

ETHICS ISSUES FACING TRUST AND ESTATE LAWYERS

Hypotheticals

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Hypothetical 1

The patriarch of your town's wealthiest family died about three months ago. Another law firm in town handled the patriarch's estate planning, which has opened up a very lucrative opportunity for you after his death -- because one of the patriarch's children hired you about two weeks ago to represent her in challenging her father's will. You were flattered (but also alarmed) to receive an unsolicited email this morning from the patriarch's widow/executor -- seeking to employ you in what the widow/executor anticipates will be a lawsuit by the patriarch's daughter challenging the will. The widow/executor's email provides some confidential information about the patriarch that would be useful in the lawsuit you plan to file on the daughter's behalf.

- (a) May you tell your client (the patriarch's daughter) about the email you just received from her mother?

YES

NO

- (b) May you continue to represent the daughter despite having received the email from the widow/executor (whose interests are obviously adverse to the daughter's interests)?

YES

NO

Hypothetical 2

After your firm's senior partner retired, you became responsible for most of his client relationships. As you sort through the files of one family, you discover that your firm is representing, or has represented (at various times): a family patriarch in business matters; a company wholly owned by the patriarch; a company 60 percent owned by the patriarch; the patriarch and his wife in some estate planning (although nothing has been done for several years); the patriarch's daughter in a divorce case that just ended; the patriarch's son; an LLC in which the patriarch's son is the majority member.

Is the following person or entity your client:

(a) The patriarch (in business matters)?

YES NO

(b) The company wholly owned by the patriarch?

YES NO

(c) The company 60 percent owned by the patriarch?

YES NO

(d) The patriarch and his wife (in estate planning matters)?

YES NO

(e) The patriarch's daughter?

YES NO

(f) The patriarch's son?

YES

NO

(g) The LLC in which the patriarch's son is the majority member?

YES

NO

Hypothetical 3

For several years, one of your partners has handled labor and employment work for a local company wholly owned by a wealthy investor. Your partner has not obtained any financial information about the company or the investor, and the work has not been very lucrative for your firm. You were just asked by a divorce lawyer representing the investor's wife to assist her in representing the wife in what looks to be a very nasty divorce from the investor. You wonder whether your partner's work for the company will prevent you from representing the wife unless you obtain the investor's consent (which seems unlikely).

May you take a matter adverse to the sole owner of a corporation that your firm represents (without the owner's consent)?

YES

NO

Hypothetical 4

About six months ago, a doctor asked you to prepare an estate plan for him and his wife. You prepared and sent the doctor and his wife a fairly simple will. You have not heard from him or his wife since you sent the draft estate planning documents. This morning, you received a call from one of your partners, whose largest client has asked your firm to file a trademark infringement action seeking an injunction against the doctor for some phrases that he uses in his marketing.

Without the doctor's consent, can you represent the company in the trademark action against the doctor?

YES

NO

Hypothetical 5

You prepared the estate plan for a wealthy developer about three years ago. His original will is still in your law firm's safe, and you send him period "legal updates" on estate tax changes -- none of which has prompted him to retain you for any work since you finished his estate documents. This morning your largest client asked you to file a lawsuit against the developer over an important zoning matter that arose six months ago.

Without the developer's consent, can you represent your client in the suit against the developer?

YES

NO

Hypothetical 6

You have handled most of the legal work for a wealthy businessman and his equally successful long-time girlfriend. Neither one has any children or previous spouses. They show no signs of marrying, although they seem very committed to one another. Both the businessman and his girlfriend have independently mentioned retaining you to prepare estate planning documents. You have not spoken to either one of them about their intent, but you assume that they would probably leave most of their wealth to each other (and perhaps some charities).

If you prepare estate planning documents for the businessman and his girlfriend, will it be a joint representation?

YES

NO

Hypothetical 7

Although you generally handle transactional work for several family-owned companies and their owners, you also help some of your clients with their estate planning. The president of one of your corporate clients just called to say that he would like you to prepare a new will for him and his fourth wife. You worry that the president's interests are or will become adverse to her interests.

May you jointly represent the president and his fourth wife in preparing their estate plan?

YES

NO

Hypothetical 8

You and your colleagues enjoyed a secret chuckle when you learned that one of your firm's wealthiest individual clients has just divorced wife number 4 and is about to marry wife number 5. However, the matter became more serious when your senior partner asked you to represent both the wealthy individual and future wife number 5 in their estate planning -- but also told you that he wants the firm to be in a position to represent your long-standing client in a possible future divorce action against wife number 5.

If you jointly represent the husband and wife number 5 in preparing their estate plan, may you obtain the wife's prospective consent to represent the husband in a future divorce action against her?

YES

NO

Hypothetical 9

For the past six months, you have been representing a husband and wife in preparing their estate plan. You did not explain to either client whether you could (or must) disclose to one spouse what the other spouse told you in connection with their estate planning. Over lunch early this afternoon, the wife told you in confidence that several years before meeting her current husband she had an affair with a coworker and had an illegitimate child. Her husband does not know anything about this, but the wife is considering if she should make arrangements for her illegitimate child to receive some of her estate.

Shell-shocked, you return to the office and discuss this issue with one of your senior partners.

(a) Must you tell the husband about his wife's illegitimate child?

YES

NO

(b) May you tell the husband about his wife's illegitimate child?

YES

NO

(c) May you continue to jointly represent the client?

YES

NO

Hypothetical 10

About six months ago, a well-known basketball coach asked you to represent him and his wife in preparing their estate plan. The coach had been the subject of tabloid rumors, and you did not want to be surprised by some disclosures that you might have to share with his wife. At the beginning of the representation, you therefore had your clients sign a retainer agreement indicating that you would not share with both clients information that you learn from one of the clients. Just as you feared, your basketball coach client told you this morning that he had been romantically involved (for about 15 minutes) with another woman at a bar, and worries that she will claim paternity if she has a baby.

(a) Must you tell the wife about this incident?

YES

NO

(b) May you tell the wife about this incident?

YES

NO

(c) May you continue to jointly represent the client?

YES

NO

Hypothetical 11

You have been representing a husband and wife in their estate planning for about two years. At the beginning of the representation, you had both of your clients sign an explicit "no secrets" retainer agreement. Your goal was to avoid the awkward situation in which one of the clients asks you to keep secret material information from the other client, and the clients have not agreed in advance on how to handle such a conflict.

During your most recent meeting with just the husband, he tells you that he has fallen in love with his neighbor, and plans to divorce his wife. When he asks you to keep this information secret until he is ready to break the news to his wife, you remind him of the agreement that he and his wife signed two years ago that there would be "no secrets" in the estate planning process. You can tell from the horrified look on the husband's face that he has forgotten about that agreement.

(a) Must you tell the wife about the husband's divorce plans?

YES

NO

(b) May you tell the wife about the husband's divorce plans?

YES

NO

(c) May you continue to jointly represent the client?

YES

NO

Hypothetical 12

Last year, you represented a husband and wife in preparing their joint estate plan. You had not addressed the "information flow" aspect of the joint representation, but fortunately that issue did not arise during the course of your work. However, you just learned that the couple is in the midst of a bitter divorce. The husband's lawyer just called to insist that you make available all of your estate planning files to him. In particular, the husband's lawyers wants all of your email communications with his wife, some of which were not copied to him at the time. Given the apparently contentious nature of the divorce, you would not be surprised if the wife's lawyer objects to this "instruction."

If the wife's lawyer objects, must you nevertheless give the husband's lawyer communications that occurred during the joint representation?

YES

NO

Hypothetical 13

One of your firm's wealthiest individual clients asked you about three months ago to prepare an estate plan for him and his third wife. You had just one meeting with them at that time, and you have been working on what you think will be a fairly complicated estate plan. The wealthy individual just called you this morning to tell you that he and his third wife have already separated, and he wants your firm to represent him in the divorce.

May you represent the wealthy individual in the divorce, without the third wife's consent.

YES

NO

Hypothetical 14

You have represented the patriarch of a wealthy family for many years. You also represent a number of his children in fairly minor matters, such as traffic infractions. The patriarch just called you to say that he has decided to disinherit one of the children whom you are currently representing in a minor traffic matter.

May you represent the patriarch in preparing a will that leaves nothing to one of his children (whom you currently represent in an unrelated matter)?

YES

NO

Hypothetical 15

For almost 30 years, you have handled the trust and estate work for a wealthy local businesswoman and her husband. Their planning has always included a very large bequest to their son. As the son grew older, he began to amass some wealth, but never as much as his parents. About six months ago, the son and his wife hired you to prepare their estate plan. Although you have not finished that work, the son has asked to include a large bequest to his college. The son told you that he feels comfortable leaving most of his wealth to his college, because his wife and child could always count on the bequest that he will receive from his parents. At a routine status meeting with his parents this morning, the wealthy businesswoman and her husband told you in confidence that they want to disinherit their son.

(a) Must you tell the son that his parents have asked you to disinherit him?

YES

NO

(b) May you tell the son that his parents have asked you to disinherit him?

YES

NO

(c) May you continue to prepare the son's estate plan knowing that he will not receive the bequest from his parents?

YES

NO

Hypothetical 16

You represented a husband and wife in preparing their fairly simple estate plan, which involved each leaving all of their assets to the other upon death. About two years after you finished working for this couple, you learn that they have divorced. You just received a call from the woman, who says that she will soon be marrying someone else, and wants you to represent her in redoing her estate plan.

May you represent the woman in handling her estate plan without her former husband's consent?

YES

NO

Hypothetical 17

You spent quite a bit of time preparing estate planning documents for a wealthy Los Angeles developer, until he fired you six months ago. Folks must have heard that you and the developer had a falling-out, because this morning you received calls from two potential new clients who want you to handle matters adverse to the developer.

- (a)** Without the developer's consent, can you represent an architectural firm in a large collection case against the developer?

YES

NO

- (b)** Without the developer's consent, can you represent the developer's neighbor in a fairly minor but very contentious dispute about the exact location of the lot line that separates their two backyards?

YES

NO

Hypothetical 18

Several years ago you represented the parents and only child of a very wealthy family in preparing their estate plan. The three clients agreed upon several overall estate planning objectives, which centered on the continuation of the family business established and built by the father. You finished all of this estate planning about five years ago. Although you read in the newspaper that the father died approximately two years ago, neither his widow nor his son called you at that time. However, his widow just called to say that she was very displeased with how her son was running the company, and wanted you to prepare a new estate plan -- which is inconsistent with the overall family estate objectives that you had earlier worked on with all three of your clients.

Without the son's consent, can you prepare the estate plan that his mother describes?

YES

NO

Hypothetical 19

You just received a call from a longstanding trust and estate client, who would like you to prepare his daughter's estate planning documents. Your client tells you that he will pay whatever fees you incur in preparing his daughter's estate planning documents.

(a) May you represent the daughter under this arrangement?

YES

NO

(b) Does the fact that the father will pay your bill affect your representation of the daughter in any way?

YES

NO

Hypothetical 20

You have been a very successful lawyer, in large part because you develop such a close personal relationship with your clients. However, this very trait has led you to pose some questions to your firm's "ethics guru."

- (a) May you solicit substantial gifts from your clients to fund a scholarship named in your parents' honor at a local law school?

YES

NO

- (b) May you accept your client's offer to name you as a beneficiary in her estate (the bequest is \$250,000)?

YES

NO

- (c) May you prepare a will for a client who has asked you to include a provision under which your daughter (for whom your client has been a "second mother" for her whole life) will receive enough money for a college education?

YES

NO

Hypothetical 21

You recently attended an ethics seminar, and learned that lawyers cannot prepare documents under which they receive some benefit from a non-family member client. You were startled by the harshness of the new rule, but recall that lawyers might be able to accept the money if someone else advises the client on the wisdom of making the bequest or gift. Now you wonder how such an arrangement would work.

- (a)** May you accept money from a non-family member client if one of your partners prepares the documents under which you receive that money?

YES

NO

- (b)** May you accept money from a non-family member client if the client is being advised by a financial advisor?

YES

NO

Hypothetical 22

You have represented a local dentist for several years, and consider yourself to be her close friend as well as her lawyer. The dentist called you this morning to discuss her estate planning.

- (a)** If the dentist suggests it, may you act as executor under a will that you draft for the dentist?

YES

NO

- (b)** May you raise the issue first, and suggest that you draft a will that names you as executor?

YES

NO

Hypothetical 23

You have practiced as a trust and estate lawyer for over thirty years. During your long career, you have seen several situations in which your former clients' greedy children, unscrupulous "friends," or unprofessional lawyers have convinced your former clients to alter the estate planning documents you prepared -- nearly always to your former clients' detriment. Starting last year, you inserted in your standard estate planning documents (with your clients' consent) a provision requiring that any changes to your clients' estate planning documents be approved by court order or by you. Two of your former clients just hired another lawyer to change their estate planning documents, and contend that this provision (to which they previously agreed) was unenforceable. In fact, they seek court sanctions against you for having suggested the inclusion of that provision.

Are you likely to be sanctioned for having included that provision in your clients' estate planning documents?

YES

NO

Hypothetical 24

For several years, you have represented a local farmer and his wife. They have become quite wealthy by selling parcels of land, and have become a good source of business for you. Two years ago, you also began to represent their daughter. Last year, the farmer died, leaving his widow as executrix and the main beneficiary of his estate. You have noticed that his widow (whom you still represent) is "slipping," and now you have become very concerned that she might not be able to care for herself. Her condition has grown worse recently (although she denies any problems, and insists on living independently), and you are considering what steps you should (or must) take. Not coincidentally, you received a call this morning from the daughter (your other client) about her mother's condition.

May you undertake the following steps (without the widow's consent)?

- (a)** Reveal confidential information about the widow's behavior to her regular physician (in an effort to see whether you are overreacting to what appears to be a worsening problem)?

YES

NO

- (b)** Reveal confidential information about the widow's behavior to an independent physician?

YES

NO

- (c)** Represent the daughter in seeking a guardian for the widow (her mother) if the doctors confirm your suspicion about her prognosis?

YES

NO

(d) Seek the appointment of a guardian for the widow on your own?

YES

NO

Hypothetical 25

You are handling the trust and estate planning for an elderly client. She is still generally capable of handling her own affairs, but you fear that she will soon be incapable of making her own decisions. Relying on your state's parallel to ABA Model Rule 1.14(b), you sought a report from a psychiatrist about your client's condition (based on your observations). Unfortunately, the report shows that your client might be suffering from the early signs of Alzheimer's disease. She has repeatedly told you that she would rather kill herself than face years in an Alzheimer's unit. Now you wonder what to do with the report.

May you refrain from providing your client with the psychiatrist's report, even if you do not immediately seek the appointment of a guardian?

YES

NO

Hypothetical 26

You have seen one of your elderly clients slip more and more over the past several years, although you do not yet feel that he has lost such capacity as to trigger the obligations under your state's version of ABA Model Rule 1.14. However, you now think that your client has what you would call "borderline testamentary capacity." Your client called this morning to ask that you change a portion of his will.

May you prepare trust and estate documents for a client with "borderline testamentary capacity"?

YES

NO

Hypothetical 27

You represented your fraternity brother for nearly 50 years -- until he suffered a stroke about six months ago. You eventually had to arrange for the appointment of a fiduciary to act as your fraternity brother's guardian. However, in the last several weeks your fraternity brother has seemed much more lucid. You wonder whether you must still take orders solely from the fiduciary -- or whether you can now also take directions from your fraternity brother.

In providing legal services for the benefit of an impaired client who has a court-appointed guardian, may a lawyer continue to meet with and counsel the impaired client?

YES

NO

Hypothetical 28

Although you have earned many hundreds of thousands of dollars in fees from one particularly troublesome client, you have always been very wary that the client might one day turn on you. You have also found her family to be equally difficult. Your client has just asked you to prepare what almost certainly will be her final estate planning documents (she is quite frail), and also wants you to act as her executor. You frankly worry that your client or her family will question your work in both capacities.

- (a)** May you enter into a retainer agreement that limits your liability to your estate planning client to return of the fees that she has paid?

YES

NO

- (b)** May the estate planning documents limit your liability as executor to return of the fees that you earn in that role?

YES

NO

Hypothetical 29

You attended law school after a decade-long career as a financial planner. Now that you are starting your law practice, you wonder if you can provide financial planning advice to clients retaining you to prepare their estate planning documents.

May you provide financial planning advice to your estate planning clients?

YES

NO

Hypothetical 30

As one of your city's best-known estate planning lawyers, you frequently receive visits, emails or telephone calls from accountants offering their services. You just received a call from an accountant who claims to have developed an estate planning strategy that she indicates could save your clients large amounts of money -- but which the accountant says she will not share with you unless you agree to keep it confidential.

May you agree to keep confidential an estate planning strategy that you learn from an accountant?

YES

NO

Hypothetical 31

You represented a local car dealer in all of her estate planning work until she fired you. The client fully paid all of your bills, but hinted that she might sue your firm for malpractice. Your former client has now demanded a copy of your entire file. Your partners are urging you to at least bill the former client for making a copy of the materials if you are obligated to send them to her.

(a) Must you give your former client the file?

YES

NO

(b) May you bill the former client for copying the file?

YES

NO

(c) May you retain a copy of the file over your former client's objections?

YES

NO

Hypothetical 32

You represented a local car dealer in a landlord-tenant dispute until she fired you. You probably should have seen this coming, because she did not pay the retainer she agreed to pay -- and actually has never paid any of her bills. Amazingly, the car dealer now wants the file that you created while representing her.

Must you give your former client the file you generated while representing her?

YES

NO

Hypothetical 33

Although you are not a lawyer, you help your employer bank wrestle with thorny fiduciary issues.

(a) May you prepare a form book of legal documents that the bank can use?

YES

NO

(b) May you prepare a power of attorney for one of the bank's customers?

YES

NO

Hypothetical 34

As a recent law school graduate, you have had quite a bit of trouble finding work. You just received an offer to earn a fairly good salary from a company that assists people in their trust and estate planning. The company employs nonlawyer sales representatives to meet with customers and discuss their estate planning needs. These sales representatives fill out forms, which you then use to communicate with the company's main office in California -- which prepares the estate planning documents that the customers require. You also send the customers a letter describing your role, and sometimes communicate by telephone with the customers if they have any questions. You review the estate planning documents prepared by the California home office before giving them to the company sales representatives who present them to the customers for signature.

Does your prospective employer's process violate any UPL laws?

YES

NO

Hypothetical 35

In your effort to reduce costs, you have increasingly relied on your firm's paralegals to handle trust and estate tasks. However, you do not want to violate any unauthorized practice of law rules.

- (a)** May one of your firm's paralegals prepare estate planning documents for your review and approval?

YES

NO

- (b)** May one of your firm's paralegals use your firm's "form book" to prepare simple documents that the paralegal will present to your client without your specific review or involvement?

YES

NO

- (c)** May one of your firm's paralegals oversee a will-signing without any of your firm's lawyers present?

YES

NO

Hypothetical 36

You are representing a client in contentious estate litigation, which has increasingly focused on your withholding of documents you claim to be protected by the attorney-client privilege. Your adversary just filed a motion arguing that the attorney-client privilege does not protect direct communications between your client and one of your paralegals -- because no lawyer participated in the communications.

Does the attorney-client privilege protect communications between your client and your paralegal?

YES

NO

Hypothetical 37

You serve as one of three in-house lawyers for a large closely held family company. You are fully licensed to practice law in your state. One of your client's owners needs some fine-tuning of her estate plan documents.

(a) May you represent one of your client's co-owners in preparing estate planning documents?

YES

NO

(b) May one of your in-house colleagues (who is registered but not fully licensed in your state) prepare one of your client's co-owners in preparing estate planning documents?

YES

NO

Hypothetical 38

About ten years ago, you left private practice and became a local bank's sole in-house lawyer. The bank's president just asked whether you could assist in a new business initiative.

May you prepare estate planning documents for bank customers?

YES

NO

Hypothetical 39

You handle the trust and estate work for several wealthy individuals who spend summers in your state but winters in Florida (where you are not licensed). Several multijurisdictional questions have just arisen in connection with your practice.

- (a)** May you travel to Florida in February and meet with one of your clients to go over her estate plan?

YES

NO

- (b)** May you represent one of your client's Florida neighbors in preparing his estate plan (the neighbor lives permanently in Florida, but heard glowing reports about you from your client who lives next door)?

YES

NO

Hypothetical 40

You have practiced for over 40 years as a trust and estate lawyer, and developed a national reputation in particular types of complicated estate planning techniques using specific trust agreements. You just received a call from a potential client in a state in which you are not licensed, and which you have never visited. The client wants to meet with you at his home in that state, because he has great difficulty traveling.

May you travel to the new client's state to discuss the particular type of estate planning techniques you have gained a national reputation for using?

YES

NO

Hypothetical 41

You started practicing in Minnesota immediately after graduating from law school two years ago, but now have the opportunity to join a firm in another state. You are not able to waive into that state's bar, and for obvious reasons would like to avoid taking another bar exam. You decided from the beginning to limit your practice to trust and estate matters, usually involving federal tax issues. You wonder whether you can avoid taking the bar exam in your new state if you limit your practice even further -- working only on matters before the U.S. Tax Court in Washington, D.C.

May you continuously practice in a state if you limit your work to matters before a federal agency or specialized tribunal?

YES

NO

Hypothetical 42

You have not practiced long enough in Kentucky to waive into the Tennessee Bar, but you wonder whether you can move to Tennessee and practice there without a Tennessee license -- as long as you limit your practice to federal estate and gift tax matters.

May you practice in Tennessee without a license there, as long as you limit your practice to federal estate and gift tax matters?

YES

NO

Hypothetical 43

You just moved into a new law office in a suburban office park. The lawyer who moved out of the office was a well-known local trust and estate lawyer, who is nearing retirement and therefore downsizing her office. As you were setting up your new office, you noticed several boxes of documents in and next to a dumpster behind the office building. You checked out the boxes that day, and discovered that they contain some client files of the trust and estate lawyer who just moved out of the office.

- (a)** Has the trust and estate lawyer violated the ethics rules by disposing of her client files in this way?

YES

NO

- (b)** Do you have an ethical duty to report the trust and estate lawyer's disposal of her client files in this way?

YES

NO

Hypothetical 44

You represent a wealthy couple who have for several decades been estranged from their drug addicted son. The son's lawyer just called to say that he would be filing a lawsuit on behalf of the son against his parents, alleging various claims based on changes to their trust and estate plans. The son's lawyer wants to know whether you still represent the couple in connection with their trust and estate planning with their son and their estate planning, how frequently you have met with the couple to discuss their plans, and who was present during those meetings.

(a) Without your clients' consent, may you provide this information to the son's lawyer?

YES

NO

(b) If the son's lawyer files the threatened lawsuit and seeks this information in discovery, may you successfully assert attorney-client privilege protection for this information?

YES

NO

Hypothetical 45

You represent the matriarch of a large Greek family. She frequently changes her estate plan, because some of her many children fall in and out of her favor. You now believe that some of her children might challenge her will after she dies, claiming that she lacked the necessary mental state at the time she amended her estate plan. Your client can become quite emotional at times, and you wonder to what extent you might be called upon after she dies to describe her demeanor during your meetings.

- (a) Will you be able to assert attorney-client privilege protection for your description of the client's demeanor during a private meeting in your office?

YES

NO

- (b) Will you be able to assert attorney-client privilege protection for your description of the client's demeanor during a meeting at a crowded Greek restaurant near your client's home?

YES

NO

Hypothetical 46

You conduct a very active trust and estate practice, and sometimes meet with as many as five clients each day to go over their estate plan. On many occasions, you must decide how to deal with the presence of other people who accompany your clients when they come to your office. Specifically, you want to assure continued attorney-client privilege protection.

- (a)** Will the attorney-client privilege protect your communications with an elderly client in the presence of her middle-aged daughter, to whom your client looks for guidance and "moral support"?

YES

NO

- (b)** Will the attorney-client privilege protect your communications with a Korean-born client in the presence of his son, upon whom your client relies to translate your communications into Korean?

YES

NO

- (c)** Will the attorney-client privilege protect your communications with a client in the presence of the client's financial advisor, upon whom your client relies for decisions involving her money?

YES

NO

- (d)** Will the attorney-client privilege protect your communications with a client in the presence of your client's neighbor, to whom your client looks for assistance in making every major life decision?

YES

NO

Hypothetical 47

Over the past twenty years, you have had a very good relationship with a local financial planner. Last month, the planner recommended that one of her clients hire you to prepare an estate plan. After meeting several times with your new client, you sent her a confidential legal analysis of her estate planning issues. Some of these are quite sensitive, because the client has engaged in some very questionably financial transactions while represented by her previous lawyer. The client just called you to report that your financial planner friend has asked her for a copy of your memorandum.

Will disclosure of your memorandum to the financial planner waive the attorney-client privilege?

YES

NO

Hypothetical 48

One of your partners recently attended a seminar on the attorney-client privilege, and now periodically warns you about the privilege's fragility. For instance, your partner just told you that you risk destroying the attorney-client privilege by inviting certain people to sit in when you meet with an elderly client to discuss his estate planning.

- (a) Will the attorney-client privilege protect communications with your client in the presence of your secretary and paralegal?

YES

NO

- (b) Will the attorney-client privilege protect communications with your client in the presence of an expert on Sharia law that you have hired to help you prepare a will meeting your Islamic client's desire to comply with Sharia law?

YES

NO

- (c) Will the attorney-client privilege protect communications with your client in the presence of the client's longstanding financial advisor, whom you were clever enough to retain (and pay yourself) for purposes of helping you prepare your client's estate plan?

YES

NO

Hypothetical 49

Before you went to law school, you worked as a CPA for approximately ten years. Clients sometimes hire you to prepare their tax returns, because you can provide both legal advice and assist in tax return preparation. You wonder about the attorney-client privilege ramifications of such a dual role.

Will the attorney-client privilege protect your communications with your clients as you prepare their tax returns?

YES

NO

Hypothetical 50

You represent a wealthy husband and wife in preparing their estate plan. They prepared some codicils for your review and revision, and you also prepared documents for their review. All of you expect that your clients' estranged daughter might ultimately challenge your clients' wills, and the husband just asked you a question about privilege protection for all of the documents that you have been exchanging during the estate planning process.

- (a)** Will the attorney-client privilege protect drafts of the codicils that your clients prepare and send to you for your review and revision?

YES

NO

- (b)** Will the attorney-client privilege protect draft documents that you prepare for your client's review?

YES

NO

Hypothetical 51

You recently finished preparing estate planning documents for a wealthy couple who anticipate that their estranged daughter might file a lawsuit challenging their wills. Your clients have asked you to send their estate planning documents to their investment advisor.

Does the attorney-client privilege protect the final version of your clients' estate planning documents, which your client just first instructed you to send to their investment advisor?

YES

NO

Hypothetical 52

You are representing a young woman in negotiating a fairly stringent prenuptial agreement with her elderly and very wealthy fiancé. The negotiations have been tense, and you are now furiously exchanging draft prenuptial language with the wealthy fiancé's aggressive lawyer. One of your new associates just explained that the fiancé's lawyer might not be aware of your ability to search for hidden "metadata" in the draft prenuptial agreements that the lawyer sends you -- which might allow you to determine what internal changes that other lawyer made in the prenuptial language before sending you the draft agreements.

May you search for hidden "metadata" in electronic documents you receive from an adversary?

YES

NO

Hypothetical 53

You represent an estranged son who has been feuding with his wealthy parents. The parents have agreed to include certain provisions in their estate plan in an effort to resolve the latest dispute, and you and the parents' lawyer have been exchanging drafts of the parents' estate plan documents. You finished your negotiations last night, and early this morning received an agreement that the parents' lawyer says memorializes your final agreement. However, you notice that the parents' lawyer failed to include a provision that you had reluctantly agreed to last night -- which would be favorable to the parents rather than to your client.

(a) Without your client's consent, must you advise the parents' lawyer of her mistake?

YES

NO

(b) Must you advise your client of the parents' lawyer's mistake?

YES

NO

Hypothetical 54

Several of your best paralegals recently decided to stop working full time (one to raise a child, and one to at least partially retire). Both of them have expressed an interest in continuing to work at least part time out of their homes, and you wonder what possibilities would pass muster under the ethics rules.

- (a)** Must you advise your clients if you rely on these paralegals (working out of their homes) to prepare the first draft of estate planning documents for your review?

YES

NO

- (b)** May you bill for these paralegals' time at an hourly rate higher than you pay them (without advising clients of the "spread")?

YES

NO

Hypothetical 55

You have been looking for ways to reduce the cost of preparing routine estate planning documents. Among other things, you have considered hiring a company in Bangalore, India, which advertises the ability to quickly and inexpensively prepare simple estate planning documents.

May you outsource estate planning document preparation to India?

YES

NO

Hypothetical 56

Your law firm has for many years represented the patriarch of a wealthy but dysfunctional family. You prepared the patriarch's estate documents. He died several months ago, and you just heard this morning that two family members have filed malpractice lawsuits against your firm based on the patriarch's estate documents.

- (a)** Is a named beneficiary likely to succeed in a malpractice case based on your failure to include a certain tax-saving provision, which cost the beneficiary \$250,000?

YES

NO

- (b)** Is a distant relative likely to succeed in a malpractice case based on your failure to include in the estate planning documents any bequest to her (she claims that you should have known that the patriarch intended to leave her at least some amount of money)?

YES

NO

Hypothetical 57

You represented a client in a nasty divorce, which you finally settled after several years of acrimonious litigation. As part of the settlement, your client agreed to leave most of his estate to his children. However, several months ago your now-divorced client told you that he intended to remarry, and directed you to prepare an estate plan that leaves all of his assets to his new fiancée. You want to follow your client's direction if that is permissible, but you also worry about your possible liability to the children.

If you follow your client's direction, may you be sued by your client's children if your client dies and the children do not receive the inheritance agreed to in the divorce settlement.

YES

NO

Hypothetical 58

As your firm's trust and estate department's newest partner, you have taken the lead in trying to update and expand your firm's marketing efforts. Among other things, you have arranged for a young associate to send out email "alerts" every few months to individuals whose estate planning your firm has handled over the last five or ten years. Because the email "alerts" go to both current and former clients, you address the emails to "Clients and Friends." You just heard from your firm's mailroom that your firm was served with a complaint by the executor of a former client's estate. One of your partners had prepared that client's estate plan about three years ago. Although no one at your firm worked for that client after it prepared his estate plan, the executor has sued your firm for malpractice -- claiming that your email "alerts" did not adequately inform the former client of an important tax change (passed two years ago) that could have saved him about \$500,000 in estate tax. The executor cites your firm's email "alerts" as creating a continuing duty to advise of such changes in the tax law.

Is a court likely to find that the complaint against your firm states a valid cause of action?

YES

NO

Hypothetical 59

You just received a call from one of your neighbors, whose wealthy mother just died. The mother's will names your neighbor as executor, and she wants to hire you.

Will your client be the neighbor (executor) rather than the estate?

YES

NO

Hypothetical 60

You just merged with a small trust and estate "boutique" firm, and you wonder about some of the conflicts implications of your new partners' roles as executors or lawyers for executors.

- (a)** May one of your partners act as executor of the estate of your largest corporate client's former president?

YES

NO

- (b)** Will your firm's representation of a local bank in its role as an estate fiduciary prevent you from taking unrelated matters adverse to the bank (without its consent)?

YES

NO

Hypothetical 61

Last week your neighbor hired you to represent her in her role as executor of her wealthy mother's estate. You quickly learned that the mother had executed a lengthy will identifying many beneficiaries, and providing such disproportionate bequests to some of the beneficiaries that you know for certain there will be enormous acrimony within the family. You are worried that this could be very awkward, because you know some of the beneficiaries on a social basis.

As the executor's lawyer, do you owe any duties to the estate's beneficiaries?

YES

NO

Hypothetical 62

One of your long-time clients died recently, and named his wife and a local bank as co-executors.

(a) May you jointly represent both the wife and the bank in their role as executors?

YES

NO

(b) May you represent both the wife and one of the other beneficiaries (the client's brother)?

YES

NO

Hypothetical 63

For several years, you have jointly represented three beneficiaries of a large estate, as well the trustee named in the trust instrument. That trustee just died, and was replaced earlier this week by the successor trustee named in the trust instrument -- who is from the opposite side of this large family, and hostile to the three beneficiaries you represent. Both the estate planning and the estate administration has been a nightmare because of the family's dysfunctional nature, and now you wonder about the effect of this new trustee's involvement.

- (a)** Will the successor trustee be entitled to see all of your files created during the joint representation of the three beneficiaries and the now-deceased initial trustee?

YES

NO

- (b)** Will the successor trustee be entitled to see the flurry of emails you sent to the three beneficiaries after the initial trustee died?

YES

NO

Hypothetical 64

Your neighbor just asked to see you about possibly representing her in connection with her wealthy mother's estate. She and her brother are the only beneficiaries of the estate. They have not been on friendly terms for years, and your neighbor thinks that her mother's designation of her (rather than her brother) as the executor of the estate will only exacerbate their personal conflicts. Your neighbor would like you to represent her both in her role as executor and in her status as a beneficiary.

May a lawyer represent a person in her role both as a fiduciary and as a beneficiary?

YES

NO

Hypothetical 65

You have served as an executor and also represented executors, and frequently have had to deal with frustrated beneficiaries and their lawyers. You frequently have found that beneficiaries' lawyers seem to discourage settlements, and you suspect that they may do so simply to run up their fees. You wonder to what extent you can deal directly with beneficiaries in those circumstance.

- (a)** If you represent an executor, may you call a beneficiary directly without the beneficiary's lawyer's consent?

YES

NO

- (b)** If you are acting as an executor, may you call a beneficiary directly without the beneficiary's lawyer's consent?

YES

NO

Hypothetical 66

You represented a woman who entered into a pre-nuptial agreement with a wealthy socialite. The socialite just died, and your former client now wants you to represent her in challenging the pre-nup. You worry that you might have to be a witness in the case.

May you represent the socialite in challenging the pre-nup?

YES

NO

Hypothetical 67

Over lunch today, one of your partners told you about a decision that she just read. That decision held that a defunct corporation could no longer assert the attorney-client privilege -- so the corporation's previous lawyer could not refuse to answer questions about otherwise privileged communications with management while the corporation was operational. Your partner wonders whether the same principle applies to individuals.

Does the lawyer's ethics duty of confidentiality and the attorney-client privilege survive an individual's death?

YES

NO

Hypothetical 68

You represented a wealthy woman in preparing her estate planning documents -- which named her son and a local bank as executors, and her daughter as the primary beneficiary.

Your client just died, and now you wonder who owns the attorney-client privilege protecting the communications you had with her shortly before her death.

(a) Does your deceased client's daughter (the primary beneficiary) own the attorney-client privilege?

YES

NO

(b) Does your deceased client's son (as one of the two executors) own the attorney-client privilege?

YES

NO

(c) Will your deceased client's son (as one of the two executors) own the attorney-client privilege after he completes his work as executor?

YES

NO

Hypothetical 69

For six months, you represented an abused wife planning to divorce her husband. However, she committed suicide just before she started the divorce proceedings. You just received a call from the abusive widower -- who announced that he is his ex-wife's executor, knows from going through her documents that she had hired you to seek a divorce, and demands to see all your files.

Must you turn over your investigation files to your late client's executor?

YES

NO

Hypothetical 70

You represented a wealthy author in preparing his estate plan. He recently died, and you expect several attacks on his estate.

- (a) Will the attorney-client privilege protect your communications with your client from discovery by his son, who was named as a beneficiary under the will but who disputes the executor's interpretation of the provision under which he takes?

YES

NO

- (b) Will the attorney-client privilege protect your communications with your client from discovery by his estranged daughter, who claims that she should have been included as a beneficiary in the will?

YES

NO

- (c) Will the attorney-client privilege protect your communications with your client from discovery by a creditor, who claims that the estate owes it \$500,000?

YES

NO

Hypothetical 71

You represent the trustee of a trust established over 20 years ago. Several of the beneficiaries have objected to the trustee's administration of the trust, and have threatened to sue the trustee. The beneficiaries' lawyer just asked you to preserve all of your communications with the trustee, and warned you that she will be seeking all of those communications in the lawsuit she is about to file.

- (a)** Will you be able to withhold your communications with the trustee about trust administration issues?

YES

NO

- (b)** Will you be able to withhold your communications with the trustee about the trustee's possible liability?

YES

NO

Hypothetical 72

You just received word that a trustee you had represented for several years might have engaged in fraud. The beneficiary who claims to have been defrauded has hired an aggressive lawyer, who just indicated that she intends to seek access to all of your communications with the trustee under both the fiduciary exception and the crime-fraud exception to the attorney-client privilege. You have always understood that the fiduciary exception might open your communications to such beneficiaries, but you are deeply offended by the beneficiary's lawyer's reference to the crime-fraud exception. You steadfastly believe that you did nothing wrong, and that you had no idea that the trustee might have been using your advice to engage in wrongdoing.

Can the crime-fraud exception to the attorney-client privilege apply if the lawyer is innocent of any improper intent or knowledge?

YES

NO

Hypothetical 73

You are just starting into some estate administration work, and you can see possible trouble with the IRS and estate administrative agencies (including tax agencies) on the horizon. You would like to maximize work product protection, and you wonder about the applicable standards.

(a) Is a threat of an IRS investigation sufficient to trigger work product protection?

YES

NO

(b) Can the work product doctrine protect documents created in anticipation of administrative proceedings?

YES

NO

Hypothetical 74

You are just starting on some estate administration work for a very complicated estate. You strongly suspect that the IRS will challenge some of the decisions you will be making on behalf of the estate. You naturally wonder about the work product protection that might apply to some of the documents you will be creating as you begin your work.

Will the work product doctrine protect documents you create because of your suspicion that the IRS will challenge some of the decisions you make?

YES

NO

Hypothetical 75

You just received a call from a client who has been working with her accountant in dealing with threatened litigation by the IRS over her mother's estate. Due either to her naiveté or her unwillingness to spend money, the new client told you that she has never spoken to a lawyer about the threatened litigation, but was hoping to just "deal with it" through her accountant. Both the new client and the accountant prepared documents relating to this threatened IRS litigation, and you wonder about what protections you can assert if the IRS seeks the documents in discovery during the inevitable litigation.

- (a)** May you assert attorney-client privilege protection for documents the client and the accountant prepared?

YES

NO

- (b)** May you assert work product protection for documents the client and the accountant prepared?

YES

NO

Hypothetical 76

You have been working with a client referred to you by a financial planner. As awkward as it has been, you have convinced the financial planner not to attend several meetings with your client, and not to ask for copies of a privileged memorandum you sent the client -- which assessed various legal issues. Unfortunately, you are now litigating with the IRS, and the financial planner is becoming increasingly concerned about how things are going. He just called to ask whether he can see your "IRS Litigation Assessment" memorandum, in which you outline your litigation strategy.

Will disclosure of work product to the client's financial planner waive the work product protection?

YES

NO