Integrity in Estates Practice

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1. Introduction

This paper is not intended to be an academic treatise on ethical and professional responsibility issues arising in estates practice. Instead, it is intended to offer what are hopefully practical perspectives on a number of commonplace issues which typically arise in an estates practice which raise ethical issues, and as such, test the integrity and professional standards of the estates practitioner.

2. Background Thoughts and Perspectives

But first, what is it that we mean when we say that a lawyer has "integrity"? What are the hallmarks of such a lawyer? I would like to think it means someone who is an ethics leader, has the complete trust and respect of clients and colleagues, who sets the tone of conduct and standards for his or her peers; and who does not compromise principle due to a firmly entrenched ethical framework.

To describe a lawyer in today's competitive, commercially-oriented legal culture as having "integrity" may be seen by some as "old-fashioned" or "old school". Certainly integrity is a trait we all respect and aspire to have others attribute to each of us, but perhaps it is a trait less revered today than in the past in defining those who are perceived as the leading edge of the profession and who enjoy the most professional success. Perhaps this is so because to act with integrity in particular situations is perceived as a constraint on commercial success, therefore not a "sexy" trait for those who wish to pursue commercial success in their practice above all else.

Yet, integrity is important in defining us as professionals, and in my view is integral to the conduct of an estates practice, perhaps *more* so that in many other practice areas.

As estate lawyers, we are often invested with sensitive and confidential financial and family information that often no one else in the world knows other than our clients and

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ourselves. We are the keepers of many secrets and must guard what we know with vigilance and with the greatest discretion.

We are often intimately involved in the dynamics of a large family group, representing multiple family members in complex issues of intergenerational wealth transfer, a process which poses difficult issues in first defining to whom we owe duties, and in managing interlocking and sometimes conflicting interests.

We are advisors to clients who at the outset of the client relationship may be hale and hearty, but with advanced age and illness often become diminished in their capacity, and as a result vulnerable both financially and emotionally. We often then assume the role of a “protector” of sorts, including protecting our client against overreaching family members and others who seek to take advantage, which tests our loyalty and faithfulness and imposes a high moral obligation on us as our client’s lawyer and advocate.

We play a challenging role in planning and administering wealth transfers between spouses, whether married, common-law or same sex, where we must creatively deal with a host of issues, for example where there is a great disparity in inherited wealth between two spouses, or second or subsequent marriages where we must ensure our clients make reasonable provision for financial obligations arising from prior marriages or other relationships. In these situations, we often bring our own value constructs and society’s in establishing dispositive plans which reflect contemporary societal attitudes, including those involving what is considered an equitable distribution between spouses, children and others in different scenarios and circumstances.

We are involved in advising clients on how to minimize their exposure to taxation and to other claims, including those advanced by creditors or family members. As a result, we often walk a tight-rope between striving to act in the best interests of our client and protecting his or her individual interests, while acting within the law in carrying out what is considered legitimate, proper planning.

We practice in an area in which there is significant legislative change and complexity and which has become increasingly specialized to meet the needs of our clients, whose affairs have also become more complicated. To practice with integrity, we must be fair to our clients, and exercise a high level of competence to serve our clients well, or they will be under-served or ill-served.

In the arena of estate litigation, the traditional costs approach of the courts where costs were regularly awarded out of an estate led in the past to a profusion of litigation, some without merit, whether will contests or applications for court directions on matters which might have been more economically dealt with by reliance on a legal opinion or other methods. While the attitude of the courts appears to be stricter and less generous in making costs awards out of an estate, the reality remains that estate litigation poses challenges to each lawyer and the profession as a whole in ensuring the system is not subject to abuse, that ill-founded, vexatious claims are appropriately dealt with by the system and its agents, and that counsel not abuse his or her position by acting in matters which are groundless or have no merit by threatening litigation.

As a final observation, estate lawyers bear a heavy burden and ethical responsibility in their role as the primary architects of wealth transfer. The exercise of their skills will often affect several generations to come, long after they are gone. The ability, ideas, values and competence they bring to the task will have significant future impact and repercussions. The will we draw today or the trust we establish tomorrow will often critically affect both the financial and non-financial well-being of many people for a very long time.

So, yes - integrity is important, perhaps key to estate practice, in particular given the long-term impact of what we do. Because estate practitioners play an important societal role in acting as the key agents of intergenerational wealth transfer, the role of integrity transcends its importance to the reputation of either the individual lawyer or the legal profession today, but goes to the very heart of the matter: society's interest in ensuring its professional fiduciaries (in this context, those estate practitioners entrusted with

carrying out this role) are fair, honest and act beyond reproach and in the general public interest - in short, that they act with integrity.

3. Discreet Ethical Professional Responsibility Issues Arising in Estate Practice

I said in my opening remarks that I would examine practical perspectives on a number of issues giving rise to ethical and professional responsibility concerns.

Identifying ethical issues arising in an estate practice is not a difficult task. There are a host of topical, challenging ones that come to mind, including the following:

1. Professional responsibility issues in advising clients on asset protection (including matrimonial protection) and tax minimization strategies.
2. The need for independent legal advice in estate planning.
3. Joint retainers and ethical concerns in acting for spouses.
4. Representation of multiple family members in estate planning.
5. Duties owed by the lawyer acting for the executor and trustee to the beneficiaries of the trust or estate.
6. Competence.
7. Preparation of wills and trusts that name the lawyer as executor and trustee.
8. Acting for clients under a disability.
9. Undue influence, suspicious circumstances and professional responsibility.
10. Professional responsibility in the estate litigation context, including promoting the resolution of disputes.

Within the constraints of this paper and the panel discussion to be based upon it, I have chosen to focus on the following four topics:

1. Joint retainers and ethical concerns in acting for spouses;

2. Duties owed by the lawyer acting for the executor and trustees to the beneficiaries of the trust or estate;

3. Competence; and

4. Preparation of wills and trusts that name the lawyer as executor and trustee.

(a) Joint Retainers and Ethical Concerns in Acting for Spouses

Acting for spouses on a joint retainer basis and, in particular, the ethical dilemma which arises when one party later wishes to change his or her will, has been a live issue in the Ontario legal profession for the last several years. With respect to joint retainers, the Rules of Professional Conduct of The Law Society of Upper Canada provide as follows:

> "Rule 2.04(6)
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> Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that:
>
> (a) the lawyer has been asked to act for both or all of them,
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> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely."

Most recently, in February 2005 Convocation approved a revised Commentary on the subject of joint retainers and the preparation of wills for spouses or partners, which provides as follows:

> "Commentary
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> Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in

> which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.
>
> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, 1992 S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:
>
> (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
>
> (b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
>
> (c) the lawyer would have a duty to decline the new retainer, unless;
>
> > (i) the spouses or partner had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
> >
> > (ii) the other spouse or partner had died; or
> >
> > (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.
> >
> > After advising the spouse or partner in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8)."

A prior proposed revised Commentary on this subject was problematic from the viewpoint of many practitioners and would have required the lawyer acting for one spouse, even after the spouses had separated or had a breakdown of their relationship, to obtain the consent of the other spouse before acting. Unfortunately, the Rules are often based on ethical principles relevant to civil

litigation and the conduct of advocates. In starting from this basis, the Rules often seem inappropriate in dealing with non-adversarial matters, such as those involving estate planning and advising husbands and wives where there is a mutuality of interest. The revised Commentary is pragmatic in recognizing that once there has been a permanent breakdown of a relationship, the solicitor should not be forestalled from acting for one of the spouses in preparing his or her will, including to remove the other spouse from benefiting under the new will. Such action should not be adverse once there is no longer a mutuality of interest.

In situations where spouses have not separated or there has not been a breakdown of the relationship, the revised Commentary emphasizes the inability to carry out instructions to revise a will unless the other spouse has been informed and agrees to the lawyer making the changes.

The Commentary also clearly sets out the protocol to be followed in acting on a joint retainer in the preparation of wills, and the information that the lawyer should make clear at the outset of the retainer, including the information set out in Rule 2.04(6). It is my practice to discuss these issues in the initial client meeting, which is then confirmed in writing when forwarding draft documents to the clients for review.

(b) Duties Owed by the Lawyer Acting for the Executor and Trustee to the Beneficiaries of the Trust or Estate

In common parlance, we often refer to the estate as if it were a person or legal entity, like we do in referring to a company. However, the estate of course is not a legal entity - in legal terms, the estate refers to property. Similarly, there is also confusion on the role of the estate solicitor. Beneficiaries and others sometimes think that the estate lawyer acts for the deceased in carrying out his or her will, that the estate lawyer is a neutral party, or that the estate lawyer acts for the beneficiaries.

Who is the client? What obligations does the estate lawyer owe to the executor and to the beneficiary? Can he or she act for both? And what happens when there are multiple executors?

The general position taken is that the estate lawyer's client is the executor, and that he or she acts for the executor in his or her capacity as executor, and not personally. As such, legal fees are paid from the estate.

Does this mean that the estate lawyer has duties only to the executor and not to the beneficiary? The issue becomes even more complex when there are multiple executors, some of whom are also beneficiaries.

Although the estate lawyer's client may be the executor, and his or her retainer is solely with the executor who alone can give instructions, the position can be taken that the estate lawyer also has derivative duties to the beneficiaries.

An excellent analysis of these issues is offered in the 1994 Report of the Special Study Committee on Professional Responsibility, Section of Real Property and Probate, American Bar Association entitled "Counselling the Fiduciary".[1]

The Report states the Committee's views that the duties owed to the executor/fiduciary to the beneficiaries is based on a derivative duty of loyalty to the estate, which bars certain conduct but which does not impose affirmative duties to advocate or otherwise to represent actively the interests of the beneficiaries. Examples of prohibited conduct include the following:

a) Self-dealing with the trust estate by transacting with it, such as the purchase of assets;

b) Facilitating the sale of estate assets at an under-value.

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[1] Real Property Probate and Trust Journal Vol. 28, No. 4, Winter 1994.

c) Assisting the executor/fiduciary in disparate treatment of beneficiaries except as provided by the governing instrument.

d) Participating in a breach of fiduciary duty by the fiduciary, for example: helping the executor/fiduciary to favour improperly some beneficiaries at the expense of other beneficiaries, participating in unauthorized self-dealing or in an impermissible delegation of duties.

e) Covering-up breaches of duty by a fiduciary or assisting in such a cover-up.

This Report also asserts that where an accounting is misleading and the fiduciary will not correct it, the lawyer should consider withdrawal. Where a fiduciary is in breach of his or her duty, the Committee takes the position that the lawyer should inform the fiduciary that the act is wrong, and direct the fiduciary to make it right, and should consider disclosure of the breach to the beneficiaries.

In short, the Report states that the lawyer for the fiduciary is barred from taking actions that might be harmful to the estate or its beneficiaries.

Understanding with clarity the distinct role the estate lawyer plays vis-à-vis his or her executor client but within the greater context of the trust and estate as a whole, is integral to good estates practice. When there is confusion and misunderstanding or clear disregard for this complex set of duties, professional irresponsibility problems can often arise. Query whether in the legal profession these duties are as clearly understood and communicated as they should be. Professional responsibility issues are intricate and difficult, and it is important that the ground rules are well understood. Yet, it seems these issues are not given as much attention as they merit. Arguably, they should comprise a significant component of continuing legal education programs on estates practice.

(c) Competence

A key aspect of professionalism and acting with integrity is competence. Competence also includes knowing one's strengths and weaknesses and the scope and limits of one's professional skills.

The practice of estates law has become increasingly specialized. Clients have more intricate situations than in the past. As an example, where there are multiple marriages and children of "blended families", or spouses and children who are U.S. citizens and have exposure to U.S. estate tax, complicated trust planning may be required. The so called "simple will' providing an outright distribution to spouse and gift-over to children is often inappropriate, can result in significant adverse tax consequences (where there is exposure to U.S. estate tax), and in the situation of multiple marriages, can lead to litigation as children of the former marriage can effectively be disinherited from their surviving parent's estate, which ends up passing to the second spouse's family, notwithstanding children born of a lengthy first marriage.

These situations call for the legal expertise to prepare a well-drawn trust will. If the lawyer does not have this expertise, it is incumbent on him or her to involve or consult with a professional who can provide it.

My observation is that those situations involving the need for more complex estate planning and the need for consultation with other professionals are not adequately differentiated from the straightforward situations. The result is that the client is often woefully underserved and thus ill-served.

To practice with integrity requires ensuring the client's interests are always best-served. There is a need for a higher ethic and professional standard among the practicing bar in the area of will and trust planning to achieve this objective. As well, the profession needs to facilitate and encourage members of the bar to co-operatively achieve these objectives, and to create structures and processes to facilitate bringing the right expertise to the table.

In finalizing my paper, I read with interest the remarks of Andrew East, Chair of the England and Wales Probate and Estates Committee of the Society of Trust and Estate Practitioners (STEP), in which he made the following comments on the issue of competence in estate practice in the U.K. context:

> "My problem in particular is with the still entrenched idea that, once qualified, any solicitor can do any kind of legal work. In this day and age, it is no longer credible to think that the same solicitor can handle your divorce, your probate, your house purchase and criminal affairs. We live in the age of specialists and I think that many of the problems that come from poor quality work derive directly from non-specialists thinking they can do this work and failing in the attempt.
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> STEP and the Probate Section of the Law Society have done well to promote the concept of the specialist but sadly there are large numbers of non-specialist solicitors out there conducting probate work and drafting wills. I am gratified that the Probate Section is joining us in passing for the regulation of will writing. Such regulation, if it is to be effective, should encourage only those who are specialists. I do not think that any specialist should have anything to fear from a regulation system that recognizes competency as a passport to practice. The inevitable result of such a system may be that only specialists will be able to do this work in the future and the public will be better served than they are at present"[2]

(d) Preparation of Wills and Trusts that Name the Lawyer as Executor and Trustee

The Rules of Professional Conduct of the Law Society of Upper Canada do not have any specific provisions which deal with the lawyer preparing a will or trust under which he or she is named as an executor and trustee.

In the Ontario bar, the ethical debate concerning naming the lawyer as executor and trustee is not a developed one. The recent case of *Cheney vs. Byrne*

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[2] *The Journal*, Society of Trust and Estate Practitioners, September/October 2005 Volume 13, Issue 5 pp. 18-19.

(*Litigation Guardian of*) (2004) 9 E.T.R. (3rd) 236 (Ont. S.C.J.) discussed below, concerns itself with these issues.

In the U.S., the debate has been a live one and has resulted in professional rules. Many states require that the lawyer ensure full consent and disclosure, including on their fees and executor's compensation, and secure the client's written acknowledgement that such disclosure has been made. For example, in New York State a written disclosure statement must be signed by the client if the lawyer is appointed executor, which discloses among other matters the lawyer's fees and compensation. A copy is attached as Appendix "A".

From an ethical viewpoint, what is the rationale for requiring a rule of conduct in this area? As stated in the "Report of the Special Study Committee on Professional Responsibility - Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary" by the Committee of the American Bar Association Section of Real Property, Probate and Trust Law, rules on this issue are grounded on the counselling function of the lawyer and the obligation to exercise independent professional judgment and render candid advice. It states:

> "…there is no *per se* rule prohibiting a lawyer from preparing a document that designates the lawyer as fiduciary. However, the rules regarding counselling, disclosure and consent all must be observed. Independent advice should be encouraged in cases in which the attorney has not had a longstanding relationship with the client."[3]

Many of these issues were canvassed in *Cheney vs. Byrne* in which two lawyers were appointed executors of an estate. The lawyers brought an application to pass their accounts, claiming compensation of approximately $143,000 on an estate valued at approximately $2.5M. Under the will, there was a clause allowing the lawyers to be compensated at their normal professional rate for their work as executors. The Public Guardian and Trustee ("PGT") represented as

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[3] Real Property Probate and Trust Journal, Vol. 28, No. 4, Winter 1994, p. 815.

litigation guardian the deceased's spouse, who was the life tenant of the estate, and mentally incapable. Counsel for the PGT raised several interesting and provocative objections to the compensation claimed, including that:

a) The testator was insufficiently advised as to the rate to be charged by the Estate Trustees so as to make an informed decision;

b) There was no signed acknowledgement or compensation agreement by the testator or other documentary evidence confirming his understanding of the compensation scheme;

c) The testator did not receive independent legal advice prior to agreeing to the compensation scheme;

d) The Estate Trustees, as lawyers, were in a conflict of interest position vis-à-vis the testator; and

e) The Estate Trustees, as lawyers, were in an unequal bargaining position with the testator in relation to the compensation scheme, as they knew his wife was mentally incapable to act and he had no other family.

The P.G.T. took the position that the applicants should be held to the same standards as a professional trustee and that they should not have placed themselves in a conflict of interest position, contrary to Rules 2 and 4 of the Law Society of Upper Canada's Rules of Professional Conduct. The applicable commentary states that there would be a conflict of interest if a lawyer had a personal financial interest in the client's affairs, or in the matters in which the lawyer is requested to act for the client.

Rule 2.04(3) also provides that a lawyer should not act in a matter when there is, or is likely to be, a conflicting interest, unless disclosure adequate to make an informed decision is given to the client, and he or she consents. The commentary to this provision also states that the lawyer is not required to advise the client to obtain independent legal advice about the conflicting interest, but in some cases especially where the client is not sophisticated or vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Counsel for the P.G.T. argued that the compensation scheme was an improvident one in part because there was no cap on the time spent or the hourly rate being charged.

The Estate Trustees submitted that their compensation should be calculated as set out in the formula in the will, and that the complex nature of the estate made the fixed percentages approach to calculating compensation inappropriate. They also submitted that there is no authority requiring independent legal advice to be sought by a testator in order to validate a compensation clause in a will, and that barring evidence of undue influence, no public policy reason exists to warrant such a requirement. In this case, they submitted that the testator, who was a senior executive, had specifically considered and understood the compensation clause, and his wishes should govern.

The court approved the Estate Trustee's claim for compensation. The traditional "usual percentages" formula used by the Courts worked out to almost the same monetary amount as did the formula under the will. The court commented that the testator was sophisticated and would have known the implications of the compensation scheme and therefore was not concerned that there was no fixed amount for compensation. Based on the facts of the case, the court found the compensation fair and reasonable. The court found there was no evidence of undue influence, and that it would be extremely onerous for solicitors to have their clients obtain independent legal advice on all their retainers. It also stated that the applicants had not placed themselves in a conflict of interest.

The case is interesting in showing how the Rules and general legal doctrines might be used in other cases to challenge compensation claims on the basis of conflict of interest and in highlighting the particular ethical concerns and issues that surround a lawyer being named as executor and/or trustee.

4. Trusts and Estates Specific Rules of Professional Conduct

The Rules of Professional Conduct are general in nature and espouse broad principles, generally litigation-based, and generally not specific to particular areas of practice. Has the time not come to create model rules and commentaries which while applying broad principles are tailored to the particular situation of each practice area? Perhaps one of the reasons for what may be a general ambivalence of the Bar concerning the Rules is their lack of guidance in particular practice areas, which generally make them and their attendant commentaries not particularly helpful when an issue arises. If we are serious about raising professional standards, we must focus on improving and expanding our model rules and commentaries. As the profession has become more specialized, so too should the rules of professional conduct and attendant commentaries.

This need was well recognized by the American College of Trust and Estate Counsel who created the “Commentaries on the Model Rules of Professional Conduct” to adapt the model rules of the American Bar Association to trust and estate practice and provide much needed guidance on professional responsibility issues. The Commentaries provided an excellent reference on many of the most challenging issues faced by trust and estate practitioners today and significant thought and study went into their creation.

As Chair of the Professional Standards Committee of the Society of Trust and Estate Practitioners (STEP), I am also involved in our committee’s work to update and revise the Code of Professional Conduct that governs the Society’s members, including making them trust and estate specific. This is particularly challenging given the international and multidisciplinary complexion of STEP membership which spans many countries over several continents and has members in the legal, accounting, trust company, private banking and related sectors.

I expect the Ontario trust and estate bar would be very receptive to well-developed guidelines on the challenging issues faced in the area of professional responsibility. Undoubtedly, such guidelines would provide much-needed clarity and create a firm foundation for professional conduct going forward.

Schedule "A"

ATTORNEY-FIDUCIARY DISCLOSURE
PURSUANT TO SCPA 2307-a

I, _____, hereby state the following:

1. I am the Testator of my Last Will and Testament heretofore dated this _____ day of _____, 2005.

2. In my Will, I have appointed my friend and attorney, _____, Esq., as an Executor of my Will.

3. I have been advised prior to signing my Will that under current section 2307-a of the New York Surrogate's Court Procedure Act:

(a) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as my Executor;

(b) absent an agreement to the contrary, any person, including an attorney, who serves as my Executor is entitled to receive statutory commissions for executorial services rendered to my estate;

(c) absent execution of this disclosure acknowledgment, an attorney who serves as an Executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive; and

(d) if such attorney serves as my Executor and he or another affiliated attorney renders legal services in connection with the Executor's official duties, he or she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an Executor is entitled.

4. Notwithstanding any statutory provisions to the contrary, it is my wish that if _____ shall act as an Executor of my Will, he be entitled to receive the commission to which a sole Executor would otherwise be entitled at the time of such payment, in accordance with the terms expressed in my current Will.

5. This Disclosure shall apply to any and all future Wills made by me which shall contain similar terms.

_____

_____

_____, Witness

Dated: _____, 2005