

Ethical Considerations Involving Trust and Estate Planning, Administration and Litigation

Bergen County Bar Association

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Defining the Representation

- Identifying the client
 - Representation of Spouses
 - RPC 1.4 Communication
 - RPC 1.6 Confidentiality of Information
 - See A v. B v. Hill Wallack, 158 N.J. 51 (1999)
 - Intergenerational Representation

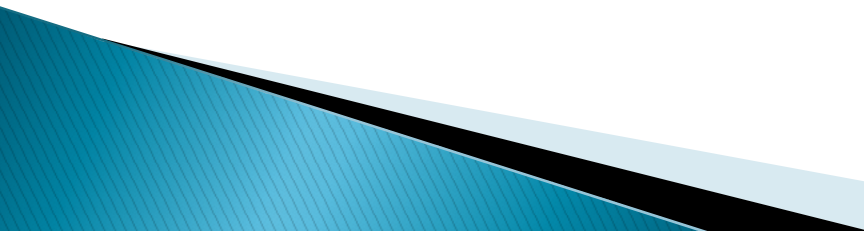
Engagement Letters

- Defining the scope of representation
 - RPC 1.2(c)
- Fees
 - RPC 1.5

Conflicts of Interests

- Attorney as the “family counselor”
 - Parent
 - Child
 - Other relatives
- Prior attorney client relationship with potential beneficiaries
 - RPC 1.7
 - RPC 5.4(c)

Conflicts of Interests

- Haynes v. First National State Bank, 87 N.J. 163 (1991)
 - In Re Will of Landman, 319 N.J. Super. 252 (App. Div. 1999)
 - Lovett v. Lovett, 250 N.J. Super. 79 (Ch. Div. 1991)
 - In Re Estate of Stockdale, 196 N.J. 275 (2008)
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Clients with Diminished Capacity

- RPC 1.14 – Client Under a Disability
 - (a) “the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client”
 - (b) “when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken...the lawyer may take reasonably necessary protective action”

Diminished Capacity

- Testamentary Capacity
 - Legal presumption that a testator is of sound mind and competent when a Will is executed
 - Very low degree of mental capacity for executing a Will

Diminished Capacity

- When is capacity measured?
 - At the time the document is executed
 - Moment of lucidity

Diminished Capacity

- Considerations when capacity issues exist
 - Other professional from the firm to meet with Testator
 - Report from treating physician
 - Can Testator articulate reasons for the course of action?
 - Over-involvement by family members
 - Document the file

Diminished Capacity

- Capacity to execute a contract
 - Generally deemed to be higher than the capacity to required to execute a Will
 - Execution of a Trust
 - Execution of a Power of Attorney
 - Making gifts

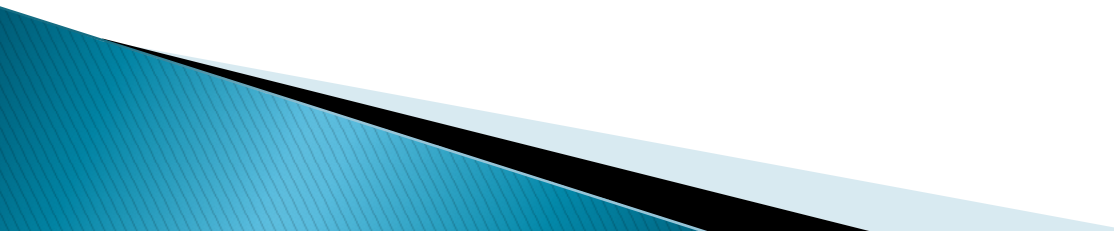
Diminished Capacity

- Undue Influence
 - Meet with Testator outside of the presence of other family members
 - Memos to the file and other documentation of discussion with client
 - Make efforts to clearly ascertain capacity and intent

Diminished Capacity

- Should a Will execution be videotaped?
 - Is this the attorney's normal procedure?
 - Testator might be shown in an artificial and unfavorable light
 - Editing or destroying the video

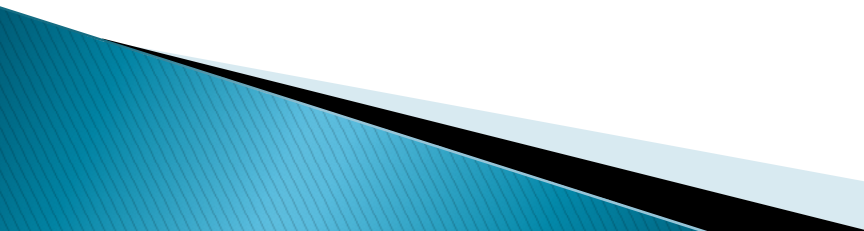
Gifts to Attorney

- RPC 1.8(c) – a lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare an instrument giving the lawyer any substantial gift.
 - Exceptions
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Gifts to Attorney

- Appointment of Attorney as fiduciary – is this a gift? See Advisory Committee on Professional Ethics Opinion, No. 683 (1996).
- Fiduciary commissions and fees. See N.J.S.A. 3B: 18–6
- New York law – written acknowledgement when attorney is named as fiduciary

Retention – Litigation & Administration

- Confirm the Terms of the Engagement in Writing
 - Identify the Client and Scope of Representation:
 - Who are you representing – fiduciary, beneficiary, multiple parties?
 - Joint representation requires an analysis under RPC 1.7. Clients may consent in writing to the representation despite potential conflicts after disclosure and consultation.
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Retention – Litigation & Administration

- An attorney who represents a fiduciary does not automatically represent the beneficiaries of a trust or estate. See In Estate of Albanese v. Lolio, 393 N.J. Super. 355 (App. Div. 2007); Estate of Spencer v. Gavin, 400 N.J. Super. 220 (App. Div. 2008).
- Is the matter limited to pre-litigation negotiations? Does it exclude tax considerations? RPC 1.2(c) permits reasonable limits on the scope of representation with client's informed consent.

Retention – Litigation & Administration

- Fees

- RPC 1.5(a) requires fees to be reasonable considering various factors: time and labor; novelty and difficulty; customary rates; the amount involved and results obtained; experience, reputation and ability; and the nature and length of the professional relationship.

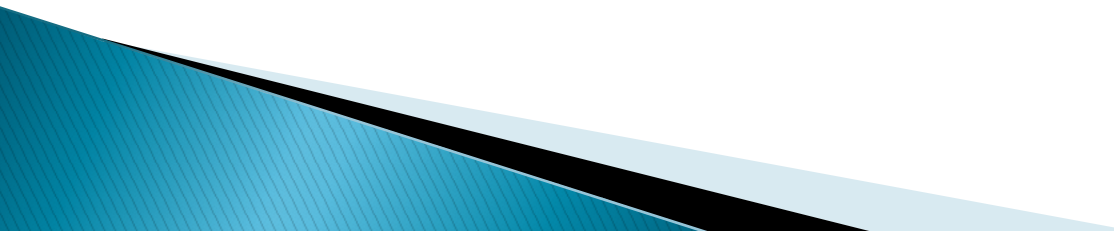
Retention – Litigation & Administration

- RPC 1.5(b) requires the lawyer to communicate the basis or rate of the fee in writing to any client that the lawyer has not regularly represented.
- Special Fee Considerations for Estates and Trusts:
- In re Bloomer's Estate, 37 N.J. Super, 85, 94 (App. Div. 1955).
- Will Contests and R. 4:42–9(a)(3).
- “Fund in Court” doctrine. R. 4:42–9(a)(2)

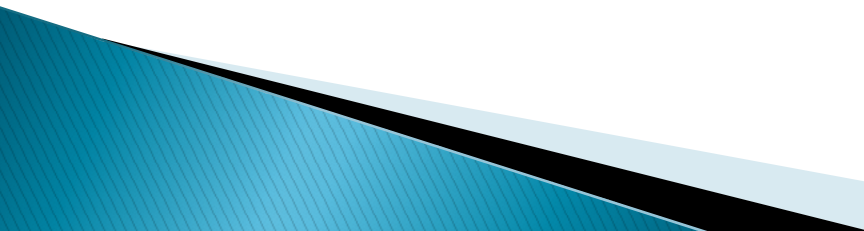
Retention – Litigation & Administration

- Fee-shifting permitted when fiduciary employs undue influence to obtain benefit under a Will. In re Niles, 176 N.J. 282 (N.J. 2003).
- Fiduciaries may employ attorneys to assist with estate administration. N.J.S.A. 3B:14–23(l).
- Fiduciaries may use funds from trust or estate to pay legal fees, subject to court approval. R. 4:42(9)(a)(2).

Retention – Litigation & Administration

- Attorneys serving as fiduciaries are entitled to fees for legal services in addition to statutory commissions. N.J.S.A 3B:18-6.
 - Attorneys cannot charge a fee for administrative matters when commissions serve as compensation.
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Advising Clients – Litigation & Administration

- RPC 1.1 (Competence). Prohibits lawyers from acting in a grossly negligent manner.
 - Lawyers who advise clients on estate and trust matters have an obligation to familiarize themselves with relevant substantive and procedural laws.
 - Sources of Law: Title 3B, Court Rules, caselaw, state and federal tax codes (Title 54 and Title 26)
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Advising Clients – Litigation & Administration

■ Executors

- Powers: The Will and N.J.S.A. 3B:14–23.
- Duties: Expeditiously probate the Will, collect assets, pay debts, taxes and make distributions. N.J.S.A. 3B:10–23 and –28.

■ Trustees

- Manage assets for beneficiaries in accordance with governing instrument and applicable law.
- Uniform Trust Code, N.J.S.A. 3B:31–1, et seq.
- Prudent Investor Act N.J.S.A. 3B:20–11, et seq.

Advising Clients – Litigation & Administration

- Duty of Loyalty and Care (See Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349 (App. Div. 1985); In re Koretsky's Estate, 8 N.J. 506 (1951))
- Practice Points:
 - Communicate with Beneficiaries
 - Remain Impartial and Refrain from Self-dealing/Conflicts
 - Act with Reasonable Prudence/ Use Any Special Skills

Advising Clients – Litigation & Administration

- Will Contests (R.4:85–1)
 - Attorney–Client Privilege after Death – N.J.R.E. 504(2)
 - Testamentary capacity
 - Natural Objects of Bounty
 - Understanding of Assets
 - Understanding of the Import and Nature of Will
 - Minimal Requirement/Presumed
 - In re Liebl, 260 N.J. Super 519 (App. Div. 1992), certif. denied., 133 N.J. 432 (1993).

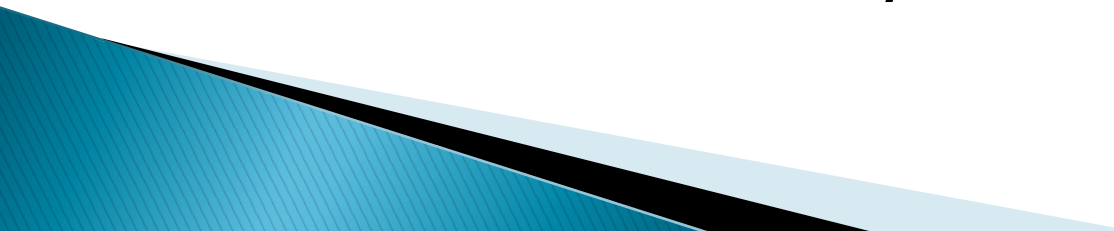
Advising Clients – Litigation & Administration

- Undue Influence
 - Mental, moral or physical exertion that destroys free will
 - Confidential Relationship
 - Suspicious Circumstances
 - Burden Shifting
 - Haynes v. First Nat'l State Bank, 87 N.J. 163 (1981)
 - Inter Vivos Transactions

Advising Clients – Litigation & Administration

- Removal of Fiduciary
- Conflict of interest, fraud, gross mismanagement, extreme hostility (N.J.S.A. 3B:14-21)
- Attorney–client privilege after removal. See Estate of Fedor, 356 N.J. Super. 218 (Ch. Div. 2001)
- Accountings, surcharges and commissions (R. 4:87 and R. 4:88)

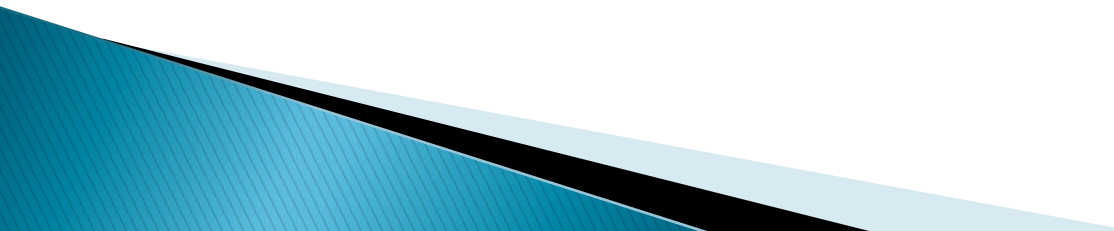
Advising Clients – Litigation & Administration

- Superior Court, Chancery Division, Probate Part (File with Surrogate's Office)
 - Order to Show Cause, Verified Complaint, Brief and Proposed Form of Judgment (R. 4:84-1; R. 4:67)
 - Service on all interested parties; minors and virtual representation; Responses
 - Summary Proceeding vs. Plenary Proceeding
 - Mediation, Discovery, Motion Practice, and Trial
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Advising Clients – Litigation & Administration

- Nonjudicial settlement agreements – N.J.S.A. 3B:31-11
 - Interested parties may reach agreements on trust matters without court approval
 - Cannot violate the material purpose of the trust or legal requirements. See RPC 1.2 (d)
 - Examples: trustee liability, appointment and resignation; trust modification, situs, and accountings

Advising Clients – Litigation & Administration

- Handling Clients Who Seek To Pursue An Unlawful Course of Action
 - Explain Your Inability to Assist – RPC 1.3(d); RPC 1.4(d). Recommend Alternatives and Withdraw if Necessary – RPC 1.16
 - RPC 1.6 – Must or May You Reveal Confidences After Withdrawal
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Overview of Guardianship of Incapacitated Person

N.J.S.A. 3B:12-25

- Who may serve
- Consideration to surrogate decision-maker

Legal Effect of Adjudication of Incompetency

- Ward divested of control and management of property
- Exceptions/carve-outs

N.J.S.A. 3B:12-26

- Action against incapacitated person
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Duties of a Guardian

N.J.S.A. 3B:12-56

- General powers, rights and duties of a guardian

N.J.S.A. 3B:12-57

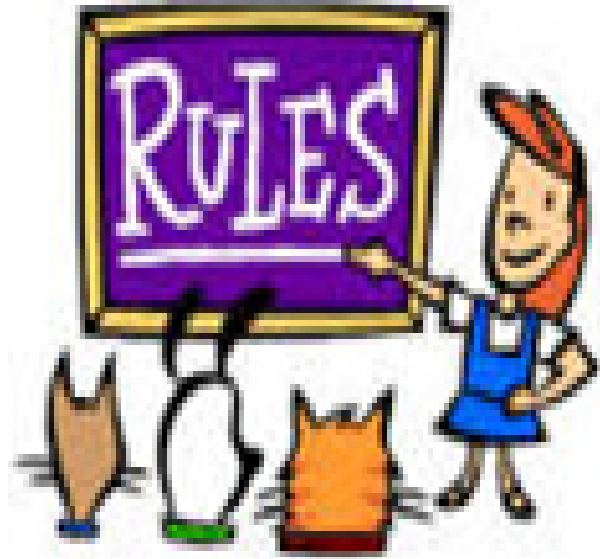
- Preferences of an incapacitated person
- Specific duties of a guardian

N.J.S.A. 3B:12-43

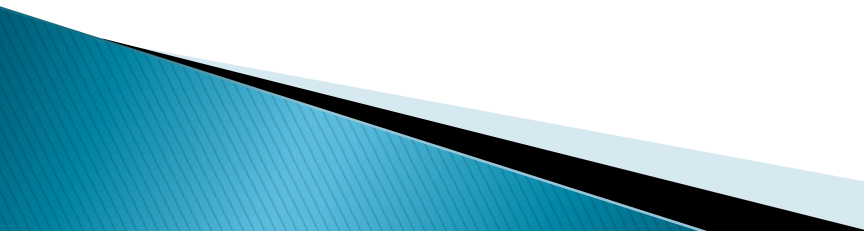
- Expenditures to be made by a guardian out of incapacitated's estate
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Procedural Aspects – N.J. Court Rules

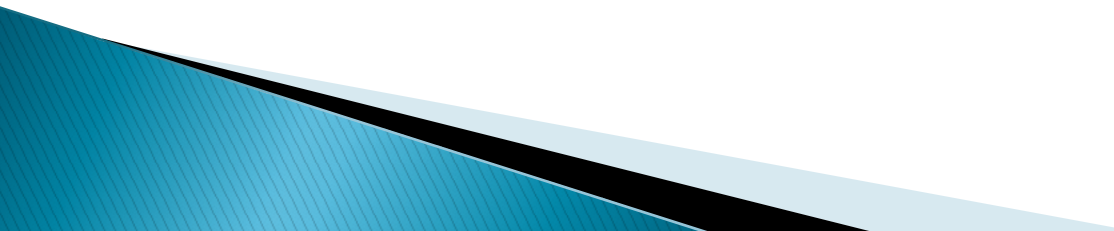
- Overview
- Rule 4:86–1 through 4:86–7
 - Complaint
 - Affidavits
 - Order for Hearing
 - Proof of Service
 - Hearing
 - Judgment



Conflicts of Interest

- RPC 1.7 Conflict of Interest: General Rule
 - Concurrent Conflicts of Interest
 - Informed Consent
 - Estate Planning Client
 - RPC 1.9 Duties to Former Clients
 - Informed Consent
 - Estate Planning Client
- 

Representing Multiple Clients

- Siblings
 - Guardianship over Parent
 - Husband and wife
 - Guardianship over child (18 or older)
 - Blended family members
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Contested and Uncontested Guardianships

- RPC 4.4 Respect for Rights of Third Persons
 - (a) 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.

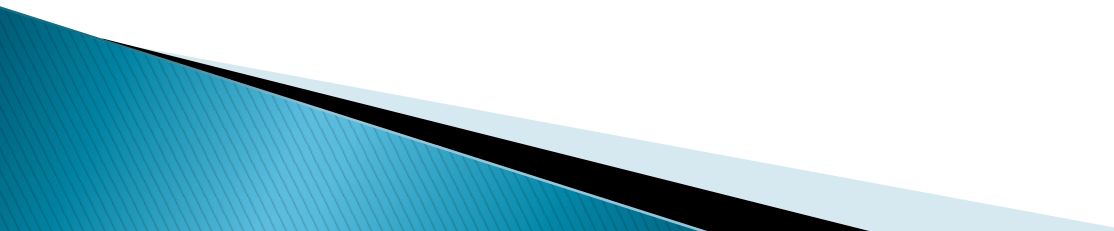
Attorney Misconduct

- RPC 8.4 Misconduct
 - Violate RPCs
 - Commit criminal act
 - Engage in conduct involving dishonesty, fraud, deceit or misrepresentation
 - Engage in conduct that is prejudicial to administration of justice
- Case Study – In re V.R. III

Clients Potential Fraudulent/Unethical Conduct

- RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
 - Prohibition on assisting in illegal, criminal or fraudulent conduct
- RPC 1.4 Communication
 - Assistance not permitted by Rules of Professional Conduct

Court Appointed Counsel/Guardian Ad Litem

- RPC 6.2 Accepting Appointments
 - A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as
 - Representation will violate RPC
 - Unreasonable financial burden
 - Repugnancy
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Duties of Court Appointed Counsel

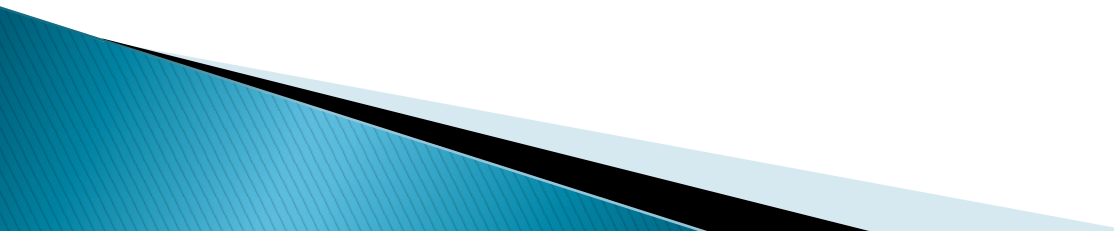
- Rule 4:86–4(b) Appointment and Duties of Counsel
 - interview alleged incapacitated person and persons having knowledge of alleged incapacitated person's circumstances
 - Court Appointed Counsel's Report
 - Advocate alleged incapacitated person's position
 - RPC 4.2 Communications with person represented by counsel



Duties of Guardian Ad Litem

- Rule 4:86–4(b) Appointment and Duties of Counsel
 - Guardian Ad Litem may be appointed in addition to counsel to evaluate best interests of the alleged incapacitated person
 - Advocate positions that further ward's best interests

Duties to Client Post-Appointment and Additional Considerations

- When does the attorney/client relationship end
 - Reporting requirements
 - Sale/encumbering of incapacitated person's property
 - Gifting, Tax, and Medicaid decisions
- 

Removal of Guardian/Vacancy in Guardianship

- N.J.S.A. 3B:12-65
 - How it arises
 - Requires court approval
 - Appointing substituted guardian
 - Conflict considerations

Representing a Client With Diminished Capacity

- RPC 1.14 Client Under Disability
 - Maintaining normal client–lawyer relationship
 - Reasonably necessary protective action
- RPC 1.6 Confidentiality of Information
 - Interrelationship with RPC 1.14
 - Authority to reveal confidential information

Questions

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