

## Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2979

**Date:** 29-Aug-22  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** Sandra D. Glazier & Martin M. Shenkman on *Scott v. Rosen*: Another Cautionary Tale Highlighting the Importance of Defensive Estate Planning Practices

*“Raia v. Lowenstein Sandler, LLP – Thoughts on a Recent Malpractice Case, addressed how Raia served as a catalyst for discussions among advisors regarding a variety of considerations that planners and advisors might wish to consider when engaged in the representation of estate planning clients. Wellin v. Nixon, Peabody, LLP: Case Lessons on Defensive Practice<sup>1</sup> reinforced the importance of estate planners reviewing practices, procedures and other considerations when engaged to assist clients with regard to the creation and implementation of a client’s planning desires. The issue in the Wellin decision was limited in scope to a determination of whether the statute of limitations should bar the claims alleged. But Wellin also identified issues concerning potential implications resulting from the claimed failure to properly identify, address and potentially have clients waive, inter-generational and spousal conflicts of interest that plaintiffs alleged arose in the course of estate planning. Also, questions were raised as to whether the client was informed of the potential consequences of grantor trusts, and the potential risks of the transaction. Many similar issues are raised in Scott v. Rosen, thereby meriting a further review and analysis of the issues and the potential importance of engaging in defensive estate planning practices.”*

**Sandra D. Glazier** and **Martin M. Shenkman** provide members with important and timely commentary on *Scott v. Rosen*.

This year, the **Notre Dame Tax and Estate Planning Institute** is scheduled to take place virtually November 9 – 11, 2022. This permits practitioners to attend and participate in the institute from wherever they are located. In addition to analysis of new developments and exploration of complex transactions, the Institute will offer practical topics, relevant for a broad range of clients, even for clients not exposed to the estate tax. Several sessions will cover income tax planning techniques available for appreciated assets owned by individuals and for assets owned by

irrevocable trusts. You may register for the institute by clicking this link: [Notre Dame](#)

Given the recent lawsuits filed against estate planners for not recommending a planning technique or for not considering the concerns of all family members, two of the Institute's sessions will consider defensive practices advisors can undertake when proposing planning techniques to clients, and what to consider when implementing a complex plan that will impact multiple family members, e.g., who is the client?

Two frequent **LISI** contributors, **Martin Shenkman** and **Sandra Glazier**, will be presenting at the Institute on "Defensive Practices When Recommending an Estate Planning Proposal." Building upon their **LISI** commentaries on *Raia v. Lowenstein* and *Wellin v. Nixon, Peabody, LLP*, as well as the commentary on *Scott v. Rosen* that follows in this newsletter, they will highlight some of the important defensive practices available to estate planners.

**Sandra D. Glazier, Esq.**, is an equity shareholder at **Lipson Neilson, P.C.**, in its Bloomfield Hills, MI office. She was also the 2019 recipient of Bloomberg Tax's Estates, Gifts and Trusts Tax Contributor of the Year Award and Trusts & Estates Magazines Authors Thought Leadership Award and has been awarded an AEP designation by the National Association of Estate Planners and Councils and Special Advisor to the Commission on Law and Aging. Sandy concentrates her practice in the areas of estate planning and administration, probate litigation and family law.

**Martin M. Shenkman, Esq., CPA, PFS, JD, AEP (Distinguished)**, is author of 42 books and 1300 articles and practices in New York.

Here is their commentary:

## **EXECUTIVE SUMMARY:**

*Raia v. Lowenstein Sandler, LLP* – Thoughts on a Recent Malpractice Case,<sup>1</sup> addressed how *Raia* served as a catalyst for discussions among advisors regarding a variety of considerations that planners and advisors might wish to consider when engaged in the representation of estate planning clients. *Wellin v. Nixon, Peabody, LLP: Case Lessons on Defensive Practice*<sup>2</sup> reinforced the importance of estate planners reviewing practices, procedures and other considerations when engaged to assist clients with regard to the creation and implementation of a client's planning

desires. The issue in the Wellin decision was limited in scope to a determination of whether the statute of limitations should bar the claims alleged. But Wellin also identified issues concerning potential implications resulting from the claimed failure to properly identify, address and potentially have clients waive, inter-generational and spousal conflicts of interest that plaintiffs alleged arose in the course of estate planning. Also, questions were raised as to whether the client was informed of the potential consequences of grantor trusts, and the potential risks of the transaction. Many similar issues are raised in Scott v. Rosen,<sup>14</sup> thereby meriting a further review and analysis of the issues and the potential importance of engaging in defensive estate planning practices.

## **COMMENT:**

Scott v. Rosen, et al.

### Defined Terms and Parties:

The case is complex and, therefore, tracking the parties and pertinent documents discussed in this article may be daunting for some. Following are some definitions that the reader may find of assistance:

- Steven Scott, who is a physician, may be referred to as: Steve, Father, Plaintiff, Parent, or Investment Trustee of Rob's Nevada Remainder Trust.
- Rebecca Scott, who is Steven Scott's second wife, may be referred to as: Rebecca, 2<sup>nd</sup> Wife, Parent, Plaintiff or grantor.
- Collectively Steve and Rebecca are referred to as Parents or Plaintiffs.
- Elizabeth Robinson is Steven Scott's mother and may be referred to as: Robinson, Steve's mother, grandmother or Plaintiff.
- Steven Robert Scott is Steven Scott's child and is also a physician. He is referred to as Rob. Hopefully, that will minimize the confusion created by the father and son having the same first name.
- Rob and Chase are Steve Scott's children from his first marriage.
- Liz, Dan and Greg are the children of Steve and Rebecca Scott's marriage.
- The "SRS GRAT" was a grantor retained annuity trust ("GRAT") of which Rebecca was the grantor and annuitant and under which Rob was the primary beneficiary following the end of the annuity term.

- “Rob’s Trust” is the remainder trust created under Rebecca Scott’s SRS GRAT.
- “Rob’s Nevada Remainder Trust” represents and refers to a Nevada Trust into which “Rob’s Trust” was decanted and of which Rob was the primary beneficiary.
- The “Scott GRAT No. 9” was a GRAT of which Rebecca was the grantor and annuitant which upon the end of the annuity period essentially poured over to a different irrevocable trust under which all five of the Scott children and Robinson were beneficiaries.
- References to “Steve” are to Steven Scott (the father) only and are not to Steven Oshins, who is named as one of the defendants in the action brought by Plaintiffs.
- “Plaintiffs” refer to Steve, Rebecca, Robinson, Chase, Greg and Liz.
- Carl Rosen was the estate planning attorney for all of the above referenced members of the Scott family, including Steve’s mother, Robinson, he is referred to as “Rosen”.
- Carl Rosen, Broad and Cassel, P.A., Steven J. Oshins, Oshins & Associates, LLC and Nelson Mullins Riley & Scarborough, LLP, d/b/a Nelson Mullins Broad and Cassel are collectively referred to as “Defendants”.
- Goldman Sachs was apparently the investment house that the Parents utilized.
- Merrill Lynch was where investment accounts for Rob’s Nevada Remainder Trust were opened.
- AYCO is a subsidiary of Goldman Sachs utilized by Steve to help value interests in Phoenix Physicians which were funded, in part, to the Scott GRAT No. 9 and the SRS GRAT.
- Rob was the CEO of Phoenix Physicians.

### General Background

In January 2020, Steve Scott together with his 2<sup>nd</sup> Wife, Rebecca, and three of the Scott children from Steve’s marriage to Rebecca (Chase, Greg and Liz), and Steve’s mother, Elizabeth Robinson filed a 150-page complaint (exclusive of exhibits) against Carl Rosen, Broad and Cassel, P.A., Steven J. Oshins, Oshins & Associates, LLC and Nelson Mullins Riley & Scarborough, LLP, d/b/a Nelson Mullins Broad and Cassel in Broward County, Florida Circuit Court. That case recently reached the trial stage of the proceedings and resulted in a mistrial.<sup>[M]</sup> As of August 19, 2022, the

matter is set to be retried on February 6, 2023 and the court has set aside one month during which that jury trial is expected to occur.<sup>[vi]</sup>

While the Defendants categorically deny the allegations contained within the original, and amended versions of the Complaint (collectively the “Complaint”), and regardless of the eventual outcome of the case, this litigation provides another cautionary tale for practitioners.

Recent headlines read: “Trial Opens Against Nelson Mullins Atty Accused of Malpractice in Planning Estate Worth Hundreds of Millions.”<sup>[vii]</sup> Not exactly the type of publicity any planner or firm relishes receiving. And unfortunately, even if the Defendants succeed in the end, damage may be done by the media coverage that occurs.

In the Complaint, Plaintiffs allege, among other things, fraudulent misrepresentation, fraudulent concealment, fraud in the inducement, grossly negligent misrepresentation, breach of fiduciary duty, constructive fraud as a fiduciary, legal malpractice, gross negligence, and a claim of aiding and abetting against the attorney and law firm that drafted Nevada trusts that acted as the receptacles for decanted trust assets. Like many complaints it is very broad and inclusive of a wide range of claims. Plaintiffs portray the creation of multiple GRATs, one of which contained different terms and was funded with a disproportionate share of what would ultimately prove to be a highly appreciating asset, followed by the decanting of Rob’s Trust to Rob’s Nevada Remainder Trust, as constituting financial elder abuse. In September 2021, the Judge assigned the case allowed the Plaintiffs to add a claim for punitive damages premised upon allegations that the Defendants hid conflicts of interest and conspired to manipulate distributions of \$250 million in trusts for the benefit of one client (Rob Scott) to the detriment of the other client(s), those being the Plaintiffs.<sup>[viii]</sup>

At its core, Plaintiffs essentially allege that multiple conflicts existed and they lacked sufficient information to provide informed consent necessary to the grant of a valid conflict waiver (and as to Robinson, that no waiver was ever provided) to the intergenerational planning ultimately complained of in the litigation. Plaintiffs contend that their complaint provides “a textbook case of the tricks that can [be] used by unscrupulous estate-planning lawyers to exploit the massive trust and estate assets that are just beginning to be transferred in the United States.”<sup>[ix]</sup>

We contend that this case (without making any inference as to the merits of any aspect of the claims, and without regard to the eventual outcome of the case) provides a primer on the importance of protective estate planning practices, especially when representing various members of a blended family in estate plans that provide for disparate treatment of beneficiaries. Similar protective practices may warrant application in inter-generational planning where beneficiaries may dispose of interests in a manner contrary to that contemplated by the planning of a prior generation or sibling. Both of these circumstances warrant particular attention when the same lawyer or firm is utilized to represent the various parties whose estate planning desires and interests may ultimately not align.

### Factual Background Gleaned from the Allegations Contained in the Complaint and Attached Exhibits

Steve Scott was married to his 2<sup>nd</sup> wife, Rebecca, when the couple engaged Rosen to assist them in implementing their estate planning desires (“Scott Engagement”). The Complaint doesn’t reflect whether a conflict waiver was obtained with regard to the couples’ joint engagement initially entered into with Rosen. It also doesn’t reflect whether Rosen was engaged to represent either of the Parents in other capacities (e.g., as a beneficiary or trustee of various trusts created under the Scott Engagement).

At the time of the Scott Engagement, Steve had two children from a prior relationship, Rob and Chase. Steve also had three children who were the issue of his marriage to Rebecca which were Liz, Dan and Greg. Steve, a physician, owned (among other things), two healthcare services businesses, Florida Health Plan Administrators (“FHPA”) and Phoenix Physicians. Rob was actively involved in at least Phoenix Physicians. Both Steve and his son from his first marriage, Rob, were doctors. Rebecca also had some interest in these business endeavors.

Plaintiffs allege that they instructed Rosen to prepare a plan that treated all of the children equally, and also provided, in some part, for Steve’s mother, Robinson. The Complaint is replete with allegations regarding the 2<sup>nd</sup> Wife’s intent to treat all five of the children (from both of Steve’s marriages) the same. Defendants contend that Steve wished the plan to recognize the value added by Rob’s active participation in growing the above referenced business interests.

Rosen had also been engaged to assist Robinson with her estate plan in 2004. At that point she was approximately 80 years old. It is unclear from the Complaint whether Rosen represented the Parents or Robinson first.

Sometime later, Rob also engaged Rosen to represent him with regard to his estate plan.

In 2007 FHPA was sold for \$700 million.<sup>[xii]</sup>

In 2008 the Parents gifted \$2 million to each of their children.

On June 8, 2009, the Rebecca J. Scott FHPA Trust was created for the benefit of all five children. This trust had a claimed value of approximately \$120 Million. It appears this trust was drafted to provide a common or "Pot" trust to benefit all five of the children, and the issue of any deceased child. It is unclear if Robinson was to be considered a discretionary beneficiary under the Pot trust provisions.

In March, 2010, two additional irrevocable trusts were established for the benefit of all five of the Scott children. During some period, those trusts were apparently administered as a Pot trust), from which discretionary distributions could be made for the benefit of any of the children and Robinson. Generally, a Pot trust does not require equal distributions from the "pot" to each beneficiary, but from allegations contained in the Complaint one might surmise that these trusts provided the trustees with the discretion, but not obligation, to equalize distributions made from the "pot" upon division of the common trust into separate shares. Pot trusts are commonly used when a grantor recognizes that children may have disparate needs which the grantor wishes to have addressed but may not wish to have specifically charged against only that child's share. Here, the trustee was apparently given the discretion to equalize distributions made from the Pot trust, but was not obligated to do so.

On October 25, 2010, Steve's mother, Robinson, updated her will and other related documents with Rosen acting as her attorney in the drafting of those documents.

On October 25, 2010, two GRATs were created for which Steve's 2<sup>nd</sup> wife, Rebecca, was the Grantor. The SCOTT GRAT No. 9, which benefited all five children, and the SRS GRAT, which primarily benefited Rob (the physician son from the first marriage who was active in the business). Both had an annuity term of 5 years and the annuity was to be paid to Rebecca. GRATs are characterized as "grantor trusts" under the Internal Revenue

Code, such that Rebecca would be taxed on all income of the trusts. This grantor trust treatment would continue until the earlier of the termination of each of the trusts or her death (or a toggling off of grantor trust status following termination of the annuity term). The GRATs were obviously intended to reduce gift tax consequences on the transfer of the stated interests of Phoenix Physicians. Schedule A (initialed by Rebecca) to GRAT No. 9 (which schedule was identified in the introductory paragraph to that GRAT), clearly reflected that GRAT was funded with a 19% membership interest in Phoenix Physicians, LLC (“Phoenix”) and \$460,000 in cash. Schedule A (also initialed by Rebecca) to the SRS GRAT (which schedule was identified in the introductory paragraph to that GRAT), clearly reflected that GRAT was funded with a 30% membership interest in Phoenix<sup>[xii]</sup> and \$725,000 in cash. Initially, Rebecca was the Trustee of each of the 2010 GRATs (however she resigned her position as trustee of the SRS GRAT on October 28, 2015, at which time an individual named Bertram E. Walls became the successor Trustee). Rebecca outlived the annuity term provided for in each of the 2010 GRATs, such that she received the entirety of her beneficial (annuity) interest in each of those GRATs.

Per GRAT No. 9, because Rebecca survived the annuity term, on the expiration of the GRAT term the SCOTT GRAT No. 9 was to be distributed to a separate Irrevocable Trusts created by Rebecca as Grantor on March 22, 2010 of which all five children and Steve’s mother, Robinson, were beneficiaries. As the receptacle trust was not appended as an exhibit to the Complaint, the extent of each beneficiaries’ interest is not known, but the Complaint alleges that to some extent the trusts created a common Pot trust from which discretionary distributions could be made for the benefit of each of the five children (and perhaps Steve’s mother, Robinson), and upon division into separate trust shares an equalization of interests might occur, presumably to address disproportionate distributions of trust assets made among the children during the common trust term.

The SRS GRAT provided for a different disposition. If Rob (the son from the first marriage who was a physician and worked in the business) survived the annuity term, the then remaining assets of that trust were to be distributed to the Steven R. Scott Trust (“Rob’s Trust”). The terms of Rob’s Trust clearly identify that the trustee of that trust should distribute income and principal to Rob (or for his benefit) according to a health, education, maintenance or support (“HEMS) standard. It also provided, that in administering Rob’s Trust the trustee shall have “primary regard” for Rob,

“rather than any remainderman”. Rob was granted a limited or special power of appointment to or among his descendants, and only to the extent he failed to exercise that power, would the residue of Rob’s Trust remaining at his death be distributed in equal shares among his siblings, and their issue per stirpes. Rob’s grandmother, Robinson, was not a beneficiary of the SRS GRAT if Rob survived the annuity term. The SRS GRAT also provided that the sole trustee of Rob’s Trust was to be Rob. Any vacancy in the office of trustee of Rob’s Trust would be filled by appointment of a majority of the beneficiaries then entitled or eligible to receive a distribution from that trust.

Each of the 2010 GRATs contained spendthrift provisions and also provided the trustee(s) with authority to change trust situs.

While some Trusts can run upwards of 100 or more pages, each of the 2010 GRATs was no more than 26 pages long, inclusive of signature, witness and notary pages and the above referenced schedule A. Therefore, even a cursory reading of the two GRAT documents should have disclosed that they were not identical. Rosen was not named or appointed trustee or successor trustee under either 2010 GRAT (or any sub trust created thereunder) when drafted. Each contained provisions for the appointment of successor trustees in the event of a vacancy. Each of the residuary trusts created under the GRAT also contained language reflecting that, under certain conditions, the trustee could distribute income and principal of a trust for a *current* beneficiary who was a descendent of either of the Parents, in the trustee’s “absolute discretion,” as the trustee deemed advisable “for any reason whatsoever”. The trustee of the residuary trust was also not required to consider any income or assets of a beneficiary in making distributions to that beneficiary. Each of these residuary trusts under the GRATs also contained language that reflected a desire and intention of the grantor to protect the assets from the claims of a beneficiary’s spouse.

Rebecca, as grantor, initialed each and every page of the two GRATs created on October 25, 2010, as well as signing each GRAT in the presence of two witnesses and a notary. The Complaint is devoid of any allegation that a GRAT was the product of undue influence or that she lacked the capacity to engage in the transaction.

At the time the two 2010 GRATs were funded with interests in Phoenix, those interests were presumably worth *considerably less* than the sales price ultimately received on disposition of that interest in 2014.

In 2011 the trustees of the 2009 FHPA Trust decanted \$40 Million into separate FHPA trusts for the benefit of Liz, Dan and Greg (the three children of Steve's second marriage). Rosen was appointed as co-trustee of the decanted trusts, and nominated to act as Successor Independent Trustee. The other current trustee of the trusts into which the decanted assets were made was Steve. Rosen was granted distribution veto powers. The decanting is alleged to have occurred to address the potential inequitable division of assets, if one or more of the Scott children were to predecease the Parents leaving children of their own who survived. It appears that by 2011, at least some Scott children already had children of their own, while other children did not and that was something the parties wished to address. This transaction also reflects that the Plaintiffs were (or should have been aware) that decanting was a process pursuant to which at least some operative terms of a trust (and beneficial interests) might be changed through a decanting by the trustee(s) of a trust.

In late 2011, Rosen is alleged to have had a meeting with the five Scott children about the decanting of the 2009 FHPA trusts. The Parents were not invited to that meeting. But it does not appear that the Parents held any beneficial interest in any of the residuary or proposed trusts into which the residuary trusts were to decanted.

On May 14, 2012, a Conflict Waiver letter was hand delivered to each of the Scott family members represented by Rosen. On that date, each of the members of the Scott family (other than Robinson) who were then represented by Rosen, executed that Conflict Waiver letter (in their individual capacities). It was a two-page letter, which in pertinent part reflected that:

- The firm had represented each family member in the past with regard to their respective estate planning and may represent each in the future with regard to estate planning and other matters;
- Those engagements were separate representations, but it is prudent to consider issues of conflict and confidentiality of information that might arise as a result of representation by the firm of each family member;
- It specifically pointed out that a conflict might arise because one of them was a Grantor or the testator of an instrument and as such creates a plan of distribution that the other disagrees with;

- Confidential information received from one family member would not be disclosed to another family member, even if the information is detrimental or adverse to a represented family member;
- Each was entitled to terminate separate representation, but the firm will be permitted to continue to represent other family members to the extent permitted by law and the rules of professional conduct;
- Each was advised that they could consult with independent counsel before providing the waiver of conflict; and,
- Each party who signed the letter waived “any claim of conflict of interest due to or resulting from” the representation and agreed to the “handling of confidential information as set forth above”.

It is impossible to determine from the Complaint whether Rosen ever represented any Scott family member in any capacity (with regard to the estate plans created) other than individually. However, one might assume with regard to the decanting of trusts, he represented one or more members of the Scott family in their capacity as a trustee of a trust.

In 2012, the Parents gifted \$5.2 million to each of the five children and their issue, in separate trusts. Each such trust provided the independent trustee with broad discretionary power to distribute income and principal to a beneficiary of the trust as the trustee deemed advisable “for any reason whatsoever”.

In late 2013, the Parents hired Wells Fargo to prepare a prospectus to aid in selling Phoenix. As of January 2014, it was expected that the sale of Phoenix would realize somewhere between \$50 and \$100 million. It ultimately sold for \$160 million.

It may be important to note that all of the irrevocable trusts created by the Scotts appear to initially have had situs in Florida and were to be interpreted and administered under the laws of that state.

On November 27, 2013, the Florida appellate court decision in *Berlinger v. Casselberry*<sup>ixiii</sup> came out essentially holding that discretionary disbursements under a spendthrift trust could, under certain circumstances, be subject to garnishment to enforce support obligations. The trial court’s

issuance of continuing writs of garnishment against future discretionary distributions made to or for the benefit of Berlinger, as beneficiary, by the independent trustee of discretionary trusts, was upheld on appeal. Citing an earlier Florida Supreme Court decision,<sup>[xvi]</sup> with regard to alimony payments owed Casselberry under the parties' divorce settlement, the court concluded that "[i]f disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment." Nevada, on the other hand, does not recognize support obligations as an exception to spendthrift provisions of a discretionary trust. Therefore, it appears that in Nevada, greater protections might be afforded in protecting assets of a trust from the claims of a former spouse.

After the *Casselberry* decision was issued, Rosen informed Steve and Chase (the other child of Steve's first marriage) of the decision and raised concerns regarding the potential risk that might occur should a Scott child divorce if the trusts retained situs in Florida. On January 28, 2014, Rosen sent Steve and Chase a copy of the Casselberry court opinion. Rosen suggested the Scotts consider changing situs of Chase's trust (and others) to Nevada and apparently discouraged consideration of Delaware as an alternative (perhaps because Delaware's DAPT statute does exclude exception creditors from spendthrift protections). That is not to say that Delaware is an inappropriate or poor trust forum; Delaware generally has a well-developed body of trust law and a chancery court composed of an appointed judiciary that is very familiar with applying the same. However, to address the concerns raised by *Casselberry*, Nevada may certainly have had potential advantages.

Apparently Rosen was not the only estate attorney who raised concerns following the *Casselberry* decision. Plaintiffs quote a portion of a LISI article in the Complaint, indicating that the authors:

... disagree with the recommendation that drafters of Florida trusts should consider migrating them to Alaska, Delaware, Nevada or South Dakota. We feel it is perhaps premature to rush out of Florida unless of course, you are the trustee of a discretionary trust with a beneficiary with an exception creditor issue who could use the *Berlinger* case against you in the near future. Instead, we urge caution and suggest taking a bit more

time before reacting (over-reacting) to the *Berlinger* decision. There is still hope that the case will be resolved correctly, and if not, that a legislative change will soon follow. If our reading of the legislative history and the Florida Trust Code is correct, then Florida already took strides toward making its trust law palatable to planners, and if the legislature has to adopt even more explicit language to effect that result, then doing so should only make using Florida Trusts even better.”<sup>[xv]</sup>

On March 19, 2014 Steve received initial non-binding bids for Phoenix reflecting a potential purchase price of between \$85 million and \$115 million. He shared this information with Rosen, who was at the time continuing to research options with regard to the possible decanting of residuary interests under the GRATs. He charged the Parents for those efforts. Steve apparently received those bills and paid for the services itemized thereon. However, it is unclear who engaged Rosen to perform those services

On May 2, 2014, the final bid for the purchase of Phoenix was received providing for a potential purchase price of \$170 million. Within days Rosen contacted Steve Oshins (a well-known and respected Nevada estate planning attorney) to inquire about the potential of decanting Rob’s Trust (which was the *remainder* interest in the SRS GRAT should both he and Rebecca survive the annuity term). Rosen’s email to Oshins acknowledges that the final annuity payment under the GRAT wasn’t due until October 29, 2015.

On May 8, 2014, Chase appears to have participated in a conference call with Oshins and Rosen about the potential of decanting his FHPA trust into a Nevada trust. Again, it is unclear who Rosen was representing on this call (Chase individually as a beneficiary under that trust or as trustee, or both, or whether the call, perhaps occurred at his father, Steve’s request). However, on May 12, 2014 Oshins & Associates, LLC issued an engagement letter relative to the proposed preparation of a Nevada Trust and the decanting of the Chase’s FHPA Trust. That engagement was addressed to Chase and his father, Steve, as trustees of that trust, and sent via email to Rosen’s attention. The engagement contained signatures blocks for both trustees’ signatures.

On May 15, 2014 a separate conflict waiver letter was executed by Rebecca and the trustees of GRAT No. 5, with regard to a request for issuance of an opinion letter on whether assets of that trust required registration under the Securities Act of 1933.

On June 10, 2014 the sale of Phoenix was concluded for a final price of \$160 million. On June 16, 2014 the SRS GRAT, which benefited Rob, received \$45.87 million from the proceeds of that sale; GRAT No. 9, which benefited all five children, received approximately \$30 million as a result of the sale. So, as of June 2014, Plaintiffs were (or should have been) aware of a significant disparity between the residuary beneficiary interests provided for under the two 2010 GRATs.

From the Complaint, it is clear that the Scott family CFO (“CFO”) was aware of the plans to decant the Rob’s Trust under the SRS GRAT, because he emailed Steve on that date indicating that the SRS GRAT *subtrust* (“Rob’s Trust”) would be decanted in October 2015.

On June 19, 2014, the CFO and Rosen engaged the Goldman Sach’s subsidiary, AYCO, to analyze the disparities in value that existed between the various irrevocable trusts created for the five Scott children. On June 24, 2014, the AYCO group projected that Rob’s interests in his FHPA trust and the SRS GRAT *subtrust* might be worth \$163 million *in 20 years*.

On June 25, 2014, Rosen emailed Steve an agenda for a meeting about Rob’s estate which included a discussion of adding a co-trustee to Rob’s Trust under the SRS GRAT. Client numbers on that agenda reflected that documents were saved in Rob’s client matter at Rosen’s firm, but the bills for this work were allegedly submitted to the Parents for payment. Work performed by Rosen in July, 2014, regarding decanting of various trusts to Nevada trusts, was apparently billed to Scott Holdings (the Parents’ entity), as opposed to each specific trust being reviewed for decanting to a Nevada trust. While draft documents relating to the documents initially indicated that Rebecca was the grantor of the trusts into which the decanting was to occur, Rosen appropriately pointed out that the Trustee was the grantor for decanting purposes and that Rebecca had been the grantor of the original trust from which assets were to be decanted.

Throughout the balance of 2014 and in 2015, Rosen’s billing records reflect that he continued analyzing issues related to a Nevada decanting, and the review of draft documents and issues relating to the decanting of various

trusts established for the benefit of a number of the Scott children. These services were allegedly billed to and paid by Scott Holdings (or the Parents).

While the Nevada trust into which Chase's FHPA Trust would be decanted, contained provisions for his father, Steve, to act as an "unremovable" family trustee and contained independent trustee provisions, Rob's Nevada trust did not contain comparable provisions.

Plaintiffs allege throughout pertinent periods, that Rosen provided Steve (or the Parents) with charts or spreadsheets that erroneously or cryptically portrayed Rob's residuary interests in the SRS GRAT (and Rob's Nevada Remainder Trust into which Rob's Trust was decanted) or failed to otherwise address the same. However, there is no allegation that the Parents did not have copies of the SRS GRAT at all times pertinent to the matter in their possession, or that the CFO managing their family office also did not have copies.

The assets of the Chase's FHPA Trust were decanted to a Nevada Trust on October 7, 2014.

On November 21, 2014, Rob accepted his appointment as trustee of Rob's Trust (pursuant to Article IV of the SRS GRAT dated October 25, 2010). While that trust only represented an expectancy as of that date (because the GRAT annuity term had not yet expired), nothing in the Rob's Trust (which was the remainder receptacle under that GRAT) precluded his acceptance of that appointment. At that point in time, there still might have been no economic consequence to him as beneficiary of the trust, if the grantor, Rebecca, didn't survive the annuity term. On that same date, Rob, in his capacity as sole trustee of Rob's Trust, changed the situs of only Rob's Trust (of which he was nominated and acted as sole trustee) to Nevada effective upon Premier Trust, Inc.'s ("Premier") acceptance of an appointment as a trustee (which was a step necessary to the creation of sufficient nexus to Nevada to change Rob's Trust's situs).

On November 21, 2014, Premier accepted the appointment and Rob resigned as trustee of Rob's Trust. On that same date a Decanting Agreement was executed with regard to Rob's Trust. That agreement recites that there will only be a distribution to Rob's Trust if both Rebecca and Rob survive the annuity term of the SRS GRAT. Because Rob's Trust gave the trustee discretion to distribute the income and principal of Rob's Trust to or for Rob's benefit (and Rob had a power of appointment),

Premier decanted that trust (in further trust) to a Nevada trust for Rob's benefit, called the Steven R. Scott GRAT Remainder Trust ("Rob's Nevada Remainder Trust"), the trustees of which were Rob and Daniel Thomas (Rob's friend) as family trustees and Premier as administrative trustee. Rob's Nevada Remainder Trust was for Rob's benefit during his lifetime. He was provided with a limited or special power of appointment which was consistent with the power provided to him under the residuary trust under the SRS GRAT. If he didn't exercise that power, any assets remaining at his death would go to his descendant's per stirpes and if none to his siblings (and their descendants per stirpes). If none of those beneficiaries existed or survived, the residue would go to the Scott Family Foundation (who was the default residuary beneficiary under the SRS GRAT if there were no qualified family descendant beneficiaries).

The intent not to benefit a spouse of a beneficiary was also reflected in Rob's Nevada Remainder Trust. It is noteworthy that Nevada's trust statute provides for no exception creditors (e.g., obligations to a spouse of a beneficiary or to address child support obligations). Paragraph 3.4 of Rob's Nevada Remainder Trust provided guidance to the trustees for distributions to be made according to a HEMS standard which was to be liberally applied to beneficiaries. Only an independent trustee could distribute income or principal to Rob for any other purpose.

The signatures of Rob and Daniel Thomas, as trustees of Rob's Nevada Remainder Trust, were notarized by Rosen in Palm Beach, Florida on November 21, 2014. Premier's trust officer, Brian Simmons, also executed Rob's Nevada Remainder Trust, as administrative trustee, on the same date, and his signature was notarized in Clark County Nevada by a notary public in that state. No assets are reflected on Schedule A of Rob's Nevada Remainder Trust (which was appropriate as none had been allocated to the trust as of the date of creation, other than \$1,750 in funds loaned to the trust to pay the initial trustee fees related to Premier acting as administrative trustee).

At the time of decanting, Rebecca, who had been the grantor of the 2010 SRS GRAT, was not sent a copy of the Rob's Nevada Remainder Trust, even though she was then the sole trustee of the GRAT annuity provisions. She alleges she didn't receive a copy of the Remainder trust until June 2018.

Between June 16, 2014 (when the SRS GRAT received proceeds of sale amounting to \$45.87 million) and the end of the annuity term in October, 2015, the value of the SRS GRAT grew to approximately \$52 million.

On September 11, 2015, Rosen sent Goldman Sachs, Steve and the CFO documents and instructions to terminate the SRS GRAT (following delivery of the final annuity payment to Rebecca) and to transfer the remaining assets to Rob's Nevada Remainder Trust with Rob, Daniel Thomas and Premier Trust as Trustees. Accounts at J.P. Morgan for Rob's Nevada Remainder Trust were opened on or about September 25, 2015 and a date for signing termination documents with regard to the GRAT was suggested of October 26, 2015. Again, it is unclear under which engagement (or for which client) these instructions were issued,

On October 27, 2015, Rosen sent executed SRS GRAT trustee resignation and acceptance documents to Goldman Sachs. On October 28, 2015, Rebecca resigned as the SRS GRAT trustee and Bertram E. Walls accepted the role of successor trustee to that GRAT. On October 30, 2015, Goldman Sachs let Rosen know that Rebecca had in fact received her final annuity payment.

In late 2015, Rosen recommended that the GRAT No. 9 residuary trust be divided into separate trusts (as opposed to being administered as a common trust) and decanted, the result of which appears to have eliminated Steve's mother, Robinson's interests.

On December 11, 2015, Rosen sent Rebecca a document to effectuate termination of grantor trust status with regard to Rob's Nevada Remainder Trust (Rob's Trust following the decanting of the residuary trust under the SRS GRAT). Rosen advised Rebecca that doing so would save her from paying taxes on income generated by Rob's Nevada Remainder Trust. It's alleged that he didn't explain that doing so would eliminate her power of substitution over the assets of the trust.

In late 2015, Rob sought to move to North Carolina. This raised concerns regarding potential income tax consequences relative to Rob's Nevada Remainder Trust if he remained a co (family) trustee. His father, Steve, was selected to succeed him. On December 16, 2015, Rob resigned as a co-family trustee of Rob's Nevada Remainder Trust, and his father (who is one of the plaintiffs) became his successor trustee, but only for purposes of investments. Despite accepting that appointment, Plaintiffs allege Steve was not provided with a copy of Rob's Nevada Remainder Trust for which

he had accepted responsibility to act as an investment trustee. Steve, as investment trustee, was allegedly not invited to attend a meeting with the CFO, Rob, Dan Thomas, Rosen, Goldman Sachs and JP Morgan that occurred on the morning of January 26, 2016 to discuss three of Rob's trusts, despite Steve then acting as investment trustee of Rob's Nevada Remainder Trust.

On February 1, 2016, the CFO (apparently acting on Steve's behalf as investment trustee) wrote a check from Rob's Nevada Remainder Trust to reimburse Rob for the money he loaned to that trust to pay trustee fees to Premier in November 2014. On February 4, 2016, Rosen provided Steve with a copy of Rob's Nevada Remainder Trust.

On April 5, 2016, June 14, 2016, and October 11, 2016, Steve (acting as investment trustee) and Dan Thomas, another trustee of Rob's Nevada Remainder Trust met to review financial issues relating to that trust. The terms of the trust were allegedly not discussed. Rosen is alleged to have attended some of those meetings. Again, it is unclear whose interests he was representing at those meetings.

On April 13 2016, Rosen also provided the CFO a copy of Rob's Nevada Remainder Trust.

It is alleged that throughout the period of representation it was Rosen's practice to supply summaries or spreadsheets of Scott trusts to Steve (but not all of these reflected information regarding Rob's trusts, even though Steve was at relevant times the investment co-trustee of Rob's Nevada Remainder Trust which was the ultimate receptacle trust of the SRS GRAT).

In 2016, Liz, Greg and Dan (the children from Steve's 2<sup>nd</sup> marriage to Rebecca) also decanted their respective individual FHPA trusts to Nevada to avoid the potential adverse consequences of the Casselberry decision. Apparently Rosen held some fiduciary position under these trusts pursuant to which he received trustee fees which were paid directly to him and not the firm with which he was associated. In addition, the trustees of the FHPA Trust (which contained a pot trust then worth over \$100 million) was divided and distributed to the children's individual FHPA trusts, eliminating Robinson's interest as a beneficiary. Of the \$100 million held in the FHPA Trust, Rob appears to have only received a \$4 million "present value" interest as a result of the FHPA pot trust distribution.

In August 2017, after Rob received a much smaller share of the FHPA Trust as a result of the Parents apparent attempt to equalize benefits between the children, Rob obtained separate counsel to represent him with regard to his interest in the FHPA (pot) Trust. On September 20, 2017, Steve terminated Rob as an officer of another company they then jointly owned. On January 4, 2018, Rob removed Steve as investment trustee of Rob's Nevada Remainder Trust. Steve alleges he didn't understand how Rob could simply remove him as trustee, since he was an "unremovable" trustee under other irrevocable trusts created for the Scott children. On January 5, 2018 Steve reached out to Rosen with regard to the removal.

On January 22, 2018, the Parents filed suit in Nevada in an attempt to enforce grantor swap rights Rebecca believed she retained in an attempt to substitute assets of Rob's Nevada Remainder Trust. Upon learning of the suit, Rosen sent Steve a copy of the December 11, 2015 document under which Rebecca had turned off grantor trust status, and to do so she waived those rights of substitution. Plaintiffs allege that by February 12, 2018 Rosen was part of the Parents' litigation team in the Nevada litigation.

On March 7, 2018, the Parents filed an amended petition in Nevada to invalidate the Nevada Remainder Trust into which Rob's Trust under the SRS GRAT had been decanted. On March 22, 2018, Rosen sent Steve a document describing the difference between HEMS and total discretion distribution standards. On April 6, 2018, Rob agreed to mediate in an attempt to reach a global resolution. On May 30, 2018, Rosen provided Steve with articles by Oshins regarding Delaware and HEMS provisions. The Parents allege that Rosen's involvement in the Nevada litigation was that of a "spy" for Rob's team while all the time billing the Parents for his services in regards thereto.

In April 2018, the Parents named Rosen as an agent under a (springing) durable power of attorney, and nominated him as a successor executor in their respective wills. Steve also asked for a provision to be inserted into his will barring Rob (and Rob's family) from attending Steve's funeral.<sup>[xvi]</sup>

In late June 2018, Rosen consulted with the Parents' Nevada lawyers (not Steven Oshins or Oshins & Associates) about whether remainder beneficiaries could be eliminated through a decanting and whether the remainder beneficiaries would need to be given notice. Presumably this inquiry was to further the Parents desire to eliminate or remediate the disparity between Rob and the other children (or perhaps to punish Rob for conduct the Parents didn't approve of).

Sometime in 2019, the Parents revised their estate planning documents to remove Rosen as a nominated Agent and successor executor.

On January 16, 2020, Plaintiffs filed their Complaint against Defendants in Broward County Circuit Court and demanded a jury trial. On July 21, 2022 the jurors were deadlocked and a mistrial was declared.

### Defensive Practices

A review and analysis of the facts and issues raised in *Scott v. Rosen*, can help to identify potentially pertinent defensive practices that might assist in the future defense of similar litigation. These suggestions in no way should be interpreted to make any inference as to the merits of this case or the actions of any defendants. The following is presented in the vein of precautionary lessons that might be learned generally, regardless of the merits or outcome of this case.

### Conflict of Interests and Violation of Duty of Undivided Loyalty and Who's the Client.

At its core, the Complaint alleges that conflicts of interest abounded with regard to the various representations engaged in by Rosen in providing legal services to a multitude of Scott family members in their individual, beneficiary and perhaps fiduciary status related to trusts created under the Scott Engagement. It's alleged that as a result of those conflicts, Rosen violated his duty of undivided loyalty to Plaintiffs, in particular with regard to: (1) the creation and funding of the SRS GRAT and decanting of the remainder interest to a Nevada trust for Rob's benefit and (2) division and distribution of pot trusts that included Steve's mother, Robinson, as a discretionary beneficiary distributee and funding of separate trust interests under which Robinson's beneficiary interest was eliminated.

While Plaintiffs repeatedly cite to the Rules of Professional Conduct ("RPC") (and ACTEC commentaries relating thereto), it remains important to note that the preamble to the MRPC (and related state Rules of Professional Conduct) specifically indicate that:

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The

rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.<sup>[xvii]</sup>

While the RPC clearly do not provide a client with a cause of action, this may give an attorney who's been sued little solace. The RPC does establish standards of conduct, however, it's important to remember that the lawyer's conduct ultimately will be viewed under the prism of the standard of practice in the area. Multi-generational representation in the estate planning arena isn't uncommon. In fact, the ACTEC Commentaries reflect:

It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances, the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them. Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the

“family.” Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost-effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.<sup>[xviii]</sup>

When separate engagements are established, it still remains advisable to address the extent to which the lawyer may share or relay information between separately engaged clients. Again, the ACTEC Commentaries recognize that inter-generational estate planning can involve separate engagements where information provided by one client will not be shared with another client.<sup>[xix]</sup> In those circumstances the lawyer may need to obtain the *informed consent* of each client “if there is a ‘significant risk’ that the representation of one might be materially limited by the representation of the other.”<sup>[xx]</sup>

While obtaining written waivers of potential conflicts may be advisable when separate multi-generational clients are represented with regard to their respective estate plans, it may not always be required. Nonetheless, a written waiver and consent to the “separate” engagements, accompanied by a disclosure of relevant client considerations that may be important to the analysis required to provide “informed” consent might provide protection against some of the types of claims levied in *Scott v. Rosen*. While Rosen did provide a written document explaining certain potential conflicts he believed should be disclosed, and some of the consequences of separate representation of the various parties involved in 2012, before any of the complained of decanting occurred, there is no evidence that such disclosures were made at the outset of representation.

In addition, identifying the client and defining the scope of an engagement in a written instrument can be helpful. In defining the scope of the engagement, it can be helpful to document what is contemplated and further document (in writing) if the scope of the engagement changes. When all services under the engagement have been performed and the engagement completed, it is helpful to document that as well. By doing so, the planner can evidence a clear demarcation of the date when the engagement was completed and when the statute of limitations began running with regard to services performed under the completed engagement. It is also recommended that a new engagement be

documented when revisions are contemplated or new planning options are to be undertaken, followed by closing letters at the completion of each such engagement. Because it can often be difficult to identify when an engagement has been completed, especially when services are complex and as intertwined as that in the instant case, documenting completion of tasks under one engagement and delineating tasks to be performed under a new engagement can help to provide a line of demarcation for purposes of establishing when a statute of limitation starts to run.

In each engagement, it remains important to define who the client is and in what capacity they are (or aren't) to be represented. Doing so can help to identify conflicts and the duties owed. If a client is represented in more than one capacity, it may also be helpful to indicate what will happen in the event a conflict does arise (e.g., the client is both a trustee and a beneficiary).

When the estate plan is being formulated, the client to whom the estate planner generally owes a duty when the plan focuses on the creation of a trust, is the grantor of that trust. Once a trust is established (particularly once it becomes irrevocable), and the attorney represents the trustee, the duty owed by the attorney is to the trustee (considering the interests of the beneficiary - not the grantor) and as such the attorney has to advise the trustee accordingly. Because a client often views an attorney as the "family's attorney" or "their attorney", the client may not understand the distinction or varying duties owed unless a clear explanation is provided. Doing so may help to avoid hard feelings that can destroy the client relationship later on. Defining who the client under an engagement is, and in what capacity the client is represented, can help to identify the type of advice that will need to be rendered and the duty owed.

A pertinent example may be the Oshins' engagement letter dated May 12, 2014, appended as an exhibit to the Complaint. That engagement letter (although emailed to Rosen's email address), was addressed to Chase and his father, Steve, in their trustee (as opposed to any beneficiary) capacities. Presumably, they each eventually executed the same. That letter identifies the intended client(s), who were reflected as the trustees of the Chase M. Scott FHPA Trust (in their fiduciary capacity) and not to Rebecca, Steve individually, or any of the other beneficiaries. The scope of the engagement was also defined. It entailed preparation of a Nevada Trust and decanting of Chase's FHPA Trust into a new Nevada Trust. The signature lines for accepting the terms of that engagement clearly indicate "Chase M. Scott

FHPA Trust” with signature lines for Steve and Chase as trustees (as opposed to individually). Neither Steve nor Chase, in their capacity as co-trustees of Chase’s FHPA Trust owed Rebecca a legal or fiduciary duty when decanting that trust. One might assume a similar engagement was entered by Rob, in his status as sole trustee of Rob’s Trust (which was intended to be the remainder receptacle under the SRS GRAT created by Rebecca as grantor). Oshins never appears to have represented Rebecca in any capacity. Nonetheless, he now faces allegations that he (willingly or unwittingly) aided and abetted a fraud perpetrated against her and other members of the Scott family, none of whom it appears his firm ever represented in any individual capacity.

Thus, it appears that Oshins carefully and properly crafted engagement letters but was nonetheless caught up in a family maelstrom. So, even careful and proper practice alone does not eliminate the possibility of litigation. Perhaps it is time the profession reconsidered the ability of practitioners to limit their liability in retainer agreements, no differently than what accountants and appraisers working side by side with estate planning attorneys are able to routinely do. Without the ability to limit liability in this fashion, the attorney may be the only professional on the estate planning team bearing the risk of unlimited liability.

#### Joint Spousal Representation.

There is much that is difficult to discern, or which we don’t know, from the Complaint and its amendments. Whether Rosen obtained a waiver of conflict as between Steve and Rebecca with regard to the Scott Engagement is not really addressed in the Complaint, there are no conflicts alleged as between Steve and his 2<sup>nd</sup> wife, Rebecca. It appears that the Scott Engagement may have been open ended and that Rosen may not have entered into separate engagements for each of the trusts or amendments made to Steve and Rebecca’s respective estate planning documents.

Plaintiffs’ Complaint is replete with allegations that the 2010 SRS GRAT contained terms, as originally drafted and executed by Rebecca, contrary to Rebecca’s intended goal of treating all five of the children as equal beneficiaries. However, there is a marked absence of allegations reflecting that Steve held those same goals and intentions at the time the 2010 SRS GRAT was created. If Steve and Rebecca’s interests were not aligned, and Rosen could not mediate their desires (without advocating on behalf of one against the other), perhaps joint representation should have been

terminated, or those estate planning instruments which were inconsistent with the desires of both should have been referred out to separate counsel. It may also be possible that the interests of Steve and Rebecca were aligned at that time, but that later when the economic consequences of the 2010 SRS GRAT were known, that Rebecca reconsidered her objectives.

Whether clients represent members of a blended family or not, making sure spouses' interests are sufficiently aligned to engage in planning remains important. While it is possible to treat members of a family as separate engagements – ACTEC commentaries reflect that when engaged in estate planning for spousal clients, the married couple should be treated as a single indivisible client.<sup>[xxi]</sup> In those instances, when the client is a married couple, material information will need to be shared with each so that both can make informed decisions with regard to the terms of their estate plan. If Steve wanted to reward Rob for his efforts in building value in Phoenix, and there was a desire for Rob to have a controlling interest over the interests allocated to his siblings, funding a separate GRAT with a larger interest might well effectuate such desires. Key will be a determination if Rebecca shared such goals when the 2010 SRS GRAT was created. If Steve directed the plan, but Rebecca was not in agreement, separate counsel may have been advisable, especially if one of the clients wanted Rosen to persuade or advocate for the other spouse to engage in a particular course of conduct, as opposed to exploring options from which the clients mutually select.<sup>[xxii]</sup> In blended family situations, especially if disparate dispositive results are possible, practitioners might consider additional steps to confirm each spouse's agreement to the plan, and understanding of various possible outcomes of the plan.

### Decanting

Decanting is a commonly used technique to not only effectuate a change in trust situs, but amend administrative (and depending upon the jurisdiction, dispositive) provisions. This article is not intended to (and does not) address whether the decanting of Rob's Trust met all of Nevada's procedural requirements for decanting. Suffice it to say,

[t]rust decanting (or “decanting”) is an efficient way to amend irrevocable trusts. It is the legal process through which a trustee transfers some or all of the property held in an existing trust into a new trust with different and more favorable terms. Michigan law allows decanting—with one exception, noted below—without the consent of the beneficiaries, the settlor, or the court.

Decanting is available to trustees of trusts that allow discretionary distributions and contain no decanting prohibition. [\[xxiii\]](#)

By way of example, while Michigan does require that notice of an intended transfer to effectuate an administrative decanting be given to beneficiaries and the grantor of an irrevocable trust 63 days before the decanting occurs, only beneficiaries of the transferee trust are entitled to notice which is to occur within 63 after the transfer is made. Every state has different notice requirements. A cursory review of Nevada's statute (NRS 164.725) only appears to reflect that notice be provided to the beneficiaries who receive, or are entitled to receive, income under the trust or who would be entitled to receive a distribution of principal if the trust were terminated. Further, the Nevada statute only references that a beneficiary (as opposed to the grantor) may object to the proposed action. While Rob's Trust merely held a contingent expectancy in the residue of the SRS GRAT, at expiration of the annuity term the sole beneficiary who would meet the Nevada notice requirements with regard to Rob's Trust (which was the only trust decanted under the SRS GRAT) appears to have been Rob. Nonetheless, the provision of notice to the grantor, in advance of the decanting, even though not required, might have undercut any such claims. While such notice might have resulted in objections being raised, judicial approval of the decanting might still have been attained.

Therefore, even when not required, providing notice to the grantor, or, in the alternative, obtaining court approval, can provide protections to the transferring trustee from a later claim that the decanting violated material provisions of the trust. This provides the trustee of the transferring trust (defending or propounding a proposed action) a payment source while the trust still has assets in order to defend (or propound) trustee's actions. In addition, including provisions in the recipient trust that (1) it assumes all the liabilities and obligations of the transferring trust and (2) indemnifies the transferring trustee is generally recommended and helpful (but beware, some jurisdictions may not permit a decanted trust to provide greater rights of indemnification than were included in the original trust).

It may be noteworthy that when decanting of the 2010 SRS GRAT was contemplated (in early 2014), Plaintiffs (other than Robinson) had already consented to separate representations and provided the 2012 written conflict waiver. Since Robinson's beneficial interest (if any) under the 2010 SRS GRAT was not adversely affected (especially in light of Rob's power

of appointment to appoint away from her), no significantly identifiable risk to her existed as a result of a (proposed or actual) decanting of Rob's Trust. If Rebecca (as grantor and annuitant) and/or Rob did not survive the annuity term under the SRS GRAT, the decanting would have absolutely no effect on other interests (if any) conferred upon alternate takers under the provisions of the SRS GRAT.

Nonetheless, when obtaining a conflict waiver, it may be advisable to have each client sign in each of their respective represented as of the date of the waiver.

While not discussed, a non-judicial modification may facilitate effectuating very broad changes. If the family members were willing, and applicable governing law permitted, they may have readjusted the dispositive scheme to eliminate the favoritism shown Rob in the SRS GRAT, if in fact that was not what Rebecca as the grantor had truly intended (despite signing the instrument) and the modification was agreed to by all. Thus, a legal remedy to address the concerns raised may have existed, but family dysfunction may have limited or prevented its use. If there had been a family therapist would that therapist have been held responsible for the family dysfunction? Unlikely. Why should the results of that dysfunction be blamed on counsel? While that was not all of this case, it certainly may be a component of it.

### Grantor Didn't Know What She Was Signing

Despite the allegations contained within the Complaint as to Rebecca's estate planning intentions, assuming that a draft of the 2010 SRS GRAT was provided to Rebecca for her review in advance of the date of execution, she would have had the opportunity and ability to review the document and ask any questions that such a review might have engendered. Whether or not that had been the case, even a cursory review by her of the 2010 Scott GRAT No. 9 and the 2010 SRS GRAT, executed on the same day, would have reflected that they were different. Despite Rebecca being the grantor and annuitant of each, and each having the same annuity term, it's clear that the documents are different. They vary in length/number of pages. Schedule A to each GRAT reflects funding with different percentage of Phoenix and differing cash amounts. The article titles contained within each and their order vary. Article IV in the Scott GRAT No. 9 is entitled "Marital Trust", while the same article number in the SRS GRAT is capitalized, underlined and entitled "Steven R. Scott Trust". Early in Article III, which defines what is to happen when the annuity term ends, the SRS GRAT reflects that if Rebecca survives the annuity term and

Rob does as well, the entire residuary of the trust will be set aside as a separate trust to be administered under the article entitled "STEVEN R. SCOTT TRUST". The trustee provisions of the SRS Trust reflect under a paragraph entitled "Trust for Steven R. Scott" that Rob will be the sole trustee of Rob's Trust. No similar provision is contained within Scott GRAT No. 9. While some terms in a trust may be difficult for a non-lawyer to understand, these terms are set forth with easily discernable meaning, clearly identified by title and not buried in a paragraph of text. Therefore, if Rebecca had taken the opportunity to read the two GRATs before initialing every page, or cursorily reviewed each page as she initialed it, some of those differences should have been easily ascertained. Some possible steps to protect practitioners from this type of allegation might include:

1. Send clients draft documents in advance of signing and save copies of the cover letters or emails transmitting those documents.
2. Make it a routine practice to ask every person signing any document:
  - a. Have you read the document?
  - b. Do you understand the document you are about to sign?
  - c. Were any questions you had regarding the document answered to your satisfaction?
  - d. Is anyone forcing you to sign the document?
3. Are you signing the document of your own free will understanding its terms. When appropriate, conduct meetings (whether by web or in person) with other advisers (and/or the witnesses) present who can testify to the clients having heard explanations of the planning and acknowledged that they have read and understood the documents.
4. Use table of contents.
5. Use captions that are descriptive of what they represent.
6. Send cover letters and when complex planning is involved consider the use of memorandum at key stages of the process.
7. When drafts of documents are sent to the client, consider including language which requests that the client advise the drafter of any questions they may have as well as let the drafter know when they are satisfied that the documents accurately reflect the client's estate planning desires before the documents are finalized for execution.

Including the client in the planning process, providing the client with options and having the client select from among those options, as well as having the grantor-client (as opposed someone else) identify important terms, such as who will be the trustees, who will be the beneficiaries and what percentage the beneficiaries interest will entail, are all important aspects of

a client's responsibility for reasonably foreseeable estate planning outcomes. This can be done in a variety of ways. For example, if a memorandum is sent, update the memorandum indicating the various options listed and the approach selected by the client.

When long documents are prepared, the provision of a summary of important provisions (or at least where to look in the instrument) might be helpful to the client's review and understanding of draft instruments.

The potential import of providing draft documents for client review in advance of the execution date should not be underestimated. While it appears that Rosen had a practice of generally communicating with Steve or the CFO (presumably with the Parents approval) when it came to issues relating to the Parents' estate plans and the execution of documents prepared in furtherance thereof, it might be helpful to ask questions in the presence of the witnesses to the execution geared toward ascertaining whether the grantor:

1. was provided with a draft of the instrument in advance of the execution;
2. had an opportunity to review the document;
3. understood the document;
4. confirms that the document accurately reflects the grantor's estate planning desires;
5. any questions they had have been addressed;
6. demonstrated sufficient capacity to engage in the plan and execute the document; and
7. was doing so of his or her own will, free of any undue influence.

When multiple documents are executed on a single day, establishing the identify of each document in front of the witnesses and that the client had an opportunity to review each document, understood the contents and that the contents accurately reflected the client's desires might be helpful against claims, such as those espoused in the *Scott v. Rosen* litigation, that the attorney "slipped" a document under the client's nose to sign without any explanation of what the document entailed.

### Disparate Treatment of Beneficiaries

When children (or other like situated beneficiaries of an overall plan) are to be treated disparately, it might be helpful to have the grantor indicate an understanding of the disparity and provide a rationale for such treatment in the presence of the witnesses to the execution of the document creating the disparity (or attempting to ameliorate a disparity). Even if such representations aren't made in the presence of the witnesses, contemporaneous notes maintained by the drafting attorney might also be beneficial in documenting the rationale provided by the client for the terms contained within the instruments which result in such disparate treatment or actions. Sending a communication to the client which points out the different treatment during the drafting stage can also be helpful against a claim that the client didn't realize or know that beneficiaries were being treated disparately (especially if those differences won't be addressed during the execution of the instrument).

Further, whenever different trusts with different beneficiaries are funded with different interests, the potential that one trust's assets might outperform those funded in other trusts always exists. When created it was clear that the SRS GRAT was immediately worth more than the Scott GRAT No. 9. If a GRAT works as intended, it will carry appreciated assets to the residuary beneficiaries. The goal is for the GRAT assets to outperform the annuity obligation so that appreciation will hopefully pass to residuary beneficiaries. Given that goal, and the apparent initial disparity between what Rob might anticipate receiving under the 2010 SRS GRAT versus what the beneficiaries under the Scott GRAT No.9 would receive, and the apparent increase in disparity should appreciation in the value of Phoenix occur, a written communication pointing out the obvious differences might have clarified and confirmed the intent to treat the Scott children differently (at least as to the Phoenix interest).

### Grantor Trusts

While the GRATs were comparatively short documents (as far as trusts go), it might be helpful for the attorney to outline, in writing, how a GRAT is intended to operate and who the intended beneficiaries are should the grantor survive the annuity term. Clients may have a hard time grasping the ramifications of the grantor trust rules and how it is that they will be taxed on assets they've given away and no longer have ownership. It can be helpful to explain that one of the purposes of the annuity term is to reduce the gift tax value attendant to the GRAT. An additional goal of a GRAT is to pass appreciation in assets (beyond that needed to satisfy the annuity

payments) to the residuary beneficiaries free of additional gift tax consequences. While the GRAT is characterized as a grantor trust under the grantor trust rules (which it must be during the annuity term), the grantor will be responsible for the income (and capital gains) tax consequences of the trust. Various provisions (and actions) can trigger grantor trust status. Outlining the terms selected (and their very existence or elimination) as having an impact on grantor trust status may aid in client understanding. A challenge with this, is how much is enough? If a summary of a page or so is provided, what becomes of the other provisions or consequences that were not explained? What of clients who refuse or indicate that they don't want to pay for the costs of such documentation and explanations? Perhaps a result of this type of case is that practitioners may wish to carefully consider whether they should serve clients who are so fee conscious that they limit the documentation the practitioner believes should be provided.

Because both the 2010 Scott GRAT No. 9 and the 2010 SRS GRAT were characterized as grantor trusts in 2014 when the interest in Phoenix was sold, Rebecca (as grantor and the Parents as joint income tax return filers) bore the tax consequences of the sale, as opposed to the trusts (unless the trusts included a discretionary tax reimbursement clause and the trustee opted to make a reimbursement). Given the significant gain which resulted from the sale, the Parents payment of the tax obligation that would have been attributable to the trusts (as a result of grantor trust status) represented an additional and significant gift that was free of gift and estate tax consequences.

While these benefits (and consequences to the grantor) may be explained to the client, litigation tends to abound when the client forgets (or isn't sufficiently informed of) the implications of grantor trust status. Clients don't always come back to the drafting attorney after a plan is implemented. Providing an income tax "burn" projection might help clients to understand how a grantor trust might work. However, that is not generally done by the attorney as many attorneys don't have the skills to create financial models. Further, consider the wide disparity of economic and tax outcomes. The wide range of possible values from the initial value to the actual sale value in the instant case might also have made such a projection somewhat misleading. Interim updated projections may assist the grantor to determine when and whether to turn off grantor trust status. Not every planner includes such projections as part of what they do during the planning or administration process. It might be helpful, in defining the

scope of the engagement, to indicate whether a projection is envisioned under the engagement, whether ongoing analysis or projections will be provided, or whether it is advisable for the client to engage someone else to provide the client with a projection before implementing a plan that is envisioned to include a grantor trust for income tax purposes.

Moreover, often the drafting attorney will not have ongoing access to the financial information of the grantor or the grantor trust. Therefore, it remains important for communications between the attorney and other financial advisors to be approved by the client and the scope of services (current and ongoing) defined, particularly if the client is relying upon the attorney to provide advice as to when it might be appropriate to consider exercising a swap power or whether to turn off grantor trust status during the grantor's lifetime. This generally requires collaboration of all advisers on the planning team, which happens too rarely. And that collaboration, if it occurs, will increase costs which many clients do not wish to bear. It may also negatively impact attorney client privilege. In many instances, perhaps most, other advisers will have to address these ongoing issues. Further, unless the attorney expressly undertakes trust administration tasks, the attorney will not be responsible for them; identifying what is or is not covered under the scope of an engagement might be helpful in this regard.

One power that is often included to create grantor trust status is the power of substitution. While some planners tout this as a mechanism that can provide flexibility to (i) substitute low basis assets with high basis assets in order to obtain a step up in basis on the death of the grantor if the substitution is properly timed, or (ii) the power to retrieve a closely held interest over which the grantor wishes to regain or change control (such as in the *Benson v. Rosenthal* litigation involving interests in a certain NFL team), the exercise of this power can be much more complicated than a client might generally understand.

In *Scott v. Rosen*, Rebecca claims she would never have turned off grantor trust status if she understood that doing so would eliminate her right of substitution. She alleges Rosen misrepresented the benefits of turning off grantor trust status, by only indicating that doing so would prospectively save the Parents income taxes. Rebecca alleges that retaining her right of substitution would have permitted her to equalize or mitigate the disparity between what Rob and the other children were receiving under the 2010 Scott GRAT No. 9 and the 2010 SRS GRAT and, by extension, retaining this right was more important to her than any income tax savings that might

have been effectuated by turning off grantor trust status. Disregarding the impact of decanting of Rob's Trust, the allegation that she would have been able to equalize the children's distributions by exercise of a power of substitution may be speculative at best, especially given the extra-ordinary appreciation that had already occurred and the value of assets contained in Rob's Trust or Rob's Nevada Remainder Trust when she turned off grantor trust status.

If the document is silent on the requirements for exercising a power of substitution, it can be helpful, when including a swap power, to explain that in order to exercise the power the grantor must swap assets of *equal* value. Revenue Ruling 2008-22 imposes upon the trustee a fiduciary duty to ensure that the grantor complies with the terms of the swap power and to make sure that the assets being substituted are of *equal* value. Moreover, the grantor may not exercise the power in a manner that can shift benefits among trust beneficiaries. In this regard, Rev. Ruling 2008-22 requires that:

“[i]n situations where the grantor of a trust holds a nonfiduciary power to replace trust assets with assets of equivalent value, **the trustee has a duty to ensure that the value of the assets being replaced is equivalent to the value of the assets being substituted. If the trustee knows or has reason to believe that the exercise of the substitution power does not satisfy the terms of the trust instrument because the assets being substituted have a lesser value than the trust assets being replaced, the trustee has a fiduciary duty to prevent the exercise of the power.** See Restatement (Third) of Trusts §79<sup>[xxvi]</sup> (2007) and Uniform Trust Code §§801 and 802 (2005). <sup>[xxv]</sup>

...However, under the terms of the trust, **the assets D transfers into the trust must be equivalent in value to the assets D receives in exchange. In addition, T has a fiduciary obligation to ensure that the assets exchanged are of equivalent value. Thus, D cannot exercise the power to substitute assets in a manner that will reduce the value of the trust corpus or increase D's net worth.**

In *Jordahl Est.*<sup>[xxvii]</sup>, the Tax Court found that **a grantor** is bound by fiduciary standards in the exercise of a right of substitution, even when the governing instrument is silent, to assure that the beneficiaries receive equivalent value. Had Rebecca sought to swap assets of the SRS GRAT

before the sale of Phoenix occurred, the facts outlined in the Complaint demonstrate that ensuring that the value of substituted assets was equivalent to the value of the trust's interest in Phoenix, at the time of the swap, could have proven to be extremely difficult. Explaining the difficulties associated with the exercise of the power, can be helpful during the planning phase and at any time when the substitution of assets may be contemplated. Moreover, she would have nonetheless been required to substitute assets in the trust (at any time the swap power was exercised) of equal value, which would likely have done little to equalize bequests amongst the children.

### Equalization Clauses

Plaintiffs allege that they asked Rosen to help analyze what could be done to redress the then apparent imbalance between their children's trust interests. It's not uncommon for clients to have a change of heart. When irrevocable trusts (or gifts) which provided a disproportional or disparate benefit among intended beneficiaries are utilized, an equalization clause in the client's revocable trust may provide some level of amelioration in the disparity. Such clauses may be formulaic in approach. Providing clients with options from which to choose and clarify as to why an already irrevocable trust may or may not provide a viable option can help. In providing options, it can be helpful to outline the potential pros and cons of those options, at least generally, so that the client cannot later effectively claim they didn't understand risks involved or the potential consequences of the options they selected.

Perhaps practitioners might consider whenever there is a disparate, or potentially disparate distribution, having the client sign a simple acknowledgement in a separate document that they are aware of and intend that disparate distribution. Perhaps documenting the disparate distribution in a memorandum to confirm the intent of the client, may reduce the risks of these types of allegations. It is possible that some measures to corroborate intent, or other precautions, were taken in the instant case, but it was not clear from the documentation available.

### Appointment as a Fiduciary under a Client's Plan

Plaintiffs allege that Rosen interjected and appointed himself, via his drafting, as a co-trustee, agent, nominated executor/personal representative, or inserted himself in another fiduciary position. The selection of a fiduciary should be the estate planning client's choice.

Nothing precludes the client from nominating their attorney to act in a fiduciary (or non-fiduciary) capacity. In fact, in a blended family scenario, or when the attorney has been actively involved with the client and the client's family, use of a long-trusted advisor may provide a myriad of benefits. That being said, it may be advisable to let the client know specifically, and perhaps in writing, that the client has the right to choose someone else to fill that role. It's advisable that the attorney not solicit the appointment and advise the client of the potential consequences of nominating the attorney or someone associated with his firm. Perhaps if the estate planning attorney will be appointed they might consider having a separate document signed by the client acknowledging that it was the client's wish and request, not the recommendation of counsel, that the attorney be appointed in that capacity, or the drafting attorney might consider including language that reflects:

Section XXX.     *Conflict Waiver*

(a) I acknowledge that I have voluntarily appointed certain Trustees and/or Trust Protectors (each a "Trusted Advisor") to serve as a successor Trustee or Trust Protector under this instrument. I understand that appointing a Trusted Advisor may create a conflict of interest for any one or more of the following reasons: (i) the Trusted Advisor drafted or advised me in connection with drafting and planning for the preparation of this instrument; (ii) the Trusted Advisor will be paid compensation for serving in such capacity; and (iii) the Trusted Advisor may provide services for a fee as referenced in Subsection (c) below.

(b) I waive any conflicts of interest now or hereafter arising from the different roles which the Trusted Advisor may separately or concurrently undertake because I trust the Trusted Advisor to serve as a Trustee and/or Trust Protector. The selection of the Trusted Advisor was a personal choice made by me with full knowledge of these conflicts, and was at my selection and not based upon any suggestion or recommendation of the Trusted Advisor. The Trusted Advisor is and has been a person who I trust and in whom I have confidence as an advisor. As such, the Trusted Advisor is intimately aware of my intentions regarding (i) my estate plan, (ii) my concerns regarding the administration of assets, (iii) the assets that comprise (or may

comprise) the trust, as well as my desires with regard to the future disposition thereof, and (iv) my explanation of the personalities or characteristics of my family members and related family dynamics. I have selected the Trusted Advisor to act as a Trustee and/or Trust Protector hereunder, knowing full well that I could name other persons to serve in that role under this instrument, but I believe it to be in my best interest and the best interests of the beneficiaries for the Trusted Advisor to serve as a Trustee and/or Trust Protector as provided for in this instrument. Moreover, it is my belief that in each case where the Trusted Advisor may serve with one or more co-Trustees, such co-Trustee(s) will also benefit from the Trusted Advisor's guidance.

(c) I authorize the Trustee to retain a firm which employs or is otherwise associated with the Trusted Advisor, to provide services for a reasonable fee to the Trusts established hereunder and/or to the Trustees (including Trusted Advisor as a Trustee), which fees will be paid from Trust assets. Such services may include, but are not limited to, legal, accounting, tax, consulting and/or investment advisory services.

(d) All beneficiaries of any trust or subtrust created under this instrument shall be bound by the acknowledgments and waivers stated in this Section and/or stated elsewhere in this instrument.

While exculpatory provisions are commonly included in estate planning documents in order to entice a non-family fiduciary to accept an appointment, an exculpatory provision which exonerates the drafting attorney, should they act in a fiduciary capacity under the instrument, should not be included without the informed consent of the client.<sup>[xxvii]</sup> If separate written consent is not obtained, it is important that the clause (and its potential implications) at least be pointed out to the client.

#### Billing Someone Other than the Client for Whom Services are Rendered

The Parents were billed and paid for services which Rosen apparently rendered for trustees or other beneficiaries. It's not prohibited or uncommon for this to occur. A lawyer asked to provide legal services on such terms may do so provided the requirements of MRPCs 1.5 (Fees), 1.7 (Conflict of Interest: Current Clients), and 1.8(f) are satisfied.<sup>[xxviii]</sup>

It is helpful, however, for the engagement to reflect that the person who isn't the client is acting as a guarantor of payment (rather than the client), in such instances. While not required, doing so may help to avoid the types of allegations Plaintiffs asserted against Defendants and identify that the non-client (with regard to such services) knowingly agreed to pay the same. The reality is that many clients choose to use business entities or other "persons" to pay legal fees. Parents frequently pay the legal fees of children or other heirs. Clients use business entities to pay legal fees, on the premise of trying to garner a tax deduction that might not be available if paid by the appropriate party, etc. It should not be to the professional adviser's detriment if and when clients undertake these actions. Billing by the practitioner is also a complex matter with wealth or large families where a myriad of business, trust, planning and other issues are involved and interconnected. What remains important is that the engagement clearly identify who the client is.

In the estate planning context, it may also be important to note that payment for such services by someone (or an entity) other than the client under the engagement, may result in a gift or other adverse tax consequences. Under such circumstances it may be important to consider whether payment is to be construed as a loan (such as was made to address Premier's initial fiduciary fee) or a gratuitous payment.

Careful record keeping (e.g., billing the appropriate client, with a copy statement to the party who may be expected to pay the obligation) may help to avoid some of the confusion exemplified in *Scott v. Rosen* as to who was the client and the extent to which a conflict may or may not exist.

### Perceived vs. Actual Conflicts

As already indicated clients often don't understand the distinction between representation in an individual, fiduciary and beneficiary capacity. The failure to explain and identify the distinctions can lead to hard feelings which may result in the loss of a significant client relationship that might have been avoided if those distinctions had been identified and explained in advance. It is possible to obtain prospective waivers under certain circumstances, but the key to an enforceable waiver is informed consent.

A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter. These conflicts are said to be "waivable." Thus, a surviving

spouse who serves as the personal representative of her husband's estate may give her informed consent, confirmed in writing, to permit the lawyer who represents her as personal representative also to represent a child who is a beneficiary of the estate. The lawyer also would need an informed consent from the child that is confirmed in writing before undertaking such a dual representation. However, a conflict might arise between the personal representative and the beneficiary that would preclude the lawyer from continuing to represent both, or either, of them.

Comment 22 to MRPC 1.7, as amended in 2002, states:

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b), provides: "A lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest" in a "wider range of future conflicts than would have been possible under the Model Rules prior to their amendment."

Comment 22 to MRPC Rule 1.7 continues:

The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. ... [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

As used in Comment 22 and ABA Formal Ethics Opinion 05-436 (2005), the term “waiver” means “informed consent,” as defined in MRPC 1.0 (Terminology).<sup>[xxx]</sup>

However, not all conflicts may be waived.

Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a “non-waivable” conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a prenuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent’s estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7.<sup>[xxx]</sup>

When the attorney wears multiple hats and/or represents multiple clients within the same family, it can be important to analyze whether any of those hats, clients or responsibilities create perceived or actual conflicts, whether any such conflict can be currently or prospectively be waived, and whether a conflict has arisen that requires further waivers or can’t be waived, in order to address the same with the client or decide whether representation is advisable or even appropriate.

Even an attorney who does everything right, and implores defensive practices, can find themselves as a defendant in a malpractice or breach of fiduciary case. The emotional and financial costs of having to defend against such an action, and the adverse impact such claims can have to a reputation built over many years, can be extensive. This may indicate that an important defensive practice may also include carefully discerning who

to accept as clients and a continued evaluation of whether to retain them as clients as the engagement progresses.

**HOPE THIS HELPS YOU HELP OTHERS MAKE  
A POSITIVE DIFFERENCE!**

*Sandra D. Glazier*

*Martin M. Shenkman*

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**CITATIONS:**

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<sup>1</sup> LISI Estate Planning Newsletter #2934 (January 20, 2022).

[iii] Estate Planning Newsletter #2725 (May 16, 2019).

[iiii] LISI Estate Planning Newsletter #2934 (January 20, 2022).

[iv] *Scott v. Rosen, et al, Broward County docket no. CACE20000868*

[v] Malpractice Suit Against Nelson Mullins Atty Ends in Mistrial, Law 360, July 21, 2022.

[vi] Fla. Doctor Seeks Retrial of Nelson Mullins Malpractice Claims, Law 360, August 19, 2022.

[vii] <https://blog.cvn.com/trial-opens-against-nelson-mullins-atty-accused-of-malpractice-in-planning-estate-worth-hundreds-of-millions>

[viii] <https://www.law360.com/articles/1421550/nelson-mullins-to-face-punitive-damages-claim-in-estate-row>

[ix] *Scott v. Rosen, et al, supra*, Complaint ¶8.

[x] This chronological recitation of background is based upon and gleaned from the allegations contained in the Complaint and attached exhibits.

[xi] It is unclear from the Complaint (and the article referenced in fn. v) whether FHPA is the same entity as Vista Healthplan, which sold in 2007 for \$685 million and resulted in Chase receiving \$3 million more than his siblings as a result of the sale. According to Law360, Chase was leading that company at the time of the sale, and the 30% interest provided for Rob's benefit was to address an imbalance resulting from the disposition of the Vista Healthplan interests.

[xii] According to Law360, *supra* at fn. v, a 30% interest in Phoenix was valued at \$685,000 at the time the SRS GRAT was funded.

[xiii] *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. Dist. Ct. App. 2013).

[xiv] *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985).

[xv] Jonathan Gopman, Jeff Baskies, David Rubin & Evan Kaufman on *Berlinger v. Casselberry: Why the Decision Was Wrong and Florida May Not Be a Bad Trust Jurisdiction for Discretionary Trusts*, LISI Asset Protection Planning Newsletter #237, Feb. 14, 2013.

[xvi] Law360, *supra* at fn. v.

[xvii] Florida Rules of Professional Conduct, May 2, 2022, Chapter 4, Rules of Professional Conduct Preamble: A Lawyer's Responsibilities, Scope, at pp. 174-175.

[xviii] ACTEC Commentaries-5<sup>th</sup>, ACTEC Commentary on MRPC 1.7, at pp. 101-102.

[xix] See Example 1.7-1a, ACTEC Commentaries, *Id.*, at pp. 103.

[xx] *Id.*

[xxi] MRPC 1.7, ACTEC Commentaries, Joint or Separate Representation, at 102-103, citing generally Price on Contemporary Estate Planning, §1.6.6 at 1059 (2014).

[xxii] Sandra D. Glazier & Martin M. Shenkman, *Joint/Dual Representation – Add protections to your retainer agreements to reflect challenges involved*, Trust & Estates, WealthManagement. (July 20, 2017), at. 24-29

[xxiii] Salvatore J. LaMendola, Michigan Bar Journal, September, 2017, Best Practices, Decanting, at p. 44. Internal citations omitted.

[xxiiii] Salvatore J. LaMendola, Michigan Bar Journal, September, 2017, Best Practices, Decanting, at p. 44. Internal citations omitted.

[xxv] Rev. Ruling 2008-46 corrected the citation to Restatement Third of Trust to Section 79 (2007) as opposed to Section 75 (2007).

[xxvi] Rev. Ruling 2008-22.

[xxvii] 65 TC 92 (1975), Acq. 1977-2 CB.

[xxviii] ACTEC Commentaries, *supra*, MRPC 1.8 Commentary at p. 129.

[xxix] *Id.*, MRPC 1.8 Commentary at p. 129.

[xxx] *Id.*, MRPC 1.7 Commentary at p. 105.

[xxxi] *Id.*, MRPC 1.7 Commentary at p. 104.