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# Touching the Third Rail: Diversity, Culture and Ethics in Estate Planning


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## I. Introduction [1]

Faith, religion and culture define people in ways other aspects of their lives do not. When an estate planning attorney is working with someone strong in his or her faith or culture, the attorney does a greater service to the client by having an understanding of how a person's faith or culture might impact the estate planning process.

### A. The Power of Faith

According to the Pew Research Center's U.S. Religious Landscape Study, published in 2015, 77% of Americans identify themselves with a religion. Of those who identify with a religion, 70.6% of the U.S. population identifies themselves at Christians, with the following breakdown:

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

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

| Religious Faith | Percentage of U.S. Population |
|---|---|
| Jewish | 1.9% |
| Muslim | 0.9% |
| Buddhist | 0.7% |
| Hindu | 0.7% |
| Other Faith | 1.5% |

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

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

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

## II. Estate planning and drafting issues (in general).

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

1. Selection of fiduciaries
2. Selection of guardians (for minor children)
3. End of life issues
4. Disposition of remains

### A. Selection of Fiduciaries

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

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

### B. Guardian for Minor Children

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

### C. End of Life Issues

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

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

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

### D. Disposition of remains

Religions have varied rules regarding disposition of remains. Some religions mandate burial and prohibit cremation (Islam, Judaism, many Christian Orthodox churches). Others mandate cremation (Hindu). Religious clients may want to spell it out in a will, Disposition of Remains document, or power of attorney for health care.

## III. Specific Drafting Issues (Per Faith)

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

### A. Christianity

#### 1. Inheritance Issues

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

There appears to be only one verse in the Bible on inheritance issues:

> *If a man dies and has no son, then you shall cause his inheritance to pass to his daughter*.
>
> (Numbers 27:8)

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

#### 2. Burial Issues

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

##### a. Cremation (Protestant View)

On account of the varied Protestant faith traditions, there is no rule per se regarding cremation. Cremation has become increasingly popular among clients, with the remains then kept by family or interred at a cemetery the same way a body would be. The Bible itself is silent on the subject, though the Old Testament is in part a history of the Jewish people, and Jewish tradition prohibits cremation of the

body except in exigent circumstances. Jesus, himself a Jew, was interred in a tomb, thus the longstanding Christian traditional way of body disposal has been burial (this also shows a stark contrast with the pagan tradition in Europe pre-Christianity of burning a dead body).

**b. Cremation (Catholic View)**

Cremation has been more discussed and considered in the Roman Catholic faith. Before 1963, the Catholic Church insisted that deceased Catholics be either entombed or buried, as that was what was done with Christ's body. Even now, the Church's Order of Christian Funerals acknowledges that "cremation does not hold the same value" as burial of an intact body.

The Catholic Church now allows for cremation. The cremated remains are to be placed in a respectful vessel and treated in the exact same way that a family would treat a body in a casket. The vessel is then to be buried or entombed immediately after the funeral in the same timely manner as a body. Cremated remains of a loved one are not to be scattered, kept at home or divided into other vessels among family members, just as it is clear that these practices would desecrate a body in a casket. The Church allows for burial at sea, providing that the cremated remains of the body are buried in a heavy container and not scattered.

The Catholic Church prefers that the full body be present for the funeral rites.

**c. Cremation (Orthodox Churches)**

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

**3. Organ Donation**

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

**4. Mission Work (Mormon)**

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

Though the mission work is for the benefit of the Church, families are expected to financially support the mission work of a member of the family. Therefore, in cases involving Mormon clients with minor children, there might be a strong desire to include a specific instruction in any trust for a child that the trustee will financially support mission work by the child. Such support might otherwise be read into

the obligation of maintenance or support in reasonable comfort, but often Mormon clients will want a very specific instruction to guarantee such support for a child who might choose to go on mission after his or her parents are dead.

### B. Judaism

#### 1. Inheritance Issues (in General)

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

#### 2. General Principles of Inheritance

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

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

#### 3. Halachic Inheritance

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

a. Husband
b. Sons (first born son receives a double portion of a father's estate)
c. Daughters
d. Decedent's father
e. Paternal brothers
f. Paternal sisters
g. Paternal grandfather
h. Paternal uncles
i. Paternal aunts
j. Paternal great grandfather
k. Paternal great grandfather's brothers
l. etc

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

However, her lack of controls restricts her ability to gift assets or otherwise direct their disposition.

**a. Issues in complying with Jewish law**

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

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

1) The testator prepares an estate plan that reflects his testamentary wishes. This may include distributions that vary significantly from what is required under halachah—leaving assets for his wife, providing equal distributions to his children, etc.

2) The testator creates a conditional debt to the beneficiaries named in his estate plan, in an amount that exceeds the value of his assets, payable a moment before death.

3) At the testator's death, the halachic heirs will have a choice. They can choose to comply with the terms of the estate plan, which would then void the debt by its terms and allow the assets to pass in accordance with the estate plan. Alternatively, they can demand that the asset be distributed in accordance with halachah, in which case the debt must first be satisfied, leaving no assets available for distribution to the halachic heirs.

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

Most scholars recommend including a provision in the estate plan that provides for a distribution of some amount (oftentimes $1000), to be distributed in compliance with traditional Halachic rules of inheritance. The preferred language also states that the provisions, other than the gift made in accordance with halachic inheritance rules, are a gift completed through a proper *kinyan*. Jewish law requires a *kinyan*, or formal act, to make any sale or transfer of assets valid. While a *kinyan* is not required if assets are passed in accordance with halachah, a *kinyan* is required if the assets pass in any other way. Rabbi Aryeh

Weil and Martin Shenkman, in their article "Wills: Halakhah and Inheritance,"[2] suggest the following language:

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

This approach only works for a husband's estate plan. In order to distribute a wife's assets in a manner other than what is proscribed by halachah, the husband must consent. Several examples of a halachic Will and addendum creating the debt are available at bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf.

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

### 4. Health Care Power of Attorney

There are multiple views on the continuation of life giving treatment for an individual who has a terminal illness within Judaism. In general, this split is reflected along the lines between the Orthodox and Conservative movements, each of which has created a model Health Care Proxy (see https://rabbis.org/wp-content/uploads/2020/11/RCA-HealthCare-Proxy_11-9-2020.pdf and https://www.rabbinicalassembly.org/sites/default/files/assets/public/publications/medical%20directives.pdf).

In general, Orthodox Judaism believes that only G-d can make decisions regarding life and death; therefore, all available methods to maintain life must be used. Food and hydration cannot be withheld.

Within the Conservative movement, there is a split of opinion. One view, advocated by Rabbi Avram Israel Reisner, requires the continuation of those things that are "of the body," such as food, medication and hydration; those items that reproduce, circumvent or supersede the body, such as respirators, may be removed. In contrast, Rabbi Elliott Dorff allows for more latitude to refuse treatment, believing that extending life without hope for a cure is not required; therefore, medication, food and

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[2] Beth Din of America Halachic Will Materials 6 (2008), at www.bethdin.org

hydration may be withheld or withdrawn. Both positions are acceptable to the Conservative movement, and the choice between them must be made by each individual within the Health Care Proxy document.

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

#### 5. Organ Donation

Most Jewish movements allow for organ donation, as the ability to save a life is highly valued. However, the Orthodox definition of when death occurs may, as a practical matter, make organ donation impossible, as Orthodox Judaism does not deem brain death to be the same as death.

#### 6. Burial Issues

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

### C. Islam

#### 1. Inheritance Issues (in General)

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

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

When a Muslim dies, there are four duties:

a. Payment of funeral expenses;
b. Payment of his or her debts;
c. Execution of his or her will (equal to 1/3 of the estate); and
d. Distribution of remaining estate amongst the heirs according to Sharia

#### 2. General Principles of Inheritance

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

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

### 3. Qur'anic Inheritance

The Qur'an contains only three verses [4:11, 4:12 and 4:176] which give specific details of inheritance shares, though they provide some detail to the issue. Qur'an 4:11 has provisions that assign certain relatives as entitled to fractional shares of a person's estate. This includes a spouse, parents, daughter and siblings (these are the Qur'anic heirs).

The Qur'an mentions nine such Qu'ranic heirs. Muslims legal scholars have added a further three by analogy; so there are a total of twelve relations who can inherit as Qu'ranic heirs.

Interesting enough, sons are not among the Qur'anic heirs; but after Qu'ranic heirs are provided for, the balance of an estate goes to nearest male "agnate". However, the same verse says that "to the male the like of the portion of two females . . ."

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

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

a. One-third as directed by the testate instrument of the decedent (discretionary share or wasiyya bequest);
b. Qur'anic heirs assigned their portions, based on family relationship to the decedent (based on class of inheritors); and
c. Balance to nearest male agnate.

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

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

### a. Spouses

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

There are six arguments in favor of the way the system deals with the rights of women in marriage to their own property and the obligations of husbands:

1) Before marriage, any gift given by the woman's fiancé to her is her own property, and her husband has no legal right or claim to it even after marriage.
2) Upon marriage a woman is entitled to receive a marriage gift (Mohr), and this is her own property.
3) Even if the wife is rich, the full responsibility for her upkeep and that of the household is her husband's responsibility.
4) Any income the wife earns through investment or working stays as her separate property, and it is not required for upkeep of the household.
5) In case of divorce, if any deferred part of the Mohr is left unpaid, it becomes due immediately.
6) The divorced woman is entitled to get maintenance from her husband during her waiting period (iddat).

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

### b. Daughters and Sons

"If (there are) women (daughters) more than two, then for them two-thirds of the inheritance; and if there is only one then it is half." [Qur'an 4:11]

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

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

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

### c. Brothers and Sisters:

If the deceased is childless, and has any brothers and/or sisters, the share of brothers and sisters of the deceased shall be exactly the same as that of his sons and/or daughters respectively, if he had any. Thus the share of the brothers and sisters is as follows:

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

### d. Parents

In case a person has neither children nor brothers or sisters, then his parents shall share the balance of his property and assets after satisfying the claims of the wasiyya bequest.

### e. Common Examples Incorporating the Above Four Rules:

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

*Example #2*: Husband dies married but with no children, but he has a brother and a sister who survive him. Husband does not exercise the right to make a wasiyya bequest (so no discretionary one-third). A fourth to Wife, and the balance to the siblings, with the brother receiving twice the share of the sister.

*Example #3*: Young man dies unmarried and with no children. He is an only child but both his parents survive him. Dad gets two-thirds and Mom gets one-third.

### f. Inheritance to or from a Non-Muslim

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

### g. Illegitimate and Adopted Children

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

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

### h. Importance of Proper Estate Planning for Devout Muslims

Since the rules of inheritance for Muslims can contradict both state law of intestacy as well as forced shares for surviving spouses, for the devout Muslim who wants to avoid a conflict between local secular laws and Sharia, it is vital that planning be done during life to effectuate an estate plan to reflect the Muslim client's religious views. The surest way to achieve this is through planning with living trusts (planning with wills only could open the estate up to a spousal shares claim in probate). Note that Islamic law has no concept of beneficiary designations, paid-on-death clauses, or rights of surviving joint tenants, and property of this nature owned by a Muslim will be treated as part of the total estate subject to the inheritance rules. There are no rules on living trusts as well, but if treated like will substitutes, it would seem that they can be used to meet a Muslim client's wishes in adhering to the tenets of Islam with respect to inheritance rules, but not to circumvent those rules.

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

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

### i. Investment Issues under Sharia

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

#### 1. <u>Riba</u>

The prohibition on riba is based on the Islamic view of money, which is seen as a "medium of exchange", having no intrinsic value.[3] This view leads to the concept that exchanging money should not result in profit; thus, a Muslim cannot earn money from lending to someone or receiving money from someone. That means no charging or receiving of interest on money, including bank accounts and mortgages.

[3] "Islamic finance— The lowdown on sharia compliant money", The Guardian, October 29, 2013.

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

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

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

### 2. Haram

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

### 3. Gharar

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

### 4. Investment implications of prohibition on riba, haram and gharar

Complying with the prohibitions on riba, haram and gharar investments pose particular challenges for fiduciaries. It is possible to screen various companies and investments to ensure they comply with Islamic law; in general, the screening is done with oversight by an Islamic organization or cleric who can certify the screening. However, because of the changing approach by companies to their revenue streams over time, continuous screening is required. As a result, many Islamic investors opt for mutual funds that are created and monitored continuously using an Islamic screen.

Numerous funds exist, including the Mizan Fund, Tat Ethical Fund, Taurus Ethical Fund, AI Ameen and Amana Funds. According to the Amana Funds website, their screens "seek to eliminate:

- bonds and other interest-based investments

- stocks of companies that have high debt (sometimes referred to as highly leveraged)
- securities of companies in industries that do not adhere to Islamic principles, such as liquor, gambling, pornography, pork, insurance, banks, etc.
- mutual funds or hedge funds that trade securities frequently (have high turnover rates) because frequent trading is seen as gambling by some Islamic scholars

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

The Prudent Investor Rule, as codified in Section 90 of the Restatement (Third) of Trusts (2007), states:

> The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust.

This standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust. In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so. The prudent investor rule allows the trustee to consider risk and return in the context of the entire portfolio; it does not prohibit any given investment. The trustee has a duty to manage risk, not to avoid it. The Restatement approach judges a trustee's investment choices at the time the choices are made, not later in time based purely on the result of an investment portfolio.

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

### 4. Burial Issues

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

Cremation is forbidden.

### 5. Organ Donation

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

## IV. Cultural Issues[4]

### A. Introduction

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

In this outline, I will focus on the impact of Asian cultures on estate planning for Asian Americans because that is what I am most familiar with, both personally and professionally. However, variations of the same themes can be found in many other cultures as well.[5] There is no precise definition of what is "Asian." The term "Asian" encompasses people from a vast geographical area, with different historical, cultural, religious, and political backgrounds, including populations that have been at odds with each other over the course of history. To make this discussion more manageable, the term "Asian" in this outline will refer to a smaller subset of people affiliated with the region generally known as East Asia – China, Japan, Korea, and their neighboring countries. Even within this subset, there is great ethnic, religious, linguistic , and cultural diversity. Overlay such diversity and complexity with immigration to the U.S. and the resulting acculturation, it quickly becomes clear that there can be no one-size-fits-all Asian American experience. When discussing cultural issues, there is a fine line between recognizing and respecting shared values and attributes on one hand, and overgeneralizing and stereotyping on the other. The following discussion will highlight the common elements for the sake of raising awareness, but it is important to remember that each individual is unique.

### B. Family as a Unit

At the core of the Asian culture is the concept of family. In many Asian countries the tradition has been for the eldest son to inherit all.[6] The system was designed to prevent the dilution of family wealth, much like the old English concept of entail. In modern times, the intestacy laws generally provide for equal distribution among siblings, but the family-centric culture still remains. The family ties remain strong even after the children become adults. It is quite common in Asia for adult children to continue to reside with their parents, and the parents would not dream of charging the children rent. In turn, there is mutual

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[4] This section was authored by Akane R. Suzuki, Perkins Coie, LLP.

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

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

understanding that the children will take care of the parents in their old age, financially and otherwise. As a result, decisions about the living arrangement and health care of an elderly parent become family decisions. In a 1995 medical study of subjects who were age sixty-five or older, those who self-identified as Korean American were more likely to conclude that the family, rather than the patient, should make end-of-life decisions.[7] This also affects the concepts of informed consent and privacy. The same study showed that only 47% of Korean Americans would have informed their ailing family members that their diagnosis was serious, compared to 89% of African Americans and 87% of European Americans.[8] If the prognosis was terminal, the percentage was even lower - 35% for the Korean Americans, compared to 63% of African Americans and 69% of European Americans.[9] There could be many reasons for this reluctance, but among them is a belief held by many that giving bad news to the patient would cause unnecessary stress and suffering, and may even hasten death.[10] Instead, the family members are told of the diagnosis rather than the patient, and the family members collectively decide what and when to tell the patient.

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

Within the family, there is a traditional preference for sons over daughters.[11] Traditionally, the son was expected to live in the ancestral home and take care of the aging parents and grandparents. Daughters left their birth families upon marriage and joined their husbands' families. The traditional family structure is gone in many countries, but some of the customs remain. Clients own businesses may direct the business interests only to their sons, even if the non-business assets are insufficient to fully equalize among the children. Or they may give the voting shares to the sons and non-voting shares to the other children. Even today, it is relatively rare in Japan to see a daughter succeed to the founding parent, and those who do attract a lot of attention. The saga of Otsuka Kagu, a furniture retailer, is one example. The company was founded in 1969. In 2009, the founder's daughter took over as president. Soon thereafter, the father and daughter clashed over the business strategy, leading to a prolonged family feud involving proxy fights, ousting each other as president, and the father starting a rival furniture business. The sad ending to the story is that the business suffered, and in 2019, the company was acquired by another business. As a Forbes article in 2016 noted: "The imbroglio may seem like nothing more than a family feud. But in

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[7] Kim, *supra* note 1, at 282, citing Leslie J. Blackhall et. al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820 (1995).
[8] *Id.*
[9] *Id.* Mexican Americans fell in between Korean Americans and the other groups.
[10] Pat K. Chew, *A Case of Conflict of Cultures: End-of-Life Decision Making Among Asian Americans*, 13 Cardozo J. Conflict Resol., 379, 385-86 (2012).

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

Japan's patriarchal--as well as hierarchical--society and its buttoned-down corporate world, it was headline news for weeks."[12]

### C. Unfamiliarity with the U.S. Legal System

Estate planning may also be hampered by the general unfamiliarity with the U.S. legal system.[13] Particularly if the client wants to leave assets in accordance with what the intestacy law provides, the client may not understand why it is necessary to document their wishes formally through an estate plan. In civil law countries, probate does not exist. Using Japan as an example, assets and liabilities vest immediately in the heirs upon death, and the heirs work out by agreement how the specific assets and liabilities will be allocated amongst them. They also work together to file any necessary tax returns. Someone coming from a background like this would not immediately understand the benefit of a revocable living trust to avoid probate. The advisor needs to start with explaining *why* the estate planning is necessary in the first place.

The extensive use of trusts in U.S. estate planning is also something that may be difficult for people from other legal backgrounds to understand. They may come from countries where trusts are not part of their legal tradition. Or their home countries are not as litigious as the U.S., so creditor protection does not strike them as a high priority. Even if they come from countries that recognize trusts, the taxation of trusts may be entirely different from the U.S., such that the tax advantages of creating trusts may be difficult to grasp.

### D. Language Barrier

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

Furthermore, first-generation Asian Americans tend to communicate in a less direct way. Their verbal communications may be less explicit because traditionally their cultures have many implicitly understood mutual values and expectations.[14] As such, some may appear blunt in their remarks, but often their implicit message is different from what is facially apparent. There may also be vagueness built into the structure of the language itself. For example, in Japanese, the subject of the sentence is often dropped. A client discussing end-of-life decisions might say, "Would like avoid drastic measures." But *who* would like to avoid drastic measures is not explicitly stated. The client believes the context of the discussion makes it clear, but it may not in fact be clear. Is it the client's wish to avoid drastic measures, or does the client believe that her family would like to avoid them? If the latter, is the family wish consistent with the client's wish, or would she rather have a different approach but is deferring to the family? If the lawyer is using a translator to facilitate the communication, does the translator ask the speaker to clarify, or does he simply assume what he believes the answer to be from the context and relay it as a definitive answer

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[12] James Simms, *Radical Redesign: Kumiko Otsuka Moves to Update Furniture Retailer*, Forbes Asia (Apr. 6, 2016, 05:42 PM), https://www.forbes.com/sites/jsimms/2016/04/06/kumiko-otsuka-updates-her-familys-50-year-old-furniture-retailer/?sh=74224a7b5c66.

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

[14] Chew, *supra* note 6, at 387.

to the lawyer? Would the answer be different if the translator is a professional as opposed to a family member? These issues can further exacerbate the communication problem.

### E. Talking about Death

In Asian cultures, many believe that discussing death will bring bad luck. In fact, U.S. insurance companies have found through research that entering the Chinese market will be difficult because of this cultural taboo on the topic of death.[15] Even in families that are less superstitious, talking about death is considered indelicate. In Japan, lawyers and other professionals who deal with estate planning matters do not discuss "death" with their clients. Instead of saying "when you die" or even "when you pass away," they talk about "when the inheritance occurs."

### F. Generational Issues

The first-generation Asian American immigrants from Asia are likely to be most immersed in their ethnic culture, with the influence of their ethnic culture getting diluted with each successive generation, to varying degrees. Thus, there could be a clash of cultures occurring within the same family unit. The older generation may hold fast to traditional Asian values, but their U.S. born and/or U.S. educated children may not share the same values - at least not to the same extent.

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

In addition, as noted above, it is culturally delicate for the children to bring up the matter of death with their parents. Not only is it bad luck, but it could also seem presumptuous – as if the children are eager for the parents to die so they can receive the inheritance. I have heard many stories of parents becoming upset that their children are "after their money" when all that the children were trying to do was to discuss the cost of care and find realistic options. This leaves both parties frustrated, and as a result planning stalls. The longer they wait, the worse the situation gets, as the parents get older and their mental capacity starts to diminish.

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[15] *Id.* at 384.

### G. Suggested Solutions

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

If working with a client whose command of English is limited, the language barrier needs to be addressed. Ideally, the lawyer can communicate in the client's native language to explain the U.S. system and the need for the legal documents. That would alleviate the burden on the children having to be the imperfect go-between. It also helps address the thorny ethical issues for the lawyer when the child who is serving as the go-between is also one of several beneficiaries - particularly if the client expresses a wish to disproportionately benefit that particular child. Keep in mind that, as discussed above, the client may be acting perfectly normal within the client's own cultural framework in preferring that child, but having the child be the conduit for the communication makes it difficult for the lawyer to gain confidence in the assessment.

If a native-speaker lawyer is not available, a good disinterested translator is ideal. It is helpful to have a translator who has experience with legal matters (especially trust and estate matters). Using an adult child, another family member, or a friend as the translator is awkward when the lawyer needs to discuss very private matters with the client. The client may not be as frank as he or she might be for fear of revealing something sensitive to the translator. Furthermore, in my experience, inexperienced translators (including family members) tend to interpose their own interpretation of the lawyer's comments, and this is dangerous. Translation is not a mechanical task, and there will always be some amount of judgment and interpretation involved, but the translator should not be explaining legal concepts to the client. The translator should be relaying the question so that the lawyer can clarify. If the lawyer has no choice but to rely on family members or friends to translate, I would recommend setting the ground rules for the translator at the outset so that the translator knows to seek clarification rather than improvise.

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

Once the language issue is addressed, the lawyer should spend time explaining the U.S. legal system. It may be a surprise to the client that a spouse or a child could be denied access to information without legal documents, or there could be valuable tax savings and other benefits by incorporating trusts into their estate plan. I have found it helpful to ask the client how the process would unfold in the client's home country, so that I can point out the similarities and the differences with the U.S. system. This also helps to uncover assumptions that the client is making and helps to convey the importance of advance planning.

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

## V. Ethics in relation to religious and cultural considerations of estate planning[16]

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

### A. Competence

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

This rule probably has the most obvious application in the above situations. Much as a lawyer who practices in the civil courts would not take on a criminal representation without either becoming familiar with criminal law or associating in counsel who does criminal law, an estate planning lawyer who has no background in the issues that arise in planning for a client of a different faith (or even the same faith but more religiously adherent) or culture may not have the necessary competence to do the work without additional research and, perhaps, consultation with counsel familiar with such issues. As noted above, there are nuances to the various rules, and different rules even within the same religious tradition. And, while it would likely be tempting to listen to the client who is familiar with the rules explain how they work, merely doing that likely does not meet the standard for competence.

### B. Limitation of representation

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

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

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

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

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[16] This section was authored by Margaret G. Lodise, Sacks, Glazier, Franklin & Lodise LLP.

Model Rule 1.2 provides a guideline for a lawyer not of the same views as the client, by stating that merely representing the client does not mean that the lawyer endorses the client's views. In the context, for instance of an estate plan which does not leave any of the estate to any of the women in the family due to religious or cultural constraints, a lawyer who disagrees with that philosophy is not barred from handling the matter. However, if the lawyer's views are sufficiently divergent from the client's it may amount to insufficient competence (See also, Rule 1.7, discussed below).

Another aspect of Rule 1.2 is the ability of the lawyer to limit the scope of the representation. If, for instance, the client wished to establish a family LLC and to ensure that it complied with Sharia law concerning appropriate investments, a lawyer might wish to limit the representation to creating documents that complied with state and federal laws concerning formation and tax issues and leave to another lawyer, or a specialist in Sharia law, any directions as to how the investments should comply.

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

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

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

### C. Diligence

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

Rule 1.3 is true for any representation, but it may take on added significance in the situation where the fall back to an incomplete estate plan, generally intestacy, will vary so widely from the desires of a client. Given the presumed importance to the client of achieving a plan that matches the religious constraints under which the client is operating, the lawyer should be particularly attuned to whether the plan can be completed on time (including, of course, any additional time that will be necessary to obtain the necessary information and education to properly create the plan.) Every estate planner has run into clients who are not good about getting documents back to the planner in a timely fashion. In a case where it makes such a significant difference to whether the intentions can be fulfilled, the traditional case law that absolves the lawyer of liability where the lawyer had timely completed the work should still absolve the lawyer, but a disappointed heir might try to argue there was some special duty.

### D. Consultation with the client

***MRPC 1.4(a)*** **A lawyer shall…**

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

Given that there are a variety of issues raised by the religious rules and cultural variances addressed above, a lawyer should take particular note of Rule 1.4(a)(5). Certainly, on their own, following religious

dictates would not necessarily be a violation either of the Rules or other law, but a client may wish to push to the extremes. *In re Estate of Feinberg,* 235 Ill.2d 256 (2009) raises the issue of whether a plan to dispose of property only to those relatives who follow in the testator's faith violates public policy. In *Feinberg,* the decedent, Max Feinberg, discovered that one of his grandchildren was taking a non-Jew to prom. In light of that fact and Max's strong views about religious loyalty, he wrote into his will what family members dubbed the "Jewish Clause." In that clause, Max provided that upon the second to die of he and his wife, Erla, their grandchildren would become lifetime beneficiaries of trusts established under the will. However, if any of the grandchildren had married outside the faith and the new spouse had not converted to Judaism within a year, that grandchild's share of the trust would revert back to the grandchild's parents. This clause was not directly tested as Erla, after Max's death, exercised her power of appointment over Max's trust to bequeath $250,000 to the one grandchild who had married within the faith and excluded the four other grandchildren, referencing Max's estate plan definition of who was and was not disinherited. One of the disinherited grandchildren sued arguing the clause violated public policy by offering money to practice a particular religion and the lower courts agreed on the grounds that the clause restricted marriage rights. The Illinois Supreme Court, however, disagreed. In a unanimous decision, the Supreme Court found that the Feinbergs' disinheritance of any grandchildren who marred outside the Jewish faith was permissible so long as doing so did not encourage divorce. As the court stated: "Erla did not impose a condition intended to control future decisions of their grandchildren regarding marriage or the practice of Judaism; rather, she made a bequest to reward, at the time of her death, those grandchildren whose lives most closely embraced the values she and Max cherished." The Court specifically stated that it was NOT ruling on Max's plan and the clause contained therein since Erla had exercised her power of appointment so the clause was not applicable. It is not clear, on the reasoning, whether the clause would meet the same test. Notably, Erla's gift specifically named one grandchild and disinherited the others, noting why, but not providing for any conditions. Under Max's clause, there could be room for a grandchild to change a condition, which might be viewed by a court as placing a limit on marriage/encouraging divorce.

Would the court's allowance of Erla's gift despite the fact it was clearly driven by her religious feelings have been as acceptable to the court if Erla had exercised her power of appointment to reward a decision not to marry a person of another race, or to enter into a same sex marriage? Given that a person is entitled to make gifts to any person that person chooses, it is difficult to see that the court could have found such a gift improper, although, the more the rationale is set forth in the document, the more troublesome the court might have found it. And, again, if the gift were conditional in some way, it is more likely that the court would look askance.

What if, instead, a client wanted to leave money to a religious organization that arguably fell within the definition of a terrorist organization? Or if the client wanted to leave money to an individual or organization expressing beliefs so far from the lawyer's own beliefs that it amounted to a violation of Rule 1.7? Rule 1.4 requires that the lawyer discuss this with the client and advise the client of the possibility that the gift might be invalidated, and alternatives that might serve to accomplish the gift as desired assuming the gift can be legally made. (Although, see below regarding the lawyer's own beliefs).

The cultural overlays discussed above raise another scenario, creating situations where the lawyer may be at substantial risk of violating the rules related to confidentiality and loyalty to clients. Where the family insists that the lawyer work with the entire family, issues related to who is actually the client and client confidentiality may be raised and the lawyer needs to discuss the potential implications of rules which limit the lawyer's actions in those circumstances.

### E. Client Confidentiality

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

Rule 1.6 is not likely implicated in faith-based planning except in very extraordinary cases, but in the cultural situations set forth, confidentiality can quickly become a serious issue. Certainly, if the client comes in with children and asks them to be involved, the client's informed consent might be presumed, but it should still be explained to the client as circumstances might change. If one child is initially involved, but then falls out of favor and another child becomes involved, the lawyer should have a clear idea of how much information can be revealed and to whom. If the child who was initially involved comes to the lawyer after that child has been replaced and the child asks for information, Rule 1.6 would suggest that the information could not be shared, but if the lawyer has in the past shared such information, the child would certainly expect the information to be shared. If the lawyer develops concerns about the influence of one or more of the children over the parents, what can the lawyer share?

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

### F. Current conflicts of interest

***MRPC 1.7(a)(2)*** **Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**

**…**

**(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

**…**

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

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

**and**

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

Rule 1.7 is the corollary to Rule 1.2's charge to act competently. In the religious context, it lays out the specific premise that the personal interests of the lawyer might create a conflict in representing a client. In the family estate planning scenario presented by traditional Asian cultural planning, the conflict scenario is more obvious and an analysis that lawyers are used to considering.

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

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

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

### G. Conflicts of interest: former clients

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

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

### H. Withdrawal

***MRPC 1.16 (a)(2)*** **Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**

**…**

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

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

**…**

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

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

### I. Candid advice

***MRPC 2.1*** **In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other**

**considerations such as moral, economic, social and political factors that may be relevant to the client's situation.**

Rule 2.1 appears to direct lawyers to conduct exactly the kind of education being engaged in here, to expand their field of knowledge to have sufficient resources to advise the client. The requirement of being candid with the client, however, may also go the other direction, requiring that the lawyer not merely bury her concerns about the client's behavior, but explain them in the context of other social factors. The *Feinberg* case is again a good example. If the client wants the lawyer to accomplish something that is legal if done one way, but not if done another, or that is likely to be frowned upon given moral, social or political factors, the lawyer owes the client the duty of fully exploring how those factors might weigh on the client's wishes and the realistic possibility that those factors might prevent complete fulfillment of the client's wishes. Be aware, however, that this does not mean that the lawyer needs to convince the client to adopt the lawyer's way of thinking. Arguably, if the lawyer believes she needs to go that far, she should be considering withdrawal from the matter as it suggests a conflict that impairs the lawyer's ability to do the work requested by the client.

### J. Candor toward the tribunal

***MRPC 3.3*** **A lawyer shall not knowingly:**

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

Again, it seems unlikely that a lawyer would be in a position of being anything less than candid with the tribunal in the situations described herein. However, looking again at the situation where the client has views which differ with society or from other members of the client's family, the narrow path that must be walked to legitimate the client's desires, could mean withholding the actual impact of the chosen action. This could be considered failure to be candid with the tribunal. Looking back, again, to the *Feinberg* facts, if there is a challenge to a gift and there is no explanation, but the drafting lawyer knows the rationale, would the failure to disclose the rationale amount to a lack of candor? Referring again to a person's absolute right to dispose of property as that person sees fit, it does not seem that this would amount to a lack of candor.

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