

**ETHICS, MALPRACTICE
& REPRESENTATION OF PARTIES**

Hypotheticals

**ACTEC Heart of America
Fellows Institute**

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HYPOTHETICAL #1

You were contacted in 2016 by Joanna Reiss. Joanna's father, Leo, had just died and she was about to take over as the named trustee of her father's testamentary trust. The trust is for the benefit of Joanna and her two siblings, Marsha and Peter. The trust is to last for 20 years after which time the principal will be paid over to the three siblings, or the descendants of any sibling who has died before the termination of the trust. During the 20 years, the trustee is to pay out all the income annually in equal shares to the three siblings. In addition, the trustee has discretion to invade the trust principal for any sibling who has an "emergency health need." All three siblings are adults at the time their father dies and Joanna is the oldest.

Joanna engaged you to represent her as trustee and to advise her as to the appropriate administration of the trust. During 2016-18, the administration of the trust proceeded fairly smoothly. However, some tension arose among the siblings in late 2018 surrounding the disposal of some stock that was owned by the trust. The stock consisted of a minority interest in a business that Leo had co-founded but later turned over to his partners. The trust gives the trustee the right to vote the stock and the right, in the trustee's "sole discretion," to retain or sell the stock. Marsha and Peter have decided that they would like to have the stock sold because it is producing only minimal income. Joanna wants to retain the stock because (as she tells her siblings), "Dad wanted it that way." (The trust itself makes no mention of any desires on Leo's part about the sale or retention of the stock.) You and Joanna have had several consultations both by phone and by email about whether she is under any legal obligation to sell the stock and how she should respond to her siblings' complaints. Joanna has also revealed to you that she wants to hold on to the stock because her son, an employee of the company, is being considered for a promotion to a major managerial position.

In 2019, Joanna issues her normal "annual report" to Marsha and Peter in which she outlines the receipts, disbursements, and expenses for the trust for 2018. The expenses include a hefty bill from you based upon, among other things, the number of times that Joanna has corresponded to you about retaining the stock. Marsha and Peter demand to see an itemized bill from you and Joanna refuses. Marsha and Peter have threatened to sue Joanna and have now contacted their own lawyer.

- 1) Who was your client when Joanna engaged you to represent her as trustee?
- 2) Did you owe any duty to anyone besides Joanna? If so, what type of duty?
- 3) What is your response if Marsha's and Peter's new lawyer asks to see the correspondence between you and Joanna?
- 4) May Joanna continue to use the trust assets to pay your attorney fees?
- 5) May you continue to represent Joanna if her siblings sue her for breach of fiduciary duty?

HYPOTHETICAL #2

Pauline Jones, 85, is brought to you by her tax preparer (TP). She is a widow with no children and no close relatives. TP tells you she has a lot of money and no estate plan – just the kind of business you’re looking for. She gives him permission to disclose what she has and he does. She tells you the charities she wants to get her stuff. She is her own trustee with the TP named as the 1st alternate and she asks you to serve as 2nd alternate. Well, there isn’t anyone else. She has about 2 million dollars.

Ten years pass and Pauline is 95. She can’t see well enough to drive or hear well enough to hear. She lives, with a great deal of help, in an assisted living facility. Her “goddaughter” and her husband (Mr. & Mrs. X) come to you with complaints about TP who took over as trustee when Pauline resigned because she just couldn’t handle the books, etc. Mr. & Mrs. X spend a lot of time with Pauline. At your first meeting with TP, Mr. & Mrs. X and Pauline you ask if you have permission to discuss Pauline’s business in front of Mr. & Mrs. X and she says “NO!” When asked about her complaints against TP she asks Mr. & Mrs. X who they are and they gently remind her. She doesn’t remember TP telling her she was going to sell her car. She wants a key for her house so she can give it to people to go in and get furniture she is giving away. She wants cash – why? – because it’s hers that’s why!

When is it time to say “Listen, Pauline, TP and I have concluded that what you want is unreasonable. Giving keys to the house is extremely problematic, especially when TP is responsible for the contents. Cash in this facility is a real problem.”

Mr. & Mrs. X have now caused her to believe that TP is untrustworthy and needs to be replaced with – guess who. Whom do you represent? If she attempts to amend the trust, create a new will, cancel a Durable Power of Attorney, grant a new Power of Attorney, etc. and the new fiduciary goes to for the assets – what do you do? File an application to have her adjudicated as mentally incompetent?

HYPOTHETICAL #3

In 2010-16, numerous lawsuits were filed among members of the prominent and wealthy Clark family. The majority interest in Clark Industries was owned by Charles and Mary Clark (the patriarch and matriarch of the family). Their four daughters, Charlotte, Dora, Freda, and Wilma, owned equal minority interests in the company. The law firm of Hanson & Fox represented Clark Industries, Charles and Mary Clark, and their daughters Charlotte and Dora in these lawsuits. Charlotte held an executive position in Clark Industries and Dora was employed by the company. Freda had been employed by the company but was terminated after a hostile attempt to take over control of the company. Wilma had supported Freda in these efforts. The litigation followed this aborted takeover.

In the midst of this litigation, Mary engaged Dennis Hanson (of Hanson & Fox) to draft a new will for her that divided her estate equally among her four daughters. The will contained a no-contest clause and a provision that conditioned the gifts to each of her four daughters on the dismissal by a beneficiary of any litigation that was pending against her or within 60 days following her death.

After Mary's death, the will was offered for probate and the unrelated litigation previously initiated by Freda and Wilma still not been dismissed. Under the terms of the will, Freda and Wilma would not receive gifts because of the pending litigation, resulting in the bulk of the estate passing to Charlotte and Dora. Freda and Wilma challenged the will, alleging among other things that the lawyer was acting on behalf of Charlotte and Dora when he prepared Mary's will. Freda and Wilma contended that Dennis had a conflict of interest in violation of Model Rule 1.7 arising from his representation of Charlotte and Dora in the intra-family litigation at the same time he undertook to represent Mary in revising her will.

- 1) Did Hanson have a conflict of interest when he prepared the will for Mary?
- 2) Would the answer be different if Hanson was Charlotte's spouse?

REFERENCES

MRPC 1.7

Matter of Estate of Koch, 849 P.2d 977 (Kan. App. 1993)

HYPOTHETICAL NO. 4

You represent John Smith and have for 10 consecutive years in his business matters. John Smith, age 67, and his wife Jane Smith have operated successfully a closely held business. John and Jane each own a fifty percent (50%) membership interest in said profitable Missouri limited liability company. John and Jane have two adult daughters but only the youngest daughter Amy Jones is employed by the business as a customer sales representative. Wife Jane has not been active in the business for the last two years and wishes that husband John would retire. John refuses to retire.

For the last three years, John Smith shows increasingly odd business decisions. John's decision making is not as logical as it once was. John's forgetfulness of details increases. John complains occasionally that his mind is "all scrambled up." Daughter Amy comments privately to you that "Dad is not the same."

Business revenues start to decrease significantly. John is not in physical danger but is not his usual self with his business judgments. John calls and asks you more frequently to refresh his memory on relatively recent business decisions. You start writing John confirming important advice given to him.

One day you learn that John has taken action contrary to what you recently wrote and advised John to do.

With respect to these facts, consider the following questions:

1. Should you as John's lawyer continue to represent John?
2. With whom, if anybody, should you discuss John's situation and does having those discussions violate your attorney-client privilege with John?
3. What signs of harm would justify you in taking action for John's benefit?
4. What protective measures should you take?
5. Can you take emergency legal assistance for John if he is unable to establish a lawyer-client relationship for that purpose?

RULES TO CONSIDER

MRPC 1.14 Client with Diminished Capacity

MRPC 1.6 Confidentiality of Information

MRPC 1.16 Declining or Terminating Representation

HYPOTHETICAL #5

You have represented John Smith for several years on business, tax and estate planning matters.

John now wants to create an irrevocable trust for the benefit of his three sons and their children. His three sons are Bill, Bob and Ted, all between the ages of 20 and 35. He wants to fund the trust primarily with unimproved real estate that he has owned for many years, and which he expects to appreciate in value. He wants to name XYZ Bank as the trustee. However, he wants to name you as the “trust protector”. The “trust protector” would hold the following powers:

- (a) The power to amend the trust, if the trust protector deems the amendment to be necessary or advisable, in order to carry out the grantor’s general intent, or due to (i) changes in tax laws applicable to the trust or its assets, (ii) changes in John’s family situation, or (iii) changes in the value or stability of the trust assets; and
- (b) The power to remove a trustee and appoint a successor trustee.

The trust instrument provides that the trust protector is entitled to reasonable compensation.

John understands that he cannot hold these powers since they may cause the assets in the irrevocable trust to be included in his gross estate at his death.

The trust generally provides that income and principal may be distributed to the beneficiaries for their health, support and medical needs, from time to time, as determined by the trustee. One-half of a child’s share is to be distributed to him at age 40, and the other half at age 50.

You continue to handle general business, tax and estate planning matters for John. A few years after the irrevocable trust is created and funded, John comes to you and wants you to exercise your powers as trust protector due to the following reasons:

- (a) He is very dissatisfied with the actions of XYZ Bank. XYZ Bank sold some of the real estate held by the trust, and John felt that the real estate should not have been sold. John feels the real estate should be held for appreciation.
- (b) John is estranged from his son, Bill. Bill is now living with his girlfriend, and has had a child out of wedlock. John disapproves of his lifestyle choices, and the two have no communications between them. John wants Bill and Bill’s child to be deleted as beneficiaries of the trust.
- (c) John feels that his son, Ted, has become an alcoholic (even though he has never been treated for alcoholism or diagnosed with alcoholism). John does not want

Ted's share to be distributed to him when Ted attains age 40 or 50. Rather, John now wants Ted's share should remain in trust for his life.

With respect to these facts, consider the following questions:

1. Should you, as John's lawyer, and as the scrivener of the irrevocable trust, act as the trust protector?
2. Should your fees in amending the trust be charged to John or to the trust? What if John insists that your fee should be paid by the trust?
3. As both John's lawyer for his general tax, business and estate planning matters, and as the trust protector, what duties do you have to John? What duties do you have to John's children as beneficiaries of the trust?
4. If you amend the trust as to the provisions for Bill and Ted, do you have potential liability from Bill or Ted? What if you have represented Bill and Ted in their individual estate planning?
5. Can the trust protector's liability be limited by exculpatory clauses in the trust instrument?
6. What standard, if any, should you apply in deciding whether or not to exercise your power to remove the trustee? How do you determine who to appoint as successor trustee?

RULES TO CONSIDER

MRPC 1.7 Conflict of Interest: Current Clients

MRPC 1.5 Fees

MRPC 2.1 Advisor

HYPOTHETICAL #6

You represented John Smith for many years and prepared his revocable trust which has now become irrevocable upon his death. John Smith, Jr. is the sole successor trustee to administer provisions for the benefit of himself, his sister Mary, and the two children of each of them. Under 2000 R.S.Mo. §456.8-813, notice is to be sent to all qualified beneficiaries advising them of certain rights. John Jr. does not send such notice to the grandchildren because of concern about their maturity and spending propensities, and you cannot persuade him to do so. What recourse do you have?

1. Can you seek to obtain a court order to require John Jr. to provide notices? Or speak to the probate judge/commissioner about what to do?
2. Does it make any difference if it is okay with Mary to send notice to her children but John Jr. does not want to send it to his own?
3. What if some of the children are minors? What if all are minors?
4. What if Mary is John Jr.'s successor trustee, and XYZ Trust Company is Mary's successor?
5. Does it make any difference if there is an *in terrorem* clause in the Trust?
6. Does it make any difference if each grandchild was to receive \$5,000 outright? And if, along with the \$5,000, each grandchild had only a contingent remainder interest in the Trust in the event his/her parent did not survive?
7. What otherwise is your duty?

RULES TO CONSIDER

MRPC 1.2	Scope of Representation including (f) re assisting client in committing a fraud
MRPC 1.6	Confidentiality of Information
MRPC 1.7	General Conflict Rule
MRPC 1.16	Declining or Terminating Representation