are often driven by emotion during a dispute. It is the attorney's role to remove emotion from the equation and work with their client and opposing counsel to reach a settlement if possible.

Even for the most ethically conscientious lawyers, there is seemingly ubiquitous tension between the duty of zealous advocacy and the duty to conduct oneself civilly at all times.[21]

> "Unnecessary, protracted battles among counsel on satellite issues are not only pointless but they are also extremely expensive. No matter how angry your clients are, no matter how aggressive they want you to be on their behalf, there is one thing they do not want to see: an inflated bill caused by your inability to communicate reasonably with the other side's lawyer. Clients pay us to solve problems. Not to create them. Although fighting with opposing counsel may show aggression (a valuable trait for a trial lawyer), it also shows a laundry-list of other traits that clients don't want to see in their lawyers: bad judgment, lack of vision, inability to control one's self, inability to control the budget, lack of maturity and many more."[22]

Opposing counsel is likely to reciprocate your level of professionalism and civility. If you grant them courtesies throughout the dispute they are likely to return the favor. The ultimate benefactor of professional conduct is the client. They receive a higher level of service without the costs associated with confrontational counsel.

Notes

17 Restatement (Second) of Torts §222A (1965).

18 Uniform Trade Secrets Act §3(a).

19 Id. at §1(2).

20 Id. at §1(4).

21 Reardon, Jayne. "Civility as the Core of Professionalism." (2013).

22 "Opposing Counsel is Not the Enemy: 5 Tips For a Positive Relationship with your Opposing Counsel." February 23, 2014.