BESSEMER TRUST

ACTEC 2016 Fall Meeting Musings

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The American College of Trust and Estate Counsel is a national organization of approximately 2,600 lawyers elected to membership. One of its central purposes is to study and improve trust, estate and tax laws, procedures and professional responsibility. Learn more about ACTEC and access the roster of ACTEC Fellows at **www.actec.org**.

This summary reflects the individual observations of Steve Akers from the seminars at the 2016 Fall Meeting and does not purport to represent the views of ACTEC as to any particular issues.

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Important Information Regarding This Summary

This summary is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients. This summary is based upon information obtained from various sources that Bessemer believes to be reliable, but Bessemer makes no representation or warranty with respect to the accuracy or completeness of such information. Views expressed herein are current only as of the date indicated, and are subject to change without notice. Forecasts may not be realized due to a variety of factors, including changes in law, regulation, interest rates, and inflation.

Introduction

Some of my observations from the 2016 ACTEC Fall Meeting Seminars in Charleston, South Carolina on October 21-22, 2016 are summarized below. (At the request of ACTEC, the summary does not include any discussions at Committee meetings.) This summary does not contain all of the excellent information from the seminars, but merely selected issues. The summary is based on the presentations at the seminars, but the specific speakers making particular comments typically are not identified.

Items 1-10 are observations from seminars about a variety of elder law issues. Topics and speakers for the various seminars were:

Demographics-Keith Gallant;

Diminished Capacity and Adult Guardianships-Richard E. Davis, James R. George, and Diana S.C. Zeydel;

Social Security, Medicare, Medicaid, Long-Term Care Insurance, and Preventing Elder Financial Abuse- Prof. Lawrence A. Frolik, Bernard A. Krooks, Kristen M. Lewis, and Deborah J. Tedford;

Marriage, Divorce and Marital Agreements, Assisted Living Contracts- Prof. Lawrence A. Frolik and Deborah J. Tedford;

End-of-Life Decision Making-Julia B. Meister, and Regina M. Spielberg; and

Ethics Issues in Representing Clients with Diminished Capacity- Prof. Karen Elizabeth Boxx and Prof. Mary F. Radford.

1. Diminished Capacity Planning

a. **"Ulysses Contract" for Revocable Trusts**. As people age, they see what they want to see. If a client realizes that he or she has diminishing capacity, the client may consider signing a revocable trust providing that it can be amended only with the consent of a disinterested trust protector. This has been referred to as a "Ulysses Contract." (The name comes from the story of Ulysses. In the epic poem *Odyssey*, the voices of Sirens lured sailors to their deaths; they could not resist their seductive song. Ulysses ordered his men to lash him securely to the mast; they filled their ears with beeswax so they could not hear the voices of Sirens and they sailed under strict orders to ignore any of Ulysses' pleas. Ulysses, when of sound mind, made arrangements so he couldn't do the wrong thing when he was in no position to make good decisions.) The job of the trust protector in that situation is not just to say "no," but to support the decision the client truly wants to make, thus guarding against changes that result from undue influence acting on the settlor. If the client has capacity and the protector thinks the client is not being unduly influenced, the client still has the right to make a bad decision.

b. **Protecting Against Improvidence with Irrevocable Trust.** Consider using an irrevocable trust that is revocable only with the consent of an independent person; that causes transfers to the trust not to be completed gifts. Consider using a co-trustee, especially a corporate co-trustee, to provide management assistance. Consider giving an agent amendment authority.

c. **Designations of Preneed Guardian.** In the event that a guardian is needed, the client can designate who should be appointed. If state law authorizes it, a designation of preneed guardian should be prepared for every client – even younger clients (who could become incapacitated by a sudden accident). Persons who are disenfranchised from power regarding an aging relative may feel that the only recourse is court action to invalidate existing estate planning documents. Such powerless persons will not be inclined to pursue an action in guardianship court if they know they will not be appointed as guardian.

   Deal expressly with compensation. Children may primarily just want money currently and hope the guardianship court will give them compensation.

   The court must respect the person who is designated, even if a conflict of interest exists, unless evidence of improper conduct is present. A mere allegation of disharmony within the family should not be enough to disrupt the selection. *E.g.*, *Acuna v. Dresner*, 41 So. 3d 997 (Fla. 3d DCA 2010).

d. **Power of Attorney; Conflict of Interest.** If the individual named as agent under a power of attorney owes money to the principal, despite the general rule summarized in the preceding paragraph, a court may decline to recognize the validity of the power of attorney because of the inherent conflict of interest. Be sensitive to the conflict of interest concern in deciding who should be named as agent under a power of attorney.

e. **Power of Attorney; Drafting Issues**.

   - Provide for a succession of agents.
   - In selecting the designated agent, consider the potential for conflicts among family members. Do not designate people who really don't want the responsibility. Should an independent person serve as agent?
   - Set forth the client's wishes in as much detail as possible; "more is better."
   - Ensure coordination among the various documents. (For example, a revocable trust may limit gifts to the annual exclusion, and the power of attorney may allow unlimited gifts. If all of the money is in the revocable trust, the wide gifting authority in the power of attorney will be useless.)
   - Address whether to allow someone to monitor ongoing estate planning. (For example, a power to decant may not apply to a revocable trust unless it is specifically authorized).
   - Specifically address compensation.
   - Ensure that appropriate HIPAA waivers are in place.
   - Preserving the estate plan – the power of attorney or revocable trust should expressly state that any gifting or amendment powers may not be exercised to alter substantially the estate plan absent extraordinary, unforeseen circumstances, such as significant changes in the tax law or changes of the beneficiaries, that the fiduciary reasonably believes would have caused the principal to change his or her estate plan. A similar restriction could be placed in

the Designation of Preneed Guardian. Having the ability to make plan amendments can be helpful if, for example, someone unduly influences the client to make an amendment that needs to be undone to accomplish the client's wishes.

2. Social Security

a. **Historical Background**. Social Security is a program coming out of the depression. Before that, the history of retirement in the United States and the world was spotty. Before the industrial revolution, the concept of retirement was nonexistent; individuals worked at the farm or mercantile business until they could work no more, and then their families took care of them. With the industrial revolution, individuals would eventually get to the point they could not do physical work. In the early to mid-1800s, some retirement plans began to become more commonplace. Railroads were one of the early sources of retirement income, but most private plans failed during the depression. In that context of retirement income becoming the norm, Social Security dealt with retirement concerns during the depression. The general goal of Social Security is to replace wages, relative to a national wage base, on a sliding scale with lower earners having more of their wages replaced. (Disability and spousal benefits came later.)

b. **Breaking Points Regarding When to Begin Receiving Social Security Payments**. Social Security benefits can begin as early as age 62, but the monthly benefit is significantly lower than if payments do not begin until the full retirement age (currently age 66, increasing to age 67 for individuals born after 1960). If payments are further delayed after reaching the full retirement age, the amount of monthly Social Security benefits grows after the full retirement age by 8% per year (to a maximum increase of 32% at age 70). The monthly benefit will be as much as 75% more if benefits are delayed from age 62 to age 70. The Social Security Administration indicates that most people claim early retirement benefits (resulting in significantly decreased monthly payments).

- Age 78 – Early Retirement: in deciding whether to begin Social Security before reaching full retirement age, if the individual is likely to live beyond age 78, do not begin payments early.
- Age 82 ½ – Deferring Payments to Age 70: deferring payments until age 70 is generally better if the individual (or the individual's spouse) is expected to live to age 82 ½.

c. **Significance of Dependence on Social Security.** The numbers are staggering as to the percentage of retirement income that comes from Social Security for many retired individuals. Making the best decision about when to begin receiving payments is a critical financial decision for those persons.

3. Medicare Issues

a. **"Admitted Status."** The status of a patient (i.e., inpatient vs. outpatient) may have significant cost implications for him or her. Medicare Part A pays more for inpatient

hospital stays than Medicare Part B pays for out-patient services. Furthermore, if the patient was not admitted to the hospital, the patient would not qualify for discharge planning services. In particular, Medicare pays for up to 100 days of care in a skilled rehabilitation center but only if the patient was admitted to a hospital for at least three days. In many situations, patients have discovered too late they were never "admitted" to the hospital for Medicare purposes but were only in the hospital for "observation," and therefore do not qualify for the increased benefits. In addition, Medicare pays more This has been such a prevalent problem (with thousands of complaints) that the NOTICE Act (Notice of Observation Treatment and Implication for Care Eligibility Act) was passed August 6, 2015 requiring that hospitals provide notice within 36 hours that patients are not "admitted" but only in observation or other outpatient status, and explain the reasons and describe the cost implications of that status. Unfortunately, the problem persists, and no appeal is possible. This can cost patients $20,000 – $30,000 when they discover they were not "admitted" to the hospital.

b. **Resource for Information**. The Center for Medical Advocacy provides consultation services to attorneys, and has invaluable resources regarding Medicare questions.

c. **Arbitration Provisions for Nursing Homes**. The Department of Health and Human Services issued a new rule in September 2016 that will prohibit long-term care facilities that accept Medicare or Medicaid from using pre-dispute binding arbitration agreements. The new rule is effective for agreements entered into on or after November 28, 2016. Nursing homes and long-term care facilities have typically included binding arbitration provisions in admission agreements.

4. Long-Term Care – Not Provided by Medicare

Medicare pays only a small portion of long-term care needs. Chronic illnesses, such as Lou Gehrig's disease, Alzheimer's, etc. are not covered by Medicare. Limited long-term care benefits are available for veterans. Otherwise, Medicaid (for the poor) is generally the only source of governmental benefits for long-term care. "We have no governmental long-term care assistance for the middle class."

Medicaid is a joint federal-state program, so the rules vary from state to state. Using only facilities that accept Medicaid dramatically impacts the quality of care in some states but not in others.

5. Long-Term Care Insurance

a. **Statistics.** Almost 70% of individuals will need some kind of long-term care. Many will be in a nursing home. Only 7.2 million individuals have long-term care insurance.

b. **Expensive and Escalating Premiums.** A sea-change is occurring in the long-term care insurance industry, largely because the early policies were not priced correctly. When policies were first issued in the 1980s, the premiums were priced too low. (As an example, neither Medicare nor Medigap covers home care needs or other long-term care, but long-term care insurance does pay for assisted living expenses, including in-home care.) After buying a policy for a premium of $3,000 per year, for example, the policy holder later received a notice from the insurance company that

due to cost increases, the premium has increased to $5,000. Companies CAN do that with long-term care insurance as long as they are treating policyholders who bought policies during the same time frame uniformly. In the example above, later, the premium might be increased to $8,000 per year. The individual (who may be living on Social Security) may not be able to afford the premium at that level. Some companies allowed the premium to stay at a lower level, but cut benefits (e.g., longer elimination period, shorter period of coverage, etc.). Sales of policies peaked in 2002, but have now leveled off. "People don't want to buy it because it is too expensive, and companies don't want to sell it because they cannot make money on it."

Younger individuals pay lower premiums than older individuals; the "sweet spot" for buying long-term care insurance is for individuals in their mid-50s. The policies can still make sense for persons in their early to mid-60s; after that it becomes very expensive.

c. **Difficult to Qualify; Cognitive Test**. Individuals often cannot qualify to buy long-term care insurance; about 25% of applicants are rejected. Underwriting is more difficult than for buying life insurance. For individuals over age 70, a cognitive test is administered that is very difficult (even for bright totally competent persons).

d. **Combination Policies.** Some companies are now selling life insurance policies with a long-term care rider. At death, the death proceeds are not as high as with a pure life insurance policy.

e. **"Partnership Policies."** Forty-six states provide that if individuals purchase a certain amount of long-term care coverage, they can go on Medicaid and keep their assets.

f. **Implement Systems to Assure Premium Payments**. When individuals get dementia or Alzheimer's disease, they often stop paying bills. In one Virginia case, a patient whose long-term care insurance lapsed for that reason sued the insurance company. Implement a system to have a third party notification if the premium is unpaid for a certain period of time to avoid that result.

g. **Only Provides Limited Coverage**. Insurance is generally thought of as providing for a catastrophic risk. However, long-term care insurance generally only provides 3 (or 4, depending on the policy) years of benefits. Furthermore, the policy does not pay expenses during an "elimination period," typically 90 days to 6 months. (The longer the elimination period, the lower the premiums.) With a long elimination period, a significant possibility exists that a person entering a nursing home will die before benefits begin. For these reasons, most people do not need long-term care insurance. They have enough money to self-fund for those 3-4 years. In effect, the person is merely buying about $200,000 - $220,000 of protection.

h. **"Sweet Spot" for Long-Term Care Insurance Purchase**. Long-term care insurance makes the most sense for persons having about $300,000 - $700,000 of assets (not counting the residence).

i. **In-Home Care**. Long-term care insurance does pay benefits for in-home care, but it may not cover all of the costs. Long-term care insurance provides about $200 per day, but if someone needs 24/7 care, it will be so expensive that staying in the home will not be feasible for many persons, even with the long-care insurance benefits.

6. Use and Abuse of Financial Powers of Attorney; Drafting Considerations for Powers of Attorney to Minimize Elder Financial Abuse

a. **"Most Effective Burglary Tool Since the Crowbar."** The general durable power of attorney has often been described as "the most effective burglary tool since the crowbar." In many states, the approach in guardianship proceedings is to use the least restrictive alternative for incapacitated persons, which may include reliance on a power of attorney. That may increase the possibility of elder abuse.

b. **"Springing" Power of Attorney**. One response to minimizing potential abuses of general powers of attorney is to use a "springing" approach, which vests authority only after designated persons make a written determination that the principal cannot manage her financial affairs. That is no panacea. An insistence on springing authority often manifests an inherent mistrust in the person designated as agent, calling into question whether that is the appropriate person to name as agent. If physicians are designated to render the disability determination, they may be reluctant to do so because of HIPAA concerns. Some states (such as Florida) prohibit springing powers of attorney.

c. **Most Appropriate Person as Agent.** The client should carefully consider who is appropriate to name as agent, and this may be very difficult for some persons. Mere relationship (by blood or otherwise) is an insufficient basis for vesting broad authority under a power of attorney. The principal should be especially mindful of the characteristics of those who perpetrate elder financial abuse (for example, family members who become dependent on an elder for financial support).

d. **Limiting "Hot" Powers**. The power of attorney may be drafted to limit the ability of the agent to upset the principal's estate plan by eliminating "hot powers, such as: tax motivated transfers; gifts; exercise of powers of appointment; sales of assets that are specifically bequeathed in the principal's will; changing beneficiary designations; creating or changing rights of survivorship; creating, amending, or terminating an inter vivos trust (including a revocable trust); waiving the right to be a beneficiary of a joint and survivor annuity; exercising fiduciary powers that the principal has the power to delegate; or disclaiming property."

e. **Opt-In Approach**. Some states apply an opt-in concept, requiring the principal to initial certain powers before they are granted under the power of attorney, particularly including "hot" powers.

f. **Required Notice to Beneficiaries or Professional Advisors**. The power of attorney might require notice to the principal's beneficiaries who would be adversely affected by the exercise of a given power. Alternatively, notice might be given to one of the principal's professional advisors who could be required to provide a written statement that the proposed transaction is necessary for tax or Medicaid planning purposes or to preserve eligibility for government benefits, does not materially alter the pre-existing estate plan, or furthers a legitimate purpose that is in the best interest of the principal and her beneficiaries.

g. **Gifting Power**. A large percentage of reported elder financial abuse is from the exercise of gifting powers in powers of attorney. Consider the following drafting possibilities:

- Require notice to the principal before exercise of a gifting power;
- Require the agent to consider the principal's prior gifting history;
- Require that gifts be made equally to all heirs or beneficiaries (if that is consistent with the principal's prior gifting behavior); or
- Limit gifts by reference to the principal's net worth at the time of the proposed gift.

h. **Clarify Explicit Duties and Responsibilities.** The power of attorney might specifically set forth the agent's duties and responsibilities, including: a duty of loyalty, good faith and due care; the requirement to segregate the principal's and agent's property; a requirement to clearly denote any of the principal's property held in the agent's capacity ("John Doe, Agent and Attorney-in-Fact for Jane Smith, under GDPOA date 1/2/16"); or a requirement to keep a contemporaneous record of each transaction undertaken by the agent with a running account of receipts and disbursements and give an annual accounting to the principal or other persons designated to receive the accounting.

i. **Self-Dealing**. The power of attorney might prohibit the agent from engaging in self-dealing transactions that involve a conflict of interest, including specific examples the principal may wish to identify in advance (e.g., investments in the agent's personal business). However, some self-dealing transactions that also benefit the principal may be appropriate. The law is undergoing a debate between proponents of "the traditional 'sole interest' test of loyalty applied to trustees, and a 'best interest' test that would permit mutually beneficial transactions" in which both the agent and principal benefit. *See* Linda Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 Stetson. L. Rev. 7, 26 (Fall 2007).

j. **Compensation**. The power of attorney should specifically address how the agent is to be compensated for services.

k. **Co-Agents.** Appointing co-agents, with a requirement of unanimous action, may provide oversight and "checks and balances" of the agents' actions.

l. **Legal Standing.** Consider expanding the persons who have legal standing to request information about the agent's actions, request an informal or formal judicial accounting, or initiate judicial action to review the agent's actions.

m. **HIPAA Waiver**. Consider including a HIPAA waiver to facilitate communication between the agent and the principal's health care providers.

7. Some Drafting Considerations for Funded Revocable Living Trusts

a. **Description**. A revocable trust can be a stand-by vehicle for managing assets during incapacity (by giving designated persons that authority to fund the trust, such as in a durable power of attorney), or can be the primary dispositive instrument upon the elder's death. The funded revocable trust provides various benefits in combatting elder financial abuse.

b. **Continuity.** The revocable living trust will not fail for lack of a trustee, because of the ability to describe detailed trustee succession procedures.

c. **Serial Powers of Attorney**. The revocable living trust can minimize the adverse impact of serially executed general durable powers of attorney given to various competing relatives.

d. **Gatekeeper**. The trustee of the revocable living trust can serve as the gatekeeper regarding the principal's assets, restricting access for those persons who might be tempted to engage in financial abuse.

e. **Co-Trustee**. Ideally, the elder should not serve as the sole trustee of the revocable living trust. This will not be alarming if the revocable trust is unfunded until the elder is incapacitated. A co-trustee is needed to serve the gatekeeper role. The co-trustee provides a "second set of eyes" to assist the principal. As the elder's ability declines, the co-trustee can gradually take on more responsibility as the elder cedes it. The co-trustee's knowledge about the elder's financial affairs and needs will facilitate the transition when the elder steps down as co-trustee.

f. **Provisions Addressing Personal Concerns**. The revocable trust can be customized to address the client's most significant personal concerns. Health care management issues might include specific authority to engage a geriatric care manager (see **www.caremanager.org**), to hire and monitor in-home caregivers, to retain a payroll service or agent, to address other considerations designed to assure a quality of care similar to living with a loving and responsible adult child, or to retain the services of a management company to allow the remain in her home as she ages.

8. End-of-Life Decisions

Relying on a hospital ethics committee or a court is the worst alternative for make end-of-life decisions. Primary care physicians contemplate a partnership between patients, lawyers, and the medical community in using advance directives.

The time to have a conversation about end-of-life desires is not when the person is in a hospital gown waiting to be put under anesthesia for surgery. A better approach is to have these conversations in calmer times in a doctor's office or in a lawyer's office when considering bequests to family members. Judges have indicated that having the patient's wishes clearly articulated in advance is one of the best gifts a client can give to his or her family. Making decisions to withhold or withdraw life sustaining treatment is gut wrenching for family members who have not discussed the issue with their loved one.

9. Ethical Issues in Representing Elder Clients

a. **Engagement Letters**. The engagement letter should clearly identify the client, regardless who is paying the legal fees. The attorney should be clear in communicating with the family that the elder person is the client.

b. **Meet Alone With Client**. The attorney should meet alone with the client, to make sure that his or her wishes are implemented. Meeting alone with the client may be key in defending against an undue influence attack.

The attorney-client privilege may be destroyed if others are present in legal discussions. Comment 3 to Rule 1.14 of the Models Rules of Professional Conduct states that a client may wish to have family members participate in legal discussions,

and if necessary, the presence of a family member in discussions with the attorney does not generally affect the attorney-client privilege. But no cases say that; they merely address having a translator present.

c. **Do Not Draft Documents Just Based on Relative's Directions**. As a general rule, do not draft estate planning documents based on what a relative directs. That is dangerous without meeting with the client.

d. **Model Rule 1.14**. The Model Rules of Professional Conduct do not give a great deal of guidance to attorneys in representing elder clients. Model Rule 1.14 lumps tougher mental impairment of all kinds. Model Rule 1.14(a) directs the attorney, as far as reasonably possible, to maintain a normal client-lawyer relationship with a client who has diminished capacity. Comment 4 directs the attorney to look to the representative for decisions on behalf of the client if a legal representative has already been appointed. But even if the client has a legal representative, Comment 2 says the attorney should as far as possible "accord the represented person the status of a client, particularly in maintaining communication."

   The new edition to the ACTEC Commentaries deal with confidentiality, stating that if a client is at risk of harm, the attorney may take action. (In most states, attorneys are not mandatory reporters of abuse, but they may be in a good position to become aware of abuse.)

e. **Release of Estate Planning Documents?** Model Rule 1.6 addresses the duty of confidentiality. Whether the attorney can release documents to an agent under a power of attorney is a case by case determination. One approach is to assume implied consent to do anything to carry out the purposes of the representation. But the recommended approach is to have a conversation with the client at the time the documents are drafted as to whether the client wants to consent to the delivery of documents to the agent under a power of attorney. The power of attorney may specifically authorize the release the document to the agent so the agent can maintain the client's estate plan.

10. Reporting Elder Abuse

A new paragraph in the ACTEC Commentaries to Rule 1.14 addresses reporting elder abuse. Attorneys may be reluctant to report abuse because of duties of confidentiality under Rule 1.6. Rule 1.14 provides, however, that the attorney may make disclosures to the extent necessary to prevent harm to the client. While the safer approach may be to do nothing, relying on the duty of confidentiality under Rule 1.6, the trend is to encourage attorneys to takes steps to address elder abuse when the attorney believes abuse may be occurring. Three states now have mandatory reporting requirements for attorneys who suspect elder abuse.

When reporting concerns, the attorney should be careful about reporting to someone who is a mandatory reporter of suspicious circumstances. The attorney may end up starting a proceeding that is not in the client's best interest.

Items 11-30 are observations from seminars about Practical and Ethical Challenges in a Trusts and Estates Practice. Items 11-18 address Internal Firm Practice Issues. Speakers were Beth Shapiro Kaufman, Randy J. Curato (ALAS, Inc.), Karen Fahrner, and Linda Retz.

11. Money Laundering and Terrorist Financing Concerns

Significant attention is being focused on attorneys being used for money laundering purposes. The Panama Papers scandal reported a Panamanian law firm that formed thousands of anonymous shell corporations, concealing tax evasion, corruption and other criminality with the shell corporations as the primary vehicle for evading exposure. A 60 Minutes report used hidden footage that raised questions about how some American lawyers might be helping to bring questionable funds into the U.S. A reporter posing as the representative of a phony African official met with over a dozen New York law firms for advice on moving tens of millions of dollars to the U.S. without the official's name being revealed.

a. **Red Flags**. Red flags when considering whether a prospective client may be involved in money laundering include a need for urgency, over-emphasis on the squeaky clean reputation of the prospect, refusal to discuss details, high level cash transactions (including an offer to pay cash for legal fees), shady answers regarding the background of funds, non-U.S. citizens, the need for anonymity, or the desire to use escrow agreements.

b. **FATF**. The Financial Action Task Force on Money Laundering (FATF) issued a comprehensive plan with 40 Recommendations for combatting money laundering. The FATF High Level Principles and Procedures 24 (2007) describes services that are at a high risk for money laundering as including services that inherently provide increased anonymity, or can readily cross international borders (such as on-line banking, stored value cards, international wire transfers, private investment companies, and trusts).

   FATF has a process for reviewing the compliance efforts of the constituent countries with the Recommendations. The fourth round of review compliance by the United States was recently conducted. It will likely determine that an attempt has been made to educate American lawyers, but notwithstanding those efforts, the United States is completely noncompliant in various respects. Among other things, the report will likely conclude that the United States is one of only several countries that is not compliant in determining the beneficial individual owners of private trusts. Attorneys in the United States thus far have been successful in resisting the reporting of beneficial owners of trusts, but the press will likely cover and emphasize these reports as reflecting lawyer behavior that undermines the efforts to combat money laundering and terrorist financing in the United States.

c. **U.S. Laws**. U.S. laws addressing money laundering include the Money Laundering Control Act of 1986 (18 U.S.C. §§1956 & 1957 (2009)) (criminalizing money laundering), and the U.S. Patriot Act (31 U.S.C. §§5311-5332 (2001)), modifying the Bank Secrecy Act of 1970 (also known as the Currency and Foreign Transactions Reporting Act), which requires financial institutions in the U.S. to keep certain records and report suspicious activity that might signify money laundering or other criminal activities.

d. **Disclosure Obligations of Attorneys**. Attorneys have no legal requirement to detect, monitor or report money laundering in the U.S. That is not true in many other countries (such as England).

e. **ABA Voluntary Good Practices Guidance**. The ABA Voluntary Good Practices Guidance For Lawyers to Detect and Combat Money Laundering and Terrorist Financing was published April 23, 2010, and is endorsed or approved by eleven lawyer associations. Its hallmark is applying a risk-based approach, with an overall risk assessment of the client, based on various risk variables and mitigating factors (with three major risk categories – country, service, and client). The Guide includes non-exclusive protocols.

   Client intake under the Good Practices Guide involves three major issues: client identity, client due diligence and periodic update.

   - Client Identity: Obtain information such as name, addresses, Social Security number, family, other advisors, prior criminal convictions, tax filing status, etc.
   - Client Due Diligence: Identify and verify the identity of the client and of beneficial owners; obtain information to understand the client's circumstances and business; perform appropriate searches, including an OFAC scan (Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List), general searches (such as Google searches), and background checks (e.g., **www.accurint.com**; **www.world-check.com)**.

f. **ABA Ethics Opinion**. Formal Opinion 463 of the American Bar Association Standing Committee on Ethics and Professional Responsibility addresses client due diligence, money laundering, and terrorist financing. It examines the contours of ethical obligations regarding efforts to deter and combat money laundering. The opinion acknowledges that lawyers are not gatekeepers (as FATF would prefer), but has a responsibility to avoid aiding and abetting fraudulent or criminal conduct. It takes the position that attorneys should be knowledgeable of risk based approaches and should develop guidance for client intake.

g. **FinCEN**. The Financial Crimes Enforcement Network (FinCEN) issued final regulations under the Bank Secrecy Act on May 11, 2016 regarding customer due diligence requirements for financial institutions. Financial institutions have until May, 2018 to comply. For example, when a bank account is opened for an LLC, the person opening the account must disclose the individual owners of more than 25% of the entity and the person who has "significant responsibility to control, manage or direct a legal entity customer." The financial institution is required to maintain the information, but (unlike in some countries), the regulations do not require the formation of a national registry of beneficial ownership information for entities. ACTEC commented on the proposed regulations and urged that disclosure of individual owners not be required for trusts. The result in the regulations not to include disclosing the beneficial owners of private trusts is a significant benefit to ACTEC Fellows and others involved with trusts.

12. Referrals by Lawyers to Others

When a lawyer makes referrals, the best practice is to give the client options. A referral to only one person or group may give rise to a negligent referral claim. The goal in making any referral is to give at least two or three options.

The client should engage the other professional directly, instead of the lawyer engaging the professional, so that attorney has no obligation to monitor what the other professional is doing.

13. Engagement Letters – Selected Issues

a. **Mode of Communication; Confidentiality and Privilege**. The engagement letter should warn the client that electronic communications are not as secure as other modes. The engagement letter may state that if the client provides an email address, mobile telephone number or fax number, the client authorizes the attorney to use that mode of communication notwithstanding the confidentiality risk.

b. **Client File**. The law firm should have a policy regarding client files and original documents. The engagement letter may define client files in a manner so that the attorney does not have to turn over attorney work product. For example, the client file might include all papers and documents, drafts of documents, documents sent to the attorney by the client or third parties, and correspondence with clients or others relevant to the estate plan. But the engagement letter would make clear that all other materials (like internal memos and notes) are proprietary to the firm and not part of the client file. However, a recent New Mexico opinion says the lawyer is required to turn over the entire file, including notes and internal memos, if it is requested by the client. The attorney is in a better position to protect proprietary material if the engagement letter addresses the issue.

14. Joint Representation With Respect to Transmutation Agreements

One speaker said she would want both spouses who are parties to a transmutation agreement (converting separate property into community property) to have separate counsel.

15. Retainers

Obtaining a modest retainer is a good test to see if the client will be reluctant to pay legal bills. For a complex project, the client's reluctance to front some money is a red flag that the client might stiff the attorney on the legal fee. Part of due diligence can be the establishment of a retainer. In a litigation matter, a recommended approach is to get a retainer equal to three months of expected billings.

16. Major Reasons for Attorney Malpractice Claims

The top reasons for attorney malpractice claims generally are (1) mistakes, (2) conflicts of interest, and (3) because the client was a bad client.

The average attorney malpractice award is about $3.8 million. If a conflict of interest is involved, the award amount increases.

Major reasons for attorney malpractice for trust and estate practices include drafting errors (such as the failure to conform trust documents to will changes, using the wrong type of trust, or FLP documents that insufficiently divest control over assets to the general partner of the partnership), missed deadlines, not assigning property to a trust, failure to file gift tax returns (be sure to clarify whose job that is), missed issues, mistakes in fact or law, representing fiduciaries (attorneys should give a checklist to fiduciaries describing the duties they owe to beneficiaries), conflicts of interest, and bad clients.

17. When to Notify Malpractice Carrier

If a client complains about services or that the work requested was not completed, consider notifying the carrier. Advantages to reporting a potential claim earlier include that the claim can be applicable for the earlier year to avoid running into aggregate limits if other claims are made in later years, and to avoid a dispute over coverage for a claim that is not timely reported. "There is no downside to reporting a potential claim to the carrier to get its assistance."

If a client complains about services but wants to continue the attorney-client relationship, the client should in writing consent to the representation and waive conflicts that may arise.

18. Termination of Representation

A common debate among estate planning attorneys is whether representation should be terminated when a project is completed. Engagement letters should narrowly describe the scope of legal services in a particular project, listing the documents being drafted and services provided. When those services have been performed, the engagement letter should provide that the representation is concluded (that is softer than saying the representation is "terminated;" saying the representation is "dormant" is not sufficient).

A common malpractice claim involves an issue over which the attorney had no idea the client was still looking to the attorney to do something else.

One approach is to send a letter saying somewhat as follows: "It has been a pleasure working with you on this project. We recommend that you re-evaluate and review this matter every __ years. We will not have any responsibility to remind you to do that, but we would be happy to assist you in the future with your estate planning needs." (The letter might describe particular matters that the client might consider doing in the future.)

Items 19-30 address Lawyers as Witnesses (Fact Witnesses, Expert Witnesses, or Witnesses as a Party to Litigation). Speakers were Steven K. Mignona, Robert W. Goldman, and Jessica A. Uzcategui.

19. Request to Turn Over Files

If asked to produce a file, respond "thank you for your call; I'll get back to you." Go get advice. This could be a case of someone ultimately wanting to sue the attorney. Get another lawyer involved from the outset.

a. **Informal Requests**. The duty of confidentiality generally extends even after the client's death. Exceptions include (1) if the personal representative for the deceased

or incompetent client consents to disclosure, (2) if the deceased client authorized disclosure (express or implied), or (3) if a need exists for the information. A handful of ethics opinions regarding the informal disclosure of client files have been inconsistent, ranging from allowing disclosure if the attorney reasonably believes the client would have authorized disclosure to prohibitions on disclosures without a court order.

One panelist thinks the best approach is to decline to produce anything without a court order ("you just don't know enough"), but another panelist would disclose file information without a court order depending on the circumstances.

The client file belongs to the law firm, not to the attorney. The law firm's permission is needed in any event to deliver a client file to another.

b. **Formal Requests**. When an attorney receives a subpoena to produce a client file, the issue is not *whether* to produce but *what parts* of the file to produce in light of the duty of confidentiality, attorney-client privilege, and attorney work product doctrine.

Confidentiality. The duty of confidentiality is separate from the evidentiary attorney-client privilege rule. In some states, a personal representative may not have the authority to waive the duty of confidentiality even if the personal representative can waive privilege. In other states, the privilege and confidentiality duty are treated the same.

Privilege. Privilege is limited in the trusts and estates context. It does not apply to communication between parties that claim through the same deceased client. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §81 (2000). Many states have that same provision in their evidentiary codes.

While the attorney client privilege survives the client's death (*see Swidler & Berlin v. United States,* 524 U.S. 399, 410 (1988)), most believe that privilege passes to the personal representative following the client's death. If the attorney represented multiple clients in the transaction, the decedent's personal representative alone may not have the authority to waive privilege.

Attorney Work Product. Protection under the attorney work product doctrine is held by the lawyer, not the client. Attorney work product includes materials prepared by the lawyer for litigation or in reasonable anticipation of litigation. "Opinion work product" (including opinions and mental impressions) has the highest degree of protection and cannot be discovered in any circumstances. "Ordinary work product" must generally be produced if the requesting party has a substantial need for the materials to prepare for trial and cannot obtain the substantial equivalent of the materials by other means without undue hardship. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§88-89 (2000).

Turning over attorney work product may sometime benefit the client, for example, by reinforcing the estate plan and the client's intent. The disclosure makes clear that the attorney is not trying to hide something. Do not just fall back of the right to withhold attorney work product in all situations.

20. Representation for Lawyer Asked to Turn Over Files; Serving as Attorney and Fact Witness

The larger the law firm, the more likely the firm will want legal representation for the lawyer who is requested to turn over client files to another party.

This raises the question of whether a lawyer (or the lawyer's firm) can serve as attorney in a proceeding in which the lawyer is a fact witness. The ABA Model Rules of Professional Conduct §3.7 says the lawyer generally should not be an advocate in a proceeding in which he or she is a fact witness, but recognizes situations in which the representation is appropriate.

Serving as attorney and as fact witness in the same proceeding can lead to potential confusion to the fact finder, and potential conflicts that can arise (a witness must tell the truth, but the attorney is an advocate). But the rule does not create an absolute prohibition, and the law firm may not want to go to the expense of hiring an outside lawyer to represent the attorney who is requested to deliver client information. The law firm may wish to represent the estate in defending the will. However, conflicts could arise, the judge may view the firm as wearing "too many hats," and the representation may look bad to a jury. Nevertheless, representation is not prohibited in that circumstance; the attorney must assess whether having the firm defend the will (where an attorney in the firm will be a fact witness) is a good idea, primarily for the client, and secondarily for the firm.

21. Payment of Lawyer as Fact Witness

Substantial differences of opinion arise as to whether lawyers should be paid for services as fact witnesses. Some attorneys prefer to pay the attorney as fact witness; the testimony may involve significant hours and paying the lawyer seems fair. But the jurisdictions differ regarding this issue. The tension is that a witness can be compensated for lost time, but a party cannot "pay for their testimony."

If the lawyer who needs the attorney's testimony is in the same firm, the attorney should not get paid for testifying. In other situations, the attorney can consider being paid for the time in serving as a fact witness, but must consider if payment of fees for the testimony would impact the case. A lawyer as fact witness should not feel awkward about requesting to be paid.

Engagement letters may provide that the attorney will be paid for serving as a fact witness regarding any aspect of the representation (but that is not a comfortable conversation in discussing the engagement letter).

Whether the lawyer is paid or not, the lawyer must pay careful attention to the testimony; the lawyer must be disciplined, focused, and totally prepared. Doing so is important to the lawyer's professional reputation before local courts and in the local legal community.

22. "Helpful Paranoia"

The attorney's job as a fact witness begins the first day of representing the client. Every move should be considered in terms of what it will look like in court – every email, note, draft, etc. Think of this constant awareness as "helpful paranoia."

23. Routine

Having an established routine may make the testimony much easier and more credible. For example, the attorney may not remember specifically what occurred in a specific will signing ceremony, but if the attorney follows the same routine in all will signings, the attorney can comfortably testify as to procedures that were followed. If a departure from the normal routine occurs, carefully document the reasons for the departure.

24. Tips for Testifying at Deposition or Trial

- Be patient.
- Listen – humans can think of 3-15 things at once, but cannot listen to more than one thing at a time. Listen carefully and understand the pending question. Otherwise, the witness may anticipate question and answer questions not actually asked. The Greek historian Diogenes Laertius: "We have two ears and only one tongue in order that we may hear more and speak less."
- Guessing or stretching testimony – do not guess or stretch knowledge; stay focused on precisely what occurred. Refresh memories as necessary before the deposition. Do not try to "win" the case; just answers questions directly, clearly and honestly. Credibility wins cases, not emotions and histrionics.
- Be wary of "improving memory" – "Our memory improves as we get older. We remember things that never happened."
- KISS – Judges love simplicity; the judge will accept the explanation that he or she understands.
- Professional – do not be a jerk just because the attorney may not be getting paid. Litigators have a rule in depositions – "Every time you do that, I'm going to ask you 30 more questions just to punish you." A pleasant approach enhances credibility.
- Read the deposition – attorneys may stipulate to the "usual stipulations" at the beginning of the deposition; the witness should make sure that means the witness can read the disposition and make corrections as necessary. The witness's credibility (and professional reputation) is on the line. The deposition may be used to cross examine the witness at trial.
- Take breaks – the lawyer may want to keep going, but the witness is in control for taking breaks as needed.
- Videotape – if the deposition is videotaped, look at the monitor and see what is being recorded. Do not sit back down in the witness chair until the witness is assured that a full "table up" shot is being recorded, not just a close "head shot."
- Defensiveness – do not be defensive.
- Representation – the witness needs someone objective sitting next to him or her in the deposition.
- Get help – lawyers generally are not good witnesses because of their egos.
- Adversarial – keep in mind at all times that a deposition is an adversarial proceeding.

25. Moving Law Firms

If an attorney moves to another firm, for active clients, the attorney must get the client's permission to take the file to the new firm. If the attorney is leaving the firm but not taking the file, the attorney must assure a good transition to another attorney and be aware of the location of the client file.

No file should leave a law firm without written direction by the client. Attorneys typically agree, when taking a client file, that the new firm will provide access if the prior firm needs the file (for example, to defend a lawsuit).

26. Producing Information if Lawyer is a Party to Litigation

If the lawyer is a party to litigation, documents can be obtained through discovery rather than by subpoena. (Producing documents in discovery may be preferable – the attorney may have more time to comply than with a subpoena.)

Who pays the costs of production is not as clear in discovery compared with a subpoena. Most states have a clear statutory framework for costs of complying with a subpoena. Generally the party requesting documents must pay the production costs (i.e., copying costs). However, if the parties will have roughly equivalent production costs, the parties may agree to may make documents available to the party through dropbox or some other electronic form.

27. Attorney as Expert Witness – Privilege and Disclosure

a. **Consulting Expert**. A consulting expert (who consults with the attorney trying the case about substantive issues, discovery questions, deposition topics, overall strategy, etc.) generally does not have to make any disclosures. Indeed, the identity of the consulting expert may not even be disclosed.

   The consulting expert should be retained by the attorney, and not by the party. Information shared with the trial attorney can be protected under the attorney work product protection available to that attorney.

   A consulting expert may later become a testifying expert. (That approach may be used to make sure what the expert's opinion is before designating the expert as a testifying expert.) Anything prepared as a consultant before the person became a testifying expert could still be covered by the attorney work product doctrine. However, the other party may argue that access to the work product is necessary and that the party will be unduly prejudiced without access. A court might order that some information (other than opinion work product) must be disclosed. Accordingly, a consulting expert should be careful about what information is put in writing; a possibility exist that some of it might have to be produced if the consulting expert later becomes a testifying expert.

b. **Testifying Expert.** All communications and work product of a testifying expert is discoverable. The testifying expert often is deposed (often close to trial after fact discovery has been completed) and all communications and work is discoverable (including handwritten notes from the initial telephone call about the case). The attorney's time and billing records are discoverable and will likely be produced. "Assume that all notes and work will be produced."

c. **Should Attorney Take Notes?** In light of the fact that all notes may be discoverable, should the attorney-expert take notes of conversations and conferences? One speaker said he takes notes as an expert, but with the realization that the notes will be discoverable. "Every sentence is thought-out and always ends with a question mark."

28. Expert Witness – Compensation

Some attorneys (and other professionals) have a higher rate for serving as an expert than for other services. Be aware that issue may be discussed on deposition or at trial and the attorney for the opposing party will attempt to make the expert appear as a hired gun who is being paid to deliver a particular opinion.

29. Expert Witness – Engagement Letter

The engagement letter should clearly define the scope of the engagement, what the expert is being asked to do, and what the expert is relying on the attorney to provide. (Various sample expert engagement letters are included in the course materials.) The engagement letter will likely have to be produced as evidence in the proceeding.

The law firm should run a conflicts check for the parties to the lawsuit and the testifying experts (for example, make sure that another attorney in the firm is not currently using an expert who is testifying for the other party).

30. Expert Witness – Ethical Considerations; Does the Expert "Represent" the Party?

If the expert is "representing" the party for whom the expert is testifying, (i) the lawyer's firm is prohibited from appearing adverse to the "client" during the case, even on matter wholly unrelated to the subject matter of the case, and (ii) the party will be a "former client" after the proceeding is completed, and the firm cannot be adverse to the former client in substantially related matters. ABA Model Rules of Professional Conduct §§1.7(a)(1) & 1.9.

ABA Formal Opinion 97-407 concludes that a testifying expert does not "represent" the party, but a consulting expert does represent the party. Even though the party is not "represented" by a testifying expert, the expert still has duties of confidentiality and loyalty.