Philip M. Hawes
Attorney & Counselor

924 Anacapa Street, Suite 1T • Santa Barbara, CA 93101
Phone: 805 962-4002 • Fax: 805 963-2273
Email: phaweslaw@verizon.net

Who is the Client?

Why is this a Problem?

California estate and elder lawyers in particular are admonished relentlessly to consider: "*Who is the client?*" and *"What is the scope of the representation?*" We are advised to answer these two important questions at the outset of the representation, and to regular reconsider those answers as representation continues.

You may be aware of something called "legal ethics", but maybe only as a lead in to a good lawyer joke. However, we have to take these rules of conduct very seriously or risk losing our license to practice law; not because we were "bad", but because we didn't follow the rules. Imagine suddenly losing your job and being unable to work in the same or similar capacity anywhere and forever. That's what I'm saying here.

So, some knowledge of the lawyer's rules of conduct as they apply in the context of estate planning, administration and elder law may help you to understand how I must deal with situations to which you may not give a second thought.

Can you keep secrets for more than one client at a time?

The most basic rules of conduct behind these questions of "who" and "what" are: (1) an attorney shall not represent parties having adverse interests, and (2) an attorney shall keep the client's confidences inviolate.

These rules are not situational. I have to determine at the outset (1) whether I have another client relationship that would create a conflict of interest if I take on the new client, and (2) whether what the client or potential client is asking me to do can be accomplished in the context of the rules.

Here are common scenarios. See if you can identify the "rule issues" in each of them. (There is a chart at the end of this article listing several more rules that often come up in these contexts.)

- *The attorney is about to undertake representation of a new client whose interests may be adverse to an existing or former client and the attorney has obtained confidential information from the existing or former client material to the representation.*
- *The attorney is about to represent Client #2 for estate planning, but Client #2 has an interest in an existing matter handled by the attorney on behalf of Client #1 (Matter #1), and Client #1 and Client #2 are adverse in Matter #1.*
- *The attorney is asked to provide legal services for more than one client in a single project.* This occurs, for example, when a couple wants to do joint estate planning, or when partners in a business or a common venture or who jointly own property request services on behalf of the group, etc. These are situations where the potential for conflicts of interest or confidentiality are likely, not theoretical. So, expect your lawyer to explore these issues before agreeing to take on your matter.

There are many situations where the client hasn't given this much thought to who will be the client, or where the lawyer is given clues that an existing or potential client might be at risk because they are vulnerable and in a relationship of trust and confidence with someone assisting him or her, such as a family member or caregiver, who may be the person making the direct approach for legal services. The rules of conduct are especially significant in situations where the client's capacity may be in issue.

Here are some typical phone conversations:

- *Please communicate with my daughter directly. She will help me understand what you are recommending and let you know if I have any questions.*

- *I need a power of attorney for my mother. Can you write one up for me?*
- *My sister is the agent for my parents. I don't like what she is doing. I want to replace her.*
- *My mom is in a nursing home. I was told she should transfer her property to me.*
- *I want to change a trust provision my husband and I agreed upon when we last met you.*
- *I'm a beneficiary of an estate. Should I take the Picasso or cash?*
- *I'm a beneficiary of Dad's trust and my sister won't sell me her half of the house.*

Although most of these situations are actually completely innocent, I cannot make that assumption. Instead I must explain that my loyalty is owed to one client at a time, or that I cannot get into situations where your interests are in conflict with a present or former client, or that I cannot communicate our conversations or my advice to friends or other family members and keep your confidences at the same time, etc.

Most of these situations can be sorted out with some education from the lawyer and identifying the true client.

What if the client is incapacitated?

Things are quite different if the existing or potential client is incapacitated.

By definition, the incapacitated client is a person who does not understand and appreciate the consequences of decisions affecting their rights, duties, responsibilities, or the probable consequences of the decision, cannot act in their own best interest. A client who is unable to resist fraud, coercion or duress, or is unable to manage his or her own income or resources for their own benefit, etc. is not necessarily incapacitated.

Incapacity is tested in a legal context by examining the persons mental functions and determining whether deficits in one or more of those functions renders the person substantially unable to exercise the cognitive awareness and ability to make decisions summarized in the preceding paragraph. At the bottom line, the incapacitated client cannot act on their own.

If the potential client is new, then nothing can occur at all because the lawyer-client relationship cannot be established in the first place.

True incapacity differs from situations where a person has diminished capacity that renders him or her vulnerable to physical or financial abuse by a third party (whether or not related) upon whom they rely to act in their best interest. This may occur due to a mistake in judgment or, as is more often the case, a situation of real abuse. I have to wonder in each of these situations whether someone taking advantage?

While California laws give lawyers and courts guidance in assessing mental capacity (CA Probate Code §§810–813, 6100.5, and 6104), if the attorney applies these rules and still has doubts about the client's mental capacity, he or she will find that *California has no rule that specifically addresses the duty of an attorney representing a mentally impaired client*.

The lawyer, who must not disclose any confidential information to anyone without the client's consent, is put into a stalemate where he cannot do anything for the client because, to do so, would breach these stringent duties of confidentiality, client loyalty, etc.

Isn't it common sense to allow the lawyer to help the client in this situation with minimal disclosure of confidential information, such as recommending the appointment of a trustee, conservator or guardian ad litem?

The answer seems to be "no". Such California authority that exists on the subject takes a position contrary to that in a majority of jurisdictions in the United States; that it is the lawyer's duty to maintain client confidentiality at all costs. Therefore, in order to protect that confidentiality, the

lawyer may not seek the appointment of a guardian or conservator for an apparently impaired client, nor even consult with the person's physician. What the attorney (or any other objective observer) deems to be in the best interests of the client is irrelevant.

Although I believe this rule should allow the latitude to allow the lawyer to take steps to protect the client, that is not our rule. Presently, we may choose only between (1) recklessly following the client's directions (even if capacity to give directions is uncertain) regardless of likely detriment to the client, or (2) withdrawing from the representation (as one would do with a competent client), leaving the former client at the mercy of his or her own failings and the possible abuse of third parties.

All of this presumes the incapacity occurs in an existing client. If a new client presents as being incapacitated, then the lawyer cannot even start representation.

What, if anything, can we do?

Unless the client is incapacitated, we may be able to find a way to proceed as the client wishes.

Rule 3-110 sets out the conditions under which a lawyer may represent more than one client without constraint of the one client rules on the condition that the consent to representing a new client with an actual or potential conflict of interests with a former client, or multiple clients (such as estate planning for a couple) where there is an actual or potential conflict of interest is given in writing by the concerned parties after disclosure of the issues by the lawyer. The idea is that the waiver is an informed decision and made in writing as the best evidence of this agreement.

For example, representing a couple for an estate plan should follow the written consent and waiver of the potential for conflicts. When that occurs, the attorney's duty of loyalty and confidentiality is to both clients equally. The clients must understand that the lawyer will not "keep secrets" imparted by one of them from the other.

Another issue is the disclosure of confidential information to agents assisting the attorney in rendering legal services is often essential to performing those services. Working with a third party who is assisting the client may be the only practical way to provide the necessary services for the client's benefit.

If the client is competent and, after a thorough explanation of his or her rights and the effect of the waiver, the client gives the lawyer his or her informed written consent, then the lawyer can work with the third party for the client's benefit without the strict limitation on confidentiality that the lawyer must otherwise observe.

In practice, it is not expected that the lawyer will obtain the written consent of the client in every instance (*e.g.*, for disclosure to the attorney's or client's office staff, the client's accountant, or life insurance agent), but when the services require the use of outside agents such as appraisers or other experts, the attorney should always obtain the written authorization of the client.

Can We Talk?

You concerned about how your mom's affairs are being handled, you want to help your dad get his estate plan in order, you want to give me information about what's going on with mom, you did a will for my husband and I want you to do one for me too….

I hope you can see the potential in these scenarios for problems with client confidentiality and conflicts of interest. These are the types of situations where you can expect me to start asking questions.

I want to know why you are calling and if mom is aware that you are trying to communicate directly with me. Do you have the authority to act for your mother: are you a trustee or agent under her durable power of attorney? Are you the only agent or trustee, or are there co-agents or trustees. Are you trying to give me information about my client that leads you to believe that there may be some form of abuse going on. Does your husband know you are calling me about your family trust?

Ethical problems can be avoided if you understand to whom I owe my ethical duties. You can expect me to ask questions that are intended to reveal ethical issues. I will tell you about these concerns as they relate to the discussion you wish to have, but will not go further without my client's informed consent.

While I appreciate hearing about concerns within the family, particularly when my client is vulnerable to personal or financial abuse, I cannot discuss them with you or tell you what should be done about the situation. If you have the authority to do so, expect that I will verify that authority before we speak.

When I prepare legal documents for you, I will supervise their review and signing. If you cannot come in to sign documents, we will arrange a meeting at your home. If you just want a will or trust form, you can find them on the internet. Don't expect me to help you with the form, except forms for Advance Healthcare Directives.

I will not work with more than one client without discussing conflicts, loyalties and confidences, and signing an agreement with you allowing multiple representation and conflict waivers.

Documentation.

Once the attorney determines who the client is or will be, that conclusion must be documented in the lawyer-client engagement letter. Best practice is to do this at the end of the initial meeting.

If the "client" is a couple or group of people who want to set up a business or nonprofit entity (the "founders"), then the informed written consent of everyone is necessary before starting a multiple representation project.

Consequences You Don't Want

An ethical breach in this area can lead to disaster. From the client's perspective, the result can be the unraveling of the client's estate plan. From the lawyer's perspective, he or she can have their right to practice law suspended or even terminated (disbarment).

The purpose of this article has been to give you some understanding of how the lawyer's ethical rules protect certain specific client interests, and why the lawyer needs to be careful when evaluating what he or she is being asked to do and for whom.

While this is not a primer on the California Rules of Professional Conduct or the rules of conduct found in the Business and Professions Code, I think you should be aware of the basic rules that typically apply in client situations involving estate planning, estate administration and elder law matters.

Rules of the Lawyer-Client Relationship

Every California attorney must abide by all the rules of ethics in California when relevant to the facts and circumstances. The estate planner most commonly encounters the following Rules of Professional Conduct and rules found in the Business & Professions Code:

- The duty to enter into a written contract (B & P §6148(a));
- The duty to avoid actual and potential conflicts of interest (Rule 3–310);
- The duty to maintain the client's confidences (B & P §6068(e));
- The duty to perform services competently and diligently (Rule 3–110);
- The duty to avoid third party interference with the attorney's independent judgment (Rule 1–600(A));
- The duty to communicate with the client (Rule 3–500);
- The duty not to charge unconscionable fees (Rule 4–200(A)); and
- The duty to segregate a client's trust moneys (B & P §6211(a)).