The Kentucky Bar Association
Elder Law Section presents:

2024 Elder Law Section CLE Seminar

This program has been approved in Kentucky for 6 CLE credits including 2 Ethics credits.

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2024 Elder Law Section CLE Seminar

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2024 KBA Elder Law Section CLE Seminar
March 14, 2024
Lexington, Kentucky

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9:30-9:45 a.m.	Break
9:45-10:45 a.m.	**Gift and Return: The Legal and Mathematical Framework with Practical Tips and Examples** (1 CLE credit) Pamela H. Potter
10:45-11:00 a.m.	Break
11:00 a.m.-12:00 p.m.	**Adding Care Planning to Your Elder Law Practice: Practical and Ethical Considerations** (1 Ethics credit) Andrew J. Schierberg
12:00-1:00 p.m.	Lunch (provided)
1:00-2:00 p.m.	**Let's Talk about KRS 389A.010 and the New Changes Effective June 29, 2023** (1 CLE credit) Mark A. Maddox
2:00-3:00 p.m.	**There Be Dragons! Dangerous Power of Attorney Provisions: When to Unleash Them and How to Tame Them** (1 CLE credit) Jonathan C. Rouse and Shelly Ann Kamei
3:00-3:15 p.m.	Break
3:15-4:15 p.m.	**When is a Client Not a Client?** (1 Ethics credit) Shari Polur

PRESENTER BIOGRAPHIES

Larisa E. Gilbert
Gilbert Weinrich Watkins PLC
Louisville, KY

Larisa E. Gilbert concentrates her practice in estate planning, including the related matters of elder law assistance, Medicaid planning and application assistance, VA benefits planning, special needs planning, and business succession planning. Ms. Gilbert brings a wealth of personal and professional experience to her practice and provides planning services with the same level of quality, care, consideration, and affordability she would want for her own family. Because Ms. Gilbert has been a Sandwich Generation caregiver for the past 20 years, she is active in Daughterhood.org, a community of caregivers supporting each other in the joys and challenges of caring for aging loved ones. She has been a featured guest on Daughterhood The Podcast: For Caregivers and in Daughterhood Conversations, a series of video interviews regarding the caregiving options and challenges. And, as the wife, daughter, sister-in-law, daughter-in-law, and niece of veterans, she is particularly passionate about helping those who served our country when they are ready to plan with more comprehensive and personalized estate planning documents than those provided by military legal assistance offices. Ms. Gilbert received her B.A. from the College of William and Mary and her J.D. from the University of Virginia. She is a member of the Kentucky Bar Association and its Elder Law and Probate & Trust Law Sections.

E. Michelle Butler
Tupper Butler Law, PLLC
Louisville, KY

After experiencing the turmoil of a family medical crisis without a plan in place, Louisville attorney Michelle Tupper Butler established Tupper Butler Law, PLLC, specifically to assist other families facing similar situations or wanting to prepare an estate plan designed for their family's unique needs. She earned her bachelor's degree at The George Washington University in Washington, D.C. before moving to New York City. After six years serving as editor in nonfiction, Ms. Tupper Butler completed law school at Georgetown University Law Center and began her career litigating in private practice. After nearly 10 years in private practice and a federal clerkship with the U.S. District Court in Washington, D.C., she moved with her family back home to Louisville in 2013 and continued working in private practice. After her father's accident in February 2017, she followed a calling to bring her zealous advocacy skills to the benefit of other families like her own. Tupper Butler Law PLLC is based in Louisville, although Ms. Tupper Butler continues to practice in the state of Maryland and Washington, D.C.

Pamela H. Potter
The Potter Law Firm
Ashland, KY

Owner and founder of the Ashland, Kentucky based Potter Law Firm, Pam Potter concentrates her practice in the area of estate planning, estate administration, and elder law. Ms. Potter's goal is to help her clients plan secure financial futures for themselves and their families. To achieve that goal, her firm offers a wide range of estate planning services, including wills, trusts, and powers of attorney in addition to probate, estate administration, elder law, and Medicaid Planning services. Ms. Potter spent three years in the public sector and 15 years practicing in general practice law firms before founding her own firm in 2000. She is a member of the American Academy of Estate Planning Attorneys, the National Academy of Elder Law Attorneys, the

Huntington Estate Planning Council, and the Real Property, Probate and Trust section of the American Bar Association. She actively serves her profession through the Kentucky Bar Association as Past Chair of the Probate and Trust Law Section and as a founding member of the KBA Elder Law Section. In addition to presenting seminars to educate the public about estate planning and elder law issues, Ms. Potter is a frequent speaker at continuing legal education seminars for other attorneys in the areas of both estate planning and elder law. She and her son, attorney John Potter, co-authored the Living Trust chapter of West Publishing Company's Kentucky Practice Series volume of Elder Law. Ms. Potter graduated from the University of Kentucky with a degree in history. She is a 1974 graduate of the University of Kentucky J. David Rosenberg College of Law. Dedicated to serving her community, Ms. Potter makes service to local civic organizations a priority. She currently serves on the Board of Directors and Executive Committee of the Community and Technical College Foundation of Ashland, Inc. where she co-chairs the Planned Giving Committee. She also serves on the board of the Foundation for the Tri-State Community.

Andrew J. Schierberg
Stages Elder Law and Estate Planning
Florence, KY

Andrew Schierberg is owner of Stages Elder Law and Estate Planning in Florence, where he works with clients and a multi-disciplinary team of professionals to develop comprehensive plans to help those clients and their families live life with fewer worries about care and end of life legal issues. Mr. Schierberg's previous career spanned over 18 years in law enforcement as a police officer. He received his bachelor's degree from Northern Kentucky University and his J.D., *cum laude*, from NKU's Salmon P. Chase College of Law. He is a member of the Safe Aging Coalition of Northern Kentucky, a board member of the Emergency Shelter of Northern Kentucky, and previously served as President of the Northern Kentucky Police Chief's Association. Mr. Schierberg is a member of the Kentucky Bar Association and currently serves as Chair-Elect of the KBA Elder Law Section and a member of the KBA Probate & Trust Law Section.

Mark A. Maddox
McClelland and Associates, PLLC
Lexington, KY

Mark Maddox is a partner in the firm McClelland & Associations, PLLC, and focuses his practice entirely on elder law. He earned his B.A. from the University of Iowa, his J.D. from Northern Kentucky University Salmon P. Chase College of Law, and became a member of the Kentucky Bar in 1981. He is a member of the Kentucky Bar Association and its Elder Law Section.

Jonathan C. Rouse
Rouse & Rouse Attorneys, PLLC
Versailles, KY

Jonathan Clay Rouse is a partner at Rouse & Rouse Attorneys, PLLC in Versailles, where he focuses his practice on guardianship law, elder law, estate planning, and probate and trust administration. He graduated from Centre College and later attended the University of Kentucky, where he received a master's degree in social work in 2003. He joined Rouse & Rouse Attorneys as a law clerk in 2008 before attending the evening program at Northern Kentucky University Salmon P. Chase College of Law. He obtained his J.D. and was admitted to the Kentucky Bar in 2016. Mr. Rouse is a member of the Kentucky Bar Association's Elder Law and Probate & Trust

Law Sections, and he currently serves as a member of the Board of the Kentucky Guardianship Association and of the National Association of Elder Law Attorneys' Kentucky Chapter.

Shelly Ann Kamei
Bardstown, KY

Shelly Ann Kamei is a solo practitioner in Bardstown with a practice that serves clients across the Commonwealth. Her areas of focus are elder law, special needs planning, estate planning, and asset protection. She is the 2022-23 Chair of the Elder Law Section of the Kentucky Bar Association, having previously served in other positions for the section's Executive Committee. Ms. Kamei is a *cum laude* graduate of the University of San Diego School of Law. She is a patron and supporter of The Speed Art Museum of Louisville and a member of the Nelson County Rotary Club.

Shari Polur
Polur Elder Law, PLLC
Louisville, KY

Shari Polur is the founder of Polur Elder Law, PLLC, a holistic elder law and special needs law firm in Louisville, Kentucky. She concentrates her practice exclusively in elder law and special needs law, with a holistic view toward long term planning. Ms. Polur received her B.A. from the University of Pennsylvania and her J.D. from Boston University School of Law. She is admitted to practice before the United States Supreme Court and has also been admitted to practice in Kentucky, Massachusetts, Florida, and Washington, D.C. Ms. Polur is honored to serve as the Chair for the University of Kentucky's Annual Elder Law Conference. She also helped found and has remained active in the Kentucky chapter of the National Academy of Elder Law Attorneys (current Board Chair), and she also serves as NAELA' s Federal Advocacy Committee Co-Chair. She is also active in the KBA's Elder Law Section (past Chair). Ms. Polur is a Director for the Board of Louisville's JCL, and has served at the pleasure of three different governors on statewide boards to help serve those with disabilities.

I. CASE LAW UPDATES

A. United States Supreme Court

Health and Hospital Corporation of Marion County v. Talevski, 599 U.S. 166 (2023).

1. Justice Ketanji Brown Jackson wrote for a 7-2 majority, affirming the Seventh Circuit, in a victory for civil rights plaintiffs.

2. HOLDING: Plaintiffs may file a federal civil rights claim under §1983 for violation of the Federal Nursing Home Reform Act as violations of the law; "unambiguously create Section 1983 enforceable rights."

B. Kentucky Case Law

1. *Jackson v. Legacy Health Services, Inc.*, 640 S.W.3d 728 (Ky. 2022)

   a. After the death of a nursing home resident, the family sued. Facility sought to enforce arbitration agreement signed by guardian on admission.

   b. HOLDING: Guardian did not have authority to bind the ward in the nursing home to the arbitration agreement and deprive her of the right to a jury trial.

2. *LP Owensboro II, LLC v. Green,* 2022-CA-0525-MR, 2023 WL 6322310 (Sept. 29, 2023) (unpublished).

   a. Daughter signed admission documents, including arbitration agreement, for mother upon entry to nursing facility. After mother's death, daughter sued, and facility attempted to enforce the arbitration agreement against the mother, though she had not signed a power of attorney and the daughter was not named guardian or conservator.

   b. HOLDING: Court relied on the Kentucky Living Will Directive Act, KRS 311.621 *et seq.*, to find the daughter lacked authority to bind her mother because no physician determined the mother was mentally incompetent. Thus, mother's estate claims were not bound to arbitration, but daughter's individual claims were bound to the extent she signed the arbitration agreement in her individual capacity.

II. STATUTORY UPDATES

KRS Chapter 389A, Sale of Real Estate (2023):

A. For fiduciaries needing authority to sell real estate, revision to statute declares conveyances made fewer than 30 days from a final district court order to sell as only **voidable**, no longer **void**.

B. Affidavits required for **all** transfers under KRS Chapter 389A, not just those involving interests of someone with a disability.

III. POLICY ISSUES FOR PRACTITIONERS

A. Nursing Home Staffing

1. Centers for Medicare and Medicaid Services (CMS) sought new national staffing requirements for nursing homes.

    a. Minimum direct care of three hours per day per resident, with .55 hours of registered nurse (RN) care and 2.45 hours of certified nurses' aide care.

    b. No minimum direct care hours for LPNs.

    c. RN on staff at all times.

    d. Three-year implementation with waivers.

But see ….

2. Nursing homes relying more on agencies for direct care nursing.

    In response to demands for improved staffing of nursing homes, many facilities have turned to staffing agencies to fill the gaps in staffing. Though helpful to ensure enough hands on deck to care for residents, problems arise with the use of agencies instead of full-time employees.

    a. Temporary workers are less invested in care, less familiar with facility layout and policies.

    b. Investment in agency staff means fewer resources for direct staff development.

    c. Morale concerns.

    d. Relationships with residents decline.

B. Medicare Advantage Plans

1. What it is and why, with pros and cons.

2. Increased delays in accessing care.

3. The use of artificial intelligence in determining outcomes of appeals.

4. Older people feeling “trapped” in Medicare Advantage plans.

5. Switch from Medicare Advantage to traditional Medicare by March 31, 2024, under the Medicare Advantage Open Enrollment Period.

C. CMS proposes changes in Medicare appeal rights for hospital admittees initially categorized as inpatient then changed to outpatient receiving observation.

1. Medicare patients initially admitted to hospitals as inpatients but later reclassified as outpatients under observation previously unable to appeal classification.

2. CMS proposing appeal process for patients given observation status.

3. Without a three-day stay, traditional Medicare patients are ineligible for post-acute rehab.

4. Rule allows hospital and skilled nursing patients who had benefits denied after a change of classification multiple ways to appeal the status change, including standard and a new expedited process to receive a ruling within a day.

D. Positive Changes in Medicare in 2024

1. Expanded mental health and substance abuse treatment.

2. Up to 3 million more people could qualify for added assistance with Part D premiums.

3. Specialty medications cap.

4. Cap of $35 a month on insulin.

5. New coverage for pain lasting longer than three months.

E. Involuntary Discharge and Bad Kentucky Law

1. Still no protection from discharge for a skilled nursing resident appealing denial of Medicaid application.

2. *King v. Butler Rest Home, Inc.*, 365 S.W.3d 561 (Ky. App. 2011), contrary to CMS guidance.

3. Consumer Financial Protection Bureau circular for families is one tool to delay scare tactics and financial blackmail.

IV. RESOURCES

A. *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023)

B. *LP Owensboro II, LLC v. Green*, 2022-CA-0525-MR, 2023 WL 6322310 (Ky. App. Sept. 29, 2023), *not to be published*

C. Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting, Vol. 88 Fed. Reg. 61352 (Sept. 6, 2023)

D. Exhibit 1 Share of U.S. Nursing Homes Using Direct Care Agency Nursing Staff, by Type of Nurse, 2018-22

E. Medicare Appeal Rights for Certain Changes in Patient Status Proposed Rule (CMS-4204-P) Fact Sheet

F. Schuster, Jim, CELA, "Sources of Authority in Medicaid Appeals," *NAELA News*, Jan./Feb./Mar. 2024

G. Consumer Financial Protection Circular 2022-05, Debt Collection and Consumer Reporting Practices Involving Invalid Nursing Home Debts, September 8, 2022

Elder law attorneys have many tools for helping their clients achieve Medicaid qualification without spending all their money. Medicaid laws, regulations, and policies place strict limitations which must be followed carefully to avoid causing clients to be unnecessarily disqualified with often severe consequences.

Medicaid has technical rules, income rules, and resource rules which must be satisfied before benefits can be paid. In this session we will be discussing the resource requirements and how we can help our clients satisfy those requirements while still protecting all or a portion of the resources they have worked a lifetime to acquire.

I. DETERMINING EXCESS COUNTABLE RESOURCES

Before diving into a discussion of gifts and returns, it's important to know what resources a Medicaid client and spouse are allowed to keep. Excluded resources are listed in the *Division of Family Support Operations Manual*, Vol. IVA, MS 1880 Excluded Resources (Manual Sections will subsequently be referred to as MS and the Section number and title) and 907 KAR 20:030. Resources that are not excluded are countable resources in determining Medicaid eligibility.

A Medicaid client without a spouse is allowed to keep only $2,000 in countable resources. When the Medicaid client has a community spouse, Medicaid does a resource assessment to determine the countable resources of the client, the community spouse, and their joint resources. The community spouse is allowed to keep one-half of the countable total, but not less than $30,828 and not more than $154,140 in 2024 (*see* MS 1750 B, Allocations, Allowances, and Standards). When both spouses are institutionalized, they each are allowed to keep $2,000 in countable resources. Any countable resources over the limit will cause a denial for being over resources, and the disqualification period will not start to run.

While the client is allowed to keep unlimited non-countable or exempt resources, it is important to remember that assets owned by the client at death will be subject to an estate recovery if another estate exemption (surviving spouse, disabled child, estate less than $10,000, etc.) does not apply. For that reason, it is often important to get exempt assets out of the name of the client before Medicaid qualification.

II. PLANNING OPTIONS

Once the amount of the countable resources is determined, the client has a choice. The client can do what the nursing home and Medicaid prefer which is to private pay for care until the excess countable resources are gone. In the alternative, the client can do planning to legally protect some of the excess resources and still qualify for Medicaid. This involves using the tools in the elder law attorney's tool kit to take advantage of saving opportunities allowed by the Medicaid laws.

The tool used most often to achieve Medicaid qualification is the transfer of excess countable resources. In a few instances, the transfer can be made without any penalty. In

most situations the transfer of a non-exempt resource will result in a period of disqualification for the Medicaid client. When a disqualification penalty cannot be avoided for a transfer, then gift returns must be utilized to reduce the disqualification period.

III. CONVERTING NON-EXEMPT COUNTABLE RESOURCES TO EXEMPT RESOURCES

Before gifting begins, the client should explore opportunities for converting non-exempt resources to exempt resources. This may involve purchasing a pre-paid funeral, buying burial plots for the client and his or her immediate family, purchasing a new vehicle, and making improvements to the home among other opportunities. When this has been done, and there are countable resources remaining, then gifting techniques should be considered.

IV. PRE-PLANNING

Obviously, if the client is not yet in the nursing home, and it does not appear that the need for nursing home care will be immediate, pre-planning should be considered. While resources the client wants to protect may be gifted to family members or other trusted persons, gifts to a Medicaid compliant trust offer more tax and asset protection benefits than outright gifts.

If the gifts are completed more than five years before a Medicaid application is made, those gifts will not result in a disqualification period. If, however, nursing home care is needed before the five years have passed, crisis planning may require that some resources given to individuals or gifted to a trust be returned to the client to pay costs during the disqualification period. This situation requires a careful calculation of whether the client can save more by paying through the remainder of the disqualification period before making the application or whether an application should be made, a disqualification period imposed, and then gifts returned to reduce the disqualification period and pay for care while still protecting some of the gifted resources.

V. EXEMPT GIFTS

The Medicaid laws, regulations, and policies do make some gifts of countable resources exempt from the disqualification penalty. These include transfers to disabled children, transfer of the home to a caregiver child, and transfer of the home to a sibling who has lived in the home for at least one year and who has an equity interest in the home. (Other exemptions are listed in MS 2070 Exception to Transfer of Resources and 907 KAR 20:025.)

VI. DISQUALIFYING TRANSFERS

When the client cannot convert countable resources to exempt resources, make gifts at least five years before an application is made, or make exempt gifts, then gifts made by the client will be treated as disqualifying transfers and a disqualification period will be assessed. The length of the disqualification period is calculated by dividing the total amount of disqualifying gifts by the transfer factor in effect for the year the application is made. Transfer factors are updated in January of each year. The transfer factor in effect for 2024 is $305.28. MS 1750 B, Allocations, Allowances, and Standards.

Once the application is made and the disqualification period is determined, that period continues to run until it ends, whether the client remains in the nursing home or not. That rule offers a planning opportunity in a limited number of cases. If it's possible that the client could qualify for nursing home care for a period of time, but the client's condition improves enough to allow the client to return home, making gifts before applying for Medicaid could allow the disqualification period to expire after the client has returned home. If the client again requires nursing home care in the future, the disqualification period would no longer result in a denial.

While this option of leaving the nursing home while the disqualification period continues to run is available for single clients, it is problematic for married clients because Kentucky Medicaid requires a new resource assessment with each period of institutionalization if the patient has been out of the institution for more than 30 days. 907 KAR 20:035, Section 1. This is inconsistent with the federal law which states that the resource assessment is done "at the beginning of the first continuous period of institutionalization." 42 U.S.C. §1396r-5(c)(1)(B).

VII. RETURNS

Unlike some other states, Kentucky does allow partial gift returns to reduce the disqualification period. This technique, called reverse half loaf planning, allows clients to protect approximately half of the amount transferred. The lower the costs at the nursing home and the higher the income of the client, the more the client will save. The higher the nursing home expenses and the lower the income of the client, the less the client will save. When the gift recipient returns a portion of the gift, that return reduces the disqualification period by the number of days in the disqualification period attributable to the value of that gift. The returned gift is then available to pay the nursing home expenses for the month. The result is that the period of disqualification is reduced, and payment has been made for a month of the recalculated disqualification period.

VIII. SINGLE CLIENT

Since an unmarried client can retain only $2,000 in countable resources, resources in excess of that amount must be reduced to $2,000 prior to making the application. If the application is made before the resources are reduced, then the client would be denied benefits for being over resources, and the disqualification period would not begin. The start date of the disqualification period is either the first day of the month resources were transferred for less than fair market value or the day the client is otherwise eligible for Medicaid vendor payment, whichever occurs last. MS 2080.C, Consideration of Transferred Resources.

A single client would have options for implementing the gift and return. Once the disqualification period and the amount of the return needed are calculated, the client could initiate any of the following steps to reduce the disqualification period:

A. Purchase of a Medicaid Compliant Annuity

An annuity is a countable resource unless the annuity:

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made;[1]

and

(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual…; or

(ii) the State is named as [the remainder] beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.[2]

See 42 U.S.C. §1396p(c)(1)(G)(ii), 42 U.S.C. §1396p(c)(1)(F), 907 KAR 20:030 §1(9) and (10), and MS 1890, Annuities.

If all the requirements set forth above are met, the single institutionalized client can purchase an annuity for the amount of the return needed and give the remainder of the excess resources to the intended recipient. When the Medicaid application is made, the annuity would be an exempt resource. A disqualification period would be imposed based on the resources given to the intended recipient. The payments from the annuity to the client would be used to pay the nursing home during the disqualification period.

B. Purchase of a Promissory Note

A similar approach can be used with a Medicaid qualifying promissory note. The same calculation is made to determine the amount that needs to be repaid. That amount is loaned to a trusted person who signs a promissory note agreeing to repay the loan in equal installments with no deferral and no balloon payments and with interest over an actuarially sound period of time based on the client's life expectancy and consistent with the disqualification period. The promissory note must also prohibit cancellation of the balance upon the death of the lender. 42 U.S.C. §1396p(c)(1)(I). The balance of the excess resources is given to the intended recipient. When the Medicaid application is made, the disqualification period is determined based on the amount given to the intended recipient. The amount loaned does not result in a disqualification. Repayment on the loan is then used to pay for care during the disqualification period.

[1] 42 U.S.C. §1396p(c)(1)(G)(ii).

[2] 42 U.S.C. §1396p(c)(1)(F).

C. Gift and Give Back

The third approach is to give all of the excess countable resources to a trusted individual or individuals and make the Medicaid application which will result in a disqualification period based on the full amount of the gift. The individual(s) receiving the gift then return a portion of the gift. That return is used to pay for care until enough has been returned to reduce the disqualification period to the length of time that the client has already paid for care. The client then makes a second application. The amount of disqualification time is recalculated based on the portion of the gift retained by the recipient. Since the client has already paid for care during the recalculated disqualification period, the client is then qualified to start receiving Medicaid payments.

IX. CLIENT WITH COMMUNITY SPOUSE

When a Medicaid client has a spouse still living in the community, the rules and planning techniques are somewhat different. When the client enters a nursing home, Medicaid should be asked to perform a resource assessment. This assessment looks at the countable resources for the client, the spouse, and their joint resources as of the first day of institutionalization. The Medicaid client is allowed to keep $2,000. The spouse is allowed to keep one-half of the countable resources, but not less than $30,828 and not more than $154,140 for 2024 (MS 1750 B, Allocations, Allowances, and Standards). The applicable community spouse resource allowance plus the client's $2,000 resource limit determine the amount the couple can keep. Total countable resources must be reduced below that amount before the client qualifies for Medicaid.

Planning techniques discussed previously, including converting non-exempt resources to exempt resources and exempt gifts could then be used to reduce the excess resources. Any excess resources remaining could be subject to the planning options discussed previously with a few modifications.

A married client also would have options not available to a single client. Once the resource assessment is done and the amount of the total exemption is calculated, the community spouse could use the excess resources to purchase a Medicaid qualifying annuity paying the community spouse rather than the institutionalized spouse. When the Medicaid application is made, there would be no disqualification because there were no non-exempt transfers. The client should qualify immediately. The community spouse will receive the payments from the annuity to supplement his or her income. The state will be the primary beneficiary at the death of the community spouse with children or other named beneficiaries being the contingent beneficiaries. For this reason, the annuity purchased by the community spouse is usually for a relatively short period of time to increase the probability that the payout will be completed during the lifetime of the community spouse.

A similar approach can be used with a Medicaid qualifying promissory note. Once the resource assessment is completed and the amount of the exempt resources is determined, the community spouse loans the amount of the non-exempt resources to a trusted person who agrees to repay the loan to the community spouse over a period of time. When the Medicaid application is made, there would be no disqualification because there were no non-exempt transfers. The institutionalized spouse should qualify immediately. The community spouse will receive the payments from the loan to supplement his or her income. If the community spouse dies before the loan is repaid in

full, the balance owed on the note would go to the community spouse's estate, not to the state to repay Medicaid.

Care must be taken to make sure the community spouse's will does not have the institutionalized spouse as the beneficiary or that the will establishes a testamentary special needs trust to hold any assets going to the institutionalized spouse. It is also important to remember that the amounts being paid from the annuity or promissory note will increase the community spouse's income and reduce or eliminate any monthly maintenance needs allowance the community spouse might otherwise be entitled to receive.

X. BOTH SPOUSES ARE INSTITUTIONALIZED

When both spouses are institutionalized, each spouse is allowed to keep $2,000 in countable assets. The remaining countable assets must be transferred resulting in a disqualification period that is divided equally between the spouses. Similar planning techniques can be used, but separate calculations should be made for each spouse because of the differences in their income resulting in different monthly shortfalls in payment of the separate nursing home accounts. It should also be remembered in making the calculation of the return that upon the death of one spouse, that spouse's remaining disqualification period will fall on the surviving spouse. For that reason, the annuity and promissory note options are more difficult to use than the transfer to a trusted individual who could allocate returns between the spouses as needed.

XI. CALCULATING THE DISQUALIFICATION PENALTY

The first step in calculating the disqualification penalty is to separate the exempt resources from the non-exempt resources as follows:

A. For a single client, transfer of the non-exempt assets in excess of $2,000 will result in a disqualification penalty.

B. For a client with a community spouse, the transfer of non-exempt assets in excess of the CSRA plus $2,000 will result in a disqualification penalty.

C. When both spouses are institutionalized, the transfer of non-exempt assets in excess of $4,000 will result in a disqualification penalty.

Once the amount of the disqualifying transfer is determined, that total is divided by the penalty divisor of $305.28 (for 2024) to determine the number of days of disqualification. When both spouses are institutionalized, the days of disqualification will be split between the spouses in equal shares.

XII. CALCULATING THE GIVE BACK OR RETURN

The calculation of the give back or return is a little more challenging. This amount will vary depending on the income of the client available to pay the nursing home and the cost of the nursing home. The higher the income available to pay and the lower the cost of the nursing home, the more the client will save. The lower the income available to pay and the higher the cost of the nursing home, the less the client will save.

There are calculators available online that will calculate this amount for you, but it is important to remember that these calculations are estimates. The numbers are calculated based on the situation on a snapshot date. These numbers can, and usually do, change. For example, cost of living adjustments cause income amounts to change. Increases in nursing home rates and increases resulting from changes in the services being provided by the nursing home will cause the shortfall to change.

A. The following information will allow a calculation of an estimated amount of the give back or return:

1. The estimated monthly cost of the nursing home care the client will be paying;

2. The client's monthly income;

3. The estimated monthly maintenance needs allowance for the spouse; and

4. The amount of the countable assets being transferred.

B. Once those numbers are determined, the amount of the return is calculated as follows:

1. The client's personal needs allowance of $40 and any MMMNA payable to the spouse are deducted from the client's monthly income to determine the total monthly income available to pay the nursing home.

2. The amount of available income amount calculated in #1 is deducted from the estimated monthly cost of the nursing home to determine the monthly shortfall.

3. The amount of the monthly shortfall is added to the monthly transfer factor (the daily factor for that year multiplied by 365 days and divided by 12 months.)

4. The monthly shortfall and the monthly transfer factor are added together to determine the spending divisor.

5. A percentage of the gift to be retained is calculated by dividing the monthly transfer factor by the spending divisor.

6. A percentage of the gift to be returned is calculated by deducting the percentage to be retained from 100 percent.

7. The total amount of the gift is then divided by the daily transfer factor ($305.28 for 2024) to determine the disqualification period.

8. The amount to be returned is calculated by multiplying the gift amount by the return factor calculated in Step 6.

9. The amount to be retained is calculated by subtracting the amount to be returned (Step 8) from the total gift amount.

10. The disqualification period after the return is the amount to be retained (Step 9) by the daily transfer factor ($305.28 for 2024).

11. The daily shortfall is determined by taking the monthly shortfall (Step 2) and dividing by 30.

12. The longevity of the return is calculated by dividing the disqualification penalty (Step 7) by the daily shortfall (Step 11).

The days in the disqualification period after the return and the days calculated in the longevity of the return should be reasonably close.

C. When calculating the give back or return, it is critical to remember the following:

1. That the amount of the monthly return payable to the client must never cause the client's income to exceed the monthly cost of the nursing home because income in excess of the monthly cost will result in the client being otherwise ineligible for Medicaid, and the disqualification period will not begin;

2. If the amount of the monthly return payable to the client causes the client's income to exceed the income allowance, a QIT will be needed; and

3. It is also important to track the give back on a regular basis until the client qualifies. This can be done in the client's file.

Now, wasn't that fun?

XIII. PUTTING IT IN PRACTICE

A. Fact Situation #1

Single client. Excess countable resources are $80,000. The client's monthly income is $1,800, and the cost of the nursing home is $9,000 per month. The client is gifting to a trusted family member.

Transfer and Return Calculator

Fact Situation #1

1-Mar-24

Client's net monthly income	$	1,800.00
Less $40.00 Personal Needs Allowance		40.00
Less MMMNA transferred to spouse		-
Total income available to pay expenses		1,760.00
Estimated monthly cost of nursing home		9,000.00
Monthly shortfall		7,240.00
Monthly transfer factor		9,285.60

Spending divisor	16,525.60
Gift Factor	56.19%
Return Factor	43.81%
Gift amount	80,000.00
Amount to be returned	35,048.65
Amount to be retained	44,951.35
Days of Disqualification	147.25
Daily shortfall	241.33
Longevity of return	145.23

The client would transfer the full gift amount $80,000 to the gift recipient. The client would then make the Medicaid application and have a disqualification of 262 days. The gift recipient would return approximately $7,240 each month to give the client enough to cover the nursing home costs. When approximately $36,000 has been returned, the client will make a new application. The gift has then been reduced to $44,000 which results in the disqualification period being reduced to 144 days. The client has paid for 144 days, so the client would be qualified.

It is a good idea to track the returns made by the gift recipient on a regular basis since these can vary. When the client is nearing the time for the second application, it is important to calculate the remaining disqualification period to correctly time the new application. Following is a suggested form for tracking the returns.

Gift Return List (Daily Transfer Factor = 305.28)

Date	Amount Returned	Remaining Gift	Disqualification Period (Days)	Qualification Date
3/1/2024		80,000.00	262	11/18/2024
3/1/2024	$7,240.00	72,760.00	238	10/25/2024
4/1/2024	8,000.00	64,760.00	212	9/29/2024
5/1/2024	3,500.00	61,260.00	200	9/17/2024
6/1/2024	7,240.00	54,020.00	176	8/24/2024
7/1/2024	7,240.00	46,780.00	153	8/1/2024

As a result of the returns, the client should be ready to do a second application and qualify in August.

B. Fact Situation #2

Single client. Excess countable resources are $80,000. The client's monthly income is $4,500, and the cost of the nursing home is $7,500 per month.

Transfer and Return Calculator

Fact Situation #2

1-Mar-24

Client's net monthly income	$	4,500.00
Less $40.00 Personal Needs Allowance		40.00
Less MMMNA transferred to spouse		-
Total income available to pay expenses		4,460.00
Estimated monthly cost of nursing home		7,500.00
Monthly shortfall		3,040.00
Monthly transfer factor		9,285.60
Spending divisor		12,325.60
Gift Factor		75.34%
Return Factor		24.66%
Gift amount		80,000.00
Amount to be returned		19,731.29
Amount to be retained		60,268.71
Days of Disqualification		197.42
Daily shortfall		101.33
Longevity of return		194.72

This client would also transfer the full gift amount $80,000 to the gift recipient. The client would then make the Medicaid application and have a disqualification of 262 days. The gift recipient would return approximately $3,040 each month to give the client enough to cover the nursing home costs. When approximately $20,000 has been returned, the client will make a new application. The gift has then been reduced to approximately $60,000 which results in the disqualification period being reduced to 197 days. The client has paid for 197 days, so the client would be qualified.

C. Fact Situation #3

Married client. Excess countable resources are $120,000. The client's monthly income is $1,200. The community spouse's monthly income is $5,200. The cost of the nursing home is $9,000 per month.

Transfer and Return Calculator

Fact Situation #3

1-Mar-24

Client's net monthly income	$	1,200.00
Less $40.00 Personal Needs Allowance		40.00
Less MMMNA transferred to spouse		-
Total income available to pay expenses		1,160.00
Estimated monthly cost of nursing home		9,000.00
Monthly shortfall		7,840.00
Monthly transfer factor		9,285.60
Spending divisor		17,125.60
Gift Factor		54.22%
Return Factor		45.78%
Gift amount		120,000.00
Amount to be returned		54,935.30
Amount to be retained		65,064.70
Days of Disqualification		213.13
Daily shortfall		261.33
Longevity of return		210.21

In this situation, the client could transfer the $65,064.70 to a trusted person and have the institutionalized spouse get a Medicaid compliant annuity or promissory note for the $54,935.30. The disqualification period for the gift would be 213 days. The annuity or promissory note payments would pay for care during the disqualification period.

In the alternative, the community spouse could get a Medicaid compliant annuity or promissory note for the full amount of the excess countable assets. The annuity or note would be exempt, so there would be no penalty period, and the institutionalized spouse would qualify for Medicaid immediately. The community spouse would have the increased income for the annuity or note term. The only downsides that the client needs to consider are (1) if the community spouse dies during the annuity term, the balance of the annuity payments end up going to the state; and (2) the person to whom the loan was given defaults on the promissory note.

While there are tools in the tool kit that give clients options for how to proceed, it is our job as elder law attorneys to give that information to clients and let them decide which option is best for them.

I. INTRODUCTION: UNDERSTANDING THE INTEGRATION OF NON-LEGAL SERVICES INTO LEGAL PRACTICE

In today's ever-evolving legal landscape, the traditional boundaries of legal services are expanding. Attorneys are increasingly incorporating non-legal services into their practices to meet the needs of their clients more fully. This trend not only reflects the dynamic nature of the legal profession but also signifies a shift towards a more holistic approach to client service. As we dive into this subject, it is crucial to understand the significance, types, and ethical dimensions of incorporating non-legal services into a legal practice.

The legal profession, historically known for its staunch adherence to tradition and precedent, is experiencing a transformation. The modern client seeks more than just legal advice; they are in search of comprehensive solutions that address all dimensions of their concerns, be it personal, financial, or otherwise. This is increasingly true regarding elder law. Many adults in the sandwich generation are balancing caring for their aging parents with raising their children. When searching for help navigating this situation, they often look for one source of guidance. This paradigm shift has prompted attorneys to reconsider the scope of their services, extending beyond the confines of traditional legal advice to include a range of non-legal services. This integration not only enhances the value proposition of legal practices but also aligns with the contemporary expectations of clients.

II. TYPES OF NON-LEGAL SERVICES COMMON TO ELDER LAW FIRMS

Elder law firms are already uniquely situated to offer non-legal services to their clients. Because a focus on elder law generally means a focus on the demographic of clients rather than a specific problem, elder law attorneys can position their practices as more comprehensive providers of guidance and service rather than solvers of singular issues. There are some common themes among the types of legal-adjacent services that elder law firms provide.

Care coordination involves organizing and managing all aspects of a client's care, particularly in cases involving the elderly or those with special needs. Law firms providing care coordination integrate legal services with care coordination to address the legal, medical, and lifestyle needs of their clients comprehensively. These may include navigating healthcare systems, coordinating with care providers, and ensuring the client's healthcare and end-of-life wishes are legally documented and respected. The Life Care Planning Law Firms Association is a professional organization centered around this concept.

Some elder law firms offer fiduciary services or accept court appointments to further aid clients. In situations where clients are unable to make decisions for themselves due to age or incapacity, attorneys may act as guardians, taking on the responsibility to make decisions that are in the best interest of the client or aid their clients by serving as an agent or surrogate.

Elder law attorneys often assist clients with some aspects of asset repositioning or preservation. This can naturally lead an attorney to take the next step toward providing full

financial advising services. Attorneys may provide advice on wealth management and investment strategies to protect and grow their clients' assets. Legal practices may offer tax planning services, helping clients navigate the complexities of tax laws to optimize their financial strategies and ensure compliance.

III. TWO MODELS OF SERVICE DELIVERY

While non-legal services can encompass a broad range of offerings, from financial planning and tax advice to care coordination and fiduciary services, as attorneys venture into these areas, they typically adopt one of two models: delivering non-legal services directly through their existing law firms or establishing separate legal entities dedicated to non-legal services. Each approach comes with its unique set of benefits and potential disadvantages.

A. Direct Provision of Non-Legal Services through Law Firms

Providing non-legal services directly through a law firm allows for a seamless, integrated service delivery model. Clients benefit from a one-stop-shop experience where they can receive both legal and non-legal services, enhancing convenience and ensuring cohesive strategy and communication. The ease of not needing to shop around for multiple providers can provide additional value to clients and can position the law firm’s offering in a premium segment. Law firms can also leverage their established brand and the existing trust they have built with their clients. Clients who are already satisfied with the legal services may be more inclined to use the same firm for their non-legal needs, capitalizing on the firm's reputation for quality and professionalism. Offering non-legal services within a law firm can foster better cross-disciplinary collaboration among professionals and break down silos. This collaboration can lead to innovative solutions and strategies that address clients' multifaceted needs in a holistic manner.

There are some potential drawbacks to providing non-legal services within a law firm. Law firms face stringent ethical and regulatory constraints that generally would not apply to separate businesses. Providing non-legal services directly may complicate compliance with these rules, especially concerning conflicts of interest, confidentiality, and the unauthorized practice of law. Diversifying into non-legal services may strain a law firm's resources and dilute its focus. Ensuring excellence across diverse service lines requires substantial investment in training, technology, and personnel, potentially diverting attention from the core legal practice. Expanding services beyond the legal domain may expose the firm to new liability risks. Ensuring adequate insurance coverage and implementing robust risk management practices become increasingly complex and critical.

B. Provision of Non-Legal Services through Separate Legal Entities

Establishing a separate entity dedicated to non-legal services allows for a higher degree of specialization. These entities can focus exclusively on their area of expertise, attracting top talent and delivering services at the highest professional standard. Operating a separate entity for non-legal services can provide clearer regulatory boundaries too. This separation can simplify compliance with the respective regulatory frameworks governing legal and non-legal services, reducing the risk of ethical violations. Separating non-legal services into distinct entities can

help isolate and manage risks. Liability arising from non-legal services is less likely to spill over into the law firm, protecting the firm's core legal practice from potential repercussions.

As was the case with offering non-legal services within a law firm, creating a separate entity also has some potential downsides. Requiring clients to engage with separate entities for legal and non-legal services can lead to a fragmented experience. This separation may result in inefficiencies and inconvenience, as clients navigate multiple relationships and potentially disjointed strategies. While a separate entity can focus on its niche, it may struggle to benefit from the law firm's established brand and reputation. Building trust and recognition in the market may require significant effort and resources. Managing separate entities increases operational complexity. It involves setting up distinct administrative structures, compliance regimes, and inter-entity coordination mechanisms, demanding additional time and resources.

IV. ETHICAL CONSIDERATIONS OF INCORPORATING NON-LEGAL SERVICES

While the integration of non-legal services into legal practice offers numerous benefits, it can also complicate ethical considerations. Attorneys venturing into this expanded realm of service must navigate these waters with utmost diligence and adherence to professional ethics.

A. SCR 3.130(1.6) Confidentiality

Kentucky's Rule of Professional Conduct SCR 3.130(1.6) primarily concerns the confidentiality of information related to client representation. It obligates attorneys to not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by paragraph (b) which details specific exceptions. When attorneys offer non-legal services, either directly through their law firms or via separate entities, they should be cognizant of potential problems that could arise concerning this rule.

When legal and non-legal services are provided together, it may become challenging to delineate what information is covered under attorney-client privilege. Clients might assume all information shared is protected, while certain non-legal services may not offer the same level of confidentiality. This misalignment could lead to unintentional breaches of confidentiality.

The rule allows disclosure of information when it's "impliedly authorized in order to carry out the representation." However, when attorneys provide non-legal services, the scope of "representation" might be ambiguous. Determining what disclosures are implicitly authorized in the context of non-legal services could be complex and might lead to inadvertent violations. Clients might not fully grasp the distinction between legal and non-legal services, especially if they are offered by the same firm or under a similar brand. They might wrongly assume that all shared information is confidential and protected by attorney-client privilege, even when it pertains to non-legal services where such privilege might not apply.

Attorneys offering non-legal services might inadvertently expose themselves to liability risks if they fail to protect client information with the same rigor as in their legal practice. Any leak or misuse of client information, even if it pertains to non-legal services, could lead to mistrust and potential claims against the attorney. When offering non-legal services, attorneys might need to comply with additional regulations pertaining to those services, which might have different confidentiality standards. Ensuring compliance with both the legal standards of confidentiality and those of other regulatory frameworks can be challenging and resource-intensive.

B. SCR 3.130(1.8) Conflict of Interest

Kentucky Rule of Professional Conduct SCR 3.130(1.8) addresses specific conflict-of-interest situations involving prohibited transactions between a lawyer and a client, such as entering into business transactions with a client or acquiring a proprietary interest in the subject matter of the litigation the lawyer is conducting for a client. This rule aims to protect clients from potential exploitation or undue influence by their lawyers and to ensure the lawyer's professional judgment is not compromised by personal interests. When attorneys offer non-legal services, navigating this rule can be particularly challenging due to the inherently different nature of these services compared to traditional legal services.

Providing non-legal services can create complex conflict-of-interest scenarios that might not be immediately apparent. For example, a lawyer offering financial planning services might encounter conflicts between the financial advice given and the legal advice related to estate planning or business transactions. Such conflicts could compromise the attorney's ability to provide impartial legal advice.

Rule 3.130(1.8) requires that transactions between a lawyer and a client be fair, reasonable, and fully disclosed in writing. Obtaining truly informed consent can be challenging when the boundaries between legal and non-legal services are blurred, as clients might not fully understand the implications of the non-legal services or the lawyer's interest in them.

Offering non-legal services might expose lawyers to liability standards that differ from those in the legal profession. For example, the standard of care for financial advisory services is distinct from that in legal services. Lawyers need to be cautious to meet the appropriate standards in each domain to avoid potential malpractice claims.

C. Rule 3.130(5.4) Professional Independence of a Lawyer

Kentucky Rule of Professional Conduct SCR 3.130(5.4), dealing with professional independence of a lawyer, primarily addresses the sharing of legal fees with non-lawyers, partnerships or associations between lawyers and non-lawyers, and the influence of non-lawyers over the professional judgment of a lawyer. The rule aims to preserve the professional independence of a lawyer and ensure that legal services are provided without interference from non-lawyers who may not be bound by the same ethical obligations. When attorneys offer non-legal services, whether directly or through a separate entity, they should be mindful of potential problems that could arise concerning this rule.

Rule 3.130(5.4)(a) prohibits lawyers from sharing legal fees with non-lawyers. When attorneys provide non-legal services, especially if within a structure that involves non-lawyers (like a multidisciplinary practice), they need to ensure that the revenue from legal services is not improperly shared with non-lawyers, which could be a complex arrangement to manage. The rule also prohibits forming a partnership with a non-lawyer if any part of the partnership's activities consists of practicing law. Lawyers offering non-legal services through a partnership or firm that includes non-lawyers must be careful to structure the organization in a way that complies with this rule.

Rule 3.130(5.4)(d) specifies that a lawyer's professional judgment must not be directed or regulated by a non-lawyer. Lawyers must be cautious when offering non-legal services to ensure that any non-lawyer associates in the business do not exert influence over the lawyer's legal practice or compromise the lawyer's professional independence.

D. Rule 3.130(5.8) Responsibilities regarding Law-Related Services

Kentucky Rule of Professional Conduct SCR 3.130(5.8) pertains to providing law-related services. This rule is obviously particularly relevant for attorneys considering offering non-legal services. The rule requires clear differentiation between the legal and non-legal services provided, informed consent from clients, and can require the application of professional conduct rules to the entirety of the relationship.

Rule 3.130(5.8) stipulates that ethical rules apply to the entirety of the relationship with the client, not just the legal services part in two circumstances. First, if the delivery of the law-related services is not, “distinct from the lawyer's provision of legal services to clients.” This seems most applicable to situations where the lawyer is delivering the law-related services within the law firm. Second, the rule extends the application of the rules of professional conduct to situations where the services are provided “by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.”

V. LESSONS LEARNED: A CASE STUDY: ATTORNEY J.T. GREEDY

The case of Attorney J.T. Greedy, detailed in a Massachusetts Board of Bar Overseers' Public Reprimand, highlights significant ethical violations in the context of providing law-related services, specifically elder care coordination services, to an elderly client. Attorney J.T. Greedy, with over 25 years of experience, represented an elderly client in probate and estate planning matters and performed non-legal services through his business, Senior Services Group (SSG), which was affiliated with his law firm. The services included assisting the client in transitioning from a skilled-nursing facility to her home, paying bills, and performing banking activities as her power of attorney. Attorney J.T. Greedy charged a 20 percent administrative fee on each invoice paid through SSG, regardless of the work performed, leading to excessive fees, especially on substantial bi-weekly home care vendor bills. The client’s home care vendor bills ranged from $11,000 to $13,000 on a bi-weekly basis, with SSG charging 20 percent to make those payments.

J.T. Greedy failed to obtain the client's informed consent in writing, did not adequately disclose the terms of the SSG arrangement, and did not clarify the distinction between legal services and services charged under the SSG agreement. Invoices provided to the client did not clearly show the balance of the client's trust funds or differentiate amounts paid to vendors from those paid to SSG. After the client's trust funds were exhausted, she terminated the attorney's services.

Attorney J.T. Greedy violated multiple Massachusetts Rules of Professional Conduct, including Rules 1.4(b), 1.5(b), 1.5(a), 1.8(a)(1), (2) ,(3), and 1.15(d)(2), leading to a public reprimand by the Massachusetts Board of Bar Overseers.

Lessons for attorneys:

A. Transparent Fee Structures

Attorneys must ensure that fee arrangements, especially when involving additional non-legal services, are transparent and justified. Charges should reflect the actual work done and value provided to the client. Kentucky SCR 3.130(1.5) starts, "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The factors used to determine reasonableness include the time and labor required. It's hardly plausible to see how paying a home care company's bi-weekly invoices could be worth $2,200 per invoice.

B. Informed Consent and Disclosure

It is imperative to obtain informed consent in writing when entering into business transactions with clients, especially for services beyond traditional legal representation. Clients should understand the terms, services covered, fees, and potential conflicts of interest. SCR 3.130(1.8) prohibits attorneys from entering into business transactions with clients unless:

1. The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

2. The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

3. The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

C. Clear Billing and Accounting

Invoices must clearly itemize and differentiate between legal services, other charges, and the balance of the client's funds. This practice ensures transparency and helps maintain the client's trust.

J.T. Greedy's case serves as a cautionary tale for attorneys offering non-legal services or engaging in business transactions with clients. Upholding ethical standards, ensuring transparent practices, and maintaining clear communication are paramount in preserving the integrity of the legal profession and the trust of the clients served.

VI. OTHER PRACTICAL TIPS FOR OFFERING NON-LEGAL SERVICES

Where non-legal services are offered from a separate entity in which the lawyer has an interest, language within the firm's fee agreement and the independent company's contract discussing conflict issues is imperative. This language could, in some ways, be similar to the type of paragraph one would use for estate planning matters where one attorney is representing both spouses of a married couple. Rule 3.130(1.8) offers guidance regarding this. The attorney should be sure to disclose their interest in the non-legal company and provide the client the opportunity to seek independent advice regarding their decision to hire the firm and company. Both agreements should include language that the client is consenting to the relationship after the opportunity to consider any risks.

Providing non-legal services through a law firm doesn't inherently change an attorney's obligation to ensure their staff complies with the ethics rules; it may just mean that there are more staff members to train. Non-legal services may also introduce novel situations the rules of professional conduct didn't contemplate. The ethics hotline is one resource available to attorneys in this situation. Attorneys, regardless of their decision to provide law-related services or not, should provide comprehensive legal ethics training to staff, including non-lawyers and those delivering law-related services. This training should be tailored to the multidisciplinary business and provide staff members with examples of predictable scenarios where the rules may pose challenges unique to the additional service areas.

Lastly, attorneys should provide clients with expectations regarding attorney-client privilege. In instances where the non-legal services are provided by a separate entity in which the attorney owns an interest, the attorney should be clear that privilege will likely not apply to matters handled by the separate entity.

VII. CONCLUSION

The incorporation of non-legal services into legal practice is not merely a trend but a response to the evolving needs of clients in a complex world. As elder law attorneys venture into this expanded scope of service, they must do so with a steadfast commitment to ethical standards, professional competence, and clear communication. The potential to offer more comprehensive, client-centric solutions is immense, but it must be pursued with careful consideration of the legal and ethical implications.

Practitioners should weigh their options regarding what services to offer and whether to offer those services through their law firm or through a separate entity. Regardless of the structure, rules of professional conduct will always apply to the attorney and may also apply to the attorney's team. Understanding of and adherence to the rules will help to reduce the attorney's liability in an expanded practice.

KRS 389A.010(1)(a) – Any **fiduciary** – trustee, guardian, conservator or personal representative – **not otherwise possessing a power of sale** – may **move** the district court **to sell or mortgage** any **real estate** or any interest in the real estate **possessed by his** or her **ward, decedent or trust**.

I. STANDING

A. Trustee

1. If the trust instrument sets forth that the trustee has the power to sell or mortgage real estate – the trustee cannot file a KRS 389A.010 motion.

2. If the trust instrument does not set forth that the trustee has the power to sell or mortgage real estate – KRS 386B.8-150(1)(b) grants the trustee all powers over the trust property which an unmarried competent owner has over individually owned property – the trustee cannot file a KRS 389A.010 motion.

3. If the trust instrument **expressly limits the power** of a trustee to sell or mortgage real estate – the trustee must file a KRS 389A.020 motion to have the circuit court alter or amend this restriction.

4. If the circuit court alters or amends the restriction so there is no restriction – KRS 386B.8-150(1)(b) grants the trustee the power to sell and mortgage real estate – the trustee cannot file under KRS 389A.010.

5. **Thus, it appears that there is no circumstance in which a trustee would have standing to file a KRS 389A.010 motion.**

B. Personal Representative

1. **EXECUTOR** or **ADMINISTRATOR** has no power to sell land belonging to his decedent without an order of court. *Strode v. Kramer*, 169 S.W.2d 29 (Ky. 1943). *See also* KRS 395.220 and KRS 395.195(6).

   a. **Except:** if the power of an executor to sell or mortgage any real estate is **expressly limited by the will**, such limitation may only be altered or amended by the **circuit court** under KRS 389A.020.

   b. **Except:** if the decedent's will **gives the authority**, it is not necessary to obtain a court order. *Weeks v. Briscoe*, 204 S.W.2d 584 (Ky. 1947).[1] This power to sell real estate also passes to an

[1] *Lucas v. Mannering*, 745 S.W.2d 654 (Ky. App. 1987). A testamentary power of sale does not vest a personal representative with the unqualified right to sell estate realty. The power is subject to the personal representative's obligations as a fiduciary. It may be exercised only if the sale is in the best interest of the beneficiaries of the estate.

administrator with will annexed.[2] But, pending an action or procedure to set aside or reject the will, there shall be no power to sell the land of the deceased, except under a judgment of court.[3]

2. **However, if you are the executor or administrator of an estate, why would you want to file a KRS 389A.010 motion?**

   The most logical reason would be to pay debts of the estate. If a personal representative needs to sell real property to pay debts, **KRS 395.510** sets up, what appears to be, a less cumbersome procedure in **CIRCUIT COURT** that "may" be used. It is unlikely that a personal representative would want to mortgage any real property of the estate.

3. **Absent some testamentary power of sale which would restrict the sale, such as a mandated distribution, the heirs or devisees are the proper persons to sell the real estate.** They just need to establish their chain of title to the property. If the decedent died intestate, an affidavit of descent under KRS 382.120 should be filed. Or if the decedent died testate, the will is an instrument of title to prove ownership and KRS 382.135(4) requires the personal representative file an affidavit of transfer of title.

4. **WARNING:** Pursuant to **KRS 396.011**, claims, excluding claims of the United States, the State of Kentucky and any subdivision thereof, which arose prior to the decedent's death, are barred against the estate, the personal representatives, and the heirs and devisees of the decedent unless presented within six (6) months of the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent's death. If real property is sold by the heirs and/or beneficiaries prior to the six (6) months or two (2) year time frame – a creditor of the estate could come forward and make a claim against the real estate sold and/or those who sold it.

5. If the new owners do not want to sign a deed, which would subject them to a warranty of title, they should sign a quit claim or special warranty and not a general warranty deed. If some of the heirs do not want to sell the real estate and others do, then the procedure under KRS 389A.030 in **CIRCUIT COURT** is the proper forum for their dispute.

6. **Additionally, why would a buyer want to purchase real estate from a personal representative?**

   a. A personal representative is not individually liable on a contract entered into in a fiduciary capacity in the course of administering the estate.[4] If there later turns out to be a cloud on the title or the

[2] The power "passes to an administrator with the will annexed, absent an expressed intention otherwise: in the will. *Pitts v. Estate of Gilbert*, 672 S.W.2d 70, 73 (Ky. App. 1984).

[3] KRS 395.220(2).

[4] KRS 396.185(1).

land is subject to unpaid debts and the estate is closed, there would be no one left to enforce the warranties under the deed.

b. **Thus, it is unlikely that a personal representative would use this statute unless one of the new owners of the property is a person under disability.**

7. Should the personal representative want to move forward to sell or mortgage real estate under KRS 389A.010, there are **NEW CHANGES EFFECTIVE JUNE 29, 2023**.

> (3)(a) Unless waived in writing, written notice of the hearing with a copy of the motion shall be served in a manner authorized by the Rules of Civil Procedure for the initiation of a civil action upon all persons who have a vested or contingent interest in the property interest sought to be sold.
>
> (b) Where the property interest sought to be sold belongs to a person under legal disability, service of notice and defense shall be governed by Civil Rule 4.04(3) and 17.03.
>
> (c) In the case where the subject of the action is the property interest of a person under legal disability, unless waived in writing, written notice shall be given by certified mail, return receipt requested, to all known adult next of kin and shall include:
>
> 1. The nature and pendency of the action; and
>
> 2. The time, date, and location of the hearing.
>
> The notice required under this paragraph shall be given no later than thirty (30) days prior to the date of the hearing on the motion.
>
> (d) At or before the hearing, the fiduciary or his or her attorney shall file an affidavit of personal knowledge showing compliance with paragraphs (a) to (c) with the following attachments:
>
> 1. A copy of the notice given; and
>
> 2. The original of all receipts returned.

8. With this new statute, there are now the additional requirements on the personal representative: (1) a waiver in writing must be received from or notice shall be given by certified mail to all known adult next of kin of any person who is under legal disability receiving an interest by intestacy or under the will (service on the disabled person under CR 4.04(3) and CR 17.03 is not enough); and (2) an affidavit of personal knowledge shall be filed with the court at or before the hearing not only showing waiver or

notice to the next of kin, **but also setting forth that all persons having a vested or contingent interest in the property sought to be sold have waived in writing written notice or that they have been served and where the interest to be sold is a person under legal disability that there has been service of notice in compliance with CR 4.04(3) and CR 17.03.**

C. Guardian-Conservator

1. **GUARDIAN-CONSERVATOR** does not have the power to sell or mortgage real estate so **may always file a KRS 389A.010 motion.** To sell any of the ward's real property, a guardian[5] and a conservator[6] shall comply with the provisions of KRS Chapter 389A.[7]

2. However, should the guardian-conservator move forward to sell or mortgage real estate under KRS 389A.010, there are **NEW CHANGES EFFECTIVE JUNE 29, 2023**.

> (3)(a) Unless waived in writing, written notice of the hearing with a copy of the motion shall be served in a manner authorized by the Rules of Civil Procedure for the initiation of a civil action upon all persons who have a vested or contingent interest in the property interest sought to be sold.
>
> (b) Where the property interest sought to be sold belongs to a person under legal disability, service of notice and defense shall be governed by Civil Rule 4.04(3) and 17.03.
>
> (c) In the case where the subject of the action is the property interest of a person under legal disability, unless waived in writing, written notice shall be given by certified mail, return receipt requested, to all known adult next of kin and shall include:
>
> 1. The nature and pendency of the action; and
>
> 2. The time, date, and location of the hearing.
>
> The notice required under this paragraph shall be given no later than thirty (30) days prior to the date of the hearing on the motion.
>
> (d) At or before the hearing, the fiduciary or his or her attorney shall file an affidavit of personal knowledge

[5] KRS 387.125(3).

[6] KRS 387.700(3).

[7] KRS 389A.030 allows another person who is a co-owner of the real estate to force the sale of a ward under guardianship. In this instance the interest of the ward is not sold by the guardian-conservator, **but by the court.**

showing compliance with paragraphs (a) to (c) with the following attachments:

1. A copy of the notice given; and

2. The original of all receipts returned.

3. With this new statute, there is now the additional requirement that an affidavit of personal knowledge shall be filed with the court at or before the hearing showing that **all persons having a vested or contingent interest in the property sought to be sold have waived in writing written notice or that they have been served and there has been service and notice in compliance with CR 4.04(3) and CR 17.03.**

II. JURISDICTION

Only the district court has jurisdiction to hear a KRS 389A.010 motion, and only a district judge can conduct the hearing. No proceedings under this section shall be conducted by or before a commissioner of the district court. KRS 389A.010(5).

III. VENUE

Venue is in the county in which the fiduciary has qualified. A guardian – conservator – executor or administrator all received their appointment in district court. A new action is not filed with a separate case number. You simply must file your motion in the district court proceeding where the fiduciary was appointed.

IV. WHAT SHALL THE MOTION INCLUDE?

A. **An adequate description of the property. Practical step:** Type in the description found in the deed – you are going to need it later when you cut and paste from the motion to the order to the deed or mortgage – you can then be sure that the description for each matches.

B. **A summary of the grounds for the motion. Practical step:** As for a guardian or conservator, the grounds may be that the ward no longer lives in the home and wants to avoid the expense of the county taxes, insurance, and necessary upkeep of the home.

C. **A request that the bond of the fiduciary be increased in an adequate amount in accordance with KRS 395.130. Practical step:** I always place this wording not only in my motion but also in the order in which the motion is granted. However, when doing Medicaid planning and I have filed this motion on behalf of a guardian/conservator, it is often my goal to spend down the proceeds from the sale so my client will qualify for Medicaid. In this case, nothing is actually done to increase the bond of the fiduciary. If the property is to be sold and the proceeds are to be held by the movant – you can either have the court, in the final order, state what is an adequate amount for the bond to be increased or after the property is sold, return to the court to ask as to what amount the bond should be increased.

V. WAIVER FOR VESTED OR CONTINGENT INTERESTS

A. Unless waived in writing, written notice of the hearing with a copy of the motion shall be served in a manner authorized by the Rules of Civil Procedure **for the initiation of a civil action** upon all persons who have a vested or contingent interest in the property interest sought to be sold.

B. The strongest wording would be that the person holding an interest **entered their appearance in the action** and stated they have no objection to the sale of the property. The statute does not require that the waiver be notarized, but an individual judge might. If you are unable to get a waiver, then **for the initiation of a civil action** you must have a summons issued and served.

C. An example of such a waiver might read:

> *I, Robert Redford, having a vested interest in the property interest sought to be sold, do hereby enter my appearance in Civil Action _____ and waive under KRS 389A.010(3)(a) written notice of the hearing with a copy of the motion served upon him in a manner authorized by the Rules of Civil Procedure for the initiation of a civil action and do not object to the sale of the below described property:*
>
> *Description of the property then follows with a place for the waiver to be signed. Notarized if you think your district judge will require it.*

VI. VESTED AND CONTINGENT INTEREST

A. A motion by a guardian or conservator is simpler as to a vested or contingent interest because you are only trying to sell the interest of the ward. The vested interest is usually the ward themselves and maybe a spouse. If the spouse is not a co-owner, the spouse would still own a contingent interest in the property under their dower or curtsey right and should be named as a party.[8]

B. A motion by a personal representative is usually more complicated as to a vested or contingent interest because there may be several people who inherited an interest in the property. These persons can present all kinds of issues as to proper service as they may be disabled, a minor, in the military, in jail, or just unknown as to who they are and their marital status.

C. **Practical step: Does a mortgage holder have a vested or contingent interest in the property so that they must either sign a waiver or be served with process?** It can be argued that a mortgagee does not have a vested or contingent interest in the property but only holds the estate mortgaged as security only for the debt. It is a mere lien of the creditor. ***Jones' Adm'r v. Jenkins*, 83 KY 391, 395 (1885).**

[8] *White v. White*, 883 S.W.2d 502, 507 (Ky. App. 1994) "If Howard is married, he should have also named his wife as a party to the action."

D. KRS 389A.010 does not define a vested or contingent interest and does not specifically state that all lienholders be made a party. Since you are going to make sure that the mortgage holder, county and city taxes are paid so that you can pass good title, is there a real reason to make them a party?

E. In contrast, **Ohio Statute 2127.13 Necessary parties in sale by guardian** requires not only that all persons holding legal title to the real property or any part of the property be made a party, but also **"all lienholders whose claims affect the real property or any part of the property."**

F. **WARNING:** Real property passes directly to a decedent's heirs-at-law or to beneficiaries under a testator's will.[9] In the case of a testate death – did the will leave the real estate directly to a beneficiary or did the will direct the executor to sell all real property and distribute the proceeds? Judgment liens, IRS liens, and state tax liens attach to any real property a person owns or later acquires after the filing of the lien.

G. **KRS 389A.010 motion does not "strip" liens from the real property.** Heirs, devisees, their spouses, and lien holders against them should be made a party to the motion or have them sign an appropriate waiver.

VII. WAIVER FOR NEXT OF KIN

A. Where the subject of the action is the property interest of a person under legal disability, unless waived in writing, written notice shall be given by certified mail, return receipt requested, to all known **adult** next of kin. Next of kin would be those who would have inherited the property should the ward die intestate. The written notice shall include the nature and pendency of the action, and the time, date, and location of the hearing. A summons is not required to be issued and served. The statute does not require that the waiver be notarized, but an individual district judge might. By certified mail, I send the following: (1) a cover letter setting forth the nature and pendency of the action; the time, date, and location of the hearing; and instructions on returning the waiver; (2) a copy of the motion; (3) a waiver to be signed; and (4) a self-addressed stamped envelope back to me for the return of the waiver.

B. An example of such a waiver might read:

> *I, Kenny Redford, being a known adult next of kin of Robert Redford, do hereby under KRS 389A.010(3)(c) waive the thirty (30) day notice in writing by certified mail, return receipt requested, of (1) the nature and pendency of Civil Action No. _____ of the Commonwealth of Kentucky, _____ District Court; (2) the time, date, and location of the hearing on a Motion to sell the below described property; and (3) waive any objection to granting the Guardian/Conservator the power to sell the following described real estate:*

[9] *Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006); *Wood v. Wingfield*, 816 S.W.2d 899 (Ky. 1991).

Description of property then follows with a place for the waiver to be signed. Notarized if you think your District Judge will require it.

C. **If not waived in writing:**

1. There is a 30 day notice requirement before the motion can be heard. *See* **KRS 446.030** and **CR 6.01** which is substantially similar for the formula for the computation of time under any **applicable statutes**. Since you are required to give notice by certified mail, I would also add at least three (3) additional days to the prescribed time under **CR 6.05**.

2. At or before the hearing, the fiduciary or his attorney shall file an affidavit of personal knowledge showing compliance with KRS 389A.010(3)(a), (3)(b) and (3)(c) and **attach a copy of the notice given** and **the original of all receipts returned**. On the hearing date, I file with my affidavit: (1) any waiver I have received; (2) a copy of any instruction letter I mailed, but did not receive a waiver back; and (3) the original of all receipts (green cards) returned.

VIII. CONSENT

Special care should be taken if the property sought to be sold is to be purchased by the fiduciary or their spouse. The waiver should contain a provision that not only is there no objection to the sale of the property but also that there is no objection to the property being sold to the fiduciary or their spouse. The sale of real property to a fiduciary is voidable.[10]

IX. GUARDIAN-CONSERVATOR: FOR PERSON UNDER LEGAL DISABILITY

KRS 389A.010 states where the property interest sought to be sold belongs to a person under legal disability, service of notice and defense shall be governed by **CR 4.04(3)** and **CR 17.03**. **CR 4.04(1) requires summons and complaint (or other initiating document) be served together.**

X. WHO TO SERVE WHEN ACTION BROUGHT AGAINST WARD

A. **CR 4.04(3):** Service **shall** be made upon an unmarried infant or a person of unsound mind by serving his resident guardian or committee if there is one known to the plaintiff or, if none,

1. By serving either his father or mother within the state or, if none,

2. By serving the person within this state having control of such individual.

B. If there are no such persons enumerated above, the clerk shall appoint a practicing attorney as guardian *ad litem* who shall be served.

[10] *West's Kentucky Practice*, Volume 2, Prob. Prac. & Proc. §1685. Purchase by the Fiduciary, pages 433-435.

C. **If any of the persons directed by this section to be served is a plaintiff, the person who stands first in the order named who is not a plaintiff shall be served.**

D. Under KRS 389A.010, the only person who can bring the action for the ward is a guardian or conservator. Usually, this is the same person, but not always. If the guardian and the conservator are two separate people – if the conservator brought the action, the guardian would need to be served. If the guardian brought the action, the father or mother would need to be served if one is within the state. Thus, while it is not required to be stated in the KRS 389A.010 motion that the father or mother are not within the state, it is good practice to set forth whether they are deceased or not within the state.

E. If the parents are deceased or not within the state, then the next person in line would be the person having control of such individual which would be the guardian or the spouse might properly be the one having "control of such individual." If the guardian is conflicted out and there is no spouse or the spouse does not have control of the individual, then service falls on the guardian *ad litem*.

F. "The purpose of directing service upon the father or mother, or person having control of such defendant (if he or she has no resident guardian or committee), is to afford additional protection to that party by having someone closely associated with the party be given notice of the proceeding."[11]

XI. GUARDIAN *AD LITEM*

A. Only a guardian, committee, or guardian *ad litem* is authorized to defend an unmarried infant or person of unsound mind.[12] When the ward was first determined to be disabled by the court a guardian *ad litem* was appointed.

B. **Practical step:** Check to make sure this person who was originally appointed has not been relieved of his duties by the court. If relieved, request the district court clerk to appoint a new guardian *ad litem* for the ward.

C. **CR 17.03(3)** – No judgment shall be rendered against an unmarried infant or person of unsound mind until the party's guardian or committee or the guardian *ad litem* shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense.

D. **Practical step:** Prepare a proposed report for the guardian *ad litem* setting forth why he/she "after careful examination of the case is unable to make defense" and "that it would be in the best interest of the Ward that the motion be granted." Be sure to leave a blank space so that the guardian *ad litem* has only to write in the amount of the fee; sign his name; serve the report on the parties to the action; and file the report with the court.

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[11] *West's Kentucky Practice*, Volume 6, Rules of Civil Procedure, 6(4.04(3)), page 51.

[12] CR 17.03.

E. **Practical step:** There is no requirement when filing a motion under KRS 389A.010 for a motion to be served on the county attorney. However, it would be good practice to serve the county attorney. The county attorney will be at the hearing and it is not unusual for the district judge to ask the county attorney if she/he has an objection.

F. **Practical step:** Prior to filing my motion, I call the office of the guardian *ad litem* to make sure that the guardian does not have a conflict with the date for the hearing. Additionally, I will mail to the guardian a cover letter which includes a copy of the motion, a copy of the summons to be issued, a copy of the proposed order to be entered, and a proposed guardian *ad litem* report in a plastic sleeve to not only keep it clean but also to show its importance to be signed, served, and filed. In the letter, I inform the guardian *ad litem* that I will be serving the summons and motion on him/her by certified mail from the district court clerk as required by KRS 389A.010.

XII. WHAT SHOULD ALSO BE INCLUDED IN THE MOTION

A. Name all persons who have a vested or contingent interest in the property interest sought to be sold, the interest that they hold, and the address of each individual. Attach to the motion as an exhibit any waiver signed by a vested or contingent interest.

B. If there is no mortgage, set forth in the motion that there is not a mortgage against the property.

C. Include in the motion a paragraph about the PVA fair cash value of the property and attach as an exhibit a copy of the PVA tax bill. If the property is to be sold for less than the PVA FCV, attach a copy of an appraisal by a licensed appraiser. If it is a private sale, attach a copy of the purchase contract. However, if it is a close family member seeking to purchase, there is often no purchase contract.

D. In the case of a disabled person, include (a) the name and address of the guardian *ad litem* and request that he/she be paid a reasonable fee for their services; (b) although not required by statute, include in the certificate of service that a copy of the motion has been mailed to the county attorney; (c) state whether or not the parents of the disabled person are deceased; and (d) state the name of all persons who are an adult next of kin and the relationship of each person to the disabled person and their address. Also, attach as an exhibit any waiver signed by an adult heir.

XIII. CIVIL SUMMONS

A. In a motion by a personal representative, a summons would not have to be issued if you can get waivers signed by each vested and contingent interest. However, in a guardianship action a summons **shall** and will always be required to be issued and served.

B. **Practical step:** On the civil summon for example, state “Plaintiff: Robert Redford, Guardian/Conservator for name of Ward” and on the heading line state “Motion to Grant the Guardian/Conservator the power to sell real estate.” For the defendant,

I type the name of the ward. For service of process, I type the name of the guardian *ad litem*, his title as guardian *ad litem* and the address to where I want the summons and motion to be mailed by the district court clerk via certified mail.

XIV. *LIS PENDENS* NOTICE

A. A *lis pendens* is a "notice, recorded in the chain of title to real property, … to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." *Greene v. McFarland,* 43 S.W.3d 258, 260 (Ky. 2001). *See* KRS 382.440, KRS 382.450 and KRS 382.460.

B. The *lis pendens* gives constructive notice when it is filed with the county court clerk where the real property or the greater part thereof lies. If a lien is filed after the *lis pendens* notice is filed, the creditor must come forward in the civil matter to assert the lien or the lien will be lost against the property being sold. **Thus, a *lis pendens* notice can "strip" liens from the real property under a KRS 389A.010 motion.**

C. The notice is to include: (a) the number of the action, if it is numbered, and the style of such action or proceeding and the court in which it is commenced or is pending; (b) the name of the person whose right, title, interest in, or claim to real property is involved or affected; and (c) a description of the real property in the county thereby affected. **KRS 382.440.**

D. Additionally, **KRS 382.335(1)** requires that the *lis pendens* also contain a preparation statement just as in a deed that includes the name, address, and signature of who prepared the *lis pendens* notice:

1. **STEP 1:** Have the title to the property examined.

2. **STEP 2:** Prepare your motion.

3. **STEP 3:** Update your title examiner to make sure a lien has not been filed since the initial exam.

4. **STEP 4:** File your motion – re-check title – file your *lis pendens* notice.

E. Failure to follow these four steps can result in a creditor holding a lien against the property that has been sold and maybe even a claim against the personal representative who distributed money arising from the sale to any person subject to the lien.

XV. HEARING

All persons having a vested or contingent interest in the property or who are next of kin of the disabled person **shall** have standing to present evidence and to be heard at the hearing.

XVI. FINAL ORDER

KRS 389A.015(1) states that the order by the district court granting a motion under KRS 389A.010 **shall** contain an adequate description of the property and **shall** recite that it is a final order. Good practice is to type on the order: **THIS IS A FINAL AND APPEALABLE ORDER FOR WHICH THERE IS NO JUST CAUSE FOR DELAY.**

XVII. APPEAL

A. An aggrieved party may no later than 30 days from the date of the order, institute an **adversary proceeding** in circuit court pursuant to KRS 24A.120(2) in respect to any order affecting the right of the fiduciary to sell or mortgage.

B. Such **adversary proceeding** shall be filed in circuit court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal. KRS 24A.120(2).

XVIII. RESTRICTIONS ON SALE OF PROPERTY

NEW CHANGES EFFECTIVE JUNE 29, 2023:

A. **Neither the fiduciary nor the owner of any vested interest** shall make any conveyance or mortgage of the real estate and any attempt to do so shall be voidable by the court until:

1. Time for appeal of any final order entered following the hearing to determine if the property may be mortgaged or sold has expired;

2. Time for appeal of any final order entered following the final adjudication of the appeal has expired; or

3. This new statute making the conveyance or mortgage voidable instead of void is retroactive as to a conveyance made prior to June 29, 2023. The new statute does not state that it is retroactive as to a mortgage made prior to June 29, 2023.

B. **Unless the court order indicates,** the statute does not set forth any limitation on how quickly the property must be sold.

XIX. DEED OR MORTGAGE

KRS 389A.015(2) states that the deed or mortgage from the fiduciary in exercise of the power granted **shall** recite in the source of title thereto the place where the order giving such authority may be found. A certified copy of the order **shall** be recorded with the deed but there is no requirement that a certified copy of the order be recorded with the mortgage.

XX. TYPE OF DEED

A. **General Warranty, Special Warranty or Quit Claim**

B. KRS 389A.010 allows a fiduciary to sell the real estate but does not state what type of deed should be used to convey the property unless you specifically state the deed to be used in the order.

THERE BE DRAGONS! DANGEROUS POWER OF ATTORNEY PROVISIONS: WHEN TO UNLEASH THEM AND HOW TO TAME THEM

Jonathan C. Rouse and Shelly Ann Kamei

Durable powers of attorney are a critical tool in incapacity planning, but they are a double-edged sword. They can be used to help a client who cannot manage their affairs, but they can also be used to harm principals, particularly those who are vulnerable due to age or infirmity. Thus, a prudent elder law attorney must consider the risk-reward calculus when drafting a durable power of attorney and specifically address (1) whether a specific power should be included; (2) the scope of the power; (3) any customizations to the power that should be made; (4) who should exercise the power; (5) any limitations that need to be placed upon exercise of the power; and (6) the fiduciary duties that bind the attorney-in-fact when exercising the power.

The purpose of this presentation is to address the risk-reward calculus with respect to some of the "hot powers" that can be included in a durable power of attorney. We begin with an explanation of the framework of the Kentucky Uniform Durable Power of Attorney Statute (KRS Chapter 457). We then analyze some of the hot powers addressed by KRS Chapter 457. We conclude with a discussion of how fiduciary duties imposed upon attorneys-in-fact may constrain or alter durable power of attorney provisions.

I. CONSIDERING KRS CHAPTER 457

Kentucky Revised Statutes Chapter 457 is based on the Uniform Law Commission's Uniform Power of Attorney Act (UPOAA).[1] The drafters of the UPOAA were concerned that some powers, such as gifting, could be used to harm a vulnerable principal. Nevertheless, the drafters wanted to preserve and safeguard the ability of the principal to choose which powers could be granted. They had to weigh the risk of harm against the the ability of the principal to make their own choices. The solution to this conundrum was to divide powers into two categories: (1) those that can be granted through general grants of authority (*e.g.,* real estate in KRS 457.270); and (2) those that must be specifically enumerated by the principal in the durable power of attorney.[2]

The powers that fall into the latter category are often termed "hot powers." This is not a legal term but a generally accepted colloquialism that describes powers that may be used to harm a principal and are particularly dangerous when the principal is vulnerable or in extremis. An unscrupulous attorney-in-fact may use these powers to override the intent of the grantor, misuse grantor funds, or change the grantor's estate plan. In spite of the risk, these powers must be considered when drafting a durable power of attorney as failure to include these powers may hamstring an ethical attorney-in-fact who is trying to protect the principal and act according to the principal's best interest. This is the catch-22 of hot powers: they can burn the principal but may also be necessary to keeping the principal warm.

[1] A copy of the Act and supporting documents may be found online at https://www.uniformlaws.org.

[2] Section 2.01 of the UPAA offers interesting commentary on the evolution of this approach.

In Kentucky, the provisions that are considered hot powers are found in KRS 457.245. The statute requires that these provisions are not granted unless specifically stated and specifically enumerated. They include the following powers:

- Create, amend, or revoke a trust (1)(a)
- Make a gift (1)(b)
- Create or change rights of survivorship (1)(c)
- Create or change a beneficiary designation (1)(d)
- Delegate authority granted under the power of attorney (1)(3)
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan (1)(f)
- Exercise fiduciary powers that the principal has authority to delegate (1)(g)
- Exercise authority over the content of electronic communications (1)(h)

II. DEALING WITH DANGEROUS PROVISIONS

Our presentation cannot cover all of the provisions which could be considered hot powers, so we are limiting our presentation to a few key provisions. First, we will discuss the power to change beneficiary designations and rights of survivorship. While these are two separate powers in KRS 457.245, they work in similar ways to harm a vulnerable principal. Second, we will address gifting.

Misuse of these powers can severely harm the principal. A rogue attorney-in-fact may deprive the principal of the ability to determine who receives their property after death and cause negative tax consequences to the principal or their estate. The harm may be more immediate and painful: misuse of the gifting power can also deprive the principal of needed resources and render them ineligible for benefits such as Medicaid.

A. Beneficiary Designations and Rights of Survivorship

One of the crucial ways that an unscrupulous attorney-in-fact can harm a principal is to override their estate plan. While it is clear that an attorney-in-fact cannot change a will in Kentucky or in any state in the United States of America, an attorney-in-fact can undo an estate plan. The days of estates passing solely by will are long gone. An ever-growing percentage of decedent's estates consist of non-probate assets such as bank accounts, investment accounts, retirements and pensions, or other similar vehicles that pass by beneficiary designation, payable-on-death designation, or contract provisions. A durable power of attorney that grants authority over these assets contains the ability for the attorney-in-fact to undue the will of the principal with respect to the disposition of their assets. In many cases, this can be accomplished by filling out a minimal amount of paperwork and signing as attorney-in-fact.

Fear of a rogue agent undoing an estate plan has led many an attorney to automatically and universally omit provisions that allow attorneys-in-fact to change rights of survivorship and beneficiary designations. While omission is sometimes prudent, it should not be automatic. Automatic omission of these powers fails to consider two scenarios: First, many of the powers of attorney that do not allow an attorney-in-fact to change these designations still allow them to completely expend the underlying asset during the life of the principal through gifting, transfer to a

trust, annuitization, etc. Second, there may be some situations in which an attorney-in-fact may need to change these beneficiary designations.

1. Provisions which allow the attorney-in-fact to change the estate plan indirectly.

   Powers of attorney which do not allow the attorney-in-fact to change the disposition of non-probate assets may still allow the attorney-in-fact to change the disposition indirectly. If the attorney-in-fact can use up the asset during the lifetime of the principal, the result may be the same as if they had the power to change the disposition after death. For example, banking powers under KRS Chapter 457 include the ability to completely withdraw funds from the account (KRS 457.310(4)) unless otherwise specified in the power of attorney. The authority to manage retirement accounts under KRS 457.380 gives the attorney-in-fact the ability to select the form and timing of payments and the withdraw of benefits under (2)(a), the power to make rollovers under (2)(b), and the power to borrow from or sell assets under (2)(f). The authority to manage insurance policies includes the power to surrender the policy for cash value (KRS 457.330(5)). The authority to oversee benefits programs includes the authority to terminate them (KRS 457.370(2)(c)). An attorney-in-fact may not have the authority to change the rights of survivorship on an asset but may have the authority to transfer the same asset into a trust which accomplishes the same outcome, but through a different means. In all of these cases, an asset can be transferred, expended, or otherwise depleted prior to the death of the principal. From the perspective of the beneficiary, the asset is gone whether or not the attorney-in-fact was acting under this provision or under the authority to change the beneficiary of the asset.

   If a drafting attorney is worried about the attorney-in-fact changing the estate plan, these types of provisions should be considered alongside the provisions to change rights of survivorship and beneficiary designations. An attorney-in-fact who cannot be trusted with the latter powers might not be trusted with the former powers.

2. Scenarios where an attorney-in-fact may need the power to change rights of survivorship and beneficiary designations.

   There are also situations where it is prudent to grant the attorney-in-fact the power to make changes to survivorship and to beneficiary designations. For example, when planning for married couples, consider whether a situation may arise where leaving an asset to a spouse as contingent beneficiary could make the institutionalized spouse(s) over-resourced. Also, do not assume that the institutional spouse will lack capacity or die first, and the community spouse will have capacity and survive. It is possible that the institutionalized spouse will be the one with capacity and outlive the community spouse.

   Further, most powers of attorney prepared for purposes of elder law planning would allow the community spouse to transfer an asset out to a trust but would not allow them to change the survivorship rights or

beneficiary designation. In such a case, it may make more sense to allow the community spouse to change the current ownership of the asset or change the post-death distribution of the asset, depending upon which makes more sense under the circumstances applicable to the couple's situation.

Another situation in which allowing such changes to be made is where a principal has a complex investment or retirement scheme and is unsure of the ultimate route of disposition to their heirs. This is particularly relevant to Secure Act assets. The Secure Act is relatively new. Since it was passed, both Congress and the IRS have tinkered with its terms and implementation. Much about the long-term impact of the Act is unknown, so there is disagreement about how to best plan for Secure Act assets.

A parent of a chronically ill person or disabled person who has a traditional individual retirement account (IRA) may want to pass it on to their child through a third-party supplemental needs trust. The provisions required to make the trust compliant with the Secure Act are different than for other non-Secure Act assets. Some attorneys deal with this by having different provisions within one trust. Some create two trusts – one for Secure Act Assets and one for other assets – naming the beneficiary of assets subject to the Secure Act the Secure Act-compliant trust and the beneficiary of any non-Secure Act assets the traditional third-party supplemental needs trust.

As it is easier to change a beneficiary designation than to change the terms of a trust, some attorneys are vesting this power in a trusted agent. The advantage of this approach is that changes can be made as the law evolves and implementation is more certain. However, caution should be exercised. Limit the ability to change rights of survivorship and beneficiary designations to only the most trusted of agents.

3. Caveats to changing designations.

Drafting attorneys should be aware that inclusion of the power to change rights of survivorship and beneficiary designations in a durable power of attorney may not be sufficient to allow the agent to legally make the change. The beneficiary designation on some assets cannot be changed once an election has been made under federal and state law. There has been extensive analysis of and commentary on the interplay of state power of attorney acts and the Employee Retirement Income Security Act of 1974 (ERISA), but it is unclear just where the limits of an attorney-in-fact's power lie with respect to ERISA preemption.

Some designations involve community property rights and may require a transmutation agreement to waive the spousal interest. Vested community property rights cannot be changed through beneficiary designation. The process must involve fully informed consent of the deprived spouse which may not be possible if the spouse is partially or wholly incapacitated.

Further, changes to designations may have negative tax consequences or result in the loss of benefits otherwise due to the principal. An attorney-in-

fact who pursues such a change in the face of such harm to a principal may be unable to act because the action would be a violation of their fiduciary duties to the principal even though it is otherwise permissible under the power of attorney.

4. Oversight of attorney-in-fact power.

Where an attorney-in-fact is granted the power to change survivorship rights or beneficiary designations, a principal may wish to provide oversight to ensure that the attorney-in-fact is acting properly and also to ensure that the attorney-in-fact will be insulated from charges of self-dealing. This can be accomplished by designating an outside person to review and approve any transactions that may be considered self-dealing, to appoint co-attorneys-in-fact where at least one is disinterested, or to create another mechanism of oversight or reporting.

5. Protecting the client by constraining possible changes.

Another method of protecting the principal from a rogue agent and protecting the attorney-in-fact from claims of self-dealing is to limit the types of changes the attorney-in-fact can make to the survivorship rights or beneficiary's designations.

The changes could be limited to generally following the estate plan as enumerated in the client's will, trusts, and other documents. The changes to the estate plan could be limited to transfers to certain types of trusts with the same provisions as the existing estate plan. This approach is in line with the ethos behind Kentucky's decanting provisions in KRS 386.175.

Practitioners should take special care if they plan to employ an irrevocable trust in their planning. KRS 457.340(2)(g) allows transfers of property only to a *revocable* trust under the general trust and estate powers. Transfers to an *irrevocable* trust are only allowed if expressly enumerated in the durable power of attorney. As Medicaid planning may require the creation of irrevocable trusts, this power should always be considered when drafting a durable power of attorney for a client.

The changes an attorney-in-fact can make to a principal's estate plan through changing beneficiary designations can also be limited by constraining the type of person that can be the new beneficiary. For example, the changes could be limited to a specific group of persons such as spouses, descendants, siblings, etc. The changes can be limited to named persons. The changes can also be limited to charities. In all of these cases, the attorney-in-fact cannot make any change they wish but must follow the constraints imposed upon them by the principal in the document.

B. Gifting Provisions

Gifting is perhaps the most dangerous hot power under a durable power of attorney. It is certainly the most universally feared. In the commentary concerning

the UPOAA, gifting provisions seem to have caused the most concern.[3] Most states have enacted limits on the amount an attorney-in-fact can transfer.[4]

Kentucky has limited gifting under KRS 457.400. Gifting is not limited to directly turning over property to third parties. It also includes transfers to a trust under KRS 457.400(1).

1. Ethical framework of gifting as an attorney-in-fact.

   KRS 457.400(3) provides that an attorney-in-fact who wishes to make gifts pursuant to a valid power of attorney provision must consider the principal's objectives if actually known by the attorney-in-fact. If the principal's objectives are unknown, the attorney-in-fact must complete a best interest analysis that includes all relevant factors such as:

   a. The value and nature of the principal's property;

   b. The principal's foreseeable obligations and need for maintenance;

   c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

   d. Eligibility for a benefit, a program, or assistance under a statute or regulation; and,

   e. The principal's personal history of making or joining in making gifts.

2. Amount of gift.

   In Kentucky, gifting by an attorney-in-fact is not allowed unless expressly permitted in the power of attorney document. Where gifting powers are included, but a dollar amount is not specified, the gift shall not exceed the "annual dollar limits of the federal gift tax exclusion" of the donee per KRS 457.400(2)(a). In 2024, this amount is $18,000. As this amount would not cover the gift of assets such as a car or house, transfers to trusts are considered gifts, and transfers to irrevocable trusts are not allowed unless expressly enumerated, an attorney should carefully consider drafting gifting provisions to allow gifts of unlimited amounts of the principal's property with constraints on how the property can be gifted and who the ultimate beneficiaries of the property shall be.

3. Gifting to interested parties.

   If the attorney-in-fact is an interested party who may receive the gift or benefit from the gift, extra precautions must be taken. The degree of precautions will depend upon the relationship of the attorney-in-fact to the

[3] *See* Section 217 and accompanying commentary.

[4] *See* NY. Gen. Oblig. Law §5-1502M, 20 Pa. Cons. Stat. Ann §5603(a)(2)(ii).

principal. Even where the attorney-in-fact will have a close relationship with the principal, express grant of authority to gift to oneself should be enumerated in a self-dealing provision such as this one:

> "If an ancestor, spouse, or descendant of mine is serving as my Attorney-in-Fact, they may engage in acts of self-dealing. They may enter into transactions in which they are personally interested as long as the terms of the transaction are fair to me or serve my best interest. For example, they may purchase any of my assets for fair market value."

Further, there are some courts in other jurisdictions which have found all gifts to be impermissible absent such a provision.[5] This is so even where the gift is to a spouse, child, or other person who would be a natural object of bounty or who is an heir or beneficiary of the principal's estate plan. Thus, otherwise permissible gifting is impermissible absent a self-dealing provision.

a. Spouse.

Gifting between spouses should be expressly allowed in a durable power of attorney if long term care planning is a consideration. Medicaid expressly allows transfers between spouses without penalty. Transfers of the home are allowed under POMS Manual Section 011150.122 and of other assets under POMS Manual Section 01150.123.

Many spouses will assume they automatically have a power to make gifts of their spouse's property to themselves. This is not the case. A spouse cannot automatically make a gift of their property to themselves, particularly if the property is separate property/non-marital property under Kentucky law or community property. Express consent of the spouse will be required to transfer any separate or non-marital property between spouses. Community property interests are even more difficult to transfer between spouses.[6] A durable power of attorney should clearly and concisely allow gifts of property between spouses irrespective of the nature of the property if such transfers will be necessary to complete long term care planning.

b. Ancestors and descendants.

As with gifting to spouses, gifting to ancestors or descendants is considered to be fundamentally different than gifting to other

[5] *See Stehlik v. Rakosnik*, 881 N.W.2d 1 (Neb. App. 2016).

[6] Depending upon the origin of the community property, a separate written agreement may be required. In some cases, consultation with independent attorneys may be required.

parties.[7] This is because the typical Kentuckian will leave his property to his spouse, parents, children, and grandchildren. They are considered natural objects of the decedent's bounty. Gifting prior to death is often not viewed as an interruption to the decedent's estate plan, merely an acceleration of the estate plan.

As with spouses, express powers and self-dealing provisions must be included. These may not be sufficient, however, as there is a fundamental difference between a spouse and an ancestor or descendants. A spouse has a legal right to part of the principal's estate in the case of divorce and to a dower or elective share in the principal's estate in the event of their death. Many individuals leave their entire estate outright to their spouse at death. A spouse who transfers all of the principal's property to themselves will frequently not be interrupting the legal defaults or their spouse's estate plan. They will also likely not be acting contrary to the known interests of the other spouse.

In contrast, unless the attorney-in-fact is a beloved only-child, an attorney in fact who is an ancestor or descendant of the principal who transfers a substantial portion of the principal's property will either be acting against the principal's known wishes or against the expectations of the principal's other heirs and beneficiaries. The risk of thwarting the will of the principal is greater. The risk of harm to the principal's other loved ones is greater. The risk of suit for breach of fiduciary duties is greater.

Where the attorney-in-fact is an ancestor or descendant, self-dealing may be allowed, but the limits placed upon such self-dealing should be very clear on the face of the document. Is the individual allowed to sell property to themselves at fair market value? To gift property to themselves outright or in trust? To gift property to themselves to the exclusion of other beneficiaries?

c. Others.

When the attorney-in-fact is not a spouse, ancestor, or descendant of the principal, even greater care must be taken. While all attorneys-in-fact are bound by fiduciary duties that require they act in the best interest of the principal and not in their own interest, the lines are sharper, and the edges are more treacherous when the attorney-in-fact is not the "natural object of bounty" of the principal. Gifting will typically be scrutinized at a level beyond that of a transfer between family members. It will often be considered improper until proven otherwise.

[7] The UPOAA has a specific carve out for gifts to ancestors, spouses, and descendants. *See* Section 201(b) of the UPOAA.

Some assume that they can overcome this hurdle by including self-dealing provisions in a durable power of attorney and further insulating them with a waiver of liability for good faith. This may not be enough. There are plenty of cases where these two provisions were not enough to protect a non-relative who transferred the principal's property to themselves. [8]

4. Impacting grantor's taxes.

Any gifting allowed under a durable power of attorney should consider the tax implications of the power. Inclusion of the power, if misused, may cause a tax liability that would otherwise not be due. However, if there are potential gift or estate tax consequences and the gifts are to be made to the attorney-in-fact or other interested persons, the power to make the gift and to self-deal must be express for federal gift and estate tax purposes. The Internal Revenue Service allows any gifting in compliance with state law. As Kentucky is a state that requires express authorization to gift and express authorization to gift in excess of the federal gift tax exclusion and further limits the context of giving based on the factors enumerated above, if these powers are not enumerated sufficiently, gifts will not be permissible even where there are severe tax consequences of the omission.[9]

Another tax consideration that must be expressly stated in the power of attorney is gift-splitting between spouses. Gift splitting is an estate planning tool that allows a married couple to double their annual gift tax exclusion. The process is not automatic. The requirements are strict. For example, the couple must file joint tax returns. They both must agree to the gift. They must file a form 709. An attorney-in-fact who wishes to utilize gift-splitting for the principal must have the power to file the principal's tax returns and the power to elect gift-splitting. KRS 457.400(2)(b) expressly allows a principal to authorize an attorney-in-fact to elect gift-splitting on their behalf. The other powers necessary to accomplish the gift-splitting should be addressed in the document. The attorney-in-fact must have the power to conduct the principal's banking and financial affairs and to file their tax returns individually or jointly with a spouse.

When enumerating gifting powers, be wary of any potential capital gains or income tax traps. An outright gift of the principal's property may cause

[8] *See, e.g., Matter of Francis*, 853 N.Y.S.2d 245 (N.Y. Sur. 2008). A neighbor transferred a 98-year-old woman's property to himself under power of attorney which had a broad power to make gifts. The durable power of attorney also had a clause absolving the attorney-in-fact for any actions taken in good faith. The court held that the durable power of attorney could not waive the fiduciary duties imposed upon the attorney in fact. Irrespective of the terms of the durable power of attorney, the attorney-in-fact had a duty to use the principal's property for the benefit of the principal, not for their own benefit.

[9] The IRS generally holds the position that a gift valid under state law does not require express authorization in an instrument. *See e.g.,* TAM 199944005 (applying Texas law, Service upheld validity of gifts for estate tax purposes where instrument granted attorney-in-fact broad powers and gifts were consistent with estate plan) and *Estate of Bronston v. Commr*, T.C. Memo 1988-510 (applying New Jersey law, the court ruled gifts were valid because the instrument contained a broad grant over "any property").

capital gains taxes where none would otherwise be due. For example, if the principal's house is transferred to their children at death, they will receive a step-up in basis. They will not do so if the house is transferred while the principal is alive. This may also be true of transfers between spouses if those transfers are not community property in nature. A principal may wish to limit the attorney-in-fact's ability to gift the house to instruments that preserve the step-up in basis. This may require not only a tailored gifting power, but the express power to transfer to irrevocable trusts.

There may also be other tax implications of gifting such as income tax shifting from the principal to the recipient of the property, loss of homestead exemption, and shifting of real estate taxes. Some, but not all, of these may be mitigated by limiting gifting to certain instruments (*e.g.,* Medicaid asset protection trust, veteran's asset protection trust, third party supplemental needs trust).

5. Gifting to accomplish long-term care planning.

As most of the gifting that is conducted under the auspices of a durable power of attorney drafted for an elder client will be for the purposes of attaining Medicaid benefits, for transferring the elder from their home to custodial care, or for similar purposes, all gifting and trust provisions of the power of attorney should be reviewed to ensure that the goals can be accomplished. If gifting is allowed, but the amount is limited, planning will not be successful. If the terms of the durable power of attorney do not expressly allow gifting to irrevocable trusts, planning my also be stymied.

III. FIDUCIARY DUTIES OF AN ATTORNEY-IN-FACT

A. Standards Imposed by Statute and Common Law

A power of attorney creates a form of agency. Unlike a trustee who holds property for the benefit of the trust, an attorney-in-fact generally holds no legal title to the grantor's property. Instead, it is the purpose of the attorney-in-fact to bind the principal to third persons while a mere trustee cannot obligate the creator of the trust or the beneficiary to third persons.[10]

KRS 457.140 itemizes an agent's duties. Among them are the requirements to act in good faith, in accordance with the principal's reasonable expectations, and only within the scope of authority granted in the power of attorney. Specifically, KRS 457.140 provides as follows:

> (1) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:
> (a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

[10] *Ingram v. Cates*, 74 S.W.3d 783, 786 (Ky. App. 2002).

(b) Act in good faith; and
(c) Act only within the scope of authority granted in the power of attorney.
(2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
(a) Act loyally for the principal's benefit;
(b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
(c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
(d) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
(e) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
(f) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
1. The value and nature of the principal's property;
2. The principal's foreseeable obligations and need for maintenance;
3. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
4. Eligibility for a benefit, a program, or assistance under a statute or regulation.
(3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.
(4) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.
(5) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.
(6) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.
(7) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.
(8) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death

> of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within thirty (30) days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty (30) days.

As can be gleaned from the above statute, the law requires of attorneys-in-fact the utmost good faith in their dealings toward the principal, and that nothing shall be said or done, either directly or indirectly, which is calculated to mislead or deceive, or to give the attorney-in-fact an unfair advantage. Kentucky courts have held that "an advantage is unduly taken when it is such as a man of ordinary prudence would not have allowed or submitted to if he had been in possession of all the facts known to the other."[11]

Accordingly, an agent, whether general or special, must be faithful and disinterested in the management of the principal's business. The agent must not have a personal interest adverse to the rights of the principal. For instance, the agent cannot act as agent for the principal, and at the same time act, on the agent's own behalf, against the interest of the principal. "When that antagonism of interest arises, the law vacates the agency."[12] Thus, it is well settled that "contracts between principal and agent should be jealously scrutinized, and slight circumstances of inequality, surprise, and hardship may be sufficient to vacate them, even sometimes without proof of fraud."[13]

Agency law dictates that one cannot act as the agent of both the buyer and seller in a transaction unless both parties are aware of, and consent to, the dual representation.[14] It is equally established that all transactions in which the agent has either acted for himself or herself or for a party whose interest is adverse to the principal are voidable by the principal and may be repudiated by the principal without a showing that the principal was injured.[15] Indeed, an agent cannot lawfully serve or acquire any private interest of his or her own in opposition to the principal's interest.[16] Consequently, as an example, an agent employed to sell property at public auction could not himself or herself purchase it at auction without the principal's consent.[17] The rationale for this rule of law is that "fraud might be committed, or unfair advantage taken, and yet, owing to the imperfections of the best human institutions, the injured party be unable either to discover it or to prove

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[11] *Eagle Distillery Co. v. McFarland*, 1890 WL 1274, at *1 (Ky. Super. Mar. 26, 1890).

[12] *Temmen v. Courtney*, 1 S.W. 875, 877 (Ky. 1886).

[13] *McHarry v. Irvin's Ex'rs*, 3 S.W. 374, 378 (Ky. 1887).

[14] *Restatement (Second) of Agency* §424 (1958); *See also, Thompson-Starrett Co., Inc. v. Mason's Adm'rs.,* 201 S.W.2d 876 (Ky. 1946).

[15] *Ferguson v. Gooch,* 26 S.E. 397 (Va. 1896); *Restatement (Second) of Agency* §313 (1958).

[16] *Davis v. Davis*, 343 S.W.3d 610, 618 (Ky. App. 2011).

[17] *Maxwell v. Bates*, 40 S.W.2d 304 (Ky. 1931).

it in such manner as to entitle him to redress."[18] Therefore, where an agent induced the principal to make a trade with the agent, the agent is liable to the principal for any profits garnered from the deal.[19]

Given these dangers, one who acts as agent for another is not permitted to deal in the subject matter of the agency for his or her own benefit without the consent of the principal. Accordingly, the law directs that profits realized by an agent in the execution of the agency belong to the principal in the absence of an agreement to the contrary. Indeed, the agent is bound to a high degree of good faith and is not entitled to avail himself or herself of any advantage that the position may give the agent to profit at the principal's expense beyond the terms of the power of attorney.[20]

An agent may also be liable to the principal for missteps regarding investments made on the principal's behalf. The rule with respect to liability of the agent to the principal for loss because of the agent's investments is stated as follows:

> Where an agent is authorized to lend or invest money of his principal he must exercise reasonable skill and ordinary care and diligence, and will be liable for losses occasioned by his negligence, as in lending money on the unsecured obligation of the borrower, or on inadequate security, or on property subject to prior mortgages, liens, or other encumbrances, unless the principal expressly or impliedly releases him from liability for the loss. The agent may also become personally liable by a guaranty to the principal against loss, in which case he must make good his guaranty.
> . . .
> But ordinarily the agent does not insure against losses due to honest mistakes or errors of judgment, and, if he has acted in good faith and with reasonable skill and ordinary care and diligence, he will not be liable for losses which the principal may sustain, as by reason of the insufficiency of the security, and, if he has invested money strictly in accordance with the terms of his agreement, he will not be liable if the investment results in loss. If an agent lends money upon property which is amply adequate security at the time the loan is made, he will not be liable for loss due to its subsequent depreciation in value; and, if a principal gives an agent money for purposes of speculation according to the latter's discretion, and the agent acts in good faith, he will not be liable for losses due to errors of judgment.[21]

[18] *Beasley v. Trontz*, 677 S.W.2d 891, 894 (Ky. App. 1984).

[19] *E.R. Spotswood & Son v. Estes*, 178 S.W. 1082 (Ky. 1915).

[20] *Patmon v. Hobbs*, 280 S.W.3d 589, 594 (Ky. App. 2009).

[21] 2 C. J. §392, pp. 729, 730.

Despite the above, where an agent protects the interest of the principal by making a better bargain than authorized, such action is legally condoned since it ultimately serves the best interests of the principal.[22]

Another interesting duty inherent to the agency/principal relationship involves a principal's estate plan. Unless the power of attorney states otherwise, an agent must attempt to "preserve" the principal's estate plan. However, an agent that acts in good faith is not liable to any beneficiary of the principal for failure to preserve the estate plan. Consider, for example, the situation in which an agent terminates a principal's whole life insurance policy and uses the funds for the payment of the mortgage on a principal's home. While that is acceptable from the point of view of the principal, the situation may appear different when the beneficiary of the whole life policy and the beneficiary under will of the home are two different people. For instance, the life insurance beneficiary will likely not be too thrilled when he or she learns that his or her inheritance was lost while another beneficiary's interest was saved. This will be particularly true if the agent was the one who received the home. Consequently, in such a scenario, the agent is in a difficult position of respecting the estate plan on the one hand, while attempting to act in "good faith" on the other.[23]

An agent that violates KRS Chapter 457 is liable to the principal or the principal's successors in interest for the amount required to (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.[24]

If an alternate agent becomes aware that a previous agent committed a breach of his or her duties, the new agent has a duty to notify the principal. This situation could come about when a new agent takes over and reviews the accounts of the principal only to discover unauthorized disbursements in the form of gifts. This new agent must take reasonable action or he or she becomes responsible for the "foreseeable" damages. Accordingly, if a newly appointed alternate agent comes to the attorney for advice about a known breach, the attorney must advise that Kentucky law requires the reporting of the known breaching acts.[25] Specifically, KRS 457.110 provides:

> (1) If a principal designates two (2) or more persons to act as coagents, each coagent may exercise its authority independently unless the power of attorney otherwise provides.
> (2) A principal may designate one (1) or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to

[22] *Frantz v. Jacob*, 11 S.W. 654 (Ky. 1889).

[23] §4:16. Agents under a power of attorney – Duties, 23 *Ky. Prac. Ky. Elder Law* §4:16 (2d ed.).

[24] KRS 457.170.

[25] §4:12. Agents under a power of attorney – Overview, 23 *Ky. Prac. Ky. Elder Law* §4:12 (2d ed.).

> designate one (1) or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:
> (a) Has the same authority as that granted to the original agent; and
> (b) May not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.
> (3) Except as otherwise provided in the power of attorney and subsection (4) of this section, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.
> (4) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent of the same principal shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

In litigating these matters of breach of fiduciary duty, the construction of a power of attorney is a question of law for the court.[26] "[A]n agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document and subject always to the agent's duty to act with the utmost good faith."[27] There is no specific statutory provision providing a statute of limitations. Therefore, KRS 413.120(7), providing a five-year limitation for actions not arising on contract and not otherwise enumerated, governs.[28] The burden of proof rests on the attorney-in-fact to account for the properness of his or her actions. As Kentucky courts have held:

> An attorney-in-fact, one acting under a Power of Attorney, must account for any and all property, real or personal, that is received by him from or for his principal. The accounting must be for all property that is received by him while acting in his official capacity or otherwise. We do not mean to say, and we do not hold, that an agent operating in a fiduciary capacity, such as in the instant case, is liable for restoration or reimbursement for all properties received by him from the principal or from whatever source. What we are saying is that the agent does have the responsibility of explaining to the satisfaction of the Court what disposition was made of the properties. The agent is required to go forward with an explanation when proof is introduced showing that the property was in the hands of the agent. The burden of going forward with the proof so as to

[26] *Ingram v. Cates*, 74 S.W.3d 783, 787 (Ky. App. 2002).

[27] *Cambridge Place Group, LLC v. Mundy*, 617 S.W.3d 838, 841 (Ky. App. 2021).

[28] *Ingram v. Cates*, 74 S.W.3d 783, 787 (Ky. App. 2002).

> explain the disposition of any and all properties received by the agent is then with him. The issue thereby presented is one of fact to be decided by the court or by a jury, as the case may be.[29]

B. What Duties Can be Altered or Waived

Under the Uniform Power of Attorney Act, the duties which can be waived by the principal in the power of attorney document include the duty of loyalty to the principal; to not act in a way that creates a conflict of interest; to serve competently, diligently and with appropriate care as a reasonable agent would; to keep appropriate financial records; to work with, not against, the health-care agent; and to make efforts to keep the principal's estate plan intact when appropriate. (UPOAA §114(b))[30]

KRS 457.150 is even broader in what duties it allows to be waived or altered. According to that statute:

> A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:
>
> (1) Relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or
> (2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

A principal may be bound when an agent violates his or her duties by the actions of the principal in response thereto. Indeed, it is a well-known principle of the law of agency that the principal may be bound by the improper or unauthorized acts of the agent if the principal adopts the actions of the agent.[31] A principal with full knowledge of all the facts is required at the earliest reasonable moment to disavow the unauthorized act of the agent; otherwise, in a case where a third person may sustain loss, the act will become that of the principal.[32] In other words, "if 'an agent has, by a deviation from his orders, or by any misconduct, or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts, or omissions, by the principal, if made with a full knowledge of all the facts and circumstances…'"[33]

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[29] *Ingram v. Cates*, 74 S.W.3d 783, 788 (Ky. App. 2002).

[30] Rebecca C. Morgan & Randolph Thomas, "Financial Exploitation by Agents under Powers of Attorney It Is A Crime!," *Crim. Just.*, Winter 2020, at 31, 33 (2020).

[31] *See* 2 *Meacham on Agency*, 2nd Ed., §§1719 and 1720; *Bratton v. Speaks*, 286 S.W.2d 526, 528 (Ky. 1956).

[32] *Evansville, R. & O.R. Co. v. Louisville Banking Co.*, 1876 WL 7686 (Ky. Sept. 26, 1876).

[33] *Worthington v. Crutcher*, 1871 WL 10387, at *2 (Ky. June 24, 1871).

IV. BALANCING FIDUCIARY DUTIES WITH HOT POWERS

When drafting a Kentucky power of attorney containing hot powers, an attorney must consider how to balance the best interest of the principal with potential dangers. To do this, the attorney should bear in mind the following considerations:

A. How the principal can use the durable power of attorney to convey their current wishes to the attorney-in-fact and to third parties.

B. How the principal can convey their wishes to the attorney-in-fact should they change after execution of the durable power of attorney.

C. How the principal can use the durable power of attorney to constrain or enlarge the ability of the attorney-in-fact to conduct a best interest analysis.

D. Whether the attorney-in-fact should be expressly allowed to take actions that would undo the principal's estate plan or conflict with wills, trusts, beneficiary designations, or other documents.

    1. The drafter should expressly address gifting powers in the document.

    2. The drafter may include power to change beneficiary designations and rights of survivorship.

    3. The drafter must consider whether powers that indirectly impact the principal's estate plan should be limited in any way (*e.g.,* power to create trusts and transfer assets to them, power to deplete assets).

E. How the powers will impact the interest of the principal's dependents.

F. How the powers will impact the principal's potential heirs and beneficiaries.

G. What fiduciary duties are impacted by the power.

H. Whether fiduciaries duties that frame a specific power can or should be waived.

I. Whether self-dealing provisions should be included.

J. Whether waiver of liability provisions should be included.

K. Whether the attorney-in-fact needs clears permission and instruction when acting pursuant to a hot power and a waiver of fiduciary duty.

L. Whether the durable power of attorney should contain a provision for the principal to sign which acknowledges the inclusion of hot powers, self-dealing provisions, and provisions waiving fiduciary duty and fiduciary liability.

M. Whether the drafter should have the attorney-in-fact sign the durable power of attorney or other document acknowledging they have fiduciary duties and that they must also follow terms of the document.

WHEN IS A CLIENT NOT A CLIENT?
REAL WORLD ETHICS: WHEN A CLIENT OF QUESTIONABLE CAPACITY SEEKS TO END YOUR REPRESENTATION

Shari Polur

I. INTRODUCTION

If you practice law that involves individuals as clients, sooner or later you will have a client who wishes to leave you. You may receive this news by letter or electronic mail, by text, or by telephone. In most instances the phrase, "You're fired!" is likely to produce a visceral reaction. It may be shame or dread, confusion, or even relief. Regardless of the emotional response, competent attorneys will take the opportunity to conclude the engagement, produce files for the client, return unearned fees, and inform others, both within and outside their firm. Counsel of record must inform tribunals and may even need permission to withdraw.

For those who are elder law or disability law attorneys, we frequently have more complicated issues to address. When dealing with clients who are aging or perhaps suffering from mental health challenges, attorneys have ethical duties that expand beyond the scope of basic client termination tasks. What follows is a scenario describing how a client both entered and exited a relationship with his elder law attorney, and how the attorney sought to comply with her ethical obligations to the client, the courts, and to her profession.[1]

II. GAINING A CLIENT

Niece Nancy calls me to help her Uncle Donald, an elderly gentleman, who recently lost his wife, Daffy. At present, he is struggling with his three children. They have decided, declares Nancy, that Uncle must leave the home he had shared with Daffy for decades, and move into institutional care. Nancy carefully explains exactly what Uncle wants: a new power of attorney, naming her mother and Uncle's sister, Suzie, as his agent. Nancy also explains that Uncle wants a new will, leaving all his worldly possessions to his sister. Nancy has generously agreed to pay for these legal services and will review the documents with Uncle, before bringing him in to sign them.

Q1: Is Uncle now my client? Can Nancy pay his bill?

A1: Of course Uncle is not my client. I have not met him nor agreed to represent him, nor has he met me and decided to hire me. In point of fact, I do not even know if he is competent to hire me, and I have not yet been able to form an opinion as to whether he meets even the low standard of a "lucid interval" required to make a will, much less any higher standard arguably required to execute a power of attorney. *Bye v. Mattingly,* 975 S.W.2d 451 (1998).

As for whether Nancy can pay his bill, that depends. Do the ethics rules permit a third-party to pay an attorney for work produced for a client? In Kentucky the answer is clearly yes, as long as the ethics rules are properly followed, including informed consent by the

[1] This scenario is a composite, with no names or identifying information from actual clients.

client and ongoing independent professional judgment of the lawyer. SCR 3.130(1.8)(f). *See, also,* SCR 3.130(5.4) (Professional independence of a lawyer).

After my firm confirms that there is no conflict with any present or past clients, I suggest to Nancy that Uncle call me directly to explain his legal concerns. Uncle is able to explain his issues and hires my firm (*i.e.,* me) to draft new legal documents for him including a power of attorney, health care surrogate designation, and last will and testament. He declines to review the documents in advance, but meets with me, along with one staffer from my office, to review his documents. He is quite nervous, but after an hour or so, Uncle is calm and reasonable and asks several pertinent questions, allowing me to determine that he is capable of understanding what he asked me to do for him, and confirming for me and the staffer that these are his wishes and no one else's. Uncle ultimately verifies the accuracy of each agent's and beneficiary's name and relationship, and then signs and dates each document in triplicate in front of a notary and two independent witnesses. At the end of the meeting, Uncle pays for his legal services himself.

Q2: Is Uncle now my client? Or is it his sister, Suzie, whom he named as his initial agent under his general durable power of attorney, designated as his health care surrogate, and nominated as his executor under his will?

A2: Uncle is absolutely my client. While I may be able to help Suzie perform her role as agent under the power of attorney and health care documents, my duties of loyalty, confidentiality, etc. remain with Uncle. Suzie has not become my client. Uncle's will, of course, has no legal significance until Uncle passes away. Note: Nancy has no current agency or other legal role.

III. KEEPING A CLIENT

Shortly after this meeting, I receive a call from Sister Suzie, with whom Uncle Donald has been living as he struggles with his new widowhood. Niece Nancy usurps over the call and informs me that Uncle's children are quite angry that Uncle has moved in with Suzie. Nancy continues stating that she is certain Uncle Donald's children have been removing their father's funds from his bank account, allegedly for "safekeeping." I speak with Uncle Donald directly and we decide to pursue curatorship, so that Uncle's funds will be safeguarded by a court-appointed fiduciary (the curator). Uncle comes to my office to review and sign a petition to have a curator of his choosing appointed by the local district court. Naturally, he nominates his sister, Suzie.

Several weeks later, Uncle Donald and I attend a probate court hearing during which the judge examines him and ultimately approves Uncle's request for the appointment of a curator. The judge has Sister Suzie take an oath to properly manage her brother's assets and income under court supervision. In this way, Uncle's financial affairs will be managed without the need for a guardianship, and the attendant loss of civil rights.

Q3: Is Uncle still my client? Is it the curator? Both?

A3. Uncle remains my client. Query: What obligation do I now have to support Suzie, as well, during the period she controls Uncle's finances – if she contacts me to do so?

Another month passes, with no further contact from Uncle, Niece, or Suzie. I send my usual closing letter to Uncle, reiterating what legal services were provided, explaining that

the engagement is complete, and stating that we are closing our file. Almost immediately, Niece Nancy and Sister Suzie call me together, as they have just received papers from the local district court and do not understand what the mental health division is. After reminding them that I represent Uncle, they elaborate: the papers were mailed to Uncle, and were forwarded to him at Suzie's house, where he has now been living for months. Upon reviewing Uncle's papers, I explain that Uncle's children have commenced a guardianship proceeding starring Uncle as the Respondent. I remind Sister Suzie and Niece Nancy that I am Uncle's attorney and end the call.

For the next several days, I attempt to contact Uncle directly, but his phone seems to not be working. In desperation, I reach out to the court-appointed *guardian ad litem* and learn that Uncle is in Hawaii, at the home of one of his children.

After trying again to contact my client to no avail, I reach back out to the *guardian ad litem,* Goofy, and ask if he would join me in seeking to set aside the petition for guardianship due to Uncle's having already arranged for his housing, medical care, and financial well-being: the epitome of less restrictive alternatives to guardianship. The *guardian ad litem* agrees, and I move to quash the guardianship, and tender it jointly with Goofy. I attach the health care surrogate and power of attorney documents, along with the curatorship order and an explanation of Uncle's decisions regarding those legal matters and his housing.

We wait.

Several weeks pass, and I receive a call from Louie, Uncle's son in Hawaii. He was asked by his cousin, Niece Nancy, to have his father call me. Unfortunately, Louie reports, Uncle's phone dropped into the Pacific Ocean. Also, Uncle is . . . somewhere else . . . and unavailable to speak. Louie, however, wants to talk. Louie has been fighting with his siblings, Dewey and Huey, who want to control Uncle's life, take his money, and move Uncle into an old age home. Louie is trying to keep Uncle in Hawaii, so as to avoid the impending guardianship hearing. Louie ends by asking if I can have Sister send him some of Donald's money. I reiterate that I am Uncle Donald's attorney and need to speak with him.

IV. LOSING A CLIENT

Without success in speaking directly with my client, I appear at motion hour to defend my motion. Unsurprisingly, Dewey has hired counsel to help pursue guardianship over his father, Donald. The court passes on my motion in favor of a full disability proceeding that is scheduled already. The court orders that Uncle Donald – who is noticeably absent – contact his private counsel.

Weeks pass and I remain unable to contact Uncle.

I receive a voicemail identifying itself as a "NO CALLER ID" number. The caller sounds like Uncle Donald, parroting exactly what a male voice[2] in the background tells him to say:

> Male voice: "Tell her who you are."
> Uncle Donald: "I am Donald."

[2] I suspect it is Uncle Donald's son, Huey, based on recollection of his voice in our prior conversations.

Male voice: “Tell her you’re fine.”
Uncle Donald: “I am fine” (into the phone) and then “What do I say next?” (aside)

Male voice: (undecipherable)
Uncle Donald: “I don’t need to talk to you.”

Male voice: “Now I hang up?”
Uncle Donald: “OK” (aside) and then “I’m hanging up” (into the phone).

I reach out to the *guardian ad litem*, Goofy, and to opposing counsel, reminding them of the court’s admonition that I must speak with my client. I request their help, as Uncle Donald has flown the coop.

Several days before the guardianship hearing to determine if Uncle Donald is disabled and whether a less restrictive alternative is available, I receive another telephone call. This time, I recognize the area code: it is from Hawaii. I quickly request that a staffer join me in my office to take notes.

The telephone call connects. There is a brief pause during which a female[3] whispers “Take this” and Uncle Donald asks, “What do I say?” The call continues much like this:

Uncle Donald: “You’re fired.”
Me: “Who is this?”

Uncle Donald (aside): “What do I say?”
Female whisper: (undecipherable)

Uncle Donald, repeating: “You’re fired.”
Me: “I’m sorry. Who is this?”

Uncle Donald (aside): “What do I say?”
Female whisper: (undecipherable)

Uncle Donald, repeating: “It doesn’t matter who I am. You’re fired.”
Me: “I’ll need to know who is calling me.”

Uncle Donald (aside): “She’s asking who I am.”
Female whisper: (undecipherable)

Uncle Donald: “I am Uncle Donald. You’re fired.”
Me: “What are you firing me from?”

Uncle Donald (aside): “What am I firing her from?”
Female whisper: (undecipherable)

The conversation continues in a similar vein for three and one-half painful minutes, during which I try to explain who I am and what legal posture Uncle Donald is in. I try to impress

[3] I suspect it is Uncle Donald’s daughter, Dewey, although I have no proof.

upon him that there will be a court hearing soon to determine if he can make his own decisions about where to live and how to spend his money. Donald, apparently at the urging of the whispering female, does not reply but rather repeats, "You're fired."

The connection is broken. The line goes dead. I suspect something fowl may be afoot.

Q4: Am I still Uncle Donald's attorney?

A4: I believe so, but it is a difficult question. Is my client being unduly influenced? Has he ceased to have decisional capacity? *See* SCR 3.130(1.14) that imposes various duties upon an attorney who suspects or knows that a client suffers from diminished capacity. *See, also,* KBA Ethics Opinion KBA E-440 (Nov. 18, 2016) (addressing representing clients with diminished capacity), especially at Question 4.

Two days after this confusing conversation, I receive an overnight mailer from Hawaii. It contains a typed letter terminating my legal services. It appears to be signed by Uncle Donald. Although the signature looks genuine, it is much shakier than the handwriting with which Uncle signed his name in my office recently.

Q5: Have my services been terminated? If so, what of my pending motion? What about the hearing, now days away? I am baffled as to my duty to Uncle, who is either a client or former client. I do not know what my ethical obligations are to the *guardian ad litem,* who signed the motion now pending before the court. More critically, I am uncertain with whom I can discuss this matter. Assuming the client is seeking to terminate my services, and I want to be done, can I simply walk away?

A5: One resource, given time, would be to seek guidance in the form of an informal ethics opinion from the Kentucky Bar Association's Ethics Hotline. Trained volunteers in each Supreme Court district staff the hotline to provide personal advice to KBA members seeking guidance on an "ethical course to take in a situation. The informal opinion, if based upon an accurate statement of the facts, and followed, can serve as a defense to a later complaint of misconduct which arises from the same facts."

I cannot determine where my client is, or even if he is back in the Commonwealth. I cannot verify whether he is competent, suffering from dehydration or dementia, or challenged by other temporary illnesses.

I have no time to await an ethics opinion.

I research far into the night reviewing Supreme Court Rules on professional conduct, American Bar Association guidance, the entire National Association of Elder Law Attorneys website, numerous ethics opinions, case law, and any relevant publication I can find. I am quacking up.

After a sleepless night, I throw myself on the mercy of the court – the guardianship court. Hearing day has arrived, and I have no idea what my role should be.

V. REAL WORLD ETHICS IN ACTION

I arrive 30 minutes early to the courthouse, knowing that all of the day's hearings are scheduled to be conducted remotely. I am permitted to enter the empty courtroom, and

when the judge arrives, I request to have an *ex parte* communication, regarding an ethical issue. She asks me to confirm that this is not about the instant case and looks shocked when I admit that it is.

Candidly, I share that I am unclear as to whether I have a client or not but have not withdrawn my motion challenging the need for a guardianship. We proceed without audio or video access by any others initially, and subject to review by the court later. I attempt to lay out my ethical concerns.

First, I note that I am obligated to act with candor to the tribunal. SCR 3.130(3.3)(d) "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." *See, also id*. at Comment 15 regarding circumstances wherein lawyer may/must seek to withdraw.

Second, I state that I have concerns about my client being unduly influenced or otherwise manipulated. I express regret that I cannot share the factual bases for these concerns (*see above* at IV.) unless so ordered by the court due to client confidentiality. I affirmatively request the judge to order me to disclose client confidential information. SCR 3.130(1.6) (disclosing confidential client communications.) In particular, I cite to SCR 3.130(1.6)(b) that permits a lawyer to disclose confidential client information as reasonably necessary "to secure legal advice about the lawyer's compliance with these Rules" or to "comply with other law or a court order." *Id.* at SCR 3.130(1.6)(b)(2),(4).

The judge orders me to disclose relevant information to the extent necessary. I explain the facts that led to Uncle hiring me. I replay the voicemail from Uncle which led me to believe my client was at best, being unduly influenced, and at worst, of diminished capacity. I informed the judge of the next (live) call wherein my client told me that I was dismissed, albeit without apparent awareness of who I was. I inform the court that I have an affidavit from the staffer who heard the call. I then hand over a FedEx envelope mailed from Hawaii containing a notarized letter signed from the client, terminating my legal services. I express concern that my client has become a person of diminished capacity since the start of our engagement. I cite to SCR 3.130(1.4) (client with diminished capacity). This rule imposes various duties upon an attorney who suspects or knows that a client suffers from diminished capacity, including acknowledging that the attorney-client relationship must change. *Id.* at Comment 6, regarding communication with a client who suffers from diminished capacity.

Since my extant motion is before the court, and a guardianship petition has been filed, I ask the judge to advise me on what to do.

The court wisely considers my arguments on the relevant Supreme Court Rules on declining or terminating representation. SCR 3.130(1.16), specifically:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law; or

(3) the lawyer is discharged.
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
. . .

SCR 3.130(1.16)(a)(b)(c).

In particular, I share my suspicion that the client now suffers from diminished capacity, and thus lacks "the legal capacity to discharge the lawyer . . ." *Id.* at Comment (6). I also explain my concern that firing counsel just prior to the hearing on a motion to avoid being subjected to guardianship would be seriously detrimental to the client's interests. *Id.* I was, I believe, ethically bound to "make special effort to help the client consider the consequences and may take reasonably necessary protective action." *Id.*

I reminded the court of the pending motion jointly filed with the *guardian ad litem*, Goofy, in which we urge the court to acknowledge that a less restrictive alternative to guardianship was already in place. The motion addresses how the client had already arranged for housing, medical and financial care, and provided back-up authority.

Ultimately, the judge orders me to stay on the case for the remainder of the proceeding. I can never be sure of the court's exact reasoning, as I cannot demand an eggsplanation. Undoubtedly, the ethics rules support the decision: the client was likely now a person of diminished capacity. Leaving such a person without private counsel to advocate for that client in guardianship court, on a motion filed to oppose the guardianship, would have "a material adverse effect" on the client. I remain counsel of record for the pendency of that proceeding.

The proceeding ends. I am off the case. Fired? Maybe. Grateful? Absolutely.

VI. ADDITIONAL RESOURCES

A. KBA Ethics Opinion KBA E-235 (May 1980) (based on older law, concerns discharge by client)

B. KBA Ethics Opinion KBA E-440 (Nov. 2016) (issues with client with diminished capacity)

C. KBA Ethics Opinion E-451 (July 2020) (revealing a client's confidential information after the client's death)

D. ABA Formal Opinion 96-404 (Aug. 1996) (client under a disability) (withdrawal from the representation of a client with diminished capacity)

E. ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of professional Conduct Rule 1.14: Client with Diminished Capacity* (Dec. 11, 2018)

F. American Bar Association Model Rules of Professional Conduct (and comments)

G. American Bar Association Commission on Law and Aging, *Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers*, 2nd Edition by the ABA Commission on Law and Aging and the American Psychological Association. (*See* https://www.americanbar.org/groups/law_aging/)

H. National Academy of Elder Law Attorneys, Inc., *Aspirational Standards for the Practice of Elder and Special Needs Law Attorneys* (2d ed. Adopted April 24, 2017), https://www.naela.org/Web/Who-We-Are/Aspirational_Standards.aspx

I. Massachusetts Office of Bar Counsel Helpline: 617-728-8750

J. Mass R. Prof. C. 1.14 (client with diminished capacity) plus comments