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***Professional Responsibility
in Probate & Estate
Planning***

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PROFESSIONAL RESPONSIBILITY IN PROBATE AND ESTATE PLANNING

Akron Bar Association
Estate Planning, Probate, and Elder Law Section
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Director of Loss Prevention
Ohio Bar Liability Insurance Company

<u>OHIO BAR LIABILITY INSURANCE CO.</u>	
<u>PROBATE, ESTATE & TRUSTS: DO'S & DON'TS</u>	
DO	DON'T
<ul style="list-style-type: none"> ✓ Keep up to date on the Local Rules for the Probate Court(s) where you practice. To find your local rules, click here. 	<ul style="list-style-type: none"> ✓ Don't assume all probate courts have the same local rules.
<ul style="list-style-type: none"> ✓ Use the correct Probate Forms. Click here to view. 	<ul style="list-style-type: none"> ✓ Don't forget to check that you have the most current form.
DO	DON'T
<ul style="list-style-type: none"> ✓ Always run a conflict of interest check before undertaking representation. 	<ul style="list-style-type: none"> ✓ Don't neglect conflicts of interest that may develop after representation is undertaken. Click here to read more.
<ul style="list-style-type: none"> ✓ Be aware of Adult Guardianship Program requirements. Click here to read more. 	<ul style="list-style-type: none"> ✓ Don't forget to check with your local probate court for other court-approved courses.
<ul style="list-style-type: none"> ✓ Follow procedures for legal fees. 	<ul style="list-style-type: none"> ✓ Don't take a fee without approval if it is required by the Court.
DO	DON'T
<ul style="list-style-type: none"> ✓ Consider becoming a certified specialist in Estate Planning, Trust and Probate Law. Click here for information from the Ohio Supreme Court. Click here for information from the Ohio State Bar Association. 	<ul style="list-style-type: none"> ✓ Don't get in over your head in a complicated matter. Consider contacting an OSBA Certified Specialist in Estate Planning, Trust and Probate Law to assist! Click here to view OSBA Certified Specialists.

I. KEEP UP TO DATE ON LOCAL RULES FOR YOUR PROBATE COURT

You can access rules for [Ohio Trial Courts and Local Rules](#) on the website of the Supreme Court of Ohio. [Rule 5](#) of the Rules of Superintendence for Ohio Courts requires each court to file with the Clerk of the Supreme Court a current copy of its local rules of court or a letter certifying that no changes have been made to the most recently submitted rules by Feb. 1 of each year.

Delaware County Probate Court Local Rules are effective January 3, 2018, as adopted by Judgment Entry filed January 3, 2018. These rules supersede prior rules of practice.

II. USE CORRECT PROBATE FORMS

Forms for the Probate Courts are usually included in the Local Rules. Delaware County includes a LOCAL FORMS INDEX at page 94 of the Local Rules.

- Don't try to use a form from another probate court in your case!
- Forms change! Be sure you are using the current form.

III. ALWAYS RUN A CONFLICTS CHECK

Conflicts of interest are increasingly a problem in probate cases. Keep conflicts in mind as the case develops. [Click here to read more.](#)

- Keep in mind: Who is my client?

IV. BE AWARE OF ADULT GUARDIANSHIP PROGRAM

[Mandatory adult guardianship education](#) is required by Superintendence Rules [66.06](#) and [66.07](#), including a one-time fundamentals course and continuing education requirements for each following year. The Supreme Court of Ohio offers free courses to guardians of adults. The [video library](#) has many useful topics such as Adult Guardianship: Guardianship of the Estate – Participant Manual, Medications and Medical Advocacy and Government Benefits.

V. CONSIDER ISSUES WHEN REPRESENTING CLIENT WITH DIMINISHED CAPACITY

Ohio Rules of Professional Conduct
Rule 1.14 Client With Diminished Capacity

- (a) When client's capacity

To make adequately considered decisions
In connection with a representation

Is diminished because of

Minority
Mental impairment
Some other reason

Lawyer shall – as far as *reasonably** possible – maintain normal lawyer-client relationship with the client

* “*Reasonably*” is a defined term in **Rule 1.0 Terminology**

(i) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(b) When lawyer *reasonably believes*** that the client has diminished capacity

Is at risk of substantial

Physical
Financial
Or other harm

Unless action is taken

And cannot adequately act in the client’s own interest

The lawyer may take *reasonably** necessary protective action

Including consulting with individuals or entities that have the ability to take action to protect the client

And in appropriate cases, seeking the appointment of a

Guardian ad litem
Conservator
Guardian

** “*Reasonably believes*” is a defined term in **Rule 1.0 Terminology**

(j) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(c) Information related to the representation of a client with diminished capacity is protected by **Rule 1.6 Confidentiality of Information**

When taking protective action pursuant to division (b)

The lawyer is impliedly authorized under rule 1.6(a)
to reveal information about the client

But only to the extent *reasonably** necessary to protect the client's
interests

VI. LAWYERS ACTING AS TRUSTEES

Coverage is often the biggest question from lawyers acting as trustees.
Before undertaking duties as a trustee, check whether there is malpractice
coverage. Policies differ! READ YOUR POLICY! Fulfill the obligations when
acting as a trustee of a trust. Don't be lax in administering the trust.

- Keep accurate accounting records.

If a question arises from a beneficiary or other interested party, the
inability to immediately respond with an explanation backed by
adequate accounting records may lead to an inference that the
trustee is hiding something nefarious or is unable to provide the
information due to some defalcation of duty as a fiduciary for not
maintaining accurate records.

- If a trustee is uncertain as to his/her duties as trustee under a trust,
then it is often wise to seek advice from independent counsel.

Obtaining such advice may help shield the trustee from claims of
breach of duty by interested parties or assist in providing an
explanation for the course of conduct followed by the trustee if
questioned by interested parties.

- If the obligations of the trustee involve making decisions regarding
financial matters or investments, then advice of an investment
advisor should be obtained.

There may be no coverage under the lawyers professional liability
policy for claims made against a trustee or other fiduciary arising
out of alleged failures to make appropriate investment decisions.

- See [Dueck v Clifton Club Co., 2017-Ohio-7161](#)

Lawyer for trustee may have duty to provide advice/information to
beneficiaries as well.

VII. OTHER TRAPS TO AVOID

Other big causes of probate, estate and trust claims are:

- Failure to obtain client's consent or inform client. Communication remains paramount – especially when dealing with families and money!
- Inadequate discovery of facts or inadequate investigation. Don't assume the "facts" as given from a person's memory! Do the facts check to be sure!
- Fraud is another leading cause of claims in this area of law. Have adequate policies in place and consider fiduciary bonds as appropriate.
- Lawyer incivility. Remember – it's the clients' case! As their legal counsel, you need to remain rational, even in the event of highly emotional situations. See Rules 1.2 and 2.1
- Do not file frivolous claims! See Rule 3.1

VIII. DON'T GET IN OVER YOUR HEAD

Failure to know or properly apply the law is a leading cause of probate, estate and trust claims. Planning or strategy errors are a second leading cause of probate, estate and trust claims. Consider becoming a [Certified Specialist](#). [Attorney Specialization Programs](#) are offered by the Ohio State Bar Association in Elder Law and Estate Planning, Trust and Probate Law.

If you need assistance with a complicated matter consider contacting a [Certified Elder Law Specialist](#) or an [Estate Planning, Trust and Probate Law Specialist](#).

IX. TAKEAWAYS...

Probate isn't an area for "dabblers"! There's so much more than "filling out forms." And while you may be representing the estates of deceased persons, the beneficiaries certainly aren't dead! You will need to keep them informed and know the nuances of the law to correctly administer the estate.

If you have questions, ASK for assistance from experienced lawyers who practice in the area. Check with your Probate Court to be sure you are following the procedures according to the local rules. Call us at OBLIC!

X. SPEAKER CONTACT INFORMATION

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