

ETHICAL CONSIDERATIONS IN DRAFTING TRUSTS FOR CLIENTS WITH DIMINISHED CAPACITY

October 4, 2022

CHRISTOPHER J. MUELLER
Hewitt Law & Mediation, LLC
255 N. Alabama St. Ste. 300
Indianapolis, IN 46204
317-922-2822
cmueller@hewittlm.com

GREGG S. GORDON
Nickloy, Albright & Gordon, LLP
5540 Pebble Village Ln. Ste. 300
Noblesville, IN 46062
317-773-3030
gregg@nickloylaw.com

CURTIS E. SHIRLEY
Law Office of Curtis E. Shirley, LLC
1905 S. New Market St., Ste. 200
Carmel, IN 46032
317-439-5648
curtis@shirleylaw.net

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, 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 and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14:

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

[1] The normal client-lawyer relationship is **based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.** When the client is a minor or suffers from a diminished mental capacity, however, **maintaining the ordinary client-lawyer relationship may not be possible in all respects.** In particular, **a severely incapacitated person may have no power to make legally binding decisions.** Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must **keep the client's interests foremost** and, except for protective action authorized under paragraph (b), **must look to the client, and not family members, to make decisions on the client's behalf.**

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

Taking Protective Action:

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include:

- consulting with family members,
- using a reconsideration period to permit clarification or improvement of circumstances,
- using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

Taking Protective Action:

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as:

- the client's ability to articulate reasoning leading to a decision,
- variability of state of mind and ability to appreciate consequences of a decision;
- the substantive fairness of a decision; and
- the consistency of a decision with the known long-term commitments and values of the client.

In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

Taking Protective Action:

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. . . .

In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the **least restrictive action on behalf of the client.**

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

Emergency Legal Assistance:

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

Emergency Legal Assistance:

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Ethical Considerations in Drafting Trusts

Client with Diminished Capacity

- Ind. Prof. Cond. R. 1.14 – Some important comments:

Taking Protective Action:

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Ethical Considerations in Drafting Trusts

Confidentiality

- Ind. Prof. Cond. R. 1.6:
 - (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Ethical Considerations in Drafting Trusts

Confidentiality

- Ind. Prof. Cond. R. 1.6:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- In any conflict analysis, you must know who your client is at all times.
- This is especially important when a single person may wear multiple hats (i.e. fiduciary and beneficiary).
- Or, if your client has diminished capacity and there are others involved.
- Let's refresh the primary conflict of interest rule.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Ind. R. Prof. Cond. 1.7:
 - (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
 - (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Ind. R. Prof. Cond. 1.7 – Some important comments:
- **Identifying Conflicts of Interest: Material Limitation**
- [8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Ind. R. Prof. Cond. 1.7 – Some important comments:
- **Special Considerations in Common Representation**
- [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.
- [30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Ind. R. Prof. Cond. 1.7 – Some important comments:
- **Special Considerations in Common Representation**
- [31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer may have to withdraw from representing one or more or all of the common clients if one client decides that some matter material to the representation should be kept from the others. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.
- [32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c) and 2.2
- [33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Ethical Considerations in Drafting Trusts

Confidentiality

- Ind. Prof. Cond. R. 1.9:
 - (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Ethical Considerations in Drafting Trusts

Confidentiality

- Ind. Prof. Cond. R. 1.9:
 - (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Ethical Considerations in Drafting Trusts

Confidentiality

- Ind. Prof. Cond. R. 1.9:
 - (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Ethical Considerations in Drafting Trusts

Confidentiality

- Ind. Prof. Cond. R. 1.8(c):

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Reminders for Conflict Analysis:
 - You should only represent your client in one capacity, unless multiple interests of your client are completely aligned.
 - Never forget who your client is.
 - Revisit who your client is as issues arise; engagements are often dynamic.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Reminders for Conflict Analysis (continued):
 - Paper your file confirming you represent your client in only one capacity. If that changes, paper your file again with a revised or additional engagement letter.
 - If your client has a conflict, you may or may not have a conflict.
 - You probably don't, as long as you represent your client in only one capacity.

Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

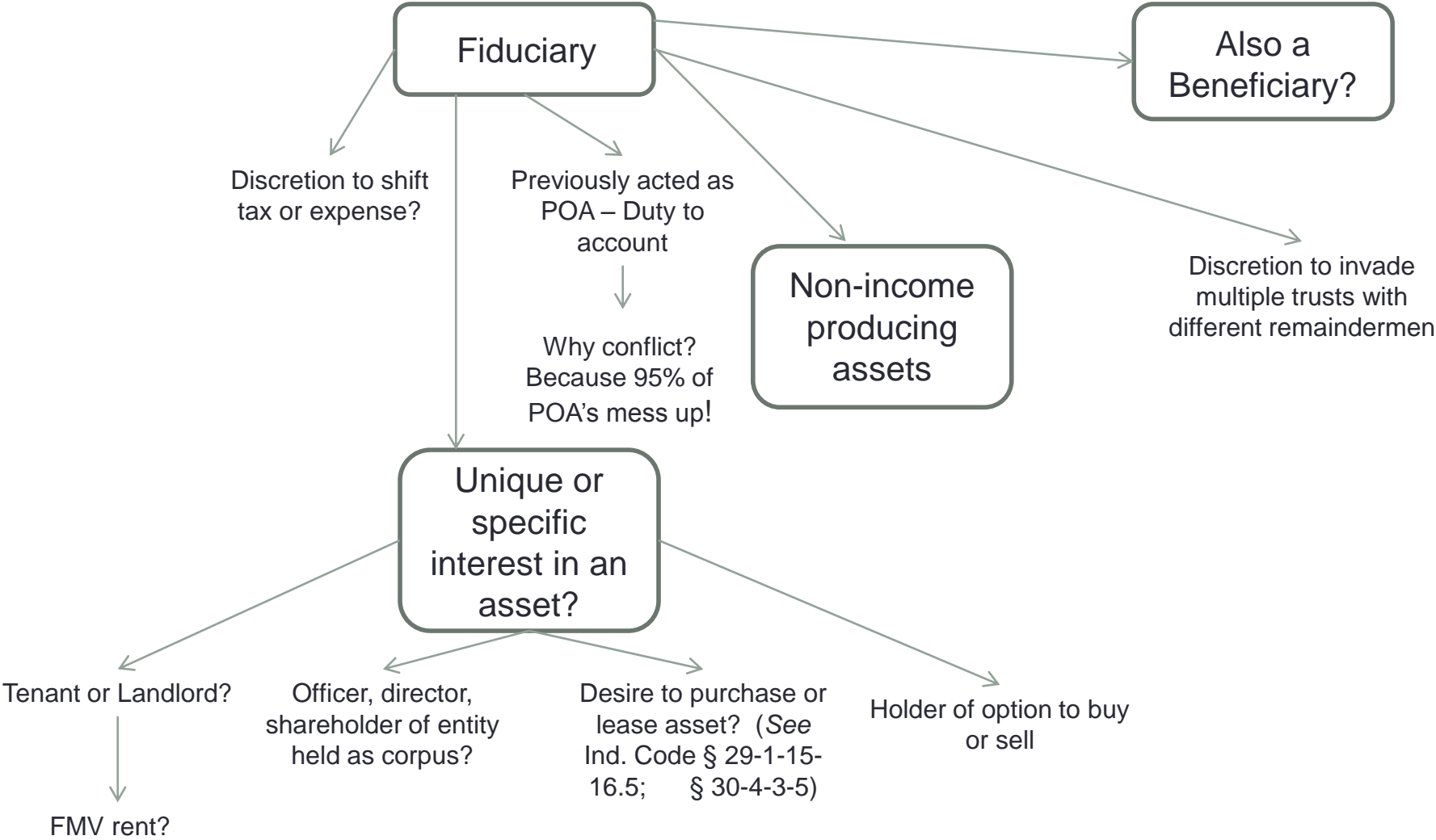
- Reminders for Conflict Analysis (continued):
 - In a Will or Trust contest, privilege and work product are precarious:
 - Privileged communications and work product may be discoverable by all beneficiaries, including adverse ones.
 - Learn about the fiduciary exception.
 - Having non-drafter litigation counsel greatly increases privilege and work product protection for post-death communications and work product.

Ethical Considerations in Drafting Trusts

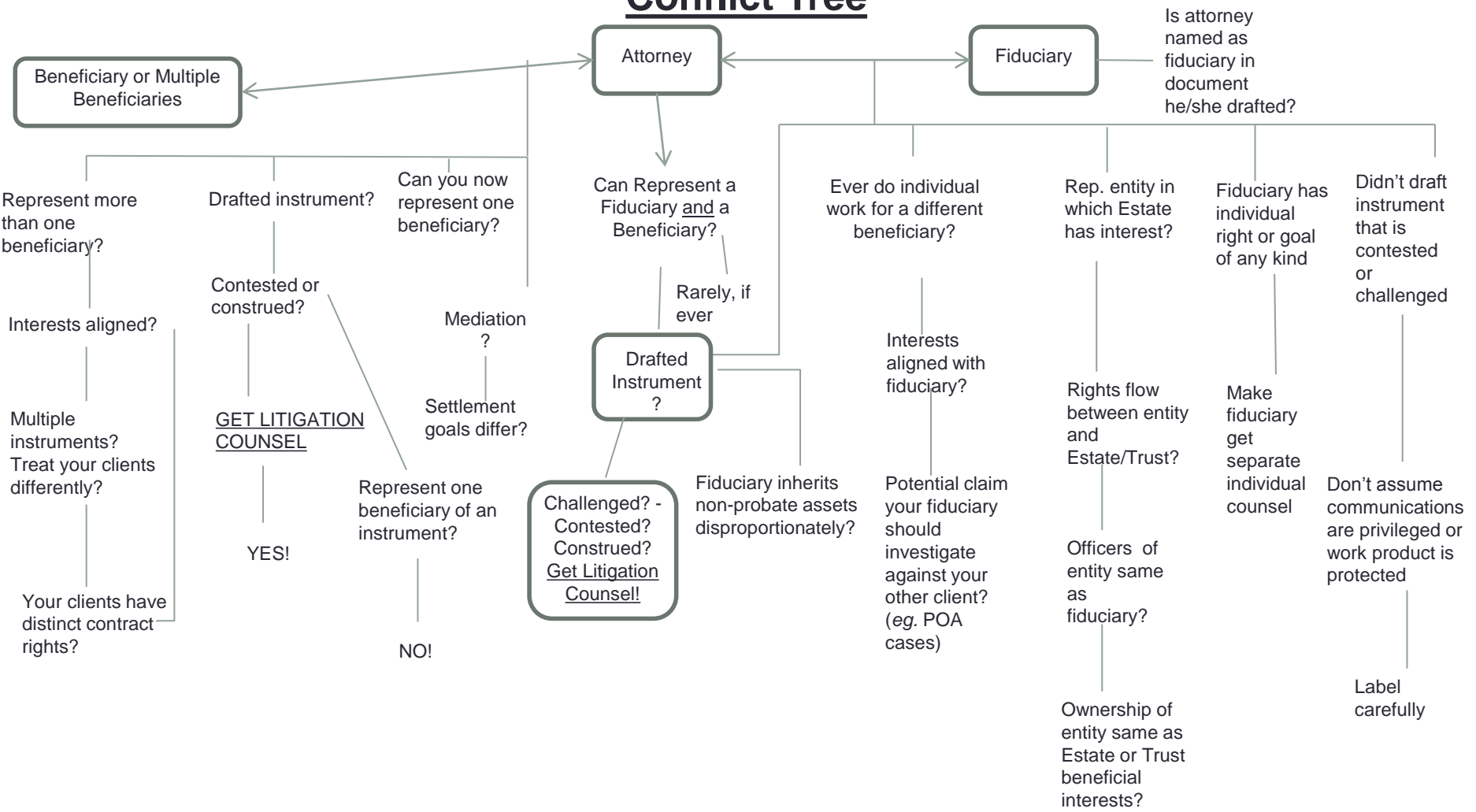
Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Reminders for Conflict Analysis (continued):
 - Your client believes he/she is entitled to the entire estate.
 - If conflicts are so obvious, why do we run into them constantly?
 - Be practical: sometimes separate counsel makes sense even if there is no technical conflict. Appearance matters.

FIDUCIARY CONFLICT TREE



Estate / Trust / Beneficiary Counsel Conflict Tree



Ethical Considerations in Drafting Trusts

Avoiding Conflicts of Interest: Who is (or Who is Not) Your Client

- Reminders for Conflict Analysis (continued):
 - Did you write the document?
 - Key witness
 - Privilege
 - Impartiality
 - **NEWSFLASH:** If you drafted the document and the document is contested or construed, you are a target, and this mess is “your fault.” If you are a named fiduciary, it’s even more “your fault.”

Ethical Considerations in Drafting Trusts

Unrepresented Parties/Beneficiaries

- Ind. R. Prof. Cond. 4.3:
 - In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Ethical Considerations in Drafting Trusts

Unrepresented Parties/Beneficiaries

- Ind. R. Prof. Cond. 4.3, comment 1:
 - An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

Ethical Considerations in Drafting Trusts

Unrepresented Parties/Beneficiaries

- Ind. R. Prof. Cond. 4.3, comment 2:
 - The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Ethical Considerations in Drafting Trusts

Protecting Confidentiality and Privilege

- Attorney-client privilege and the testamentary exception
- *Gast v. Hall*, 858 N.E.2d 154 (Ind. Ct. App. 2006), *trans. den.* Provides a thorough history of this exception and driving policy.
- “The attorney-client privilege is one of the oldest recognized privileges for confidential communications”
- “The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”

Ethical Considerations in Drafting Trusts

Protecting Confidentiality and Privilege

- From *Gast*.
- An exception to the posthumous survival of the privilege exists when a controversy arises concerning the validity of the will or between the claimants under the will.
- Stated succinctly, the "testamentary exception" is as follows:
 - Communications by a client to the attorney who drafted his or her will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him or her.
 - The testamentary exception is limited to evidence pertaining to preparation of will or other similar documents.
- When the communications between a decedent and his attorney do not result in an executed will, the communications do not fall within the exception to the attorney-client privilege and thus are confidential. The distinction between communications with attorneys who prepare executed wills and attorneys who do not as follows:

Ethical Considerations in Drafting Trusts

Protecting Confidentiality and Privilege

- From *Gast*.
 - The distinction between communications with attorneys who prepare executed wills and attorneys who do not as follows:
 - When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective.
 - If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own.
 - If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interest.
 - Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind.
 - When the communications do not, however, result in an executed will, the decedent does not assume the attorney's file, notes or memory will become part of any court proceedings and therefore we cannot assume that the decedent expected his communications to be made public.
 - In short, in the absence of an executed will, we do not infer that the decedent intended to waive those communications to effectuate his intent.
 - Therefore, the established exception, which is consistent with the purposes of the privilege, should not be construed or applied so as to defeat its purpose.

Ethical Considerations in Drafting Trusts

Protecting Confidentiality and Privilege

- If a party seeks discovery of the communications between decedent and his attorney, which communications resulted in the execution of a will, the communications are not protected by the attorney-client privilege.
- All other communications to an attorney likely remain protected by the privilege.
- Ultimately, most arguments will come down to the competing policy interests behind the exception.

Ethical Considerations in Drafting Trusts

- Questions?