ALI-ABA/ACTEC Telephone Seminar/Audio Webcast
Ethics and Professionalism Series

Top Ten Ethical Challenges Facing Estate Planners
Thursday, October 16, 2008

Course Outline
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The Top Ten Ethical Challenges Facing Estate Planning Practitioners Today and the Best Practices for Addressing Them

I. Introduction

A. Practicing in the estate planning field, while enjoyable and professionally rewarding, is also challenging. One of the most satisfying or alluring aspects of the estate planning field is the ability to practice in many different areas of the law. Estate planners, to be able to give clients the appropriate advice and counsel and to have successful practices, must be proficient in drafting, trust and estate administration, tax law, corporate law, partnership law, real estate law and different aspects of litigation. While this ability to practice in different areas of the law makes estate planning attractive to many practitioners, it also exposes estate planners to a wide array of ethical issues in their practices. Individuals can disagree on which ethical rules pose the greatest difficulty to estate planners in their practices. Here, we discuss the ten ethical areas, which, if violated, we believe will most likely expose the estate planner to disciplinary complaints by clients.

B. The ten areas presenting the greatest ethical challenges to estate planning attorneys are:

1. Representing clients who reside in a state in which the estate planning attorney is not licensed.

2. Representing multiple parties such as husbands and wives or family members in different generations.

3. Representing clients in various asset protection strategies.

4. Making sure that the representation of a client is effective and timely and keeping the client informed of the work.

5. Charging reasonable fees for the work.

6. The lawyer who represents a client permitting or soliciting the client to name the lawyer as a fiduciary in the client’s estate planning documents or being the recipient of gifts from clients.

7. Dealing with the obligation to report the failure to disclose information on tax or other returns.

8. Representing clients with diminished capacity.

9. Obtaining releases from clients for malpractice or possible self-dealing.
Handling issues arising in the age of electronic communications such as metadata.

C. Interestingly, the November 2007 edition of the *ABA Journal* has an article entitled “Top Ten Ethics Traps.” These do not correspond in whole to the ethical challenges which we believe face estate planners partly because they apply across all disciplines of law practice. However, they are instructive as to the types of ethical challenges facing all lawyers, including estate planners. The ethics traps listed in that article are:

1. Stumbling into a Lawyer-Client Relationship.
2. Overlooking the Marketing Rules.
3. Don’t Be Vague.
5. Law Firm Breakups.
6. Communicating by E-Mail.
8. Failing to Communicate with Clients.
9. Not Knowing the Ethics Issues.
10. Fee Agreements.  

D. The American Bar Association’s Model Rules of Professional Conduct. The ethical conduct of almost all lawyers is governed by some version of the American Bar Association’s *Model Rules of Professional Conduct*.

1. The *Model Rules of Professional Conduct* were adopted by the American Bar Association House of Delegates in 1983 and have been amended several times since then. Prior to the *Model Rules*, the model put forth by the American Bar Association was the 1969 *Model Code of Professional Responsibility*, which in turn replaced the 1908 *Canons of Professional Conduct* (which were last amended in 1963).

2. Only three states, California, Maine, and New York, have professional conduct rules that do not follow the *Model Rules of Professional Conduct*. New York follows the *Model Code of Professional Responsibility*. California and Maine have developed their own rules.

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