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ETQUETTE FOR CALLING YOUR PARENTS' ESTATE PLANNING ATTORNEY By Randy Spiro

Bill has been the estate planning attorney for Mary for some years. Mary is now 75 years of age and has designated her oldest child Carol in her trust as successor trustee. Carol has some concerns about Mary and decides to call Bill.

Mary has a confidential relationship with Bill. Bill cannot reveal the contents of Mary's estate plan, even to her successor trustee, without Mary's consent. Bill also has a duty of loyalty to Mary which will prevent him from acting on Carol's concerns without first consulting Mary.

In this situation, Bill should be concerned with the issue of whether Carol is exerting undue influence on Mary. Carol may want Bill's help, but Bill's client is Mary and Bill has not heard what Mary's wishes are yet.

In many cases, Carol's call will be quite innocent, and even motivated by a concern to do what is best for Mary. If Mary is capable of communicating with Bill, it is always better for Carol to suggest to Mary that she call Bill. If Mary agrees with Carol's suggestions, Mary can call Bill and instruct him accordingly.

But what if Carol wants Mary to resign as trustee to prevent Mary from being taken advantage of by other family members. Assume further that Mary doesn't want to resign. Bill will be put into a difficult position if he determines that Mary should resign when Mary adamantly refuses. Different states have different rules as to how the attorney should act in this situation.

If Mary is objectively incapacitated and cannot express her wishes, her attorney should consult the trust for what documents are required to prove Mary's incapacity. If, for example, letters from two of Mary's doctors are required and if Carol has produced these letters, Bill may conclude that he can work with Carol in establishing Mary's incapacity and in helping Carol establish control of trust assets as incoming trustee.

Suppose Carol created a bad impression when she first called Bill. If Carol reacted badly to Bill's cautiousness in not immediately treating Carol as the client, the entire situation may spin out of control. Bill may bring in a trust litigation specialist to help defend Mary. Carol may bring in a trust litigation specialist to help her take control of the trust.

While this dispute rages, a probate court judge will have a difficult task. Leave Mary in place. Substitute Carol for Mary. Bring in a neutral trustee. In any event, all the other children will be given notice of any court hearings and they will be able to weigh in with their positions on what should be done.

Mary herself may be under the influence of a bad character: a new boyfriend or even a paid caregiver. Bill will not only have to determine if Mary is being unduly influenced by Carol, but also by other persons as well.

Timing is important. If Mary has early stage Alzheimers, Carol may be able to convince Mary to discuss her situation with Bill. As the disease becomes more advanced, the opportunities for pre-planning decrease.

Bill might say to Mary, if consulted on the issue, that it is easier to re-title assets in Carol's name if Mary resigns than it is if Mary is determined to be incapacitated (for example by two doctors letters if the trust calls for them). Transfer agents (banks, stock brokers) will typically take more time trying to determine if the doctors letters should be honored than they would if Mary walked into their office and presented them with her resignation.