TOUCHING THE THIRD RAIL: DIVERSITY, CULTURE, AND ETHICS IN ESTATE PLANNING

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Faith, religion, and culture define people in ways other aspects of their lives do not.[1] An estate planning attorney does a greater service to the client by having an understanding of how a person's faith or culture might impact the estate planning process.

According to the Pew Research Center's US Religious Landscape Study,[2] published in 2015, 77 percent of Americans identify themselves with a religion. Of those who identify with a religion, 70.6 percent identify themselves at Christians, with the following breakdown:

Christian Denomination	Percentage of US Population
Evangelical	25.4%
Roman Catholic	20.8%
Mainline Protestant	14.7%
Historical Black Protestant	6.5%
Mormon	1.6%
Orthodox (all branches)	0.5%
Jehovah's Witnesses	0.8%
Other	0.4%

Among non-Christians who identify with a religion, the breakdown is as follows:

Religious Faith	Percentage of US Population
Jewish	1.9%
Muslim	0.9%
Buddhist	0.7%
Hindu	0.7%
Other Faith	1.5%

Religious beliefs are as diverse as clients themselves. Some clients may identify with a particular religion but never consider that faith's views on inheritance when deciding on their estate plan. Other clients may consider only the beliefs of their faith and never contemplate if those religious beliefs fit their personal opinions. In either event, it is helpful to understand the religious beliefs that may come into play, even unconsciously, when clients who identify with a particular religion contemplate their estate plan.

This article will explore those issues as we deal with a population that continues to become more diverse as the years progress, religiously, culturally and otherwise.

ESTATE PLANNING AND DRAFTING ISSUES (IN GENERAL)

When religion is an important consideration in a person's estate plan, several specific issues may be implicated, including:

- Selection of fiduciaries;
- Selection of guardians (for minor children);
- End of life issues; and
- Disposition of remains.

Selection of fiduciaries

In choosing a fiduciary, clients often want someone who shares their values and beliefs. Fiduciaries should include not only trustees but also agents under a power of attorney and a health care directive in the event that a chronic illness or other incapacity results in these powers being the operative documents. The client's selection of fiduciaries has a profound effect on the client's ability to transmit values. Consequently, deeply religious clients often want trustees and executors who are strong in their religious beliefs and who share the same faith as they do. However, in many instances, the person who best fits these criteria may not be the person best suited to handle investment and other fiduciary responsibilities.

Agents and fiduciaries should be given guidance, and granted legal authority, to disburse funds for religious education, charitable giving, and other purposes consistent with the client's religious goals. Boilerplate distribution provisions often will not suffice, nor will a general reference to a testator's faith.

Guardian for minor children

Most religious individuals want to raise their children in the same faith tradition they practice. Indeed, even with some clients who identify with a faith but who may not be particularly "religious," this can still be an issue when children are involved.

End-of-life issues

Because of advances in medical science, people are living longer than ever. Issues of end-of-life care, whether it be extending life, pain and comfort control, or dignity issues, are becoming a greater part of the estate planning discussion. Some faiths attempt to navigate these issues, particularly with respect to the "right to die."

Perhaps the single phrase in all of estate planning that has the most religious repercussions is the mandate in a living will or health care proxy that "no heroic measures" be taken. Apart from the definitional issues of the phrase, clients with religious sensitivities should be queried for appropriate modifications. Although some religious clients may assume that they cannot ever withdraw life support without violating their religious standards, this often is not correct.

Currently, none of the major religions condones physician-assisted suicide but the withholding of life-sustaining treatment ("pulling the plug") is not generally treated as synonymous with suicide.

Disposition of remains

Religions have varied rules regarding disposition of remains. Some religions mandate burial and prohibit cremation (e.g., Islam, Judaism, and many Christian Orthodox denominations). Others mandate cremation (e.g., Hinduism). Religious clients may want to specify their intentions in a will, Disposition of Remains document, or power of attorney for health care.

Each faith has its own religious texts, interpretations of those texts, and customs around estate planning issues. What follows is a brief overview of three of the most dominant religions in the United States as well as cultural issues involved in estate planning. Note that even within a particular faith, there may be disagreement around a particular issue. As such, this summary is intended to share what appears to be the most common view within the faith; it does not profess to cover all permutations or opinions within a faith around any of these issues.[3]

SPECIFIC DRAFTING ISSUES: CHRISTIANITY

Inheritance issues

In general, there are no specific provisions or rules required for the testamentary documents of Christians. The Bible itself does not mandate or discuss inheritance rights. Christians in general are free to follow secular law and leave their property at death to whomever they wish.

There appears to be only one verse in the Bible discussing inheritance issues: "If a man dies and has no son, then you shall cause his inheritance to pass to his daughter."[4]

This passage notwithstanding, there does not appear to be any Christian denomination that suggests that there is Biblical authority for daughters to be treated differently than sons in terms of inheritance of property, although in early Christian times, this was common practice in Europe.

Burial issues

Many clients want to have express directions regarding the disposition of their remains at death. In all denominations, there may be a preference to be buried in a cemetery affiliated with the client's denomination. Such instructions can be spelled out in the will, power of attorney for health care, or even a set of instructions (e.g., Disposition of Remains statement) the client can leave behind for loved ones.

Cremation (Protestant view)

There is no per se rule regarding cremation among the various Protestant denominations. Cremation has become increasingly popular among clients, with the remains kept by family or interred at a cemetery the same way a body would be. The Bible itself is silent on the subject, though the Old Testament is in part a history of the Jewish people, and Jewish tradition prohibits cremation of the body except in exigent circumstances. Jesus, himself a Jew, was interred in a tomb; thus, burial is the longstanding Christian way of body disposal (in stark contrast with the pagan tradition in pre-Christianity Europe of burning a dead body).

Cremation (Catholic view)

Cremation has been discussed and debated more in the Roman Catholic faith. Before 1963, the Catholic Church insisted that deceased Catholics be either entombed or buried, in accordance with what was done with Christ's body.

The Catholic Church now allows for cremation, although the Church's Order of Christian Funerals

acknowledges that "cremation does not hold the same value" as burial of an intact body and prefers that the full body be present for the funeral rites. After the funeral, the cremated remains are to be placed in a respectful vessel and treated in the exact same way that a family would treat a body in a casket. The vessel is then to be buried or entombed immediately after the funeral in the same timely manner as a body would be buried. Cremated remains of a loved one are not to be scattered, kept at home, or divided into other vessels among family members, just as it is clear that these same practices would desecrate a body in a casket. The Catholic Church does allow for burial at sea, provided that the cremated remains of the body are buried in a heavy container and not scattered.

Cremation (Orthodox churches)

There is no clear consensus on the issue of cremation in Christian Orthodox faiths. Historically, cremation was not allowed, based on the traditional Christian practice of burying the dead. Some Orthodox churches, however, are beginning to permit cremation. When dealing with a Christian Orthodox client, if the issue arises, it would be best to counsel the client to discuss the matter specifically with a religious advisor.

Organ donation

There does not seem to be a general prohibition or discouragement of organ donations by Christians at death or during life. The primary concern of some churches is in the definition of death (cessation of brain function versus cessation of all bodily functions), which is critical to the issue of some organ donation.

Mission work (Mormonism)

The Church of Jesus Christ of Latter-Day Saints has a strong tradition of mission work among its members. Indeed, at the end of 2019, there were 67,000 active missionaries in the world, the vast majority of them young, single men. It is not uncommon in practicing Mormon households for young men, and to a lesser extent, young women, to defer college for up to two years after high school graduation in order to perform mission work.

Though the mission work is for the benefit of the Church, families are expected to financially support the mission work of a member of the family. Therefore, Mormon clients with minor children might desire to include a specific instruction in any trust for a child that the trustee will financially support mission work by the child. Such support might otherwise be read into the obligation of maintenance or support with reasonable comfort, but often Mormon clients will want a very specific instruction to guarantee such support for a child who might choose to go on mission after his or her parents are dead.

SPECIFIC DRAFTING ISSUES: JUDAISM

General inheritance issues

Jewish law (referred to as halachah) is found in two locations—the Torah (also known as the Old Testament) and the Talmud, which is a compilation of rabbinical opinions written over 2,000 years ago. Taken together, these address most issues of Jewish life, although debates continue. In addition, each Judaic movement (Orthodox, Conservative, Reconstructionist, and Reform) may interpret issues differently. In general, Orthodox Judaism has the strictest approach to issues, hewing closest to the Talmudic view. Reform Judaism has the greatest flexibility in addressing issues, with far fewer absolutes. Halachah places some restrictions on Jewish testamentary freedom, requiring assets to pass to the closest relatives.

General principles of inheritance

Jewish laws on inheritance are found in the Torah, and provide that property passes without a will to certain beneficiaries, as determined by halachah. A distribution to anyone not designated for inheritance under Jewish law is deemed invalid. That means a halachic heir cannot be disinherited under halachah, even though the will that disinherits him would still be valid. Note that halachic rules do not apply to jointly owned assets, including joint tenancy property.

Jewish law presumes that all assets are held in the husband's name; the rules for inheritance from a woman are much less clear. In addition, the rights of sons and daughters are different. Sons are halachic heirs, while daughters are only entitled to certain levels of support (food, shelter, clothing, medical care, and cost of living), and to payment of the expenses of their wedding. Adopted children do not inherit from their adoptive parents.

Halachic inheritance

Inheritance is based on designated levels of priority; the survivor with the highest priority (or that person's descendants in accordance with halachah) receives the entire estate. Paternal heirs are deemed to be the proper heirs. The order of priority for inheritance is:

1. Husband;
2. Sons (first born son receives a double portion of a father's estate);
3. Daughters;
4. Decedent's father;
5. Paternal brothers;
6. Paternal sisters;
7. Paternal grandfather;
8. Paternal uncles;
9. Paternal aunts;
10. Paternal great-grandfather;
11. Paternal great-grandfather's brothers;
12. Etc.

The obvious omission is the decedent's wife. While she does not inherit from the decedent under halachah, she is entitled to either: (i) a fixed amount established under a prenuptial agreement; or (ii) to be supported by her husband's estate until she remarries. "Support" has been interpreted to mean food, shelter, clothing, medical care, and living expenses. Under one interpretation of Jewish law, a surviving widow is entitled to a claim against most of the assets, but without the burdens of ownership. She has a right to as many of the assets as needed to maintain her standard of living, even if control of the assets rests with the children or other heirs. Her lack of controls, however, restricts her ability to gift assets or otherwise direct their disposition.

Issues in complying with Jewish law

Many individuals will want to leave their assets in a manner that does not comply with the halachic requirements, particularly in terms of the double portion for the oldest son, the lack of funds given to a surviving wife, and the lack of ability to leave funds to a daughter where there is also a son.

Because of the frequent desire to leave assets in a way that may differ from halachah, Jewish scholars have determined a number of ways to comply with halachah while leaving assets to individuals who would not otherwise be entitled to receive them under halachah. While there are a number of potential methods to comply with halachah and still carry out the testator's wishes, the consensus is that the best approach is through use of a financial penalty, known in Hebrew as a Conditional Shetar Chov. It is, in essence, a form of a Jewish in terrorem clause. It works as follows:

- The testator prepares an estate plan that reflects his testamentary wishes. This may include distributions that vary significantly from what is required under halachah (e.g., leaving assets for his wife, providing equal distributions to his children, etc.);
- The testator creates a conditional debt to the beneficiaries named in his estate plan, in an amount that exceeds the value of his assets, payable a moment before death; and
- At the testator's death, the halachic heirs will have a choice. They can choose to comply with the terms of the estate plan, which would then void the debt by its terms and allow the assets to pass in accordance with the estate plan. Alternatively, they can demand that the assets be distributed in accordance with halachah, in which case the debt must first be satisfied, leaving no assets available for distribution to the halachic heirs.

Note that this approach only works, in practice, if each of the halachic heirs will receive something under the estate plan; if not, they may have nothing to lose from asserting that halachah should apply, as they will receive nothing in both scenarios.

Most scholars recommend including a provision in the estate plan that provides for a distribution of some amount (often $1,000) to be distributed in compliance with traditional halachic rules of inheritance. The preferred language also states that the provisions, other than the gift made in accordance with halachic inheritance rules, are a gift completed through a proper kinyan, or formal act. Jewish law requires a kinyan to make any sale or transfer of assets valid. While a kinyan is not required if assets are passed in accordance with halachah, a kinyan is required if the assets pass in any other way. Rabbi Aryeh Weil and Martin Shenkman, in their article Wills: Halakhah and Inheritance,[5] suggest the following language:

> It is my intent that all transfers of property made under this Will shall be in conformity with Orthodox Jewish law (halachah). Therefore, for the sole purpose of meeting this objective, I provide as follows:
>
> A. I hereby devise and bequeath the sum of One Thousand Dollars ($1,000.00) to my heirs, as defined in accordance with halachah, to be divided among them in strict accordance with halachah.
>
> B. Each and every distribution or other transfer of any property under this Will, except for the bequest set forth in subsection A, above, shall be deemed to be made by way of gift, effective the instant prior to my death. Each such transfer shall be deemed to have been completed through a proper kinyan, as appropriate for each type of property, and as defined by halachah.

This approach only works for a husband's estate plan. In order to distribute a wife's assets in a manner other than what is proscribed by halachah, the husband must consent.[6]

The use of a Conditional Shetar Chov may be the most traditional way to comply with halachah, but modern estate planning techniques are also viable options, as halachah has been interpreted to apply only to assets that comprise the probate estate. As such, the use of lifetime gifts and revocable trusts are also appropriate alternatives. If a revocable trust is used, it is imperative to ensure that all assets are properly titled into the trust, as the will should still comply with halachah, either with or without a Conditional Shetar Chov.

Health care power of attorney

There are multiple views on the continuation of life-giving treatment for an individual who has a terminal illness within Judaism. In general, this split is between the Orthodox and Conservative movements, each of which has created a model Health Care Proxy.[7] In general, Orthodox Judaism believes that only G-d can make decisions regarding life and death; therefore, all available methods to maintain life must be used. Food and hydration cannot be withheld.

Within the Conservative movement, there is a split of opinion. One view, advocated by Rabbi Avram Israel Reisner, requires the continuation of those things that are "of the body," such as food, medication, and hydration; those items that reproduce, circumvent, or supersede the body, such as respirators, may be removed. In contrast, Rabbi Elliott Dorff allows for more latitude to refuse treatment, believing that extending life without hope for a cure is not required; therefore, medication, food, and hydration may be withheld or withdrawn. Both positions are acceptable to the Conservative movement, and the choice between them must be made by each individual within the Health Care Proxy document.

The Reform movement allows its members to choose whether to maintain life sustaining treatment. Because the decision is seen as very personal, there is not a standard form to be used.

Organ donation

Most Jewish movements allow for organ donation, as the ability to save a life is highly valued. However, because Orthodox Judaism does not deem brain

death to be the same as death, the definition of when death occurs, as a practical matter, may make organ donation impossible.

Burial issues

Jewish law directs that burial should occur within 24 hours (unless the death occurs immediately before the Sabbath or other religious holidays, in which case the burial waits until those holidays are completed). No embalming is performed, and burial is traditionally in a simple wood box. Men are often buried with their prayer shawls. Traditionally, cremation is not permitted, although it has become more acceptable in recent years.

SPECIFIC DRAFTING ISSUES: ISLAM

Inheritance issues

Whereas the Bible does not offer much authority or guidance on estate planning issues, the sacred writings of Islam (the Qur'an and Sunna) establish an entire legal code of their own called Sharia. Indeed, the Qu'ran emphasizes the duty of every Muslim with property to provide for its proper disposition at death.

The Qur'an is the revealed word of God (Allah) through the Angel Gabriel to the Prophet Muhammad. The Sunna are the statements, utterances, and actions of Muhammad. The Qur'an and the Sunna do not answer all legal questions, but they do offer instructions from which the law itself developed. Consequently, in estate planning for an observant Muslim client, it is not enough to refer to Sharia law of the Qu'ran in order to give proper instruction for division of property. Furthermore, as explained below, doing so could run counter to another provision in the estate plan (for example, the common treatment in secular documents of an adopted child as the same as a child of the bloodline).

When a Muslim dies, there are four duties:

- Payment of funeral expenses;
- Payment of his or her debts;
- Execution of his or her will (equal to one-third of the estate); and
- Distribution of the remaining estate amongst the heirs according to Sharia

General principles of inheritance

There are a number of general principles regarding inheritance under Islamic tradition:

- One-third disposition by bequest: In general, a Muslim has discretion to leave up to one-third of his or her property to anyone he or she desires. This is called the wasiyya bequest, and is useful in providing for those not otherwise covered by laws of inheritance. Inheritance of the other two-thirds of property is determined by operation of law based primarily on family relationships (intestacy rights).
- Priority: The priority order depends on whether the Muslim is a Sunni or a Shiite. As long as the decedent has close relatives (spouse, mother, daughter, son), the rules of the two traditions of Islam are largely the same.
- Status of women: While inheritance rights differ if the heir is a man or a woman, Islam actually improved the legal status of women, who previously were generally excluded from inheritance.

Qur'anic inheritance

The Qur'an contains only three verses (4:11, 4:12 and 4:176) which give specific details of inheritance shares. Qur'an 4:11 has provisions that assign certain relatives known as Qur'anic heirs fractional shares of a person's estate.

The Qur'an mentions nine such Qu'ranic heirs, including spouses, parents, daughters, and siblings. Muslim legal scholars have added a further three by analogy; there are a total of twelve relations who can inherit as Qu'ranic heirs.

Interestingly, sons are not among the Qur'anic heirs, but after Qu'ranic heirs are provided for, the balance of an estate goes to nearest male "agnate." However,

the same verse says that "to the male the like of the portion of two females."

Before Islam, Arab inheritance rules were strictly based on male bloodline (asaba); Islam changed that by carving out shares for females, and, depending on their relationship to the deceased, placed some female relatives of the decedent ahead of more distant male relatives.

In general, division of the estate of a Muslim is supposed to occur as follows:

- One-third as directed by the testate instrument of the decedent (discretionary share or wasiyya bequest);
- Distribution to Qur'anic heirs, based on family relationship to the decedent (based on class of inheritors); and
- The balance to nearest male agnate.

Sunni jurists take the view that the intention of the Qur'anic rules is not to replace the old customary agnatic system completely, but instead to modify it to enhance the position of female relatives.

Shia jurists, however, take the view that since the old agnatic customary system had not been endorsed by the Qur'an, it must be rejected and completely replaced by the new Qur'anic law. This is the fundamental difference between the two traditions as it pertains to inheritance rights. Consequently, the concept of asaba heirs is rejected in Shia theology. Again, if the decedent's heirs are close enough in relationship, the two major forms of Islam are the same.

Spouses

If the husband dies childless, a quarter of the property and assets of the husband are required to go to his spouse. If the husband had any children, one-eighth of the property and assets of the husband are required to go to the spouse. This is a minimum, not a maximum number, though there may be limitations based on obligations to other family members.

There are six justifications for the way the system deals with the rights of women in marriage:

- Before marriage, any gift given to a woman by her fiancé is her own property, and her husband has no legal right or claim to it even after marriage;
- Upon marriage, a woman is entitled to receive a marriage gift (mahr), which is her own property;
- Even if the wife is independently wealthy, the full responsibility for her upkeep and that of the household is her husband's;
- Any income the wife earns through investment or employment remains her separate property;
- In case of divorce, any deferred part of the mahr becomes due immediately; and
- The divorced woman is entitled to get maintenance from her husband during her waiting period (iddat).

In modern times, these issues are less set in stone. For example, Muslim spouses who are both employed tend to contribute jointly to the household, and they both are co-obligated for taxes, expenses of children, and the like per state and federal law.

Daughters and sons

"If (there are) women (daughters) more than two, then for them two-thirds of the inheritance; and if there is only one then it is half."[8]

If there are any sons, the share of any daughters is no longer fixed because the share of the daughter is determined by the principle that a son must inherit twice as much as a daughter. In the absence of any daughters, this rule is applicable to agnatic granddaughters (a son's daughters). The agnatic granddaughter has been made a Qur'anic heir by Muslim legal scholars by analogy.

If there is only a single daughter or agnatic granddaughter, her share is a fixed one-half; if there are two or more daughters or agnatic granddaughters, then their share is two-thirds. Two or more daughters will totally exclude any granddaughters. Consequently, the common law concept of per stirpes distribution is not compatible in Sharia.

If there is one daughter and agnatic granddaughters, the daughter inherits a one-half share, and the agnatic granddaughters inherit one-sixth, making a total of two-thirds. If there are agnatic grandsons amongst the heirs, then the principle that the male inherits a portion equivalent to that of two females applies.

Brothers and sisters

If the deceased is childless and has any brothers or sisters, the share of the brothers and sisters shall be as follows:

- If there are both brothers and sisters, the share of each brother shall be double that of each sister after the wasiyya bequest;
- If there are only brothers, all the brothers shall share equally in the balance of the property and assets of the deceased after the wasiyya bequest;
- If there is only one brother, he takes all the balance of the property and assets of the deceased after the wasiyya bequest;
- If there is only one sister (and no other brothers or sisters), she shall get half of the balance of the property and assets of the deceased after the wasiyya bequest; and
- If there are two or more sisters (and no brothers), they shall share equally in two-thirds of the balance of the property and assets of the deceased after the wasiyya bequest.

Parents

If the deceased has neither children nor siblings, then his parents shall share the balance of his property and assets after satisfying the claims of the wasiyya bequest.

Common examples

Example #1: Husband dies survived by Wife, Son, Daughter, and three Sisters. Husband does not exercise the right to make a wasiyya bequest (i.e., no discretionary one-third). Wife gets one-eighth, and Son and Daughter split the rest. Sisters are excluded. Son gets two-thirds of the remainder (after debts and expenses and the one-eighth going to Wife), and Daughter gets one-third of the remainder.

Example #2: Husband dies survived by Wife, Brother, Sister, and no children. Husband does not exercise the right to make a wasiyya bequest. Wife receives one-fourth, and the balance goes to the siblings, with Brother receiving twice the share of Sister.

Example #3: Young man dies unmarried and with no children. He is an only child but both his parents survive him. The father receives two-thirds and the mother receives one-third.

Inheritance to or from a non-Muslim

The majority view is that a Muslim cannot inherit from a non-Muslim, although a Muslim may inherit from an apostate (former Muslim). These rules again apply to the non-discretionary portion of the estate, and so for the discretionary one-third portion, the Muslim testator is free to make gifts to non-Muslims.

Illegitimate and adopted children

Only legitimate relatives with a blood relationship to the decedent are entitled to inherit under Islamic law. Illegitimate and adopted children have no part in Muslim inheritance.

Conversely, the adoption of a child by another does not cut off that child's inheritance rights to his or her birth family. This is important as Muhammad himself, while knowing his parents and other kin, became an orphan while approximately eight years old and was raised for a time by his grandfather.

Importance of proper estate planning for devout Muslims

Since the rules of inheritance for Muslims can contradict both state law of intestacy as well as forced shares for surviving spouses, for the devout Muslim who wants to avoid a conflict between local secular laws and Sharia, it is vital to effectuate an estate plan to reflect the Muslim client's religious views. The surest way to achieve this is through living trusts since estate planning with wills only could open the estate to a spousal-shares claim in probate. Note that Islamic law has no concept of beneficiary

designations, paid-on-death clauses, or rights of surviving joint tenants, and property of this nature owned by a Muslim will be treated as part of the total estate subject to the inheritance rules. There are no rules on living trusts, but if treated like will substitutes, they can likely be used to meet a Muslim client's wishes in adhering to the tenets of Islam without circumventing them.

Interestingly enough, some Islamic countries (e.g., Iran and Indonesia) do recognize the concept of marital property as separate and distinct from these rules.

Finally, because of the obligations to family, there is no concept of a complete or substantially complete charitable bequest of an estate at death, even to a Muslim organization (outside of the discretionary one-third). Muslims wishing to make substantial charitable gifts should do so prior to death.

Investment issues under Sharia

Three key tenants of Sharia may significantly impact estate planning, particularly with regard to a fiduciary's duty to invest in accordance with the prudent investor standard: (i) a prohibition on riba (earning interest); (ii) a prohibition from investing in assets that are haram (prohibited); and (iii) a prohibition on gharar (excessive risk taking).

Riba

The prohibition on riba is based on the Islamic view of money, which is seen as a "medium of exchange" having no intrinsic value.[9] This view leads to the concept that exchanging money should not result in profit; thus, a Muslim cannot earn money from lending or receiving money from someone. That means no charging or receiving of interest on money, including bank accounts and mortgages.

There are a number of approaches that can be used to avoid formal, prohibited lending. All require special conditions and additional flexibility by the bank, which may necessitate using a bank that has experience or was created with Islamic principles in mind.

One approach, Ijara, is to have the bank purchase the item for which a loan is needed (such as a car) and then lease it back to the individual. It can be structured as a lease or a lease buyback. Alternatively, the bank can purchase the item (e.g., a home, commercial real estate, or other investment) and then sell it to the individual in installments at a higher price that reflects a profit margin. This is known as Murabaha. Finally, the bank and the individual can enter into a joint venture to purchase the item, with each sharing the profit and losses. This is known as Musharaka. Note that there is some controversy within the Islamic community regarding these techniques. The final determination regarding compliance with Sharia law in any particular situation is made by a Sharia board, which is not bound by precedent and will make a decision based only on what is presented in the situation under review. As such, it is not certain that any given technique will be approved at a given time.

The requirement not to charge interest is a separate challenge for investing, as all fixed-income products, such as bonds, earn interest. Similarly, most companies earn interest on their balance sheet, and also have debt on it.

Haram

Islamic law does not allow investment in companies or entities involved in activities that are prohibited under Islamic law. These include companies involved in gambling, pornography, manufacturing or selling alcohol, financial services (because of the charging of interest as a primary source of revenue), and pork products. Most scholars also advise against investing in tobacco products.

Gharar

Islamic law does not allow for excessive uncertainty or risk. As a result, any terms of a contract that are unstated, unknown, or based on circumstances outside the control of the parties are prohibited, including derivatives, futures, and options, as all are based on the uncertainty of future events.

Complying with the prohibitions on riba, haram, and gharar investments poses particular challenges for fiduciaries. It is possible to screen various

companies and investments to ensure they comply with Islamic law, usually with oversight by an Islamic organization or cleric who can certify the screening. Continuous screening is required, however, because of the changing approach by companies to their revenue streams over time. As a result, many Islamic investors opt for mutual funds that are created and continuously monitored using an Islamic screen.

Numerous funds exist, including the Mizan Fund, Tat Ethical Fund, Taurus Ethical Fund, Al Ameen Fund, and Amana Funds. According to the Amana Funds website, their screens "seek to eliminate" investments in: (i) bonds and other interest-based investments; (ii) highly-leveraged or high-debt companies; (iii) companies in industries that do not adhere to Islamic principles, such as liquor, gambling, pornography, pork, insurance, banks, etc.; and (iv) mutual funds or hedge funds that trade securities frequently (which is seen as gambling by some Islamic scholars).[10]

In general, it is possible that Islamic-screened portfolios will underperform typical investment portfolios, as many of the elements of risk have been removed from the potential investment options. There is now a Standard & Poor's BSE 500 Shariah Index, which was launched in May 2013 and provides a benchmark for performance of Sharia-compliant funds. However, in a fiduciary account, if the funds are not invested in a manner that complies with the prudent investor rule, the fiduciary may be subject to claims of breach of fiduciary duty.

The prudent investor rule, as codified in Section 90 of the Restatement (Third) of Trusts (2007), states: "The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust." This standard requires the exercise of reasonable care, skill, and caution. It is not to be applied to investments in isolation but rather in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable for the trust. In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so. The prudent investor rule does not prohibit any given investment and requires the trustee to manage risk, not to avoid it. The Restatement approach judges a trustee's investment choices at the time the choices are made, not at a later date or based purely on the result of an investment portfolio.

Complying with Islamic law is likely to conflict with the standard prudent investor rule approach. As such, estate planning documents that require the fiduciary to comply with Islamic law in determining investments should clearly waive the prudent investor rule and specifically direct the trustee or other fiduciary to comply with Islamic law in all investment decisions. If there is any question regarding compliance, the grantor may wish to include language directing the fiduciary to consult with an Islamic scholar or leader to determine what is required or permitted under Sharia, and direct that the trustee may rely on such determination without further review or investigation.

Burial issues

Muslim tradition dictates that burial must occur before the next sundown following the time of death. As a result, there is almost never a viewing of a body in Muslim tradition. Cremation is forbidden.

Organ donation

Organ donation is generally acceptable for Muslims, as it follows the Qur'an's teaching that "[w]hosoever saves the life of one person it would be as if he saved the life of all mankind."[11] If there is any question as to whether or not organs may be donated, it is best to consult with an imam (religious leader) or Muslim funeral director.

SPECIFIC DRAFTING ISSUES: ASIAN CULTURE[12]

Cultural factors influence all aspects of life, including the estate planning process. Cultural competency allows the lawyer to effectively communicate with the client; being insensitive to cultural issues can lead to a misunderstanding of the client's intent, or worse, lack of trust between the lawyer and the client.

Although this section focuses on estate planning for Asian Americans, variations of the same themes can be found in many other cultures as well.[13] There is no precise definition of what is "Asian"; the term encompasses people from a vast geographical area, with different historical, cultural, religious, and political backgrounds, including populations that have been at odds with each other over the course of history. In this article, the term "Asian" will refer to a subset of people affiliated with the region generally known as East Asia: China, Japan, Korea, and their neighboring countries. Even within this subset, there is great ethnic, religious, linguistic, and cultural diversity. Overlay this diversity with immigration to the US and the resulting acculturation and it quickly becomes clear that there is no one-size-fits-all Asian American experience. When discussing cultural issues, there is a fine line between recognizing and respecting shared values and attributes on one hand, and overgeneralizing or stereotyping on the other. The following discussion will highlight the common elements for the sake of raising awareness, but it is important to remember that each individual is unique.

Family as a unit

At the core of the Asian culture is the concept of family. In many Asian countries, the tradition has been for the eldest son to inherit all.[14] The system was designed to prevent the dilution of family wealth, much like the old English concept of entail. In modern times, the intestacy laws generally provide for equal distribution among siblings, but the family-centric culture still remains. The family ties remain strong even after children become adults. It is quite common in Asia for adult children to continue to reside with their parents. In turn, there is a mutual understanding that the children will take care of the parents in their old age, financially and otherwise. As a result, decisions about the living arrangement and health care of an elderly parent become family decisions. In a 1995 medical study of subjects who were 65 or older, those who self-identified as Korean American were more likely to conclude that the family, rather than the patient, should make end-of-life decisions.[15] This also affects other issues, including informed consent and privacy. The same study showed that only 47 percent of Korean Americans would have informed their ailing family members that their diagnosis was serious, compared to 89 percent of African Americans and 87 percent of European Americans.[16] If the prognosis was terminal, the percentage was even lower: 35 percent for the Korean Americans, compared to 63 percent of African Americans and 69 percent of European Americans.[17] There could be many reasons for this reluctance, but among them is a belief held by many that giving bad news to the patient would cause unnecessary stress and suffering, and may even hasten death.[18] Instead, the family members, rather than the patient, are told of the diagnosis, and the family members collectively decide what and when to tell the patient.

This family-centric approach to estate planning can manifest itself in other ways. Parents in Asian countries often set up accounts in the names of their children or transfer shares of the family company to the children. Even though the assets legally belong to the children, the expectation is that the assets are still under the parents' control; in fact, sometimes the children are not even told that these assets are in their names. This creates a problem if those children are US taxpayers who have a duty to report the income from those assets and disclose the ownership of certain foreign assets. Even after the children become aware of the existence of these foreign assets, it can be difficult to obtain sufficient information to file appropriate returns because it is considered "unseemly" for the younger generation to ask their elders about financial matters.

Within the family, there is a traditional preference for sons over daughters.[19] Traditionally, the son was expected to live in the ancestral home and take care of the aging parents and grandparents. Daughters left their birth families upon marriage and joined their husbands' families. Although the traditional family structure is gone in many countries, some of the customs remain. For example, clients who own businesses may direct their business interests only to their sons or they may give their voting shares to the sons and non-voting shares to the other children. Even today, it is relatively rare in Japan to see

a daughter succeed to the founding parent. The saga of Otsuka Kagu, a furniture retailer founded in 1969, is one example. In 2009, the founder's daughter took over as president. Soon thereafter, the father and daughter clashed over business strategy, leading to a prolonged family feud involving proxy fights, ousting each other as president, and the father starting a rival furniture business. The sad ending to the story is that the business suffered, and in 2019, the company was acquired by another business. As a 2016 Forbes article noted: "The imbroglio may seem like nothing more than a family feud. But in Japan's patriarchal—as well as hierarchical—society and its buttoned-down corporate world, it was headline news for weeks."[20]

Unfamiliarity with the US legal system

Estate planning may also be hampered by the general unfamiliarity with the US legal system.[21] Accordingly, an estate planning advisor should begin by explaining to clients why it is necessary to document their wishes formally through an estate plan. In civil law countries, for example, probate does not exist. Using Japan as an example, assets and liabilities vest immediately in the heirs upon death, and the heirs work out by agreement how the specific assets and liabilities will be allocated. They also work together to file any necessary tax returns. A client from such a background would not immediately understand the benefit of a revocable living trust to avoid probate.

The extensive use of trusts in US estate planning may be difficult for people from other legal backgrounds to understand. They may come from countries where trusts are not part of their legal tradition or their home countries are not as litigious as the US, so creditor protection may not be a high priority. Even if they come from countries that recognize trusts, the tax advantages in the US of creating trusts may be difficult to grasp.

Language barrier

If the client is not fluent in English, the advisor must also address the language barrier. Typically, the client will rely on family members or friends to translate, which adds another layer of complexity.

Furthermore, first-generation Asian Americans tend to communicate in a less direct manner because traditionally their cultures have many implicitly understood mutual values and expectations.[22] As such, some may appear blunt in their remarks, but often their implicit message is different from what is facially apparent.

There may also be vagueness built into the structure of the language itself. For example, in Japanese, the subject of the sentence is often dropped. A client discussing end-of-life decisions might say, "Would like to avoid drastic measures." But *who* would like to avoid drastic measures is unclear. Does the client wish to avoid drastic measures, or does the client believe that *her family* would like to avoid them? If the lawyer is using a translator to facilitate communication, does the translator ask the speaker to clarify, or does he simply assume what he believes the answer to be from the context and relay it as a definitive answer to the lawyer? Would the answer be different if the translator is a professional as opposed to a family member? These issues can further exacerbate the communication problem.

Talking about death

In Asian cultures, many believe that discussing death will bring bad luck. Even in families that are less superstitious, talking about death is considered indelicate. In fact, US insurance companies have found through research that entering the Chinese market will be difficult because of this cultural taboo on the topic of death.[23] In Japan, lawyers and other professionals who deal with estate planning matters do not discuss "death" with their clients but instead talk about "when the inheritance occurs."

Generational issues

The first-generation Asian Americans are likely to be most immersed in their ethnic culture, with each successive generation less influenced by their ethnic culture to varying degrees. Thus, there could be a clash of cultures occurring within the same family unit. The older generation may hold fast to traditional Asian values, but their US-born and/or

educated children may not share the same values, at least not to the same extent.

In a typical situation, it is the adult children who suggest the need for advance estate planning with their first-generation Asian American parents. The children, having grown up in the US, understand the US system. They recognize the need for their parents to sign legal documents. They understand that a doctor in the US cannot, without proper authorization, discuss medical information with the patient's family members. They know that avoiding probate and maximizing tax savings allow the family wealth to be preserved, which is what the parents want. They also know the cost of medical care in the US may be significantly higher than what their parents anticipate, and worry that their parents will not be able to live out their last days in the manner they envision. Further, many first-generation Asian Americans never become completely comfortable communicating in English, while the children lose the ability to speak the native language. This compounds the problem because parents and children lack a common language in which they can discuss complex legal, medical, and emotional matters.

In addition, as noted above, it is culturally indelicate for the children to bring up the matter of death with their parents. Not only is it seen as bad luck, but it could also appear presumptuous—as if the children are eager for the parents to die so they can receive the inheritance. Many parents misinterpret their children's efforts to discuss advance planning as simply being "after their money." This leaves both parties frustrated and, as a result, planning stalls. The longer the parties wait, the worse the situation gets, as the parents get older and their mental capacity starts to diminish.

Suggested solutions

Recognizing the cultural influence on the client's view of estate planning and having an appreciation for the client's communication style can help the lawyer overcome potential barriers and clarify the client's wishes.

When working with a client whose command of English is limited, the language barrier needs to be addressed. Ideally, the lawyer can communicate in the client's native language, alleviating the burden on the children of having to be an imperfect go-between. It also helps address the thorny ethical issues that can arise when the child who is serving as the go-between is also one of several beneficiaries, particularly if the client expresses a wish to disproportionately benefit that particular child.

If a native-speaking lawyer is not available, the best alternative is a disinterested translator, particularly one who has experience with legal matters (especially trust and estate matters). Using an adult child, another family member, or a friend as the translator can be awkward for the client who might be hesitant to reveal private or sensitive matters to the translator. Furthermore, inexperienced translators (including family members) tend to interpose their own interpretation of the lawyer's comments which is dangerous. Translation is not a mechanical task, and there will always be some amount of interpretation involved, but the translator should not explain legal concepts to the client. If the lawyer has no choice but to rely on family members or friends to translate, the lawyer should set clear ground rules at the outset so that the translator knows to seek clarification rather than interpret.

Even if the client can communicate in English, the lawyer should keep in mind the implicit cultural context, the imprecise nature of some Asian languages, and the cultural reluctance to discuss death. Respectfully asking clarifying questions during the estate planning process is crucial.

Once the language issue is addressed, the lawyer should spend time explaining the US legal system. It may surprise the client that a spouse or a child could be denied access to information without legal documents, or that there could be valuable tax savings and other benefits by incorporating trusts into their estate plan. It is helpful to ask the client how the process would unfold in the client's home country in order to highlight the similarities and the differences with the US system. This also helps to uncover

any assumptions that the client is making and to convey the importance of advance planning.

The ultimate goal is an estate plan that reflects the client's wishes, and the lawyer needs to communicate effectively with the client in order to achieve the goal. To that end, having an awareness of the cultural factors that could be influencing the client's behavior is crucial.

ETHICAL ISSUES IN RELATION TO RELIGIOUS AND CULTURAL CONSIDERATIONS OF ESTATE PLANNING[24]

An overlay to any discussion about estate planning, particularly estate planning that is unfamiliar or outside a lawyer's comfort zone, is the ethics of that representation. Set forth below are some of the more relevant ethics issues that present themselves in planning and advising for clients with diverse religious and cultural backgrounds in connection with the Model Rules of Professional Conduct (Model Rules). Although not adopted in every state, the Model Rules are sufficiently similar in most states to provide a handy guide for analyzing ethical issues that might arise in these situations.

Competence

MRPC 1.1 A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

An estate planning lawyer who has no experience planning for a client of a different faith or culture may not have the necessary competence to do the work without additional research and, perhaps, consultation with counsel familiar with such issues. As noted above, there are nuances to the various rules, and even different rules within the same religious tradition. While it might be tempting to defer to a client's interpretation of faith-based rules, doing so would likely not meet the standard for competence.

Limitation of representation

MRPC 1.2 Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representations

…

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rule 1.2 provides a guideline for a lawyer with differing views from the client, by stating that mere representation of a client does not equate to an endorsement of the client's views. For instance, in the context of an estate plan which excludes women due to religious or cultural constraints, a lawyer who disagrees with that philosophy is not barred from handling the matter. However, if the lawyer's views are sufficiently divergent from the client's, it may amount to insufficient competence.[25]

Rule 1.2 also allows the lawyer to limit the scope of the representation. If, for instance, the client wishes to establish a family LLC that complies with Sharia law concerning appropriate investments, a lawyer might wish to limit her representation to creating documents that complied with state and federal laws concerning formation and tax issues and leave

to another lawyer, or a specialist in Sharia law, any directions as to how the investments should comply.

Similarly, if the lawyer is confronted with planning for a family investment that includes assets or inheritance in another country, the lawyer would need to associate appropriate counsel.

Comment 6 to Rule 1.2 states "such exclusions may exclude actions that the client thinks are too costly or that the lawyer thinks are repugnant or imprudent."

Note that Comment 13 charges the lawyer not just with knowing that the client is doing something contrary to the Model Rules or other law, but also with reasonable cause to believe that there is a violation.

Diligence

> *MRPC 1.3* A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.3 is applicable to any representation, but it may take on added significance where the alternative to an incomplete estate plan (e.g., intestacy) will substantially vary from the desires of a client. The lawyer should also be attuned to whether the plan can be completed on time (including any additional time to obtain information necessary to properly create the plan). In a case where a client's failure to provide documents or information to the lawyer in a timely fashion significantly impacts the fulfillment of the client's intentions, traditional case law generally absolves the lawyer of liability if the lawyer had timely completed the work, although a disappointed heir might try to argue there was some special duty.

Consultation with the client

> *MRPC 1.4(a)* A lawyer shall…
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Given the variety of issues raised by the religious rules and cultural variances addressed above, a lawyer should take particular note of Rule 1.4(a)(5). Following a client's religious dictates would not necessarily be a violation either of the Model Rules or other law, but occasionally there is a conflict.

In re Estate of Feinberg raises the issue of whether a plan to dispose of property only to those relatives who follow in the testator's faith violates public policy.[26] In light of his strong views about religious loyalty, the decedent, Max Feinberg included a provision in his will which family members dubbed the "Jewish Clause." In that clause, Max provided that upon the second-to-die of he and his wife Erla, their grandchildren would become lifetime beneficiaries of trusts established under the will. If any of the grandchildren married outside the faith, however, and the new spouse did not convert to Judaism within a year, that grandchild's share of the trust would revert back to the grandchild's parents. After Max's death, Erla exercised her power of appointment over Max's trust to bequeath $250,000 to the one grandchild who had married within the faith and excluded the four other grandchildren, referencing Max's estate plan definition of who was and was not disinherited. One of the disinherited grandchildren sued, arguing the clause violated public policy by offering money to practice a particular religion. The lower courts agreed on the grounds that the clause restricted marriage rights but the Illinois Supreme Court disagreed. In a unanimous decision, the court found that the Feinbergs' disinheritance of any grandchildren who marred outside the Jewish faith was permissible so long as doing so did not encourage divorce. As the court stated: "Erla did not impose a condition intended to control future decisions of their grandchildren regarding marriage or the practice of Judaism; rather, she made a bequest to reward, at the time of her death, those grandchildren whose lives most closely embraced the values she and Max cherished." The court specifically stated that it was not ruling on Max's plan and the clause contained therein since Erla had exercised her power of appointment instead. It is not clear, based on the court's reasoning upholding Erla's distribution, whether Max's clause would also be valid. Notably, Erla's gift specifically named one grandchild and disinherited the others, noting why, but not providing for any conditions. Under Max's clause, there could

be room for a grandchild to change a condition, which might be viewed by a court as placing a limit on marriage or encouraging divorce.

Would the court's allowance of Erla's gift have been as acceptable to the court if Erla had exercised her power of appointment to reward a decision not to marry a person of another race or the same sex? Given that a person is entitled to make gifts to anyone, it is unlikely that the court could have found such a gift improper, although the more the rationale is set forth in the document, the more troublesome the court might find it. Further, if the gift were conditional in some way, it is more likely that the court would look askance.

What if, instead, a client wanted to leave money to a religious organization that arguably fell within the definition of a terrorist organization? Or if the client wanted to leave money to an individual or organization expressing beliefs so far from the lawyer's own beliefs that it amounted to a violation of Rule 1.7? Rule 1.4 requires that the lawyer discuss this with the client and advise the client of the possibility that the gift might be invalidated, as well as alternatives.

An additional scenario, in which the family insists that the lawyer work with the entire family, may raise the additional question of who is the client and the lawyer needs to discuss the potential implications of rules which limit the lawyer's actions in those circumstances.

Client confidentiality

> *MRPC 1.6(a)* A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Rule 1.6 is not likely implicated in faith-based planning, but in the cultural situations set forth above, confidentiality can quickly become a serious issue. Certainly, if the client asks for their children to be involved in the estate planning, the client's informed consent might be presumed, but it should still be explained to the client as circumstances might change. If one child is initially involved, but then falls out of favor and another child becomes involved, the lawyer should have a clear idea of how much information can be revealed and to whom. Rule 1.6 would suggest that subsequent information could not be shared with the now-excluded child, but if the lawyer previously shared such information, the child might reasonably expect the information to continue to be shared. Additionally, if the lawyer develops concerns about the influence of one or more of the children over the parents, what can the lawyer share?

A cultural preference for involving the entire family in planning may also lead to the lawyer acting for multiple generations and members of a family. Again, the issue of confidentiality arises. If, for instance, the lawyer represents the eldest son, who is anticipating that the family business will be passed down to him, and then the parents decide to defy tradition and split the asset, but advise the lawyer not to share this information, does this create a conflict? The lawyer is bound to not share the parents' confidential information, but now has information that impacts the son's estate planning. Does this impact the lawyer's ability to adequately represent the son? Arguably, the lawyer is in no different a situation than a lawyer who made similar assumptions and did not know the confidential information related to the parents' plan, but it certainly should make the lawyer uncomfortable. Clear consents for certain disclosures would simplify the lawyer's (and the client's) decisions.

Current conflicts of interest

> *MRPC 1.7(a)(2)* Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> …
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

…

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; …

and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.7 is the corollary to Rule 1.2's charge to act competently. In the religious context, it lays out the specific premise that the personal interests of the lawyer might create a conflict in representing a client.

In most instances, the personal interest contemplated by the rules would be the lawyer's own economic interests, but it could also be the lawyer's particular belief system. It makes sense to think this through thoroughly at the outset of the representation. Rule 1.7 (b) requires that, if there is a conflict, but the lawyer believes it will not interfere in the representation, the client must give informed written consent.

Imagine a situation in which the lawyer initially takes on the representation, works for the client for some period of time, then decides that there is a conflict (perhaps because of a specific beneficiary or a position that becomes stronger over time), but is still willing to continue the representation. If at that point, the lawyer has to obtain informed written consent (presumably advising the client that the lawyer had some discomfort with the client's position even from the beginning), the discussion is likely to be difficult. Depending on the lawyer's tolerance for conflict, it might be that the discussion would need to occur at the very beginning of such a representation.

In the family estate planning situation, as already noted above, conflicts could easily arise, both during the planning phase, but also in the administration phase where the interests of clients who are children or grandchildren of the matriarch and patriarch may substantially diverge from those of their parents and grandparents. The lawyer, trying to represent all of the interests, would clearly face a conflict. While a waiver could solve the problem, the lawyer needs to consider whether a truly informed waiver can be obtained in light of confidentiality rules. Case law suggests that vaguely worded waivers of conflicts are not sufficient. The specific nature of the conflict should be disclosed. At the outset of the representation, this would not necessarily require the disclosure of confidential information, but rather scenarios that could arise. As the representation proceeds, however, obtaining an informed waiver may require the disclosure of confidential information, or at least a hypothetical so close to the facts that it amounts to a disclosure. The lawyer should make every attempt to consider the possible conflicts and obtain necessary waivers at the outset of the representation. Any waiver should specify the result of an actual conflict, explaining whether the lawyer will withdraw from all or from some representation.

Conflicts of interest: former clients

MRPC 1.9 A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.

Rule 1.9 is, of course, the continuation of Rule 1.7, but addressing former clients. In the estate planning context, this is most likely to arise in a situation where the lawyer is acting as the family counselor and preparing estate plans for various generations of the family. While this practice is acceptable where appropriate waivers are in place, in the case of particular religious concerns, conflicts could arise. If the parents, for instance, were particularly desirous of complying with religious rules, but the next generation was not, a lawyer would face a conflict if the successor trustee wanted to modify the parents' directive because the parents would not be alive to give informed consent to a waiver.

Withdrawal

MRPC 1.16 (a)(2) 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:

…

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; …

MRPC 1.16(b)(4) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

…

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement

Rule 1.16 is yet another take on Rule 1.2's competence requirement and Rule 1.7's prohibition of conflicts. Although Rule 1.16 is directed primarily at situations that arise in connection with the lawyer's physical or mental health, it could apply in circumstances where the lawyer is handling a matter for a client with differing beliefs and attitudes from the lawyer. To take a current example, what if the lawyer's client refuses to get a COVID vaccine for religious reasons and the lawyer is in a vulnerable population, or if the client insists that the lawyer appear in person at a meeting or hearing where the lawyer would be at risk of contagion? The lawyer might have to consider whether withdrawal is necessary or appropriate.

Candid advice

MRPC 2.1 In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.1 appears to direct lawyers to expand their field of knowledge to have sufficient resources to advise the client. The requirement of being candid with the client, however, may also go the other direction, requiring that the lawyer not merely bury her concerns about the client's behavior, but explain them in the context of other social factors. The *Feinberg* case is a good example. The lawyer owes the client the duty of fully exploring and explaining how an estate plan may be executed in a manner that meets the client's objectives and also comports with case law, as well as moral, social, or political factors that might be involved. Be aware, however, that this does not mean that the lawyer needs to convince the client to adopt the lawyer's viewpoint. Arguably, if the lawyer believes she needs to go that far, she should be considering withdrawal from the matter as it suggests a conflict that impairs the lawyer's ability to do the work requested by the client.

Candor toward the tribunal

MRPC 3.3 A lawyer shall not knowingly:

Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

It seems unlikely that a lawyer would be in a position of being anything less than candid with the tribunal in the situations described above. However, when the client has views which differ from societal norms or from other members of the client's family, the lawyer must be mindful of achieving the client's desires while still being candid with the tribunal. Looking back, again, to the *Feinberg* facts, if there is a challenge to a gift and there is no explanation, but the drafting lawyer knows the rationale, would the failure to disclose the rationale amount to a lack of candor? It is unlikely due to a person's absolute right to dispose of property as that person sees fit, but the lawyer should always keep this mind.

Notes

1 The materials on religion were originally prepared by Jason Ornduff, Harrison & Held, Chicago, and Stacy Singer. Stacy wishes to express her appreciation to Jason for his work on the original version of these materials.

2 Religious Landscape Study, Pew Research Center, available at https://www.pewresearch.org/religion/about-the-religious-landscape-study/.

3 See generally K. Eli, Basic Principles of Estate Planning within the Context of Jewish Law, Probate & Property, 60-63 (July/August 2011); Rabbi Arye and Martin Shenkman Wei, Wills: Halakhah and Inheritance, Beth Din of America Halachic Will Materials 6 (2008), available at www.bethdin.org; Wendy S. Goffe, Conform Health Care Directives to Client Religious Views— Part 1, Estate Planning, February 2012; Hamoudi et al., Islamic Law and Estate Planning for Muslim Clients, ABA RPTE Committee Webinar February 9, 2016; Islamic finance—The lowdown on sharia compliant money, The Guardian, Oct. 29, 2013; Rabbi Ari Marburger, Estate Planning, Wills and Halachah: A Practical Guide to Hilchos Yerusha, 2011; Omar T. Mohammedi, Sharia-Compliant Wills: Principles, Recognition, and Enforcement, 57 N.Y.L. Sch. L. Rev. 259 (2012–2013).

4 Numbers 27:8.

5 Halachic Will Materials 6, Beth Din of America (2008), available at https://bethdin.org/wp-content/uploads/2015/07/PDF14-Halachic_Will_Materials.pdf.

6 Several examples of a halachic will and addendum creating the debt are available at bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf.

7 See, e.g., Halachic Health Care Proxy, The Rabbinical Council of America, available at https://rabbis.org/wp-content/uploads/2020/11/RCA-HealthCare-Proxy_11-9-2020.pdf; Jewish Medical Directives for Health Care, The Rabbinical Assembly Committee on Jewish Law and Standards (1994), available at https://www.rabbinicalassembly.org/sites/default/files/assets/public/publications/medical%20directives.pdf.

8 Qur'an 4:11.

9 Hilary Osborne, Islamic finance—The lowdown on sharia compliant money, The Guardian, Oct. 29, 2013, available at https://www.theguardian.com/money/2013/oct/29/islamic-finance-sharia-compliant-money-interest.

10 Saturna Capital, Amana Mutual Funds Trust, Halal Investing, available at https://www.saturna.com/amana/halal-investing.

11 Qu'ran 5:32.

12 This section was authored by Akane R. Suzuki, Perkins Coie, LLP.

13 See Helen Y. Kim, Do I Really Understand? Cultural Concerns in Determining Diminished Competency, 15 Elder L. J. 265 (2007) (noting similarities between Native Americans, Korean Americans, and Mexican Americans in their family-based decision-making).

14 For example, Japan's former Civil Code provided for the eldest son to inherit all family assets until the law was revised in 1947. Minpō [Civ. C.] 1896, art. 970.

15 Kim, supra note 13, at 282 (citing Leslie J. Blackhall et. al., Ethnicity and Attitudes Toward Patient Autonomy, 274 JAMA 820 (1995)).

16 Id.

17 Id. Mexican Americans fell in between Korean Americans and the other groups.

18 Pat K. Chew, A Case of Conflict of Cultures: End-of-Life Decision Making Among Asian Americans, 13 Cardozo J. Conflict Resol., 379, 385-86 (2012).

19 See, e.g., Heidi Drobnick, Ahmed Bachelani & See Lee-Sanders, Probate Issues for Cultural/Religious Communities, 89 Hennepin Law. 15, 18 (2020) (discussing the Hmong people, who are originally from Laos).

20 James Simms, Radical Redesign: Kumiko Otsuka Moves to Update Furniture Retailer, Forbes Asia (Apr. 6, 2016), https://www.forbes.com/sites/jsimms/2016/04/06/kumiko-otsuka-updates-her-familys-50-year-old-furniture-retailer/?sh=74224a7b5c66.

21 Jung Kwak & Jennifer R. Salmon, Attitudes and Preferences of Korean-American Older Adults and Caregivers on End-of-Life Care, J. Am. Geriatrics Soc'y, 55: 1867-72 (2007).

22 Chew, supra note 18, at 387.

23 Id. at 384.

24 This section was authored by Margaret G. Lodise of Sacks, Glazier, Franklin & Lodise LLP.

25 See also Model Rules of Pro. Conduct R. 1.7.

26 235 Ill.2d 256 (2009).