

ACTEC[®]

THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

COMMENTARIES

Fifth Edition 2016

**on the Model Rules of
Professional Conduct**

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ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT

The American College of Trust and Estate Counsel

Fifth Edition 2016

Neither the Model Rules of Professional Conduct (MRPC) nor the Comments to them provide sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. Recognizing the need to fill this gap, ACTEC has developed the following Commentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others regarding their professional responsibilities. First published in 1993, the Commentaries continue to assist courts, ethics committees and others concerned with issues regarding the professional responsibility of trusts and estates lawyers. The Commentaries generally seek to identify various ways in which common problems can be dealt with, without expressly mandating or prohibiting particular conduct by trusts and estates lawyers. While the Commentaries are intended to provide general guidance, ACTEC recognizes and respects the wide variation in the rules, decisions, and ethics opinions adopted by the several jurisdictions with respect to many of these subjects.

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REPORTER'S NOTE

First Edition

The following Commentaries build upon the substantial body of prior writings by numerous authors, including Luther Avery, Jackson Bruce, Gerald Johnston, Jeff Pennell and Ronald Link. Their contributions have enriched the literature and sharpened our sensibilities. While acknowledging their contributions, we hasten to add that they are in no way responsible for the organization or content of the Commentaries.

Basic Themes of Commentaries. The main themes of the Commentaries are: (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally nonadversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC. The Commentaries additionally reflect the role that the trusts and estates lawyer has traditionally played as the lawyer for members of a family. In that role a trusts and estates lawyer frequently represents the fiduciary of a trust or estate and one or more of the beneficiaries. In drafting the Commentaries, we have attempted to express views that are consistent with the spirit of the MRPC as evidenced in the following passage: “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” MRPC, Scope.

Scope of Representation. The Commentaries encourage a full discussion between lawyer and client of the scope and cost of the representation. Lawyers increasingly use engagement letters to cover these and other matters related to the representation. The trusts and estates practice is generally nonadversarial, client-centered and involves a high degree of client autonomy. The nature of the practice and the autonomy of clients allow lawyers and clients, including multiple clients, to define the scope and nature of the representation in ways that diminish the adverse effects that might otherwise flow from conflicts of interest. The Commentaries also note that, while the representation of multiple clients by a single lawyer involves some risks, it often provides the clients with the most economical and effective representation—particularly where the clients are members of the same family. Finally, the Commentaries encourage lawyers to act in ways that promote the resolution of disputes without resort to the courts.

Duties of Trusts and Estates Lawyers Incompletely and Inconsistently Described. In large measure the duties of trusts and estates lawyers are defined in many states by opinions rendered in malpractice actions, which provide incomplete and insufficient guidance regarding the ethical duties of lawyers. Compounding the problem, the decisions in malpractice actions and the legal principles upon which they are based vary considerably from jurisdiction to jurisdiction. Courts have perhaps had the most difficulty in defining the role and duties of the lawyer who represents a fiduciary in the fiduciary’s representative capacity with respect to a fiduciary estate (who might be said to represent the fiduciary generally). For example, in a malpractice action brought by the beneficiaries of a fiduciary estate against the lawyer for the fiduciary, a California appellate court stated that the lawyer owed no duty to the beneficiaries of the estate. *Goldberg v. Frye*, 266 Cal. Rptr. 483 (Cal. App. 1990). Other appellate courts have reached the opposite conclusion, including courts in California. Thus, in *In re Estate of Halas*, 512 N.E.2d 1276, 1280 (Ill. App. 1987), the court stated that, “[t]he attorney for the executor, therefore, must act with due care and protect the interests of the beneficiaries.” Similarly, in *Charleston v. Hardesty*, 839 P.2d 1303 (Nev. 1992), the court wrote that the lawyer for a personal representative owes the beneficiaries “a duty of care and fiduciary duties.” *Id.* at

1307. See also *Fickett v. Superior Court*, 588 P.2d 988 (Ariz. App. 1976), in which the court held that the lawyer for the guardian owed a duty directly to the ward to protect the ward's interests.

Lawyer for Fiduciary. Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries. In this connection note that a distinction should be drawn between the duties of a lawyer who represents a fiduciary in the fiduciary's representative capacity (a "general" representation) and the duties of a lawyer who represents the fiduciary individually (i.e., not in a representative capacity). The distinction between the two types of representation is developed in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Unless otherwise indicated, all references in the Commentaries to "the lawyer for a fiduciary" are intended to be to a lawyer who represents a fiduciary generally and not to a lawyer who represents a fiduciary individually. Note also that under some circumstances a lawyer may properly represent the fiduciary and one or more of the beneficiaries. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and Example 1.7-3.

Duties to Beneficiaries. The lawyer who represents a fiduciary generally is not usually considered also to represent the beneficiaries. However, most courts have concluded that the lawyer owes some duties to them. Some courts subject the lawyer to the duties because the beneficiaries are characterized as the lawyer's "joint," "derivative" or "secondary" clients. Other courts do so because the lawyer stands in a fiduciary relationship with respect to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries. The duties, commonly called "fiduciary duties," arise largely because of the nature of the representation and the relative positions of the lawyer, fiduciary, and beneficiaries. However, note that the existence and nature of the duties may be affected by the nature and extent of the representation that a lawyer provides to a fiduciary. Thus, a lawyer who represents a fiduciary individually regarding a fiduciary estate may owe few, if any, duties to the beneficiaries apart from the duties that the lawyer owes to other non-clients. See ACTEC Commentaries on MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) and 4.1 (Truthfulness in Statements to Others).

General Nature of Duties. Unfortunately, the duties that the lawyer for a fiduciary owes to the beneficiaries of the fiduciary estate have not been adequately identified, defined, or discussed. In general, the duties prohibit the lawyer from taking advantage of his or her position to the detriment of the fiduciary estate or its beneficiaries. Thus, the lawyer who represents a fiduciary is prohibited from making sales to, or purchases from, the fiduciary. In some jurisdictions the prohibition extends to transactions between the lawyer and the beneficiaries of the fiduciary estate. Indeed, in exceptional cases the lawyer for a fiduciary may be subject to the duties of the fiduciary. That approach was taken in a leading New York decision, *In re Bond & Mortgage Guarantee Company*, 103 N.E.2d 721 (N.Y. 1952). In that case the lawyers for a trustee for the holders of mortgage participation certificates were required to disgorge the increase in the value of certificates that the lawyers had purchased from third parties.

The attorneys, concededly in the same position as the trustee, owed an equally high degree of fidelity, and so both courts below held, the Appellate Division stating that, "by reason of their status as attorneys for the trustee, [they] were no less fiduciaries than was the trustee himself." ... Thus the attorneys, like the trustees, owed to these certificate holders "the duty of the finest loyalty," "something stricter than the morals of the market place." 103 N.E.2d at 725.

Good Faith, Fairness and Impartiality. The lawyer who represents a fiduciary generally is required to act in good faith and with fairness toward the beneficiaries. In addition, the lawyer should advise the fiduciary to act impartially with respect to the beneficiaries and to provide the beneficiaries with information regarding material matters affecting their interests in the fiduciary estate. Consistent with the provisions of the MRPC, especially MRPC 4.1 (Truthfulness in Statements to Others), the lawyer may not deliberately misinform or mislead the beneficiaries or withhold information from them. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

Affirmative Duties to Beneficiaries. The duties that the lawyer who represents a fiduciary generally owes to the beneficiaries are largely restrictive in nature (i.e., ones that impose limitations upon the conduct of the lawyer). However, in some circumstances the lawyer may owe some affirmative duties to the beneficiaries. Thus, the lawyer for a fiduciary may be required to take affirmative steps to protect the interests of the beneficiaries if the lawyer learns that the fiduciary is engaged in acts of self-dealing, is embezzling assets of the fiduciary estate, or is engaged in other wrongdoing. In some cases it may be appropriate for the lawyer to disclose the misconduct to the beneficiaries or to the court. If the local rules do not permit disclosure in such cases, it may be appropriate for the lawyer to resign with notice to the beneficiaries.

The existence of such affirmative duties is implicit in the nature of the representation, which involves the lawyer advising the fiduciary in a representative and not a personal capacity. Recognition of such duties is also supported by the fact that the fiduciary estate is almost invariably created by a testator or trustor for the exclusive benefit of the beneficiaries. In addition, the fiduciary and the lawyer are both compensated by the fiduciary estate. Finally, recognition of some affirmative duties is also appropriate because the lawyer for a fiduciary is typically in a superior position relative to the beneficiaries, who may repose trust and confidence in the lawyer.

Throughout the Commentaries, when the word “may” is used in referring to a lawyer’s duties, obligations and authorizations to disclose, the intent is to indicate that the duties, obligations and authorizations may exist in some jurisdictions but not in others.

Annotations. The Annotations that follow each Commentary include references to a broad sampling of the cases, ethics opinions and articles that deal with the professional responsibility of the trusts and estates lawyer but are by no means exhaustive. Reflecting various approaches taken in different jurisdictions, the cases and ethics opinions are often inconsistent and cannot be harmonized. The summaries of the cases and ethics opinions are not part of the Commentaries. They are included for illustrative purposes only and do not necessarily reflect the judgment of the reporter or ACTEC regarding the issues involved.

October 1993

John R. Price
Professor of Law, University of Washington
Reporter

Bruce S. Ross
Chair, ACTEC Professional Standards Committee (1990-1994)

REPORTER'S NOTE

Second Edition

“The existing ethics codes merely espouse certain general principles that apply to all lawyers, such as you don’t co-mingle a client’s funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties.” Judge Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993).

Judge Sporkin focuses on the principal problem posed by the Model Rules of Professional Conduct (MRPC): It is composed largely of general, litigation-based rules that do not address many of the difficult problems that arise in specific areas of practice. Rather than recognize the need to consider ways in which the MRPC might be adapted to meet the needs of lawyers in specific practice areas, the American Bar Association appears to insist that one rule fits all—without regard to any differences in the nature of a client and the type of representation provided. The ABA’s position is illustrated by ABA Formal Opinion 94-380 (1994), which held that MRPC 1.6 (Confidentiality of Information) prohibited the lawyer for a fiduciary from disclosing fraudulent or criminal conduct on the part of the fiduciary. According to the ABA, MRPC 1.6 overrides the other duties of the lawyer: “The client’s status [as fiduciary] is irrelevant.”

Anticipating and Avoiding Conflicts. This edition of the *ACTEC Commentaries* continues to emphasize the advantages to clients and lawyers of anticipating and attempting to avoid potential problems under the MRPC. Estate planners not infrequently encounter difficult problems of professional responsibility, particularly ones involving confidentiality and conflicts of interest. Serious problems can often be reduced or eliminated by advance discussion and planning. In particular, in many instances uncertainties regarding the lawyer’s duty of confidentiality can be eliminated with sufficient advance planning and consent. Disclosure and agreement may also allow the same lawyer to represent the interests of multiple parties who have somewhat conflicting interests, but not clients whose interests are seriously adverse, such as adverse parties in litigation.

Other Sources of Guidance. A special committee of the Real Property, Probate and Trust Law Section of the American Bar Association chaired by Malcolm Moore has produced thoughtful and helpful Reports on three topics: *Comments and Recommendations on the Lawyer’s Duties in Representing Husband and Wife*; *Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary*; and *Counseling the Fiduciary*. These Reports and the initial edition of the *ACTEC Commentaries* are published in the winter 1994 issue of the Real Property, Probate and Trust Journal, Volume 28, Number 4. In addition, the American Law Institute is working on the *Restatement, Law Governing Lawyers*, portions of which have appeared in draft form. We hope the *Restatement* will, in its final form, provide useful specific guidance both to estates and trusts lawyers and to lawyers in other fields of law.

This edition of the *ACTEC Commentaries* also includes additional annotations including several malpractice decisions, some of which hold that the lawyer for a fiduciary owes no duties in tort or contract to the beneficiaries of the fiduciary estate. Included in the latter category are *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994), and *Trask v. Butler*, 872 P.2d 1080 (Wash. 1994).

Since their adoption, the *ACTEC Commentaries* have provided guidance to individual lawyers and law firms and have been used in instructional programs at law schools and in programs of continuing legal education. In addition, some portions have been proposed for adoption in various states. This edition represents a

continuing effort to refine and improve the content of the *ACTEC Commentaries* for the benefit of the bar, bench and public.

The original edition of the *ACTEC Commentaries* was prepared with the capable assistance of Berrie Martinis, a member of the class of 1994 at the University of Washington School of Law. This edition was prepared with the equally capable assistance of Catherine Baytion, a member of the class of 1995 at the University of Washington School of Law. Sincere thanks to them both and to the librarians at the University of Washington whose dedication to professionalism and public service is legendary.

March 1995

John R. Price
Professor of Law, University of Washington
Reporter

J. Michael Farley
Chair, ACTEC Professional Standards Committee (1994-1997)

Bruce S. Ross,
Chair, *ACTEC Commentaries* Update Subcommittee

REPORTER'S NOTE

Third Edition

This Edition of the ACTEC Commentaries, following by six years the original publication of the Commentaries and four years after publication of the Second Edition, builds incrementally upon the prior Editions. The ACTEC Commentaries continue to receive widespread acceptance and increasing citation by the courts, secondary authorities, and members of the legal profession.

The most significant changes in this Edition include new Commentaries discussing MRPC 1.16 (Declining or Terminating Representation) and MRPC 3.7 (Lawyer as Witness). Also, this Edition includes a Table of Authorities (broken down by state). As with the Second Edition, the Annotations have been greatly expanded and continue to expand to reflect new decisions, ethics opinions and the like.

A note re Ethics 2000: The American Bar Association Commission on Evaluation of the Rules of Professional Conduct, popularly known as "Ethics 2000," under the chairmanship of Chief Justice E. Norman Veasey, is in the midst of an intensive analysis and reevaluation of all of the Model Rules of Professional Conduct and will be proposing extensive revisions and modifications of the MRPC. Much of the Commission's work product, although in draft form only, is now available online at its website, <http://www.abanet.org/ethics2k>. If the Commission's final work product is adopted by the American Bar Association, significant changes to such key Rules as 1.4 (Communication), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients), and 1.8 (Conflict of Interest: Current Clients: Specific Rules) may be anticipated, and some new Rules may come into existence. Preliminary suggestions and recommendations for changes in the MRPC endorsed by the Commission suggest a positive response to the long-stated concerns of ACTEC and the ABA's Real Property, Probate and Trust Law Section that the present MRPC do not adequately address concerns specific to different specialties in the profession, including the estates and trusts area. The next edition of the *ACTEC Commentaries* will include appropriate references to and the text of those Rules relevant to the estates and trusts practice that are modified or newly adopted by the ABA following submission of the Ethics 2000 Commission's final report and recommendations.

This Third Edition reflects ACTEC's continuing commitment to refine and improve the contents of the *ACTEC Commentaries* and to maintain their relevance to the bench, the bar and the general public which all courts and lawyers serve.

June 1999

Bruce S. Ross
Reporter for the Third Edition

Jack G. Charney
Chair, ACTEC Professional Standards Committee (1997-2000)

REPORTERS' NOTE

Fourth Edition

This Fourth Edition of the *ACTEC Commentaries* continues the tradition of providing particularized guidance to estate and trust practitioners on the Model Rules of Professional Conduct. In particular, the Fourth Edition focuses on amendments to the Model Rules promulgated by the American Bar Association Commission on Evaluation of the Rules of Professional Conduct, commonly known as the “Ethics 2000 Commission,” almost all of whose recommendations were adopted in the revised MRPC, approved by the ABA House of Delegates in February 2002 (with additional revisions in August 2002 and August 2003). New Model Rules with Commentaries include MRPC 1.0 (Terminology) and MRPC 1.18 (Duties to Prospective Client). Significant changes to the Commentaries have been made for the following amended Model Rules: MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), MRPC 1.4 (Communication); MRPC 1.5 (Fees); MRPC 1.6 (Confidentiality of Information); MRPC 1.7 (Conflict of Interest: Current Clients); and MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). Another area revised by Ethics 2000 was MRPC 1.14 (Representation of Client with Diminished Capacity), and the Fourth Edition reflects these changes as well.

In addition to Ethics 2000, the ABA created the Commission on Multijurisdictional Practice. As part of its work, this Commission proposed a revised MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), that was adopted in 2002. The revised Rule addresses what has been commonly referred to as the “multijurisdictional practice of law.” The revised Rule establishes safe harbors in which a lawyer may practice in a jurisdiction where the lawyer is not admitted to practice law without violating that jurisdiction’s unlawful practice of law provisions. The Fourth Edition provides guidance for estate and trust practitioners concerning the use of these safe harbors in a multijurisdictional estate and trust practice.

New court decisions, ethics opinions and articles concerning the estate and trust legal practice have been included in the Annotations published with the Fourth Edition. As in prior editions, the selected annotations are intended to be illustrative only and are not exhaustive. The Annotations are not to be treated as part of the Commentaries.

As Reporters, we thank the many who contributed to the Fourth Edition but give special acknowledgment to Professor Charles Rounds, Jr., and to all members of the Professional Responsibility Committee of ACTEC for their efforts on this project. We also express appreciation to John R. Price, Reporter for the First and Second Editions, and Bruce S. Ross, Reporter for the Third Edition, for assistance with the editing of the Fourth Edition. Finally, we commend and thank the ACTEC Foundation for its ongoing support of the *ACTEC Commentaries*, which continue to provide important guidance to the bench, bar and public sector.

August 2005

Charles M. Bennett
Co-Reporter for the Fourth Edition

Cynda C. Ottaway
Co-Reporter for the Fourth Edition
Chair, ACTEC Professional Responsibility Committee

REPORTERS' NOTE

Fifth Edition

This Fifth Edition of the *ACTEC Commentaries* continues the tradition of providing guidance on the Model Rules of Professional Conduct particular to estate and trust practitioners. The Fifth Edition update to the Commentaries takes account of amendments to the Model Rules adopted since the 2005 Fourth Edition, including those proposed by the American Bar Association Commission on Ethics 20/20 as adopted by the ABA in 2012 and 2013. It is current through August 31, 2015 as there have been no amendments to the Model Rules since 2013.

In addition to these updates, we have added Commentary and Annotations to four more of the Model Rules: MRPC 1.10, 5.3, 7.1, and 8.5 after concluding that these rules have a special kind of impact on trust and estate practice that justified including them.

This edition also takes into account related ABA developments beyond the Model Rules that affect estate and trust practitioners. In particular, we have updated the Commentaries and Annotations to take into account the work of the Financial Action Task Force (FATF) and the ABA's response to that work as they affect trust and estate practice.

The Annotations have also been updated to include information on state judicial decisions and ethics opinions through December 31, 2014. As in prior editions, the selected annotations are intended to be illustrative only and are not exhaustive. The Annotations are not to be treated as part of the Commentaries. Moreover, in this Fifth Edition, we have departed from the way in which the Annotations have previously been deployed. The Annotations appended to the rules in this published version of the Fifth Edition have been both updated and winnowed to include only those which are most important in giving guidance on how the Model Rules have been interpreted relative to trust and estate practice. A more comprehensive set of Annotations has been compiled which includes cases and opinions included in previous editions, but removed from this Fifth Edition, as well as more cases and opinions which touch on trust and estate practice, but which are deemed not important enough to include in the published version of the Fifth Edition. An electronic version of this more comprehensive set of annotations may be accessed from a link on the ACTEC website behind the link for Publications/ACTEC Commentaries where ACTEC has been providing updates to the Annotations serially since 2005. The new more comprehensive document will replace the serial updates for the period from 2005-2014. It is our expectation that updates to these Annotations for the years 2015 and following will be provided serially as they become available, as has been done for the last several years.

As Reporters, we thank the many who contributed to the Fifth Edition but give special acknowledgment to Robert Chapin, Cynda Ottaway, and John Rogers, who have served as an Editorial Committee on this edition, and to all members of the Professional Responsibility Committee of ACTEC for their efforts on this project. We also express appreciation to the reporters for the previous editions: John R. Price, Reporter for the First and Second Editions; Bruce S. Ross, Reporter for the Third Edition; and Charles Bennett and Cynda Ottaway, Co-Reporters for the Fourth Edition. Finally, we commend and thank the ACTEC Foundation for its ongoing support of the ACTEC Commentaries, which continue to provide important guidance to the bench, bar and public sector.

October 2015

Thomas Andrews
Professor of Law, University of Washington
Co-Reporter for the Fifth Edition

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INTRODUCTION

The Preamble, Scope and Terminology applicable to the MRPC provide some helpful guidance regarding the content, meaning and application of the Rules. The following excerpts are particularly relevant:

Excerpts from Preamble

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.... As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

* * * * *

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between an interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Excerpts from Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms of "shall" or "shall not." These define proper conduct for the purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.... Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

* * * * *

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. 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.

JURISDICTIONS THAT HAVE ADOPTED THE MODEL RULES OF PROFESSIONAL CONDUCT

Forty-nine states, the District of Columbia, and the Virgin Islands have adopted the MRPC, often with significant modifications. Only California does not follow the format of the MRPC. The following jurisdictions have adopted the MRPC, often with state-specific amendments, with the initial dates of adoption shown:

Dates of initial adoption

Alphabetical Order

Jurisdiction	Date of Adoption
Alabama	5/2/90
Alaska	4/14/93
Arizona	9/7/84
Arkansas	12/16/85
Colorado	5/7/92
Connecticut	6/23/86
Delaware	9/12/85
District of Columbia	3/1/90
Florida	7/17/86
Georgia	6/12/00
Hawaii	12/6/93
Idaho	9/3/86
Illinois	2/8/90
Indiana	11/25/86
Iowa	4/20/05
Kansas	1/29/88
Kentucky	6/12/89
Louisiana	12/18/86
Maine	2/26/09
Maryland	4/15/86
Massachusetts	6/9/97
Michigan	3/11/88
Minnesota	6/13/85

Mississippi	2/18/87
Missouri	8/7/85
Montana	6/6/85
Nebraska	6/8/05
Nevada	1/26/86
New Hampshire	1/16/86
New Jersey	7/12/84
New Mexico	6/26/86
New York	12/16/08
North Carolina	10/7/85
North Dakota	5/6/87
Ohio	8/1/06
Oklahoma	3/10/88
Oregon	1/1/05
Pennsylvania	10/16/87
Rhode Island	11/1/88
South Carolina	1/9/90
South Dakota	12/15/87
Tennessee	8/27/02
Texas	6/20/89
Utah	3/20/87
Vermont	3/9/99
Virgin Islands	1/28/91
Virginia	1/25/99
Washington	7/25/85
West Virginia	6/30/88
Wisconsin	6/10/87
Wyoming	11/7/86

CAVEAT TO ANNOTATIONS
Limiting the Scope and Purpose of the Annotations

The Annotations that follow each Commentary include references to a broad (but not exhaustive) range of statutes, cases, ethics opinions and secondary authorities that deal with the professional responsibility of trusts and estates lawyers. Reflecting various approaches taken in different jurisdictions, the statutes, cases and ethics opinions are often inconsistent and cannot be harmonized. The Annotations are not part of the Commentaries. They are not exhaustive and are included for illustrative purposes only. They do not necessarily reflect the judgment of the Reporters or ACTEC regarding the issues involved. A more comprehensive (but still not exhaustive) set of annotations which is searchable by rule number and topic is available on the ACTEC website.

MRPC 1.0: TERMINOLOGY

...

- (b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

...

- (d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

...

- (n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

...

ACTEC COMMENTARY ON MRPC 1.0

If the MRPCs require a lawyer to obtain a client’s informed consent, confirmed in writing, the lawyer should at the outset provide the client with information sufficient to allow the client to understand the matter. At that point the client may give informed consent regarding the matter. For purposes of MRPC 1.0, it is sufficient if the consent is confirmed in a writing sent by the client to the lawyer or by the lawyer to the client.

Confirmed in Writing. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained informed oral consent, the lawyer may act in reliance on that consent, so long as it is confirmed in writing within a reasonable time thereafter. The confirmation must be “in writing,” but this includes electronic records and thus encompasses communications such as email or a voicemail recording that can be preserved.

The lawyer must make reasonable efforts to ensure that the client possesses information as to the law and the facts reasonably adequate to make an informed decision. Not all consents must be confirmed in writing to be binding, however. See, e.g., MRPC 1.2(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent); MRPC 1.6(a) (Confidentiality

of Information) (providing that a lawyer with certain exceptions shall not reveal information relating to the representation of a client unless the client gives informed consent). Generally, a client or other person who is independently represented by other counsel in giving the consent may be assumed to have given informed consent.

Adequate Information. What constitutes adequate information about risks and available alternatives will vary with the nature of the engagement. The lawyer must explain only those risks and alternatives related to the scope of the engagement. For example, if the client requests a limited service, such as preparing a power of attorney, the lawyer would not need to explain the possible ways to save estate taxes through a gifting program. However, the lawyer would need to explain the possible choices concerning the appointment of an attorney-in-fact and any risks that one choice might have over another. The nature of the client's request for limited services of itself would limit the need to explain risks and alternative courses of action.

MRPC 1.1: COMPETENCE

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

ACTEC COMMENTARY ON MRPC 1.1

Meeting Needs of Client. A lawyer who initially lacks the skill or knowledge required to meet the needs of a particular client may overcome that lack through additional research and study. The needs of the client may also be met by involving another lawyer or other professional who possesses the requisite degree of skill or knowledge. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), noting that confidentiality concerns must be addressed prior to involving another lawyer. Thus, the lawyer may choose to consult another lawyer while maintaining the client's confidential information or may obtain the client's informed consent to associate another lawyer to whom disclosures will be made if, under the circumstances, it is reasonable to do so. The lawyer should be candid with the client regarding the lawyer's level of competence and need for additional research and preparation, which should be taken into account in determining the amount of the lawyer's fee. See ACTEC Commentary on MRPC 1.5 (Fees). A lawyer may, with the client's informed consent, limit the scope of the representation to those areas in which the lawyer is competent. See MRPC 1.2(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer).

Mistaken Judgment Does Not Necessarily Indicate Lack of Competence. The fact that a lawyer does not precisely assess the tax or substantive law consequences of a particular transaction does not necessarily reflect a lack of competence. In some instances the facts are unclear or disputed, while in others the state of the law is unsettled. In addition, some applications of law and determinations of facts made by courts or administrative agencies are not reasonably foreseeable. In other instances the complexity of a transaction or its unusual nature generates uncertainties regarding the manner in which it will be treated for tax or substantive law purposes and may prevent an otherwise thoroughly competent lawyer from accurately assessing how the transaction would be treated for tax or substantive law purposes.

Importance of Facts. A lawyer who is engaged by a client in an estate planning matter should inform the client of the importance of giving the lawyer complete and accurate information regarding relevant matters

such as the ownership and value of assets and the state of beneficiary designations under life insurance policies and employee benefit plans. Having so cautioned a client, the lawyer is generally entitled to rely on information supplied by the client, unless the circumstances indicate that the information should be verified. For a client who already has an estate plan, it is a good practice, where appropriate, to obtain the client's documents from his or her previous lawyer. If that is not possible, it is good practice to ask the client to supply originals or copies of signed originals of the most recent documents on which the client is seeking advice or work. These practices reduce the risk of the client inadvertently supplying incomplete or inaccurate information. The lawyer should verify the information provided by the client if the client appears to be uncertain about it or if other circumstances create doubts about its accuracy.

Supervising Execution of Documents. Generally, the lawyer who prepares estate planning documents for a client should supervise their execution. In doing so, it is advisable for the lawyer to develop a procedure for execution that is complete and adequate to meet the requirements of the jurisdiction where the document is to be executed, and to follow that procedure consistently whenever a document of that sort is executed. Of course, he or she may arrange for another lawyer to do so. If it is not practical for a lawyer to supervise the execution or if the client so requests, the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which they should be executed. The lawyer should do so only if the lawyer reasonably believes that the client is sufficiently sophisticated and reliable to follow the instructions and that there are no present concerns about potential challenges. The lawyer who sends estate planning documents to the client for signing outside of the lawyer's office should request original signed documents be returned for the lawyer's review. If the lawyer determines the documents were signed improperly, the lawyer should resend the estate planning documents for the client to sign. Note that in some jurisdictions the supervision of the execution of estate planning documents constitutes the practice of law, which a lawyer may not delegate to a member of the lawyer's staff who is not a lawyer.

Competence Requires Diligence and Communication with Client. Competence requires that a lawyer handle a matter with diligence and keep the client reasonably informed during the active phase of the representation. See MRPCs 1.3 (Diligence) and 1.4 (Communication). See also the discussion of a dormant representation in the ACTEC Commentary on MRPC 1.4 (Communication).

Staff Training and Oversight. Consistent with the requirements of MRPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) and MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants), a lawyer should provide adequate training and supervision to the legal and nonlegal staff members for whom the lawyer is responsible. As indicated by the Comment to MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), the MRPCs do not prohibit lawyers from employing paraprofessionals and delegating work to them. The requirement of supervision is described in the Comment to MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants):

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

A lawyer should provide adequate training, supervision and oversight of the lawyer's staff in order to protect the interests of the lawyer's clients. See ACTEC Commentary on MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistance).

Competence with Technology. A lawyer who uses technology to transmit or store client documents or communicates electronically with a client regarding the drafting of documents must be aware of the potential effects of such use of technology on client confidentiality and preservation of client information. A lawyer must stay reasonably informed about developments in technology used in client communications and document storage, including improvements, discoveries of risks and best practices.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Disciplinary Cases

California:

Butler v. State Bar, 228 Cal. Rptr. 499, 502 (1986). A lawyer was disciplined for failure to inquire adequately regarding the existence of assets standing in decedent's name alone, failure to communicate with the person named as executor of decedent's will and his attorney, knowingly misrepresenting that probate was proceeding satisfactorily and improperly prolonging the probate proceeding. "While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation."

Colorado:

People v. Woodford, 81 P.3d 370 (Colo. 2003). Attorney was suspended after he created an invalid trust that did not accomplish the purpose he was paid to achieve and failed to advise client of additional legal options.

District of Columbia:

In re Long, 902 A.2d 1168 (D.C. 2007). Lawyer who had no experience in estate planning agreed to prepare a will for a client at the request of a mutual friend who was to be the principal beneficiary. "Sometime before [he] produced the final draft of the will, he spoke with [the client] at her home. [He elicited from her that she wanted to turn her farm over to the drafter's friend. [But he] ... did not become knowledgeable about the existence or identity [of the client's] other relatives, he had no specific knowledge of her finances, and he did not discuss her intentions in anything more than this perfunctory manner. He took no special precautions in light of Mrs. Lowery's advanced age and medical condition in anticipation of a challenge to the will." The court concluded that he had not exercised the requisite competence and had an undisclosed and unwaived conflict (presumably his personal ties to her beneficiary). But his "foray into estate planning represented a one-shot event of a personal nature." Accordingly, he was suspended for one month, but the suspension was stayed on conditions.

Kansas:

In re Alig, 285 Kan. 117, 169 P.3d 690 (2007). Lawyer was publicly censured for taking on a contested probate matter in an estate worth \$4 million that was beyond his competence: "Respondent's prior

experience did not include significant experience in probate matters to take on this complicated, contested case. Respondent should have realized that he was not competent to handle a probate case of this complexity shortly after he undertook representing the administrator.” Evidence of his lack of competence was that he instructed the administrator to pay lawyer’s fees from the estate without judicial approval as was required by Kansas law. Lawyer stipulated to violating these rules and Rule 1.5 for charging an unreasonable fee.

Maryland:

Attorney Grievance Comm’n of Maryland v. Myers, 490 A.2d 231 (Md. 1983). This decision came in a disciplinary case in which, in addition to other offenses, the lawyer prepared a will without an attestation clause and signature lines for the witnesses and failed to instruct the client properly regarding manner of execution. The court upheld a three-year suspension.

Minnesota:

Discipline of Fett, 790 N.W.2d 840 (Minn. 2010). Client was attorney-in-fact for his brother and consulted lawyer with regard to Medicaid planning. Lawyer advised client in letter to liquidate brother’s assets and transfer the assets into the client’s name, even though the power of attorney did not allow transfers to the attorney-in-fact. Court held that lawyer’s advice in the letter was incompetent and did not adequately disclose to the client the risks of the recommended course of action or the legal basis which would justify the self-gifting and therefore the client was not given sufficient information to participate intelligently in the decision whether to transfer the assets into his name. Lawyer was publicly reprimanded and placed on one year’s probation.

Ohio:

Toledo Bar Ass’n v. Wroblewski, 512 N.E.2d 978 (Ohio 1987). In this disciplinary case the lawyer made no attempt to determine whether or not the decedent was survived by next of kin; failed to include assets in estate inventory; and improperly prepared some tax returns. An indefinite suspension was imposed.

Oregon:

In re Greene, 557 P.2d 644 (Or. 1976). A lawyer was put on probation for selling estate property without properly ascertaining its value and for failing to discover other assets of the estate.

Malpractice Cases

England:

Ross v. Caunters, 3 All Eng. Rep. 580, 582-583 (1979). In holding that a will’s beneficiaries’ lack of privity of contract with the attorney-drafter of the will was no bar to an action for negligence, the English court observed:

In broad terms, the question is whether solicitors who prepare a will are liable to a beneficiary under it if, through their negligence, the gift to the beneficiary is void. The solicitors are liable, of course, to the testator or his estate for a breach of the duty that they owed to him, though as he has suffered no financial loss it seems that his estate could recover no more than nominal damages. Yet it is said that however careless the solicitors were, they owed no duty to the beneficiary, and so they cannot be liable to her.

If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim.

California:

Biakanja v. Irving, 320 P.2d 16 (Cal. 1958). This landmark decision abolished the privity defense in California in malpractice cases involving estate planning, and the Supreme Court of California set forth a “balancing” test for use in a given case to determine liability with respect to a plaintiff not in privity with the attorney. As modified over the years in California, and applied in several other jurisdictions, the test involves balancing the following five factors:

- (i) The extent to which the transaction was intended to affect the complaining beneficiary;
- (ii) The foreseeability of harm to the beneficiary; (iii) Whether, in fact, the beneficiary suffered harm;
- (iii) The closeness of connection between the negligent act and the injury; and
- (iv) The public policy in preventing future harm.

Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961). In this case, the Court extended the rule from *Biakanja*, which had involved a notary who was engaged in the unauthorized practice of law while doing estate planning, to licensed attorneys. It held that extending liability to intended beneficiaries would not unduly burden the legal profession, despite lack of privity. It also upheld liability on a third-party beneficiary contract theory. But the court ultimately declined to find the lawyer liable for malpractice in estate planning in the specific case on the theory that failure adequately to avoid the rule against perpetuities did not fall below the standard of ordinary skill and capacity.

Heyer v. Flaig, 74 Cal. Rptr. 225 (1969). In this malpractice case the court held that a lawyer has a continuing duty to a client whose will the lawyer has drafted where the attorney-client relationship continues and the lawyer is aware of events reasonably foreseeable and subsequent to the client’s execution of the will, making revisions thereto necessary. The court held that an attorney may be liable for failing to appreciate the consequences of a post-testamentary marriage of which the attorney was advised.

Bucquet v. Livingston, 129 Cal. Rptr. 514, 521 (App. 1976). In this malpractice case, in holding that, as with beneficiaries under a negligently drafted will, the beneficiaries of a trust have standing to sue the drafter, the court stated:

We are not aware of any cases or guidelines establishing in a civil case a standard for the reasonable, diligent and competent assistance of an attorney engaged in estate planning and preparing a trust with a marital deduction provision. We merely hold that the potential tax problems of general powers of appointment in *inter vivos* or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present. [Footnotes omitted.]

Sindell v. Gibson, Dunn & Crutcher, 63 Cal. Rptr. 2d 594 (Cal. App. 1997). In this case the court held that the intended beneficiaries of a law firm’s estate planning services rendered for the beneficiaries’ father suffered “actual injury” (attorneys’ fees and litigation expenses) in defending a lawsuit by the surviving spouse’s conservator that plaintiffs alleged would not have been filed but for the law firm’s

failure to obtain a waiver of community property rights from the allegedly willing spouse when she was competent.

Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888 (Cal. App. 2003). Because an attorney generally has no professional duty to anyone who is not a client, an attorney preparing a will has no duty to the intended beneficiaries to investigate, evaluate, ascertain or maintain the client's testamentary capacity. The duty of loyalty of the attorney to the client might be compromised by imposing such a duty to beneficiaries on the attorney. [Citing and quoting from the ACTEC Commentary on MRPC 1.14 (3rd Edition).]

Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Cal. App. 2004). When preparing a will or other testamentary instrument giving property to a beneficiary who, under applicable state law, is presumptively disqualified from receiving such a gift (in this case, the decedent's caregiver), the testator's lawyer owes a duty of care to the nonclient intended beneficiary to try to ensure that the proposed transfer stands up (in this case meaning that the lawyer should have advised the client testator to obtain a "Certificate of Independent Review" from a totally disinterested and independent lawyer without which the gift would and in this case did fail), declaring that the gift in question was clearly what the client intended and that the client had not been unduly influenced to make the gift.

Boronian v. Clark, 20 Cal. Rptr. 3d 405 (Cal. App. 2004). An estate planning attorney, at the direction of a third party and without meeting or speaking to the client, prepared a will and a "confirmation of gift" for a terminally ill individual. The "gift" was to the third party. When the testator signed the documents, she was lethargic, hallucinating, and in great pain. She died three days later. The testator's son and daughter contested the will and the gift, and the third party settled by receiving a token amount of cash, but the estate was left with a debt related to the gift. In the subsequent malpractice action, the trial court found in favor of the son and daughter against the attorney. The Court of Appeal reversed, stating: Although a lawyer retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the lawyer's primary duty is owed to his client and his primary obligation is to serve and carry out the client's intentions. Where, as here, there is a question about whether the third-party beneficiary was, in fact, the decedent's intended beneficiary, and the beneficiary's claim is that the lawyer failed to adequately ascertain the testator's intent or capacity, the lawyer will not be held accountable to the beneficiary—because any other conclusion would place the lawyer in an untenable position of divided loyalty.

Chang v. Lederman, 172 Cal. App. 4th 67, 86, 90 Cal. Rptr. 3d 758, 773 (2009). Client, recently married and terminally ill, allegedly instructed his lawyer to revise his estate planning documents to leave the bulk of his estate to his wife. His lawyer refused, alerting the client to the likelihood of a lawsuit if he did this, and insisting that the client get a psychiatric evaluation before making such a change. Client died without making the changes and his surviving spouse sued the lawyer for malpractice. But the court held that lawyer owed her no duty and granted judgment for the lawyer:

[T]estator's attorney owes no duty to a person in the position of [surviving spouse here], an expressly named beneficiary who attempts to assert a legal malpractice claim not on the ground her actual bequest... was improperly perfected but based on an allegation the testator intended to revise his or her estate plan to increase that bequest and would have done so but for the attorney's negligence. Expanding the attorney's duty of care to include actual beneficiaries who could have

been, but were not, named in a revised estate plan, just like including third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict.... Moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has died.

Stine v. Dell’Osso, 230 Cal. App. 4th 834 (2014). An incapacitated woman’s son was appointed her conservator and he misappropriated \$1 million of her property. He was removed as conservator, and the professional fiduciary appointed as successor conservator sued the lawyers for the son, alleging that they were aware of significant assets of the incapacitated woman that the son had not reported to the court. The court cited prior case law holding that as a matter of statute (which states a successor personal representative has all powers and duties as the former executor), a successor fiduciary has standing to sue the predecessor’s attorney. The court further noted that such a malpractice action would not threaten attorney-client privilege because the privilege would be held by the successor fiduciary. The lawyers claimed that the successor conservator would be attributed the former conservator’s unclean hands and therefore barred from suing, but the court held otherwise, noting that unclean hands was an equitable remedy that should not apply here. The successor conservator only stepped into the son’s fiduciary shoes and did not step into the “morass created by his personal malfeasance.”

Colorado:

Glover v. Southard, 894 P.2d 21, 25 (Colo. App. 1994). This decision upholds dismissal of a malpractice claim brought by the intended beneficiaries against the scrivener of the decedent’s will and trust agreement. “[I]n drafting testamentary instruments at the behest of a client, an attorney should not be burdened with potential liability to possible beneficiaries of such instruments.”

Connecticut:

Licata v. Spector, 225 A.2d 28 (Conn. Com. Pl. 1966). The court here held that the named legatees under a will declared invalid and inoperative because the statutory requirements as to attesting witnesses were not met could maintain an action against the attorney-drafter of the will for the attorney’s alleged negligence in failing to provide for the required number of witnesses.

Delaware:

Pinckney v. Tigani, 2004 WL 2827896 (Del. Super. 2004). Attorney drafted a trust to provide for the plaintiff. Pursuant to the scope of the engagement agreement, the attorney was not hired to investigate the client’s finances to determine if funds were available to fund the bequest to the trust. In determining whether the beneficiary had standing, the court stated, “Where the drafting is correct [as in the instant case], yet the bequest fails for other reasons, the disappointed heir must allege facts that irrefutably lay the bequest’s failure at the scrivener’s door.” The court held that the attorney did not owe a duty of care to the trust beneficiary to investigate the decedent’s finances to ensure that the bequest would be funded because the scope of representation was limited to preparation of documents, and the engagement letter specifically excluded any investigation into the decedent’s finances.

District of Columbia:

Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983). In a case of first impression, the court here held that the intended beneficiary of an allegedly negligently drafted will is not barred by the lack of privity from

bringing a suit for malpractice against the attorney-drafter. (The attorney-drafter had admittedly failed to include a residuary clause in the will as executed.)

Florida:

Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1380 (Fla. 1993). In this malpractice action the Supreme Court of Florida observed:

In the area of will drafting, a limited exception to the strict privity requirement has been allowed where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party. [Citations omitted.]

* * *[W]e adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's lawyer. [Emphasis added.]

Kinney v. Shinholser, 663 So. 2d 643 (Fla. Dist. App. 1995). Applying Florida malpractice standards, the court here upheld the dismissal of a complaint against the lawyer who drew a will for a married client which did not preserve the tax benefit of the testator's unified credit. The will gave the testator's entire residuary estate to a trust for the benefit of his widow, over which she was given a general power of appointment. In effect, the will caused the widow's estate to pay some estate tax that was avoidable had she not been given a general power of appointment. According to the court, there was no evidence of malpractice by the scrivener as the will did not indicate any intent to minimize taxes on the death of the surviving spouse. However, the court held that the complaint stated a cause of action by the decedent's son, the remainderman under the husband's will and the sole beneficiary of the wife's will, against the lawyer and the accountant who were retained by the surviving spouse to probate the will and prepare the federal estate tax return, for failing to advise her of the tax savings that would be achieved if she disclaimed the general power of appointment.

Dingle v. Dellinger, 134 So.3d 484 (Fla. App. 2014). Grantees of quitclaim deed that was later invalidated could sue the attorney who prepared the deed. The court noted that attorneys who represent a client in a property transfer are generally not liable to nonclients, because the transactions are typically two-sided, with different interests held by the parties. However, in this case the transaction was one-sided and the parties' interests did not conflict.

Brookman v. Davidson, 136 So.3d 1276 (Fla. App. 2014). In a case of first impression, the Florida court of appeals allowed a successor personal representative of an estate to bring a malpractice action against the attorney for the predecessor personal representative. The court relied on the state statute that gave a successor personal representative the same power and duty as the original personal representative.

Georgia:

Rhone v. Bolden, 608 S.E.2d 22 (Ga. App. 2004). Attorneys representing decedent's estate and attorneys who represented decedent's heirs in prosecuting wrongful death action have no fiduciary duty to an heir not included in the wrongful death action and, therefore, are not liable for legal malpractice in an action brought by the decedent's father who was not included in the settlement of the wrongful death claim. The decedent's father was clearly not the client of the attorneys prosecuting the wrongful death action. With respect to the duty of the lawyers for the administrator of the estate, the court observed:

[T]he existence of a duty by the administrator to the heirs [to marshal and manage the estate assets and then distribute them properly to the heirs] does not translate into a duty by the administrator's lawyers to the heirs. While the estate may or may not ultimately pay the lawyer's fee, the lawyer's client is the administrator, not the estate.

Hawaii:

Blair v. Ing, 21 P.3d 452 (Haw. 2001). The beneficiaries of a trust brought legal malpractice action against the attorney who created the trust, alleging that attorney's negligence in drafting the trust caused adverse tax consequences that diminished their inheritance. In a case of first impression for that state, the Supreme Court of Hawaii held: Non-client beneficiaries have standing in legal malpractice action under both contract and negligence theories. In a testator-attorney relationship, the attorney is retained for the specific benefit of the named beneficiaries, thus the attorney owes the non-client beneficiaries a duty of care; 2) even where the testamentary instrument is valid on its face, extrinsic evidence will be allowed in a legal malpractice action to prove the testator's true intent; and 3) the statute of limitations for legal malpractice arising in the estate-planning context does not accrue at the time of drafting, but instead only begins to run when the plaintiff knew or reasonably should have known of the attorney's negligence.

Young v. Van Buren, 130 Haw. 349, 310 P.3d 1050 (Haw. App. 2010). Court rejected malpractice claims by son who claimed attorney who drafted trust amendments for his mother had negligently failed to ascertain that the client lacked competence to execute the documents and/or was being unduly influenced. Although the son was a residuary beneficiary of the trust, he remained so after the amendments; since he was not the intended beneficiary of the trust amendments, he was owed no duty by the lawyer for his mother.

Idaho:

Harrigfeld v. Hancock, 90 P.3d 884, 888 (Idaho 2004). The Supreme Court of Idaho adopted the rule set forth above in *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378 (Fla. 1993), holding that a testator owed limited duties to the testator's beneficiaries. The attorney owed a duty to include beneficiaries as requested by the testator and to have the instruments properly executed. The attorney did not owe any duty to individuals who believed they did not receive their fair share of the testator's estate.

Soignier v. Fletcher, 151 Idaho 322, 325, 256 P.3d 730, 733 (2011). The Supreme Court of Idaho reaffirmed the rule adopted in *Harrigfeld*. Testator's will left a named beneficiary "[a]ll beneficial interests that I have in any trusts," even though testator's interest in his mother's trust had recently been distributed to him and he had no trust interests at the time his will was prepared and executed. "Attorneys do not have to postulate whether a testator intended to do something other than what is expressed in the will...[and] attorneys have no ongoing duty to monitor the legal status of the property mentioned in a testamentary instrument."

Illinois:

Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984). The Supreme Court of Illinois here held that the beneficiaries under an allegedly negligently drafted will could sue the drafter directly in legal malpractice both under traditional negligence theory and third-party beneficiary/breach of contract

theory given the plaintiffs' allegations that, among other things, the testators' purpose in employing the attorney was to draft the will not only for the benefit of the testators (plaintiffs' uncle and aunt) but for the benefit of the intended contingent beneficiaries.

Estate of Powell v. John C. Wunsch P.C., 989 N.E.2d 627 (Ill. App. 2013). Lawyer was hired by wife of decedent to pursue wrongful death claim. The statutory beneficiaries of the claim were the wife, and decedent's son and daughter. Lawyer was later sued by guardian of son, who was disabled, for not protecting the son's share of the settlement. Lawyer argued son was not a client but court held that lawyer owed a duty to all statutory beneficiaries in a wrongful death action.

Indiana:

Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988). The Supreme Court of Indiana here held that an action will lie by a beneficiary under an allegedly negligently drafted will against the attorney-drafter based on a known third-party beneficiary/breach of contract theory.

Ferguson v. O'Bryan, 996 N.E.2d 428 (Ind. App. 2013). Attorney was sued for malpractice by disappointed heirs. The testator had told the attorney she had a list of specific gifts for relatives, and that the residue would go to her alma mater. The attorney drafted the will referring to a separate list and leaving the residue to the school, and he gave her a form to use for the gifts. He told her it needed to be signed and dated but the form did not provide for a date and signature. After her death the form was found with a list of gifts but it was not signed. The court stated that drafting attorneys can be held liable to disappointed beneficiaries if they are known to the attorney, and held that even if attorney did not know who the intended beneficiaries were, he knew of their existence so he could be sued. A dissenting judge did not think knowledge of the testator's intent to prepare a list was enough to trigger liability.

Iowa:

Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987). The Supreme Court of Iowa here held that the lawyer drafting a will owes a duty of care to the direct, intended and specifically identifiable beneficiaries of the testator-client and that such a beneficiary has an action for legal malpractice against the attorney without regard to lack of privity.

New Hope Methodist Church v. Lawler & Swanson, P.L.C., 791 N.W.2d 710 (Iowa App. 2010). Beneficiaries of a trust who are owed notice by the personal representative are owed no duty of care by the lawyer for the personal representative and thus lack standing to sue the lawyer for negligently failing to provide notice.

Sabin v. Ackerman, 846 N.W.2d 835 (Iowa 2014). The lawyer represented a married couple and prepared for them a lease of their farm with option to purchase to their son. Couple died, leaving their estate to their 3 children and naming the daughter as executor. The lawyer represented the daughter as executor. Son exercised the option to purchase from the estate and the lawyer handled the transaction. The lawyer did not advise the daughter that the option might be invalid. The daughter and the other son later sued the son who purchased the farm, challenging the validity of the option, settled the claim and then sued the lawyer, claiming that he should have advised the daughter about the option or advised her to seek independent counsel. The court held the lawyer had no duty to advise daughter as to her claims as beneficiary.

Kansas:

Pizel v. Zuspahn, 795 P.2d 42 (Kan. 1990), *modified on other grounds and reh'g denied*, 803 P.2d 205, *aff'd sub nom. Pizel v. Whalen*, 845 P.2d 37 (Kan. 1993). The Supreme Court of Kansas here held that the lack of contractual privity between the potential beneficiaries under a testator's will and the attorney-drafter did not bar the beneficiaries' action for legal malpractice. The court applied the modified multifactor balancing test (first enunciated in California in *Biakanja v. Irving*, *supra*) in coming to this conclusion.

Kentucky:

Cave v. O'Bryan, 2004 WL 869364 (Ky. App. 2004). An intended beneficiary of a will may maintain a malpractice action against the testator's attorney alleging that the estate was not distributed according to the testator's intent. After acknowledging that the "clear trend" among courts in other jurisdictions is to hold that estate beneficiaries are intended to benefit from the services rendered by attorneys to their testator-clients, the court held that an attorney owes a "duty of care to the direct, intended, and specifically identifiable beneficiaries of the estate planning client, notwithstanding a lack of privity."

Branham v. Stewart, 307 S.W.3d 94, 101 (Ky. 2010). "[T]he attorney retained by an individual in the capacity as a minor's next friend or guardian establishes an attorney-client relationship with the minor and owes the same professional duties to the minor that the attorney would owe to any other client."

Pete v. Anderson, 413 S.W.3d 291 (Ky. 2013). Attorney was hired by surviving spouse to pursue a wrongful death action for death of husband. Husband was survived by spouse and two minor children. Case was dismissed and surviving spouse missed the deadline to sue for malpractice, so the two minor children filed the malpractice action. Attorney claimed that the children were not his clients because the proper party in a wrongful death action is the personal representative. Court discussed the history of the wrongful death statute and held, that because the real parties in interest were the beneficiaries and lawyer owed a duty to them, the minor children could maintain the suit. A dissent argued that allowing statutory beneficiaries to sue for malpractice could allow an estate beneficiary to sue the estate personal representative's attorney.

Louisiana:

Woodfork v. Sanders, 248 So.2d 419 (La. App. 1971), *cert denied*, 252 So.2d 455 (La. 1971). In this case the court rejected an attorney-drafter's privity defense in a legal malpractice action brought by a disappointed beneficiary and applied an intended third-party beneficiary/breach of contract theory.

Succession of Killingsworth, 270 So.2d 196 (La. App. 1972), *aff'd in part and rev'd in part*, 292 So.2d 536 (La. 1973). In this case the court permitted a legal malpractice action by a beneficiary not in privity with the attorney who acted as the officiating notary for execution of a will, basing its decision on a state statute permitting damages arising from "every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it."

Maryland:

Noble v. Bruce, 709 A.2d 1264 (Md. 1998). The Court of Appeals (Maryland's highest court) held that a testamentary beneficiary, who is not a client of the drafting lawyer, may not maintain a malpractice action against the lawyer for allegedly providing negligent estate planning advice to the testator or

negligently drafting the testator's will in a manner which resulted in significant estate and inheritance taxes that could have been avoided, thus re-establishing the strict privity rule in Maryland.

Massachusetts:

Connecticut Junior Republic v. Doherty, 478 N.E.2d 735 (Mass. App. 1985), *review denied*, 482 N.E.2d 328 (Mass. 1985). In this case the court assumed that the attorney-drafter of a defective will could be held liable to the disappointed beneficiary but found no liability on the facts of this case since the testator had ratified the attorney's error.

Spinnato v. Goldman, 67 F. Supp. 3d 457 (D.Mass. 2014). The attorney represented an elderly woman who left her estate to Spinnato, a man she befriended, rather than her relatives in Texas with whom she had little contact. The attorney and Spinnato were co-executors of her estate. When she died, the attorney contacted the Texas relatives and told them a significant amount of assets were transferred to Spinnato by the deceased during her life and that the transfers were a result of Spinnato's undue influence. The attorney put them in touch with a Massachusetts lawyer and testified that the decedent lacked capacity and was subject to undue influence at the time the transfers were made. Spinnato settled with the relatives and sued the attorney. On a motion to dismiss, the court held that: (1) while decedent was alive, the attorney owed no duty to Spinnato and thus his failure to disclose concerns about undue influence to Spinnato during decedent's life was not actionable; (2) his testimony was protected by the absolute witness privilege and not actionable; (3) one co-executor does not owe duties to the other co-executor; (4) the attorney owed duties to Spinnato as heir, so those claims were not dismissed; (5) Spinnato's allegations that the attorney assured him during decedent's life that the estate plan and transfers were enforceable (thus keeping him from taking steps to ensure enforceability), and that those were false misrepresentations, were not dismissed; (6) Spinnato's allegations that the attorney's assurances after decedent's death that he would probate the will as written were false misrepresentations, were not dismissed; (7) Spinnato's claim of tortious interference with expectancy, based on alleged facts that attorney drafted the estate plan despite his concerns about undue influence, were not dismissed.

Michigan:

Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996). The Supreme Court of Michigan here held that, although a beneficiary named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by reason of the beneficiary's third-party beneficiary status, the attorney could not be held liable to the testator's heirs for negligence inasmuch as the will in question fulfilled the intent of the testator *as expressed in the will*. (The will did not exercise the testator's power of appointment over her predeceased husband's marital trust, thereby permitting the testator's daughter, disinherited by the testator, to receive one-third of the assets held in the husband's trust.)

Sorkowitz v. Lakritz, Wissbrun & Assoc., P.C., 683 N.W.2d 210 (Mich. App. 2004). Non-client estate beneficiaries may maintain a malpractice action against the attorneys who drafted estate planning documents on the ground that they rendered inadequate advice about tax consequences. The court departed from prior Michigan precedent (see *Mieras v. DeBona, supra*) and allowed the beneficiaries here to use extrinsic evidence to show that the attorney's negligence in omitting a common tax savings clause from the estate planning documents had thwarted the testator's intent.

Charfoos v. Schultz, 2009 Mich. App. LEXIS 2313, 2009 WL 3683314 (Mich. App. 2009). This is a malpractice case brought by the disinherited children of decedent who allege lawyer committed malpractice by drafting the offending will and trust amendment which bequeathed 70% of his estate to his surviving wife rather than to the children, even though lawyer knew their father was mentally incompetent. First, court held that in Michigan, the testator's intent to provide for the beneficiaries alleging malpractice must appear on the face of the will, which it did not. Second, Rule 1.14 does not provide a standard for civil liability. Summary judgment for the lawyer.

Minnesota:

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981). In this malpractice case the court applied the California *Biakanja*, *supra*, multifactor balancing test in a case involving the alleged negligent drafting of a joint tenancy deed but found no liability since plaintiff failed to prove he was the direct and intended beneficiary of the lawyer's services.

Missouri:

Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. 1995). In this malpractice case the Supreme Court of Missouri aligned Missouri's law with the majority rule in holding that lack of privity was not a defense to an action for alleged malpractice in the drafting of a testamentary instrument.

Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C., 958 S.W.2d 42 (Mo. App. 1997). Applying Missouri's recently adopted "modified balancing test" as enunciated in *Donahue, supra*, the court directed the trial court on remand to determine whether or not the decedent, in employing the defendant estate planning attorney, intended to benefit the non-client/beneficiary. The court noted that the lawyer, who had prepared a total amendment and restatement of an existing trust instrument, could be held responsible for the entire instrument's contents even though large portions of the instrument were simply copied, verbatim, from the original trust document.

Montana:

Stanley L. and Carolyn M. Watkins Trust v. Lacosta, 92 P.3d 620 (Mont. 2004). The court ruled that it was a factual question, precluding summary judgment, whether non-client will and trust beneficiaries had standing to bring a legal malpractice action against the attorney who drafted the decedent's estate planning documents. The court also ruled that the statute of limitations for bringing the action did not begin to run until a claim was brought that jeopardized the validity of the documents.

Harrison v. Lovas, 356 Mont. 380, 383, 234 P.3d 76 (2010). Parents contacted lawyer to discuss giving larger trust shares to three of their children. The lawyer informed the clients she was waiting on additional information to complete the changes, but the parents did not follow up and died a few years later without making the changes. The children who would have received the larger shares sued the lawyer for malpractice, but the court held that the lawyer owed no duty to the children. Whether a drafting attorney owes a duty to named beneficiaries is a factual issue, and here there was no clear indication that the parents intended to go through with the changes.

Nebraska:

Lilyhorn v. Dier, 335 N.W.2d 554 (Neb. 1983). The court here held that the beneficiary's lack of privity with the attorney-drafter barred an action for negligence in the preparation of the will.

Perez v. Stern, 279 Neb. 187, 198, 777 N.W.2d 545, 554 (2010). Unlike *Lilyhorn*, where the estate planner owed no duty to a potential will beneficiary, a lawyer hired by the personal representative to prosecute a wrongful death claim on behalf of the decedent's children as statutory beneficiaries does owe them a duty "as direct and intended beneficiaries of her services, to competently represent their interests."

New Hampshire:

Simpson v. Calivas, 650 A.2d 318, 323-324 (N.H. 1994). This decision reverses the dismissal of a malpractice action against the scrivener of a will, who was charged with failing to draft a will that expressed the decedent's intent to leave all of his land to plaintiff. "We hold that where, as here, a client has contracted with an attorney to draft a will and the client has identified to whom he wishes his estate to pass, that identified beneficiary may enforce the terms of the contract as a third-party beneficiary."

Sisson v. Jankowski, 148 N.H. 503, 809 A.2d 1265 (2002). Lawyer had drafted estate planning documents for a client suffering from cancer and had taken them to him at a nursing home for execution. The client decided at that time, however, that he wanted a contingent beneficiary in his will. Rather than write in the addition, or make the change and return that day, the lawyer took the documents back to her office and returned with them 3 days later when she concluded client was incompetent to execute them. Client died intestate and the intended beneficiary sued the lawyer for negligence. The court held that the estate planner owed no duty to the intended beneficiary ensure the will was executed promptly.

New Jersey:

Rathblott v. Levin, 697 F. Supp. 817, 820 (D.N.J. 1988). Here a federal court, applying New Jersey law, held that an attorney, whose alleged negligence in drafting a will caused the will's beneficiary to deplete the estate's assets in successfully defending a will contest, could be liable to the beneficiary for malpractice despite the lack of privity. In answer to the defendant lawyer's argument that cases from the majority of jurisdictions finding liability for negligence in will drafting should not be extended to the facts of this case, where the beneficiary had successfully defended a contest to the will, the court observed:

[W]e are unable to see a valid legal difference between a plaintiff who loses the right to one-half of an estate and a plaintiff who loses one-half of an estate in protecting her rights. If either was caused by an attorney's negligence in drafting, that attorney should be liable.

Lovett v. Estate of Lovett, 593 A.2d 382, 387 (N.J. Super. 1991). This case involved various charges of misconduct by a lawyer in connection with the preparation of a will, including a failure to meet with the husband-testator out of the presence of his second wife who would receive a share of his estate outright under the new will rather than in trust for her; a failure to counsel the client adequately with respect to tax matters; and a failure to obtain information regarding the husband's assets. Although the charges were rejected by the court, it stated that, "[i]n most circumstances, meeting with a client alone would be well advised." A failure to counsel the client in detail regarding the tax consequences was permissible because the client had indicated that he was not interested in them. In addition, the court observed that obtaining information regarding a client's assets "in most cases, is important to the formulation of an adequate testamentary disposition."

Estate of Albanese v. Lolio, 923 A.2d 325 (N.J. Super. 2007). Where retainer agreement between personal representative and law firm purported to be between the firm and the client “individually and as executrix,” this was enough to defeat summary judgment entered by the trial court on the malpractice claim brought by the personal representative for damages she allegedly suffered as beneficiary. “[She] may have had a reasonable expectation of representation as an ‘individual’ as well as executrix.” Summary judgment against her co-beneficiary sisters, however, was affirmed as no duty was owed them.

New York:

Maneri v. Amodeo, 238 N.Y.S.2d 302 (1963). The court here upheld the privity defense in an action for legal malpractice and specifically rejected the California approach.

Viscardi v. Lerner, 510 N.Y.S.2d 183 (App. Div. 1986). The court here described the privity rule as “firmly established” in New York and to be applied to bar actions for legal malpractice by non-clients absent fraud, collusion, malice or other “special circumstances.”

Leff v. Fulbright & Jaworski LLP, 78 A.D.3d 531, 911 N.Y.S.2d 320 (App. Div. 2010). Law firm represented a husband and wife (his third wife) for estate planning, but separately. When husband died, an agreement was found that required him to leave half his estate to a son from prior marriage. His wife sued the law firm, alleging law firm should have known about and discussed the agreement with husband, and that he would have devised a way to give her a larger share of the estate than she received had he known of the obligation to the son. The court held that the wife had no privity with law firm with respect to her husband’s estate plan, and under New York’s privity rule, she could not sue for malpractice. “Plaintiff’s subjective belief that she had engaged in joint estate planning or was jointly represented with her late husband is insufficient to establish such privity.... There is no evidence that [law firm] knew and intended that their advice to plaintiff’s late husband was aimed at affecting plaintiff’s conduct or was made to induce her to act. Nor is there evidence that plaintiff relied upon defendants’ advice to her detriment. Significantly, the standard is not satisfied when the third party was only ‘incidentally or collaterally’ affected by the advice.” (This case was decided after *Schneider*, noted below, and that case was distinguished). Note that these Commentaries caution that separate representation of H and W is “generally inconsistent with the lawyer’s duty of loyalty to each client.” Commentaries, MRPC 1.7 “Joint or Separate Representation.” Leff may present a requirement that clients be informed in advance of the separate representation of the effect of lack of privity in jurisdictions that restrict a beneficiary’s right to sue a drafting attorney.

Estate of Schneider v. Finmann, 15 N.Y.3d 306 (2010). Lawyer allegedly gave client bad advice regarding titling of life insurance, causing life insurance to be included in client’s taxable estate. The New York court relaxed its strict privity rule and held that the executor of the estate could sue for malpractice. See the New York Bar ethics opinion issued in response to *Schneider* case.

Steinbeck v. Steinbeck Heritage Foundation, 400 Fed. Appx. 572 (2d. Cir. 2010). In a longstanding dispute among the Steinbeck heirs over copyright interests in the author’s works, the court held that deceased author’s son could not claim an attorney-client relationship with lawyers who worked for the literary agency simply because they held themselves out as copyright experts, told him they had his best interests in mind, and expressed sympathy for him, particularly in light of the fact that son was

represented by other counsel at the time. His claim for breach of fiduciary duty against the literary agency on this basis therefore failed.

North Carolina:

Babb v. Bynum & Murphrey, PLLC, 182 N.C. App. 750, 643 S.E.2d 55 (N.C. App. 2007). Beneficiary/co-trustee brought a malpractice claim against partner and law firm of another lawyer who served as a co-trustee for failure to monitor the trustee lawyer's conduct. The trustee lawyer was alleged to have engaged in fraud, conversion and embezzlement of trust funds. Court rejected the plaintiff's theories that defendants owed plaintiff a duty to monitor under either the state limited liability act or the law firm's operating agreement.

Ohio:

Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 887 N.E.2d 1167 (2008). Under Ohio's strict privity rule, estate legatees have no standing to sue their mother's estate planner for malpractice. The estate planner assisted the decedent to transfer a life estate in a farm to one of her children allegedly without advising her of the tax consequences, thus shifting substantial tax liabilities to estate. Ohio is one of the minority of jurisdictions holding that lack of privity is a valid defense to a disappointed beneficiary's action against a lawyer for negligent drafting of a will. In this case, the court refused to relax the privity requirement announced in *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987). In general, the only exception is for "fraud, bad faith, collusion or other malicious conduct." However, see *Elam v. Hyatt Legal Services*, discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Estate of Barney v. Manning, 2011 Ohio 480 (Ohio App. 2011). Lawyer who was serving as executor of estate and successor trustee misappropriated funds. The clients sued the law firm for malpractice, but the court affirmed dismissal of the case. The law firm did not know of the lawyer's misconduct, the lawyer's actions were beyond the scope of his employment and the lawyer's actions were not "calculated to promote the employer's business," so there was no liability under *respondeat superior* or agency law.

Oklahoma:

Hesser v. Central Nat'l Bank, 956 P.2d 864 (Okla. 1998). Joining the majority of jurisdictions that permit a lawsuit for alleged negligent will drafting by a disappointed beneficiary, the court here applied the third-party/intended beneficiary contract theory to permit a suit for malpractice by the intended beneficiary of a will that the testator's lawyer allegedly failed to have properly executed.

Oregon:

Hale v. Groce, 744 P.2d 1289 (Or. 1987). The court here held that a malpractice action for negligence in the drafting of a will sounds under both tort and contract theories.

Pennsylvania:

Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). Criticizing California's multifactor balancing test as too broad, the Supreme Court of Pennsylvania here applied a third-party beneficiary contract theory in permitting a suit by the intended beneficiaries of a negligently drafted will against the attorney-drafter. The court observed that the contract between the testator and attorney must be for the drafting of a will that clearly manifests the intent of the testator to benefit the legatees who are the intended beneficiaries of the contract and are named in the will.

Gregg v. Lindsay, 649 A.2d 935, 940 (Pa. Super. 1994), *appeal denied*, 661 A.2d 874 (1995). This decision reversed a judgment entered on a jury verdict that the lawyer's failure to see that a client's will was executed constituted a breach of a third-party beneficiary contract. The lawyer prepared a new will on the same day that a friend of the decedent told the lawyer of the client's wish to execute a new will that made the friend the principal beneficiary. When the lawyer took the will to the hospital for execution, the client said it was acceptable. However, as no witnesses were available, it was not signed. The lawyer agreed to change the name of a charitable beneficiary designated in the will and bring it back the following day for execution. The client was moved to another hospital, where he died the next day. The court stated:

To hold otherwise, under the circumstances of this case, would open the doors to mischief of the worst type. To permit a third person to call a lawyer and dictate the terms of a will to be drafted for a hospitalized client of the lawyer and to find therein a contract intended to benefit the third person caller, even though the will was never executed, would severely undermine the duty of loyalty owed by a lawyer to the client and would encourage fraudulent claims.

Jones v. Wilt, 871 A.2d 210 (Pa. Super. 2005). Surviving spouse had standing as beneficiary to sue his deceased wife's estate planner for malpractice, but not as executor because he could not show harm to the estate. Nonetheless, his claim that estate planner was negligent for failing to advise the decedent of the value of using a QTIP trust and/or other means of saving estate and inheritance taxes failed because it lacked foundation: there was no evidence that testator wanted to minimize taxes or that she wanted her surviving husband to receive the use of the assets which she gave to her sister under an *inter vivos* trust.

South Carolina:

Argoe v. Three Rivers Behavioral Center, 697 S.E.2d 551 (S.C. 2010). An attorney-in-fact hired a lawyer to assist with the principal's (his mother's) incapacity. She had allowed a loan against a condominium to go into default. The principal was unhappy with some of the things her attorney-in-fact son had the lawyer do for him and sued the lawyer on several claims, including malpractice. The court held that the principal was not the client of the lawyer and so lacked standing to sue the lawyer for her attorney-in-fact.

Fabian v. Lindsay, 410 S.C. 475 (2014). The Supreme Court of South Carolina held that an intended beneficiary named in a will or trust may sue the drafting attorney for faulty drafting. The court limited the action to beneficiaries named or otherwise identified by status in the document but held that extrinsic evidence was admissible to establish the decedent's intent.

South Dakota:

Persche v. Jones, 387 N.W.2d 32 (S.D. 1986). In this case a bank and its president who drafted and supervised the execution of wills and a codicil resulting in the documents' invalidity were held liable both in negligence and for the unauthorized practice of law.

Friske v. Hogan, 698 N.W.2d 526 (S.D. 2005). South Dakota here joins the vast majority of states rejecting the rule that the lack of contractual privity between a testator's lawyer and the beneficiaries bars an action for legal malpractice against the attorney. The court found that the privity rule does not

apply where it can be shown that the nonclient was the direct, intended beneficiary of the lawyer's services to the testator. The court cites favorably to the Restatement (Third) of the Law Governing Lawyers §51(3) (2000).

Tennessee:

Akins v. Edmondson, 207 S.W.3d 300 (Tenn. App. 2006). This was an unsuccessful malpractice claim brought by a former attorney-in-fact (AIF) operating under a power of attorney against a law (and an accounting) firm which advised the principal. The AIF, who was also an attorney at law, was also the beneficiary of her principal's farm under the principal's will. Acting under the Power of Attorney, the AIF hired an accounting firm to provide tax and estate planning advice and the accountants recommended a limited partnership be established with the principal as the general partner and the AIF as the limited partner. The principal accepted this advice, and a law firm was hired to draft the limited partnership agreement, which it did. It provided the agreement to the principal who executed it on the advice and assistance of her personal attorney. The farm was transferred into the partnership, in which the AIF had only an 8.5% interest, thus rendering the testamentary gift of the farm to the AIF adeemed. After the principal died, and the AIF discovered the ademption, she brought this malpractice claim against the accounting firm and the law firm claiming to have been a co-client or at least an intended beneficiary of the services. The court rejected the AIF's standing to bring the malpractice claim because all services were provided to her principal, not to her personally; so she was not a client. It also rejected her claim that the firm had provided false information to the principal on which the AIF was expected to rely, finding the record devoid of any evidence of such false information supplied by the law firm. Finally, the court rejected a claim that the accounting firm had engaged in the unauthorized practice of law in providing the estate planning advice it did, and that the law firm had assisted this unauthorized practice. The unauthorized practice action was time barred, said the court, and breach of the Rules of Professional Conduct does not provide a private cause of action.

Texas:

Barcelo v. Elliott, 923 S.W.2d 575, 579-580 (Tex. 1996). The Supreme Court of Texas here reaffirms the application of the strict privity rule to bar an action for legal malpractice brought by the beneficiaries under an allegedly negligently drafted trust against the attorney-drafter. One of the dissenting Justices in this 4-3 decision noted:

With an obscure reference to "the greater good" [citation omitted], the Court unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing, and unjustly denies legal recourse to the grandchildren for whose benefit [Testator] hired a lawyer in the first place....

By refusing to recognize a lawyer's duty to beneficiaries of a will, the Court embraces a rule recognized in only four states, [footnote omitted] while simultaneously rejecting the rule in an overwhelming majority of jurisdictions. [Footnote omitted] Notwithstanding the fact that in recent years the Court has sought to align itself with the mainstream of American jurisprudence, [footnote omitted] the Court inexplicably balks in this case.

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006). Having rejected in *Barcelo* (above) the rule followed in the "overwhelming majority of jurisdictions" that allows intended beneficiaries to sue a decedent's estate planners for legal malpractice, the Supreme Court of Texas decided here whether the decedent's executor had standing to do so. This was a malpractice case

brought by the executors of the estate of their father against his estate planners, alleging that their negligence caused the estate to incur \$1.5 million in taxes that could have been avoided by competent estate planning. The Court holds that the claim for legal malpractice accrued during the decedent's life and survived to his estate; therefore the executors were entitled to pursue the survival claim against the decedent's lawyers. Thus, contrary to the concern of the dissenters in *Barcelo*, the estate planners are not insulated from the consequences of their malpractice.

Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009). This was a malpractice case brought by the executor of an estate (O'Donnell) against the law firm (Smith) that advised the executor's decedent (Corwin) in his role as executor of his deceased wife's estate. The Supreme Court of Texas holds here that the executor is in privity with his decedent and may bring this malpractice claim against the decedent's lawyer who advised him as executor for his wife's estate. The case thus extends the holding of *Belt* (above) by concluding that, not only do the decedent's claims for malpractice in estate planning survive to his executor, but so also do other legal malpractice claims that arise outside the estate planning context. At issue was the law firm's advice to Corwin, when he was executor for his deceased wife's estate, about the dangers of mischaracterizing community property as separate property and thus excluding it from his wife's estate. The law firm had assisted the decedent in filing tax returns which took the position (alleged to be a mischaracterization) that certain oil stock was the separate property of Corwin rather than the community property of Corwin and his wife. After both had died, their children as beneficiaries of their mother's estate sued Corwin's estate for this mischaracterization and Corwin's executor (O'Donnell) settled their claims for almost \$13 million. The Court allowed his malpractice claim against Corwin's law firm to proceed.

Virginia:

Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989). In this action brought by a decedent's grandchildren against the decedent's estate planning attorney for alleged negligence, the court held that lack of privity barred any cause of action in tort and the plaintiffs' allegations based on a third-party beneficiary contract theory were insufficient to confer standing to sue since the plaintiffs failed to show that they were "clearly intended" beneficiaries of testator's contract with the law firm.

Rutter v. Jones, Blechman, Woltz & Kelly, 568 S.E.2d 693 (Va. 2002). Virginia, one of the very few "privity" jurisdictions left in the country whose courts hold that no intended beneficiary may sue the decedent's estate planning lawyer for alleged negligence when the testator's estate plan fails to achieve its intended purposes as a result of the estate planner's alleged negligence, retains its consistent approach to this issue. Here it refused to permit the personal representative of a decedent's estate (clearly "in privity" with the estate planning lawyer) to bring a negligence action for an estate planning lawyer's alleged failure to properly plan to avoid otherwise clearly avoidable estate taxes by holding that, since the action for malpractice did not arise until after the client had died, the personal representative (limited under Virginia law to bringing only actions that arose before death) could present no viable claim for malpractice.

Washington:

Ward v. Arnold, 328 P.2d 164 (Wash. 1958). In this malpractice action the court found an attorney liable for breach of contract where the beneficiary had employed the defendant attorney to draw a will for her husband, and the will was defective.

Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994). In this decision the Supreme Court of Washington holds that the California *Biakanja v. Irving*, *supra*, multifactor balancing test should be applied in determining whether the beneficiary of a decedent's estate may bring an action against the lawyer who represented the executor in her fiduciary capacity. It modified that test, however, by making the "intent to benefit" factor a critical threshold inquiry. "After analyzing our modified multifactor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries."

Estate of Deigh v. Perkins, 2006 Wash. App. LEXIS 2160, 2006 WL 2895073 (Wash. App. 2006) (unpublished). This was a malpractice claim against the lawyer for a discharged, predecessor executor. The successor executor of Deigh's estate sued the lawyer retained by the predecessor executor (plaintiff's sister) for malpractice after predecessor executor/sister settled the claims her sister/successor executor had made against her for breach of fiduciary duty and, as part of the settlement, had assigned her malpractice claim against her lawyer to the estate. The court held that the successor executor had no standing to sue the predecessor executor's lawyer for malpractice because the lawyer hired by the executor owed duties to the executor not to the estate. Under Washington law, adversaries may not assign malpractice claims to one another. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 291, 67 P.3d 1068 (2003). The court conceptualized this assignment as one between adversaries since it was done by the predecessor executor to escape personal liability. The court dismissed the claims against the lawyer on summary judgment for lack of standing.

Linth v. Gay, —P.3d—, 2015 WL 5567050 (Wash. App. 2015). Relying on *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013), the court held that an estate planner does not owe a duty to an intended beneficiary to make sure a critical document was attached to a trust prepared for and executed by the decedent. Relying on *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), the court also held that the same attorney, while serving as attorney for the personal representative after trustor's death, did not owe a duty to the same beneficiary.

Wisconsin:

Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983). The court here applied the California *Biakanja v. Irving*, *supra*, multifactor balancing test) in permitting an action by disappointed beneficiaries against the drafter of an allegedly defective will.

Anderson v. McBurney, 467 N.W.2d 158 (Wis. App. 1991). In this case the decedent's only child was omitted from the will drafted by an attorney to whom the decedent gave his estate. The attorney's law firm represented the attorney as executor, and the lawyer filed an affidavit with the court incorrectly stating that the decedent had no heirs. The child's guardian sued the attorneys for negligence in failing to discover her status as a pretermitted heir. The court affirmed the dismissal of the child's claim holding that, under Wisconsin's intended third-party beneficiary/breach of contract test, the child lacked standing to sue.

Ethics Opinions

ABA:

ABA Op. 08-51 (2008). "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model

Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them. In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer 's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.”

Pennsylvania:

Philadelphia Bar Op. 2013-6 (1/13). Client is in a coma and near death. Lawyer had prepared a power of attorney naming friend as agent, and a will leaving the estate primarily to charity and naming lawyer as executor. Lawyer has just learned that the client placed her financial accounts into JTWROS with friend, with assistance from financial advisor. Friend states that the reason was to facilitate the friend paying bills. The lawyer: (a) must try to communicate with client to determine if client intended to give the accounts to friend at death, and if so, take no other action; (b) if unable to determine client’s intent, may notify the state attorney general if the lawyer believes consistent either with competent representation of client while alive or with gathering estate assets as executor, provided that during client’s life lawyer must limit disclosure to only information as is necessary to effectuate the client’s intent, under 1.6(a) and 1.14.

Op. 2014-300. This opinion examines an attorney’s ethical responsibilities as they relate to social media. On the issue of competence, it concludes that “a lawyer should (1) have a basic knowledge of how social-media websites work and (2) advise clients about the issues that may arise as a result of their use of these websites.”

MRPC 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- (a) 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 representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (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.

ACTEC COMMENTARY ON MRPC 1.2

General Principles. The client and the lawyer, working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client. If multiple clients are involved, the lawyer should discuss with them the scope of the representation and any actual or potential conflicts and determine the basis upon which the lawyer will undertake the representation. As stated in the Comment to MRPC 1.7 (Conflict of Interest: Current Clients) with respect to estate administration, “the lawyer should make clear the lawyer’s relationship to the parties involved.” Also, as indicated in the ACTEC Commentaries on MRPCs 1.6 (Confidentiality of Information), and 1.7 (Conflict of Interest: Current Clients), it is often permissible for a lawyer to represent more than one client in a single matter or in related matters. A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.

In the estate planning context, the lawyer should discuss with the client the functions that a personal representative, trustee, or other fiduciary will perform in the client’s estate plan. In addition, the lawyer should describe to the client the role that the lawyer for the personal representative, trustee, or other fiduciary usually plays in the administration of the fiduciary estate, including the possibility that the lawyer for the fiduciary may owe duties to the beneficiaries of the fiduciary estate. The lawyer should be alert to the multiplicity of relationships and challenging ethical issues that may arise, particularly when the client has a personal interest in the subject matter of the representation in addition to a fiduciary role. This is discussed below. The lawyer should also be alert to such issues when the representation involves employee benefit plans, charitable trusts or foundations.

Multiple Fiduciaries. A lawyer may represent co-fiduciaries in connection with the administration of a fiduciary estate subject to the requirements of the MRPC, particularly MRPC 1.7 (Conflict of Interest: Current Clients). Before accepting the representation, the lawyer should explain to the co-fiduciaries the implications of the joint representation, including the extent to which the lawyer will maintain confidences as between the co-fiduciaries. An example of the potential conflicts in joint representation of co-fiduciaries is *Estate of Rothko*, 372 N.E.2d 291 (N.Y. App. 1977), where two of three co-executors were found to have conflicts of interest with respect to contracts to sell paintings in the estate. Informed consent of the co-fiduciaries, confirmed in writing, may be required in order to comply with MRPC 1.7 if there is a potential conflict. If the co-fiduciaries become adversaries with respect to matters related to the representation, the lawyer may be permitted to continue the representation of one co-fiduciary with the informed consent and conflict waiver of the other co-fiduciary. Without such consent and waiver, or if the conflict cannot be waived, the lawyer must withdraw from the representation. Because of the risk of a later determination that informed consent was required, it is advisable to obtain informed consent in all representations of co-fiduciaries.

Communication with Beneficiaries of Fiduciary Estate. The lawyer engaged by a fiduciary to represent the fiduciary generally in connection with a fiduciary estate may communicate directly with the beneficiaries regarding the nature of the relationship between the lawyer and the beneficiaries. However, the fiduciary is primarily responsible for communicating with the beneficiaries regarding the fiduciary estate. An early meeting between the fiduciary, the lawyer, and the beneficiaries may provide all parties with a better

understanding of the proceeding and lead to a more efficient administration. See ACTEC Commentaries on MRPCs 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

As a general rule, the lawyer for the fiduciary should consider informing the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests. As indicated in MRPC 2.3 (Evaluation for Use by Third Persons), the lawyer may, at the request of a client, evaluate a matter affecting a client for the use of others.

Facilitating Informed Judgment by Clients. In the course of the estate planning process, the lawyer should assist the client in making informed judgments regarding the method by which the client's objectives will be fulfilled. The lawyer may properly exercise reasonable judgment in deciding upon the alternatives to describe to the client.

For example, the lawyer may counsel a client that the client's charitable objectives could be achieved either by including an outright bequest in the client's will or by establishing a charitable remainder trust. The lawyer need not describe alternatives, such as the charitable lead trust, if the use of such a device does not appear suitable for the client. As indicated below, the lawyer should describe the tax and nontax advantages and disadvantages of the plans and assist the client in making a decision among them.

Express and Implied Authorization. A client may authorize a lawyer to pursue a particular course of action on the client's behalf. By doing so, the client may also impliedly authorize the lawyer to take additional, unspecified action to implement the particular course of action. Absent a material change in circumstances and subject to MRPC 1.4 (Communication), a lawyer may rely on a client's express or implied authorization. In most circumstances, a client may revoke an express or implied authorization at any time.

Defining and Refining the Scope of Representation. As the lawyer obtains information from a client, the lawyer and the client are typically working together toward defining further the scope and objectives of the representation, which are often revised as the representation progresses. One of the lawyer's goals should be to educate the client sufficiently about the process and the options available to allow the client to make informed decisions regarding the representation. See ACTEC Commentary on MRPC 1.4 (Communication). In furtherance of that goal, many lawyers review with an estate planning client the appropriate alternative methods by which the client's general estate planning objectives could be implemented. In the course of doing so, the lawyer should express to the client the relative cost advantages of the alternatives, including the present and future tax, legal and other costs, such as trustee's fees. See ACTEC Commentary on MRPC 2.1 (Advisor).

Formal and Informal Agreements. Variations in the circumstances and needs of trusts and estates clients and in the approach and practice of individual lawyers naturally result in lawyers and clients adopting different methods of working together. The agreement between a lawyer and client regarding the scope and objectives of the representation is often best expressed in an engagement letter or other written communication. However, often their agreement is implicit—reflected in the manner in which lawyer and client choose to work together. Their approach will reflect the client's needs (as perceived by the client and

the lawyer) and the lawyer's judgment regarding the client's needs and objectives and the ways in which they may reasonably be fulfilled.

Limitation on the Representation Must Be Reasonable. This Rule recognizes that a lawyer and client may limit the scope of the representation in a manner that is reasonable under the circumstances. For example, a lawyer and client may agree that the lawyer will represent the client with respect to a single matter, such as the preparation of a durable power of attorney. See discussion of Adequate Information in the ACTEC Commentary on MRPC 1.0 (Terminology). Unless the scope of the representation is expanded by a subsequent agreement, the lawyer is not obligated to provide advice or services regarding other matters.

Disagreement Between Lawyer and Client as to Means for Accomplishing Client's Objectives. If an adequately informed client directs the lawyer to take action contrary to the lawyer's advice, and the action is neither illegal nor unethical, the lawyer should generally follow the client's direction. See MRPCs 1.4(a)(5) and 1.4(b) (Communication), and 1.16(b) (Declining or Terminating Representation). A client might insist, for example, that a "simple" will alone is all that is needed to accomplish the client's estate planning objectives. The lawyer, however, might disagree, concluding, in the lawyer's professional opinion, that a revocable *inter vivos* trust and a pour-over will would better achieve those objectives. Provided the lawyer obtains the client's informed consent, the lawyer may proceed against the lawyer's better professional judgment to prepare the "simple" will. See ACTEC Commentary on MRPC 1.0(e) (Terminology) (defining *informed consent*). If a client insists on an action that the lawyer believes will be ineffective, such as inclusion of a provision that the lawyer believes will not be enforced by a court, the lawyer should inform the client of that risk and may refuse the request if the lawyer believes complying with it would violate the duty of competence under MRPC 1.1.

Lawyer May Not Make False or Misleading Statements. In all cases the lawyer shall not, in dealing with third persons, make a false statement of material fact or law or fail to disclose a material fact when disclosure is required in order to avoid assisting a criminal or fraudulent act by a client. See MRPC 4.1 (Truthfulness in Statements to Others). This requirement applies to accountings or other documents that the lawyer for a fiduciary may prepare on behalf of the fiduciary.

Disclosure of Acts or Omissions by Fiduciary Client. In some jurisdictions a lawyer who represents a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty. In deciding whether to make such a disclosure, the lawyer should consider MRPCs 1.6 (Confidentiality) and 1.8(b) (Use of Confidences to Disadvantage of Client) along with the ACTEC Commentaries to these rules. In jurisdictions that do not require or permit such disclosures, a lawyer engaged by a fiduciary may condition the representation upon the fiduciary's agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty. The lawyer may wish to propose that such an agreement be entered into in order better to assure that the intentions of the creator of the fiduciary estate to benefit the beneficiaries will be fulfilled. Whether or not such an agreement is made, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. The nature and extent of the duties of the lawyer for the fiduciary are shaped by the nature of the fiduciary estate and by the nature and extent of the lawyer's representation.

Representation of Client in Fiduciary, Not Individual, Capacity. If a lawyer is retained to represent a fiduciary generally with respect to an estate, the lawyer's services are in furtherance of the fulfillment of the client's fiduciary responsibilities and not the client's individual goals. The ultimate objective of the engagement is to assist the client in properly administering the fiduciary estate for the benefit of the beneficiaries. Confirmation of the fiduciary capacity in which the client is engaging the lawyer is appropriate because of the priority of the client's duties to the beneficiaries. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is acceptable for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate, subject to the fiduciary client's overriding fiduciary obligations. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and Example 1.7-2.

General and Individual Representation Distinguished. A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate. A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.

Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them. Without having first given written notice to the beneficiaries of the fiduciary estate, a lawyer who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer otherwise owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, a lawyer should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary that the lawyer would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, the lawyer generally should not give up the opportunity to make such disclosures when the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

Duties to Beneficiaries. The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.

The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. In resolving conflicts regarding the nature and extent of the lawyer's duties, some courts have considered the source from which the lawyer is compensated. The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary. See MRPC 4.2 (Communications with Persons Represented by Counsel). However, even though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary. Additionally, the lawyer's communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them.

In this connection, note the Comment to MRPC 4.3 (Dealing with Unrepresented Person) stating that a lawyer should "not give advice to an unrepresented person other than the advice to obtain counsel."

Lawyer Serving as Fiduciary and Counsel to Fiduciary. Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. (See paragraph above captioned "*General and Individual Representation Distinguished.*") Such dual service may be appropriate where the lawyer previously represented the decedent or (where permitted) is a primary beneficiary under the estate plan. See ACTEC Commentary on MRPC 1.8 (Gifts to Lawyer). It may also be appropriate where there was a long-standing relationship (personal or professional) between the lawyer and the decedent. The client may request the lawyer to serve in both capacities during the estate planning process, or the beneficiaries might request this post-mortem. Regardless of when the request is made and by whom, the lawyer should explain the costs of such dual service, the financial implications for the lawyer and the estate, and the alternatives to dual service. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa. A lawyer serving in such a dual capacity must ensure that he or she complies with the relevant conflict of interests rules. See MRPC 1.7 (Conflict of Interest: Current Clients), 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) and 1.10 (Imputation of Conflicts of Interest: General Rule) and the ACTEC Commentaries thereon.

Avoiding Misunderstandings as to Scope of Representation. The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sends the client an appropriate engagement letter at the outset of the representation. If a lawyer is retained by a new client with respect to a single matter, the representation may terminate when the work on the matter is completed; on the other hand, the representation may become dormant. See the discussion of a dormant representation in the ACTEC Commentary on MRPC 1.4 (Communication). Where the lawyer has served a client in a

variety of matters, the client may reasonably assume that the representation is active or that the client may reactivate the representation at any time. A lawyer in these circumstances should clarify with the client the scope of the representation and the expectations of the client. A client may terminate a representation at any time, and, subject to the requirements of MRPC 1.16 (Declining or Terminating Representation), a lawyer may also terminate a representation at any time.

Duty to Avoid Assisting in Criminal or Fraudulent Activity. Whether assisting clients in probating estates, establishing trusts, or engaging in other transactions, lawyers need to be ever watchful that the client is not seeking to enlist the lawyer’s services in a criminal or fraudulent activity. Lawyers who assist clients in asset protection planning must be particularly careful, and lawyers must also be watchful when following clients’ directions regarding disbursement of funds held in trust accounts. See *In re Harwell*, 2012 WL 3612356 (M.D. Fla. 2012) (discussed below in the annotations). Today, the need for diligence has taken on international dimensions. As international crime and terrorism have grown in extent and sophistication, the role that lawyers may play in such illegal activities has become a focus of the Financial Action Task Force on Money Laundering (FATF). FATF is an intergovernmental body of the major industrialized nations formed in 1989 to coordinate efforts to prevent money laundering in both the international financial system and the domestic financial systems of the member entities. Estate planners are a potential instrumentality of money laundering activities because of their expertise in setting up trusts. Trusts present a financial vehicle that might be utilized by criminals to launder illegally obtained funds, and estate planners need to guard against their services being used for this purpose. FATF has issued “risk based guidance” for legal professionals to assist them in avoiding assisting such illegal activity. The ABA, in turn, with significant input from ACTEC, has issued its own “VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING” and reinforced this with Formal Ethics Opinion 463 in 2013. More information on these documents is provided in the annotations below. In summary, lawyers need to exercise diligence and make a determination whether their clients present a risk of such illegal activities. If clients pose such a risk, lawyers should either decline to represent, or cease representing, them as permitted under MRPC 1.16 (Declining or Terminating Representation), or engage in further inquiry to rule out the risk that the client is using the lawyer’s services for illegal activity.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Statute

South Carolina:

§62-1-109. This statute states that, unless provided otherwise in written employment agreement, the attorney representing a fiduciary does not have duties to other persons interested in the estate or trust, even if fiduciary funds are used to compensate the lawyer for services rendered to the fiduciary.

Cases

Alaska:

Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983). In this legal malpractice case the Supreme Court of Alaska held that a complaint alleging that an attorney-client relationship existed between

family members of the decedent and the defendant lawyers and that the lawyers had negligently failed to advise the surviving spouse and her children with respect to the availability and consequences of the surviving spouse's right to disclaim her interest in the estate, as a result of which the surviving spouse incurred gift taxes and fees in connection with certain gifts made to her children in lieu of a disclaimer, stated a cause of action for professional negligence.

Pederson v. Barnes, 139 P.3d 552 (Alaska 2006). This case affirms a malpractice verdict against a guardian's attorney where the guardian client had stolen almost all of the ward's property, relying on the Restatement of the Law Governing Lawyers 51 and comment h. Under that standard, said the court, an attorney for a guardian owes a duty of care to a minor ward if the lawyer "knows that appropriate action by the lawyer is necessary ...to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient." "Knows" under the Restatement means "actual knowledge," as it does under the Model Rules, but this encompasses "reason to know" as used in the Restatement Second of Torts 12, which is to be distinguished from "should have known." On the other hand, there was no basis for the award of punitive damages against the attorney; and this was reversed.

California:

Lasky, Haas, Cohler & Munter v. Superior Court, 218 Cal. Rptr. 205 (Cal. App. 1985). This is an evidentiary privilege case in which the court denied the beneficiaries access to the work product generated by the lawyers for the trustee but not communicated to the trustee. The court stated that the beneficiaries of a private trust are not clients of the trustee's lawyers.

Goldberg v. Frye, 266 Cal. Rptr. 483, 488 (Cal. App. 1990). In this malpractice action the court stressed the absence of an attorney-client relationship between the lawyer for the personal representative and the beneficiaries:

Contrary to the allegations of the complaint, it is well established that the attorney for the administrator of an estate represents the administrator and not the estate... A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence... . By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate.

Sullivan v. Dorsa, 27 Cal. Rptr. 3d 547 (Cal. App. 2005). This case follows *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000), discussed under MRPC 1.6, in holding that the trustee's attorney owes no duty to the trust beneficiaries.

Colorado:

Klancke v. Smith, 829 P.2d 464 (Colo. App. 1991). This case involved an action brought by the surviving children of an accident victim for breach of trust against the attorneys who had represented the victim's surviving spouse (the plaintiffs' step-mother) in a wrongful death action. The court held that the attorneys for the surviving spouse did not breach any duty they owed to the accident victim's surviving children when the attorneys paid the proceeds of a judgment entered in the wrongful death action directly to their client, the surviving spouse, without taking any steps to insure that the children received their claimed share of the proceeds.

Delaware:

Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 713-714 (Del. Ch. 1976). This case involved a successful motion by the beneficiaries of a trust to compel the trustee to produce legal memoranda prepared by the lawyers for the trustee:

As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply the incidental beneficiaries who *chance* to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries.

District of Columbia:

Hopkins v. Akins, 637 A.2d 424 (D.C. 1993). In this action for legal malpractice involving estate administration, the court held that the beneficiary of an estate may not sue the attorney for the personal representative for negligence absent an express undertaking between the attorney and the beneficiary, fraud or malice. Counsel for the estate is to be viewed as an employee of the personal representative in normal circumstances. The court cites with approval the analysis of the California court in *Goldberg v. Frye*, *supra*, discussed above.

Florida:

Estate of Gory, 570 So.2d 1381 (Fla. App. 1990). In an action to disqualify the personal representative's lawyer from representing her at a compensation hearing, the court recognized that the lawyer for a personal representative owes fiduciary duties to the beneficiaries of the estate. However, the lawyer does not represent the beneficiaries. Moreover, no conflict of interest results merely because one or more of the beneficiaries takes a position adverse to that of the personal representative. In Florida, the personal representative is the client rather than the estate or the beneficiaries. Rule 4-1.7, Rules Regulating the Florida Bar (Comment). It follows that counsel does not generate a conflict of interest in representing the personal representative in a matter simply because one or more of the beneficiaries takes a position adverse to that of the personal representative. A contrary result would raise havoc with the orderly administration of decedents' estates, not to mention the additional attorney's fees that would be generated.

Barnett Nat'l Bank v. Compson, 629 So. 2d 849 (Fla. App. 1993). The court here rejected the analysis of the Delaware case, *Riggs Nat'l Bank v. Zimmer*, *supra*. It held that the surviving spouse in litigation with the trustee of an *inter vivos* trust created by her deceased husband may not discover communications between counsel for the trustee and the trustee or between counsel for the trustee and counsel for other beneficiaries who were aligned with the trustee. "The trustee's charging its attorney's fees to the trust does not change our decision under the facts of this case."

Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So.2d 182 (Fla. App. 2007). This case relied on *Espinosa* (discussed in the annotation to MR 1.1) to hold that the personal representative was entitled to sue lawyers for the decedent for failure to disclose conflict which may have impacted their recommendation to decedent that he appoint JP Morgan to a fiduciary role, and their failure to fund a revocable living trust before decedent's death.

Idaho:

Allen v. Stoker, 61 P.3d 622, 624 (Idaho App. 2002). Beneficiary of a fiduciary estate was an incidental beneficiary with regard to the employment agreement between the fiduciary and the fiduciary's attorney. Thus, the attorney owed no duty of care to the beneficiary.

Illinois:

Rutkoski v. Hollis, 600 N.E.2d 1284 (Ill. App. 1992). In this case the decedent's surviving spouse, as executor under her husband's will, sued the attorney who had represented her deceased husband as executor of a third party's estate (of which the husband was also a beneficiary). The wife contended that her husband, as a beneficiary, had a claim against the attorney for providing negligent tax advice in the administration of the estate. The appellate court found that husband as executor had a claim against the lawyer but affirmed the trial court's dismissal of the wife's action on behalf of her husband as beneficiary.

Jewish Hosp. v. Boatmen's Nat'l Bank, 633 N.E.2d 1267, 1277-1278 (Ill. App. 1994), *cert. denied*, 642 N.E.2d 1282 (Ill. 1994). In this case the beneficiaries of the testator's will sued the attorney who allegedly negligently prepared the will and who represented the personal representative of the testator's estate and allegedly negligently prepared the federal estate tax return. Applying a third-party beneficiary/breach of contract theory, the Illinois appellate court held that the attorney owed the beneficiaries a duty in preparing the will but, as counsel for the estate representative, owed no duty to the beneficiaries in handling the probate administration. The court observed:

Our supreme court has strongly embraced the concept that third-party-beneficiary status should be easier to establish when the scope of the attorney's representation involves matters that are non-adversarial, such as in the drafting of a will, rather than when the scope of the representation involves matters that are adversarial...Often, the estate's adversary is a beneficiary of the estate who is contesting the will or making a claim against the estate or petitioning to have the executor removed or held liable for mismanagement of the estate. An attorney representing an estate must give his first and only allegiance to the estate, in the event that such an adversarial situation arises. Even though beneficiaries of a decedent's estate are intended to benefit from the estate, an attorney for an estate cannot be held to a duty to a beneficiary of an estate, due to the potentially adversarial relationship between the estate's interest in administering the estate and the interests of the beneficiaries of the estate.

Dunn v. Patterson, 395 Ill. App. 3d 914, 919 N.E.2d 404 (Ill. App. 2009). It is not against public policy or a violation of duties under Rule 1.2 in Illinois for a lawyer to draft trusts, durable health care powers or living wills which require the drafter's written consent (or that of a court) to any amendment. Out of concern that others might be taking advantage of elderly clients, the drafter refused to consent until he could be satisfied that his clients were making competent decisions. He was carrying out his clients' instructions in the documents they had knowingly executed.

Indiana:

Hermann v. Frey, 537 N.E.2d 529 (Ind. App. 1989). The court here held that decedent's surviving spouse and sole heir at law had standing to pursue an action for legal malpractice against the attorney handling the estate where the surviving spouse, as personal representative, had retained the attorney and

was therefore entitled to rely on the attorney's advice with respect to her personal cause of action for wrongful death.

Iowa:

Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995). In this legal malpractice action the Supreme Court of Iowa found that an attorney retained to handle a decedent's estate had breached the duty of care he owed to the estate beneficiaries in negligently completing the estate's death tax returns and failing to recognize that the same parcel of land included on the return was being described three times and that some of the land included on the returns was subject to a life estate. The attorney also failed to thoroughly investigate and make reasonable efforts to verify the legal descriptions of the land set forth in the death tax returns after he was told that there was an error in the descriptions.

Iowa Supreme Court Attorney Disciplinary Bd. v. Ouderkirk, 845 N.W.2d 31 (Iowa 2014). Lawyer represented married couple for numerous real estate transactions. The husband killed someone over a land dispute and hid the body in a cistern. The lawyer represented the husband in the ensuing criminal case, in which the husband was claiming self-defense. The victim's widow filed a wrongful death action against the husband, which the lawyer also defended. The lawyer then assisted the couple in transferring millions of dollars of real estate into revocable trusts, with relatives serving as trustees. The couple asked about irrevocable trusts but the lawyer advised against it. The couple told the lawyer that they found a purchaser for the property, claiming they were bona fide when in fact the purchaser was an irrevocable trust for the benefit of the couple's sons. The lawyer drafted the transfer documents but did not participate in the closing and did not know of consideration passing. The husband was eventually convicted of manslaughter and the widow won a judgment in the wrongful death action, and successfully challenged the transfer of the property. The widow then filed a disciplinary complaint against the lawyer. The disciplinary commission found that the lawyer did not knowingly assist the clients in fraud, but a clause in the contract to sell to the irrevocable trust referring to the wrongful death suit made the fraudulent intent apparent so knowledge of the fraud was imputed. The Supreme Court of Iowa overruled the commission's finding that the lawyer should have known of the fraud, because the court found the lawyer's explanation of his interpretation of that clause and his beliefs as to his clients' legitimate purposes, and dismissed the ethical complaint against the lawyer.

Louisiana:

Succession of Wallace, 574 So.2d 348, 357 (La. 1991). This decision upholds a disciplinary rule previously issued by the court which allows a client to discharge his or her lawyer at any time for any reason. Under the separation of powers provided for in the Louisiana constitution, the court invalidated a statute that allowed an executor to discharge a lawyer designated in a will only for "just cause." Citing numerous authorities the court stated that, "[I]t is universally held that when an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as an attorney of the executor, and not of the estate, and for his services the executor is personally responsible."

Maine:

Estate of Keatinge v. Biddle, 789 A.2d 1271 (Me. 2002). The mere retention of counsel by the holder of a power of attorney does not by itself create an attorney-client relationship between the attorney and the grantor. In such a case, the attorney has an attorney-client relationship with the holder only.

Maryland:

Ferguson v. Cramer, 709 A.2d 1279 (Md. 1998). In this case, decided contemporaneously by the Court of Appeals (Maryland's highest court) with *Noble v. Bruce*, *supra*, discussed in the Annotations under MRPC 1.1, the court held that the strict privity doctrine barred a suit by the estate's beneficiaries for alleged negligence on the part of the attorney retained by the personal representative to advise the representative with respect to the administration of the estate.

Attorney Grievance Commission of Maryland v. Coppola, 419 Md. 370, 19 A.3d 431 (2011). At the behest of a client's daughter, an attorney prepared estate planning documents for the mother who was in the hospital. He believed the documents were consistent with the intent the mother had expressed to him a few months before. He then took the documents to the hospital for execution but discovered the mother was unconscious and unlikely to recover. It was believed that the documents would save the estate \$10,000 in attorneys' fees and the mother's four children persuaded the attorney to allow one of them to execute the documents on the mother's behalf, that is, to forge her signature. He allowed this and notarized the falsely-executed documents. Then he directed two of his employees to attest (falsely) that they had witnessed the client sign the will, and he notarized their attestations. Finally he filed a falsely executed and notarized deed with the county land office. The court held that in doing all this, the attorney had formed an attorney-client relationship not only with the mother, but with her four children because he had given them legal advice and tried to assist them in reducing the fees that their mother's estate would need to pay. As a consequence, he violated MRPC 1.2(d) by assisting his clients to engage in a crime and also MRPC 8.4(b) and (c). He was disbarred.

Massachusetts:

Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994). This case upholds the dismissal of a malpractice action brought by some of the beneficiaries of a trust against the lawyers for the trustees. The court was concerned that if a trustee's lawyer owed a duty in tort or contract to the beneficiaries, "conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee." The court also noted that the disciplinary rules require the lawyer to preserve the secrets of a client.

Minnesota:

Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734, 738-739 (Minn. App. 1995), *review denied*, 1995 Minn. LEXIS 859 (1995). In a lawsuit brought by the beneficiaries of an estate against a personal representative and its attorneys for alleged negligence, the court adopted a modified multifactor balancing test (first enunciated in California in *Biakanja v. Irving*, *supra*, discussed under MRPC 1.1), and dismissed the beneficiaries' claim against the attorneys, holding:

Here, appellants are not the direct, intended beneficiaries of the personal representative's attorneys' services. As permitted by statute, the personal representative hired the attorneys to assist and advise him in fulfilling his fiduciary duty to manage the estate in accordance with the terms of the will and the law and "consistent with the best interests of the estate." The attorneys' services, therefore, must be directed towards serving the best interests of the estate, and, thus, all beneficiaries. If any "person" is a third-party beneficiary of the attorneys' services, it is the estate itself; at best, individual beneficiaries of the estate are only "incidental beneficiaries" of the attorneys' services.

Nevada:

Charleson v. Hardesty, 839 P.2d 1303, 1307 (Nev. 1992). In an action brought by the beneficiaries of a trust against the lawyer who allegedly represented the trustee, the Supreme Court of Nevada stated:

We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law. In the present case if [Defendant Lawyer] was the attorney for the trustee, we conclude that he owed the [Plaintiff Beneficiaries] a duty of care and fiduciary duties.

New Jersey:

Albright v. Burns, 503 A.2d 386 (N.J. Super. App. Div. 1986). Before his uncle's death, a nephew acting pursuant to a power of attorney employed counsel to advise him in connection with the sale of certain stock and the making of a loan to the nephew's business. The attorney performed the requested services which included distributing the proceeds of the stock sale to the nephew. After the uncle's death, the attorney represented the nephew as personal representative of the estate. In an action by the estate beneficiaries against the attorney, the court applied the California *Biakanja v. Irving*, *supra*, multifactor balancing test (discussed under MRPC 1.1) and found that the attorney had a duty to the beneficiaries for breach of which he could be held liable.

Barner v. Sheldon, 678 A.2d 717 (N.J. Super. App. Div. 1996). The court affirmed a summary judgment granted in favor of a lawyer who, while serving as the lawyer for the executor in an estate administration proceeding, had not advised the decedent's children to disclaim the bequests to them. Doing so would have increased the amount of the decedent's estate that would be received by the surviving spouse, thereby decreasing the estate tax liability of the decedent's estate. The appellate court held that under the circumstances, "the defendant had no duty to inform the beneficiaries of the tax consequences of their failure to disclaim." The court pointed to the decedent's wish to minimize the amount that passed to his surviving spouse. "Had plaintiffs, the testator's children, disclaimed, the testator's wife would have benefitted. This would have been contrary to the testator's intent." The trial court opinion (678 A.2d 767), which contains a useful summary of decisions regarding the duties the lawyer for a personal representative may owe to the beneficiaries, concludes that, "when an attorney is employed to render services in procuring admission of a will to probate or in settling the estate, he acts as attorney of the executor, and not of the estate and for his services the executor is personally responsible."

Fitzgerald v. Linnus, 765 A.2d 251 (N.J. Super. App. Div. 2001). An attorney who represented the surviving spouse as executor of her deceased husband's estate was found not liable in negligence for failing to advise the surviving spouse to consider disclaiming certain insurance proceeds payable on the death of the husband in favor of the couple's children. The court found that the attorney was retained by the surviving spouse solely in her capacity as executor, and the attorney had specifically disclaimed in writing any duty to advise the surviving spouse about her own estate planning. The attorney owed no duty to the children (who also sued) because they were not beneficiaries of the deceased spouse.

New Mexico:

Leyba v. Whitley, 907 P.2d 172 (N.M. 1995). In this case involving a suit by the conservator for the minor beneficiary of his father's estate against the lawyers representing the personal representative in a wrongful death claim, where the proceeds from the settlement of the claim were paid to the minor

beneficiary's mother who then squandered the funds, the Supreme Court of New Mexico, applying the California *Biakanja*, *supra*, multifactor balancing test (discussed under MRPC 1.1), found that the attorneys owed a duty to the minor beneficiary.

New York:

Baer v. Broder, 436 N.Y.S.2d 693 (1981), *aff'd on other grounds*, 447 N.Y.S.2d 538 (App. Div. 1982). In an action by the executor of a decedent's estate against the attorney whom he had hired to pursue a wrongful death claim (of which the executor was also a statutory beneficiary in his individual capacity), the court held that the plaintiff had a cause of action despite the lack of contractual privity because of several "face to face" meetings between the attorney and the plaintiff.

North Carolina:

Ingle v. Allen, 321 S.E.2d 588 (N.C. App. 1984), *review denied*, 329 S.E.2d 593 (1985). This case involved an action brought by a beneficiary of a decedent's estate against the lawyer who represented a co-executor. The court stated that the lawyer "owed a duty of care to the plaintiff as a beneficiary under the will." However, the court concluded that the lawyer had acted with the care and skill required of a lawyer for the personal representative.

Ohio:

Elam v. Hyatt Legal Serv., 541 N.E.2d 616 (Ohio 1989). In this case the Supreme Court of Ohio permitted a lawsuit brought by beneficiaries contending they had lost their inheritance through the negligence of the estate's attorney who had recorded a certificate of title to certain real estate in the name of the deceased testator's husband alone, despite the fact that the decedent's will had bequeathed the husband only a life estate in the property with the remainder devised to the plaintiff beneficiaries. The court distinguished *Simon v. Zipperstein*, *supra*, (discussed under MRPC 1.1) and found that the estate's beneficiaries were in privity with the estate attorney because here their interests were vested, whereas in *Simon* the beneficiaries' interests were contingent and not vested.

Lewis v. Star Bank, N.A., 630 N.E.2d 418 (Ohio App. 1993). This decision upholds dismissal of a malpractice action brought by the beneficiaries of a revocable trust against the trustee and the lawyers for the deceased trustor for alleged failures to advise her properly regarding the generation-skipping transfer tax. Dismissal was proper because the beneficiaries were not in privity of contract with the trustee or the lawyers during the trustor's lifetime. In addition, the court observed that "While [the Trustor] was alive, the Law Firm owed her a duty of complete and undivided loyalty. If we were to hold that the duty was owed to [the Trustor] and to all the plaintiffs, as plaintiffs implicitly urge us to do, the Law Firm would have found itself representing divided and disparate interests, which is impermissible." 630 N.E.2d at 421.

Svaldi v. Holmes, 2012-Ohio-6161, 986 N.E.2d 443 (Ohio App. 2012). Lawyer drafted a power of attorney for an elderly client that appointed two neighbors as attorneys-in-fact. The lawyer included a provision in the power of attorney, intended to protect the client, that required the attorneys-in-fact to deliver an inventory of the principal's assets within 30 days to the lawyer, and to give the lawyer annual accountings. The attorneys-in-fact failed to satisfy those duties, and proceeded to steal approximately \$800,000 from the client, who then sued the lawyer for malpractice. He alleged lawyer had negligently failed to monitor the neighbors as provided for in the power of attorney. The court held that by including this provision, the lawyer had increased the scope of his representation, and had assumed a

responsibility to attempt to make it work. The court relied on Restatement (Third) of the Law Governing Lawyers § 50 comment (a lawyer “must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation.”)

South Carolina:

Sims v. Hall, 592 S.E.2d 315 (S.C. App. 2003). The court here found an attorney liable in negligence for failing to advise the plaintiff’s deceased mother about the opportunity for a disclaimer. The estate of the plaintiff’s sister passed to the mother by intestacy, and the mother died less than eight months later. A disclaimer by the mother’s estate would have saved almost \$200,000, for which the court found the attorney liable.

Texas:

Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. App. 1993). Texas is one of the minority of jurisdictions applying the strict privity rule, and on that ground the court here barred an action by the beneficiaries of a trust against the trustee’s attorneys for alleged negligence in the attorneys’ distribution of the trust assets.

Utah:

Oxendine v. Overturf, 973 P.2d 417 (Utah 1999). In analyzing a claim by a statutory beneficiary against the attorneys for the personal representative regarding a wrongful death claim, the Court adopted an “intended third party beneficiary” analysis of when the attorneys would owe a duty of care to the beneficiaries. The Court reasoned that there “can be no other purpose” in a wrongful death case than to provide benefits to the statutory beneficiaries. Nonetheless, the Court held that no duty attached in the circumstances of this case based on a “conflicts exception” explaining that the statutory beneficiary was adverse to the personal representative throughout the case.

Washington:

Estate of Larson, 694 P.2d 1051, 1054 (Wash. 1985). The court was here asked to pass upon the reasonableness of the lawyer’s fees in an estate administration. The Supreme Court of Washington overturned decisions of a court commissioner, the superior court and the court of appeals affirming the lawyer’s fees. In the opinion the court stated that:

The personal representative stands in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs. . . . The personal representative employs an attorney to assist him in the proper administration of the estate. Thus, the fiduciary duties of the attorney run not only to the personal representative, but also to the heirs.

Leipham v. Adams, 894 P.2d 576 (Wash. App. 1995), *review denied*, 904 P.2d 1157 (1995). In this legal malpractice action the court, applying the modified multifactor balancing test for determining when an attorney owes a duty of care to a non-client (see *Trask v. Butler, infra*) held that the beneficiaries of an estate were barred from suing the lawyer for the estate for the lawyer’s alleged negligent failure to advise the decedent’s surviving spouse with respect to a possible disclaimer of a joint tenancy account. The court found that the limited scope of the lawyer’s undertakings on behalf of the surviving spouse distinguished this case from *Linck v. Barokas & Martin, supra* (discussed under MRPC 1.1).

Janssen v. Topliff (Guardianship of Karan), 38 P.3d 396 (Wash. App. 2002). Following *Trask v. Butler, supra*, and applying the California *Biakanja, supra*, multifactor balancing test (both discussed under MRPC 1.1), the court held that the attorney for the guardian of a minor ward owes a direct duty of care to the guardian's ward and could be liable in malpractice for failing to ensure that guardian either posted a bond or deposited guardianship proceeds in a blocked account.

Estate of Treadwell, 61 P.3d 1214 (Wash. App. 2003). This case follows *Janssen v. Topliff (Karan), supra*, in finding a duty of care owed directly to the ward by the lawyer for the guardian of an incapacitated adult.

Wisconsin:

In re Nussberger, 296 Wis. 2d 47, 719 N.W.2d 501 (2006). Lawyer was suspended for 2 months for proposing to the personal representative who had hired him to help her probate her mother's estate that he could inflate his attorney's fees and split the excess with her as a means of "trying to get a little bit extra" from the estate that would otherwise go to the state for cost of care. This violated Rule 1.2(d) by counseling a client to engage in conduct the lawyer knew to be criminal or fraudulent.

Tensfeldt v. Haberman & LaBudde, 319 Wis.2d 329, 768 N.W.2d 641 (2009). This was a malpractice case brought by the decedent's children which included a claim for aiding and abetting an unlawful act of a deceased estate planning client. The decedent had been party to a divorce agreement, which had been incorporated in the divorce decree, under which he was obligated to keep in place an estate plan providing 2/3 of his estate to the couple's adult children. Lawyer knowingly prepared an estate plan for the client that violated the divorce agreement and was thus "liable as a matter of law for intentionally aiding and abetting his client's unlawful act" and subject to damages for that tort.

Ethics Opinions

Alaska:

Op. 91-2 (1991). An attorney representing the personal representative of an estate is not prohibited from representing the personal representative in disputes with heirs. The attorney may not, however, represent the personal representative in such disputes if the attorney has obtained relevant confidential information from the heirs while acting for the personal representative nor may the attorney assist or counsel the personal representative in conduct inconsistent with the best interests of the estate.

Illinois:

Advisory Op. 96-05 (1996). Although under some circumstances it may be professionally improper for a lawyer to represent both a renouncing spouse and a creditor in the same proceedings, it is not improper for a lawyer to represent the same person both in a representative capacity as executor and in an individual capacity as debtor of the estate where an independent special administrator has been appointed to collect the debt.

Indiana:

Op. 2-2001. Attorney, preparing a power of attorney for the agent, without interviewing the principal, may be aiding in perpetrating a fraud in violation of MRPC 1.2; the attorney has an ethical responsibility of further inquiry. In this case, the attorney may have violated MRPC 4.2 in contacting an individual the lawyer knew to be represented by another lawyer in the matter. If the grandfather

(principal) is the attorney's client, he has a duty to discover if the client is impaired, see MRPC 1.14, and may need to take the protective action of seeking appointment of a legal representative. If both granddaughter (agent) and grandfather (principal) are the attorney's joint clients, MRPC 1.7 requires written consent after consultation is given. Further, attorney violated MRPC 5.3 in his failure to supervise the paralegal who was asked to exceed her notary duties in determining the capacity of an 88-year-old gentleman and in determining if he was free of undue influence in signing the power of attorney.

Op. 2-2003. The hypothetical asks whether an attorney for a fiduciary has a duty to advise the office administering Medicaid benefits of the death of an individual who received, or had the potential to receive, Medicaid during lifetime; there is no specific Indiana statute requiring the notice. The conclusion is that, if the fiduciary is not required to give the notice, then the lawyer is not required to require the fiduciary to give the notice. The lawyer's duty is no higher than that of his client. If it is not a fraud or crime on the part of the fiduciary, then it is not an obligation of the lawyer. The lawyer, however, shall not assist a client in engaging in conduct which is criminal or fraudulent [MRPC 1.2(d)]. Further, under MRPC 1.16(a)(1), a lawyer shall withdraw from representation if called upon to violate the Rules of Professional Conduct. The lawyer must counsel the fiduciary that the lawyer cannot assist in the fraud and give the fiduciary an opportunity to provide the notice required by law. Failing that, the lawyer shall withdraw and may withdraw quietly so as not to imply that there is a problem with the client's conduct. The lawyer shall maintain the confidentiality or may exercise his duty to the Tribunal or to the administrative body as he chooses.

Kentucky:

Op. 401 (1997). In this extended opinion the Committee on Ethics of the Kentucky Bar Association first opined that a lawyer's representation of a fiduciary of a decedent's estate or trust neither expands nor limits the lawyer's obligations to the fiduciary under the MRPC. Secondly, the lawyer's representation of a fiduciary imposes on the lawyer no obligations to the beneficiaries of the decedent's trust or estate that the lawyer would not have toward other third parties. Thirdly, the Committee held that the lawyer's obligation to preserve client confidences under MRPC 1.6 is not altered by the fact that the lawyer's client is a fiduciary; and, finally, the Committee held that the lawyer for the fiduciary may also represent the beneficiaries of the decedent's trust or estate. The Committee quotes at length from the *ACTEC Commentaries* and describes them as "helpful" to the Committee's analysis. The Committee, however, adopts the position taken in ABA Formal Opinion 94-380 (1994) which is discussed under MRPC 1.6.

Michigan:

Opinion RI-342 (2007). "When a lawyer undertakes representation at the request of a fiduciary in a situation involving an estate, trust, conservatorship or guardianship, his or her client is the fiduciary, not a fictional entity to which the fiduciary owes its duties."

North Carolina:

Opinion 2007-1 (2007). A lawyer representing an estate represents the personal representative in his or her official capacity and the estate as an entity. Although the heirs are interested parties and may benefit from a successful wrongful death action, they are not clients of the lawyer in the matter. The personal representative and the estate are the lawyer's clients, whereas the heirs of the estate are non-clients. Communications with the heirs should be governed by Rule 4.3, but "[w]ith the consent of the estate's

personal representative, the lawyer may provide the heirs with factual information concerning the wrongful death action.” The lawyer may also negotiate on behalf of the estate with a person arguably entitled to participate in the wrongful death recovery and/or file an action on behalf of the estate to determine a person’s right to participate in such recovery.

Pennsylvania:

Op. 2004-7. An attorney’s duty to a client who was a guardian of a ward, now deceased, must be considered in light of duties to beneficiaries of the ward’s estate. The opinion provides that attorney may and should notify the personal representative of the ward’s estate when the guardian requests return of the attorney’s unearned retainer. If consent is not given, the attorney may seek court instructions.

Rhode Island:

Op. 2014-04. The lawyer’s client, an executor of an estate, told the lawyer he borrowed estate funds to pay personal expenses. The lawyer: (a) cannot disclose the information with the client’s consent; (b) cannot file a false accounting with the court;and (c) should move to withdraw.

South Carolina:

S.C. Op. 93-94 (1993). This opinion holds that an attorney for an estate does not have an ethical or a legal duty to inform a surviving spouse of his right to claim a 1/3 elective share of the probate estate provided there is no present or past attorney-client relationship with the surviving spouse. The attorney for an estate in probate is retained by and owes a duty to the personal representative, who is the fiduciary for the estate and its beneficiaries. The opinion holds the same for an attorney who is acting as personal representative of an estate under the theory that the attorney as fiduciary owes a duty to act in the best interests of the beneficiaries of the estate within the framework of the will.

South Dakota:

Opinion 2007-3. This opinion states that where a lawyer who has prepared a will for an elderly client and has been instructed by the client to reveal the contents to no one, the lawyer is bound by that instruction notwithstanding that the inquirer holds a durable power of attorney from the client. Subsequent to the execution of the power, the lawyer consulted the client (again) about his wishes and was again instructed that no one should see his will. Based on the circumstances and the communications from the client, the attorney-in-fact is not a “client” for the “specific purpose” of reviewing Client's Will.

Utah:

Op. No. 97-09 (1997). This opinion analyzes an arrangement where a non-lawyer estate planner solicited clients, referred them to lawyer, and used lawyer’s forms in preparing the first draft of the documents. Lawyer’s only contact with the client was a telephone call upon receiving the first draft and through written correspondence transmitted to the client via the non-lawyer estate planner. Lawyer would charge a set fee for the services. Although not concluding that the arrangement was per se unethical, the Opinion concluded only a case-by-case analysis could find a particular representation ethical. Because the inquiring attorney was seeking approval of a set procedure to be followed in every case, the lawyer was likely precluded from participating in the arrangement.

Virginia:

Op. 1778 (2003). A lawyer may represent an administrator (surviving spouse) who is taking his elective share as spouse of the decedent. The lawyer may represent the administrator with respect to his individual legal needs provided they are not in conflict with the administrator's fiduciary duties to the beneficiaries of the estate.

Related Secondary Materials

The Financial Action Task Force (FATF) in 2008 issued a monograph entitled *RBA GUIDANCE FOR LEGAL PROFESSIONALS* intended to give guidance to lawyers about how to avoid assisting international or domestic money laundering and/or terrorist financing by means of a "risk based approach" (RBA) for assessing whether a given client presents a reduced, standard or enhanced risk of such activities, and then responding with appropriate "client due diligence" (CDD) commensurate with the risk presented. Such CDD is called for, in particular, when lawyers are asked to assist in the following kinds of transactions:

- Buying and selling of real estate.
- Managing of client money, securities or other assets.
- Management of bank, savings or securities accounts.
- Organization of contributions for the creation, operation or management of companies.
- Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

(FATF RBA Guidance at ¶12) (emphasis added). The full FATF RBA Guidance monograph is available on-line at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf> (8-13-2013).

The key terms "legal persons or arrangements" were defined broadly in an earlier FATF document as follows:

"Legal persons" refers to bodies corporate, foundations, anstalt, partnerships, or associations, or any similar bodies that can establish a permanent customer relationship with a financial institution or otherwise own property.

"Legal arrangements" refers to express trusts or other similar legal arrangements.

See FATF 40 Recommendations (2004) (Glossary) available on-line at <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf> (8-13-2013).

In 2010, in collaboration with various other organizations, including ACTEC, the ABA published a monograph titled *VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING*. The full document is available on-line at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_task_force_gtfgoodpracticesguidance.authcheckdam.pdf (8-13-2013).

In 2013, the ABA issued Formal Opinion 463 which reinforces and encapsulates the foregoing guidance documents.

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf. Excerpts from Opinion 463 follow:

In an effort to combat money laundering and terrorist financing, intergovernmental standards-setting organizations and government agencies have suggested that lawyers should be “gatekeepers” to the financial system. The underlying theory behind the “lawyer-as-gatekeeper” idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing. Many have taken issue with this theory and with the word “gatekeeper.” The Rules do not mandate that a lawyer perform a “gatekeeper” role in this context. More importantly, mandatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5)....

In August 2010 the ABA’s policymaking House of Delegates adopted the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (“Good Practices Guidance”) along with a resolution stating that the Association “acknowledges and supports the United States Government’s efforts to combat money laundering and terrorist financing.” The approved Good Practices Guidance states that it is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing, but rather is intended to serve as a resource that lawyers can use in developing their own voluntary approaches.

...This approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. The Good Practices Guidance urges lawyers to assess money-laundering and terrorist financing risks by examining the nature of the legal work involved, and where the business is taking place, the nature of the legal work involved, and where the business is taking place.

. ...It would be prudent for lawyers to undertake Client Due Diligence (“CDD”) in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity.....

An appropriate assessment of the client and the client’s objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. Rule 1.2(d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. A lawyer also is subject to federal laws prohibiting conduct that aids, abets, or commits a violation of U.S. anti-money laundering laws (e.g., 18 U.S.C. Sections 1956 and 1957) or counter-terrorist financing laws. Thus, for example, lawyers should be mindful of legal restrictions applicable to all persons in the U.S. to avoid providing certain legal services to, and receiving money from, individuals or entities publicly identified by the U.S. Department of the Treasury on its Specially Designated Nationals List (“SDN List”). In certain circumstances, checking a client’s identity internally within the firm against the SDN List can avoid the risk of unlawful conduct by the lawyer.

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved. For example, the fact that clients are deemed to be “Politically Exposed Persons,” (e.g., domestic or foreign senior government, judicial, or military

officials) may justify enhanced due diligence on the part of the lawyer because of the potential for corruption. Clients or legal matters associated with countries that are subject to sanctions or embargoes issued by the United Nations, or those identified by credible sources as having significant levels of corruption or other criminal activity or that provide funds or support to terrorist organizations, may require greater examination. Furthermore, clients who ask that the lawyer handle actual receipt and transmission of funds or those who request accelerated real estate transfers for no apparent reason may also require an extra level of scrutiny.

Once a representation has commenced, a lawyer may terminate it in a number of circumstances in which the lawyer does not know for certain the client's plans or whether the client is engaged in criminal or fraudulent activities, but the lawyer has reason to believe that the client is engaging, or plans to engage, in such improper activities. Rule 1.16(b)(2) (Declining or Terminating Representation) states that a lawyer may withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."

...[L]awyers should be conversant with the risk-based measures and controls for clients and legal matters with an identified risk profile and use them for guidance as they develop their own client intake and ongoing client monitoring processes. When in a lawyer's professional judgment aspects of the contemplated representation raise suspicions about its propriety, that lawyer's familiarity with risk-based measures and controls will assist in avoiding unwitting assistance to unlawful activities. Indeed, the usefulness of the Good Practices Guidance is an example of the declaration in the Model Rules that "[t]he Rules do not ... exhaust the moral and ethical considerations that should inform a lawyer..." (Footnotes omitted).

Restatement (Third) of the Law Governing Lawyers (2000), §14 Formation of a Client-Lawyer Relationship, Comments f and i

....

f. *Organizational, fiduciary and class-action clients.*

...

In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. In the absence of clarification the inference to be drawn may depend on the circumstances and on the law of the jurisdiction. Similar issues may arise when a lawyer represents other fiduciaries with respect to their fiduciary responsibilities, for example a pension-fund trustee or another lawyer.

...

- i. *Others to whom lawyers owe duties.* In some situations, lawyers owe duties to nonclients resembling those owed to clients. Thus, a lawyer owes certain duties to members of a class in a class action in which the lawyer appears as lawyer for the class (see Comment f) and to prospective clients who never become clients (see §15). Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer, to trust beneficiaries by a lawyer representing the trustee, and to certain nonclients in other situations (see §134, Comment f; see also Comment f hereto). What duties are owed can be determined only by close analysis of the circumstances and the relevant law and policies. A lawyer may also become subject to duties to a

non-client by becoming, for example, a trustee, or corporate director. On conflicts between such duties and duties the lawyer owes clients, see §135; see also §96. On civil liability to nonclients, see §§51 [Duty of Care to Certain Nonclients] and 56 [Liability to a Client or Nonclient under General Law].

Restatement (Third) of the Law Governing Lawyers (2000), §51 Duty of Care to Certain Nonclients

For purposes of liability under §48 [Professional Negligence—Elements and Defenses Generally], a lawyer owes a duty to use care within the meaning of §52 [The Standard of Care] in each of the following circumstances:

(4) to a nonclient when and to the extent that:

...

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the nonclient is not reasonably able to protect its rights; and
- (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Illustrations:

...

- 5. Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures (see §67 [Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss]). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.
- 6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though Lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

MRPC 1.3: DILIGENCE

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

ACTEC COMMENTARY ON MRPC 1.3

Timetable. Whether the representation relates to *inter vivos* estate planning or the administration of a fiduciary estate, it is usually desirable, early in the representation, for the lawyer and client to establish a timetable for completion of various tasks. Insofar as consistent with providing the client with competent representation, the lawyer should adhere to the established schedule and inform the client of any revisions that are required, whether attributable to the lawyer or to circumstances beyond the lawyer's control. Many clients engaged in estate planning are elderly or are facing medical emergencies. There is thus an enhanced risk that the client might die or otherwise become incapable of completing an estate plan if the estate planner takes more time than is reasonable under the circumstances to do the work requested. In such cases the client may be harmed, and intended beneficiaries may not receive the benefits the client intended them to have.

Planning the Administration of a Fiduciary Estate. Lawyers retained to assist in the administration of an estate too frequently succumb to the temptation to delay this kind of work, where rigid court deadlines may not be imposed, in favor of what they consider more pressing matters. The lawyer and the fiduciary should plan the administration of an estate or trust in light of the fiduciary's obligations to the courts, tax authorities, creditors and beneficiaries. The lawyer and fiduciary may subsequently decide to accelerate or delay some planned payments or distributions in order to improve the tax position of the fiduciary estate or of its beneficiaries. The lawyer's obligation to be diligent includes the duty to advise the fiduciary competently regarding the tax and nontax impact of sales, distributions and other administrative actions, as well as to take reasonable steps to ensure that the fiduciary completes administration of the estate in a timely manner. In connection with the administration of an estate or trust, it is appropriate for the lawyer and the fiduciary to consider the circumstances of the beneficiaries and to communicate with them regarding the fiduciary estate. See ACTEC Commentary on MRPC 2.1 (Advisor). However, the lawyer and the fiduciary should adhere to their general duties, including the duty to act impartially with respect to the beneficiaries.

Time Constraints Imposed by Client. The lawyer should not agree to the imposition of time limits that may prevent the lawyer from consulting fully with the client or giving a matter the time and attention it should receive. The lawyer should caution the client regarding the risks that arise if a matter is pursued on an abbreviated time schedule that deprives the lawyer of the opportunity fully to fulfill the lawyer's role. A lawyer who agrees to pursue a matter on such a schedule acts properly if adherence to the agreed schedule is reasonable under the circumstances.

Planning for Disability or Death of Lawyer. As stated in Comment (5) to MRPC 1.3, to prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that

each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. The obligation to assure that clients are represented on an uninterrupted basis should also extend to lawyers who practice in firms.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentary on MRPC 1.1 & 1.2.

Cases

California:

Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573 (Cal. App. 1995). The court held that the beneficiary of an un-executed will must prove facts that “manifest a commitment by the decedent to benefit” the beneficiary in order for the decedent’s lawyer to owe any duty to that beneficiary. The appellate court upheld summary judgment for the lawyer in a suit brought by the deceased client’s husband. The lawyer had met with the client in June to discuss the preparation of a new will that would increase the provisions to be made for her husband. Although the lawyer knew the client was terminally ill, the lawyer did not send a draft of the new will to the client until October and did not otherwise follow up on the matter. The client died in December without having executed a new will. The court found that the lawyer did not have a duty, after sending the draft will to the client, to inquire whether she had any questions or wanted further assistance.

Colorado:

People v. Van Nocker, 490 P.2d 697 (Colo. 1971). In this disciplinary case the court held that “crass irresponsibility or callous indifference to a client’s affairs is inexcusable under any circumstances.” The lawyer who failed to file tax returns on two occasions for the same client and was not timely in sending a will to the client was suspended for an indefinite period.

People v. James, 502 P.2d 1189 (Colo. 1972). This is a disciplinary case in which a lawyer who had previously been disciplined for dereliction of duty to clients was disbarred for “failure to prepare a will for at least eight months after [being] employed to do so” by an aged and infirm client.

Connecticut:

Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988). In this malpractice action the attorneys, engaged by the client to prepare documents for the disposition of his estate, were sued for their allegedly negligent failure to provide the documents to the client for execution prior to the client’s death. In reversing a trial court judgment against the attorneys in favor of the plaintiffs, the intended beneficiaries under the unexecuted documents, the Supreme Court of Connecticut observed:

We conclude that the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer’s duty of undivided loyalty to the client... .

A central dimension of the attorney-client relationship is the attorney's duty of "[e]ntire devotion to the interest of the client." [Citations omitted.] This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney's delay, the testator did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third-party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. 543 A.2d at 735.

Florida:

Babcock v. Malone, 760 So.2d 1056 (Fla. App. 2000). This is a malpractice case in which would-be beneficiaries under an unexecuted will lawyer had drafted for client sought damages on the theory lawyer had delayed unnecessarily in finalizing the will. Applying Florida's rule from *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 612 So.2d 1378 (Fla. 1993), the court held that plaintiffs could not qualify as intended beneficiaries because testator's intent that they be beneficiaries was not expressed in his will.

Illinois:

In re Cutright, 233 Ill. 2d 474 (2009). This is a disciplinary case in which an attorney was suspended for two years, in part for failing to act diligently in closing an estate (which took almost 20 years) and failing adequately to inform his client about the status of the matter, in violation of Rules 1.3 and 1.4.

Maryland:

Attorney Grievance Com'n v. Pawlak, 408 Md. 288, 969 A.2d 311 (Md. 2009). Lawyer took over a probate estate as the result of the death of the lawyer previously handling it, but the lawyer failed to take action on the estate for more than a decade. He was suspended indefinitely for violations of Rules 1.1, 1.3 and 8.4, as well as failure to respond to the disciplinary process in a timely manner.

Minnesota:

In re Holker, 730 N.W.2d 768 (Minn. 2007). Lawyer was suspended for a minimum of six months based on misconduct in probating an estate. He delayed work on the estate for more than two years after being retained, without good cause, and without adequate communication with the client; when he was fired by the client and replaced, he failed to turn over the complete file. Then, when called upon to supply the rest of the file, he fabricated correspondence he claimed to have had with the client.

New York:

In re Goldsmith, 61 A.D.3d 132, 874 N.Y.S.2d 28 (App. Div. 2009). This was a reciprocal disciplinary proceeding. Licensed in both NY and NJ, the lawyer was found by NJ to have grossly neglected an estate worth more than \$500,000 for two years, failing, among other things, promptly to distribute \$591,000 of assets that were available to beneficiaries. Significantly, his neglect was as executor rather than attorney for the estate. "Although he was acting as executor, as opposed to the attorney for [the] estate, he still had a fiduciary relationship with the beneficiaries, and an obligation to conduct himself in accordance with the rules." He was publicly censured for this conduct in NJ and also in NY. See *In re Goldsmith*, 190 N.J. 196, 196, 919 A.2d 812 (2007) (lacking details).

Ohio:

Geauga Cty. Bar Assn. v. Patterson, 124 Ohio St.3d 93, 919 N.E.2d 206 (2009). Lawyer was suspended for one year, in part for “neglecting an entrusted [probate] matter” (DR 6-101(A)(3)). Note that the neglect related to his conduct as co-executor and co-trustee of a client’s estate, rather than as lawyer for the estate, in that he permitted his co-fiduciary to misappropriate estate assets.

Oklahoma:

State ex rel. Oklahoma Bar Ass'n v. Hulett, 2008 Okla. 38, 183 P.3d 1014 (2008). Lawyer was suspended for 3 months, in part for lack of diligence in completing estate planning for a client for whom time was of the essence. Apparently he prepared the will for the client and sent it to him, but it was returned because of an address change and the lawyer failed thereafter to return calls from the client and did not complete the matter for a year and a half.

Texas:

Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716 (Tex. App. 1986), *writ dismissed by agreement*, 729 S.W.2d 690 (1987). In this case the lack of privity between the lawyer and the decedent’s intended beneficiaries barred them from bringing a negligence action against the lawyer for failing to prepare a new will in accordance with decedent’s instructions prior to death.

Vermont:

Professional Conduct Board Decision No. 25 (1992). In this case the respondent lawyer, who took over as personal representative for an estate in 1982 and failed to take any action to close the estate until after he was required to appear before the probate court following an heir’s complaint over the delay in 1989, was given a private admonition for his misconduct. The Professional Conduct Board observed:

The Board is concerned with the number of neglect cases which have come to its attention, particularly in probate practice. Given the pressures and the volume of the modern law office, it is easy for some client matters to “slip through the cracks.” It is the responsibility of every lawyer to ensure that client matters are not neglected. The beneficiaries of estates should not have to tolerate inactivity nor have to go to extraordinary lengths just to secure the attention of counsel.

Wisconsin:

In re Nussberger, 2009 Wis. 103, 775 N.W.2d 525 (2009). Lawyer was publicly reprimanded for lack of competence and diligence in administering an estate. First, he failed to determine whether the estate was required to file state and federal estate tax returns prior to the filing deadlines; and then filed an inventory that incorrectly used the redemption value of the decedent’s savings bonds rather than the date of death value. Second, he failed to file an estate inventory until almost a year after the filing deadline and failed to file estate tax returns for almost three years after the filing deadline.

MRPC 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (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.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ACTEC COMMENTARY ON MRPC 1.4

Encouraging Communication; Discretion Regarding Content. Communication between the lawyer and client is one of the most important ingredients of an effective lawyer-client relationship. In addition to providing information and counsel to the client, the lawyer should encourage communications by the client. More complete disclosures by a client may be encouraged if the lawyer informs the client regarding the confidentiality of client information, although a lawyer need not, and sometimes should not, assure a client of confidentiality beyond what the rule and its exceptions require. See MRPC 1.6 (Confidentiality of Information). The nature and extent of the content of communications by the lawyer to the client will be affected by numerous factors, including the age, competence and experience of the client, the amount involved, the complexity of the matter, cost factors and other relevant considerations. The lawyer may exercise informed discretion in communicating with the client. It is generally neither necessary nor appropriate for the lawyer to provide the client with every bit of information regarding the representation.

In order to obtain sufficient information and direction from a client, and to explain a matter to a client sufficiently for the client to make informed decisions, a lawyer should meet personally with the client at the outset of a representation. A lawyer should not agree to do estate planning for one person when the lawyer's only communication has been with another who purports to be acting as an intermediary for the client. If circumstances prevent a lawyer from meeting personally with the client, the lawyer should communicate as directly as possible with the client. In either case the elements of the engagement should be confirmed in an engagement letter.

Effective personal communication is necessary in order to ensure that any estate planning documents that are prepared by a lawyer are consistent with the client's intentions. Because of the necessity that estate planning documents reflect the intentions of the person who executes them, a lawyer should not provide estate planning documents to persons who may execute them without receiving legal advice. Accordingly, a lawyer should be hesitant to provide samples of estate planning documents that might be executed by lay persons without legal advice. A lawyer may, of course, prepare or assist in the preparation of sample estate planning documents that are intended to be used by lawyers or by lay persons with personal legal advice.

It is equally important that the client understand the documents that the lawyer has prepared and their effects going forward. Explanations by the lawyer could include a clear statement as to whether the plan (in whole or in part) is irrevocable, and a summary of the most important features of the plan. Where the plan will require management by the client, the lawyer should provide appropriate instructions. Rather than relying on oral communications only, the lawyer should consider furnishing these explanations in writing.

Communications During Active Phase of Representation. The need for communication between the lawyer and client is reflected in Rules respecting the lawyer's duties of competence and diligence. See ACTEC Commentaries on MRPCs 1.1 (Competence) and 1.3 (Diligence). The lawyer's duty to communicate with a client during the active period of the representation includes the duty to inform the client reasonably regarding the law, developments that affect the client, any changes in the basis or rate of the lawyer's compensation [See ACTEC Commentary on MRPC 1.5 (Fees)], and the progress of the representation. The lawyer for an estate planning client should attempt to inform the client to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). In addition, the lawyer should inform the client of any recommendations that the lawyer might have with respect to changes in the scope and nature of the representation. The client should also be informed promptly of any substantial delays that will affect the representation. For example, the client should be informed if the submission of draft documents to the client will be delayed for a substantial period regardless of the reason for the delay. If the lawyer determines that the client has some degree of diminished capacity, the lawyer should proceed carefully to assess the ability of the client to communicate his or her intentions and to understand the advice being given and the documents being drafted by the lawyer. The lawyer should also be alert to the possibility that after the commencement of a representation, the client might lose sufficient capacity for the lawyer to continue. See MRPC 1.14.

Communications Needed for Informed Consent. Some of the rules require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of action. The nature of the communication that is generally required in connection with informed consent is described in MRPC 1.0(e) (Terminology).

Advising Fiduciary Regarding Administration. Unless limited by agreement concerning the scope of the representation, the lawyer who represents a fiduciary generally with respect to a fiduciary estate should assist the fiduciary in making decisions regarding matters affecting the representation, such as the timing and composition of distributions and the making of available tax elections. The lawyer should make reasonable efforts to see that the beneficiaries of the fiduciary estate are informed of decisions regarding the fiduciary estate that may have a substantial effect on them. See ACTEC Commentaries on MRPCs 1.3 (Diligence), 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

Dormant Representation. The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual communication or a form email, letter, or similar mass communication regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose

representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs.

Termination of Representation. A client whose representation by the lawyer is dormant becomes a former client if the lawyer or the client terminates the representation. See MRPC 1.16 (Declining or Terminating Representation) and MRPC 1.9 (Duties to Former Clients) and the ACTEC Commentaries thereon. The lawyer may terminate the relationship in most circumstances, although the disability of a client may limit the lawyer's ability to do so. Thus, the lawyer may terminate the representation of a competent client by a letter, sometimes called an "exit" letter, that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

In general, a lawyer may communicate with a former client regarding the subject of the former representation and matters of potential interest to the former client. See MRPCs 7.3 (Direct Contact with Prospective Clients) and 7.4 (Communication of Fields of Practice).

Example 1.4-1. Lawyer (*L*) prepared and completed an estate plan for Client (*C*). At *C*'s request, *L* retained the original documents executed by *C*. *L* performed no other legal work for *C* in the following two years but has no reason to believe that *C* has engaged other estate planning counsel. *L*'s representation of *C* is dormant. *L* may, but is not obligated to, communicate with *C* regarding changes in the law. If *L* communicates with *C* about changes in the law, but is not asked by *C* to perform any legal services, *L*'s representation remains dormant. *C* is properly characterized as a client and not a former client for purposes of MRPCs 1.7 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients).

Example 1.4-2. Assume the same facts as in Example 1.4-1 except that *L*'s partner (*P*) in the two years following the preparation of the estate plan renders legal services to *C* in matters completely unrelated to estate planning, such as a criminal representation. *L*'s representation of *C* with respect to estate planning matters remains dormant, subject to activation by *C*.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Enabling Estate Planning Client to Make Informed Decisions

Cases

California:

In re Respondent G., 1992 WL 204655 (Cal. Bar Ct. 1992). In this proceeding a lawyer was privately reprimanded for repeated failure to advise a client of the state inheritance tax owed by her with respect to an estate administration handled by the lawyer.

Minnesota:

In re Holker, 730 N.W.2d 768 (Minn. 2007). Lawyer was suspended for a minimum of six months based on misconduct in probating an estate. He delayed work on the estate for more than two years after being retained, without good cause, and without adequate communication with the client; when he was fired by the client and replaced, he failed to turn over the complete file. Then, when called upon to supply the rest of the file, he fabricated correspondence he claimed to have had with the client.

Washington:

In re Shepard, 169 Wn.2d 697, 239 P.3d 1066 (2010). Lawyer was suspended for 2 years for his participation in the sale of “living trusts.” Among other violations, he failed to adequately explain to clients the effect of the documents they were signing, the availability of alternatives to the package he was selling, and the risks and benefits of living trusts compared to other estate-planning options for their specific situation.

Ethics Opinions

ABA:

Op. 08-450 (2008)). This opinion concentrates on the insurance defense scenario, but has helpful things to say for estate planners representing multiple clients on the same or related matters, particularly with regard to the interplay between the duty of confidentiality and the duty to inform. It is quoted in the annotation to Rule 1.6.

Extent of Continuing Duty to Client

Cases

California:

Brandlin v. Belcher, 134 Cal. Rptr. 1 (Cal. App. 1977). A client for whom the lawyer had previously drawn a will and trust discussed with a trust officer changing the trust to add other children as beneficiaries. The trust officer discussed the possibility with the lawyer, who said that he would have to hear from the client directly. The client died without having amended her trust. The Lawyer was granted a summary judgment in an action brought against him by the decedent’s children for negligence. “[Lawyer] fully discharged whatever duty his prior representation imposed by his request through the intermediary that the client communicate with him personally. [Lawyer’s] conduct satisfied rather than violated his duty as a lawyer. It was designed to assure that the personal nature of the attorney-client relationship was protected.” 134 Cal. Rptr. at 3.

New York:

Lama Holding Co. v. Shearman & Sterling, 758 F. Supp. 159 (S.D.N.Y. 1991). This case involves a U.S. holding company and its foreign parents who brought an action against a law firm and trust company alleging various causes of action arising from the defendants’ alleged failure to inform the plaintiffs of changes in U.S. tax laws affecting the plaintiffs’ investments. Applying New York law, the federal district court held that the complaint properly stated a cause of action against the lawfirm for legal malpractice (among other claims). According to the allegations of the complaint a partner at the law firm, in response to a specific inquiry as to the possible effect on plaintiffs’ interests of tax legislation then pending in Congress, replied there were no significant tax changes enacted as of that

time, but that the firm would inform the plaintiffs if any significant amendments to U.S. tax laws were enacted in the future.

Washington:

Stangland v. Brock, 747 P.2d 464 (Wash. 1987). The court here ruled that, after a will is prepared and executed, “the attorney has no continuing obligation to monitor the testator’s management of his property to ensure that the scheme originally established in the will is maintained.”

Termination of Lawyer-Client Relationship

See also ACTEC Commentary on MRPC 1.16 and the Annotations thereto.

Cases

Federal:

Heathcoat v. Santa Fe International Corp., 532 F. Supp. 961 (E.D. Ark. 1982). The court here found that the lawyer-client relationship between the individual plaintiff and her lawyer had ended after a will prepared by the lawyer had been executed by her in 1966 although in 1981 she received a form letter from the law firm. In the meantime, the individual lawyer who had provided the estate planning services had died. The salutation of the letter, which pointed out the significance of ERTA, was “Dear Friend.”

Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188 (D.N.J. 1989). In this case the court found that the lawyer-client relationship which was established in 1976 still existed in 1989. The law firm performed estate planning services for the client and his spouse in 1976, advised the client regarding the renegotiation of an employment contract in 1983 and 1984 and sent the client estate planning reminder letters in 1983 and 1988.

MRPC 1.5: FEES

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.
- (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly

represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

ACTEC COMMENTARY ON MRPC 1.5

Basis of Fees for Trusts and Estates Services. Fees for legal services in trusts and estates matters may be established in a variety of ways provided that the fee ultimately charged is a reasonable one taking into account the factors described in MRPC 1.5(a) (Fees). Fees in such matters frequently are primarily based on the hourly rates charged by the attorneys and legal assistants rendering the legal services or upon a mutually agreed-upon fee determined in advance. There is nothing improper, in principle, with charging a flat fee for estate planning or estate administration if the fee is reasonable after considering all the factors enumerated in Rule 1.5(a). If a statute or other authority in the attorney's state authorizes certain flat fees or declares them reasonable, then a flat fee consistent with that state authority is reasonable under Rule 1.5. See, e.g., Fla. Stat. 733.6171. Unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. The rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representation, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel.

Any changes in the basis or rate of the fee or expenses shall be communicated to the client. Basing a fee for legal services solely on any single factor set forth in MRPC 1.5 (Fees) is generally inappropriate unless required or allowed by the law of the applicable jurisdiction. See Cal. Prob. Code § 10810 and Fla. Stat. Ann. § 733.6171 described in the Annotations to this Commentary. In recent years courts in several states

have, in effect, prohibited or seriously limited the use of fees based upon a percentage of the value of the estate.

Most states allow a lawyer who serves as a fiduciary and as the lawyer for the fiduciary to be compensated for work done in both capacities. However, it is inappropriate for the lawyer to receive double compensation for the same work.

Fees Paid with Property Other than Money. Occasionally a client may wish to pay an attorney's fee with property other than money. Lawyers should be very careful before agreeing to this form of payment. A comment to Model Rule 1.5 suggests that "a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client.") MRPC 1.5, cmt [4]. The comments to Model Rule 1.8, however, take a much more definite position, indicating that the more stringent requirements of MRPC 1.8(a) *do* apply where a lawyer "accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." MRPC 1.8, cmt [1]. See ACTEC Commentary on MRPC 1.8.

Fee Paid by Person Other than Client. One person, perhaps an employer, insurer, relative or friend, may pay the cost of providing legal services to another person. Notwithstanding the source of payment of the fee, the person for whom the services are performed is the client, whose confidences must be safeguarded and whose directions must prevail. Under MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules), the lawyer may accept compensation from a person other than a client only if the client consents after consultation, there is no interference with the lawyer's independence of judgment or with the lawyer-client relationship, and the client's confidences are maintained. See ACTEC Commentary on MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). See also MRPC 5.4(c) (lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services).

Rebates, Discounts, Commissions, Referral Fees and Fee Splitting. Under MRPC 7.2(b), a lawyer may not "give anything of value to a person for recommending the lawyer's services," except that a lawyer may (1) pay for permissible advertisements (MRPC 7.1-7.3), (2) pay the usual charges of a legal service plan or referral service, (3) pay for a law practice as permitted by MRPC 1.17, and (4) "refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement." Conversely, a lawyer should not accept any rebate, discount, commission or referral fee from a nonlawyer or a lawyer not acting in a legal capacity in connection with the representation of a client except as permitted by MRPC 7.2(b). Even with full disclosure to and consent by the client, such an arrangement involves a risk of overreaching by the lawyer and the potential for actual or apparent abuse. The client is generally entitled to the benefit of any economies that are achieved by the lawyer in connection with the representation. The acceptance by the lawyer of a referral fee from a nonlawyer may involve an improper conflict of interest. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). In those jurisdictions that permit referral fees between lawyers, the lawyer should comply with the requirements of local law governing such matters, including full disclosure to the client. A lawyer is generally prohibited from sharing legal fees with nonlawyers. See MRPC 5.4 (Professional Independence).

While a lawyer is not entitled to accept a referral fee (except as permitted by MRPC 7.2(b)), lawyers are permitted to split fees under the terms of MRPC 1.5(e). Ordinarily this will be done “in proportion to the services performed by each lawyer” as stated in that subsection. Even then, the client must agree to the arrangement, including the share of each lawyer; the agreement must be in writing; and the total fee must be reasonable. But MRPC 1.5(e) also permits fee splitting between law firms *not proportional to services performed* provided that “each lawyer assumes joint responsibility for the representation.” Comment [7] to MRPC 1.5 elaborates that “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.” It is contemplated by the rule that a referring lawyer who provides no further services for the referred client may receive a share of the fee ultimately paid by the client, provided the technical requirements of the rule are met. To this extent, the Rule allows referral fees “[i]n practical effect.” 1 G.C. HAZARD, JR., W.W. HODES & P.R. JARVIS, THE LAW OF LAWYERING §8.16 at 8-43 (3d ed. 2013).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Percentage, Excessive and Reasonable Fees

Statutes

California:

California has a statute governing the ordinary compensation of an attorney for a personal representative based on the value of the estate accounted for by the personal representative. “For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Cal. Prob. Code § 10810. California also allows additional compensation for “extraordinary” legal services rendered to a personal representative. Cal. Prob. Code § 10811. The same statute allows for an attorney and personal representative to agree upon the provision of extraordinary services on a contingent-fee basis provided the court approves the agreement as reasonable and other statutory conditions are met.

Florida:

Florida has enacted a comprehensive statute governing compensation of the attorney for a personal representative. Attorneys for personal representatives are entitled to “reasonable compensation” without court order. If the compensation is calculated pursuant to a statutory percentage fee schedule set forth in the statute, it is presumed to be “reasonable.” Provision is made for payment for certain “extraordinary services,” examples of which are included in the statute. Upon the petition of any interested person the court may increase or decrease the compensation for ordinary services or award compensation for extraordinary services (if the facts and circumstances of the particular administration warrant.) The statute also includes a list of factors for the court to use in determining what is “reasonable” and gives the court discretion to give such weight to each such factor as the court determines to be appropriate. Fla. Stats. § 733.6171 (eff. July 1, 1995).

Wisconsin:

Wisconsin provides for “just and reasonable” attorneys fees for probating an estate. “But if the decedent died intestate or the testator's will contains no provision concerning attorney fees, the court shall consider the following factors in determining what is a just and reasonable attorney's fee: ...(e) The sufficiency of assets properly available to pay for the services, except that the value of the estate may not be the controlling factor.” Wis. Stat 851.40(2)(e).

Cases

California:

Estate of Trynin, 264 Cal. Rptr. 93 (1989). The Supreme Court of California, construing California's statute governing extraordinary compensation for attorneys, here held that in an appropriate case attorneys may be compensated for legal services rendered in preparing and prosecuting a claim for prior extraordinary legal services (so-called “fees on fees”). The Court observed that the trial court retains the discretion to reduce or deny additional compensation for fee-related services if the court finds that the fees otherwise awarded the attorneys for both ordinary and extraordinary services are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorneys for all services rendered.

Colorado:

Estate of Painter, 567 P.2d 820 (Colo. App. 1977), *appeal after remand*, 628 P.2d 124 (Colo. App. 1980), *appeal after remand*, 671 P.2d 1331 (Colo. App. 1983). Fee awards for personal representative and counsel based on expert testimony applying percentage method of determining fees were reversed. The Colorado legislature had repealed authorization for percentage fees and adopted a reasonable fee standard.

Connecticut:

In re Smigelski, 124 Conn. App. 81 (2010). Lawyer represented estate in recovering asset, and also represented executor in probating estate. Lawyer charged contingent fee for recovery action, which was held to be unreasonable because of way contingency fee collected was calculated and because lawyer failed to show a nexus between fee and service provided. Also, lawyer paid himself the fee by withdrawing funds from the estate to which he had access as attorney for estate. Court held that this action was improper because his fees were subject to approval of probate court and his actions violated 1.15, which requires prompt delivery to a client of funds to which the client is entitled.

District of Columbia:

In re Ifill, 878 A.2d 465 (D.C. 2005). Lawyer collected \$10,000 from client to collect on four insurance policies he told her insured her deceased husband, but no evidence supported the existence of these policies and he failed to return the excess fees collected when he discovered this. Not only did he collect an unreasonable fee, he “failed to provide zealous, diligent and prompt representation; nor did he keep the client reasonably informed about her case; nor did he explain that she had no more non-frivolous claims against her husband's insurers.” He was suspended for a year on this count, although disbarred on another, unrelated count.

In re Bach, 966 A.2d 350 (D.C. 2009). Lawyer who was serving as a conservator for a 95-year-old woman wrote himself a check for \$2,500 for his services even though he had not yet received court

approval for this disbursement, which he knew he needed. Since his ward's nursing home had submitted a claim for her care, he was concerned that by the time his fee petition was approved there would be no funds left in her estate to pay him. He was disbarred for taking a fee prohibited by law (Rule 1.5) and misappropriating entrusted funds (Rule 1.15). The result, the court held, was required by *In re Addams*, 579 A.2d 190 (D.C. 1990)

Florida:

In re Estate of Platt, 586 So.2d 328 (Fla. 1991). The court here held that it was inappropriate to determine the fees of a fiduciary and the fiduciary's lawyer solely according to a percentage of the value of the estate when governing statutes provide a number of factors to be considered in determining fees. (See discussion of Florida statute above)

Teague v. Estate of Hoskins, 709 So.2d 1373 (Fla. 1998). In this case of first impression, the Supreme Court of Florida held that the attorneys' fees awarded to a widow's guardian against an estate's personal representative in the guardian's successful litigation with the personal representative over the widow's homestead, and elective share rights constituted a claim of the highest priority against the estate's assets. Two dissenting judges argued that the majority's opinion "exact[s] no toll from the personal representative for initiating and pursuing a fruitless claim."

Illinois:

In re Estate of Pfoertner, 700 N.E.2d 438 (Ill. App. 1998). An attorney filed a successful will contest on behalf of some, but not all, of the intestate heirs of a decedent. The attorney moved for an order assessing his fees and costs against each heir's intestate share of the estate to the extent such heir's interest exceeded what the heir would have received under the challenged will. The appellate court affirmed the trial court's authority and broad discretion to award fees and costs pursuant to the common fund doctrine (described as an equitable exception to the "American Rule" that each party to litigation must bear its own attorneys' fees). The appellate court nevertheless remanded the case to the trial court to make a *quantum meruit* award.

Estate of Zagaria, 997 N.E.2d 913 (Ill. App. 2013). Attorneys were hired by sister to open estate of absentee for her missing brother. The estate was opened, and in the course of administration the attorneys discovered that the brother was in fact alive. While the estate was open, the sister, as administrator, withdrew significant funds from the estate, for such expenses as buying ponies for her grandchildren. The brother hired an attorney, the estate was closed, and the funds were distributed to the brother. The attorneys for the sister had not requested fees before the estate was closed, and after funds were returned to the brother they sought fees from the brother. The court upheld the order requiring the brother to pay the attorneys' fees. The court noted that under prior law (citing an 1883 case), administration of a live person's estate is "absolutely null and void," but that the statutory scheme for estates of absentees superceded that rule. Because the requirements of the statute were followed, the attorneys were entitled to be compensated even though the absentee was later discovered alive. A dissenting judge faulted the attorneys for not making the fee application sooner, and for not seeking payment from their client, the sister, who had removed significant funds from the estate.

Indiana:

In re Matter of Gerard, 634 N.E.2d 51, 53 (Ind. 1994). A lawyer was here suspended for one year for enforcing contingent fee agreement under which the lawyer received over \$150,000 with respect to

largely administrative work in locating certificates of deposit that belonged to an elderly hospitalized client. The lawyer's conduct involved fraud and charging a clearly excessive fee. The "enormity of Respondent's fee in relation to the amount of service rendered is fraudulent."

Maine:

In re Estate of Davis, 509 A.2d 1175 (Me. 1986). The practice of basing a lawyer's fee on a percentage of the estate being handled should carry little or no weight in determining a reasonable fee.

Massachusetts:

In re Matter of Tobin, 628 N.E.2d 1273 (Mass. 1994). A lawyer was suspended for 18 months for fraudulently inducing a client unnecessarily to probate an estate, all of the assets of which passed to her as surviving joint tenant, for charging excessive fees based on bar association's former fee schedule, and misrepresenting facts to probate court.

Mississippi:

Estate of McLemore, 63 So. 3d 468 (Miss. 2011). This was an extremely contentious estate, pitting widow and three sons against eldest son who was serving as co-executor and co-trustee of deceased father's relatively large estate (in excess of \$7 million). Court held that it was proper for trial court to award attorneys fees of non-fiduciary beneficiaries to be paid from estate, even though there was no statutory authority or authority under the Will to pay beneficiaries' attorneys fees, as long as the beneficiaries' actions benefited the estate and were necessary because of failure of the executor. The court adopted the principles in *Becht v. Miller*, 273 N.W. 294 (Mich. 1937), regarding when beneficiaries' attorney fees can be awarded, and found they were appropriate in this case. It also relied on authority from Ohio, Wisconsin, South Dakota, California, Minnesota, Missouri, and Nebraska. As for amount of fees, attorney for the executor and co-trustee submitted a fee request for over \$420,000 based on a representation that there had been no written fee agreement. It later turned out that the lawyer had signed a fee agreement and sent it to the client, who had never returned it. The proposed fee agreement had significantly lower fees (\$125-175/hour) than the stated oral agreement (\$175-350/hour) on the basis of which the fee petition was calculated. The court reduced the attorney's fee to what would be due under the agreement but stopped short of finding this constituted a fraud on the court, and did not impose sanctions (although calling it "a 'very close' question").

Missouri:

Estate of Perry, 978 S.W.2d 28 (Mo. App. 1998). This was an action brought by the decedent's son by a prior marriage to remove the decedent's surviving husband as personal representative and for an accounting. The trial court declined to remove the husband as personal representative but entered a money judgment against him for certain claims made on jointly secured obligations. The court also adjudicated the husband's request for an allowance of exempt property. The appellate court, reversing the trial court on the issue of attorneys' fees, held that the son was entitled to a fee award since the estate had benefited from the judgment against the husband and the fact that the son was not successful in his removal action was not determinative on the attorneys' fees issue.

Montana:

Hauck v. Seright, 964 P.2d 749 (Mont. 1998). In this will contest action where the decedent had executed two wills within four days, counsel for the personal representative was unsuccessful in defending the validity of the second will. Nevertheless, in admitting the first will to probate, the trial

court awarded attorneys' fees to the personal representative under the second will. On appeal by the contestant, the Supreme Court of Montana, construing Montana's statute, held that a personal representative is entitled to recover fees from an estate when he defends or prosecutes a proceeding in good faith, whether successful or not.

In re Engel, 338 Mont. 179, 169 P.3d 345 (2007) and 341 Mont. 360, 177 P.3d 502 (2008). Attorney was publicly censured and suspended for two months for collecting unreasonable fees for handling an uncontested proceeding to terminate client's charitable remainder trust. After agreeing on an hourly rate, he inexplicably changed this to a contingent fee agreement and charged \$121,000 rather than the \$1,500-\$2,500 that might have been reasonable. (He also failed to deposit fee retainers in his trust account in violation of Rule 1.15.)

New York:

Estate of Benware, 86 A.D. 3d 687, 927 N.Y.S.2d 173 (2011). This was a challenge of the fees awarded as part of the final accounting for an estate administration. Court upheld order directing 20% of the fees to be taken from one beneficiary's share, because that beneficiary, "by her actions, caused the estate to incur unnecessary legal expenses" and the applicable statute (SPCA 2110(2)) authorized such an allocation of fees. But the court remanded for a potential reduction of the fees awarded because they exceeded what had been requested and the record did not support an upward adjustment.

In re Lawrence, No. 149, 2014 WL 5430622 (N.Y. Oct. 28, 2014). This case is the culmination of an almost 15-year dispute over fees earned by the law firm Graubard Miller and gifts made to 3 of its partners for representing the widow of Sylvan Lawrence and her 3 children in claims against the executor of his \$1 billion estate. In 2005, the underlying estate litigation settled for \$111 million, triggering a 40% contingent fee that Lawrence had agreed on with Graubard. When Lawrence refused to pay it, this action was commenced. By this time, Lawrence had already paid at least \$18 million in fees for twenty years of estate litigation and had made additional gifts to Graubard partners that totaled more than \$5 million. Lawrence (herself) died in 2008, and the dispute was continued by her estate. The court held that the contingency fee agreement here was neither procedurally nor substantively unconscionable, and so it was enforceable. The court further held that Lawrence's attempt to recoup the gifts made to Graubard partners was time-barred since the doctrine of "continuous representation," which would have tolled the statute until the end of the law firm's representation, did not apply.

North Carolina:

Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439 (2005). Law firm entered into a contingent fee agreement to represent will contestants. It negotiated what it believed was a settlement to which clients agreed, but ultimately clients rejected settlement, fired lawyers, hired a new firm, and lost entirely at trial. Original law firm then sought recovery on the fee agreement (which would have yielded a contingent fee of \$300,000) or, in lieu of that, *quantum meruit* (\$62,000). In this decision, the appeals court denied firm any fee on the ground that no recovery was ever obtained. It did, however, allow firm to recover expenses of litigation (\$32,000) on a theory of *quantum meruit* since a lawyer may not assume these expenses in NC.

North Dakota:

In re Hellerud, 714 N.W.2d 38 (N.D. 2006). Attorney was reprimanded and ordered to refund \$5,000 in fees out of roughly \$15,000 received in a relatively simple cash probate administration of an estate

valued at about \$65,000. Lawyer admitted charging the administrator more than he had charged any other client because he was unfamiliar with North Dakota probate law, and also admitted (inadvertently) billing his paralegal's time at the same rate as his own.

Ohio:

Estate of Haller, 689 N.E.2d 612, 615 (Ohio App. 1996). An attorney/administrator sought fees for his firm's representation of himself in an estate administration. Introducing no expert testimony, the attorney did support his application with a 67-page itemization of his services. In affirming the trial court's approval of the entire fee requested (approximately \$39,000), the court observed that, "[w]hile the better practice may be to introduce expert testimony as to the reasonableness of the fees, a probate court judge is nevertheless qualified to make a determination, upon evidence, of the reasonable attorney fees to be paid from the estate without the necessity of expert testimony."

Disciplinary Counsel v. Johnson, 113 Ohio St. 3d 344, 865 N.E.2d 873 (2007). Attorney was hired by an elderly client from whom a previous attorney had stolen \$800,000 to help her and her sister recover some of the funds. The client executed a power of attorney naming the attorney as AIF and he was appointed guardian for both sisters. The court concluded that in pursuing the sisters' claims he had charged excessive fees, spending time and money long after it was economically justified. All in all, he charged almost \$160,000 to collect just under \$198,000. The court found his fees excessive and suspended him for one year, with six months of this stayed on conditions, among which was the condition that he repay \$50,000.

Ivancic v. Enos, 2012-Ohio-3639, 978 N.E.2d 927 (Ohio App. 2012). Lawyer found to have breached fiduciary duties to estate (see annotation under MR 1.7), was properly required to return a portion of fees taken for services to estate: "Where it is revealed an attorney has not in fact augmented or preserved a fund, but, rather, has diminished, squandered, or mismanaged the fund with which he was entrusted, ...reduction, or even outright denial, of attorney fees is appropriate. "

South Dakota:

Estate of O'Keefe, 583 N.W.2d 138 (S.D. 1998). In this action decedent's two nephews, who had acted as fiduciaries in taking care of his property, were found liable for both compensatory and punitive damages for breach of their fiduciary duties, conversion, fraud and deceit. The plaintiff, who, with the nephews, was the only other beneficiary of the estate, sought an order to prevent the two nephews from receiving any part of the punitive damages as estate beneficiaries and requested the court to assess the estate's attorneys' fees incurred in the prior litigation against the nephews' distributive shares. After the trial court so ruled, the Supreme Court of South Dakota, interpreting that state's version of the Uniform Probate Code, upheld the trial court's order regarding the punitive damages but reversed the award of attorneys' fees, finding that such fees could only be awarded by contract or when explicitly authorized by statute.

Tennessee:

Estate of Weisberger, 224 S.W.3d 154 (Tenn. App. 2006). In this case, the appeals court approved a fee sought by a lawyer hired to represent a probate estate based on an oral contract entitling the firm to 3% of the estate value, against the estate's claim that the fee was excessive and had not been agreed upon. As it turned out, the estate had a value of about \$1 million, and the lawyer's estimate of the hours he had expended on the probate (7 hours) yielded an hourly fee rate in excess of \$4,000/hour. The trial and

appeals courts recognized that these fees seemed excessive in hindsight. But the court upheld the fees as reasonable because the agreement was reasonable at the outset. The executors had entered into the agreement knowingly, it was the lawyer's usual rate, and was within the range of the Probate Court guidelines for fees in an estate such as this (albeit at the upper end of those guidelines). "The contract at issue was not a contingency fee contract, because Cooper was certain to be paid, but the amount of his fee was uncertain at the outset because the ultimate value of the estate's assets were unknown.The agreement was more of a flat-fee arrangement in which the percentage was certain, the value of the assets was believed to be approximately \$1 million, but the amount of work that would be required of Cooper was unknown at the time the contract was signed. By agreeing to charge a small percentage of the estate's assets at the outset of the case, Cooper bore the risk of these unforeseen circumstances. As it turned out, however, less work was required of him. However, had a great deal of work been required of Cooper, he likewise would be bound by the bargain he struck."

Shamblin v. Sylvester, 304 S.W.3d 320 (Tenn App 2009). This was a fee dispute arising from a wrongful death claim filed by the father of the victim against the driver of the car in which his daughter was killed. The father hired a lawyer on a 33% contingent fee contract, and a wrongful death claim was filed and quickly settled for the limits of two insurance policies. The settlement (\$300,000) entitled the lawyer to a fee of \$100,000. The victim's surviving mother, entitled to half the proceeds of the settlement, objected to sharing any of her share with the attorney, whose fee she contended was unreasonable. The trial court and appeals court upheld the fee as reasonable and assessed half of it against the objecting mother under the common fund doctrine.

Texas:

Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron & Blue, 843 F. Supp. 2d 673, 689 (N.D. Tex. 2011). This opinion resolved lingering attorney fee disputes arising out of the Hunt family trust litigation in Texas. Albert Hill III and his family and their attorneys had entered into a contingency fee agreement that would pay 30% of gross recovery from a settlement of the trust litigation. After the litigation settled for something in excess of \$114 million, 30% yielded something in excess of \$33 million. But the Hill III family disputed the fees on several grounds. Among the court's holdings: (a) the contingency fee agreement did not comply with the Texas fee splitting rule, but since it did not violate public policy, the court was not willing to limit the law firms to *quantum meruit* (even though the Texas version of MR 1.5(e) would have limited them to *quantum meruit*); (b) the law firms had engaged in negotiations with the GAL about their fees but this was not a sufficient basis for the client to discharge the law firms and was not a breach of their fiduciary duty; (c) the law firms had attempted to secure a release from Hill which the court refused to enforce because of the firms' failure to comply with Texas' version of MRPC 1.8(g), but this was not an abuse of the firms' fiduciary duty; (d) although the three law firms withdrew before a settlement was reached, and the agreement stated that withdrawal would waive the contingency, the court found that the firms had been forced to withdraw when the client (Hill III) challenged their fees and concluded that the contingent fee agreement would be enforced; (e) but the 30% amount could be adjusted by the court with respect to portions of the settlement that were to be paid into trusts for the minor children of Albert Hill III, and reduced the fee to 10% of those amounts. The court also held that the amount of the settlement earmarked for estimated gift taxes that Hill III would owe on establishment of the trusts for his children could not be included in the "gross recovery from settlement" figure used to determine the fees owed. In the end, the court reduced the fees from something in excess of \$33 million to something just under \$22 million.

Washington:

Estate of Morris, 949 P.2d 401 (Wash. App. 1998). A corporate personal representative personally incurred attorneys' fees in successfully defending a suit for removal brought by the beneficiaries of two estates. Its request for reimbursement from the estates was disallowed. The appellate court affirmed the trial court's decision denying any fees on the grounds that the bank's conduct had conferred no "substantial benefit" on the estate as required by the applicable Washington statute.

Bennett v. Ruegg, 949 P.2d 810 (Wash. App. 1999). In this case the court, interpreting statutory law, found that the state's broadly drawn statute permitting attorneys' fees to be awarded in a probate proceeding "as justice may require" applies to permit the personal representative's recovery of attorneys' fees from a beneficiary who has unsuccessfully sought removal of the personal representative.

Ethics Opinions

Arizona:

Ariz. Op. No. 94-09 (1994). (For a more detailed summary see the Annotations following the ACTEC Commentary on MRPC 1.6.) A lawyer who believes that the fees charged by another lawyer in connection with the administration of an estate are clearly excessive has a duty to report the other lawyer's violation of the rules to the state bar.

Connecticut:

Op. 00-22 (2000). Attorney had previously represented a corporate fiduciary on unrelated estate matters. No written fee agreement is required for lawyer's representation of same corporate executor of a new estate.

Illinois:

Op. 12-02 (2012). It is improper for an estate planner to compute his or her fee solely as a percentage of the client's estate. The impropriety is in failure to take into account all the other factors set out in MR 1.5(a). Noting three cases (citations below) that so held with regard to probate work, not estate planning, the committee thought its conclusion followed *a fortiori*: "[I]f a probate attorney, whose task would seemingly involve more uncertainty and unpredictability than that of an estate planner, cannot charge on a percentage basis, we see no reason why an estate planner should be allowed to do so." See *Estate of Painter*, 567 P.2d 820 (Colo. 1977), *In re Estate of Platt*, 586 So.2d 328 (Fl. 1991), and *In re Estate of Weeks*, 409 Ill. App. 3d 1101, 950 N.E.2d 280 (4th Dist. 2011).

Op. 13-01 (2013). If fees are disallowed by the probate court as unreasonable, the lawyer cannot require the executor to pay the disallowed fees. Fees deemed excessive by the court are excessive under the ethics rules.

Oregon:

Op. No. 2003-177. A lawyer does not charge or collect an illegal fee in a probate case if the lawyer requests and receives an initial payment or interim payments from the personal representative's own funds. The personal representative client may later seek court approval for reimbursement from the estate assets of some or all of the money advanced for legal fees. Lawyer who is serving as a personal

representative of an estate must obtain court approval before withdrawing any compensation for services.

Contingent Fee Agreements

Cases

Oklahoma:

Estate of Hughes, 90 P.3d 1000 (Okla. 2004). The court has authority to examine a written contract between attorney and personal representative before approving attorney's fee as an expense. The contract here was found ambiguous because it was unclear what portion of a contingent fee was for representation of the personal representative in estate matters and what portion was for representing her individually.

Ethics Opinions

Missouri:

Op. 20000090 (2000). Attorney who represents the children of a decedent on a contingent fee basis in an attempt to secure their portion of an intestate estate may later represent them in a suit involving other family members under a representation contract with terms providing for a small retainer up front and a later contingency fee basis. The fee assessed at the conclusion of the representation must be assessed for its reasonableness.

New York:

New York City Bar Op. 1993-2. This opinion concludes that a lawyer may enter into a contingent fee contract with a client in connection with a dispute involving a will. The lawyer may not enter into a joint fee agreement among the lawyer, clients and a private investigator under which the investigator would receive a contingent fee.

Rebates, Discounts, Commissions, Referral Fees, and Fee Splitting

Cases

New York:

In re Estate of Clarke, 188 N.E.2d 128 (N.Y. 1962). The lawyer for a personal representative who entered into an agreement with a real estate broker to split the broker's fee on the sale of real property belonging to the estate had a conflict of interest that required denial of all of the lawyer's fees.

Ethics Opinions

ABA:

ABA Formal Op. 93-379 (1993). This opinion covers a number of subjects relating to attorneys' fees and disbursements. It states, in part, that, "if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view

these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements.”

California:

San Diego Op. 1989-2. A lawyer for the executor of a decedent’s estate may not ethically demand payment of a referral fee by a real estate broker as a condition to retention of the broker. “Disclosure and consent by the client (per Rule 3-300) does not cure the abuse.”

Missouri:

Missouri Ethics Opinion 2006-0073 (2006). A lawyer may offer a discount on estate planning to clients who leave a portion of their estates to a not-for-profit organization if the lawyer clearly and fully discloses his relationship with the organization and objectively advises and consults with the clients about their options and the effects of their choices.

North Carolina:

99 Formal Ethics Opinion 1 (1999). A lawyer may not accept a referral fee or solicitor’s fee for referring a client to an investment advisor.

Pennsylvania:

Op. 2000-100. Lawyers may accept referral fees from insurance agents, investment advisors, or other persons who provide products or services to the lawyer’s client subject to MRPCs 1.7(b) and 1.8(f).

Op. 2008-18. It is permissible for two law firms to enter into a joint venture which will use the talents of an associate employed by one of them to provide estate planning services for clients of both provided that the associate’s relationship with both firms is made clear under Rule 7.1, the fee splitting rules in Rule 1.5(e) are complied with and it is understood that the conflicts of each firm’s members are imputed to all the lawyers in both firms.

Philadelphia Op. 2008-5. It would comply with Rule 1.5(e) (fee splitting with an attorney) for a lawyer hired by the executor to provide legal service to an estate to pay a referral fee to the executor who is also an attorney, provided the total fee is not excessive, since here the attorney sharing the fee is also a client and has given consent. But if the attorney serving as executor does not give the benefit of the referral fee to the estate, this would be impermissible self-dealing by the executor and a violation of Rule 8.4(c) and the lawyer paying the referring fee would be in violation of Rule 8.4(a).

Texas:

Op. 536 (2001). A lawyer may not receive referral or solicitation fees for referring a client to an investment adviser while the lawyer’s client continues to receive services from the investment adviser because the client would be adversely affected by the lawyer’s own financial interests and his obligations to the investment adviser.

Utah:

Op. No. 99-07 (1999). It was not “per se unethical” for a lawyer to refer a client to a financial advisor and to receive a referral fee, but the lawyer “has a heavy burden to insure compliance with applicable ethical rules.” The opinion noted that several states hold, as do the Commentaries, that the practice is “per se unethical.”

Op. No. 01-04 (2001). Charging an annual fee for estate planning or asset protection services based on a percentage of the value of the client's assets would be ethical "only in extraordinary circumstances." The opinion does not suggest any circumstances where the arrangement would be appropriate.

Virginia:

Op. 1754 (2001). It is not unethical for an attorney and an insurance agent to share the commission generated by the purchase of a survivorship life insurance policy to fund client's irrevocable life insurance trust provided full and adequate disclosure is made to the client.

MRPC 1.6: CONFIDENTIALITY OF INFORMATION

- (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).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (6) to comply with other law or a court order.
 - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ACTEC COMMENTARY ON MRPC 1.6

Legal Assistants, Secretaries and Office Staff. In the absence of express contrary instructions by a client, the lawyer may share confidential information with members of the lawyer's office staff to the extent reasonably necessary to the representation. As indicated in MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants), the lawyer is required to assure that staff members respect the confidentiality of clients' affairs. The lawyer should "give such assistants appropriate instructions concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the

representation of the client, and should be responsible for their work product.” Comment to MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Consultants and Associated Counsel. The lawyer should obtain the client’s consent to the disclosure of confidential information to other professionals. However, the lawyer may be impliedly authorized to disclose confidential information to other professionals and business consultants to the extent appropriate to the representation. Thus, the client may reasonably anticipate that a lawyer who is preparing an irrevocable life insurance trust for the client will discuss the client’s affairs with the client’s insurance advisor. Additionally, in order to satisfy the lawyer’s duty of competence, the lawyer may, without the express consent of the client, consult with another professional regarding draft documents or the tax consequences of particular actions, provided that the client’s identity and other confidential information is not disclosed. In such a case the lawyer is responsible for payment of the consultant’s fee. As indicated in the ACTEC Commentary on MRPC 1.1 (Competence), with the client’s consent, the lawyer may associate other professionals to assist in the representation.

Preserving Confidentiality. A lawyer must make reasonable efforts to prevent inadvertent or unauthorized disclosure of or unauthorized access to client confidences. If a lawyer has “outsourced” legal work to lawyers or non-lawyers who are independent contractors in this country or abroad, the same duty to make reasonable efforts to protect confidentiality applies. Particular care should be taken to ensure that electronic storage sites and transmission methods provide adequate protection for the confidentiality of any client information entrusted to them. Depending on the specific needs and instructions of the client, greater security measures may be required in some cases. The duty to protect client confidences extends to protecting information that has been stored electronically on storage devices such as computers, copy machines, smart phones and flash drives, as well as on remote storage devices provided by third-party vendors (“cloud computing”).

Conversely, where a lawyer has received client confidences relating to another firm’s client that the recipient lawyer believes were not intentionally transmitted to the recipient lawyer by the client or the firm retained by the client, the lawyer has a duty to notify the sender. See MRPC 4.4(b) (Respect for Rights of Third Persons). Whether the recipient lawyer may use the confidences thus transmitted is not addressed in the model rules, but may be addressed by the law of a particular jurisdiction.

Implied Authorization to Disclose. The lawyer is also impliedly authorized to disclose otherwise confidential information to the courts, administrative agencies, and other individuals and organizations as the lawyer believes is reasonably required by the representation. A lawyer is impliedly authorized to make arrangements, in case of the lawyer’s death or disability, for another lawyer to review the files of his or her clients. As stated in ABA Formal Opinion 92-369 (1992), “[r]easonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.”

A lawyer has no implied authority to disclose client confidences in the context of electronic bulletin boards, social media, continuing legal education seminars or similar public forums where persons from outside the lawyer’s firm may be participating. The prohibition on disclosure includes information that could reasonably lead to the discovery of confidential information. Thus, a lawyer may use a hypothetical to discuss issues relating to a representation only so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Whether there is implied authority to disclose information related to a representation that is generally known is unclear. There is no such exception expressly stated in MRPC 1.6. As to former clients, MRPC 1.9(c) states that a lawyer may use information to the disadvantage of the former client if the information has become generally known. The Restatement of the Law Governing Lawyers defines “confidential client information” more narrowly than the model rules, excepting from the concept “information that is generally known.” See Restatement section 59. But even the Restatement adds the caveat that “the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public....Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense.” Section 59, cmt. d.

Other Rules Affecting a Lawyer’s Duty of Confidentiality. There are other rules that may impact the lawyer’s duties regarding a client’s confidential information. For example, see IRC Section 7525 (confidentiality privileges relating to taxpayer communications with federally authorized tax practitioners), Treasury Department Circular 230 (e.g., 31 C.F.R. 10.20 and 10.26(b)(4)), and MRPC 1.6(b)(6) (right to disclose when required by other law). See also MRPC 1.6(b)(2).

Obligation After Death of Client. In general, the lawyer’s duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client’s death. However, if consent is given by the client’s personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client’s dispositive instruments and intent, including prior instruments and communications relevant thereto. The personal representative or client may also authorize disclosure of other confidential information learned during the representation if there is a need for that information. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

Disclosures to Client’s Agent. If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client’s affairs, the attorney-in-fact often will ask the lawyer for copies of the client’s estate planning documents in order to manage the client’s assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney’s duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client’s preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request if, after considering the specific circumstances and the specific information being requested by the attorney-in-fact, the attorney reasonably concludes that disclosure is impliedly authorized to carry out the purpose of the representation of the client.

Protection Against Reasonably Certain Death or Substantial Bodily Harm. A lawyer may reveal information insofar as the lawyer believes it reasonably necessary to prevent reasonably certain death or substantial bodily harm. Estate planning clients may disclose to their lawyer that they intend to do injury to themselves: they may be engaged in estate planning, for example, because they are planning suicide and they may disclose this. Such a client may be of diminished capacity. See MRPC 1.14 (Client with Diminished Capacity). But one need not be of diminished capacity to contemplate suicide, for example, if

one has contracted a debilitating disease which has radically reduced one's quality of life. An estate planner who encounters this situation is not required to disclose the plan under the model rules, and may well conclude that it is the client's well-considered and rational decision. But a lawyer may nonetheless reasonably conclude, given the specific facts of a client's situation, that the client should be prevented from carrying through on the plan. The model rule entrusts to the lawyer discretion to make this very difficult decision.

Disclosures by Lawyer for Fiduciary. The duties of the lawyer for a fiduciary are affected by the nature of the client and the objectives of the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Special care must be exercised by the lawyer if the lawyer represents the fiduciary generally and also represents one or more of the beneficiaries of the fiduciary estate.

As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. It should be noted that the evidentiary attorney-client privilege is in some jurisdictions subject to the so-called fiduciary exception, which provides generally that a trustee cannot withhold attorney-client communications from the beneficiaries of the trust if the communications related to exercise of fiduciary duties. See *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011); Restatement (Third) of the Law Governing Lawyers §84 (2000).

In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. See MRPC 3.3(c) (Candor Toward the Tribunal), which requires disclosure to the court "even if compliance requires disclosure of information otherwise protected by MRPC 1.6." In addition, the lawyer may not knowingly provide the beneficiaries or others with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communication with Person Represented by Counsel; and Dealing with Unrepresented Person).

Disclosure of a Fiduciary's Commission of, or Intent to, Commit a Fraud or Crime. When representing a fiduciary generally, the lawyer may discover that the lawyer's services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.

Whether a given financial loss to a beneficiary is a “substantial injury” will depend on the facts and circumstances. A relatively small loss could constitute a substantial injury to a needy beneficiary. Likewise, a relatively small loss to numerous beneficiaries could constitute a substantial injury. In determining whether a particular loss constitutes a “substantial injury,” lawyers should consider the amount of the loss involved, the situation of the beneficiary, and the non-economic impact the fiduciary’s misconduct had or could have on the beneficiary.

In the course of representing a fiduciary, the lawyer may be required to disclose the fiduciary’s misconduct under the substantive law of the jurisdiction in which the misconduct is occurring. For example, the elder abuse laws of some states require a lawyer who discovers the lawyer’s conservator/client has embezzled money from an elderly, protected person to disclose that information to state agencies, even though the lawyer’s services were not used in conjunction with the embezzlement. Under such circumstances, MRPC 1.6(b)(6) (“to comply with other law”) would authorize that disclosure.

Example 1.6-1. Lawyer (L) was retained by Trustee (T) to advise T regarding administration of the trust. T consulted L regarding the consequences of investing trust funds in commodity futures. L advised T that neither the governing instrument nor local law allowed the trustee to invest in commodity futures. T invested trust funds in wheat futures contrary to L’s advice. The trust suffered a substantial loss on the investments. Unless explicitly or implicitly required to do so by the terms of the representation, L was not required to monitor the investments made by T or otherwise to investigate the propriety of the investments. The following alternatives extend the subject of this example:

L, in preparing the annual accounting for the trust, discovered *T*’s investment in wheat futures and the resulting loss. *T* asked *L* to prepare the accounting in a way that disguised the investment and the loss. *L* may not participate in a transaction that misleads the court or the beneficiaries with respect to the administration of the trust—which is the subject of the representation. *L* should attempt to persuade *T* that the accounting must properly reflect the investment and otherwise be accurate. If *T* refuses to accept *L*’s advice, *L* must not prepare an accounting that *L* knows to be false or misleading. If *T* does not properly disclose the investment to the beneficiaries, in some states *L* may be required to disclose the investment to them. In others, it may be permitted under MRPC 1.6(b)(3) or other exceptions to the duty of confidentiality. In states that neither require nor permit such disclosures, the lawyer should resign from representing *T*.

L first learned of *T*’s investment in commodity futures when *L* reviewed trust records in connection with preparation of the trust accounting for the year. The accounting prepared by *L* properly disclosed the investment, was signed by *T*, and was distributed to the beneficiaries. *L*’s legal advice to *T* as to appropriate investments was proper. *L* was not obligated to determine whether or not *T* made investments contrary to *L*’s advice. *L* may not give legal advice to the beneficiaries but may recommend that they obtain independent counsel. In jurisdictions that permit the lawyer for a fiduciary to make disclosures to the beneficiaries regarding the fiduciary’s possible breaches of trust, *L* should consider whether to make such a disclosure.

Conditioning Appointment of Fiduciary on Permitting Disclosure. A lawyer may properly assist a client by preparing a will, trust or other document that conditions the appointment of a fiduciary upon the fiduciary’s agreement that the lawyer retained by the fiduciary to represent the fiduciary with respect to the fiduciary estate may disclose to the beneficiaries or an appropriate court any actions of the fiduciary that might

constitute a breach of trust. Such a conditional appointment of a fiduciary should not increase the lawyer's duties other than the possible duty of disclosing misconduct to the beneficiaries. If the lawyer retained pursuant to such an appointment learns of acts or omissions by the fiduciary that may, or do, constitute a breach of trust, the lawyer should call them to the attention of the fiduciary and recommend that remedial action be taken. Depending upon the circumstances, including the nature of the actual or apparent breaches, their gravity, the potential that the acts or omissions might continue or be repeated, as well as the actual or potential injury suffered by the fiduciary estate or the beneficiaries, the lawyer for the fiduciary whose appointment has been so conditioned may properly disclose to the designated persons and to the court any actions of the fiduciary that may constitute breaches of trust even if such disclosure might not have been required or permitted absent the agreement.

Client Who Apparently Has Diminished Capacity. As provided in MRPC 1.14 (Client with Diminished Capacity), a lawyer for a client who has, or reasonably appears to have, diminished capacity is authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity), ABA Inf. Op. 89-1530 (1989), and *Restatement (Third) of the Law Governing Lawyers*, §§24, 51 (2000). In such cases the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client's condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client's interests [MRPC 1.14(c) (Client with Diminished Capacity)].

Prospective Clients. A lawyer owes some duties to prospective clients including a general obligation to protect the confidentiality of information obtained during an initial interview. See *Restatement (Third) of the Law Governing Lawyers*, §§15, 60 (2000). Under MRPC 1.18(b) (Duties to Prospective Clients), even though a lawyer-client relationship does not result from the initial consultation, the lawyer "shall not use or reveal information learned in the consultation, except as MRPC 1.9 would permit with respect to information of a former client." In addition, a lawyer who is not retained may be disqualified from representing a party whose interests are adverse to the prospective client in the same or a substantially related matter. See ACTEC Commentary on MRPC 1.18 (Duties to Prospective Client).

Joint and Separate Clients. Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of any inherently adversarial contract (e.g., a marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly, but the law is unclear as to whether all information must be shared between them. As a result, an irreconcilable conflict may arise if one co-client shares information that he or she does not want shared with the other (see

discussion below). Absent special circumstances, the co-clients should be asked at the outset of the representation to agree that all information can be shared. The better practice is to memorialize the clients' agreement and instructions in writing, and give a copy of the writing to the client.

Multiple Separate Clients. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, this may be permissible if the lawyer reasonably concludes he or she can competently and diligently represent each of the clients. Some estate planners represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients in related matters should do so with care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. For example, without disclosing a confidence of one estate planning client who is the parent of another estate planning client and whose estate plan differs from what the child is expecting, the lawyer may have difficulty adequately representing the child/client in his or her estate planning because of the conflict between the duty of confidentiality owed to the parent and the duty of communication owed to the child. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients), example 1.7.1a. Within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. Changed circumstances may, however, create a non-waivable conflict under MRPC 1.7 (Conflict of Interest: Current Clients) and require withdrawal even if the clients consented. See *Hotz v. Minyard*, 403 S.E.2d 634 (S.C. 1991) (discussed in annotations). The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

Confidences Imparted by One Joint Client. As noted earlier, except in special circumstances, joint clients should be advised at the outset of the representation that information from either client may be required to be shared with the other if the lawyer considers such sharing of information necessary or beneficial to the representation. This advice should be confirmed in writing, and the lawyer should consider asking the clients to acknowledge that understanding in writing. Absent an advance agreement that adequately addresses the handling of confidential information shared by only one joint client, a lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, *inter alia*, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and, (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement, I intend to leave her..." or "All of the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should

not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the existence of an agreement at the outset of the representation that all information will be shared is particularly helpful. The lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Separate Representation of Related Clients in Unrelated Matters. The representation by one lawyer of related clients with regard to unrelated matters does not necessarily involve any problems of confidentiality or conflicts. Thus, a lawyer is generally free to represent a parent in connection with the purchase of a condominium and a child regarding an employment agreement or an adoption. Unless otherwise agreed, the lawyer must maintain the confidentiality of information obtained from each separate client and be alert to conflicts of interest that may develop. The separate representation of multiple clients with respect to related matters, discussed above, involves different considerations.

Detection of Conflicts of Interest. Under MRPC 1.6(b)(7), a lawyer may disclose client confidences to detect and resolve conflicts of interest that might arise from a new lawyer joining a firm or from changes in the composition or ownership of the firm. But any such disclosures must be limited to what is reasonably necessary, and they may not be made to the prejudice of clients. Thus, disclosure should ordinarily be limited to the names of the persons and entities involved in a matter, a brief summary of the general issues involved, and information as to whether the matter has terminated or is ongoing. Sometimes even that amount of information might prejudice a client. Suppose that a firm is doing joint estate planning for a husband and wife and a lawyer from another firm who is defending the husband in a paternity action is

considering joining the estate planning firm. The paternity lawyer may disclose to the estate planning firm that he is representing the husband, but disclosure of the nature of the representation to the estate planning firm might seriously harm the husband and compromise the ability of the estate planning firm to continue its work for the wife. The paternity lawyer, in such a situation, should disclose only enough to allow the paternity lawyer and the estate planning firm to know that there might be a conflict of interest.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Joint and Separate Clients

Cases

Florida:

Cone v. Culverhouse, 687 So.2d 888 (Fla. App. 1997). In this case the court discussed the “common interest” exception to the lawyer-client communications privilege. Under state statute there is no lawyer-client communication privilege where the communication is relevant to a matter of common interest between two or more clients, such as a husband and wife, with regard to their estate planning, if the communication was made by either of them to the lawyer whom they retained or consulted in common.

Witte v. Witte, 126 So.3d 1076 (Fla. App. 2012). This is a marital dissolution case involving an elderly couple, which has relevance for communications with elderly clients. Husband asserted that wife could not claim attorney-client privilege for communications with her attorney because her daughter and son-in-law were present during those communications. The court remanded, finding that the wife was elderly, had several cognitive impairments and needed her daughter and son-in-law to help her communicate with the lawyer. She also needed the daughter and son-in-law’s help in translating several of her financial documents, which were written in Hebrew. The court remanded for a determination of whether the communications “were intended to remain confidential as to other third parties, and whether the disclosure to [them], within the factual circumstances presented by this case, was reasonably necessary for the transmission of the communications.”

New Jersey:

A v. B v. Hill Wallack, 726 A.2d 924 (N.J. 1999). Construing New Jersey’s broad client-fraud exception to the state’s version of MRPC 1.6, the Supreme Court of New Jersey held that a law firm that was jointly representing a husband and wife in the planning of their estates was entitled to disclose to the wife the existence (but not the identity) of husband’s child born out of wedlock. The court reasoned that the husband’s deliberate failure to mention the existence of this child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under MRPC 1.6(c). Interestingly, the law firm learned about the child born out of wedlock not from the husband but from the child’s mother who had retained the law firm. The court also based its decision permitting disclosure on the existence of a written agreement between the husband and wife, on the one hand, and the law firm, on the other, waiving any potential conflicts of interest with the court suggesting that the letter reflected the couple’s implied intent to share all material information with each other in the course of the estate planning. The court cites extensively and approvingly to the *ACTEC Commentaries* and to

the *Report* of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility discussed immediately below.

Ethics Opinions

ABA:

Op. 08-450 (2008). This opinion concentrates on the insurance defense scenario, but has useful things to say for estate planners representing multiple clients on the same or related matters. With regard to the interplay between the duty of confidentiality and the duty to inform:

Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise.

The question generally will be whether withholding the information from the other client would violate the lawyer's duty under Rule 1.4(b) to 'explain a matter to the extent reasonably necessary to permit the [other] client to make informed decisions regarding the representation.' If so, the interests of the two clients would be directly adverse, requiring the lawyer's withdrawal under Rule 1.16(a)(1) because the lawyer's continued representation of both would result in a violation of Rule 1.7. The answer depends on whether the scope of the lawyer's representation requires disclosure to the other client.

District of Columbia:

Op. 296 (2000). A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another. Without express consent in advance, the lawyer who receives relevant information from one client should seek consent of that client to share the information with the other or ask the client to disclose the information to the other client directly. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.

Florida:

Op. 95-4 (1997). "In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." This opinion is also discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

New York:

Op. 555 (1984). A lawyer retained by A and B to form a partnership, who received communication from B indicating that B was violating the partnership agreement, may not disclose the information to A although it would not be within the lawyer-client evidentiary privilege. The lawyer must withdraw from representing the partners with respect to partnership affairs. A minority of the Ethics Committee dissented on the ground that “the attorney must at least have the discretion, if not the duty in the circumstances presented, to disclose to one partner the facts imparted to him by the other partner, that gave rise to the conflict of interests necessitating the lawyer’s withdrawal as attorney for the partnership.”

Op. 1002 (2014). Lawyer who was a prosecutor was executor for his father, who was a solo practitioner and who held original wills of clients at his death. Lawyer as executor may examine the wills and may disclose information necessary to transfer or dispose of the wills. Because the lawyer did not acquire the wills incident to his law practice, MR 1.6 and 1.15 are not applicable.

Related Secondary Materials

ABA, Probate and Trust Division, Report of the Special Study Committee on Professional Responsibility, *Report: Comments and Recommendations on the Lawyer’s Duties in Representing Husband and Wife; Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary; and Counseling the Fiduciary*, 28 REAL PROPERTY, PROBATE & TRUST JOURNAL 765-863 (1994). The representation of a husband and wife is one of the subjects that has been studied by the ABA Probate and Trust Division Special Study Committee on Professional Responsibility (“the ABA Special Committee”). *Id.* at 765-802. The ABA Special Committee recommends the practice of having an agreement that sets out the ground rules of representation. *Id.* at 801. Absent such an agreement, a representation of husband and wife is a joint representation. *Id.* at 778. The ABA Committee takes the position that a lawyer may represent a husband and wife separately, agreeing to maintain the confidences of each, provided the mode of representation is clearly spelled out in an agreement. *Id.* at 794. Even where there is such an agreement to represent spouses separately, however, if a lawyer’s independence of judgment and duty to one spouse are compromised by the disclosure of adverse confidences by the other, the lawyer must be prepared to withdraw. *Id.* at 800.

In the context of a joint representation, problems arise where one spouse tells the lawyer of a fact or goal that he or she desires to remain confidential from the other spouse. *Id.* at 783-93. If a confidence is communicated by one spouse, the Report suggests that the lawyer must inquire “into the nature of the confidence to permit the lawyer to determine whether the couple’s difference that caused the information to be secret constitutes either a material potential for conflict or a true adversity.” *Id.* at 784. The Report goes on to describe three broad types of confidences that may cause the lawyer to conclude that the differences between the spouses make the spouses’ interests truly adverse: (1) Action-related confidences, in which the lawyer is asked to give advice or prepare documents without the knowledge of the other spouse, that would reduce or defeat the other spouse’s interest in the confiding spouse’s property or pass the confiding spouse’s property to another person; (2) Prejudicial confidences, which seek no action by the lawyer, but nonetheless indicate a substantial potential of material harm to the interests of the other spouse; and (3) Factual confidences which indicate that the expectations of one spouse with respect to an estate plan, or the spouse’s understanding of the plan, are not true. *Id.* at 785-86. Because an unexpected letter of withdrawal may not protect a confidence from disclosure, the ABA Committee concluded that “[t]he lawyer must balance the

potential for material harm arising from an unexpected withdrawal against the potential for material harm arising from the failure to disclose the confidence” to the other spouse.” *Id.* at 792.

Obligation Continues After Death

Cases

Federal:

Swidler & Berlin v. U.S., 524 U.S. 399 (1998). “[T]he general rule with respect to confidential communications ... is that such communications are privileged during the testator’s lifetime and, also, after the testator’s death unless sought to be disclosed in litigation between the testator’s heirs. [Citation omitted.] The rationale for such disclosure is that it furthers the client’s intent. [Citation omitted.] Indeed, in *Glover v. Patten*, 165 U.S. 394, 406-408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual’s death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client’s interest, could be impliedly waived in order to fulfill the client’s testamentary intent. [Citations omitted.]”

United States v. Yielding, 657 F.3d 688 (8th Cir. 2011). Husband and Wife were charged with Medicare fraud. W died, and H subpoenaed files from W’s attorneys, claiming that as Personal Representative of her estate, he was waiving attorney-client privilege. He wanted to use the files to shift blame to W. Eighth Circuit held that trial court judge properly quashed the subpoena. “A personal representative of a deceased client generally may waive the client’s attorney-client privilege ... only when the waiver is in the interest of the client’s estate and would not damage the client’s reputation.” H argued that W’s reputation was already damaged, but court held that waiving the privilege could cause further damage.

California:

HLC Properties Ltd. v. Superior Court (MCA Records Inc.), 24 Cal. Rptr. 3d 1999 (2005). Construing California’s Evidence Code, the Supreme Court of California held that, “the attorney-client privilege of a natural person transfers to the personal representative after the client’s death, and the privilege thereafter terminates when there is no personal representative to claim it.” Therefore, the company taking over responsibility for running the business ventures of the deceased entertainer Bing Crosby did not succeed to the entertainer’s attorney-client privilege.

New York:

Mayorga v. Tate, 752 N.Y.S. 2d 353 (App. Div. 2002). A decedent’s personal representative may waive the attorney-client privilege to obtain disclosure in a malpractice case against the decedent’s former attorney.

Ethics Opinions

District of Columbia:

Op. 324 (2004). A decedent’s former attorney may reveal confidences obtained during the course of the professional relationship between the decedent and the attorney only where the attorney reasonably believes that the disclosure is impliedly authorized to further the decedent’s interest in settling her estate. In “rare situations” where the attorney is unsure what the client would have wanted the attorney

to do, the attorney should seek an order from the court supervising disposition of the estate and present the materials at issue for an *in camera* review. For example, if the surviving spouse needed the information to fulfill the spouse's duties as executor to administer the estate, disclosure is clearly warranted. If on the other hand, the surviving spouse is or was engaged in litigation with the deceased spouse, disclosure, absent a court order, might be inappropriate.

Hawaii:

Op. 38 (1999). An estate planning attorney may disclose confidential information about a deceased client if the attorney reasonably and in good faith determines that doing so would carry out the deceased client's estate plan or if the attorney is authorized to do so by other law or court order. A waiver by the personal representative of the deceased client's estate is not a proper basis for disclosing confidential information.

Iowa:

Op. 98-11 (1998). The Board in this case was asked to provide an opinion on what types of matters involving his deceased clients an attorney could testify to in a deposition. The Board noted the existence of its earlier Opinions 88-11 and 91-24 and the recent decision of the U.S. Supreme Court in *Swidler & Berlin v. U.S.*, *supra*. Noting that the U.S. Supreme Court had held that the attorney-client communications privilege survives the death of the client and that a series of narrow tests must be met before an exception to the general rule that privileged communications survive the death of the testator may be applied, the Board stated, "these tests require findings of fact, which are legal questions which must be determined by a court of law and not by this Board. Upon the determination of these fact questions, it may well be that ethical questions may arise but in the meantime this Board does not have jurisdiction to issue an opinion in this kind of a question."

Missouri:

Op. 940013 (1994). Confidentiality restrictions apply in a situation where an attorney prepared a will for a decedent and the decedent's heirs and their attorneys wanted to discuss the matter with decedent's attorney with respect to a possible will contest action. This prohibition against disclosing confidential information prohibits any disclosure of decedent's competency without a court order to do so.

Op. 990146 (1999). An attorney who prepared a will and filed the will in probate but never opened an estate for a deceased client may not voluntarily provide the estate planning file or information about the advice provided to the deceased to a personal representative, unless the deceased expressly consented to such a disclosure. The duty of confidentiality survives the death of a client. If the attorney, whose services are eventually terminated by the personal representative, is subpoenaed to provide such information, he may "only do so after the factual and legal issues related to confidentiality are fully presented to the court" and the court issues an order to disclose the information.

New York:

Nassau County Bar Op. 304 (2003). A lawyer who was representing a wife in secret planning for divorce may not after her death disclose confidences to her husband as personal representative. Husband had sought return of a retainer and then sought the lawyer's file. Acknowledging the general rule that a decedent's personal representative may waive the attorney-client privilege, the committee concluded that such a waiver was appropriate "if and when acting in the interest of the decedent-client and his or her estate." See also Nassau County Bar Op. 89-26 (1989).

North Carolina:

2002 Op. 7 (2003). A lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney-client privilege does not apply to the lawyer's testimony.

Pennsylvania:

Phila. Bar Op. 91-4 (1991). A lawyer may not disclose to a client's children the contents of a deceased client's prior will: "The earlier will constitutes confidential information relating to your representation of the testator, and your duty not to reveal its contents continues even after your client's death."

Op. 2003-11. The executor of the testator's estate does have the authority to consent to the disclosure of confidential information pertaining to the estate planning and other aspects of the representation of the testator.

Related Secondary Materials

Restatement (Third) of the Law Governing Lawyers (2000), §81A Dispute Concerning a Decedent's Disposition of Property, Comment b:

....

The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an *inter vivos* transaction.

Client with Diminished Capacity

Cases

See MRPC 1.14(c) and cases collected under MRPC 1.14 in these Commentaries.

Ethics Opinions

Alabama:

Op. 89-77 (1987). The lawyer for a guardian who discovers embezzlement by the guardian may not disclose misconduct that is confidential information, must call on client to restore funds, and if client refuses to do so lawyer must withdraw. The lawyer may not represent a client who fails to account for the embezzled funds.

California:

Op. 1989-112. This opinion states that a lawyer may not take steps to protect a client that might involve disclosure of the client's condition if the client objects. This opinion is also discussed under MRPC 1.14.

Illinois:

Op. 00-02 (2000). A lawyer may not provide a copy of a psychiatric report relating to the lawyer's client with diminished capacity to the client's father. The father previously had retained the lawyer to represent the child (an adult). Lawyer should advise father to seek independent counsel.

Maine:

Op. 84 (1988). The lawyer for an elderly client believed to be incapable of making rational financial decisions may inform the client's son if the son has no adverse interest. Alternatively, the lawyer may seek help from the state adult guardianship service, etc.

Missouri:

Op. 20000208 (2000). Attorney prepared a will for a client in the past and had ceased contact with that client since that transaction. Second attorney contacted the first attorney as to the mental capacity of the client during the period of drafting the will, for the purpose of representing the client in another action. The first attorney may discuss the competency of the client without a court order if client is capable of giving consent. If the client is incapable of giving consent to the disclosure by the first attorney concerning his mental state at the time of the drafting, the attorney is prohibited from disclosing information related to his representation of client without a court order. Also, if no court order exists for the disclosure and the client is incapable of giving his consent, an attorney may discuss the client's competency with client's child if the client's child has been named as attorney-in-fact under a durable power of attorney, dependent upon the exact terms of that power of attorney.

Ohio:

Cleveland Bar Op. 86-5 (1986). A lawyer who represented a husband and wife may initiate a guardianship proceeding for the incompetent husband but may not take a position contrary to the interests of the wife. However, if interests of the husband and wife conflict, the lawyer must withdraw from representing either.

Cleveland Bar Op. 89-3 (1989). The lawyer for a person with diminished capacity has a duty to choose a course of action in accordance with the best interests of the client, which may include moving for the appointment of a guardian for purposes of a tort action, but must avoid unnecessarily revealing confidential information. The lawyer should avoid the conflict involved in representing the client and petitioning for the appointment of a guardian.

Tennessee:

Op. 2014-F-158. The opinion addresses an "increasingly common" problem: whether to disclose estate planning documents of a now-incapacitated client to third parties such as guardians. The opinion distinguishes between judicial proceedings and requests outside of judicial proceedings. In a judicial proceeding, the lawyer must assert the attorney-client privilege but must disclose the documents if the privilege claim is overruled by the court. Outside of a court proceeding, "neither RPC 1.6(a)(1), RPC 1.9(c)(1), nor accompanying comments permit someone other than the client or former client to waive confidentiality on behalf of the client," so a guardian cannot waive confidentiality. However, Tenn. Code Ann. § 34-3-107(2)(F) allows a court to vest conservators with the power to receive or release confidential information of the incapacitated person, so in that circumstance the lawyer may be able to disclose under the "other law" exception to 1.6. The lawyer may determine that disclosure is impliedly authorized but the lawyer must exercise reasonable professional judgment and "consider the client's wishes or intent" in such determination, and "doubt should be resolved in favor of not disclosing."

Disclosures by Lawyer for Fiduciary

Rules Variations

Washington:

WRPC 1.6 allows a lawyer to inform the court of misconduct by a court-appointed fiduciary as follows:

(b) A lawyer to the extent the lawyer reasonably believes necessary ... (7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver.

Cases

Federal:

United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011). The litigation involved the federal government's management of funds held by the government in trust for the benefit of the Jicarilla Apache Nation. The tribe sought discovery of documents and communications between the government and its lawyers concerning management of the funds, and the government asserted attorney-client privilege. The lower courts nevertheless ordered disclosure because of the fiduciary exception to the attorney-client privilege. The Supreme Court held that the fiduciary exception did not apply in this case. The Court discussed the history and purpose of the exception, and held that it did not apply here for two primary reasons: first, the advice given was for the benefit of the government in its governing role, as opposed to the circumstance of private trusts where the beneficiary is the "real" client. It was significant to the court that the government lawyers were not paid out of trust funds. Second, the Court distinguished between the common law duty of broad disclosure to beneficiaries of a private trust and the limited disclosure required by statute with respect to the tribe's funds held in trust by the government. Other federal cases considering the fiduciary exception in the ERISA context have held that it applies to ERISA trustees. *See Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011); *Harvey v. Standard Ins. Co.*, 275 F.R.D. 629 (N.D. Ala. 2011) (distinguishing *Jicarilla*); *Moore v. Metropolitan Life Ins. Co.*, 799 F. Supp. 2d 1290 (M.D. Ala. 2011).

Arkansas:

Estate of Torian v. Smith, 564 S.W.2d 521 (Ark. 1978). The Supreme Court of Arkansas here held that the attorney-client privilege did not bar testimony by the attorney for the executor of the decedent's will relating to a consultation which took place before the will was filed for probate in another state since the executor, in consulting with the attorney, was necessarily acting for both itself as executor and for the beneficiaries under the will, all of whom were therefore to be treated as joint clients.

California:

Moeller v. Superior Court (Sanwa Bank), 69 Cal. Rptr. 2d 317 (1997). This case holds that, since the powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee, when a successor trustee (who in this case also happened to be a beneficiary of the trust) takes office, the successor assumes all powers of the predecessor trustee, including the power to assert (or waive) the attorney-client communications privilege.

Wells Fargo Bank v. Superior Court (Boltwood), 91 Cal. Rptr. 2d 716 (2000). This case holds that since the attorney for the trustee of a trust is not, by virtue of that relationship also the attorney for the beneficiaries of the trust, the beneficiaries are not entitled to discover the confidential communications of the trustee with the trustee's counsel, regardless of whether or not the communications dealt with trust administration or allegations of trustee misconduct. In addition, the work product of trustee's counsel is not discoverable. These results obtain regardless of the fact that the fees for the attorney's services are paid from the trust.

Florida:

First Union Nat'l Bank of Florida v. Whitener, 715 So.2d 979 (Fla. App. 1998), *review denied*, 727 So.2d 915 (1999). In this discovery dispute, a trust beneficiary who had brought a breach of fiduciary duty action against the trustee bank sought information and documents exchanged between the trustee and its attorneys. The court held that the attorney's client was the trustee and not the beneficiary. The attorney had been hired by the trustee after the beneficiary had retained counsel and was questioning the trustee's conduct. The court also found that Florida's version of the fraud exception to the attorney-client communications privilege did not apply and that the trustee's earlier voluntary production of certain letters from its attorney to the trustee did not waive the attorney-client privilege as to undisclosed documents.

Jacob v. Barton, 877 So.2d 935 (Fla. App. 2004). A trust beneficiary sought discovery of the trustees' attorneys' billing records. In deciding whether the attorney-client privilege and work product doctrine applied to the billing records, a court must decide whose interests the attorneys represent—the trustee's or the beneficiary's. According to the court, to the extent the attorneys' work concerns the trustee's dispute with the beneficiary, their client is the trustee. Since the record before the appellate court was limited, it could not determine whether the billing records contained privileged information. The appellate court therefore quashed the circuit court's order granting unlimited discovery of the billing records and directed it to determine whether any of the billing records would be protected.

Illinois:

In re Estate of Minsky, 376 N.E.2d 647, 650 (Ill. App. 1978) (no discussion of confidentiality). "As an attorney and officer of the court, the lawyer was under an obligation to inform the court of any suspicions of fraud or wrongdoing on the part of the executor."

New York:

Hoopes v. Carota, 531 N.Y.S.2d 407, 410 (App. Div. 1988), *aff'd mem.*, 543 N.E.2d 73 (1989). In this case the court allowed the beneficiaries of a trust to discover communications between the defendant-trustee and the lawyer who advised the defendant generally with respect to administration of the trust. The opinion recognizes the distinction between a representation of the trustee *qua* trustee and a representation of the trustee "in an individual capacity." The Appellate Division opinion states that the lawyer-client evidentiary privilege:

[D]oes not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure, on the ground that a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought to his own private interests under the guise of privilege.

Pennsylvania:

Follansbee v. Gerlach and Reed Smith, 2002 WL 31425995, 22 Fid.Rep.2d. 319 (Pa. Com. Pl. 2002). The beneficiaries of a trust have a right to see routine correspondence between the trustee and its counsel during the trust administration and that right may not be denied unless the correspondence was developed in the contemplation of litigation and has been appropriately cloaked with the attorney-client privilege.

South Carolina:

Floyd v. Floyd, 615 S.E.2d. 465 (S.C. App. 2005). Distinguishing *Barnett Nat'l Bank v. Compson*, supra, MRPC 1.2, from Delaware, and instead relying on *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, supra MRPC 1.2, from D.C., the court here found that the beneficiary of a trust was entitled to review the opinions of the trustees' counsel to ensure that the trustee was acting in accordance with the dictates of his fiduciary duties, particularly where, as here, the opinions in question were paid for with trust funds.

Ethics Opinions

Illinois:

Op. 91-24 (1991). The lawyer retained by a guardian represents both the guardianship estate and the guardian in a representative capacity. It was assumed that the guardian did not reasonably believe that the lawyer represented her personally. "Accordingly, the communication by the guardian to the attorney, even if made in confidence, (and the other information acquired by the attorney in the course of his representation of the estate) would not be covered by the attorney-client privilege nor would it be considered a 'secret' of the guardian..... The guardian is not represented personally by the attorney but is represented only in his capacity as guardian for closing out the guardianship estate." The lawyer's duty to the estate requires that "he take the steps necessary to protect the estate from the possibly fraudulent action of the guardian. If the attorney does not take steps to have the propriety of the taking of the money determined now, he runs the risk that both his and the guardian's actions will later be determined fraudulent."

Op. 98-07 (1998). A lawyer representing a guardian who has filed annual accountings, now known to have been false, must take appropriate remedial action to avoid assisting the guardian in concealing from the court the guardian's misappropriation of estate assets, even if the disclosure of client information otherwise protected by MRPC 1.6 may be required.

Kentucky:

Op. 401 (1997). In representing a fiduciary, the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. The lawyer's obligation to preserve client's confidences under MRPC 1.6 is not altered by the circumstance that the client is a fiduciary. A lawyer has a duty to advise multiple parties who are involved with a decedent's estate or trust regarding the identity of the lawyer's client and the lawyer's obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the

probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term “lawyer for the estate” or the term “lawyer for the trust” on documents or correspondence or in other dealings with the fiduciary or the beneficiaries. A lawyer may represent the fiduciary of a decedent’s estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer’s actions in the event a conflict arises and the consequences to the clients if a conflict occurs.

New York:

Op. 797 (2006). A lawyer hired by the named executor and decedent’s only heir to probate the estate files a petition to have the heir appointed as executor and he is appointed. Thereafter lawyer learns that the client is a convicted felon who is not permitted to serve as executor under state law. Committee opines that under NY’s confidentiality rules, lawyer is not permitted to disclose this secret to the tribunal, but is permitted to withdraw his own certification that the client is authorized to serve. He must, therefore, withdraw that certification and is permitted to disclose the secret only to the extent that disclosure is implicit in the withdrawal. Thereafter, lawyer may be required to withdraw from representation if continuing to represent the client would require the lawyer to violate another rule, such as that prohibiting him from assisting his client in an illegal act.

North Carolina:

2002 Op. 3. Lawyer for the personal representative may seek removal of his client if the personal representative has breached fiduciary duties and has refused to resign. Lawyer should first determine if actions of representative constitute grounds for removal under the law.

Oregon:

Op. 2005-119. A lawyer who represents widow as an individual and widow in her capacity as personal representative, has only one client. The fact that widow may have multiple interests as an individual and as a fiduciary does not mean that lawyer has more than one client, even if widow’s personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7, do not apply to lawyer’s situation. If the client confides in the lawyer that she has breached her duties as fiduciary in the past, he is not free to disclose this unless one of the exceptions to Rule 1.6 applies. Neither may he make affirmative misrepresentations about such conduct. The lawyer may be required to withdraw if not withdrawing would involve the lawyer in misconduct. If the client informs lawyer she plans to engage in criminal conduct in the future, he is permitted (but not required) to disclose this to prevent the crime under Oregon Rule 1.6(b)(1) (future crime exception).

Pennsylvania:

Philadelphia Bar Op. 2008-9. A lawyer was retained to represent a Personal Representative (PR) and helped her administer the estate, then thought to consist of \$300,000. Thereafter U.S. Bonds in the name of the decedent worth \$360,000 were discovered and the lawyer turned them over to the PR. Now the PR has dropped out of touch and will not communicate with lawyer. Opinion concludes that under PA’s equivalent of MR 1.6(b)(2) and (3), lawyer is permitted to disclose PR’s misconduct and, assuming representations have been made to the court sufficient to trigger Rule 3.3, the lawyer is required to disclose this information to the court. He will also be required to withdraw under Rule 1.16.

Disclosure to Third Party

Cases

Connecticut:

Gould, Larson, Bennet, Wells and McDonnell, P.C. v. Panico, 273 Conn. 315, 869 A.2d 653 (2005). “The principal issue on appeal is whether, in the context of a will contest, the exception to the attorney-client privilege, as recognized by this court in *Doyle v. Reeves*, 112 Conn. 521, 152 A. 882 (1931), that communications between a decedent and the attorney who drafted the executed will may be disclosed, applies when the communications do not result in an executed will. Specifically, we consider whether, in a probate proceeding in the course of a dispute among heirs, an attorney may be compelled to disclose testamentary communications that have not culminated in an executed will. We conclude that the exception to the privilege does not apply when the communications do not culminate in the execution of a will.” “[O]ur research reveals that the overwhelming majority of courts to consider the issue have not broadened the [testamentary] exception under such circumstances.”

New Hampshire:

In re Lane's Case, 153 N.H. 10, 889 A.2d 3 (2005). Lawyer who had represented the executor in a probate that had closed was charged with disclosing confidences of his former client to the client's disadvantage. By the time the confidences were disclosed, the lawyer had married the former client's sister and lawyer's wife (the sister) was in litigation with her brother, her husband's former client, over the brother's management of the estate. Without the consent of his former client, lawyer disclosed to his wife's lawyer the existence of a \$100,000 life insurance policy that his former client denied existed. Although the court concluded that lawyer had used this information to the disadvantage of his former client, it credited the lawyer's argument that disclosure was permitted under an exception of NH's (then) version of Rule 1.6 which permitted disclosure to prevent a client from committing a crime the lawyer believes is “likely to result in ...substantial injury to the financial interest or property of another.” The court affirmed the dismissal of the disciplinary proceedings.

In re Stomper, 82 A.3d 1278 (N.H. 2013). Dispute between children of deceased parents. One child had assisted parents in preparing estate plan leaving everything to that child. Other children challenged the estate plan and asked for file of an attorney who had consulted with parents but had withdrawn before documents were executed. Attorney claimed they were privileged but court ordered disclosure of the documents based on the exception to the privilege for communications relating to an issue between parties claiming through the same deceased client. The child opposing disclosure claimed the exception only applied if the estate plan was executed, but that argument was rejected.

New York:

Estate of Walsh, 17 Misc.3d 407, 840 N.Y.S.2d 906 (N.Y. Sur. 2007). Lawyer who formerly represented the decedent and now is personal representative of an estate is representing himself as PR and petitions for discovery. Court holds he has waived the attorney-client privilege as to communications he had with another lawyer about the decedent's affairs insofar as he has attached those communications to his petition. As personal representative, he may waive decedent's attorney-client privilege.

Ethics Opinions

California:

Op. 2007-173. A lawyer may not deposit a will with a private will depository under California statutes without the client's express consent. A lawyer may not register identifying information about a client's testamentary documents with a private will registry unless the lawyer has a basis in the client file and/or in statements made by the client and all the other facts and circumstances that this would further the client's interest and be neither embarrassing nor likely to be detrimental to the client.

Maine:

Op, 192 (2007). A lawyer may not disclose confidential information of a deceased client to a court-appointed personal representative simply because the personal representative requests it and waives the attorney-client privilege. The lawyer is required to make an independent investigation as to the requested disclosure. "If... the attorney believes that the information sought to be disclosed would not further the client's purpose or would be detrimental to a material interest of the client, the attorney may waive the privilege only as required by law or by court order. Thus, despite a PR's waiver of the attorney-client privilege, the attorney may still be ethically obligated to claim the privilege on behalf of his former client if, for example, the information had been specifically sought to be kept unqualifiedly confidential by the client or if disclosure of the information would embarrass or otherwise be detrimental to a material interest of the client."

Maryland:

Op. 2009-05 (2008). Where a firm drafts a will for a client who dies before executing it and the decedent's personal representative requests it, the firm must deliver the will to the PR. The PR is deemed the firm's client in the matter and the letters of administration constitute a court order entitling the PR to possession of the decedent's property, including the draft will. Delivery of the draft does not amount to an impermissible disclosure under the confidentiality rules.

Missouri:

Op. 930172 (1993). If an attorney accepts referrals for estate planning from insurance agent whereby the agent obtains all the information from the clients, compiles the information in a form, sends that information to the attorney, and the attorney then prepares the estate planning documents which are returned to the clients via the agent, then the attorney is in violation of MRPC 7.3(b). The agent in this situation is engaging in "in-person solicitation" on behalf of the attorney which is prohibited under the Model Rules. By assisting the agent and the client in filling out the estate planning documents, the attorney is participating in the unauthorized practice of law in violation of MRPC 5.5. Also, MRPC 1.6 is violated by the attorney-agent relationship because the agent is delivering confidential legal documents between the attorney and the clients.

Op. 2006-0004. A lawyer who prepared an agreement for the decedent has been subpoenaed in litigation between the heirs, various entities, and the decedent's estate to produce all files and documentation regarding the decedent. The lawyer may not divulge confidential information until ordered to do so after the issue of confidentiality has been fully presented. The lawyer should seek to ensure that any such order is as specific and limited as possible. It is not necessary for the inquiring lawyer to present the issue of confidentiality if he knows that another lawyer will fully present the issue.

New Jersey:

Op. 719 (2010). Lawyer representing personal representative with bad credit history asked whether it was ethical to comply with surety company's demands that in order to issue fiduciary bond for client, lawyer would have to, among other items, agree to be liable to the surety if the lawyer does not remain involved as promised; provide a retainer agreement indicating the client's agreement to the lawyer's continuing involvement; pay the bond premiums; "work to protect the interests of the administrator and surety"; provide legal services for the benefit of the surety in connection with the joint control agreement; provide the surety with full details about any disputes regarding estate matters; and notify the surety of any change in legal representation, any allegations of breach of fiduciary duty on the part of the administrator, and any objections to a request by the administrator for commissions or fees. The ethics committee found that the agreement would violate several ethics rules, including confidentiality, conflicts of interest, giving financial assistance to a client, independent judgment of lawyer, allowing third parties to affect lawyer's judgment, lawyer's right to practice, and requirements of withdrawal of representation. The opinion noted similarities with issues raised with respect to third-party financing of litigation.

Pennsylvania:

Philadelphia Bar Op. 2007-6. A lawyer who did estate planning for a decedent, and knew his wish that his daughter receive no share of his estate, is permitted to disclose contents of decedent's will to daughter, even though it was not probated and is not public, if disclosure was impliedly authorized. Relying on and quoting the *ACTEC Commentaries*, the committee notes that "If the inquirer feels that doing so would likely promote the husband's estate plan, forestall litigation, preserve assets, and further his daughter's understanding of his intentions then it would be permissible. However, if the inquirer does not feel that there is such implied authorization, then without being required by the Court to produce the will, he may not disclose its contents. The Committee notes that even if the inquirer concludes that he has implied authorization to reveal the contents of the will that he is not required to do so, only that he may choose to do so."

Philadelphia Bar Op. 2008-10. Eleven years after lawyer had prepared estate planning documents for a client (C), the client's step-daughter (D) and her son (S) came to lawyer and said that C wanted lawyer to revise the will to provide bequests to D, S and a sibling of S. There were significant discussions about C's mental health and the reasons for the change. Lawyer went with D and S to visit C in the hospital, and lawyer concluded C lacked mental competency and refused to prepare the documents. C died a year later and a will contest was mounted in New Jersey which, among other things, called into question the work of lawyer in helping C execute the original documents. The executor of C's estate has asked about the procedures followed when C executed the documents and lawyer wants to know what he can disclose about this and about the conversations with D & S 11 years later. Committee, relying on and quoting *ACTEC Commentaries*, says that disclosures about advice and procedures followed when the will was executed may be impliedly authorized if they will promote former client's interests but even if they are not, the executor may waive the deceased client's right to confidentiality. Moreover, PA's equivalent of MR 1.6(b)(5) permits disclosure since lawyer's conduct has now been called into question. As for conversations with D & S, since they were not prospective clients but rather seeking to have lawyer provide additional legal work for C, "such discussions are not confidential and can be revealed to whomever the inquirer and his partner wish." Finally, committee cautions that under the

conflict of laws provision of Rule 8.5, New Jersey ethics rules may apply to the NJ will contest, rather than Pennsylvania ethics rules.

Philadelphia Bar Op. 2013-6. Client is in a coma and near death. Lawyer had prepared a power of attorney naming friend as agent, and a will leaving the estate primarily to charity and naming lawyer as executor. Lawyer has just learned that the client placed her financial accounts into JTWROS with friend, with assistance from financial advisor. Friend states that the reason was to facilitate the friend paying bills. The lawyer: (a) must try to communicate with client to determine if client intended to give the accounts to friend at death, and if so, take no other action; (b) if unable to determine client's intent, may notify the state attorney general if the lawyer believes consistent either with competent representation of client while alive or with gathering estate assets as executor, provided that during client's life lawyer must limit disclosure to only information as is necessary to effectuate the client's intent, under 1.6(a) and 1.14.

Rhode Island:

Op. 2013-05. A lawyer who drafted and supervised execution of a trust amendment for a now deceased client must assert confidentiality and privilege when the trustee (client's daughter) is questioning the amendment. If a court orders disclosure the lawyer must try to minimize the disclosure when complying.

South Carolina:

Op. 93-04 (1993). A lawyer drafted a trust agreement and pour-over will for a competent client who, at the same time, executed a durable general power of attorney appointing a friend and authorizing the friend "to do and perform all and every act, deed, matter and thing whatsoever in [sic] about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present..." When the friend asked the lawyer for a copy of the will and trust agreement, the lawyer should inform the client of the request and not provide the friend with the information without the client's consent. If the client becomes incompetent, the lawyer is authorized to open his file to the friend, absent prior instruction from the client to the contrary.

Op. 08-09 (2008). Lawyer is approached by A who is concerned about the wellbeing of his cousin (C) who is mentally incapacitated. C's mother and father are deceased although the estate of only the first to die has been probated. No guardianship has been established for C. Lawyer advises A about how to protect C. "Lawyer has reason to believe A was not receptive to such advice. Lawyer refused to participate since he has reason to believe that A [and others] are intending to transfer Cousin's property without consideration of Cousin's best interests." Lawyer inquires as to his right to disclose this information to agencies who can protect C. Committee analyzes who might be the client, or prospective client here and discusses the lawyer's duties under RPC 1.18 and 1.6 and concludes that SC RPC 1.6(b)(1) would permit the lawyer to disclose "regardless of the identity of the client." That SC Rule permits a lawyer to disclose confidences to prevent a client from committing a crime.

South Dakota:

Op. 2007-3. A lawyer who has prepared a will for an elderly client and who has been instructed by the client to reveal the contents to no one is bound by that instruction notwithstanding that the inquirer holds a durable power of attorney from the client. Here, the holder of the power demanded (through an attorney) to see the principal's will under the authority of the durable power. Subsequent to the

execution of the power, the lawyer consulted the client (again) about his wishes and he again instructed that no one should see his will. Based on the circumstances and the communications from the client, " the Niece is not a `client' for the `specific purpose' of reviewing Client's Will. First, absent a guardianship, conservatorship or other legal limitation, Client can revoke or modify the attorney-in-fact's authority. Second, if the general POA ever gave the Niece the authority to review the Will, the [subsequent] communication from Client to Attorney revoked it. Attorney believes that Client is slipping, but, until he is adjudicated unable to make such decisions, Rules 1.6, and 1.14(a) and (c) require that Attorney continue to protect Client's confidences."

Washington:

Op. 2188 (2008). A lawyer was hired by a wife to assist her in a legal action for separation and pays him fees in advance; but then dies before the work is done. The lawyer has a duty to take reasonable steps to identify who is entitled to these fees and to pay them to that person. If doing so requires communications with the husband, the lawyer is impliedly authorized to disclose that he holds funds in trust, but is not permitted to disclose the basis for the representation except to the extent determined by a court.

MRPC 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) 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:
 - (1) the representation of one client will be directly adverse to another client; or
 - (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;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

ACTEC COMMENTARY ON MRPC 1.7

General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients. 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.

Disclosures to Multiple Clients. Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

Before accepting a representation involving multiple parties, a lawyer should consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest. Failure initially to meet with the prospective clients separately risks the possibility that information will be revealed by one of them in a joint meeting that would disqualify the lawyer from representing either of them because of the duties owed to a prospective client under MRPC 1.18 (Duties to Prospective Client).

Existing Client Asks Lawyer to Prepare Will or Trust for Another Person. A lawyer should exercise particular care if an existing client asks the lawyer to prepare for another person a will, trust, power of attorney or similar document that will benefit the existing client, particularly if the existing client will pay the cost of providing the estate planning services to the other person. The lawyer would, of course, need to communicate with the other person and decide whether to undertake representation of that person as a new client, along with all the duties such a representation involves, before agreeing to prepare such a document. If the representation of both the existing client and the new client would create a significant risk that the representation of one or both clients would be materially limited, the representation can only be undertaken as permitted by MRPC 1.7(b). In any case, the lawyer must comply with MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules) and should consider cautioning both clients of the possibility that the existing client may be presumed to have exerted undue influence on the other client because the existing client was involved in the procurement of the document.

Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to

each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed). In other contexts, however, some experienced estate planners undertake to represent related clients separately with respect to related matters. Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining *informed consent*) and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). The writing may be contained in an engagement letter that covers other subjects as well.

Example 1.7-1. Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* their estate planning goals and the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Assuming that the lawyer reasonably concludes that there is no actual or potential conflict between the spouses, it is permissible to represent a husband and wife as joint clients. Before undertaking such a representation, the lawyer should elicit from the spouses an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

Example 1.7-1a. Lawyer (*L*) was asked to represent Father (*F*) and Son (*S*) in connection with estate planning matters. *L* had previously not represented either *F* or *S*. At the outset *L* should discuss with *F* and *S* their estate planning goals and the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. If the prospective clients have common estate planning objectives and coordination is important to them, and there do not appear to be any prohibitive conflicts, the best practice would be for the lawyer to undertake the representation of the two clients jointly with an agreement that information can be shared. Depending on the circumstances, however, a lawyer may be able to represent the father and son as separate clients between whom information communicated by one client will not be shared with the other. Even then, the circumstances may be such that the lawyer knows or should know that their estate plans are interconnected. In that situation, separate representation may be appropriate, provided that there is no obvious conflict of interest between the clients. But even so the lawyer will need to make a conflict determination and 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. In such a case, each client must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

Consider Possible Presence and Impact of Any Conflicts of Interest. A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer’s own interests. The lawyer must also bear this concern in mind as the representation progresses: What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients.

Example 1.7-2. Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the

preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge *T* for any substantial personal services that *L* performs for *T*.

Example 1.7-3. Lawyer (*L*) represented Husband (*H*) and Wife (*W*) jointly with respect to estate planning matters. *H* died leaving a will that appointed Bank (*B*) as executor and as trustee of a trust for the benefit of *W* that meets the QTIP requirements under I.R.C. 2056(b)(7). *L* has agreed to represent *B* and knows that *W* looks to him as her lawyer. *L* may represent both *B* and *W* if the requirements of MRPC 1.7 are met. If a serious conflict arises between *B* and *W*, *L* may be required to withdraw as counsel for *B* or *W* or both. *L* may inform *W* of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients). However, without the informed consent of all affected parties confirmed in writing, *L* should not represent *W* in connection with an attempt to set aside *H*'s will or to assert an elective share. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining *informed consent*) and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*).

Conflicts of Interest May Preclude Multiple Representation. 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 (Conflict of Interest: Current Clients).

A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 (Conflict of Interest: Current Clients) with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration. Nonetheless, the corporate fiduciary might be of a different view; and it would be useful to clarify this in advance. Where the lawyer is trying to keep open the possibility of such a future adverse representation on an unrelated matter, the lawyer should ask the corporate fiduciary for a prospective waiver as to such representations, as explored in the next section. Where a lawyer is already representing another party adverse to the corporate fiduciary on an unrelated matter, it will be necessary for the lawyer to comply with MRPC 1.7(b) as to both clients before undertaking to represent the corporate fiduciary.

Prospective Waivers. 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).

Several additional limitations and requirements apply to prospective waivers: 1) Some conflicts, of course, are not consentable [see MRPC 1.7(b)(2) and (3)]; 2) the client’s informed consent must be confirmed in writing [see MRPC 1.7(b)(4)]; 3) a client’s informed consent to a future conflict, “without more, does not constitute the client’s informed consent to the disclosure or use of the client’s confidential information against the client [see MRPC 1.6 (Confidentiality of Information)]”; and 4) in any event, the lawyer considering taking on a later matter arguably covered by an informed prospective consent must nevertheless determine whether accepting the later engagement is prohibited for any other reason under either MRPC 1.7(b) or MRPC 1.9 (Duties to Former Clients). ABA Formal Opinion 05-436 at 4-5. Finally, the lawyer in any event would need the consent of the other client whose interests are affected by the representation. MRPC 1.7(a).

Lawyers should also note that neither Comment 22 nor ABA Formal Opinion 05-436 will be binding on the jurisdiction in which a lawyer practices. This is important because MRPC 1.7 limits the circumstances to

which it applies under both paragraph (a) and (b) to situations where “a concurrent conflict of interest [exists] under paragraph (a).” Accordingly, a state disciplinary authority could argue that since Rule 1.7 applies only to a concurrent conflict of interest, neither Comment 22 nor ABA Formal Ethics Opinion 05-436 (2005) accurately reflects the text of MRPC 1.7, so MRPC 1.7(b) would not control a future conflict of interest.

In addition, the lawyer should consider the impact, if any, that MRPC 1.8 (h) could have on a state disciplinary authority. It provides: “A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” A claim that a lawyer asserted the interests of another party in conflict with a client’s interest normally constitutes a breach of fiduciary duty, rather than malpractice. Even so, both as a matter of substantive law and pursuant to the Rules of Professional Conduct of a particular state, the disciplinary authority or court may believe that of the two types of misconduct, a client’s right to bring a claim in the future for breach of the lawyer’s fiduciary duty to the client deserves greater protection than a client’s right to bring a future claim for malpractice. Thus, a state disciplinary authority or court could apply MRPC 1.8(h) to a future conflict of interest on the basis that “malpractice” includes a “breach of fiduciary duty” to the client.

Selection of Fiduciaries. The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer’s independent professional judgment in the selection of a fiduciary would be materially limited by the lawyer’s self-interest or any other factor, the lawyer must obtain the client’s informed consent, confirmed in writing. If the client is selecting a fiduciary that is affiliated with the lawyer, such as a trust company owned by the lawyer’s firm, the lawyer must obtain the client’s informed consent, confirmed in writing.

Appointment of Scrivener as Fiduciary. An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). Comment [8] to MRPC 1.8 makes clear that Rule 1.8(c) “does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position” provided that doing so does not run afoul of MRPC 1.7. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer.

The designation of the lawyer as fiduciary will implicate the conflict of interest provisions of MRPC 1.7 when there is a significant risk that the lawyer’s interests in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. See ACTEC Commentary on MRPC 1.8. (Conflict of Interest: Current Clients: Specific Rules) (addressing transactions entered into by lawyers with clients).

For the purposes of this Commentary, a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary. The client should also be informed of any significant lawyer-client relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary under consideration for appointment.

Designation of Scrivener as Attorney for Fiduciary. The ethical propriety of a lawyer drawing a document that directs a fiduciary to retain the lawyer as his or her counsel involves essentially the same issues as does the appointment of the scrivener as fiduciary. However, although the appointment of a named fiduciary is generally necessary and desirable, it is usually unnecessary to designate any particular lawyer to serve as counsel to the fiduciary or to direct the fiduciary to retain a particular lawyer. Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm [see MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules)] as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction. See also the discussion of the lawyer serving as both fiduciary and counsel to the fiduciary in ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

Representation of Fiduciary in Representative and Individual Capacities. Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be both an executor and a beneficiary of the estate, and may want the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client's personal interest, such a "dual capacity representation" poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities.

In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer's clients. MRPC 1.7(a)(2) notes that if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to "...a third person" then MRPC 1.7(b) must be complied with, including the duty to get informed consent found in MRPC 1.7(b)(4). Waivers from beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MRPC 1.7(b)(4) only contemplates waivers from "affected client[s]." Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the

requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

Example 1.7.4 X dies leaving a will in which X left his entire estate in trust to his spouse A for life, remainder to daughter B, and appointed A as executor. A asked L to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented, including an informed agreement to forego any right to have the L advocate for A's personal interest insofar as it conflicts with A's duties as executor. L may properly represent A in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

Example 1.7.5 X dies, leaving a will giving X's estate equally to his three children. Child A was appointed executor. A engages L to represent her as executor. A dispute arises among the three children over distribution of X's tangible personal property, and A asks L to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, L may need to advise A to obtain independent counsel to represent her in the dispute. In addition, L may need to advise A to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties.

Client with Diminished Capacity. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court's attention to the client's opposition and ask that separate counsel be provided to represent the client's stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

Rebates, Discounts, Commissions and Referral Fees. As indicated in the ACTEC Commentary on MRPC 1.5 (Fees), a lawyer should not accept a rebate, discount, commission or referral fee from a nonlawyer in connection with the representation of a client except insofar as is authorized by MRPC 7.2(b). The receipt by the lawyer of such a payment involves a conflict of interest with respect to the client. It is improper for a lawyer, who is subject to the strict obligations of a fiduciary, to benefit personally from such a representation. The client is generally entitled to the benefit of any economies achieved by the lawyer.

Significant Risks Arising From a Lawyer's Own Interests. Estate planners are often asked questions about techniques for avoiding taxes and/or creditors. Some of these techniques involve sophisticated instruments which are expensive for the client and may not be appropriate for the client's situation. MRPC 1.7(a)(2) notes that "[a] concurrent conflict of interest exists if ...there is a significant risk that the representation of [a client] will be materially limited by ...a personal interest of the lawyer." It is a conflict of interest and also a violation of the duty of competence for a lawyer to recommend to a client work that the client does not need, but which will increase fees for the lawyer. See MRPC 1.1 (Competence). If the lawyer is recommending investment vehicles or products in which the lawyer has a financial stake apart from the time required to prepare the instrument, the situation may be considered a business transaction with the client. In that case, the requirements of MRPC 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) will need to be satisfied.

Confidentiality Agreements. A lawyer generally should not sign a confidentiality agreement that bars the lawyer from disclosing to the lawyer's other current and future clients the details of an estate planning strategy developed by a third party for the benefit of the lawyer's client. As stated in Ill. Op. 00-01, a lawyer who signs such a confidentiality agreement creates an impermissible conflict with the lawyer's other clients who might benefit from the information learned in the course of representing this client. "In the case at hand, the Lawyer's own interests in honoring the Confidentiality Agreement would 'materially limit' [the Lawyer's] responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D." See MRPC 5.6 (Restrictions on Right to Practice) and Restatement of the Law Governing Lawyers §59, cmt. e ("Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients."). See also ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Concurrent Conflicts of Interest Generally

Cases

See also cases cited in the Annotations following the ACTEC Commentary on MRPC 1.5 regarding rebates, discounts, commissions and referral fees.

Federal:

Abbott v. U.S. I.R.S., 399 F.3d 1083 (9th Cir. 2005), *aff'g Estate of Sexton v. C.I.R.*, T.C. Memo. 2003-41 (2003). It was not an impermissible conflict under Rule 1.7 for lawyer simultaneously to represent an estate before the IRS while also serving as an expert consultant to the IRS on an unrelated matter. In his role as expert consultant, he did not represent the IRS, so there were no adverse clients. Nor was there any evidence that lawyer's representation of the estate was materially limited by the work he did for the IRS.

Transperfect Global, Inc. v. Motionpoint Corp., 2012 WL 2343908, 2012 U.S. Dist. LEXIS 129402 (N.D. Cal. 2012), *relief from disqualification denied* at 2012 WL 3999869 (N.D. Cal. 2012). An estate

planning lawyer represented the co-CEOs and 99% owners of a closely held corporation, Transperfect, and then moved to the law firm representing the defendant in a patent infringement case earlier brought by Transperfect. She continued to represent the co-CEOs with respect to estate planning and related matters after the move, without obtaining an adequate conflict waiver. Transperfect moved to disqualify defendant's firm, and the federal magistrate granted the motion. The court noted that, although this was a case of an after-acquired client (the CEOs) causing the disqualification of representation of a prior client (Motionpoint), it was nonetheless a concurrent conflict because the affairs of the estate planning clients were inextricably intertwined with the business and financial matters of Transperfect, and the applicable California rule required per se disqualification. The district court denied the defendant's motion for relief from the disqualification.

Scanlon v. Eisenberg, 913 F. Supp. 2d 591 (N.D. Ill. 2012). Plaintiff was beneficiary of discretionary trusts set up by her father and uncle. The law firm that represented the trustee of the trusts also represented General Growth, the company whose stock was held by the trusts, and other family members. The lawyers also held General Growth stock and controlled the corporate trustee. The lawyers had represented plaintiff for all of her legal matters throughout her life. Plaintiff sued the lawyers for malpractice for several questionable transactions involving the trusts, and the lawyers responded that there was no attorney-client relationship with plaintiff with respect to her position as beneficiary of the trusts. In response to a Rule 12(b)(6) motion to dismiss by the lawyers, the court determined that the attorney-client relationship between the plaintiff and the lawyers was sufficiently broad to include her interest as beneficiary of the trust and so was sufficient to ground plaintiff's malpractice and breach of fiduciary duty claims.

Arizona:

In re Estate of Shano, 869 P.2d 1203 (Ariz. App. 1993). This decision involves a lawyer who represented a friend of the decedent who was one of the primary beneficiaries of a holographic will executed by the decedent two days prior to his death. The lawyer obtained the friend's appointment as special administrator. The lawyer also later undertook to represent an independent third party who was appointed as administrator, whose legal positions included opposition to claims made against the estate by the decedent's surviving spouse. This decision upholds an order disqualifying the lawyer from representing the administrator because of the conflict of interest between his duties to the decedent's friend and to the administrator and, derivatively, to the persons entitled to receive the decedent's estate.

Arkansas:

Craig v. Carrigo, 12 S.W.3d 229 (Ark. 2000). An attorney should not represent a client if the representation will be directly adverse to another client. It is not necessarily a conflict of interest for an attorney to represent both the estate and the only devisee in the will. The core issue is whether the existence of a parallel legal position held by the personal representative for the estate, and one of the potential heirs of the estate, has been shown to be prejudicial to the other potential heirs. Actions taken by the attorney throughout the proceeding reflect conscientious legal services consistent with the duties of counsel for a personal representative in an ancillary probate. His obligations as estate counsel do not include advocacy for any individual heirs; however, his obligations do not prevent the estate from having positions that are consistent with the interests of some individual heirs.

California:

Estate of Buoni, 2006 Cal. App. Unpub. LEXIS 9368, 2006 WL 2988737 (2006). A personal representative of the estate who was also a creditor was represented by one lawyer in both capacities. An estate beneficiary sought to disqualify the lawyer based on the conflict, but the court refused the disqualification. The conflict here is the PR's, not that of his attorney, but even if there is a conflict for the attorney, it is cured by California law which contemplates that when the PR is a creditor, the creditor's claim is submitted to the court for approval or rejection. If it is rejected, PR may sue to enforce the creditor's claim and the court is empowered to appoint a separate lawyer to defend against the claim. Given this procedure, representation of one person in both capacities is not a disqualifying conflict.

Baker Manock & Jensen v. Superior Court (Salwasser), 175 Cal. App. 4th 1414 (2009). Law firm represented one son (George) of the decedent both as executor and in his own right as beneficiary. When the firm, on behalf of George personally, opposed a brother's petition that would have reduced the probate estate assets and also reduced George's own share, the brother sought to disqualify the firm for its conflict. The trial court granted the motion to disqualify but the court of appeals reversed, reasoning that the positions taken by George personally and those he took as executor were the same: to avoid loss of probate assets. Even if the firm were viewed as representing two Georges (one personally, the other as executor) who could theoretically have adverse interests, that was not the case here so there was no conflict.

Colorado:

Estate of Klarner, 98 P.3d 892 (Colo. App. 2003). Husband (Albert) had two daughters by a prior marriage and his wife (Marian) had two sons by a prior marriage. They had no children during the second marriage. After Albert died, Law firm became co-trustee of Albert's QTIP Trust whose remaindermen (at Marian's death) were his two daughters. Law firm was also a co-trustee of a trust set up by Marian after Albert died (Marian Trust). Marian's two sons were the beneficiaries; Albert's daughters were not. When Marian died, husband's QTIP trust was included in her estate for estate tax purposes. A decision had to be made whether she had waived her estate's right to reimbursement from Albert's QTIP trust in the amount of estate taxes incurred as a result of the inclusion of the QTIP in her estate. The court held that the law firm, as co-trustee of both trusts, had an insuperable conflict because claiming reimbursement was owed would benefit the beneficiaries of widow's estate (her sons) to the detriment of the beneficiaries of the QTIP trust (Albert's daughters). In fact, the Law firm claimed that the widow had not waived the right to reimbursement and did seek reimbursement, but this court found that this was error; she had waived. Noting that it was within the trial court's discretion whether to deny or reduce fees, it remanded for a determination of the appropriate remedy to be imposed as a result of the conflict.

District of Columbia:

In re Evans, 902 A.2d 56 (D.C. 2006). Attorney, as owner of a real estate title company, was contacted to close a real estate loan to be secured by a residential property. He discovered that the borrower did not own the residential property because it was still owned by the unprobated estate of her deceased mother. Thereupon he undertook, as lawyer, to represent the borrower and probate her mother's estate, without disclosing his conflict as owner of the title company with a financial interest in closing the loan, and he failed to obtain an informed waiver of the conflict. In probating the estate, he failed to act

competently in violation of Rule 1.1 and, further, engaged in actions prejudicial to the administration of justice in violation of Rule 8.4(d). He was suspended for six months.

Florida:

Chase v. Bowen, 771 So.2d 1181 (Fla. App. 2000). This case holds that no conflict of interest exists when a lawyer revises a will to disinherit a beneficiary whom the lawyer represents on an unrelated matter.

Harvey E. Morse P.A. v. Clark, 890 So.2d 496 (Fla. App. 2004). Court held that law firm representing Clark, the trustee of a revocable living trust, had an unwaived concurrent conflict of interest because it simultaneously represented Harvey E. Morse, PA, in an unrelated matter, and Morse was adverse to Clark in this case. Morse was the assignee of intestate heirs of the estate in this case and its interest was to maximize assets in the probate estate of which it was a partial assignee at the expense of the revocable trust of which Clark was trustee. Therefore the law firm must be disqualified from representing Clark.

Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So.2d 182 (Fla. App. 2007). Court affirms a \$1 million malpractice judgment in case brought by personal representatives against lawyer for decedent based on lawyers' failure to disclose conflict which may have impacted their recommendation to decedent that he appoint JP Morgan to a fiduciary role, and their failure to fund a revocable living trust before decedent's death.

Georgia:

Estate of Peterson, 565 S.E.2d 524 (Ga. App. 2002). Attorney who drafted will under which he was named as executor was disqualified from acting because, although he had informed testator orally of potential conflict of interest, he failed to either obtain client's consent in writing or to give client written notice as required by applicable Georgia ethics opinion (GAO 91-1).

Illinois:

Fitch v. McDermott, Will and Emery, LLP, 401 Ill.App.3d 1006, 929 N.E.2d 1167 (2010). Son of decedent alleged that law firm committed malpractice in failing to advise him of its conflict of interest in simultaneously representing both him and the co-trustees of the trust set up by his mother when he wished to buy a farm held in the trust. The court held that, because firm was representing him for purposes of prenuptial and estate planning matters, and was not advising him about purchase of the farm, it had no conflict.

Indiana:

Matter of Taylor, 693 N.E.2d 526 (Ind. 1998). Knowing that he was a principal beneficiary of his father's will, lawyer advised his stepmother that she could execute a waiver of her right to claim a forced share of his father's estate in connection with a bankruptcy proceeding she was contemplating. The court held that in doing so, he violated Rule 1.7(a) because his ability to represent his stepmother was materially limited by his personal interest. He was suspended for four months.

Kansas:

In re Estate of Koch, 849 P.2d 977, 997-998 (Kan. App. 1993). In this action two respected commentators on ethics testified on behalf of opposing parties. The court upheld a will that was drafted

for the testator by a lawyer who also represented the testator and two of her sons in litigation involving a charitable foundation brought by her other two sons. Her will, which left the bulk of her estate to her four sons, included a no-contest clause and a provision that conditioned the gifts on the dismissal by a beneficiary of any litigation that was pending against her within 60 days following her death. The lawyer did not discuss the testator's will with her sons, including the two sons who were clients of the firm in the litigation. The sons were all unaware of the terms of their mother's will, which was prepared "without any evidence of extraneous considerations." The court continued that:

The scrivener's representation of clients who may become beneficiaries of a will does not by itself result in a conflict of interest in the preparation of the will. Legal services must be available to the public in an economical, practical way, and looking for conflicts where none exist is not of benefit to the public or the bar.

Kentucky:

Kentucky Bar Ass'n v. Roberts, 431 S.W.3d 400 (2014). "[I]t is clear that representing the estate, the executor of the estate, and two of the heirs (one of whom was accused and eventually found guilty of killing the testator) creates a conflict of interest.... Roberts could not have reasonably believed that the representation would not be adversely affected when one of the clients is on trial for killing the testator and a negative outcome in that case would bar that client from taking under the will. No amount of consent and consultation allows waiver of this limit."

Louisiana:

Succession of Lawless, 573 So. 2d 1230 (La. App. 1991). This case involved removal of the lawyer who was designated in the decedent's will as lawyer for the executor. The court found that just cause existed for the lawyer's removal because of (1) a conflict under MRPC 1.7 concerning a gift of \$50,000 to the lawyer that was included in a holographic codicil that the executor wished to challenge; and (2) a conflict arising in connection with a real estate listing agreement under which the lawyer's wife, who was a real estate agent, was to receive a percentage of the listing agent's fee. With respect to the latter, the court said that the lawyer had "acquired a pecuniary interest in the estate property requiring adherence to MRPC 1.8(a)."

Maryland:

Attorney Grievance Com'n v. Ruddy, 411 Md. 30, 981 A.2d 637 (Md. 2009). Lawyer borrowed \$95,000 interest free from his aunt and executed a promissory note. When she died, the note was in default, but lawyer was appointed personal representative of the estate and apparently did the legal work for himself. The court held that the mere fact that a lawyer is indebted to an estate for which he is serving as personal representative and lawyer does not create a conflict of interest. But here the lawyer failed to make arrangements for the payment of interest on the loan that was in default, and this violated Rule 1.7. The lawyer was reprimanded.

Atty Grievance Comm'n of Md v. Hodes, 441 Md. 136 (Md. 2014). The attorney represented an elderly woman. After she entered assisted living, he and staff at his firm took over management of her finances. He used his positions as her attorney-in-fact while she was alive to make self-interested distributions to himself; after she died, as trustee of a foundation set up under her Will, he transferred funds to his separate financial consulting business contrary to the terms of the trust. He argued that he was not subject to discipline because his actions were taken in a "personal or non-legal capacity." The court

rejected this argument, on the ground that some of the misconduct occurred while his client was alive and he was still representing her; but also because his roles as attorney-in-fact and trustee arose from the attorney-client relationship, and his intentionally dishonest conduct was a violation of Rule 8.4. He was disbarred.

Michigan:

Ervin v. Bank One Trust Co., 2005 Mich. App. LEXIS 528, 2005 WL 433573 (unpublished). Decision affirms a disqualification of a law firm from representing a beneficiary against a bank trustee when the same firm represents an affiliate of the bank trustee and had signed a retention agreement making clear that its representation of one bank affiliate would be deemed representation of all affiliates and subsidiaries and waivers would not be granted. Here the clients were directly adverse.

New Hampshire:

In re Wyatt's Case, 159 N.H. 285, 982 A.2d 396 (2009). Lawyer was suspended for two years for conflicting concurrent and successive representations. After persuading an adult client (the ward) to submit to a voluntary conservatorship, lawyer simultaneously represented the ward and the conservator, and later also the ward's wife, despite adversity between these clients, without a reasonable belief that these conflicts could be reconciled and without the informed consent of the clients. Later, after withdrawing from representation of the ward, he continued to represent the conservator and assisted him and the ward's wife in an attempt to establish a health care guardianship of the ward, and also defended conservator against charges by the ward that the conservator had mismanaged his estate, all without the ward's consent.

Williams v. L.A.E. Association, (N.H. Super. Ct. 1/6/2016). Lawyer had done estate planning work for two separate clients and after the estate planning work was complete, a partner of the estate planner undertook to represent property owners suing the estate planning clients in a dispute over elections to a property association board. Citing the ACTEC Commentaries and commentators relying on them, the court concludes that although the estate planning matters might be dormant, the estate planning clients remained current clients of the firm. Since they remained current clients of the estate planner, he would be disqualified from representing the plaintiffs in the adverse matter against his estate planning clients under Rule 1.7, and his conflict was imputed to his partner under Rule 1.10.

New Jersey:

Haynes v. First Nat'l State Bank, 432 A.2d 890 (N.J. 1981). At the behest of the testator's daughter, who had been a client for some time, the lawyer drew a will and trust for the testator, who was a new client, which drastically changed the disposition of the testator's estate in favor of the daughter who procured the will. "[I]t is clear that attorney [here] was in a position of irreconcilable conflict." 432 A.2d at 901. "[T]here must be imposed a significant burden of proof upon the advocates of a will where a presumption of undue influence has arisen because the testator's attorney has placed himself in a conflict of interest and professional loyalty between the testator and the beneficiary." 432 A.2d at 900.

Grete Bay Hotel & Casino, Inc. v. Atlantic City, 624 A.2d 102 (N.J. Super. 1993). A law firm that represents a business trust does not represent the individual members of the trust. Accordingly, MRPC 1.7 does not preclude the law firm from representing an adverse party in litigation with a member of the trust with whom the law firm has no other connection.

Santacroce v. Neff, 134 F. Supp. 2d 366, 367 (D.N.J. 2001). This case involved a palimony action against the estate of a former lover. Here, the court applies the so-called “hot potato” doctrine to disqualify a firm that represented both the plaintiff and the estate at a time when they were adverse. In fact, the court found that while the firm was representing both the plaintiff and the Estate on ostensibly unrelated matters, it got wind that she was planning to file a palimony claim against the estate and so dropped her as a client “like a hot potato” to avoid a concurrent conflict with the estate, the more remunerative client. The court refused to let the firm convert her into a “former client” by such behavior and disqualified it under Rule 1.7.

New Mexico:

In re Stein, 143 N.M. 462, 177 P.3d 513 (2008). This is a disciplinary case in which a lawyer was disbarred for multiple conflicts of interest and misrepresentations to courts and a former client. At first, lawyer represented a husband (Bruce) who had set up trusts totaling more than \$11 million and his wife (Ruth) who held a durable power of attorney for her husband. When a daughter sought to establish a guardianship for her father, lawyer ostensibly continued to represent both Bruce and Ruth. After a guardian ad litem was appointed for Bruce, and while the guardianship proceedings were pending, lawyer sought to have the trustee distribute the trust income to Ruth, even though Bruce was the income beneficiary. When that failed, without notifying Bruce’s guardian ad litem, lawyer filed two federal actions to obtain control over the assets for Ruth. He was disqualified from continuing to represent Bruce because his interests were adverse to those of his wife Ruth, and he was later disqualified from representing Ruth, as well, since she was adverse to his former client Bruce from whom he had not obtained consent. The lawyer was disbarred for these conflicts and related misconduct.

Spencer v. Barber, 299 P.3d 388 (N.M. 2013). This is a case involving multiple claims against an attorney who represented the personal representative in two wrongful death claims. The PR (Sam) was the mother of one of the decedents and grandmother of the other; she was also the driver of the vehicle that was involved in the fatal accident. The lawyer (Barber) hired to represent Sam as PR on these claims knew that the father/grandfather (Spencer)—Sam’s ex-husband—was also alive, but Sam told Barber that her position was that Spencer had no right to wrongful death shares because he had abandoned their daughter. Prior to settling the wrongful death claims, Barber met with Spencer and got him to agree to accept a specified amount in lieu of any claim as a statutory beneficiary of the wrongful death claim. When the claims settled for a much higher amount, Spencer sued Barber for malpractice and misrepresentation. In this case, the Supreme Court of New Mexico held that (a) Barber owed duties to Spencer as a statutory beneficiary which were complicated by the conflict of interest between his client Sam and Spencer; (b) Barber could have resolved that conflict in a number of ways, one of which would have been to notify Spencer that he, Barber, was not his lawyer, that Spencer could not rely on Barber to act for his benefit, and provide Spencer with sufficient information that he could understand why he needed independent representation; and (c) Spencer’s right to sue Barber for misrepresentation did not depend on any fiduciary duties owed Spencer. When Barber learned that Sam may have been liable for the accident, he developed still another potential conflict of interest between his duties to her as PR and her individual interests. For all these reasons, the court found that summary judgment had been improperly granted in favor of Barber and remanded for trial.

New York:

Matter of Birnbaum, 460 N.Y.S.2d 706, 707 (N.Y. Sur. 1983). The court denied a motion to disqualify the firm that represented one of the co-executors in her representative and individual capacities. In the

opinion the court stated that, “It is well settled that the common practice of having one attorney or one law firm represent an executor as fiduciary as well as a beneficiary of an estate does not create a conflict of interest for the attorneys.... On the other hand, where the attorney represents his client in both capacities, he may not act to advance the *personal interests* of a fiduciary in such a way as to harm his other client, the estate.”

In re Estate of Lowenstein, 600 N.Y.S.2d 997, 998-999 (N.Y. Sur. 1993). In a suit brought by a lawyer to enforce a contract under which he was to be named as executor the court found the contract unenforceable and attorney had no claim for damages in amount of lost commissions. “[A] contract provision requiring the nomination of the attorney draftsman as fiduciary of the testator’s estate is unenforceable unless it is clearly demonstrated to the satisfaction of the court that special circumstances required the services of the attorney draftsman and that the nomination was not the product of overreaching.”

Bishop v. Maurer, 823 N.Y.S.2d 366 (App. Div. 2006). Conflicts waivers in an engagement letter—and in a related estate planning document—which plaintiff signed were enough to avoid a malpractice claim brought by husband against firm that did estate planning for him and his wife, notwithstanding his allegation that more was expected of the firm in light of the “apparently hostile relationship with his wife.” The engagement letter waiver stated: “Any relationship between a lawyer and a client is subject to Rules of Professional Conduct. In estate planning, ethical rules applicable to conflicts of interest and confidentiality are of primary concern. By countersigning a copy of this letter, you each acknowledge that you have had the opportunity to consult independent legal counsel with respect to your estate planning, and you each affirmatively waive with full understanding any conflict of interest inherent in your both relying on the advice of this firm and its attorneys.” These waivers were sufficient to rebut he client’s claim that defendants had failed to advise him of the conflict implicit in their simultaneous representation of him and his wife.

Estate of Tenenbaum, 2006 N.Y. Misc. LEXIS 9013, 235 N.Y.L.J. 2 (N.Y. Sur. 2006). This is a dispute between one of five co-executors (H), in her personal capacity, and several of the other co-executors. H argues that she is entitled to a particular piece of property based on a written note from the decedent. One of the respondent co-executors (M) seeks to disqualify the law firm which is representing H, claiming it is a conflict for the firm to represent H in both her personal capacity and as a co-executor where it must defend against her personal claim. Court denies M’s motion to disqualify H’s counsel, finding that while the law firm is representing her in both her personal and her fiduciary capacity, it is not representing her in her fiduciary capacity in defending against her personal petition here; indeed, she is not a respondent in this proceeding, even in her fiduciary capacity, but appears in the action only as the petitioner. Moreover, all the other co-executors have separate representation. Thus, the court found no conflict. Under the circumstances, the fact that her lawyer is representing her in her fiduciary capacity as to other estate administration matters does not require counsel’s disqualification. Another motion to disqualify M’s lawyer by another co-executor is described under MRPC 1.9.

Tischler v. Fahnestock & Co., Inc., 871 N.Y.S.2d 887 (2009). Mother (R) of a disabled adult child (E) hired lawyer (L) who had formerly represented R to prosecute an action against a securities broker on behalf of E for malfeasance. Defendant counterclaimed against R alleging that she was responsible for any losses to E. L had court appoint a guardian ad litem for E who then continued the retention of L. L advised mother R that he did not represent her, and R retained separate counsel. Amidst several changes

in the guardianship for E, L was dismissed and a replacement GAL also served as counsel for E. When L sought *quantum meruit* fees (roughly \$80,000) for his work for E, R challenged the lawyer's fee petition on the ground that he had a conflict because he simultaneously represented both her (R) and E. Court, however, rejected the objection finding that the lawyer had never represented R but only E and therefore had no conflict. Indeed, L had avoided taking direction from R (who had contracted to pay his fees) once he discovered she did not have authority to act for E. The court granted the fee request to be paid from E's recovery, rather than by R.

Will of McElroy, 34 Misc.3d 689, 935 N.Y.S.2d 855 (N.Y. Sur. 2011). Decedent left a will that put 2/3 of her residuary estate into a special needs trust for her only daughter and gave the remaining estate to grandchildren. A Guardian ad litem was appointed for the daughter, and the GAL filed objections to the will on her behalf. The lawyer who drafted will was named as executor and he was being represented by his law firm, which had represented daughter in the past and currently provided her with financial management assistance. The GAL moved to disqualify law firm for conflict of interest. The court agreed that the law firm had a conflict of interest and disqualified the law firm.

North Dakota:

Disciplinary Action against McIntee, 833 N.W.2d 431 (N.D. 2013). Attorney prepared will for testatrix, and when she died, represented a son and a daughter who were appointed as co-executors (and who were also beneficiaries under the will). Attorney was aware that there were potential problems in interpreting the will but did not advise co-executors of potential conflicts in the joint representation and did not get their consent. During the administration of the estate, the daughter executor complained about lack of information but the attorney did not advise her that she could get independent representation for her role as co-executor. After the probate was closed, attorney began to represent the son co-executor individually and filed suit against the daughter and other siblings for interpretation of the will terms regarding use of farmland. Court held: attorney violated 1.7 by not getting consent for the common representation, and violated 1.9 by filing suit against the daughter, a former client, in a substantially related matter in which her interests were materially adverse.

Ohio:

Ivancic v. Enos, 2012-Ohio-3639, 978 N.E.2d 927 (Ohio App. 2012). Enos hired lawyer Davies—who had formerly represented her deceased father—to probate her father's estate. Davies did not tell client he was the estate's largest creditor (\$50,000) or that shortly before decedent had died, Davies had filed a lien against the decedent's home to secure an alleged promissory note for services rendered to the decedent. Davies satisfied the lien from the estate assets without filing a creditor's claim with the estate—which was required by Ohio law. Finally, although Enos had told Davies that she had a half-sister who had been raised by someone other than their father, Davies failed to investigate whether the half-sister had been adopted by the person who raised her. The appeals court affirmed a trial court determination that Davies breached a fiduciary duty owed to Enos in (a) failing to disclose his creditor status and obtaining a conflicts waiver or withdraw (b) collecting the lien without adequate disclosure to his client and without properly using the creditors' claim process—a claim which he could not adequately document; and (c) failing to investigate the client's half-sister's adoption status. He was ordered to return fees paid to him and to pay the plaintiffs' fees.

Oregon:

In re Schenck, 345 Or. 350, 194 P.3d 804 (2008). Lawyer was suspended for a year for multiple violations in connection with estate planning for sisters. One of the violations was to draft wills for the sisters while knowing that they were feuding at the time and had adverse interests (had an “actual conflict”) as to the disposition they intended relative to one another, in violation of Oregon’s then version of MRPC 1.7.

South Carolina:

Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991). Lawyer Dobson had a long-standing attorney-client relation both with Hotz and her father Minyard. After Dobson had done some estate planning for Minyard relative to succession to his car business, Hotz met with Dobson to request a copy of her father's will. The will was favorable to Hotz and Dobson discussed the will with Hotz without telling her it had been revoked by a second will that he had also prepared. According to Dobson, Minyard had instructed him not to disclose the existence of the second will to his daughter. Hotz sued Dobson for malpractice. In reviewing summary judgment that had been granted in favor of Dobson, the court concluded that although Dobson represented Hotz's father, not Hotz, regarding the will, “Dobson did have an ongoing attorney/client relationship with [Hotz] and there is evidence she had ‘a special confidence’ in him.” While Dobson had no duty to disclose the existence of a second will against the wishes of his client (Hotz's father), he owed Hotz a duty to deal with her in good faith and to not actively misrepresent the first will. Thus, the court concluded that summary judgment had been improperly granted to Dobson on this cause of action and remanded for a trial.

Smith v. Hastie, 367 S.C. 410, 626 S.E.2d 13 (S.C. App. 2005). In this malpractice case, appeals court reversed summary judgment that had been entered in favor of lawyer Hastie and remanded for trial on negligence and breach of fiduciary duty. Lawyer had represented husband and wife in setting up a family limited partnership and, in that role, had allegedly encouraged wife to transfer assets into the FLP without advising her of the potential conflict he had in representing both her and her husband, without inquiring into actual conflicts between them (there was substantial marital discord at the time), and without advising her of the implications of the FLP were the couple to divorce.

South Dakota:

Gold Pan Partners, Inc. v. Madsen, 469 N.W.2d 387 (S.D. 1991). An order affirming sale of real property of estate was vacated because of defects in proceedings, including “confused legal advice given the executrix and the decedent’s sons.” The court observed: “Counsel may have become involved in representing conflicting interests by advising the executrix in her personal capacity and advising the sons. We recognize estate attorneys often find themselves being ‘peacemakers.’ Nevertheless, they should exercise caution to avoid being compromised in the representation of conflicting interests.” 469 N.W.2d at 390, n. 4.

Texas:

Baker Botts LLP v. Cailloux, 224 S.W.3d 723 (Tex. App. 2007). Court reverses an equitable trust in the amount of \$65.5 million imposed on Baker Botts & Wells Fargo (as executor) to remedy fiduciary breaches in their representation of a widow who disclaimed this amount from the estate of her deceased husband. The law firm had concurrently represented the widow, her deceased husband’s executor (Wells Fargo) and the charitable foundation that was the beneficiary of her disclaimer. Allegedly the widow’s waiver of the conflict was not sufficiently informed, and the trial court held that this was a

fiduciary breach. But the court of appeals reversed for lack of evidence that the fiduciary breach caused the widow to execute the disclaimer and because establishment of the equitable trust was without basis in fact or law.

Hill v. Hunt, 2008 U.S. Dist. LEXIS 68925, 2008 WL 4108120 (N.D. Tex. 2008). This is an action brought by a great grandson of HL Hunt against a variety of persons involved with the management of trusts set up by HL Hunt. Among the defendants is plaintiff's father, a grandson of HL Hunt and this decision adjudicates the defendant father's motion to disqualify the law firm representing the plaintiff son. Finding that the law firm had established an attorney-client relationship with the defendant father in the context of unrelated trust litigation in New York, and that this attorney-client relationship was continuing, the court concluded that there was a concurrent conflict for the firm to also be representing the father's son as plaintiff in this suit against his father. The violation of Rule 1.7 and the surrounding circumstances convinced the court that the firm must be disqualified from representing the plaintiff son based on the appearance of impropriety and the likelihood of public suspicion.

Washington:

Behnke v. Ahrens, 172 Wn. App. 281, 294 P.3d 729 (2012). The co-trustees of a trust had paid large fees to attorney Ahrens for advice and implementation of a tax shelter to shelter capital gains upon sale of trust assets. Co-trustees were later advised by other attorneys that the IRS considered this an abusive tax shelter and that they should pay the taxes and penalties. They settled with the IRS and then sued the first lawyer—Ahrens—for fraud, consumer protection violation, common law breach of fiduciary duty, and breach of fiduciary duty based on RPCs. The court held that the attorney had violated RPC 1.7(b) and thus his fiduciary duty. While representing the trust and setting up the tax shelter, the lawyer had also been representing the vendor of the tax shelter, and had a financial interest in referring clients to the vendor, and did not fully disclose that relationship to the co-trustees and obtain written consent. Ahrens objected to imposing civil liability for a violation of the RPCs, but the court stated: "A trial court may properly consider the RPCs in an action by a client to recover attorney fees for the attorney's alleged breach of fiduciary duty."

Ethics Opinions

ABA:

Op. 02-428 (2002). This opinion addresses the responsibilities of a lawyer whose estate planning services are recommended (and perhaps paid for) by a potential beneficiary of the relative. "A lawyer who is recommended by a potential beneficiary to draft a will for a relative may represent the testator as long as the lawyer does not permit the person who recommends him to direct or regulate the lawyer's professional judgment pursuant to Rule 5.4(c). If the potential beneficiary agrees to pay or assure the lawyer's fee, the testator's informed consent to the arrangement must be obtained, and the other requirements of Rule 1.8(f) must be satisfied. If the person recommending the lawyer also is a client of the lawyer, the lawyer must obtain clear guidance from her as to the extent to which he may use or reveal that person's protected information in representing the testator. The lawyer should advise the testator that he also is concurrently performing estate planning services for the other person. Ordinarily, there is no significant risk that the lawyer's representation of either client will be materially limited by his representation of the other client; therefore, no conflict of interest arises under Rule 1.7."

Op. 05-434 (2005). This opinion is discussed in the text of the Commentary. It addresses the responsibilities of a lawyer who represents a client (testator) who asks the lawyer to draft a new will, the effect of which is to disinherit the testator's son whom the lawyer is representing on an unrelated matter. The Committee concluded that drafting the will is not directly adverse to the son, and the lawyer does not need the son's consent to do the will. The Committee also concludes that ordinarily this situation does NOT pose a significant risk of material limitation of the estate planning work unless (perhaps) the lawyer begins advising the testator about whether to disinherit the son. The Committee does point out scenarios under which the lawyer may not be able to do the will, on which we will not elaborate here.

California:

San Diego Op. 1990-3. This opinion discusses the position of a lawyer who is asked by a son or daughter to prepare a new will for the child's parent. The opinion concludes that the person who is to sign the instrument is the client of the lawyer:

As stated above, in our view the person who will be signing the document is clearly a client of the attorney, and must be treated as such. However, unless it is agreed upon in advance the Son or Daughter may also be considered clients of the attorney. If so, the provisions of Rule 3-310 apply. The attorney must disclose the potential conflicts of interest to the clients in writing, and obtain their informed written consent to the representation in order to proceed. Depending upon the specific facts, the conflicts of interest may be so great that the attorney would be well advised not to represent both even if the clients were willing to give their consent.

Maryland:

Op. 2003-08. A lawyer who chairs his church's committee that promotes legacy giving from its parishioners may not prepare wills for parishioners who want to bequeath property to the church. The panel ruled that the lawyer's responsibility for furthering the church's financial interests would conflict with his representation of the parishioners and contravene MRPC 1.7(b). If the church is also the lawyer's client, then MRPC 1.7(a) may be violated.

Missouri:

Op. 2006-0073. A lawyer may offer a discount on estate planning to clients who leave a portion of their estates to a not-for-profit organization if the lawyer clearly and fully discloses his relationship with the organization and objectively advises and consults with the clients about their options and the effects of their choices.

Nebraska:

Op. No. 12-08. Lawyer's representation of co-trustees who were also beneficiaries of the trust was challenged on ground that the co-trustees/beneficiaries had conflicts. The validity of a trust amendment was being challenged by two other beneficiaries, and if successful their claim would reduce the share of the co-trustees/beneficiaries. The Advisory Committee concluded that there was no conflict since trustee clients were seeking to enforce the terms of the trust as written, and there was no conflict with another client or former client.

Nevada:

Op. 47 (2011). A lawyer who is on the board of directors of a company may not prepare the estate for a client who wishes to name the company as a beneficiary, at least not without a conflicts waiver. The lawyer is a fiduciary for the company and owes it duties of loyalty, impartiality, and confidentiality

which would preclude him from fully disclosing to the estate planning client company information that might be relevant. Further, the lawyer's information as to the company's financial situation and his interest in furthering the economic goals of the company would create a conflict of interest were he to do the estate planning in question. If the lawyer reasonably believes that the client will not be adversely affected, however, he is entitled to ask the client for consent after full disclosure of the conflicts. The committee relied, among other things, on Maryland Bar Association Ethics Opinion 2003-08, *supra*, to the same effect as to a lawyer who sits on a church's legacy committee.

New Hampshire:

Op. 2008-09/1. A lawyer may, at a client's request, draft an estate-planning document naming the lawyer as a fiduciary, but first must ensure that he is competent to perform the fiduciary role; discuss the client's options in choosing a fiduciary, including the relative costs of having the lawyer or someone else serve as fiduciary; and make a reasonable determination whether his personal interest in serving as fiduciary requires the client's informed consent. A lawyer may not nominate himself by default to serve as fiduciary in estate-planning documents he presents to a client. If a lawyer actively solicits clients to nominate the lawyer to serve as fiduciary, Rule 1.8(a) may apply.

New York:

Nassau County Op. 90-11 (1990). The lawyer who represented a decedent's former wife in advancing a claim against the decedent's estate may not later undertake to represent the decedent's personal representative. "Because the interests of the former wife are different from the interests of the estate, inquiring counsel must not undertake to represent the estate. (See Disciplinary Rule 5-105)."

Op. 836 (2010). Lawyer who previously represented an incapacitated client in guardianship proceeding inquired whether lawyer could now represent client and the guardian in proceeding to terminate the guardianship. The opinion concludes that this is a consentable conflict (assuming lawyer reasonably believes that lawyer will be able to competently represent both clients) that requires informed consent of both the client and the guardian. Obtaining informed consent of client must take into account any limits on client's capacity, but client's existing determination of incapacity does not bar obtaining client's consent. The requirement of the court's approval of the termination of the guardianship mitigated concerns about the client's ability to give informed consent.

North Carolina:

2000 Op. 9 (2001). Lawyer who is also a CPA may provide legal services and accounting services from the same office if he discloses his self-interest. Lawyer may offer legal services to existing client of accounting practice because this is a prior professional relationship with a prospective client.

North Dakota:

Op. 14-01. The lawyer prepared an estate plan for a husband and wife and represented husband in a child support matter, and never sent them a termination letter. Lawyer also drafted a power of attorney for wife's aunt, appointing wife as agent. The aunt revoked the power of attorney and appointed new agents, and wanted the lawyer to represent her in suing the husband and wife to recover funds. The lawyer could not represent the aunt because the husband and wife were still the lawyer's clients (1.7) and the matter is substantially related to lawyer's prior representation of the couple (1.9).

Ohio:

Op. 2001-4. It is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer's interest in selling an annuity and a client's interest in receiving independent professional legal counsel free of compromise are differing interests. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance.

Oregon:

Op. 525 (1989). A lawyer who is on the board of a charity and also represents it may not represent both the charity and a donor in a unitrust transaction. However, the lawyer may draft the donor's will in which the charity is designated as a beneficiary if the lawyer discloses his representation of the charity to the donor.

Pennsylvania:

Op. 2013-005. The attorney represents an estate as plaintiff in litigation against a company for negligent damage to property. The estate's administrator was added as defendant under a contributory negligence theory. The estate and the administrator want the lawyer to represent both of them, but the lawyer cannot represent both because the estate has a directly adverse interest in establishing liability of the administrator. The lawyer cannot use or disclose any harmful information obtained from the administrator as a potential client.

South Carolina:

Op. 90-16 (1990). With full disclosure to its clients of all relevant factors, a law firm may refer estate planning clients to an insurance agency in which the law firm owns a 50% or greater interest. A similar arrangement regarding title insurance had previously been approved.

Washington:

Op. 2107 (2006). Insofar as the duties of a guardian for an incapacitated person diverge from those owed by the trustee of a special needs trust for the same person, for a lawyer who is guardian and counsel for the guardian to accept appointment as the trustee of a special needs trust would create an actual or a potential conflict. "[S]ince the incapacitated person probably lacks the mental capacity to understand a full disclosure and consent to the dual representation, the conflict cannot be waived pursuant to RPC 1.7(a) or 1.7(b)." Moreover, accepting the role of trustee for compensation would constitute a business transaction with a client, the "guardianship," which would be governed by Rule 1.8(a). Accordingly, some other person should be appointed to serve as trustee.

Joint Representation: Disclosures

Cases

Louisiana:

In re Hoffman, 883 So. 2d 425 (La. 2004). An attorney represented three siblings in a will contest. The court held that the attorney violated MRPC 1.7(b) by failing to obtain the informed consent of each client to the representation. The attorney relied upon the daughter of one of his clients to prepare an

affidavit of representation, which in turn the attorney's other clients signed without having the benefit of the advice of counsel. More importantly, according to the court, the attorney's failure to appreciate the potential conflict between his clients led directly to his violation of MRPC 1.8(g) in the course of settling their claims. Instead of giving all three clients the opportunity to exercise their absolute right to control the settlement decision, the attorney, after obtaining only one client's consent, accepted a settlement proposal on behalf of all of his clients. The attorney then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of only one client and over the objection of another client.

Ethics Opinions

Florida:

Eth. Op. 95-4 (1997). This opinion discusses whether a lawyer engaged in estate planning has an ethical duty to counsel a husband and wife concerning any separate confidences which either the husband or wife might wish the lawyer to withhold from the other. It holds that, until such time in a joint representation that an objective indication arises that the interests of the husband and wife have diverged or it objectively appears to the lawyer that a divergence of interests is likely to arise, a conflict of interest does not exist and, thus, the disclosure and consent requirements under the Florida Rules are not triggered.

North Carolina:

Op. RPC 229 (1996). This opinion holds that a lawyer who jointly represents a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will adversely affect the interests of the other spouse or each spouse has agreed not to change the estate plan without informing the other.

Oregon:

Op. 2005-86. Ordinarily it is permissible for a lawyer to jointly represent and prepare wills for a married couple. "A lawyer is charged with all knowledge that a reasonable investigation of the facts would show. ... Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when joint wills are contemplated, because the interests of spouses in such matters will generally be aligned. This will not always be the case, however. For example, ... spouses with children by prior marriages may have very different opinions concerning how their estates should be divided. *See, e.g., In re Plinski*, 16 DB Rptr. 114 (2002) (husband and wife, who each had adult children from previous marriages, had interests that were adverse because value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband on financial issues)." Absent further facts, opinion "declined to state whether, or under what circumstances, the interests of the spouses would be directly adverse or that a significant risk of materially limited representation would result in such cases."

Joint Representation: Co-Fiduciaries

Cases

New York:

In re Flasterstein's Estate, 210 N.Y.S.2d 307, 308 (N.Y. Sur. 1960). In this case the surrogate court denied a motion to disqualify a law firm that represented the executors, who were also residuary beneficiaries, because of an alleged inherent conflict of interest. The court observed:

It is axiomatic that executors and fiduciaries generally are entitled to representation by attorneys of their own choosing. The fact that the executors are financially interested in the estate as residuary legatees and may profit individually through the services of their attorneys is immaterial and does not lead to a conflict of interest. In instances where an executor may assert a personal claim against the testator or the estate it may be claimed that an attorney representing the executor in his representative capacity and individually appears for conflicting interests as the allowance of such a claim may reduce the shares of others beneficially interested in the estate. Such is not the situation here presented....

Ethics Opinions

Pennsylvania:

Op. 2006-20. It is permissible for a lawyer to represent a resigning trustee of a testamentary trust and also the successor trustee (who is a remainder beneficiary), notwithstanding the temporary overlap between the two representations and the potential for conflict, provided that the successor trustee will not oppose the accounting presented by the resigning trustee. Procedurally, the resigning trustee should prepare a preliminary verified accounting for the proposed successor and the successor should file a conditional waiver to the effect that “the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of successor trustee does not intend to object to the official account when filed; and the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of remainder beneficiary of the trust does not intend to object to the official account when filed.”

Virginia:

Va. Op. 1473 (1992). A lawyer who was retained “to represent the interests of the estate” is treated as having represented the co-executors (each of whom had separate counsel) and not “the estate.” The same lawyer may represent two of the executors in their capacity as trustees of a testamentary trust only with the consent of the third co-executor.

Va. Op. 1387 (1990). A law firm of which a co-fiduciary is a member may be retained to represent the fiduciaries with the consent of all fiduciaries. However, “the committee urges that the co-fiduciaries rather than the fiduciary/partner maintain the necessary communications with the firm throughout the administration of the estate.”

Appointment of Scrivener as Fiduciary

Cases

Tennessee:

Petty v. Privette, 818 S.W.2d 743 (Tenn. App. 1989). The court held that the scrivener of a will that appointed him as executor could be protected by the terms of an exculpatory clause that exonerated him from liability for any act of negligence that did not amount to bad faith, if the scrivener rebuts the presumption that the inclusion of the exculpatory clause in the will resulted from undue influence exerted by the scrivener.

Washington:

Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 980 (Wash. 1987). In this case excessive compensation was recovered from the scrivener of a will who was subsequently appointed co-trustee of a large testamentary trust. The court held that an exoneration clause did not protect the scrivener against liability: “As the attorney engaged to write the decedent’s will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect.”

Wisconsin:

In re Disciplinary Proceedings Against Felli, 291 Wis. 2d 529, 718 N.W.2d 70 (2006). An attorney was suspended for three years for drafting estate planning documents naming the attorney as a fiduciary in violation of Rule 1.7 and 7.3. The court distinguished its earlier case, *State v. Gulbankian*, 196 N.W.2d 733 (Wis. 1972), in which it had warned against this practice but had declined to discipline the lawyers involved in that case.

Ethics Opinions

Georgia:

Op. 91-1 (1991). A lawyer who neither promotes his or her appointment nor exercises undue influence on the client may draft an instrument appointing the lawyer as fiduciary if the lawyer makes full disclosure to the client, obtains the client’s written consent, and charges a reasonable fee.

Illinois:

Op. 99-08, 2000 WL 1597066. Lawyer engaged to prepare a trust for a client may, at the client’s direction, include a provision directing the trustee administering the trust to retain the lawyer for legal services, so long as (i) adequate disclosure (including disclosing that the trustee also would have the right to discharge the lawyer as its lawyer) is made, (ii) the client consents to the representation, and (iii) the lawyer concludes that his representation of the client will not be adversely affected by including such a provision.

Massachusetts:

Op. 06-01 (2006). There is no per se rule against a lawyer drafting an estate planning document that names the lawyer as a fiduciary and, as such, retaining themselves as counsel, but these are personal interests of the lawyer that require analysis under Rule 1.7. The possibility of material limitation requires the lawyer to satisfy himself that the role is in the best interests of the client and will typically

require discussion of alternatives and of the method for calculating fees as fiduciary and as counsel. There is no requirement that Rule 1.8(a) be followed, but comment 8 to Model Rule 1.8 provides relevant guidance.

Michigan:

Eth. Op. RI 291 (1997). A lawyer who is drafting a will for a client may not suggest that he be named as personal representative or as trustee to serve without bond for a reasonable fee. However, the lawyer may accept the nomination if asked independently by the client.

New Jersey:

Eth. Op. 683 (1996). This opinion holds that, subject to the applicable statutory and substantive case law, as a matter of professional ethics, a scrivener may properly prepare a will naming himself as a fiduciary and may properly be paid for services in both capacities. In doing so, counsel should be aware of the disclosure and consultation requirements set forth in MRPC 1.7(b)(2).

New York:

N.Y. Op. 610 (1990). This opinion states that, “[e]xcept in limited and extraordinary circumstances, an attorney should not serve as draftsman of a will that names the lawyer as an executor and as a legatee.” The opinion refers to Surrogate’s Court Rules in Suffolk County that require that a will appointing an attorney as fiduciary be accompanied by an affidavit of the testator setting forth the following:

- (1) that the testator was advised that the nominated attorney may be entitled to a legal fee, as well as to the fiduciary commissions authorized by statute;
- (2) where the attorney is nominated to serve as a co-fiduciary that the testator was apprised of the fact that multiple commissions may be due and payable out of the funds of the estate; and
- (3) the testator’s reason for nominating the attorney as fiduciary.

South Carolina:

S.C. Op. 91-07 (1991). It is not unethical for a lawyer to prepare a will at the direction of a client that names the lawyer as personal representative and trustee except under the circumstances proscribed under MRPC 1.8(c).

Virginia:

Op. 1358 (1990). A lawyer may draft a will naming the lawyer as personal representative or trustee or in which the fiduciary is directed to retain the lawyer as attorney if the client consents after being informed of alternate representatives, all fees involved, and of the lawyer’s own financial interest. A lawyer’s suggestion of himself as fiduciary may constitute improper solicitation.

Related Secondary Sources

Restatement (Third) of the Law Governing Lawyers (2000) §135 (A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient) addresses conflicts of interest that arise as a result of serving as a fiduciary, such as a personal representative or trustee. See, in particular, comment c and related illustrations.

MRPC 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client- lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not:
 - (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
 - (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

ACTEC COMMENTARY ON MRPC 1.8

Business Transactions with Client. MRPC 1.8(a) provides mandatory procedural safeguards when a lawyer engages in business transactions with a client. As explained in this Commentary, lawyers often provide services for clients that could be considered business transactions but should not be so considered. Like any lawyer, an estate lawyer who desires to enter into a business transaction with a client should follow the procedures set forth in MRPC 1.8(a). Lawyers who intend to take all or a part of their fee in the form of an interest in a client's business or other nonmonetary property must comply not only with the primary fee rule (MRPC 1.5), but also with the more demanding requirements of MRPC 1.8(a). MRPC 1.8, cmt [1].

As to lawyers who seek or receive a commission or referral fee from a third party when providing legal services to a client, see ACTEC Commentary on MRPC 1.5 (Rebates, Discounts, Commissions or Referral Fees).

Prohibited Transactions. Unless the lawyer complies with the requirements of MRPC 1.8(a), a lawyer generally should not enter into purchase or sale transactions with a client or with the beneficiaries of a fiduciary estate if the lawyer is serving as fiduciary or as counsel to the fiduciary. Model Rule 1.8(a) "applies to lawyers purchasing property from estates they represent." MRPC 1.8, cmt [1].

Gifts to Lawyer. MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term "related person" is defined in MRPC 1.8(c) and may include a person who is not related by blood or marriage but has a close familial relationship. In principle, therefore, an unmarried person living with another person in a committed marriage-like relationship, should qualify as "related" under this definition. It should also encompass persons in a stepchild/stepparent relationship and persons who have been raised by "de facto" parents but who have never formally been adopted, provided there is, in fact, a "close familial relationship." However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. See MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules).

For the purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint

tenancy with right of survivorship, and pay-on-death and trust accounts. As noted in comment [8], the rule “does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position.” See also ABA Formal Opinion 02-426 (2002). The client’s appointment of the lawyer as a fiduciary is not a gift to the lawyer and is not a business transaction that would subject the appointment to MRPC 1.8. Nevertheless, such an appointment is subject to the general conflict of interest provisions of MRPC 1.7 (Conflict of Interest: Current Clients).

Exculpatory Clauses. Under some circumstances and at the client’s request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office. (An exculpatory provision is one that exonerates a fiduciary from liability for certain acts and omissions affecting the fiduciary estate.) The lawyer should not include an exculpatory clause without the informed consent of an unrelated client. An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary.

Payment of Compensation by Person Other than Client. It is relatively common for a person other than the client to pay for the client’s estate planning services. Examples include payment by a parent or other relative or by an employer. 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.

Example 1.8-1. Father (*F*), a client of Lawyer (*L*), has asked *L* to prepare an irrevocable trust for *F*’s daughter (*D*), who will soon attain her majority. *D* will be the settlor, since *F* wants *D* to transfer property to the trust that *D* will be entitled to receive from a custodianship that was established for *D* under the Uniform Transfers to Minors Act. *F* has indicated that he would pay the cost of *L*’s representation of *D* in connection with the preparation of the trust. Before undertaking to represent *D*, *L* should inform *F* regarding the requirements of MRPC 1.8—particularly that *L* must be free to exercise independent judgment in advising *D* in the matter. *L* must also obtain *D*’s informed consent to *L* being compensated by *F*. Since *F* is a client, *L* must be satisfied that representing both *F* and *D* is permissible. If there is significant risk that the *L*’s representation of *D* will be materially limited by the lawyer’s own interests in the fee arrangement or by *L*’s responsibilities to *F*, then *L* must be able to reasonably conclude that it will be possible to competently and diligently represent both clients and the consent of each must be confirmed in writing. See ACTEC Commentary to MRPC 1.7 (Conflict of Interest: Current Clients). If *L* cannot represent both *F* and *D* consistent with the provisions of MRPC 1.7 (Conflict of Interest: Current Clients), *L* should decline to represent *D*. *L* should not prepare the trust at *F*’s request without meeting with *D* personally—just as *L* should not draw *D*’s will without meeting with her personally.

Example 1.8-2. After a review of various forms of fringe benefit programs, Employer (*E*) is introduced to Lawyer (*L*) for the purpose of having *L* provide estate planning services for those of *E*’s employees who desire such services. *E* agrees to pay *L* for providing the contemplated professional services “that will benefit *E*’s employees.” Provided each employee gives an informed consent to *L*’s representation of the employee under the circumstances, and provided *L* exercises independent judgment on behalf of each employee-client, *L* may render the services requested by each employee.

Example 1.8-3. *L* represents Charity. Charity contacts *L* and tells her that a donor wishes to leave his estate entirely to Charity as long as Charity will cover the costs of drafting the Will. Charity asks *L* to

meet with the client and draft his Will, with the understanding that the Charity will pay L's fees. L should inform Charity regarding the requirements of MRPC 1.8—particularly that L must be free to exercise independent judgment in advising donor in the matter, and that confidentiality of information regarding L's representation of donor will be maintained, even if donor's intentions regarding disposition of his estate vary from what Charity currently understands. L must also obtain donor's informed consent to L being compensated by charity. Since Charity is a client, L must be satisfied that representing both Charity and donor is permissible. If there is significant risk that the L's representation of donor will be materially limited by the lawyer's own interests in the fee arrangement or by L's responsibilities to Charity, then L must be able to reasonably conclude that it will be possible to competently and diligently represent both clients and the consent must be confirmed in writing.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Gifts to Lawyer

Statutes

California:

California has enacted detailed legislation voiding any gift to a “disqualified person,” a term defined to include any individual having a fiduciary relationship to the transferor who drafts, transcribes or causes to be drafted or transcribed any instrument of transfer (i.e., will, trust, deed, etc.), relatives by blood or marriage of or cohabitants with such persons, and partners, shareholders and partnerships or corporations in which disqualified persons have a ten percent or more interest, and employees of any such entity. Exceptions to disqualification include: (i) if the otherwise disqualified person is related by blood or marriage to or a cohabitant with the transferor; (ii) if an *independent* attorney certifies that the transfer was not the product of fraud, menace, duress or undue influence. Cal. Prob.C. §§21380-92.

Texas:

Texas Probate Code §58b (adopted in 1997) provides in subsection (a): “A devise or bequest of property in a will to an attorney who prepares or supervises the preparation of the will or a devise or bequest of property in a will to an heir or employee of the attorney who prepares or supervises the preparation of the will is void.” Subsection (b) exempts “a bequest made to a person who is related within the third degree by consanguinity or affinity to the testator....”

Cases

Alabama:

Cooner v. State Bar, 59 So.3d 29 (Ala. 2010). Lawyer prepared a trust for his uncle by marriage, the surviving husband of his deceased aunt. The trust drafted by the lawyer named the lawyer as one of 13 beneficiaries of the residuary estate. The court concluded that the phrase “related to” in 1.8(c) referred to relatives by marriage as well as blood, and the death of the blood relative (his aunt) did not terminate the necessary relationship for the relevant exception to apply. Accordingly, he did not violate Rule 1.8(c).

California:

Estate of Auen, 35 Cal. Rptr. 2d 557, 562-563 (Cal. App. 1994). This decision upholds the invalidation of certain *inter vivos* gifts and a will that made gifts to testator's lawyer and her family because of the presumption that the lawyer exercised undue influence over the client. "The relation between attorney and client is a fiduciary relation of the very highest character.... Transactions between attorneys and their clients are subject to the strictest scrutiny.... These general principles applicable to the attorney-client relationship support the trial court's reasoning that, when an attorney is acting as an attorney, any benefit other than compensation for legal services performed would be 'undue.'"

Connecticut:

Sandford v. Metcalfe, 110 Conn. App. 162, 954 A.2d 188 (2008), *appeal denied* 289 Conn. 931, 289 Conn. 931, 958 A.2d 160 (2008). It was undisputed that Sandford, a lawyer licensed in NY, went to the home of her ill friend in Connecticut, who asked her to draft a will for her which would leave a substantial bequest to Sandford; that Sandford told her she was not licensed in Connecticut and could not draft the will; but that she relented and drafted a will in which she was the beneficiary of half of decedent's estate and a handyman the other half. Decedent died five days later at the hospital and her heirs at law failed to have the will denied probate and then sought to void the gift to Sandford on grounds of public policy. Noting that the permissibility of the gift under RPC 1.8(c) and/or the alleged unauthorized practice had not been adjudicated in the case, the court held it had no equitable power to void the gift to Sandford.

Florida:

Agee v. Brown, 73 So.3d 882 (Fla. 2011). Beneficiaries under a prior will filed will contest claiming that a later will was procured by undue influence. Personal Representative under later will answered that beneficiaries of prior will did not have standing, because the prior will was drafted by the attorney for the decedent who was named as a beneficiary and the will was therefore void. Court held that under 1.8(c), there was a rebuttable presumption of undue influence because the beneficiary/attorney drafted the will, but that did not change the status of the other beneficiaries under the will contest statute as interested persons with standing to challenge the later will.

Louisiana:

Succession of Tanner, 895 So.2d 584 (La. App. 2005). Legatees under the will of Tanner challenge a residuary bequest to his attorney valued at more than \$500,000 on the ground that it violated Rule 1.8(c). The challenge was rejected based on evidence that the beneficiary lawyer had not drafted the will but had asked, on the client's behalf, another lawyer in his office building (with whom he was not professionally affiliated) to do so because he knew the client intended a bequest of half the residue to him and knew he could not draft such a will. The drafter independently conferred with the client and satisfied himself that this was the client's intent, and assisted him to execute the will.

In re Cabibi, 922 So.2d 490 (La. 2006). Attorney's daughter, a notary employed by him, drafted and typed a codicil at a client's request that made a substantial bequest to the attorney, her father, and sent it to the client. She did this while her father was absent from the office and without his knowledge. The client handwrote the codicil, based on the typed language, executed it as a holograph, and returned it to the office. Upon his return to the office, the attorney reviewed the codicil and filed it. He did not view the testator as a client but as a long-time personal friend who he knew had made similar bequests (apparently not drafted by the attorney) in the past. When she died, the codicil was challenged and set

aside because of the bequest to the attorney. In disciplinary proceedings, the disciplinary board recommended a three-month suspension, but the Supreme Court of Louisiana concluded that discipline was inappropriate. Although a technical violation had occurred which attorney should have corrected when he discovered the codicil, given the long-time friendship between the attorney and the decedent and his limited interaction with her as an attorney, discipline was not imposed.

Maryland:

Attorney Grievance Com'n v. Saridakis, 402 Md. 413, 936 A.2d 886 (Md. 2007). The testator was adamant that she wanted to give her estate planner a substantial bequest (\$ 413,281.00 as it turned out). He resisted drafting such a bequest but when his client told him to obtain independent counsel, he drafted the bequest and asked another estate planner with whom he shared office space to serve as independent counsel for this gift. (Maryland's version of Rule 1.8(c) has an express exception where the client is represented by independent counsel for the gift.) Serving in that role, the other lawyer met with the testator privately, satisfied himself that she was competent and intended the gift, and helped her execute the will. The Court held that while this was a good faith effort by the beneficiary/estate planner to comply with Rule 1.8(c), it was not good enough. The office-sharing lawyer is not sufficiently independent and so the beneficiary violated 1.8(c); the act was also prejudicial to the administration of justice and so also violated Rule 8.4(d). Nonetheless, the Court ordered the petition dismissed and let the attorney off with a warning.

Montana:

Stanton v. Wells Fargo Bank Montana, N.A., 335 Mont. 384, 152 P.3d 115 (Mont. 2007). Lawyer who was the ex son-in-law of decedent client drafted trust amendments, a will, and a stock gift of which he was the beneficiary. Court acknowledged that this drafting violated Rule 1.8(c) but refused to raise a presumption of undue influence and repeated earlier conclusions that "a violation of a professional conduct rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." It affirmed summary judgment in favor of the lawyer/drafter.

Nevada:

In re Jane Tiffany Living Trust 2001, 177 P.3d 1060 (Nev. 2008). Although the estate planner seems to have violated Nevada's equivalent of former MR 1.8(c) by drafting a trust which named his partner as the beneficiary of a house that was transferred to the trust, the court held that this breach of the rules did not create a private right of action in heirs seeking to set aside the gift and the beneficiary/attorney had rebutted the presumption of undue influence that arose as a result of the gift.

New Hampshire:

Whelan's Case, 619 A.2d 571, 573 (N.H. 1992). In this case a lawyer was censured for drafting a will in which the testatrix left her residence to the scrivener's partner. The lawyer did not violate MRPC 1.8(c) or MRPC 1.10. Instead, the lawyer violated MRPC 5.1(c)(2) because the lawyer is responsible for the lawyer's partner's violation of MRPC 1.8(c) and MRPC 8.4(a). In its opinion the court observed that: "The respondent's defense is basically one of ignorance of the Rules of Professional Conduct, which is no defense. We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct."

New York:

Will of Cromwell, Dec'd, 552 N.Y.S.2d 480 (N.Y. Sur. 1989). The gift of \$500,000 to an attorney draftsman was held valid where it was not procured by fraud or undue influence and where there was a longstanding professional relationship between the attorney and the testator involving close family ties.

North Dakota:

In re Disciplinary Action Against Boulger, 637 N.W.2d 710 (N.D. 2001). Attorney drafted will for client/friend that gave attorney a 20% contingent devise of a large estate. The terms of the contingency were that the testator's sons would have to predecease the testator, without issue. The contingency never materialized, and the attorney received no property from the estate. Nevertheless, the attorney was reprimanded. MRPC 1.8 prohibits an attorney from drafting an instrument giving herself a substantial gift. The extreme unlikelihood of the occurrence of the contingencies is immaterial. Simply because a gift is contingent, it is not rendered "insubstantial."

Pennsylvania:

In re Bloch, 625 A.2d 57, 62-63 (Pa. Super. 1993). A will that named the scrivener's father and his paramour as residuary legatees was not proved to be the result of undue influence. The court observed:

To the extent that the scrivener's conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, MRPC 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct.... We have been presented with no evidence of undue influence engaged in by the scrivener as to the decedent, nor was there proof of a weakened intellect associated with the testatrix during the period the will in question was prepared.... Accordingly, we are not prepared to invalidate the will on the grounds that the scrivener acted in violation of the Code of Professional Conduct.

Ethics Opinion

New Hampshire:

Op. 2011-12/7 (4/11/12). An estate planning client wishes to leave (a) a gift in trust to his brother (who happens to be lawyer's son-in-law) of a sports car; (b) a gift in trust to his sister-in-law (lawyer's daughter) of a valuable painting; (c) a \$50,000 endowment in trust to a hospital on whose endowment committee both client and lawyer (who is chair) sit; and (d) an unsolicited outright gift of theater tickets and the price of a nice dinner to lawyer. The committee concluded that: (a) the gift to client's brother fits within the exception for gifts to those in a close familial relationship with the client (unless the client and the brother are estranged); (b) the gift to the lawyer's daughter (client's sister-in-law) is presumptively prohibited and would only fall within the exception if factual analysis were to show that client has a close familial relationship also with the sister-in-law comparable to other relationships clearly covered in MR 1.8(c); (c) the endowment gift is not precluded by MR 1.8(c) because it does not personally benefit lawyer, but must be analyzed under MR 1.7 given the potential conflict caused by lawyer's interest in furthering the hospital's goals. The lawyer should therefore not proceed here without reasonably concluding that he can draft such a gift competently and impartially and obtaining the client's informed consent – relying on Maryland Bar Association Ethics Op. 2003-08. Finally, the unsolicited gift of theater and dinner tickets was permissible as an insubstantial gift given that the client's estate was \$3 million.

Transactions with Client or Beneficiary

Cases

California:

Sodikoff v. State Bar, 121 Cal. Rptr. 467 (1975). In this disciplinary action the court imposed a six-month suspension on a lawyer who represented the administrator of an estate who violated a position of trust and confidence that he voluntarily assumed *vis-a-vis* an elderly beneficiary, who lived in England. The lawyer, who had encouraged the beneficiary to sell real property, falsely advised the beneficiary that “one of our clients by the name of Acquistate, a California corporation” had made an offer to buy the property for \$20,000. The lawyer failed to disclose to the beneficiary that Acquistate was not a client of the law firm but was the lawyer’s alter ego. The lawyer also failed to disclose that the property had been appraised at \$46,500.

Florida:

The Florida Bar v. Doherty, 94 So.3d 443 (Fla. 2012). Doherty did estate planning for a client who also named him as trustee and personal representative. In the process of his estate planning for the client, the lawyer—who was a certified financial advisor and sold investment products—tried to sell annuities to the client without complying with RPC 1.7(a)(2) or RPC 1.8(a). Lawyer did not appeal the conclusion that he had failed to disclose his conflict of interest as a financial products salesperson and obtain client consent to that conflict, but he appealed the conclusion that he had violated RPC 1.8(a). He argued that, since he was not the vendor of the annuities but only the broker/agent, he was not entering into a transaction with client. But the court rejected this analysis, concluding that RPC 1.8(a) sweeps in such a broker relationship. The court noted that comment 1 to MR 1.8(a) makes it clear that the rule “applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice.”

New Hampshire:

In re Coffey's Case, 152 N.H. 503, 880 A.2d 403 (2005). Lawyer was disbarred for taking advantage of an elderly client, with diminished capacity, during estate litigation. Client had acquired a house by right of survivorship, and lawyer was helping her to defeat claims to the house brought by dissatisfied estate heirs of one of the predeceasing joint tenants. When the client resisted his estimate of the likely cost of protecting her judgment on appeal, lawyer persuaded client to sell him a remainder interest in the house (she retained a life estate) in return for his fees, which were estimated at \$30,000 or more. The house was valued at \$200,000. The court found that he violated Rules 1.4, 1.5, 1.7, 1.8(a), 1.8(b) (using confidences to her disadvantage), and 1.8(j), among other rules.

New York:

McMahon v. Eke-Nweke, 503 F. Supp. 2d 598 (E.D.N.Y. 2007). This is an action to set aside a lease agreement entered into between plaintiff-lessor and an attorney who had an ongoing attorney-client relationship (including estate planning work) with the lessor. The attorney moved for summary judgment and this decision denies the motion finding genuine issues have been raised, among other things, on plaintiffs’ claims of unconscionability and breach of fiduciary duty because there was evidence presented that attorney failed to advise his client to seek independent advice and the attorney failed to disclose his conflict of interest as required by NY’s equivalent of Rule 1.8(a).

Ohio:

Stark Cty. Bar Assn. v. Marosan, 119 Ohio St.3d 113, 892 N.E.2d 447 (2008). Lawyer was disbarred after persuading a client to invest in a land trust established by the lawyer. The lawyer continued to represent the client and also to serve as trustee of the land trust and represent the trust. He did not advise the client of his conflict and the advisability of retaining separate counsel.

Washington:

LK Operating, LLC v. Collection Group, LLC, 279 P.3d 448, 449 (Wash. App. 2012). This case involved a complicated estate plan in which two law partners set up irrevocable trusts for the benefit of their children and then set up a company called LK Operating (“LKO”) to manage the trusts. Each trust was the sole shareholder of a corporation and the five corporations were the sole members of LKO. LKO contributed funds to a business started by a client of the attorneys. LKO and the clients went to court over a dispute as to exact percentage owned by LKO. The court held that the attorney who arranged for the LKO investment had violated both 1.7 and 1.8(a). The trial court had relied on the 1.7 violation to order rescission of the agreement. The appeals court found no Washington authority for granting rescission based on RPC 1.7 and refused to do so in this case, worrying that burden of the rescission remedy could easily fall on innocent clients who should not pay for “the sins of its lawyer.” The court of appeals, however, held that the 1.8(a) violation justified rescission. Even though the lawyer had not personally been a party to the transaction, the lawyer’s family interest in LKO was enough to trigger 1.8(a).

Ethics Opinions

Indiana:

Op. 1-2002. This opinion discusses three related issues faced by an attorney becoming a financial planner. In that capacity he may solicit by telephone, a practice forbidden to attorneys by MRPC 7.3. He may not, however, refer financial planning clients to another attorney for estate planning because the client was procured by telephone solicitation. The attorney may sell financial products to his law clients if he follows the narrow path left open for attorney-client transactions described in MRPC 1.8 including that the arrangement is objectively fair to the client, that the client be advised to seek counsel, and that the client consent to the arrangement in writing. It is also required that the attorney show that the non-lawyer activities can be distinguished from the law practice.

Missouri:

Informal Advisory Op. 20020024 (2002). It is allowable for an attorney to have a financial planning/insurance practice, independent of the attorney’s law practice. The attorney does not violate any ethics rules if he refers his legal clients to his financial planning/insurance practice so long as he advises the clients in writing of: (1) the differences in confidentiality, (2) the fact that he will receive compensation if they purchase the products from the attorney’s financial planning practice, and (3) that they have the right to consult with independent legal counsel regarding the advisability of purchasing these products. The attorney is allowed to let clients of the financial planning/insurance practice know that he is an attorney and his affiliation with his firm. Also, the attorney must notify the clients that they have the right to purchase the products from a different financial planning/insurance business. However, it would be a violation of “in-person solicitation” provisions under the model rules for the attorney, or

any employee of his financial planning/insurance business, to refer a client of that business to the attorney's legal practice.

New Jersey:

Op. 696 (2005). A lawyer representing an executor, or serving as executor, may list estate real property for sale with an agency that employs the lawyer's spouse only if Rule 1.8(a) is strictly complied with, regardless of whether the spouse will receive financial benefit as a result of the listing. If the lawyer represents the executor, the written consent of the executor will suffice; but if the lawyer is serving as the sole executor, nothing short of consent from all the beneficiaries will suffice to comply with Rule 1.8(a).

New York:

Op. 711 (1999). A lawyer may not sell long-term care insurance to the lawyer's own clients if the representation relates to estate planning or other matters or areas of practice that might reasonably cause the lawyer's professional judgment on behalf of the client to be affected by the lawyer's own financial or business interest.

Pennsylvania:

Op. 2003-16. Although it is conceivable that an estate planning attorney could be ethically permitted to sell life insurance, securities, or other financial products to his or her client as part of the estate planning process, it is highly unlikely that the lawyer could satisfy MRPCs 1.7(b), 1.8(a) and 1.8(f).

Rhode Island:

Op. No. 99-08 (1999). Lawyer may not provide both legal services and investment services to same client. Inherent conflict makes it impossible to satisfy requirements of fairness and reasonableness to client.

Appointment of Scrivener as Attorney for Fiduciary

Ethics Opinion

Mississippi:

Op. 73 (1990). A lawyer may at client's request draft a will naming scrivener as attorney for the estate.

Serving as Fiduciary and Counsel for Fiduciary

Statute

California:

California by statute prohibits lawyers who are serving as fiduciaries from collecting dual compensation unless such dual compensation is specifically authorized by the court in the conservatorship, guardianship or estate context or, in the case of *inter vivos* trusts, following advance notice to the beneficiaries and no objection by the beneficiaries. A purported waiver of these provisions in any instrument of transfer is void as against public policy. Cal. Prob. C. §§10804, 15687.

Cases

South Dakota:

In re Discipline of Martin, 506 N.W.2d 101 (S.D. 1993). In this case a lawyer was suspended for two years for multiple infractions including preparation of a will that named the lawyer as executor and trustee, which would allow him to manage the estate, including his debts to it. Lawyer never advised aged client to obtain independent advice.

Ethics Opinions

Missouri:

Op. 970130 (1997). If an attorney drafts an irrevocable life insurance trust for a client and the client requests that the attorney serve as the primary trustee of that trust, then the attorney may serve the primary trustee, but he must comply with all the requirements of MRPC 1.8.

Op. 970138 (1997). An attorney, who is a co-trustee of a 501(c) charitable trust, is not prohibited from performing legal services for the trust if the attorney follows the guidelines set out in MRPC 1.8. The legal services that the attorney may provide include “preparation of necessary documents for loans from trust funds secured by real estate.” The attorney, however, is prohibited from participating in the decisions of the trustees regarding hiring and compensation of the attorney to perform the legal services.

New Hampshire:

Op. 2008-09/1. A lawyer may, at a client's request, draft an estate planning document naming the lawyer as a fiduciary, but first must ensure that he is competent to perform the fiduciary role; discuss the client's options in choosing a fiduciary, including the relative costs of having the lawyer or someone else serve as fiduciary; and make a reasonable determination whether his personal interest in serving as fiduciary requires the client's informed consent. A lawyer may not nominate himself by default to serve as fiduciary in estate planning documents he presents to a client. If a lawyer actively solicits clients to nominate the lawyer to serve as fiduciary, Rule 1.8(a) may apply.

Other Issues

Cases

Ohio:

Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009). Lawyer was charged with misconduct relative to one client who had originally hired him to help him with a dispute involving his mother's estate. Concerned about the client's mental health and financial affairs, the lawyer loaned the client \$5,000 in violation of Rule 1.8(e) and had him execute a power of attorney appointing the lawyer as his attorney-in-fact. After having his client admitted to a hospital for depression, lawyer proceeded to clean up the client's property without his consent, and to lie about his condition and the condition of the property, to his children. The lawyer was suspended for one year with this suspension stayed on conditions.

Ethics Opinions

ABA:

Op. 02-428 (2002). Opinion addresses the responsibilities of a lawyer whose estate planning services are recommended (and perhaps paid for) by a potential beneficiary of the relative. "A lawyer who is recommended by a potential beneficiary to draft a will for a relative may represent the testator as long as the lawyer does not permit the person who recommends him to direct or regulate the lawyer's professional judgment pursuant to Rule 5.4(c). If the potential beneficiary agrees to pay or assure the lawyer's fee, the testator's informed consent to the arrangement must be obtained, and the other requirements of Rule 1.8(f) must be satisfied. If the person recommending the lawyer also is a client of the lawyer, the lawyer must obtain clear guidance from her as to the extent to which he may use or reveal that person's protected information in representing the testator. The lawyer should advise the testator that he also is concurrently performing estate planning services for the other person. Ordinarily, there is no significant risk that the lawyer's representation of either client will be materially limited by his representation of the other client; therefore, no conflict of interest arises under Rule 1.7."

North Carolina:

2006 Op. 11. "[O]utside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal." The opinion clarifies NC 2003 Formal Ethics Opinion 7 which addressed requests by third persons to draft powers of attorney. The 2003 opinion grounded its conclusions on MR 5.4(c) and MR 1.8(f), and explained that sometimes it is the person requesting the work that is the client rather than the intended signer. "[T]he purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer." But lawyers need to be vigilant that they are not being asked to assist an improper purpose in violation of MR 1.2(d). The 2006 opinion makes clear that the 2003 opinion applies to "all such legal documents for the principal upon the request of another."

MRPC 1.9: DUTIES TO FORMER CLIENTS

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
 - (1) whose interests are materially adverse to that person, and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ACTEC COMMENTARY ON MRPC 1.9

The completion of the specific representation undertaken by a lawyer often results in the termination of the lawyer-client relationship. See MRPC 1.16 (Declining or Terminating Representation). Thus, the completion of the administration of an estate normally results in the termination of the representation provided by the lawyer to the personal representative. The execution of estate planning documents and implementation of the client's estate plan may, or may not, terminate the lawyer's representation of the client with respect to estate planning matters. In such a case, unless otherwise indicated by the lawyer or client, the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive. However, following implementation of the client's estate plan, the lawyer or the client may terminate the representation by giving appropriate notice, one to the other. Even if the representation is terminated, the lawyer continues to owe some duties to the former client. As stated in the Comment to MRPC 1.9, "[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest."

The lawyer who formerly represented a client in connection with an estate or trust matter may not, without the informed consent of the former client, confirmed in writing, represent another person in the same or a substantially related matter if that person's interests are materially adverse to those of the former client. For example, a lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's claims against the trust by invading the assets of the trust. Similarly, the lawyer may not, without the informed consent of a former client, confirmed in writing, use to the detriment of the former client any confidential information that was obtained during the course of the prior representation. See MRPC 1.7 (Conflict of Interest: Current Clients) (addressing the effectiveness of an advance waiver); MRPC 1.10 (Imputation of Conflicts of Interest: General Rule) (regarding disqualification of a firm with which the lawyer is or was formerly associated).

MRPC 1.9 may be implicated following the termination of a joint representation.

Example 1.9-1. Lawyer (*L*) represented Husband (*H*) and Wife (*W*) jointly in connection with estate planning matters. Subsequently *H* and *W* were divorced in an action in which each of them was separately represented by counsel other than *L*. *L* has continued to represent *H* in estate planning and other matters. Because *W* is a former client, MRPC 1.9 imposes limitations upon *L*'s representation of *H* or others. Thus, unless *W* gives informed consent, confirmed in writing, MRPC 1.9(a) would prevent *L* from representing *H* in a matter substantially related to the prior representation in which *H*'s interests are materially adverse to *W*'s, such as an attempt to modify or terminate an irrevocable trust of which *W* was a beneficiary. However, after the marital dissolution is final, amending *H*'s estate plan to remove *W* as a beneficiary, consistent with state law and the dissolution decree, should not be considered a conflict. Also, under MRPC 1.9(c), *L* could not disclose or use to *W*'s disadvantage information that *L* obtained during the former representation of *H* and *W* in estate planning matters without *W*'s informed consent, confirmed in writing. For example, *L* could not use on behalf of one of *W*'s creditors information that *L* obtained regarding *W*'s financial condition or ownership of property. Subject to these

limitations, it is possible that L could represent H and W concurrently with respect to their now separate estate plans.

As noted in the Comments to MRPC 1.9, matters are “substantially related” for purposes of the Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. MRPC 1.9(c)(1) (use of confidential information to the disadvantage of a former client permissible when the information has become “generally known”). Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

California:

Fiduciary Trust Int’l of CA v. Superior Court, 218 Cal. App. 4th 465 (Cal. App. 2013). This case is a cautionary tale about conflicts of interest when an attorney prepares an estate plan for a couple (sometimes a long-term client and the spouse) and then has an impermissible conflict in later disputes because of the representation of the spouse. Attorney drafted wills in 1992 for H and W that provided upon H’s death, his significant separate property was to be put into a credit trust and QTIP trust for the life of W, remainder to his 3 children from prior marriage and their joint child. W’s will provided that upon her death her estate would be distributed to the trusts set up under H’s Will. H died, and W revised her will to give her entire estate (\$80M accumulated from distributions from the QTIP) to her daughter, thus cutting off the 3 stepchildren. Her executor claimed that the QTIP was required to pay the estate taxes on W’s \$80M estate (based on language in H’s will) but the trustee of the QTIP (represented by firm where original attorney practiced) objected. W’s executor moved to disqualify the trustee’s law firm because of the prior representation of W. Trial court denied, but on appeal court disqualified, holding that disqualification was required because prior representation of W was direct and substantially related to the current dispute. Court rejected arguments that disqualification not necessary because unlikely the lawyer had obtained confidential information when doing the estate plan (“The California Supreme Court has also repeatedly held that the disqualification rules are not merely intended to protect client confidences or other ‘interests of the parties’; rather, ‘[t]he paramount concern ...[is] to preserve public trust in the scrupulous administration of justice and the integrity of the bar.’”), and arguments that joint representation with client consent allows later representation of one of the parties.

Florida:

Yang Enters. v. Georgalis, 988 So. 2d 1180 (Fla. App. 2008). Plaintiffs in a trade secret case against a former employee sought to disqualify counsel for employee on the ground that another office of the

employee's law firm had done estate planning work for plaintiffs and continued as their lawyer. Court rejected claim that plaintiffs were current clients of the estate planning firm and commented that they had no legal basis for disqualification as former clients. But even had there been such a basis for disqualification at the time the employee hired their former estate planning firm, by waiting five years before raising the conflict question, the plaintiffs had waived the issue.

Illinois:

Gagliardo v. Caffrey, 800 N.E.2d 489 (Ill. App. 2003). An attorney, who formerly represented an estate for a limited time period, was disqualified from representing the executor individually in beneficiary's action against her. The court noted that, where the estate beneficiaries challenge the executor, the attorney for the estate's executor does not have an attorney-client relationship with the beneficiaries. In this case, however, the sole beneficiary never challenged the executor's administration of the estate. Therefore, the court concluded that, for the time the attorney represented the estate, he represented the sole beneficiary thereby precluding him from representing the executor individually in that beneficiary's action against her.

Estate of Klehm, 363 Ill. App. 3d 373, 842 N.E.2d 1177 (2006). In a citation proceeding to recover estate assets from certain relatives, the relatives moved to disqualify counsel for the executor on the ground that the law firm had previously represented them. The trial court granted the motion, but the appeals court reversed. Insofar as the lawyers had represented the relatives, for a time, as co-executors, it did not represent them personally and so this did not establish the requisite attorney-client relationship. Insofar as the firm did represent the relatives personally as to certain real estate transactions and estate planning, the relatives had failed to show that these services were substantially related to the current action. Finally, even if it were, the relatives had waived their right to complain of the potential conflict by waiting four years to bring the motion to disqualify.

Estate of Wright, 377 Ill. App. 3d 800, 881 N.E.2d 362 (2007). Law firm represented the decedent as to the transfer of \$1.8 million to her son, including negotiating the terms of the transfer. After she died, same firm sought to represent the son, who took the position that the transfer was a gift rather than a loan. Here the court affirms the disqualification of the law firm for the son based on Rule 1.9: he was adverse to the firm's former client (decedent) on a substantially related matter.

Indiana:

Matter of Robak, 654 N.E.2d 731 (Ind. 1995). Lawyer does estate planning work for a husband and then the wife, all of it in the shadow of a marital property agreement he did not draft. When the husband died, lawyer represents estate in opposition to widow's attempt to set aside the marital property agreement and claim a forced share. In these disciplinary proceedings, court holds that the estate planning he had done for wife was substantially related and adverse to this representation of the estate against her. He is reprimanded for violating Rule 1.9(a). He is also found to have violated Rule 1.9(b) by seeking to use his knowledge of wife's emotional state when she executed her will against her in the estate proceeding.

Angleton v. Estate of Angleton, 671 N.E.2d 921 (Ind. App. 1996). Lawyer acted as deputy prosecutor for state in a criminal case in which a man was convicted of killing his wife. The lawyer later entered an appearance to represent the personal representative of the wife's estate in opposition to the convicted murderer's attempt to secure the assets of his wife's estate, including life insurance which named him as

beneficiary. The murderer sought to disqualify the former prosecutor because of his conflict of interest, but the court refused to disqualify. In the estate proceeding “it was not necessary for [the former prosecutor] to prove [the murderer's] culpability for [his wife's] death or to delve into the facts of [the] criminal trial. Further, the interests of [the prosecutor]'s client in the criminal proceeding, the State, are in no way adverse to the interests of [that lawyer's] client in the probate proceedings, the Estate. Thus, [his] participation in [the] criminal conviction was not ‘substantially related’ to the constructive trustee proceedings.”

Maine:

Estate of Markheim v. Markheim, 2008 Me. 138, 957 A.2d 56 (2008). An attorney who had previously represented a husband and wife in defending against a creditors' claim brought against them and the husband's mother later sought to represent the mother's estate against the husband and wife in trying to collect a debt allegedly owed the estate. The court held that the attorney was violating Maine's equivalent of Rule 1.9 because the current representation was adverse to his former clients on a substantially related matter and, moreover, there was reason to suppose he had received confidential information during the prior representation that could be used against his former clients in this matter. The attorney was disqualified.

Minnesota:

In re Estate of Janecek, 2000 WL 1780250 (Minn. App. 2000). A beneficiary of the estate objects to the estate accounting and seeks to disqualify the lawyer for the personal representative, among other reasons, on the ground that the lawyer had previously represented the objectant when he was serving as personal representative and recommended his replacement when allegations of misappropriation surfaced. The court disqualified the lawyer.

New York:

Leber Associates, LLC v. The Entertainment Group Fund, Inc., 2001 U.S. Dist. LEXIS 20352, 2001 WL 1568780 (S.D.N.Y. 2001). Leber's business entity was suing Entertainment Group Fund (EGF) and sought to disqualify law firm representing EGF on the ground that it had done estate planning work for Leber. The court found that while the firm had previously done estate planning work for Leber, that work was not substantially related to the EGF litigation involving Leber's business entity under the Second Circuit test requiring the issues to be “identical” or “substantially the same.” Thus NY's equivalent of MRPC 1.9 did not apply. Moreover, there was no evidence that the confidences obtained in the estate planning work were relevant to the EGF litigation.

Lamotte v. Beiter, 2006 N.Y. Misc. LEXIS 3254, 235 N.Y.L.J. 116 (2006). This is a dispute between the estate of one of two owners of a pair of companies against the surviving owner. The estate, as 50% owner, seeks to disqualify the law firm which is representing the surviving owner and the companies against the estate. The court denies the motion to disqualify based on a former client conflict. It holds that the companies, not the decedent, were represented by the law firm before the death of the co-owner, rather than the co-owner personally, and so no attorney-client relationship with the decedent was formed, or will be imputed to the law firm. Nor is there any evidence to show law firm acquired confidential information about the decedent that was related to the current proceeding. Finally, even if the firm had represented the decedent, the matters are not substantially related.

Estate of Gallagher, 2007 N.Y. Misc. LEXIS 7639, 238 N.Y.L.J. 83 (N.Y. Sur. 2007). This is a will contest in which the contestants argue that the decedent lacked testamentary capacity to execute the will offered and/or it was the result of undue influence by the named executor who is offering it. The contestants moved to disqualify the lawyer for the executor and another lawyer who had withdrawn from participation in the will contest, but who was still representing the executor on post-mortem matters relative to the estate. The court disqualified the lawyer who was representing the executor on post-mortem non-contest matters because he had served as counsel for both the executor and the contestant when the two had been appointed as co-guardians for the decedent. The contestant “has the right to be free from any concern that [her former lawyer] may, even inadvertently, betray any confidences which she may have imparted to him. Any doubts should be resolved in favor of disqualification.” On the other hand, there was no evidence that executor’s current counsel in the will contest (who had not previously represented the contestant) had been privy to any confidences communicated to the contestant’s former lawyer, and the court refused to disqualify this lawyer.

Matter of Bacot v. Winston, 21 Misc.3d 1123(A), 873 N.Y.S.2d 509 (2008). Bacot petitioned for a guardianship of her father, Winston, and Winston’s son opposed the petition and moved to disqualify Bacot’s lawyer arguing that the firm had previously represented his father in an action for an accounting. The court refused to disqualify the firm first because it had not actually represented Winston in the accounting action but instead had represented the daughter (Bacot) on behalf of her father and the firm never met with or spoke to the father in that representation and second because the action for an accounting was not substantially related to the guardianship matter. “While concededly, one of the issues that shall be explored in this action is the claims made in the former [accounting action], the actions are independent, the issues are different and the questions of law are not at all related.” Third, there was no evidence that the firm had acquired confidences of Winston’s that could be used against him in the guardianship matter.

Estate of Goodman, 2009 N.Y. Misc. LEXIS 2445, 241 N.Y.L.J. 102 (2009). Surviving husband of decedent and petitioner for appointment as executor moved to disqualify lawyer representing a party opposed to his appointment on the ground that lawyer representing the opponent had previously represented decedent in estate planning and was a necessary witness as to her testamentary intentions and, moreover, lawyer had represented both decedent and her surviving husband, petitioner here, in estate planning. Court disqualified the contestant’s lawyer on the ground that he would be a necessary witness, but more importantly on the ground that he was now adverse to his former client (the surviving husband) on a matter substantially related to his former representation of the husband.

Oregon:

In re Hostetter, 238 P.3d 13 (Or. 2010). In what appears to be the first reported case on this issue in Oregon, the court found that the Rule 1.9 duty to former clients can under some circumstances survive the death of the client. Lawyer had represented borrower in a series of loans from lender, and when borrower died, represented lender in collecting amounts that were still owing at the borrower’s death. The claims were settled but the executor of borrower’s estate complained to the bar association about the lawyer’s conflict of interest. The court stated that “an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client’s interests survive his or her death and are adverse to the current client during the subsequent representation.” It further held that in this case, the deceased former client’s interest in minimizing the

amounts owed survived death and was adverse to the debt collection action, so lawyer had violated Rule 1.9. Lawyer is suspended for 150 days.

Rhode Island:

Haffenreffer v. Coleman, 2007 U.S. Dist. LEXIS 75432, 2007 WL 2972575 (D.R.I. 2007). Law firm represented a son of decedent Haffenreffer (David) in a state court action seeking to determine scope of a right of first refusal his brother Karl was seeking to exercise over estate property. David and Karl were co-executors with third person and David's action was nominally brought by him as a co-executor against his two co-executors. Subsequently, Karl brought this action in federal court against the Colemans, holders of an option given to them by David, seeking to invalidate the option. Law firm entered an appearance for the option holders and Karl sought to disqualify the firm on the theory that the firm, in representing David in the state court action, had represented the estate and was now appearing adverse to the estate and in possession of estate confidences that could be used against it. The court denied the motion to disqualify, concluding that David had brought the state court action on his own behalf, rather than that of the estate (since two of the three co-executors did not concur with him and were, in fact, defendants in the state court action). Nor was there any evidence produced that law firm was in possession of estate confidences derived from its representation of David that it could use against Karl. "Unfortunately, it appears that the real conflict in these cases is not between the Estate and the Colemans; but, rather, it is a conflict between Karl and David in which the Estate is merely the entity in whose name the battle is being waged."

South Carolina:

Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011). Wife of hospitalized Congressman was told he would not recover from coma, so she hired lawyer Wingate to advise her of her rights in her husband's estate, in light of prenuptial agreement. In the course of the representation, she also consulted with him about her husband's \$500,000 FEGLI life insurance policy and advised him that her husband had named her as the sole beneficiary. Wingate negotiated an agreement between wife and the Congressman's children from another marriage. The Congressman then died, and Wingate was hired to represent estate, telling wife that she no longer needs a lawyer. He then tried to convince her to relinquish her rights in the FEGLI life insurance policy. She asks him to "put his hat back on" as her lawyer, but he refuses. She succeeds in having the agreement set aside and then sues Wingate for breaching his duty to her as a former client. She alleged that he failed to get her informed consent to his representation of the estate, and failed to protect her interests regarding the life insurance. The court holds that S.C. Code 62-1-109, which states that a lawyer for a fiduciary does not owe a duty to the beneficiaries, did not apply in this case because the life insurance policy was not an asset of the probate estate. The court further held that whether a fiduciary relationship existed between lawyer and wife was a question of law for the court, whereas breach of the duty is a question fact. Relying on *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991), a case holding that a lawyer breached his duty to a client when he misled her regarding her father's estate plan, where the father was also a client, the court held that lawyer owed a duty to the wife as a former client under RPC 1.9(a), and remanded the case for trial.

Texas:

In re Murphy, 2009 Tex. App. LEXIS 3934, 2009 WL 707650 (Tex. App. 2009). Widow and surviving daughter, a lawyer, are fighting over who gets to administer the decedent's estate (and over whether it even needs to be administered). The widow seeks, here, to disqualify her daughter from representing

decedent's estate on the ground that she provided legal advice to her and her deceased husband. It was established that, while married couple were considering estate planning, this daughter advised them to execute a survivorship community property agreement. Trial court found that this created a former client conflict because the matters were substantially related and disqualified the daughter. But the appeals court reversed, concluding that neither the movant nor the trial court had identified with sufficient specificity how the matters were related and the record fails to reveal how the matters are related.

Wisconsin:

Mathias v. Mathias, 188 Wis. 2d 280, 286, 525 N.W.2d 81, 84 (Wis. App. 1994). Husband sought to disqualify his wife's counsel in a divorce proceeding on the ground that another lawyer in the same firm had done estate planning for him. The court disqualified counsel under Rule 1.9: "[A]s a matter of law [we hold] that estate planning which is reasonably contemporaneous with initiation of divorce proceedings is substantially related to issues which may arise in those proceedings."

Ethics Opinions

Illinois:

Op. 98-01 (1998). This opinion advises that a lawyer may represent the beneficiary of a trust in a breach of fiduciary duty action against the trustee even though the lawyer had previously represented the trust, the beneficiary and the trustee in a condemnation suit involving trust real property. The opinion observes that the scope and nature of the lawyer's prior representation of the trustee were limited to the trust's real estate subject to the condemnation proceeding during which time the lawyer may have gained confidential information regarding the trust's property in general. However, since the beneficiary was not contesting the trustee's activities in connection with the condemnation, the information the lawyer may have received "does not appear to be relevant to the Beneficiary's claim against the Trustee." Thus, the proposed representation of the beneficiary was not substantially related to the subject matter of the prior joint representation.

Maryland:

Op. 89-14 (1989). A lawyer who represented a client in a divorce ten years earlier in which the client's ex-spouse received a note may represent the estate of the ex-spouse. However, if there are problems in connection with the note, the lawyer must withdraw from representing the estate unless the former client consents to the representation after consultation.

Missouri:

Op. 930122 (1993). Attorney who counsels the two children and second wife of a deceased client concerning the estate of that deceased client cannot later represent the children against the second wife in dispute over estate unless second wife consents to such representation after full disclosure.

Op. 960048 (1996). Attorney who represented a client in administering the estate of client's spouse and created an estate plan for that client has a conflict of interest under MRPC 1.9 if he serves as attorney to client's child in a guardianship proceeding where the child wants a guardian appointed for the client. If the client's child believes that the client now needs a guardian and the attorney obtained information during the course of his service to the client that could be used adversely against the client, the

attorney's assistance of the child in a guardianship proceeding would be a violation of the Rules of Professional Conduct.

New York:

Op. 865 (2011). Lawyer who drafted estate plan is asked by executor to represent estate of client. Lawyer asks whether, in light of *Estate of Schneider v. Finmann*, 15 N.Y.3d 306 (N.Y. App. 2010) (summarized under MRPC 1.1), he can represent the estate of a client for whom he drafted the estate plan. Estate of Schneider held that an executor of an estate had privity to sue the drafter of the estate plan. The ethics opinion concludes that a lawyer who drafted the estate plan may represent the executor of the client's estate as long as the lawyer does not perceive any colorable claim for malpractice for the estate planning work. If the lawyer perceives at the outset that there is a colorable claim of malpractice against him as a result of the estate planning, the lawyer must decline the representation and must advise the executor of the colorable claim of malpractice against him. If the lawyer begins representing the estate and discovers a basis for a malpractice claim, the lawyer must withdraw and must (again) advise the executor of the malpractice claim.

Oregon:

Op. 2005-17. If a lawyer prepares a will for Client A and later is approached by Client B to assist in the sale of a boat to former Client A or to collect a debt from former Client A, whether this implicates the successive conflict rule and requires the informed consent of the two clients will depend on whether the matters are substantially related. Neither of the situations described above presents a representation adverse to a former client involving the same transaction or legal disputes. Thus, there is no matter-specific conflict. See *In re Brandsness*, 299 Or. 420, 702 P.2d 1098 (1985), discussing and creating the matter-specific and information-specific former-client conflicts categories used in subsequent cases and in OSB Formal Ethics Op. No 2005-11. It follows that unless the lawyers have acquired some confidential information in representing the former client that could be used to materially advance the new client's position, Rule 1.9(c), there is no information-specific conflict and the matters are not substantially related within the meaning of Oregon RPC 1.9(a). This does not seem likely with regard to the boat sale, but seems more likely with regard to the debt collection action.

Op. 2005-62. If a lawyer represents a personal representative and that PR resigns and a second is appointed, the lawyer may continue to represent the first in seeking compensation for services rendered and for expenses. Whether the lawyer may represent the second PR will depend on whether the second is adverse to the first on a substantially related matter. The lawyer could not represent the second PR in opposition to a claim by the first for fees and expenses, absent the informed consent of the former client.

Op. 2005-148. Where lawyer has done joint estate planning for a married couple and is thereafter approached by one of the spouses to represent that spouse in a dissolution, this may or may not be prohibited by Rule 1.9 absent informed consent from the clients. It will depend on whether the estate planning work is substantially related to the dissolution, and this turns on whether there is a "matter specific" or an "information specific" conflict. There would appear to be no information specific to the dissolution from the estate planning because there is no privilege as between joint clients. Whether there is a "matter specific" conflict will depend on the estate planning that was done. There might be a conflict if, for example, the couple had bound themselves not to alter their joint estate plan; or the

lawyer, as estate planner, had set up an estate plan that the divorce would require the lawyer to seek to undo as dissolution attorney.

Pennsylvania:

Op. 2005-107 (2005). Lawyer prepared will for and gave other estate planning advice to decedent and wishes now to represent beneficiaries. Another law firm is handling the administration of the estate. Assuming that the lawyer will not be a necessary witness, Rule 3.7 would not be triggered, If the beneficiaries do not have interests adverse to lawyer's prior work for decedent and, in fact, their interests will actually coincide with the intentions of the decedent, neither Rule 1.9 nor Rule 1.7(a)(2) would be triggered and nothing precludes the representation.

Op. 2009-09. A lawyer assisted a married couple to execute reciprocal wills; all communications occurred in the presence of both. On the understanding that the lawyer has no information that could be used to the disadvantage of the former client, the lawyer may later represent the husband in the couple's divorce. The matters do not seem to be the same or substantially related. Moreover, as information that was transmitted was done so with another person present, there is as an arguable waiver of any possible confidentiality should there be confidential information that was transmitted.

Washington:

Op. 2155 (2007). Lawyer represented the decedent in opposing a daughter's petition to establish a guardianship and client (alleged incompetent person) ("AIP") died before the guardianship hearing occurred. Lawyer has been approached by the former client's widow to represent her as PR. The "Rules of Professional Conduct do not prohibit the lawyer of a deceased former client from representing the PR of the former client's estate where the PR is also the former client's spouse and sole heir of the estate. Should the lawyer have acquired information which would jeopardize, compromise, influence or affect representation of the estate in violation of RPC 1.1 or 1.3 or should the lawyer learn or conclude that he is likely to be a necessary witness (RPC 3.7), or if there is evidence that the AIP was not competent at the time his will was executed, or if such other facts come to light that might indicate conflict in violation of 1.6(a), 1.7(a), 1.8(b) or 1.9, the lawyer may well be obligated to withdraw."

MRPC 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
 - (3) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
- (a) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an

agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

- (b) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

ACTEC COMMENTARY ON MRPC 1.10

MRPC 1.10 addresses when a lawyer's conflicts under MRPC 1.7 and 1.9 would be imputed to other lawyers practicing in the same firm with the conflicted lawyer or lawyers practicing in a firm where the conflicted lawyer previously practiced.

Personal Interest Exception. If a lawyer is disqualified from representing a client because of the lawyer's personal interest and that interest would not materially limit another lawyer in the firm representing the client, the disqualified lawyer's conflict is not imputed to other lawyers in the firm. Note, however, that this does not allow other lawyers in the firm to draft Wills or other donative documents favoring a lawyer who would be disqualified from drafting such documents under MRPC 1.8(c). MRPC 1.8(k) overrides MRPC 1.10 with respect to any disqualifications specified in MRPC 1.8 (except for those derived from sexual relations with a client), and would impute that conflict to all lawyers practicing with the disqualified lawyer.

There is a larger point relevant to estate planners and probate lawyers that is embedded in this interplay between MRPCs 1.8 and 1.10. MRPC 1.8(k) imputes the specific requirements for at least nine separate kinds of problematic situations to other lawyers in the firm. In addition to MRPC 1.8(c), these include MRPC 1.8(a) (business transactions with clients) and MRPC 1.8(f) (compensation for representing a client from a nonclient). As the commentary to MRPC 1.8(a) (business transactions with a client) explains, "even when a transaction is not closely related to the subject matter of the representation [the rule may be triggered], as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client." MRPC 1.8(a) comment [1]. Similarly, MRPC 1.8(a) applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients." *Id.* "It also applies to lawyers purchasing property from estates they represent." *Id.* All MRPC 1.8(a) conflicts are imputed to other lawyers in the firm under MRPC 1.8(k) even if they are viewed as "personal" to the lawyer engaged in the transaction. Thus, a lawyer wishing to avoid the strictures of MRPC 1.8(a) cannot do so by sending the client down the hall to another lawyer in the firm for representation, nor may a lawyer enter into a business transaction with the client of another lawyer in the firm without complying with MRPC 1.8(a).

Conflicts with Other Firm Clients. The potential for conflicts between an estate planning lawyer's clients and the other clients of the lawyer's firm is significant because of the high volume of an estate planner's client list, particularly over long periods of time. Also, the conflicts created can be broader than just the individual interests of the clients because estate planning work can involve business and professional affiliations and investments of the clients. Conflicts checks are therefore critical. An estate planning lawyer should be thorough when opening a new client file to list all parties that may give rise to a later conflict, such as businesses owned by the client and professional fiduciaries working with the client. This may require updating the database after the representation has begun.

Example 1.10-1. Lawyer represented A with estate planning. Five years after the representation began, A began a business which became successful. Lawyer's firm did not represent A's business. However, A gave information about A's company to Lawyer in connection with updating her estate plan, and Lawyer represented A in negotiating a prenuptial agreement when A became engaged. Protection of A's interest in the business was a significant issue in the prenuptial agreement negotiations. Lawyer continued to represent A with respect to estate planning, which included transactions involving A's interests in the business for estate tax planning purposes. A then discovered that other lawyers in Lawyer's firm were representing a competitor of A's business after A's business filed suit against them, and A's business has moved to disqualify Lawyer's firm. Although Lawyer's firm has not represented A's business directly, the firm may be disqualified under MRPC 1.7 & 1.10 as having an imputed concurrent conflict because of its representation of A, the intertwining of A's personal interests with A's business, and Lawyer's access to information about A's business.

Migrating Lawyers. As of 2009, MRPC 1.10 allows a law firm to use a screen and associated procedures to avoid an imputed conflict that would otherwise result from a lawyer moving to a new firm where there are conflicts between the lawyer's former clients and the new firm's clients. Screening will not work, however, to avoid an imputed conflict where the migrating lawyer is bringing clients into the new firm, if there are any conflicts between those clients and clients of the new firm. The concurrent conflict will need to be avoided by withdrawal from representation of one of the clients or (where the conflict is consentable) by obtaining the informed consent from both clients under MRPC 1.7(b)(4). The conflicts checks of the migrating estate planner therefore need to include not just the names of the individual clients but also their significant business and professional involvements. Whether a client's business and professional involvements are sufficient to create such a conflict is a factual determination, but lawyers should be alert to the potential.

Example 1.10-2. Lawyer 1 represented A with estate planning. Five years after the representation began, A began a business which became successful. Lawyer's firm did not represent A's business. However, A gave information about A's company to Lawyer in connection with updating her estate plan, and Lawyer represented A in negotiating a prenuptial agreement when A became engaged. Protection of A's interest in the business was a significant issue in the prenuptial agreement negotiations. Lawyer continued to represent A with respect to estate planning, which included transactions involving A's interests in the business for estate tax planning purposes. Lawyer 2 approaches Lawyer 1's firm seeking to move there from his/her prior firm. A conflicts check is done and it is discovered that Lawyer 2 is representing a competitor (C) of A's business in litigation against that business. Were Lawyer 2 to join Lawyer 1's firm while still representing C, his/her conflict with A would be imputed to all lawyers in the firm and vice versa. Lawyer 2 would be subject to being disqualified from representing C in the

litigation and would be in violation of MRPC 1.7 by imputation via MRPC 1.10. Assuming A is not a party to the litigation with C, but only A's company, this conflict might be consentable with proper disclosures by Lawyers 1 & 2 to their clients and proper consent from their respective clients. Absent such a waiver, Lawyer 2 must withdraw from representing C and, upon joining the firm, must either obtain C's consent as a former client under MRPC 1.9 or be screened from any involvement with client A's representation with proper notice given to C, and Lawyer 2 must not receive a share of the fees directly derived from representing A. MRPC 1.10(a)(2).

Screening (absent client consent) is still not permitted in about half of the states. S.R. MARTYN, L.J. FOX, & W.B. WENDEL, *THE LAW GOVERNING LAWYERS* 124-27 (2014-15 edition). So this method for avoiding imputed conflicts may not be available to many estate planners and probate attorneys.

Nonlawyers. The comments to MRPC 1.10 state that imputation does not apply to conflicts of nonlawyers, such as paralegals and legal secretaries, and to conflicts that arise because of a lawyer's activities before he or she became a lawyer (e.g., as a law student). However, those persons are still disqualified from participating in the representation to protect confidential information and according to the comment, "ordinarily must be screened." Again, because of the high volume of an estate planning and probate practice, an experienced legal assistant changing firms is likely to have a significant number of such conflicts and should be given the opportunity to identify and report any such conflicts, so screening can be put in place. The rule does not, however, require the notice provisions required when a lawyer must be screened to avoid imputation. See also MRPC 5.3 (requiring lawyers supervising nonlawyers to take measures reasonably calculated to comply with the lawyers' ethical duties).

Conflicts with Departed Lawyer's Clients. When an estate planning lawyer leaves a firm, the departing lawyer's clients do not create conflicts under MRPC 1.9 as former clients unless the clients remain at the firm or the new matter is the same or substantially related to the departed lawyer's representation and a lawyer remaining at the firm has confidential information that is material. Again, because of the high volume of an estate planning practice, a departing estate planner could leave significant former client conflicts, but this rule clarifies that such conflicts would be limited to related matters, where a remaining lawyer had involvement.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

California:

Transperfect Global, Inc. v. Motionpoint Corp., 2012 U.S. Dist. LEXIS 129402, 2012 WL 2343908 (N.D. Cal. 2012). In a patent infringement case, an estate planning lawyer represented the co-CEOs and owners of the plaintiffs, and then moved to the firm representing the defendant. She continued to represent the co-CEOs with respect to estate planning after the move. Plaintiffs moved to disqualify defendant's firm, and the court upheld the disqualification. The court noted that this was a case of an after-acquired client causing the disqualification of representation of a prior client, but in this circumstance, a concurrent conflict, the applicable California rule required per se disqualification.

Connecticut:

Rompre v. Rompre, 1995 WL 94728 (Conn. Super. 1995). Wife in a divorce action seeks to disqualify her husband's lawyer on the ground that the lawyer's partner had done estate planning work for her and her husband only months before the divorce proceeding. The court disqualified the lawyer. Although the divorce lawyer and the estate planner were not, technically, partners, they were sufficiently associated by Rule 1.10 for the conflicts of one to be imputed to the other. The estate planning work was substantially related to the divorce, and she and her husband were materially adverse in the divorce proceeding.

Newlands v. NRT Associates, LLC, 2008 WL 4415752 (Conn. Super. 2008). Newlands sought to dissolve NRT Associates of which Thompson was a principal. Thompson was a defendant in the case, and sought to disqualify the law firm representing Newlands in the dissolution action on the ground that the firm had done estate planning work for him three years before. The firm conceded that a lawyer with the firm had done that work, but he had left the firm taking the estate planning file with him. Another lawyer remaining with the firm had briefly done some follow-up work, but there was no argument that the current matter was the same or substantially related to the estate planning work. Moreover, the movant failed to demonstrate either the nature of the estate planning information obtained by the lawyer still with the firm or that it was potentially usable against him in the dissolution proceeding. The motion was denied.

Georgia:

Blumenfeld v. Borenstein, 247 Ga. 406, 276 S.E.2d 607 (1981). During the trial of a will contest, an attorney for the contestant was married to an attorney with the firm representing the personal representative and defending against the will contest. The court of appeals held that the husband and his law firm should have been disqualified, even though husband did not work on the will contest case and there was no evidence that confidences had been shared between the married couple. The Supreme Court of Georgia reversed: "A per se rule of disqualification on the sole ground that an attorney's spouse is a member of a firm representing an opposing party would be not only unfair to the lawyers so disqualified and to their clients but would also have a significant detrimental effect upon the legal profession." Note that disqualification based on familial status is now covered by MRPC 1.7, and this conflict of interest is "ordinarily...not imputed to members of firms with whom the lawyers are associated." MRPC 1.7, cmt [11].

Nevada:

In re Jane Tiffany Living Trust 2001, 124 Nev. 74, 177 P.3d 1060 (2008). A lawyer was made the beneficiary of the trust which was drafted by the lawyer's partner. The family member who had expected to receive the asset that went to the lawyer argued undue influence and violation of Nevada's equivalent of MRPC 1.8(c) and 1.10. The court held that, although a presumption of undue influence had arisen because of the fiduciary relationship between the lawyer and the client, the lawyer had rebutted the presumption. While concluding that "apparently" Nevada's analogues for Rules 1.8(c) and 1.10 were violated, there was no private right of action to sue for such a violation.

New Hampshire

Williams v. L.A.E. Association, (N.H. Super. Ct. 1/6/2016). Lawyer had done estate planning work for two separate clients and after the estate planning work was complete, a partner of the estate planner undertook to represent property owners suing the estate planning clients in a dispute over elections to a

property association board. Citing the ACTEC Commentaries and commentators relying on them, the court concludes that although the estate planning matters might be dormant, the estate planning clients remained current clients of the firm. Since they remained current clients of the estate planner, he would be disqualified from representing the plaintiffs in the adverse matter against his estate planning clients under Rule 1.7, and his conflict was imputed to his partner under Rule 1.10.

North Carolina:

Kingsdown, Inc. v. Hinshaw, 2015 WL 1406311 (N.C. Super. 2015). Plaintiff sued its former CEO alleging fiduciary breaches. Defendant moved to disqualify the plaintiff's law firm alleging that one of its founders, since deceased, had represented him personally for more than twenty years, including extensive estate planning work and advice relevant to the current lawsuit. The law firm argued that the lawyer who had done the work had died and so was no longer with the firm. The court disqualified the firm under Rule 1.10(b), nonetheless, because it had failed to convince the court that it did not continue to possess confidential information that was relevant to the current case.

Ethics Opinions

Pennsylvania:

Op. 2008-18. It is permissible for two law firms to enter into a joint venture which will use the talents of an associate employed by one of them to provide estate planning services for clients of both provided that the associate's relationship with both firms is made clear under Rule 7.1, the fee splitting rules in Rule 1.5(e) are complied with, and it is understood that the conflicts of each firm's members are imputed to all the lawyers in both firms.

MRPC 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.
- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

ACTEC COMMENTARY ON MRPC 1.12

Trust and Estate Lawyers as Third-Party Neutral. In addition to trust and estate lawyers who are former judges, this rule can apply to trust and estate practitioners who participate in alternative dispute resolution. Mediation and arbitration are frequently used in trust and estate matters, and experienced trust and estate lawyers are often selected as the mediators or arbitrators because the issues can involve technical, complex principles that a non-specialist may not fully comprehend. Trust and estate lawyers may also serve as part-time or temporary judicial officers.

Most of the Model Rules of Professional Conduct apply to lawyers only when they are representing clients and so do not apply to lawyers serving as judges or third-party neutrals. But there are exceptions: MRPC 8.4 (Misconduct) applies to all lawyers whether they are representing clients or not. MRPC 2.4 directs that lawyers serving as third-party neutrals should advise unrepresented parties that the lawyer is not representing them. See also MRPC 7.6 (political contributions to obtain appointment as judges) and MRPC 8.2 (judicial and legal officials). Lawyers serving as judges or third-party neutrals need to determine what other codes of conduct outside the Model Rules govern their conduct. When lawyers serve as judges, whether part-time or fulltime, their conduct is primarily governed by the Code of Judicial Conduct applicable in their jurisdiction. There is no comparable code governing the conduct of mediators or arbitrators. Many jurisdictions have adopted the Uniform Arbitration Act, and a number have adopted the more recent Uniform Mediation Act. Each of these acts contains some guidance for the conduct of their respective third-party neutral practice. The provisions of those acts are beyond the scope of these commentaries, but lawyers serving as arbitrators or mediators will need to become familiar with their requirements.

MRPC 1.12 governs the interplay between a lawyer's work as a judge or third-party neutral and the lawyer's practice of law. For any matter in which a lawyer participated personally and substantially in such a role, the lawyer is prohibited from later representing a party "in connection with" that matter, unless all parties give informed, written consent. When a lawyer has served as a mediator or arbitrator, the lawyer's involvement in the matter is likely to have been personal and substantial. A lawyer's involvement in a matter as a judge, however, may not have been, given the various tangential roles that judges sometimes play in connection with pending cases. According to the comments to MRPC 1.12, if the lawyer had previously served on a court but had not participated in the matter before the court, or if the lawyer's involvement as judicial officer involved "remote or incidental administrative responsibility that did not affect the merits," the lawyer is not disqualified.

Where a lawyer is personally disqualified under this rule, that disqualification is imputed to all lawyers practicing with the disqualified lawyer unless the lawyer is screened, notice is given to all parties, and the lawyer is apportioned no part of the fee generated by the matter. In contrast to MRPC 1.10, screening is available under this rule to avoid an imputed disqualification not only for lawyers who are bringing a disqualification with them when they join the firm, but also for lawyers who acquired the personal disqualification while doing third-party neutral work at the firm. In view of the availability of screening in this situation, trust and estate lawyers who wish to serve as third-party neutrals on occasion while also carrying on an active practice representing clients should consider screening off that aspect of their practice from their other work at the outset of their third-party neutral work.

Example 1.12-1: Lawyer A, while working at Firm X, is asked to mediate a dispute between the beneficiaries of Tycoon T's estate. Lawyer A accepts the assignment and attempts to help the beneficiaries reach a mutually satisfactory resolution of their differences, but the attempt is unsuccessful. After the mediation fails, one of the beneficiaries (B) involved in the mediation approaches A's partner P to represent B in contesting T's estate plan. A will be disqualified from any involvement in this litigation because of A's "personal and substantial" involvement in the mediation. If, however, A's work in attempting to mediate the dispute has been carefully screened off from other members of the firm from the beginning, and the others requirements of the rule are met, then P and other lawyers at X may accept this matter. On the other hand, if A has shared information about the mediation with other members of the firm while engaged in the mediation or after it was completed but before B approached P, then any attempt to set up a screen when B approaches P is likely to be insufficient because too late.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

California:

Sukhov v. Sukhov, 2015 WL 1942797 (Cal. App. Apr. 29, 2015), as modified (May 18, 2015), review denied (July 15, 2015). The parties to a dispute over a trust which disinherited two of them engage in mediation with a retired judge. After a settlement was reached and approved by the court, one of the parties sought to have it set aside and to disqualify counsel for the defendants because of their association with the mediator/retired judge. The alleged "association" was not a formal one; rather the allegation was that the defense lawyers had paid for the mediation and had offered the mediator's declaration in opposition to the motion to set aside the settlement. The court held that, while the mediator was personally disqualified, movant had failed to demonstrate an association with defense counsel that required imputed disqualification.

Illinois:

In re Marriage of Thornton, 138 Ill. App. 3d 906, 486 N.E.2d 1288 (1985). When a former judge, who had presided over an earlier stage of a divorce proceeding, joins the firm representing the husband, wife moves to disqualify the firm. Although Illinois had not yet adopted MRPC 1.12, the court looks to that rule and denies the motion on the ground that the firm had adequately established a screen to exclude the former judge from any involvement in the case.

In re W.R., 2012 IL App. (3d) 110179, 966 N.E.2d 1139 (Ill. App. 2012). Attorney who had mediated a custody dispute between a father and mother was later (a) appointed to represent the father in a neglect proceeding and (b) petitioned for custody on behalf of the father. When it came to light that the attorney had mediated the former dispute, the court disqualified the lawyer and ordered a new trial. In the process, the court looked to MRPC 1.11, cmt [10] for guidance on what is considered the same "matter" under MRPC 1.12 and held that the matters were sufficiently the same to be covered. That comment states: "a `matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." The court also ruled that a three-year gap between the mediation and the later proceedings did not render the "matter" different.

Mississippi:

J.N.W.E. v. W.D.W., 922 So. 2d 12, 14 (Miss. App. 2005). In a child custody dispute, the father WDW sought to disqualify counsel for the mother on the ground that while serving as court chancellor, the attorney had presided over a prior custody dispute between them. The court disqualified the attorney, concluding that her signing of three orders in the prior proceeding, one staying unsupervised visitation temporarily, one setting the matter for trial, and a third extending the temporary order, was enough “personal and substantial involvement” to require disqualification under Rule 1.12.

New York:

Matter of Coleman, 22 Misc. 3d 830, 868 N.Y.S.2d 882 (2008), *rev'd in part* 2010 N.Y. App. Div. LEXIS 489 (2010). This was an action to compel an executor to distribute a legacy in which petitioner and the defendant executor moved to disqualify petitioner’s counsel and petitioner counter-moved to disqualify executor’s counsel. Both motions were granted by the trial court. See annotations to MR 3.7 for analysis of that issue. On the MR 1.12 issue, petitioner’s counsel was disqualified because they were associated in the same firm with the former chief court attorney who had been responsible for overseeing cases referred to the law department, of which this was one. The court thought it unnecessary to ask whether he had specific involvement with this case as an appearance of impropriety was raised in any event. This second ruling, however, was reversed on appeal under NY’s version of Rule 1.12. It was only appropriate to disqualify the former chief court attorney if he had been personally and substantially involved in a case while with the court, and there was no evidence of that here. Moreover, his involvement in developing court policies was not a sufficient basis for disqualifying him or his firm.

Texas:

In re de Brittingham, 319 S.W.3d 95 (Tx. App. 2010). Lawyer had been a court of appeals judge and sat on a panel deciding a proceeding in a hotly contested probate. She then left the bench and entered private practice, and was representing some of the heirs in a subsequent proceeding in the probate. Court disqualified the lawyer from the representation, finding that “matter” for purposes of the ethical rule included the entire probate, not just isolated proceedings in the probate.

Ethics Opinion

Rhode Island:

Op. 2007-01. A lawyer who formally served as a probate judge may appear before the same probate court on which he served, “provided that he/she does not represent anyone in connection with a matter in which he/she participated personally and substantially as the probate judge.”

MRPC 1.13: ORGANIZATION AS CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which

reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the persons involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ACTEC COMMENTARY ON MRPC 1.13

A lawyer for an organization, defined as a corporation, partnership, limited liability company, or an unincorporated association represents the entity and not the officers, directors, employees and/or shareholders ("constituents") with whom the lawyer deals. Misconduct by one of those constituents may require the organization's lawyer to take protective action on behalf of the organization. Subject to the requirements of other rules, however, including both MRPC 1.6 (Confidentiality of Information) and MRPC 1.7 (Conflict of Interest: Current Clients), the lawyer who represents an organization may appropriately undertake to represent individuals who are interested in the business or are employed by it. The common interests of multiple clients with respect to matters concerning the business or family enterprise may predominate over any separate interests they may have. Multiple representation in such cases may be in the best interests of the clients and may provide them with better and more economical representation. The lawyer may, with full disclosure and the informed consent, confirmed in writing, of the business enterprise and an employee, represent both with respect to matters that affect both (e.g., an employment agreement) if their interests are not seriously adversarial and the lawyer reasonably believes it is possible to diligently and competently represent both the entity and the employee. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients).

The lawyer may similarly represent both a fiduciary that owns an interest in a business enterprise and the business enterprise itself, unless to do so would violate MRPC 1.7 (Conflict of Interest: Current Clients).

A very small minority of cases and ethics opinions have adopted the so-called entity approach under which the fiduciary estate is characterized as the lawyer's client. However, most cases and ethics opinions treat the fiduciary as the lawyer's client and the beneficiaries as persons to whom the lawyer may owe some duties. See ACTEC Commentaries on MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients), 1.9 (Duties to Former Clients) and 1.18 (Duties to Prospective Client). The lawyer and the fiduciary, with the fiduciary's informed consent, confirmed in writing, may agree that the fiduciary estate and not the fiduciary shall be the lawyer's client. See MRPC 1.7(b) (Conflict of Interest: Current Clients) (when representation is permissible notwithstanding a concurrent conflict of interest); MRPC 1.0(e) (Terminology) (defining *informed consent*); and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). Such an agreement may significantly affect the extent of the lawyer's duties to the fiduciary, including the duty of confidentiality. However, such an agreement may not limit the duties that the lawyer or the fiduciary otherwise owe to the beneficiaries of the fiduciary estate.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentary on MRPC 1.2.

Cases

California:

Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756 (Cal. App. 1993). Representation of a partnership does not necessarily entail representation of the individual members of the partnership for purposes of determining whether counsel for the partnership must be disqualified if there is a conflict of interest between the partners. "Considering the mutability of circumstances surrounding an attorney's representation of a partnership, and the attorney's relationship with individual partners, we believe the rule's approach is sensible. All partnerships are not shaped by the same mould. The relationship a partnership attorney has with the individual partners will vary from case to case. A rule which may seem appropriate for an attorney representing a two-person general partnership may be entirely inappropriate for an attorney representing a limited partnership with scores or even hundreds of partners." 20 Cal. Rptr. 2d at 765.

District of Columbia:

Griva v. Davison, 637 A.2d 830, 844 (D.C. 1994). This decision reversed a summary judgment granted to two members of a three-member general partnership and to the law firm that represented both the partnership and the two individual members in an action for breach of fiduciary duties. Applying the modified form of MRPCs 1.7 and 1.13 that were adopted in D.C., the court concluded that, "a law firm ethically can represent several individuals in creating a partnership after obtaining their informed consent pursuant to MRPC 1.7(c)." The court continued to say that, "with the informed consent of all affected clients, a law firm ethically can represent a partnership and one or more of its individual

partners at the same time—including representation as to matters affecting the partnership, except when such dual or multiple representation would result in an ‘actual conflict of positions,’ in which case the absolute prohibition of MRPC 1.7(a) comes into play.”

Pennsylvania:

Pew Trusts, 16 Fid. Rep. 2d. 73 [Montg. Cty (Pa.) 1995]. Lawyer representing the executor or administrator does owe “derivative duties” to beneficiaries and has an obligation to rectify a situation where the lawyer observes his client taking action that is improper or otherwise to the detriment of the beneficiaries.

Ethics Opinions

Michigan:

Op. RI-342 (2007). “When a lawyer undertakes representation at the request of a fiduciary in a situation involving an estate, trust, conservatorship or guardianship, his or her client is the fiduciary, not a fictional entity to which the fiduciary owes its duties.” Note that Probate Court Rule 5.117(A) states: “[a]n attorney filing an appearance on behalf of a fiduciary or trustee shall represent the fiduciary or trustee.” The comment by the Probate Rules Committee stated that the amendment “clarifies that the lawyer represents the fiduciary or trustee and not the estate.”

Oregon:

Op. 1991-62. The lawyer for a personal representative represents the personal representative and not the estate or the beneficiaries as such. See also Or. Op. 1991-113.

Pennsylvania:

Op. 91-62A (1991). The lawyer who is retained by an administrator of a decedent’s estate represents the estate and not the administrator “at least where the interests of the estate diverge from those of the administrator.”

Virginia:

Op. 1473 (1992). A lawyer who is retained to represent “the estate” will be treated as counsel to all co-executors although each co-executor may have independent counsel.

MRPC 1.14: CLIENT WITH DIMINISHED CAPACITY

- (a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ACTEC COMMENTARY ON MRPC 1.14

Preventive Measures for Competent Clients. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client and the lawyer reasonably believes that the client is unable because of diminished capacity, either temporary or permanent, to protect him or herself. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

Risk and Substantiality of Harm. For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly

expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.

Disclosure of Information. As amended in 2002, MRPC 1.14(c) makes clear that a lawyer is impliedly authorized to disclose client confidences “but only to the extent reasonably necessary to protect the client’s interests.” This is so “even when the client directs the lawyer to the contrary.” MRPC 1.14, cmt [8]. But before making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client’s interests. *Id.* See also ABA Informal Opinion 89-1530 (1989).

Determining Extent of Diminished Capacity. In determining whether a client’s capacity is diminished, a lawyer may consider the client’s overall circumstances and abilities, including the client’s ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client’s values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.

Lawyer Representing Client with Diminished Capacity May Consult with Client’s Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client’s interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client’s directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer’s duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

Reporting Elder Abuse. Elder abuse has been labeled “the crime of the 21st century,” Kristin Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014), and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.*, Tex. Hum. Res. Code § 48.051(a)–(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. *See, e.g.*, Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer’s ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and

whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. *See* NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and state elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.

Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity. *See* ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct. *See* MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).

As suggested in the Commentary to MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons.

Person with Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the

person was competent may appropriately continue to meet with and counsel him or her. If the client became incapacitated while the lawyer was representing the client, that very incapacity may preclude the client from terminating the attorney-client relationship. Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information)). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

Wishes of Person with Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client. A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

May Lawyer Represent Guardian or Conservator of Current or Former Client? The lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients). Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. See MRPC 1.7(a)(2) (Conflict of Interest: Current Clients). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. See MRPC 1.0(e) (Terminology) (defining *informed consent*).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Arizona:

Fickett v. Superior Court, 558 P.2d 988 (Ariz. App. 1976). In this malpractice action the court held that the lawyer for a guardian owed fiduciary duties to the guardian's ward. Privity of contract between the lawyer and the ward was not required in order for the ward to pursue a claim for negligence against the lawyer for the guardian.

Connecticut:

Gross v. Rell, 304 Conn. 234, 263-64, 40 A.3d 240, 259-60 (Conn. 2012). Lawyer appointed by court to represent an elderly client who was the subject of a conservatorship proceeding was not entitled to quasi-judicial immunity from suit by the client. The Supreme Court of Connecticut was responding to certified questions from the Second Circuit Court of Appeals. One of the questions was: under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? After extensive discussion of the roles of guardians (conservators) and of lawyers under MRPC 1.14, the

court concluded that: “Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts,...a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation.” The discussion of the role of lawyers for conservators is also significant:

[Where a conservator has retained an attorney,] if a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary (“[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication”) In addition, if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary. We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

Florida:

Vignes v. Weiskopf, 42 So.2d 84, 86 (Fla. 1949). The Supreme Court of Florida here held that it was proper for a lawyer to prepare and supervise the execution of a codicil for a client who was “incurably ill and was in such pain that a great deal of medication to relieve him of his suffering was being administered, such as phenobarbital, novatrine, demerol, cobra venom, and so forth.” The court stated that:

We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.

Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.

Florida Bar v. Betts, 530 So.2d 928, 929 (Fla. 1988). In this case an attorney was publicly reprimanded for his actions in preparing two codicils to the will of his client at a time when the client was in a rapidly deteriorating physical and mental state. In the first codicil the testator removed his daughter and son-in-law as beneficiaries. The lawyer spoke with his client several times in an effort to persuade him to reinstate his daughter as a beneficiary. Subsequently, the lawyer prepared a second codicil to reach this result. However, when the codicil was presented to the testator, he was in a comatose state. The lawyer did not read the second codicil to the testator, the testator made no verbal response when the

lawyer presented the codicil to him, and the lawyer had the codicil executed by an X that the lawyer marked on the document with a pen he had placed and guided in the testator's hand. The court observed:

Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third-parties. It is undisputed that [Lawyer] did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own.

Michigan:

In re Makarewicz, 516 N.W.2d 90, 91-92 (Mich. App. 1994). A lawyer who was hired by a minor's conservator on a contingent fee basis to pursue the minor's claim does not, after discharge by conservator, have standing to petition the court to replace the conservator and require acceptance of settlement. The Presiding Judge directed the Clerk of the Court to forward a copy of the decision to Michigan's Attorney Grievance Committee. The opinion endorses the approach taken in the Comment to MRPC 1.14:

Under MRPC 1.14(b), a lawyer may take protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interests. The Comment accompanying MRPC 1.14 suggests that where a legal representative has already been appointed for the client, the lawyer ordinarily should look to the representative for decisions on behalf of the client. However, if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

Taylor v. Shipley (In re Hughes Revocable Trust), 2005 Mich. App. LEXIS 2301, 2005 WL 2327095, *appeal denied*, 474 Mich. 1092, 711 N.W.2d 56 (2006). Court affirmed a probate court order invalidating a trust executed by the decedent, apparently on the ground that decedent was demonstrably incompetent at the time of execution. One issue in the case was whether the lawyer who had prepared the documents had adequately assessed decedent's competence and the court did not think so: An attorney is required to make "a reasonable inquiry into his client's ability to understand the nature and effect of the document she was signing." Here, the estate planner was "at least on notice that Gladys may not have been competent. He also stated that in both meetings with Eric and Gladys, Eric did all the talking while Gladys said nothing. By not talking to Gladys, Sheridan made no effort to determine whether she was competent, or even to determine that she approved of the proposed plan for her care."

Missouri:

Thiel v. Miller, 164 S.W.3d 76 (Mo. App. 2005). Court affirms malpractice judgment for defendants where heirs alleged that estate planner was (a) negligent in failing to make the power of attorney prepared for client durable, thus precluding her husband from executing trust provisions to avoid federal estate taxes after she became incompetent and (b) negligent in failing to recognize that attempted trust was invalid (because of inadequate power of attorney) and taking action to establish conservatorship for incompetent client so as to reduce taxes. Even assuming negligence had been shown, plaintiffs failed to prove that but for this negligence the damage would have been avoided.

New Jersey:

Lovett v. Estate of Lovett, 593 A.2d 382, 386 (N.J. Super. 1991). The court stated that, “[a]lthough I agree that a lawyer has an obligation not to permit a client to execute documents if he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1982 [Client] was incompetent or that [Lawyer] should have concluded that he was.”

New York:

Cheney v. Wells, 23 Misc. 3d 161, 877 N.Y.S.2d 605 (N.Y. Sur. 2008). Executors for Cheney continued an action previously commenced by the decedent against decedent’s daughter alleging harassment, threats and mistreatment of the mother while she was alive. Here, the fifth lawyer for the defendant daughter moves to withdraw on the eve of trial arguing that withdrawal is mandated given a conflict of interest with the client. Noting from its own observations that the client was “incapable of managing the instant litigation, but also that she was unable to appreciate the consequences of that incapacity, “and after a detailed discussion of ethics authorities, the court here grants the motion to withdraw, but only on the condition that this lawyer file a petition for a limited guardianship of defendant’s property. “[I]t appears that there is no ethical impediment to [the lawyer’s] bringing a limited guardianship proceeding for her client, and to disclosing to the [court] whatever information may be necessary. Such a proceeding is the ‘least restrictive alternative’ available, and [this lawyer] is the only available person with significant knowledge to bring it.”

North Dakota:

In re Christensen, 2005 N.D. 87, 696 N.W.2d 495 (2005). Lawyer was reprimanded for misconduct in three matters, one of which involved estate planning. After preparing a trust and power of attorney for a client, the client married and the attorney-in-fact questioned his competence to do so. So he authorized the lawyer to commence annulment proceedings and a guardianship proceeding, which the lawyer did on behalf of the attorney-in-fact. The court held that, although the lawyer would have been authorized under Rule 1.14 to commence guardianship proceedings to protect his client, whose competency he questioned, he was not entitled to do so on behalf of a third person, the attorney-in-fact, and the lawyer stipulated that this was a violation of Rule 1.7. The court relied on ABA Op. 96-404.

Discipline of Kuhn, 785 N.W.2d 195 (N.D. 2010). Lawyer had prepared client’s will and later represented client’s 2 sons in having a guardian appointed for the client. Sometime after the guardian was appointed, lawyer’s assistant took a call that client wanted to change his will. Without consulting with the guardian, lawyer prepared a new will for and assisted client in executing the new will which provided a larger bequest than previously to the 2 sons who were the lawyer’s former clients. In doing so, lawyer violated Rule 1.14 and was suspended for 90 days.

Ohio:

Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009). Lawyer was charged with misconduct relative to one client who had originally hired him to help him with a dispute involving his mother’s estate. Concerned about the client’s mental health and financial affairs, the lawyer improperly loaned the client \$5,000 and had him execute a power of attorney appointing the lawyer as his attorney-in-fact. After having his client admitted to a hospital for depression, lawyer proceeded to clean up the client’s property without his consent, and to lie about his condition and the condition of the property, to his children. The lawyer was suspended for one year with this suspension stayed on conditions.

Washington:

Morgan v. Roller, 794 P.2d 1313 (Wash. App. 1990). In this malpractice action brought by the beneficiaries under a will to recover from the scrivener of the will the costs of successfully defending a will contest, the court held that the scrivener of the will was not required to inform intended beneficiaries under the will of his view, based on subsequent contacts with the testator, that she was incompetent at the time the will was executed.

In re Eugster, 166 Wn.2d 293 (2009). An 18-month suspension is the proper sanction for a lawyer who, when fired by his elderly client, asked a court to declare her incompetent without first investigating whether she was actually impaired. The court rejected the lawyer's claim that he justifiably feared his former client was suddenly unable to manage her affairs and was at risk of being taken advantage of. The court noted the lawyer had evidence that his client had recently had a mental health exam which determined she was competent; had been satisfied of her competence only months before when he had her execute documents he had prepared; and had failed to explain why his abrupt "epiphany" about his ex-client's mental state came on the same day he was fired. "[If a] lawyer reasonably believes that her client is suffering diminished capacity and is under undue influence, the lawyer may take protective action under RPC 1.14 without fear of provoking charges of ethical misconduct... [But a] lawyer's decision to have her client declared incompetent is a serious act that should be taken only after an appropriate investigation and careful, thoughtful deliberation." "Lawyers who act reasonably under RPC 1.14 are not subject to discipline. Eugster did not."

Wisconsin:

In re Guardianship of Jennifer M., 323 Wis.2d 126, 779 N.W.2d 436 (Wis. App. 2009). Where an attorney has been appointed as the guardian ad litem of a partially disabled person who is known to be represented by counsel and needs to meet with the ward, Rule 4.2 does not directly prohibit the GAL from meeting with the ward without the consent of her counsel because the GAL would be acting pursuant to court order. Nonetheless, the policies behind the no-contact rule and the ward's statutory right to counsel justify extending it to this situation and so the court holds that a GAL may not meet with ward without the ward's counsel being present.

Ethics Opinions

ABA:

Op. 96-404 (1996). "Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent ... " The opinion goes on to observe that the lawyer in question may consult with the client's family, and may even petition the court for the appointment of a guardian, but may not represent a third party petitioning for appointment. It is not impermissible for the lawyer to support the appointment of a guardian who the lawyer expects will retain the lawyer as counsel.

Alabama:

Op. 87-137 (1987). A lawyer whose client has become incompetent may file a petition for appointment of a guardian. A lawyer is "required to do so" if the lawyer believes it is in the client's best interests.

Alaska:

Op. 87-2 (1987). The discharged lawyer for a conservator may ethically disclose to the ward's personal lawyer that the conservator was not acting in the ward's interests.

California:

L.A. Op. 450 (1988). Initiating a conservatorship proceeding for a present or former client without the client's authorization involves an impermissible conflict of interest.

Op. 1989-112. Without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client's behalf, even though the lawyer has concluded it is in the best interests of the client. Initiation of the proceeding would breach confidences of the client and constitute a conflict of interest.

San Diego Op. 1990-3. The portion of this opinion dealing with the capacity of a client advised that, "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." The opinion continues, suggesting that once an issue of capacity is raised in the attorney's mind it must be resolved. "The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship."

S.F. Op. 99-2 (1999). Criticizing the result reached in California Formal Opinion 1989-112, *supra*, this opinion concludes after a careful analysis:

An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client. [Citations omitted.]

Connecticut:

CT Inf. Op. 15-07 (2015). Rules 1.14. Committee was asked (a) whether a Court-appointed attorney for a conservatee is required to "assist" the client in filing an appeal of a Probate Court Order when the attorney believes the appeal is "frivolous" and may be financially "detrimental" to the client (not only as a result of the fees and expenses incurred in the appeal itself but, especially, if the appeal were to cause a delay in liquidating assets needed for the individual's care); (b) whether the Court-appointed attorney risks grievance proceedings for filing the appeal or for refusing to "assist" the client; and (c) whether the Conservator, if an attorney, is obligated to report the attorney's behavior to the Grievance Committee. The Committee's short answers to the three questions were as follows:

1. No. The Court-appointed attorney has no duty to assist the client/conservatee in filing a frivolous or financially detrimental appeal.
2. Yes. All attorneys risk being the subject of a grievance proceeding.
3. No. The Conservator is not required to report the attorney's behavior to the Grievance Committee if he or she acts as we suggest.

The Committee reached its conclusions after relying on and quoting extensively from the Connecticut case *Gross v. Rell*, 304 Conn. 234 (2012), which is summarized in the case section above.

District of Columbia:

Op. 353 (2010). Lawyer had been hired by attorney-in-fact to represent disabled principal in challenging a mortgage. Defendant mortgage company responded with allegations of wrongdoing by attorney-in-fact. Lawyer asked attorney-in-fact to step down as fiduciary but she refused. Opinion states that ordinarily, lawyer should look to the client's chosen surrogate decision maker. If that surrogate is in conflict with the principal, however, or is endangering the success of the legal matter, the lawyer can seek a guardian to be appointed. The lawyer must evaluate the danger of allowing the surrogate to continue in that role. The lawyer could not, however, withdraw, because withdrawal could in this case harm the disabled client.

Florida:

Op. 96-94 (1996). Since a person adjudicated incapacitated is the intended beneficiary of the guardianship, an attorney who represents a guardian of such a person and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

Michigan:

RI 176 (1993). The adverse interests of a mother and daughter preclude the same lawyer from representing both of them in connection with the revocation of a durable power of attorney and petitioning for the appointment of a guardian for the mother.

New York:

Op. 746 (2001). A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that (i) the client is incapacitated, (ii) there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests and (iii) there is no one else available to serve as petitioner.

Op. 775 (2004). When a possibly incapacitated former client sends a lawyer a letter, evidently prepared by someone else, requesting the return of the client's original will, the lawyer may communicate with the former client and others to make a judgment about the client's competence and to ascertain his or her genuine wishes regarding the disposition of the original will. In this case, the lawyer had reason to believe that the client might be acting under the influence of a family member who would benefit by the destruction of the will.

Oregon:

Op. 1991-41. A lawyer who has represented Client for many years and has begun to observe extraordinary behavior by Client that is contrary to Client's best interests, may take action on behalf of Client. This opinion states that, "[a]s the language of [former] DR 7-101(C) makes clear, an attorney in such a situation must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

Pennsylvania:

Op. 89-90 (1989). A lawyer for a competent client who decided to refuse medical treatment for progressively disabling disease may serve both as her lawyer and as her guardian ad litem.

Virginia:

Op. 1769 (2003). A lawyer may not represent the daughter in gaining guardianship of incompetent mother, who is currently a client of the lawyer in another matter.

MRPC 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

ACTEC COMMENTARY ON MRPC 1.15

Retention of Original Documents. A lawyer who has drawn a will or other estate planning documents for a client may offer to retain the executed originals of the documents subject to the client's instructions. The documents so held should be considered client property and held by the lawyer in a manner consistent with the requirements of MRPC 1.15. Some states specifically include estate planning and similar documents in the definition of "property" for the purposes of this rule. For example, the Washington comments to its RPC 1.15 states: "Property covered by this Rule includes original documents affecting legal rights such as wills or deeds."

The documents should be properly identified and appropriately safeguarded. Some states may have more particular requirements for safekeeping of estate planning documents. For example, Cal. Probate Code 710 states: “If a document is deposited with an attorney, the attorney, and a successor attorney that accepts transfer of the document, shall use ordinary care for preservation of the document on and after July 1, 1994, whether or not consideration is given, and shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.”

MRPC 1.15 also required that records be kept of property for a certain specified number of years after termination of the representation or release of the property. This period of years varies from state to state. Most states have adopted the five-year period recommended in the model rule, but a number of states have longer periods, ranging from six to ten years. Therefore, lawyers should retain records of all original client documents for the specified number of years after such documents have been delivered to the client or the client’s representative.

Storage of client documents is also subject to the notice and accounting provisions of MRPC 1.15. Notification to the client should be done in writing. The writing should disclose that the documents are being held at the client’s direction and should contain the other provisions recommended in ACTEC Commentary on MRPC 1.8, addressing the potential conflict of interest issues when retaining client documents. Lawyers should also confirm that they are in compliance with any other requirements for notification, accounting or other responsibilities relating to client property under specific state versions of MRPC 1.15.

The retention of the client's original estate planning documents does not itself make the client an “active” client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status. See ACTEC Commentary on MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules), and ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Delaware:

In re Wilson, 900 A.2d 102 (Del. 2006). Lawyer “admitted failure to act with reasonable diligence and promptness in the probate of over twenty estates; failure promptly to deliver to a third party funds that that party was entitled to receive from an estate; failure to place fiduciary funds in an interest-bearing account; and engaging in conduct prejudicial to the administration of justice by failing to probate over twenty estates.” He was suspended for 18 months.

District of Columbia:

In re Ifill, 878 A.2d 465 (D.C. 2005). Lawyer was hired to probate an estate and withdrew \$21,000 from the estate account, without approval from the executor, for his personal benefit. He later returned the money. On this matter, which occurred in Maryland, lawyer was disbarred in Maryland and (reciprocally) in D.C.

In re Miller, 896 A.2d 920 (D.C. 2006). This was reciprocal discipline for misconduct that occurred and was disciplined for in Florida. Lawyer was “a co-trustee of an estate, had engaged in misconduct including the failure to deposit certain insurance proceeds into a segregated escrow account, and failure to insure that his co-trustee properly and prudently used trust monies for the benefit of the children of the settlor, who later died.” This violated Rule 1.15, and the lawyer was suspended for 6 months (in Florida and in D.C.).

In re Bach, 966 A.2d 350 (D.C. 2009). Lawyer who was serving as a conservator for a 95 year old woman wrote himself a check for \$2,500 for his services even though he had not yet received court approval for this disbursement, which he knew he needed under the law. He was disbarred for taking a fee prohibited by law (Rule 1.5) and misappropriating entrusted funds (Rule 1.15). The result, the court held, was required by *In re Addams*, 579 A.2d 190 (D.C. 1990), which imposes disbarment in such cases except in “the most stringent of extenuating circumstances” which were not present here.

Illinois:

In Re Karavidas, 999 N.E.2d 296 (Ill. 2013). An attorney with no experience in trusts and estates was appointed as executor and trustee under his father’s Will. In that role, he failed to fund trusts as directed, borrowed funds from the estate for his personal use (and later reimbursed the estate), and made unauthorized distributions to his mother, his sister and himself, all in violation of his fiduciary duties. The court held that his breach of fiduciary duties could not be the basis for professional discipline. His misuse of funds could not be considered conversion in violation of RPC 1.15, because he was not in possession of another’s funds in the role of attorney. The court acknowledged that acts involving breach of fiduciary duty could violate RPC 8.4, if such acts were criminal (Ill. RPC 8.4(a)(3)), such acts involved dishonesty, fraud, deceit or misrepresentation (Ill. RPC 8.4(a)(4)), or such acts were prejudicial to the administration of justice (Ill. RPC 8.4(a)(5)). This attorney was charged with violating Ill. RPC 8.4(a)(4), but the hearing officer found no intent to deceive or defraud, and Ill. RPC 8.4(a)(5), but the court held that in breaching his fiduciary duty, he was not acting as attorney and he was not involved in the judicial process. The charges against the attorney were dismissed. A dissenting judge disagreed with the majority’s reading of Ill. Supreme Court Rule 770, which states, “Conduct of attorneys which violates the [RPCs] or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court.” (emphasis added). The majority held that a violation of the RPCs was necessary to discipline a lawyer, but the dissent’s position was that Rule 770 presented an independent ground for discipline. Note that at the time, Illinois’ enumeration of the relevant subsections of Rule 8.4 differed from those found in the Model Rules.

Maryland:

Attorney Grievance Com'n of Maryland v. Goff, 399 Md. 1, 922 A.2d 554 (Md. 2007). Attorney was suspended indefinitely, but in no event for less than two months, for trust account violations, delay and incompetence in the handling of two probate estates. “[T]he combination of Respondent's lackadaisical handling of trust funds, his unreliable recordkeeping system, his failure to routinely back up his computer, and his lack of urgency in correcting the errors once discovered rise to the level of incompetent representation.”

Tennessee:

Nevin v. Board of Professional Responsibility of Supreme Court, 271 S.W.3d 648 (Tenn. 2008). Lawyer was suspended for six months as a result of misconduct in three guardianship matters which he handled as a public guardian. Lawyer had served as a public guardian for more than 20 years and had handled hundreds of cases involving guardianships and conservatorships. In these three cases, all occurring in the late 1990s, he had mishandled guardianship assets by placing them in his trust account rather than in the appropriate guardianship account and had failed to take actions on behalf of the estates he was required to take to protect the estate assets.

Ethics Opinions

Alaska:

Op. 2008-1. Notwithstanding Alaska's adoption of the Uniform Electronic Transactions Act, a lawyer must still maintain in original form any client documents entrusted for safekeeping. Further, the Uniform Electronic Transactions Act recognizes that certain types of documents, including wills and testamentary trusts, must be maintained in original form. AS 09.80.010(b).

Maryland:

Op. 2009-05 (2008). Where a firm drafts a will for a client who dies before executing it and the decedent's personal representative requests it, the firm must deliver the will to the PR. The PR is deemed the firm's client in the matter, and the letters of administration constitute a court order entitling the PR to possession of the decedent's property, including the draft will. Delivery of the draft does not amount to an impermissible disclosure under the confidentiality rules.

New Jersey:

Op. 701 (2006). "Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property..... Such documents cannot be preserved within the meaning of RPC 1.15 merely by digitizing them in electronic form."

New Mexico:

Op. 2005-01. New Mexico's version of Rule 1.15 requires lawyers to maintain client files for 5 years. However, "[t]he lawyer contemplating destruction of a client file should note ... that some instances may require that files be retained for a period of longer than five years in light of the circumstances surrounding the case.The most obvious of these situations is the preparation of a will or a trust by a lawyer, the interpretation of which may become an issue many years after it was prepared. To accommodate such situations, the lawyer should identify the types of files which should be kept beyond the five year period required by Rule 16-115(B) and retain any such files."

North Carolina:

Op. 2011-13 (10/21/11). Attorney agreed to represent the Estate of a deceased lawyer; and his work consisted of collecting assets and paying claims of the decedent's law practice, with the goal of dissolving the practice and paying remaining assets to the decedent's estate. Attorney deposited \$3,000 in "estate assets" and \$100,000 of the decedent's firm's assets in his trust account. When the estate administrator terminated the attorney's representation and asked for all the assets held in trust to be returned, the attorney sought to withhold \$29,000 which, he said, constituted fees he had earned in representing the estate. The committee concluded that the attorney was not entitled to hold any of the

trust assets back because they were turned over to the attorney not for the payment of fees, but as estate assets. “[P]ayment of administrative expenses of an estate from estate assets, including attorney’s fees, is only permitted on the issuance of an order of the clerk of superior court and requires the clerk to exercise judicial discretion in such matters. A personal representative must file a petition seeking an order from the clerk enabling the payment of attorney’s fees by an estate. ...Attorney was obliged to deliver all of the funds as directed by Administrator.”

MRPC 1.16: DECLINING OR TERMINATING REPRESENTATION

- (a) 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:
 - (1) the representation will result in violation of the rules of professional conduct or other law;
 - (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

ACTEC COMMENTARY ON MRPC 1.16

Mandatory Withdrawal/Prohibited Representation. A lawyer should never accept representation of a client or, having commenced the representation, continue same, unless the lawyer can perform the required work competently [see MRPC 1.1 (Competence) and ACTEC Commentary thereon]; can avoid conflicting interests [see MRPCs 1.7 (Conflict of Interest: Current Clients) and 1.8 (Conflict of Interest: Current Clients: Specific Rules) and ACTEC Commentaries thereon]; and is not physically or mentally impaired

from diligently completing the representation [see MRPC 1.3 (Diligence) and ACTEC Commentary thereon].

Also, the representation must not result in the violation of any Rule of Professional Conduct applicable to the lawyer or any other law applicable to either the lawyer or the client. The most common problems facing the estates and trusts lawyer in this regard include conflicts of interest arising after the representation of joint clients (e.g., husband and wife) has commenced [see MRPC 1.6 (Confidentiality of Information) and ACTEC Commentary thereon, particularly *Confidences Imparted by One Joint Client*] and the misconduct of a fiduciary client who either refuses to follow the lawyer's advice or, having breached a fiduciary obligation owed to others, refuses to correct the matter [see MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) and 1.6 (Confidentiality of Information) and ACTEC Commentaries thereon, particularly *Disclosure of Acts or Omissions by Fiduciary Client* and *Disclosures by Lawyer for Fiduciary*]. The lawyer's withdrawal is mandatory when the lawyer's own conduct will violate a Rule of Professional Conduct or a law if the lawyer continues the representation. See, e.g., ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity).

Finally, a lawyer must always withdraw from a representation if the lawyer is discharged by the client (whether with or without cause). If the client has diminished capacity, the lawyer should consider whether the client has the requisite capacity to terminate the representation and whether the lawyer can or should take actions authorized by MRPC 1.14 (Client with Diminished Capacity) to protect the client and the client's interests.

Permissive Withdrawal. Withdrawal is permissive in most (but not all) jurisdictions if it is the client's conduct that will violate the law, although a lawyer may never assist the client in violating the law or breaching any fiduciary obligation. When a lawyer withdraws from representation, the duty of confidentiality imposed by MRPC 1.6 (Confidentiality of Information) continues, although, if the representation involves judicial proceedings, the lawyer may be required to explain the withdrawal to the court. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). Applicable state law and ethics opinions should always be consulted to determine the nature and extent of the disclosures, if any, mandated or permitted to be made by the withdrawing lawyer to the court or other parties.

A lawyer may withdraw from the representation of a client whenever withdrawal can be effected either without material adverse effects on the interests of the client or for one or more of the reasons stated in MRPC 1.16(b). Common instances in trust and estate practice justifying permissive withdrawal include (1) a fiduciary client's insistence on engaging in misconduct, as explored in the prior paragraph; (2) a lawyer's discovery that a fiduciary client has used the lawyer's services to engage in misconduct; (3) an estate planning client wishes to pursue an estate plan which the lawyer finds repugnant; (4) the client fails to timely pay the lawyer's bill and has been given reasonable warning in advance of the withdrawal that the lawyer will withdraw unless the obligation is fulfilled; (5) an executor persists in failing to provide the lawyer with information or take other action required to enable the lawyer to provide the legal services called for; or (6) other "good cause" exists (often involving mutual antagonism between lawyer and client and the breakdown of the lawyer-client relationship). See ACTEC Commentary on MRPC 1.4 (Communication), particularly *Dormant Representation* and *Termination of Representation*.

Special Rules in Litigation and Other Court Proceedings. The right of a lawyer to withdraw from the representation of a client engaged in litigation or other court proceedings (e.g., a judicially supervised

probate, trust or protective proceeding) is subject to the court's overriding authority to require the lawyer to continue in the representation, particularly when a hearing is pending. See 1.16(c). Generally, court permission for withdrawal is required whenever the client has refused to consent to the lawyer's withdrawal, when the client cannot be found and fails to communicate with the lawyer, or where the client may lack the capacity to give an informed consent to the lawyer's withdrawal (e.g., the mentally impaired or incapacitated client). Generally, courts retain broad discretion to deny withdrawal if the withdrawal would adversely affect parties to the proceeding or impede the administration of justice. See Comment to MRPC 1.16.

Duties upon Withdrawal. Subparagraph (d) of MRPC 1.16 requires the withdrawing lawyer to take "reasonably practicable" steps to protect the client's interests and includes requirements for giving reasonable notice of the impending withdrawal to the client, giving the client time to employ alternative counsel, refunding any advanced but unearned fees and returning any papers and property to which the client is entitled under applicable law. For further discussion of the duty to communicate with the client, see ACTEC Commentary on MRPC 1.4 (Communication).

Other Events of Termination. Obviously, a client's death terminates a lawyer's representation, although the client's successor in interest, typically an executor or successor trustee, may revive or recommence the representation. Special considerations apply to a lawyer's representation of a client who has become or may be mentally impaired or incapacitated. See MRPC 1.14 (Client with Diminished Capacity) and ACTEC Commentary thereon. A representation may also be terminated by the lawyer's completion of the legal services or tasks mutually contemplated by the lawyer and client, such as, e.g., the completion of an estate planning project for the client. Refer also to ACTEC Commentary on MRPC 1.4 (Communication) and the concept of the dormant representation.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentary on MRPC 1.4.

Cases

District of Columbia:

In re Bingham, 881 A.2d 619 (D.C. 2005). Lawyer was publicly censured for neglecting a probate matter entrusted to him and, when his incapacity resulting from an inoperable brain tumor became apparent, for failing to withdraw.

Missouri:

Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92 (Mo. App. 1992). After decedent's estate was closed, widow, as beneficiary under his will, brought replevin and injunction action against her husband's attorneys, seeking work product relating to their representation of husband, arguing that the papers were tangible personal property to which she was entitled under the will. The court held that (1) the widow had no property interest in the work product which, it said, was intangible personal property in any event; and (2) attorneys had no ethical duty to turn over the papers under Rule 1.16 where they had already turned over final work done for the client and there was no evidence that

the client needed the files. “The only ostensibly justified need here, however, is the stated need to determine whether a malpractice action may exist. Neither ethics nor legal process should be used as the vehicle to satisfy that need.” Compare *Sage Realty* (New York) noted below.

New York:

Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30, 689 N.E.2d 879 (1997). Following the draft Restatement (Third) Law Governing Lawyers, section 58 [now 46], the NY Court grants former client’s petition to obtain additional documents from its former law firm relating to that firm’s representation of the former client, including “internal legal memoranda, drafts of instruments, mark-ups, notes on contracts and transactions and ownership structure charts [and] firm correspondence with third parties and conference negotiation notes.” According to the New York’s highest court: “A majority of courts and State legal ethics advisory bodies considering a client’s access to the attorney’s file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney’s file on a represented matter with narrow exceptions.” Compare *Corrigan* (Missouri) noted above.

Ethics Opinions

Connecticut:

Op. 03-06 (2003). Pursuant to MRPC 1.16(d) a law firm in possession of original will should furnish that will to new lawyer on written request of testator’s attorney-in-fact, noting that testator through her attorney-in-fact could retain new counsel and authorize transfer of all papers to new counsel.

New York:

Op. 865 (2011). Where a lawyer has drafted an estate plan for a client and later represents the estate, and discovers there is a colorable malpractice claim against the estate planner, the lawyer must withdraw and advise the executor of the claim. See fuller annotation on this opinion under MR 1.7.

Rhode Island:

Op. No. 2000-6. Lawyer must turn over copy of joint file of clients A and B to client B as required under MRPC 1.16(d).

Utah:

Op. 06-02 (2006). Under Utah Rule 1.16, at the end of the representation the lawyer must return the client’s “file;” and there is no exception conferring a retaining lien against the client’s file in the event of nonpayment. But an unexecuted trust and will prepared by the lawyer, for which the client has not paid, are not part of the client’s “file” which must be returned to the client at the end of a representation.

MRPC 1.18: DUTIES TO PROSPECTIVE CLIENT

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

ACTEC COMMENTARY ON MRPC 1.18

Scope of MRPC 1.18. The lawyer's ability to enter into a lawyer-client relationship with a prospective client is governed primarily by MRPC 1.7 (Conflict of Interest: Current Clients), which may prohibit the lawyer from entering into the relationship if there is a conflict of interest and MRPC 1.9 (Duties to Former Clients), which may preclude a representation if the prospective client is materially adverse to a former client on the same or a substantially related matter. On the other hand, MRPC 1.18 necessarily implies that it applies only if the client does not retain the lawyer or the lawyer does not accept the representation. If the client hires the lawyer and the lawyer accepts the representation, confidentiality and conflict of interest issues will thereafter be resolved under MRPCs 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients) and 1.9 (Duties to Former Clients) and under the rules for imputing conflicts, MRPC 1.10 (Imputation of Conflicts of Interest: General Rule), MRPC 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), and MRPC 1.12 (Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral).

When a lawyer discusses confidential information with a prospective client, MRPC 1.18(b) prohibits in all cases the disclosure or use of confidential information thereafter except as permitted in MRPC 1.9 (Duties to Former Clients) regarding a lawyer's disclosure or use of confidential information of a former client. However, as explained below, it may be possible for a lawyer to contract with a prospective client that the lawyer may disclose confidential information. See *Agreement with Prospective Client to Waive Possible Conflict* below. It may also be possible for a lawyer consulted by a prospective client to be screened so as to avoid a conflict created by the prospective client interview from being imputed to the rest of the firm. See *Exception that Allows the Lawyer's Firm to Represent a Party Adverse to the Prospective Client* below.

MRPC 1.18(c) and (d) apply when a lawyer is contacted by a prospective client and the lawyer or the lawyer's firm either (i) currently represents a client adverse to the prospective client or (ii) in the future, accepts or considers accepting representation that is adverse to the prospective client.

Who is a prospective client? A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter, but not all communications constitute such a consultation. Generally, if a lawyer requests or invites the submission of confidential information without clear and understandable warnings that limit the lawyer's obligations, and such information is submitted, a consultation is likely to have resulted and the person is a prospective client. But if a person communicates confidential information unilaterally without any reasonable expectation that the lawyer is willing to discuss the possibility of representing the person, the person is not a prospective client.

Estate Planning Lawyers; Initial Interview and Conflicts Check. At the initial conference with a prospective estate planning client, the lawyer usually obtains confidential information regarding the prospective client's family, assets and estate planning goals. As soon as practical, the lawyer should run a conflicts check to determine whether the representation of the prospective client would result in a conflict of interest with an existing client. However, because of the generally non-adversarial nature of estate planning, gathering information from a prospective client at the initial conference will seldom disqualify the lawyer from representing a current or future client in a matter adverse to the prospective client. Under MRPC 1.18(c), a lawyer who receives confidential information from a prospective client is prohibited from continuing an adverse representation "in the same or a substantially related matter" only "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." In the estate planning context, it is very unlikely that the lawyer would already be involved in an adverse representation in the "same or a substantially related matter." Depending on the kind of firm in which the estate planner practices, however, it is possible that other lawyers in the firm may be engaged in an adverse representation on a related or an unrelated matter, and that potential conflicts might be imputed to the whole firm. Accordingly, lawyers who interview prospective clients regarding estate planning services, depending on the nature of their firm, may be required to take the same precautions that would be appropriate if the lawyer were interviewing the prospective client about a dispute or pending or threatened litigation. See *Exception that Allows the Lawyer's Firm to Represent a Party Adverse to the Prospective Client* below.

If the lawyer were to accept the representation of the prospective client for the estate planning matter, MRPC 1.7 (Conflict of Interest: Current Clients), MRPC 1.9, (Duties to Former Clients), and the rules for imputing conflicts, in particular MRPC 1.10 (Imputation of Conflicts of Interest: General Rule), would govern whether the lawyer or the lawyer's firm could continue a representation or undertake a future representation that is or would be adverse to the client.

Estate Litigation Lawyers and Prospective Clients. Lawyers also provide litigation and dispute resolution services to clients regarding wills, trusts, fiduciary administration and other estate matters. In interviewing prospective clients regarding these matters, the lawyer may wish to limit the amount of confidential information obtained from the prospective client so that the lawyer could represent another party in the same or a substantially related matter. In doing so, the lawyer would need to avoid obtaining confidential information that was "significantly harmful" to the prospective client or, if such information has been obtained, would need to be screened as provided by MRPC 1.18(d). See *Exception that Allows the Lawyer's Firm to Represent a Party Adverse to the Prospective Client* below.

Client Discloses Confidential Information Unilaterally. As noted in Comment 2 to MRPC 1.18, a prospective client who unilaterally provides confidential information to a lawyer without having a reasonable expectation that the lawyer is willing to discuss representation of the prospective client is not entitled to the protections of MRPC 1.18. Thus, in those circumstances, the lawyer would not be precluded from continuing a representation adverse to the prospective client nor from taking a new matter adverse to the prospective client.

Lawyers Contacted by Other Lawyers as a Consultant. Another lawyer (the “consulting lawyer”) will occasionally contact the lawyer for advice concerning one of the consulting lawyer’s cases. When the consulting lawyer seeks advice concerning estate planning issues, given the non-adversarial nature of estate planning services, there is little risk of MRPC 1.18 precluding the lawyer from later representing a party adverse to the consulting lawyer’s client under the circumstances proscribed in MRPC 1.18. See *Estate Litigation Lawyers and Prospective Clients* above. When the consulting lawyer seeks advice concerning estate disputes, litigation or administration matters, whether the consulting lawyer’s client is a prospective client of the lawyer will depend on the facts and circumstances. Generally, if the consulting lawyer uses hypothetical questions and makes no promise to compensate the lawyer, the lawyer should not be precluded from representing a client adverse to the consulting lawyer’s client. Under those circumstances, the consulting lawyer’s client and the consulting lawyer do not have a reasonable expectation that the lawyer will consider that he or she is being asked to be a lawyer for the consulting lawyer’s client. However, if the consulting lawyer discloses the name of the client and other relevant facts or offers to pay for the advice obtained, depending on the facts and circumstances, the consulting lawyer’s client may be considered a prospective client of the lawyer. Thus, the lawyer may decide to limit the amount of confidential information disclosed by the consulting lawyer to prevent the disclosure of confidential information “significantly harmful” to the consulting lawyer’s client. This would protect the lawyer’s ability to represent a client adverse to the consulting lawyer’s client in the same or a substantially related matter.

Lawyers as Expert Witnesses. When a lawyer is contacted by another lawyer or a prospective client about being an expert witness, generally the client will be considered a prospective client. Under MRPC 1.18, in order to be able to represent the opposing party as an expert witness in the same or a substantially related matter, the lawyer would need to take steps to prevent the disclosure of confidential information significantly harmful to the prospective client.

Exception that Allows the Lawyer’s Firm to Represent a Party Adverse to the Prospective Client. Even if the lawyer obtained confidential information that was significantly harmful to a prospective client, under MRPC 1.18(d), the lawyer’s firm could undertake a representation adverse to the prospective client if the firm obtained the informed consent, confirmed in writing, of both the adverse client and the prospective client. Furthermore, the lawyer’s firm could undertake the representation if the lawyer who consulted with the prospective client were properly screened from the new matter and the firm otherwise met the requirements of MRPC 1.18(d)(2). See also Comment 8 to MRPC 1.18.

Agreement with Prospective Client to Waive Possible Conflict. Comment 5 to MRPC 1.18 provides that a lawyer may, with the prospective client’s informed consent, condition the initial consultation on the prospective client’s agreement that the lawyer may represent a present or future client adverse to the prospective client in the same or a substantially related matter. Although not expressly required by the Comment, the lawyer should confirm any such agreement in writing.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Ethics Opinions

Pennsylvania:

Philadelphia Bar Op. 2008-10. Eleven years after lawyer had prepared estate planning documents for a client (C), the client's step-daughter (D) and her son (S) came to lawyer and said that C wanted lawyer to revise the will to provide bequests to D, S and a sibling of S. There were significant discussions about C's mental health and the reasons for the change. Lawyer went with D and S to visit C in the hospital, and lawyer concluded C lacked mental competency and refused to prepare the documents. C died a year later and a will contest was mounted in New Jersey which, among other things, called into question the work of lawyer in helping C execute the original documents. Lawyer wants to know what he can disclose the conversations with D & S 11 years after the original documents were executed. The Opinion concludes that since D and S were not prospective clients but rather seeking to have lawyer provide additional legal work for C, the conversations with D & S were not protected. "[S]uch discussions are not confidential and can be revealed to whomever the inquirer and his partner wish."

South Carolina:

Op. 08-09 (summarized under MRPC 1.6). This opinion discusses at some length the relationship between MRPC 1.18 & MRPC 1.6 under circumstances where it is ambiguous who the prospective client is.

MRPC 2.1: ADVISOR

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.

ACTEC COMMENTARY ON MRPC 2.1

As advisor, the lawyer may appropriately counsel the client with respect to all aspects of the representation, including nonlegal considerations. In doing so, the lawyer should recognize his or her own limitations and the risks inherent in attempting to assist a client with respect to matters beyond the lawyer's expertise. Although it may be appropriate for the lawyer to suggest that a client consider either diversifying the client's investments or investing in a particular class of assets (e.g., municipal bonds), the lawyer ordinarily should not recommend specific investments to the client. In contrast, the lawyer may properly suggest that the client consider whether or not a particular course of action might generate adverse legal or nonlegal consequences. For example, the lawyer may properly ask a client to consider the legal and nonlegal consequences that might result if the client were to make unequal gifts to children or other equally related relatives. The lawyer may also appropriately recommend that the client consult with an expert in a particular field, whether it be mental health, investments, insurance, employee benefits or any other matter that is not within the lawyer's expertise.

In estate and probate practice, one area of recurring concern for clients is the status of federal tax rules. While a lawyer needs to explain the legal implications of possible changes in the applicable legal rules, a lawyer's ability to predict whether the rules will actually change and, if so, precisely how, will often turn on political forecasting rather than legal judgment. There may be important nonlegal implications for clients insofar as they consider changing an estate plan to take account of possible tax changes. Lawyers may properly explore these nonlegal factors when counseling clients. In doing so, the objective in view should be to assist the client in taking into account all these considerations and to help the client make the most informed decision possible consistent with the client's values.

No Annotations

MRPC 2.3: EVALUATION FOR USE BY THIRD PERSONS

- (a) A lawyer may provide an evaluation of a matter affecting a client for use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
- (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
- (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

ACTEC COMMENTARY ON MRPC 2.3

MRPC 2.3 describes the circumstances under which a lawyer may undertake to provide a legal evaluation of a matter for use by nonclients and when the lawyer should refrain from providing an evaluation for use by a third party. The latter point is made clear in Comment 3 to MRPC 2.3:

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client.

Comment 2 also notes that, "the general rules concerning loyalty to client and preservation of confidences apply," which makes it essential to identify the person by whom the lawyer is retained. MRPC 2.3 is of limited application to the representation of clients in the estate planning since by its terms it only applies if the lawyer undertakes to perform an evaluation of the type described in the Comment.

The Comment to MRPC 2.3 indicates that it applies primarily to the preparation of evaluations, such as title reports for use by prospective purchasers or opinions required by governmental agencies that will be relied upon by nonclients. MRPC 2.3 logically applies to such evaluations regardless of the particular nature of the client or the type of representation involved. It may apply, for example, when a lawyer retained by a fiduciary to assist in the administration of an estate or trust is asked by the fiduciary client to prepare a legal opinion about the tax treatment of distributions or other legal matters of interest to the beneficiaries.

Under MRPC 2.3(a) the lawyer may undertake an evaluation only if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client. Thus, as noted in the Comment to MRPC 2.3, “if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction.”

Information relating to an evaluation is subject to MRPC 1.6 (Confidentiality of Information). Where it is reasonably likely that providing the evaluation will affect a client’s interests materially and adversely, the lawyer must first obtain the client’s informed consent. See MRPCs 1.6(a) (Confidentiality of Information) (providing in part that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent); and 1.0(e) (Terminology) (defining *informed consent*).

Evaluations prepared for the use of nonclients are also subject to the requirements of MRPC 4.1 (Truthfulness in Statements to Others). In addition, MRPC 3.3 (Candor Toward the Tribunal) prohibits a lawyer from knowingly presenting to the court any petition, accounting, or other document or evidence that is false or fails to disclose a material fact.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Ethics Opinions

Florida:

Op. 76-16 (1977). The attorney for the personal representative has the right and in some circumstances a duty, to inform the surviving spouse of the existence of elective share or other statutory rights. “The purpose of the Florida Probate Code is to provide a procedure to pay a decedent’s debts and taxes and transfer and distribute the remaining assets as efficiently and inexpensively as possible to those entitled to them under the will or by intestacy. It is normal in most instances that the persons entitled to those assets will look to the personal representative or the lawyer for the estate to find out what they may expect to receive from the estate. A beneficiary or heir always has the right, of course, to retain independent counsel. We believe that the lawyer for the personal representative has the right to provide those persons with that information and to provide the surviving spouse with information about his or her rights under the Probate Code. This is to be distinguished from counseling or giving legal advice....When the personal representative is someone other than the surviving spouse, the surviving spouse may be looking to the lawyer for the personal representative for information even though there is no attorney-client relationship between them. If the lawyer knows this, we believe he may have a duty to inform the surviving spouse of these statutory rights.”

South Carolina:

Op. 93-34 (1993). An attorney for an estate in probate or an attorney acting as personal representative for an estate in probate has no ethical duty to inform a surviving spouse of the right to claim an elective share in the absence of a present or past attorney-client relationship with the surviving spouse. The attorney for the estate in probate should take care to see that the spouse does not rely on him for legal advice and is informed of the right to independent counsel. The attorney acting as personal

representative for the estate in probate should take care that the beneficiaries not misunderstand the attorney's role by assuming that he represents them.

MRPC 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) 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;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ACTEC COMMENTARY ON MRPC 3.3

A lawyer may not mislead the court with regard to any matter before it, including ex parte applications. In particular, a lawyer may not assist a client by presenting to the court any petition, accounting, or other document or evidence that is false, and the lawyer must correct a false statement of material fact or law previously made to the court by the lawyer. If a lawyer knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to a matter, the lawyer shall take reasonable remedial measures, including, if necessary disclosure to the court. A lawyer should not construe too narrowly the scope of the term "criminal or fraudulent." In the context of the lawyer-client communications privilege, a client's fraudulent conveyance of property may be a fraudulent act that must be disclosed by the lawyer to a court. Similarly, frustrating an order of the court may involve a fraud, justifying disclosure of confidential information. This rule is consistent with MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer), which prohibits a lawyer from assisting a client in criminal or fraudulent conduct, and MRPC 4.1 (Truthfulness in Statements to Others), which prohibits the lawyer from making false statements to any third party. A lawyer for a court-appointed fiduciary should consider the extent to which MRPC 3.3 may require the lawyer to disclose to the court any criminal or fraudulent conduct by the fiduciary.

Example 3.3-1. To remedy a breach of trust, the court appoints a special fiduciary (*SF*) to take possession of the trust property and administer the trust. See Uniform Trust Code §1001(b)(5). *SF* retains lawyer (*L*) to represent *SF* in matters pertaining to the trust. *L* prepares and files a pleading with the court seeking approval of *SF*'s itemized invoice of its fees and includes the invoice with the

pleading. Later, *L* discovers that a substantial portion of the invoice was for time that *SF* did not spend on trust matters. *SF* refuses to prepare a corrected invoice for submission to the court. *L* should take corrective action. Depending on the circumstances, *L* may be able to correct the false statement by informing the beneficiaries, or *L* may need to inform the Court of the false statement. Since the pleading seeks approval of the invoice, the false statements in the invoice are material false statements subject to MRPC 3.3(a)(1).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Alabama:

F.L.C. v. Ala. State Bar, 38 So.3d 698 (Ala. 2009). Attorney's failure to disclose existence and identity of decedent's principal heir during probate was a continuing violation not only of Rule 3.3 but also of Rule 8.4, so that the limitations period for filing disciplinary proceedings applicable in Alabama did not begin to run until this information was disclosed to the probate court almost two years after probate opened. Private reprimand & \$10,000 restitution affirmed.

District of Columbia:

In re Jumper, 984 A.2d 1232 (D.C. 2009). DC Court of Appeals affirmed a sanction award (based on court's inherent power) of nearly \$20,000 jointly against an attorney who assisted his client in getting his client appointed as guardian for the decedent (in the course of which the lawyer omitted material facts in representations made to the court in violation of RPC 3.3).

Iowa:

Iowa Supreme Court Atty. Disciplinary Bd. v. Van Beek, 757 N.W.2d 639 (Iowa 2008). Prior to being suspended for a disability (alcoholism), lawyer engaged in multiple counts of misrepresentation in relation to probate matters. She substituted a new first page of a will before submitting it for probate and forged executors' names on various documents filed with the court. She was suspended for two years for this conduct.

Ohio:

Disciplinary Counsel v. Taylor, 120 Ohio St. 3d 366, 899 N.E.2d 955 (2008). Lawyer represented husband and wife for estate planning. Husband died, but lawyer did not tell his widow or family. When the widow's granddaughter brought a petition for a guardianship for her grandmother, the lawyer sought to intervene by telling court he was representing the husband, omitting to tell the court the husband had died. For this and other misconduct, the lawyer was suspended for one year but the suspension was stayed on conditions.

Pennsylvania:

Estate of Shelton, 29 Fiduc.Rep.2d 433, 2009 Phila. Ct. Com. Pl. LEXIS 170, 2009 WL 8558393 (2009). Lawyer represented the executor of this estate for 17 years from 1991 to 2008. A dispute arose over which of several churches was entitled to the estate assets and in 1999, the Orphans Court ordered that there should be no further distributions until this was resolved. In 2007, however, lawyer learned

that the executor planned to make further distributions against his advice and failed to take sufficient remedial action to prevent this. As a consequence, \$1.6 million was distributed from the estate in violation of the court order. When this came to light, executor was replaced and, in this decision, lawyer is surcharged for the amount of the improper distribution and is also required to refund \$130,000 in attorneys fees previously paid to him. Conflicting expert views were heard about lawyer's ethical obligations when it became clear to him that his client was going to and/or had violated the court order, but the court ultimately concluded that disclosure to the banks to prevent this, and ultimately to the court, was permitted under Pennsylvania's Rule 1.6 and required under Pennsylvania's Rule 3.3 to remedy this fraudulent conduct by the client. (Note that Pennsylvania RPC 1.6(b) now requires disclosure of client confidences if necessary to comply with RPC 3.3.)

Ethics Opinions

Illinois:

Op. 98-07 (1999). Lawyer who had represented a guardian and in the course of the representation had prepared accountings for the guardian and presented them to the court later discovered that the accountings were false. The lawyer no longer represented the guardian. The lawyer has a duty to take appropriate remedial action to avoid assisting the guardian in concealing the misappropriation of estate assets from the court even if the lawyer must disclose what would otherwise be confidential client information. Illinois version of MRPC 3.3(b), like the parallel Model Rule, provides that a lawyer's duty to take remedial action is a continuing duty, even though the fraud was committed by a former client.

Pennsylvania:

Philadelphia Op. 2011-4. Lawyer was hired by the PR of an estate to assist in the administration of the estate. Client had obtained letters after falsely claiming she was the sole intestate heir, but informed lawyer she had 3 siblings. Lawyer filed an inventory and inheritance tax return which properly disclosed existence of the siblings. When client informed lawyer that her siblings were willing that she receive all the estate assets, he prepared a family agreement for them to sign and sent it to the siblings, but received no response. Lawyer advised client of her duties to distribute assets of the estate as required by law, but client has been unresponsive. Committee concludes that (a) lawyer's knowledge of fraud in obtaining letters of administration triggered lawyer's duty to take remedial measures under MR 3.3(b), but the filing of the inventory and tax return with proper disclosures satisfied that duty. (b) No further disclosure to the siblings was required unless lawyer concludes that disclosure of his adverse representation when the proposed family agreement was sent was incomplete under MR 4.3, in which case lawyer must supplement to comply with MR 4.3. (c) Pennsylvania law (outside of the ethics code) may require additional disclosures of the sister's misconduct given the "derivative duties" owed to estate beneficiaries. (d) Lawyer must remonstrate with client to comply with law but if client is unresponsive, lawyer should withdraw.

MRPC 3.7: LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;

- (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in the trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

ACTEC COMMENTARY ON MRPC 3.7

MRPC 3.7 is intended to avoid or eliminate not only possible conflicts of interest between lawyer and client but also situations in trial that may prejudice the opposing party when the lawyer combines or intermingles his or her role as an advocate with that as a witness.

The first two exceptions to acting as an advocate at trial when the lawyer is "likely to be a necessary witness" are straightforward and uncontroversial. Exception two is commonly encountered in estate, trust and protective proceedings where the reasonableness of the attorney's compensation for legal services may be an issue and testimony by the lawyer(s) involved is required to resolve the dispute. The third or "substantial hardship" exception involves a balancing of the interests of the client in keeping his or her counsel (despite counsel's involvement as a witness) and the possible prejudice to the opposing party. In determining prejudice, the trier-of-fact will look to the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony may conflict with that of other witnesses. However, even if a risk of prejudice to the opposing party exists, the court will nevertheless consider the negative effects of disqualification on the lawyer's client. In applying this Rule, the principle of imputed disqualification does *not* apply [MRPC 1.10 (Imputation of Conflicts of Interest: General Rule)]. Moreover, MRPC 3.7, itself, only precludes a lawyer who is a necessary witness from serving as an "advocate at trial" in the same case. It does not preclude the lawyer from working on the case outside of court. See ABA Inf. Opin. 89-1529 (1989) (if no impairment of representation, lawyer expecting to testify at trial may represent client in discovery and other pretrial matters) and Restatement (Third) of Law Governing Lawyers §108 cmt c. But the lawyer witness' involvement in the case outside of court may independently be prohibited if other conflicts rules are triggered.

MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients) often come into play:

For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with MRPC 1.7 (Conflict of Interest: Current Clients). This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by MRPC 1.9 (Duties to Former Clients). The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Comment, MRPC 3.7.

Problems implicating MRPC 3.7 typically arise in such estate and trust litigation matters as will contests, surcharge actions, will and trust interpretation cases involving extrinsic evidence, disputes among heirs and beneficiaries and, sometimes, tax litigation. Not infrequently the lawyer who drafted a client's will or trust, or another lawyer in the scrivener's firm, will be asked to represent the executor or trustee in a dispute where interpretation of the document and the former client's intent is at issue. The estates and trusts lawyer

who is likely to be a “necessary witness” in a trial involving his or her client or former client must carefully parse the decisions involving lawyer and law firm disqualification under MRPC 3.7 as well as the cases arising under MRPC 1.7 (Conflict of Interest: Current Clients); MRPC 1.9 (Duties to Former Clients); and MRPC 1.10 (Imputation of Conflicts of Interest: General Rule).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentaries on MRPC 1.7 and MRPC 1.9.

Cases

Alaska:

Matter of Estate of McCoy, 844 P.2d 1131 (Alaska 1993). A person holding a power of attorney from decedent contacted an attorney to revise the decedent’s will. “The ...will was drafted by attorney ...at request [of the attorney-in-fact]. [He] told [attorney] that [decedent] wished to leave everything to him. Although [decedent] was ostensibly [attorney’s] client, attorney did not consult with her, did not discuss the terms of the will with her, and did not supervise execution of the will. In fact, [attorney] never met [decedent], despite his intention to do so. [Attorney-in-fact] arranged for a Notary and witnesses when the will was executed.” The will was contested on grounds of undue influence and when attorney sought to represent attorney-in-fact, contestant moved to disqualify under Rule 3.7. Attorney was disqualified as a necessary witness.

Delaware:

Estate of Waters, 647 A.2d 1091, 1098 (Del. 1994). In this case the Supreme Court of Delaware ruled that the trial court had committed “plain error” by allowing an attorney to appear in a will contest both as trial advocate on behalf of the estate and as a necessary witness testifying on the *contested* issues of undue influence and testamentary capacity. The court observed:

Under the facts of this case, the centrality of [the lawyer’s] testimony to the contested issues of undue influence and testamentary capacity mandated his withdrawal as trial attorney. [Citations omitted.] Unlike other members of the Delaware Bar confronted by the same ethical obligation in the past, [the lawyer] failed to recognize his duty as a lawyer/witness to withdraw, even after opposing counsel called it to his attention.

Florida:

Devins v. Peitzer, 622 So.2d 558 (Fla. App. 1993). In this will contest the court refused to disqualify the estate’s lawyer solely because the contestants had announced their intention to call the lawyer as an adverse witness on their own behalf. The court found that MRPC 3.7 was not designed to permit a party to disqualify opposing counsel merely by calling him or her as a witness.

Eccles v. Nelson, 919 So.2d 658 (Fla. App. 2006). After a daughter offered the will of her mother for probate and sought appointment as PR, another relative contested the first will and offered a later will. The daughter moved to disqualify the lawyer representing the contestant on the ground that he had prepared the later will under circumstances raising questions about her mother’s capacity, undue

influence and the genuineness of her mother's signature. Consequently he was a necessary witness and should not be allowed to advocate for the contestant. The court here affirmed the lower court's order disqualifying the lawyer.

Nebraska:

State ex rel. Nebraska State Bar Ass'n v. Neumeister, 449 N.W.2d 17 (Neb. 1989). A lawyer was disciplined for failing to withdraw from representation of a client, now in a nursing home, the relatives of whom had petitioned for conservatorship, when the lawyer knew he would be a material witness for the client concerning her mental capacity.

New York:

Estate of Walsh, 17 Misc.3d 407, 840 N.Y.S.2d 906 (N.Y. Sur. 2007). Lawyer who is personal representative of an estate must be disqualified from representing himself as personal representative because he is a necessary witness to key transactions and so the witness/advocate rule applies. Although there is an exception to that rule in NY for lawyers appearing *pro se*, where a lawyer represents himself as personal representative, this is not *pro se* representation. As with representation of an entity, the personal representative does not proceed in his/her own interest but on behalf of those interested in the estate.

Matter of Coleman, 22 Misc. 3d 830, 868 N.Y.S.2d 882 (2008), *rev'd in part* 2010 N.Y. App. Div. LEXIS 489 (2010). This was an action to compel an executor to distribute a legacy in which petitioner and the defendant executor moved to disqualify petitioners counsel and petitioner counter-moved to disqualify executor's counsel. Both motions were granted by the trial court. On the MR 3.7 issue, executor's counsel was disqualified under NY's version of Rule 3.7 because he had represented the executor at the closing of a transaction that was at issue in the motion to compel and so was a necessary witness. For the MR 1.12 issue, see annotations under that rule.

Pennsylvania:

Pew Trust (2), 16 Fid. Rep. 2d 80, 84-85 [Montg. Cty (Pa.) 1995]. The Pennsylvania Orphans Court granted the petition of certain trust beneficiaries to disqualify the law firm representing the trustee in related actions challenging, among other things, the prudence of the trustee's reliance on certain tax and legal opinions previously rendered by the law firm to support a material corporate transaction entered into by the trustee. The court found that certain of the firm's lawyers were "likely to be called as necessary witnesses" and that the firm and its lawyers must be disqualified from trying the case. Although the court acknowledged that the law firm had never served as counsel for the trust's beneficiaries and, consequently, the firm's only client was the trustee, disqualification of the entire firm was warranted in light of the "derivative" duties owed by the law firm to the trust's beneficiaries. [Citing extensively to the ACTEC Commentary on MRPC 1.2.]

Virginia:

Estate of Andrews v. U.S., 804 F. Supp. 820 (E.D. Va. 1992). The court disqualified counsel for the estate from representing the estate in a tax refund action where counsel's law partner not only was a party to the action in his representative capacity as a co-executor of the will but also was to be called to testify as a material witness at trial.

Ethics Opinions

Iowa:

Op. 07-07 (2007). It is not necessarily a conflict of interest for a lawyer who drafted a will to represent the personal representative. But if a will contest emerges, the estate planner may be a necessary witness and, as such, would be precluded from advocating for the personal representative and simultaneously serving as a witness since this would violate Rule 3.7. In some cases it may be appropriate for another lawyer in the witness' firm to serve as advocate, provided that this would not violate Rule 1.7.

Texas:

Op. 439 (1987). An attorney prepared a will, signed by two witnesses, and acted as notary thereof. After filing the will for probate and acting as counsel for the petitioner, a contest of the will was filed claiming that the document was not executed in accordance with the applicable law and that the testator did not have testamentary capacity. Contestant filed a motion to disqualify the attorney who had prepared and notarized the will, and the issue presented was whether or not the attorney should be disqualified from continuing to act as attorney for the executor (who was also the sole beneficiary under the will). The Texas Committee on Professional Ethics held that the attorney could not continue to act under these circumstances (following Texas Opinion 234 (1961), holding that the law partner of a lawyer who had drafted a will, deed and contract for a client, the validity of which instruments were attacked after the client's death on grounds of fraud, undue influence and mental incapacity of the client, could not serve as counsel since the lawyer knew his partner would be a material witness). Note that Texas' version of the witness advocate rule, unlike MRPC 3.7, imputes the lawyer witness conflict to other lawyers in the lawyer witness' law office.

MRPC 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ACTEC COMMENTARY ON MRPC 4.1

MRPC 4.1 prohibits a lawyer from knowingly making false statements of fact or law to any third party or knowingly failing to disclose material facts to any third party under the circumstances described in paragraph (b). This rule must be considered in light of the lawyer's duties to the court, MRPC 3.3 (Candor Toward the Tribunal). In addition, the lawyer for a fiduciary is obligated to deal fairly and honestly with the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

In representing a fiduciary, the lawyer is bound by MRPC 3.3 (Candor Toward the Tribunal) in all relations with the court. But MRPC 4.1 governs when the lawyer who is representing the fiduciary is dealing with beneficiaries. Thus, if a fiduciary is not subject to court supervision and is therefore not required to render an accounting to the court but renders an accounting to the beneficiaries, the lawyer for the fiduciary must exercise at least the same candor in statements made to the beneficiaries that the lawyer would be required

to exercise toward any court having jurisdiction over the fiduciary accounting. In contrast to MRPC 3.3, however, if a lawyer discovers that material facts have been misrepresented to the beneficiaries, MRPC 1.6 (Confidentiality of Information) is accorded greater weight than if a court were involved. MRPC 4.1 and 1.6 must be parsed very carefully to analyze this kind of situation properly. For example, if a lawyer discovers a fiduciary client has committed a crime or fraud against the beneficiaries, the lawyer is required to disclose this to avoid assisting the criminal or fraudulent conduct of the client unless disclosure is prohibited by Rule 1.6. But under MRPC 1.6(b)(3), if the client used the lawyer's services to further the crime or fraud, the lawyer may be permitted to disclose the information to "prevent, mitigate or rectify substantial injury to the financial interests or property ...[of the beneficiaries] that is reasonably certain to result or has resulted from the client's ...crime or fraud." Thus, disclosure to avoid assisting the client's crime or fraud may well be required. But if the client did not utilize the lawyer's services to commit the crime or fraud which has now been discovered, disclosure may not be required, or even permitted, because the information is protected by MRPC 1.6.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Montana:

In re Potts, 336 Mont. 517, 158 P.3d 418 (2007). Attorney was publicly censured for assisting his clients to commit fraud during the mediation of a will contest and later, when presenting the agreement to the court. He assisted his clients to negotiate a settlement of the will contest that the other parties believed covered all estate assets, including joint tenancy assets, whereas his clients intended and later sought to obtain the joint tenancy assets outside of the settlement. Rule 1.6 may have precluded attorney from disclosing his clients' confidences as to this, but he was obliged to withdraw rather knowingly to assist their fraud, as he did.

Texas:

Lesikar v. Rappeport, 33 S.W.3rd 282 (Tex. App. 2000, *pet. denied*). Attorney has no duty to reveal information about his client-executor's fraud to a third party (even a co-executor who is not his client) when his "client is perpetrating a nonviolent, purely financial fraud through silence."

Ethics Opinion

New York:

Op. 796 (2006). If a lawyer who represents the administrator of an estate has advised the attorney for a creditor of the decedent's death, and the creditor's attorney subsequently withdraws a court action on the claim in the apparent but erroneous belief that the estate has no assets, assuming the lawyer for the estate has done nothing directly or by implication to suggest the estate is insolvent, the estate lawyer has no ethical duty to contact the creditor's attorney to advise the creditor's attorney that the estate has assets and that the creditor should file a claim.

MRPC 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ACTEC COMMENTARY ON MRPC 4.3

The lawyer for a fiduciary is required to comply with MRPC 4.3 in communicating with the beneficiaries of the fiduciary estate, or with the protected person in the case of guardianships and conservatorships, when such persons are not represented by counsel. In dealing with unrepresented beneficiaries or the protected person, the lawyer for the fiduciary may not suggest that he or she is disinterested. As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer should inform the beneficiaries of the fiduciary estate regarding various matters, including the fact that the lawyer does not represent them and that they may wish to obtain independent counsel. If the lawyer knows, or reasonably should know, that an unrepresented beneficiary, or another unrepresented person, misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding. The lawyer should not permit the beneficiaries to believe that the lawyer is the lawyer for the parties interested in the matter if the lawyer is representing only the fiduciary.

If the lawyer for the fiduciary believes that the interests of an unrepresented person are adverse to the interests of the fiduciary, the lawyer must refrain from giving the unrepresented person any advice. In such cases the lawyer should suggest that the unrepresented person consult with independent counsel. See Comment to MRPC 4.3.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentary on MRPC 1.2.

Cases

District of Columbia:

In re Jumper, 984 A.2d 1232 (D.C. 2009). In this case the DC Court of Appeals affirmed a sanction award (based on court's inherent power) of nearly \$20,000 jointly against an attorney who assisted his client in getting his client appointed as guardian for Jumper (in the course of which he evidently omitted material facts in representations made to the court in violation of RPC 3.3) and, when that guardianship was vacated, met with Jumper in order to induce her to change her existing estate planning documents in favor of the client. The meeting either violated RPC 4.3 if lawyer believes Jumper was unrepresented (as lawyer alleged), or RPC 4.2 if lawyer knew Jumper was represented. Bad faith litigation conduct was also part of the basis for the sanction.

Ethics Opinions

North Carolina:

Op. 2007-1. Since the heirs of an estate are not clients, communications with them should be governed by Rule 4.3, but “[w]ith the consent of the estate's personal representative, the lawyer may provide the heirs with factual information concerning the wrongful death action.” The lawyer may also negotiate on behalf of the estate with a person arguably entitled to participate in the wrongful death recovery and/or file an action on behalf of the estate to determine a person’s right to participate in such recovery.

Pennsylvania:

Philadelphia Bar Association Opinion 2011-4 (2011). Lawyer was hired by the PR of an estate to assist in the administration of the estate. Client had obtained letters after falsely claiming she was the sole intestate heir, but informed lawyer she had 3 siblings. Lawyer filed an inventory and inheritance tax return which properly disclosed existence of the siblings. When client informed lawyer that her siblings were willing that she receive all the estate assets, he prepared a family agreement for them to sign and sent it to the siblings, but received no response. Lawyer advised client of her duties to distribute assets of the estate as required by law, but client has been unresponsive. As to communications with siblings, Committee concludes that no further disclosure to the siblings was required unless lawyer concludes that disclosure of his adverse representation when the proposed family agreement was sent was incomplete under Rule 4.3, in which case lawyer must supplement to comply with Rule 4.3. Pennsylvania law (outside of the ethics code) may, however, require additional disclosures of the sister’s misconduct given the “derivative duties” owed to estate beneficiaries. This opinion also involved MRPC 3.3 and the opinion as to Rule 3.3 is summarized under that rule.

MRPC 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
- (d) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (e) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ACTEC COMMENTARY ON MRPC 5.3

Lawyers engaged in trust and estate practice have many occasions to draw on the experience and expertise of nonlawyers, both inside and outside their firm. Use of paralegals and legal secretaries to assist the practice is routine, as is retention of outside accounting firms, investigators, appraisers, estate liquidators,

business managers, real estate managers, copying services and data storage providers. Occasionally a trust and estate lawyer will need to retain a doctor to assess the competency of a client or to opine on the competency of a decedent in the event of a will contest. Nonlawyer assistance may also be employed through the use of legal forms systems created by nonlaw companies and by the “outsourcing” of legal work to nonlawyer firms in other states or countries. Even such ostensibly benign uses of nonlawyer assistance such as trash removal, computer and/or photocopier maintenance can pose serious risks for confidentiality and need to be carried out with attention to the lawyer’s professional responsibilities.

General Rules. Responsibilities for the conduct of other lawyers are governed by Model Rule 5.1, whereas responsibilities for the conduct of nonlawyers are covered by this Rule. After making adjustments for the fact that lawyers, unlike nonlawyers, are, themselves, subject to the Rules of Professional Conduct, the general standards under Rules 5.1 and 5.3 are the same: a lawyer who is a partner or has managerial responsibility comparable to that of a partner must make “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance” that other lawyers or nonlawyers conform to the Rules of Professional Conduct. Similarly, lawyers who directly supervise other lawyers or nonlawyers must make “reasonable efforts to ensure” that those under their supervision comply with the Rules of Professional Conduct. And finally, a lawyer with either managerial or supervisory responsibility over others is responsible for their conduct if it would have been a violation of the Rules had the conduct been that of the lawyer and the conduct was ordered or ratified by the lawyer, or the lawyer failed to take reasonable remedial actions when he or she came to know of the conduct.

While lawyers are not guarantors that their nonlawyer assistants will behave properly under Rule 5.3, conversely they may be responsible for violating Rule 5.3 if they have not made reasonable efforts to ensure compliance by nonlawyers even if the nonlawyers do not misbehave. A lawyer who does not adequately supervise the work of a nonlawyer assistant will violate both this rule and also Model Rule 5.5, which prohibits assisting the unauthorized practice of law by nonlawyers (covered in these ACTEC Commentaries below). Moreover, if a supervising lawyer has directed a nonlawyer to do something which would have been a violation had the lawyer done it, the lawyer may also have violated MRPC 8.4(a) which prohibits violating or attempting to violate any of the rules “through the acts of another.” See also MRPC 5.7 (“Responsibilities Regarding Law-Related Services”). Even though the Model Rules do not impose vicarious liability on partners or owners for the conduct of nonlawyer subordinates, the background civil law of agency may do so.

On occasion, an outside lawyer may be retained to provide what are essentially nonlaw services for which one need not be licensed to practice law. Thus, for example, some lawyers may provide data management or investigative services or fiduciary services that do not constitute the practice of law. Similarly, some licensed lawyers are also medical doctors and might be retained for their medical, rather than their legal expertise. The Model Rules do not specifically address this situation and so it is unclear whether such associations are governed by MRPC 5.3 or MRPC 5.1. Since the standards set out in MRPC 5.1 and 5.3 are so similar, the issue may not be of great import. But if the lawyer has an active license, the retaining lawyer should be able to take into account the fact that the lawyer may be subject to professional discipline even for conduct that does not constitute the practice of law. See MRPC 8.4.

Initial Employment. When a decision is being made to hire or retain the services of a nonlawyer, due diligence must be exercised to make sure that the nonlawyer has the requisite training and honesty to work with the kinds of sensitive information that lawyers must protect and can provide competently the services

for which he or she has been retained. If the nonlawyer in question does not have experience working for lawyers, the lawyer must be confident that the nonlawyer can be adequately trained in the professional responsibilities with which he or she must comply.

A nonlawyer may also have confidential information as a result of working for clients in a previous workplace, and the hiring process needs to check for such conflicts and, if necessary, set up a screen to prevent the transmission of protected information across conflict lines. The model rules do not impute the conflicts of interest held by nonlawyers to the lawyers in a firm, but the rules nonetheless recommend that such nonlawyers should be screened if they have conflicts, to avoid communication of protected information. See MRPC 1.10, cmt [4].

If the nonlawyer who is to be retained is an independent contractor who will not work on site with the lawyer, it is even more important that the lawyer take reasonable steps to ascertain that the working conditions of the nonlawyer provide the level of security necessary to protect client confidences and that they provide an appropriate mechanism for protecting against conflicts of interest. This kind of due diligence is particularly important if the nonlawyer being retained is a business entity with multiple nonlawyer employees who are working on matters not only for one lawyer or law firm, but for multiple law firms. Some nonlawyer firms of this sort are located in foreign countries where the ethical responsibilities of lawyers and nonlawyers may not be monitored as closely as American law and the rules of professional conduct require. The retaining lawyer has a duty at the outset to make sure that such outside nonlawyer firms will conduct themselves in a way compatible with the lawyer's professional duties. In some circumstances, it may also be necessary to obtain client consent before outsourcing. Several ethics opinions on outsourcing are included among the annotations. [See generally ABA Op. 08-451 (2008) (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services); N.Y. City Bar Op. 2006-3 (outsourcing).]

Cloud Computing. Another kind of nonlawyer service that may be employed by trust and estate lawyers is remote storage of client information on servers owned and operated by nonlawyer companies. In general, such services are permissible if the lawyer has engaged in due diligence in evaluating the vendor of such services and has reasonable assurance that client information will be preserved from destruction and that client confidentiality will be protected. Several state and local ethics opinions on the issue are included among the annotations. [See, e.g., NYSBA Op. 842 (2010), and Iowa SBA Op. 11-01 (2011).]

What May be Delegated? Virtually any kind of preparatory work can be delegated to nonlawyer assistants if the lawyer has reasonable and well-founded confidence in the nonlawyer, has given appropriate instruction to the nonlawyer, exercises appropriate supervision and takes responsibility for reviewing and correcting the final product or services performed. While easily stated, implementation of these duties is often difficult. The ability to assess the competence and professional responsibility of nonlawyers, and the possibility of appropriate instruction and supervision will vary greatly depending on the kind of task delegated and on whether the nonlawyer is inside or outside one's law firm. Thus, nonlawyers may be assigned to collect information from or on behalf of clients, may be asked to draft legal documents for a client, and may be directed to communicate with and/or file appropriate documents with courts and other agencies, public or private. Similarly lawyers may utilize the services of outside nonlawyer vendors to do this work if they have exercised the due diligence necessary to have reasonable assurance that those nonlawyers will behave in conformity to the lawyer's professional duties and can maintain the requisite supervisory responsibility. Regardless of what tasks have been assigned to nonlawyers, however, ultimately a lawyer must be

responsible for the exercise of legal judgment required. If the lawyer has delegated work and fails to exercise an appropriate level of review over the work product, the lawyer is violating his or her duties regardless of whether the client is injured thereby.

Since the exercise of legal judgment itself cannot be delegated, there are certain tasks that cannot be delegated to nonlawyers. They should not be given responsibility for determining what estate planning documents are appropriate for the client. They should not be given responsibility for making sure that clients understand the contents of the documents that have been drafted. In addition, they should generally not be asked to supervise the execution of estate planning documents. See ACTEC Commentary on MRPC 1.1 (Competence). Similarly, nonlawyers should ordinarily not be given responsibility for ascertaining the competence of clients to execute estate planning documents. An exception to this general rule should be made, however, where a doctor has been retained precisely for the purpose of assessing a client's competence since the doctor's expertise should be superior to that of the lawyer, and the doctor would be retained for this very reason.

In many jurisdictions, nonlawyers may serve as fiduciaries and appear *pro se* in court on their own behalf. If a nonlawyer with whom the lawyer is associated is performing such a fiduciary role, court appearances by the nonlawyer may be permissible. But nonlawyers employed or retained by a lawyer to assist in representing a client may not appear in court in a representative capacity unless the rules of the tribunal permit it, which is unusual. In probate or trust administration matters, for example, nonlawyers should not be asked to appear in court on behalf of a client absent clear authority for such an appearance in the jurisdiction.

Appropriate Instruction. The appropriate level of instruction will depend on the kind of nonlegal work being assigned and on the prior training of the nonlawyer involved. At a minimum, nonlawyers need to be educated in the lawyer's Rules of Professional Conduct insofar as they impact the work assigned. They also need to be given instruction as to how to carry out the task assigned so as to meet the lawyer's duty of competence. In some cases, such instruction, itself, can be outsourced. Paralegals, for example, have typically completed a paralegal training program and obtained a certificate of completion of such a program before being hired by a lawyer. Such programs typically include instruction in legal ethics. A lawyer is entitled to rely on such a certificate as to the content of the program that has been certified after making reasonable efforts to ascertain that relevant topics have been covered and mastered. But many kinds of nonlawyer assistants have had no such training and the lawyer must provide that training, or see that it is provided, as needed to give the lawyer the reasonable assurance required. In particular, even paralegals may not have received focused instruction on the law of trusts and estates; and such training may be required for some kinds of work that the lawyer wishes to assign to the nonlawyer. For example, nonlawyers should be sensitized to the confidentiality of a client's documents and other information in the event they are contacted by the client's family members.

Appropriate Supervision and Review. As in other areas of practice, in trust and estates practice it is possible for a lawyer to take on and delegate so much work to nonlawyers that the lawyer will find it impossible to supervise the nonlawyer adequately or to review the work product. Failure to supervise nonlawyer assistants is just as dangerous for clients as is hiring an incompetent nonlawyer or failing to provide adequate instruction. If the lawyer does not adequately review the work product of a nonlawyer, the lawyer is not taking responsibility for the exercise of legal judgment on behalf of that client and is, effectively, assisting the unauthorized practice of law by the nonlawyer. A lawyer needs to have mechanisms in place that ensure

adequate supervision and review to avoid violating both MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistance) and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Example 5.3-1. Lawyer (L) employs legal secretary (LS) and delegates to LS more and more responsibility for probate and guardianship matters. LS essentially becomes a paralegal and bookkeeper as well as a legal secretary. L also gives LS authority to make deposits to and withdrawals from both L's trust account and L's office account. As the workload delegated to LS intensifies, LS becomes delinquent in meeting filing deadlines, but conceals this from L by diverting notices and court warnings that might alert L, putting these communications in the appropriate office files rather bringing them directly to L's attention. In addition, LS begins misappropriating money from trust and guardianship accounts over which LS has withdrawal authority, all without L's knowledge. Despite L's lack of knowledge, L is liable for violation of MRPC 5.3 because all of this would have been easily discoverable had L properly reviewed the office files and the trust accounts or heeded the warnings by the court concerning the neglect of numerous files. [Based on *Disciplinary Counsel v. Ball*, 67 Ohio St. 3d 401, 402-03, 618 N.E.2d 159 (1993).]

Use of Estate Planning Form Systems and Packages Prepared by Outside Nonlawyers. It is a common practice for estate planners to use form packages and systems prepared by outside vendors. Some of these form packages are created by lawyers licensed in other jurisdictions; some of them are prepared by unlicensed lawyers working for nonlaw companies; and some of them may be prepared by persons without any formal legal training whatsoever. A lawyer has a duty to use such form systems competently, and so must assess and take responsibility for the adequacy of the forms for a given client's needs. See MRPC 1.1. As long as the lawyer using the forms has not become directly associated with the nonlawyers selling such systems, MRPC 5.3 would not apply. But some nonlaw vendors enter into an active association with the lawyers such that the nonlaw vendors meet with clients, draft estate plans, and then ask the lawyer to review the final product. These situations are fraught with risk for clients and for the lawyer entering into the arrangement. The requirements of MRPC 5.3 do apply where the association is active in this way. The lawyer must take special care to assess the business practices of such nonlaw companies and to supervise such nonlaw participants to make sure that they are behaving in a way that comports with the lawyer's professional duties. The lawyer must also review with care the work product before approving it for a particular client. See also the ACTEC Commentary on MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Example 5.3-2. Lawyer (L) spends about one-third of his practice on estate planning. L enters into an association with a vendor (V) of "living trust services" who is a nonlawyer. V markets the trust documents; meets with clients to educate them about the value of living trusts in their estate plan; and drafts the relevant documents. In return for allowing V to use L's name, V agrees to refer clients to L for an "independent review" of the estate plan and to have clients sign a flat fee retainer agreement with L for this review. L does not accompany V to any of V's meetings with clients and L makes no independent determination as to the suitability of the living trusts for the clients who have purchased them. In short, L makes no truly independent review of the estate plans. L has violated MRPC 5.3 by failing to supervise V and have adequate measures in place to give reasonable assurance to L that V's conduct was compatible with L's duties to his clients. L has also assisted the unauthorized practice of law in violation of MRPC 5.5, failed to diligently communicate with clients in violation of MRPC 1.3 and 1.4, and failed to obtain client consent to a conflict of interest that results from the business

relationship with V in violation of MRPC 1.7. [Based on *In re Disciplinary Proceeding Against Shepard*, 169 Wn. 2d 697, 239 P.3d 1066 (2010).]

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Kansas:

In re Flack, 272 Kan. 465, 33 P.3d 1281 (2001). Lawyer was suspended for two years for working with a company of nonlawyer “client service representatives” (ALMS) who solicited estate planning work “to be performed” by the lawyer. Lawyer knowingly authorized ALMS and the client service representatives to use his name to conduct client interviews; provide explanations of the different types of trusts, wills, powers of attorney and other legal documents; and obtain signatures and attorney fees prior to Respondent knowing the identity of the client. ALMS prepared and printed all the marketing material as well as the forms for the trust, will, and power of attorney documents in the name of the lawyer.

Ohio:

Office of Disciplinary Counsel v. Ball, 67 Ohio St. 3d 401, 618 N.E.2d 159, 161 (1993). A lawyer was suspended from practice for six months for neglect in failing to supervise a secretary who embezzled \$200,000 from client funds over a ten-year period. “As the record demonstrates, respondent relinquished significant aspects of his probate practice to [his secretary] and failed to set up any safeguards to ensure proper administration of the matters entrusted to him by clients. Delegation of work to nonlawyers is essential to the efficient operation of any law office. But, delegation of duties cannot be tantamount to the relinquishment of responsibility by the lawyer.”

Disciplinary Counsel v. Young, 113 Ohio St. 3d 36, 862 N.E.2d 504 (2007). Lawyer was appointed as guardian of the estate of a veteran who had been declared incompetent to manage his own affairs. Over a number of years, lawyer became uninterested in carrying out his duties and turned over his responsibilities to his nonlawyer secretary, although he never sought to withdraw as guardian. As a consequence the ward’s estate lost \$40,000, although this was repaid by sureties. The lawyer was suspended indefinitely.

Washington:

In re Disciplinary Proceeding Against Shepard, 169 Wash. 2d 697, 239 P.3d 1066 (2010). Lawyer was suspended for two years for assisting the unauthorized practice of law in violation of Rule 5.5 and failing to adequately supervise nonlawyers in violation of Rule 5.3 as a result of his working with a nonlawyer “living trust” company.

Wisconsin:

Discipline of Roethe, 780 N.W.2d 139 (Wis. 2010). Lawyer represented estate with co-executors, numerous heirs, and numerous delays. He had executors sign undated personal representative deeds and other documents and later inserted dates other than the date of execution, and had the documents notarized. Court held that lawyer had violated 5.3 by directing his assistant to notarize documents with

an incorrect date, and 8.4 because his fee agreement violated a statute, and publicly reprimanded the attorney.

Ethics Opinions

New York:

NY City Bar Op. 2006-3. This opinion addressed outsourcing of legal support services overseas to nonlawyers. In principle it applies to outsourcing of legal work to nonlawyers, whether foreign or domestic. The opinion concludes that a New York lawyer may ethically do so provided the New York lawyer sufficiently supervises the nonlawyer to guard against the unauthorized practice of law; to ensure that the lawyer is competently representing the client; to ensure that the client's confidences are protected; and to avoid conflicts of interest. The opinion also notes that the client must be billed properly for this kind of outsourcing and, under some circumstances, may need to give advance consent.

MRPC 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
 - (1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice or

- (2) are services that the lawyer is authorized to provide by federal law or other law or rule to provide in this jurisdiction.
- (e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

ACTEC COMMENTARY ON MRPC 5.5

The Unauthorized Practice of Law. A lawyer admitted to practice in one jurisdiction (an “admitted jurisdiction”) who provides legal services in another jurisdiction in which the lawyer is not admitted (a “non-admitted jurisdiction”) may violate the non-admitted jurisdiction’s proscriptions against the unauthorized practice of law. If so, the lawyer is subject to discipline in both the admitted jurisdiction and the non-admitted jurisdiction. MRPC 8.5 (Disciplinary Authority; Choice of Law). Moreover, a lawyer guilty of the unauthorized practice of law in a non-admitted jurisdiction is subject to having the lawyer’s legal services contract held void and unenforceable. Thus, a lawyer’s adherence to a non-admitted jurisdiction’s ethical rules will not only allow the lawyer to practice ethically, but it will also protect the lawyer’s financial interest as well.

This Commentary provides ethical guidance to lawyers engaged in estate planning, estate administration, estate litigation, and collateral fields when their representation touches other jurisdictions in which the lawyer is not licensed to practice law.

Mandatory Conduct. Even though authorized by MRPC 5.5 to provide services in a non-admitted jurisdiction, the lawyer remains subject to all other ethical provisions of the MRPC. In particular, pursuant to MRPC 1.1 (Competence), the lawyer must provide competent representation regarding the laws and rules applicable in the non-admitted jurisdiction.

MRPC 5.5, cmt [20] states that “In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction.” But that comment does not go far enough in indicating what is required. Although MRPC 5.5 and its Comments are silent regarding “informed consent,” MRPC 1.2(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer) authorizes a lawyer to limit the scope of the lawyer’s representation only with the client’s “informed consent.” MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Under MRPC 5.5, a lawyer engaged in a multijurisdiction practice necessarily offers limited services in jurisdictions in which the lawyer is not admitted to practice law. Thus, if a lawyer intends to render services in or concerning a jurisdiction in which the lawyer is not admitted to practice law, the lawyer should consider the need to obtain the client’s informed consent to do so. See Commentary to MRPC 1.1 (Competence); MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (limiting the scope of the lawyer’s representation with client’s informed consent). In addition, some jurisdictions specifically require notification to the client.

Prohibited Conduct. Under paragraph (b)(2), “a lawyer who [has] not been admitted” to the practice of law in the jurisdiction “shall not ... hold out to the public or otherwise represent that the lawyer is admitted to

practice law in this jurisdiction.” This prohibition would apply even though the lawyer may be authorized to practice federal or state law in the non-admitted jurisdiction pursuant to paragraph (d)(2).

Impact of MRPC 5.5(c) and (d). The addition of MRPC 5.5(c) and (d) benefits all lawyers engaged in providing legal services that span state lines. However, the amended Rule especially benefits lawyers who provide transactional services, such as estate planning counsel. Prior to the amendment, a trial lawyer who was retained to represent a client in litigation in a non-admitted jurisdiction could do so by being admitted *pro hac vice*. There was no similar exception available to transactional lawyers. With the adoption of paragraph (c)(4) of MRPC 5.5, a transactional lawyer, in the circumstances described in that paragraph, may provide legal services in a non-admitted jurisdiction, as well as providing legal counsel regarding the laws of a non- admitted jurisdiction.

In addition, MRPC 5.5 provides other means for a lawyer to provide legal services in a non-admitted jurisdiction. If federal or state law expressly authorizes a lawyer to represent a client in a matter, MRPC 5.5 authorizes that representation in a non-admitted jurisdiction. Similarly, if a lawyer is involved in an alternative dispute resolution proceeding, MRPC 5.5 authorizes the lawyer to participate in the preparation for and in the proceeding in a non-admitted jurisdiction without violating MRPC 5.5.

The Practice of Law. Before a lawyer can be found to have engaged in the unauthorized practice of law, the lawyer must be engaged in the “practice of law.” Not only are there significant variations in how the various jurisdictions define the “practice of law,” most definitions are circular or amorphous. For example, under Oregon law, “[T]he practice of law means the exercise of professional judgment in applying legal principles to address another person’s individualized needs through analysis, advice, or other assistance.” *Oregon State Bar v. Smith*, 149 Or. App. 171, 183, 942 P.2d 793, 800 (1997). California courts define the “practice of law” as both “the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure,” and as “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 128, 949 P.2d 1, 5 (1998). Arizona relies on traditional concepts and examples for its definition:

[T]he practice of law [means] those acts, whether performed in court or in the law office, which lawyers customarily have carried out from day to day through the centuries.... Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect, alter, or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities; the preparation for another of matters for courts, administrative agencies and other judicial and quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer. They also include rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession, either with or without compensation. *State Bar of Ariz. v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961), *opinion supplemented on denial of reh'g*, 91 Ariz. 293, 371 P.2d 1020 (1962).

In some states, what constitutes the “practice of law” is defined by court rule. Washington, for example, defines it as follows:

The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

- (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
- (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

Washington General Rule 24(a). (The rule goes on to carve out exceptions permitting non-lawyer practice of various kinds “whether or not they constitute the practice of law.”) GR 24(b).

Given this diversity of definitions of the “practice of law,” a lawyer engaged in a multijurisdictional practice could review the laws of each of the jurisdictions to determine whether the services the lawyer is providing constitute the “practice of law” in those jurisdictions. However, the lawyer can avoid this study by simply assuming that any services the lawyer intends to provide will be the practice of law in each non-admitted jurisdiction and proceed accordingly.

Safe Harbors. A lawyer practicing in a non-admitted jurisdiction can obtain complete protection from a claim of unauthorized practice of the law by being admitted to practice law in that jurisdiction. In recognition of this principle, in passing the 2002 amendments to MRPC 5.5, the ABA also adopted a proposed Rule regarding admission of a practicing lawyer in another jurisdiction by motion made to the courts of the local jurisdiction. ABA Model Rule on Admission by Motion, available on-line (as amended in 2012), at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_admission_motion.authcheckdam.pdf See *ABA Report to the House of Delegates, No. 201F*. Subject to length of service, good character, and other qualifications, states were encouraged to allow active lawyers in other jurisdictions to be admitted to practice in the local jurisdiction by motion. Several states have entered into compacts allowing active lawyers in any of the states to be admitted to practice law in the others provided certain conditions are met. See N.H. Sup. Ct. R. 42(XI(b) & (c)); Vt. Sup. Ct. R. Adm. Bar 7(e); Maine Bar Admission Rule 11A (New Hampshire, Vermont, and Maine).

A lawyer may also choose to associate counsel in the non-admitted jurisdiction [MRPC 5.5(c)(1)]. By doing so, the lawyer gains a similar, though not as expansive, safe harbor in which to practice. This safe harbor is only available when the legal services the lawyer provides in the non-admitted jurisdiction are provided on a “temporary basis.” See *Threshold Requirement under MRPC 5.5(c): Temporary Basis* below. In addition, the associated counsel must “actively participate” in the matter. Active participation is not defined in the Rule or the comments. Lawyers providing estate counseling services in a non-admitted jurisdiction would

meet this second requirement by associating local counsel for such matters as deed preparation, will execution formalities, and similar services.

Threshold Requirement under MRPC 5.5(c): Temporary Basis. If a lawyer desires to practice law in a non-admitted jurisdiction, MRPC 5.5(c) provides that the lawyer “may provide legal services on a temporary basis.” The term “temporary basis” is not defined in the Rule. As noted in Comment 6 to MRPC 5.5: “There is no single test to determine whether a lawyer’s services are provided on a ‘temporary basis’ in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be ‘temporary’ even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.” Thus, Comment 6 suggests a liberal interpretation of “temporary basis.” This is particularly important for estate lawyers practicing in close proximity to another state. For example, a Chicago lawyer providing estate counseling for Illinois clients is likely to find multiple occasions to analyze and opine on the laws of Wisconsin, Iowa, Indiana, and Michigan regarding titling, tax, and similar issues. In addition, the Chicago lawyer may need to prepare deeds and other documents according to the laws of one or more of these jurisdictions. Provided the Chicago lawyer otherwise complies with paragraph (c), the lawyer’s legal services regarding the surrounding non-admitted jurisdictions would constitute practicing law in those jurisdictions on a “temporary basis.”

On the other hand, a lawyer who is engaged to provide estate planning services by clients in a non-admitted jurisdiction and makes personal visits to those clients on a recurring basis should be cautious in relying upon MRPC 5.5(c). While Comment 6 might lead the courts in the non-admitted jurisdiction to interpret “temporary basis” broadly, the comments are not binding. Thus, a lawyer in such circumstances should consider the desirability of joining the non-admitted jurisdiction’s bar.

Legal Services Reasonably Related to the Lawyer’s Transactional Practice. Subject to the “temporary basis” threshold requirement, under paragraph (c)(4), a lawyer may provide legal services in a non-admitted jurisdiction that arise out of or are reasonably related to the lawyer’s practice in an admitted jurisdiction. Comment 14 states that a variety of factors may establish that the services performed are reasonably related to the lawyer’s practice in the admitted jurisdiction. For example, a lawyer provides estate planning services for a client in the lawyer’s admitted jurisdiction. The client then moves to a non-admitted jurisdiction. The lawyer may continue to provide estate planning services for the client. Similarly, where a client retains the lawyer to represent the client in a fiduciary administration and the admitted jurisdiction is the natural situs for administration, the lawyer could provide legal services for ancillary administrations in non-admitted jurisdictions.

Where the lawyer has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the lawyer’s practice in non-admitted jurisdictions will be considered reasonably related to the lawyer’s practice in the lawyer’s admitted jurisdiction. For example, a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions, again on a temporary basis. Because the comments are not binding, a lawyer who intends to rely on this analysis should consider seeking an opinion of the non-admitted jurisdiction’s bar association. In addition, since this exception is based on “recognized expertise,” a lawyer who chooses to rely on this exception should take steps to insure that the lawyer is recognized as an expert. These steps could include: obtaining certification as a specialist in those jurisdictions offering such programs; participating actively in bar sections related to the lawyer’s

expertise; participating in national associations of lawyers related to the lawyer's expertise; writing scholarly articles; teaching; participating in seminars and panel discussions; or any other activity that demonstrates the lawyer's expertise.

Legal Services Regarding Litigation and ADR. Subject to the "temporary basis" threshold requirement, paragraphs (c)(2) and (3) expand the situations in which lawyers may render services in a non-admitted jurisdiction regarding litigation and alternative dispute resolution ("ADR"). Regarding trials, preliminary work in preparation for the trial is acceptable, provided the lawyer is either authorized to appear or reasonably expects to be so authorized. Thus, a lawyer asked to assist or handle estate litigation could investigate the underlying facts, meet with and counsel clients, and provide related services, provided the lawyer reasonably expected to be admitted *pro hac vice*. While this exception is available to allow the lawyer to investigate the matter before seeking admission, the lawyer should not rely on the exception except where necessary. Instead, the lawyer should seek and obtain admission *pro hac vice* at the earliest opportunity.

On the other hand, the exception for ADR applies only when the non-admitted jurisdiction does not require admission *pro hac vice* to participate in the ADR and the lawyer's services "arise out of or are reasonably related to the lawyer's practice" in an admitted jurisdiction [MPRC 5.5(c)(3)]. If admission *pro hac vice* is required to participate in the ADR, then the lawyer must comply with MRPC 5.5(c)(2). Where admission *pro hac vice* is not required, the lawyer may provide legal services in the non-admitted jurisdiction regarding the client's ADR, provided those legal services are "reasonably related" to the lawyer's practice in an admitted jurisdiction. Like litigation, a lawyer engaged to assist a client's efforts to resolve estate litigation in a non-admitted jurisdiction through ADR may provide legal services both in preparation for ADR and during ADR.

While paragraph (c)(3) is silent regarding whether this exception would apply to settlement negotiations alone, logically a lawyer should be able to assist a client with settlement negotiations in a non-admitted jurisdiction, if the lawyer could assist the client with ADR. Although silent regarding this matter, paragraph (c)(3) does apply to both "pending" and "potential" ADR. Since every settlement negotiation could "potentially" lead to ADR, a lawyer may rely on (c)(3) to authorize participation in settlement discussions alone. If a lawyer is asked to represent a client in settlement negotiations regarding estate litigation in a non-admitted jurisdiction, the lawyer should consider specifically raising the possibility of "potential ADR" in written communications with the client.

Other Legal Services on a Temporary Basis. While the language of paragraph (c) appears to state all of the exceptions available to a lawyer seeking to practice law in a non-admitted jurisdiction on a "temporary basis," Comment 5 specifically provides: "The fact that conduct is not [stated in (c)(1) through (4)] does *not* imply that the conduct is or is not authorized" (Comment 5 to MRPC 5.5, emphasis added). Given the diversity of legal services that can be offered in estate planning and administration matters, there may be other situations in which a lawyer may provide legal services in a non-admitted jurisdiction or concerning the laws of a non-admitted jurisdiction not expressly covered in paragraphs (c)(1) through (4). In analyzing whether the lawyer may act on a "temporary basis" with regard to the requested services, the lawyer should consider whether or not the "circumstances . . . create an unreasonable risk to the interests of their clients, the public or the courts" (Comment 5 to MRPC 5.5). If the lawyer can demonstrate that there is no unreasonable risk, the lawyer may proceed with the requested representation on a "temporary basis." In any event, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.

Legal Services Following a Major Disaster. In the event of a major disaster, it is quite probable that trust and estate counsel will be affected in and near the vicinity where the disaster has occurred. Certainly this was true in the case of the 9/11/2001 terrorist attacks and for Hurricane Katrina (2005). In 2007, the ABA adopted a Model Court Rule on Provision of Legal Services Following Determination of Major Disaster and added a sentence to cmt 14 of MRPC 5.5 that reads as follows: “Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].” The so-called “Katrina Rule” contemplates that the highest court of an adopting state may determine that “an emergency affecting the justice system, as a result of a natural or other major disaster has occurred” either in the adopting state or another state. If the disaster has occurred in the adopting state, or in another state such that displaced persons in the adopting state are in need of legal services, and the assistance of out-of-state lawyers is needed, the court would authorize temporary pro bono practice by out-of-state lawyers to provide assistance. If the disaster has occurred in another state and lawyers licensed there can no longer practice in their home jurisdiction, the court may authorize temporary practice by those displaced lawyers so long as the practice arises out of or is reasonably related to the lawyer’s practice in the area where the disaster occurred. As of January 2015, 18 states had adopted the rule (AZ, CO, DE, GA, IA, IL, LA, MN, MO, NH, NJ, NY, ND, OR, SC, TN, WA. and WI). See http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf. A full copy of the Katrina Rule is available on-line at the ABA’s website: http://www.americanbar.org/content/dam/aba/migrated/disaster/docs/model_court_rule.authcheckdam.pdf

Legal Services Authorized by Federal or State Law. A lawyer providing legal services regarding estate planning and administration often represents clients in disputes with the IRS. A lawyer “may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party or parties on whose behalf he or she acts.” [31 CFR §10.3; see generally 31 CFR Part 10, §10.0 *et seq.* (published as a pamphlet as Treasury Department Circular No. 230)]. In addition, a lawyer may practice before the United States Tax Court by complying with its requirements for admission (Tax Court Rule 24). Pursuant to paragraph (d)(2) of MRPC 5.5, a lawyer who is authorized to practice before the IRS or the Tax Court would be able to practice in any non-admitted jurisdiction adopting MRPC 5.5(d)(2). Moreover, unlike MRPC 5.5(c), there is no requirement that the practice in the non-admitted jurisdiction be on a “temporary basis.”

In addition, states adopting MRPC 5.5(d)(2) may have state rules regulating practice before a state administrative tribunal, such as a tax commission, or an administrative law judge, that would authorize a lawyer admitted in another jurisdiction to practice before the commission or administrative law tribunal in the non-admitted state.

While the text of MRPC 5.5(d)(2) appears expressly to permit multijurisdictional practice in these circumstances, given the ease with which a lawyer can qualify to practice before the Tax Court or the IRS, the lawyer should consider seeking an opinion of the non-admitted jurisdiction’s bar counsel.

When authorized by federal or state law, including authorizations by “statute, court rule, executive regulation or judicial precedent,” the lawyer “may establish an office or other systematic and continuous

presence in [the non-admitted] jurisdiction for the practice of law...” (MRPC 5.5, Comments 18 and 15). For example, a lawyer in South Carolina might be able to practice full-time in Georgia (Georgia having adopted MRPC 5.5(d)(2), if the practice were limited to handling tax appeals with the IRS and tax court litigation. However, the lawyer must take steps not to mislead potential clients about the lawyer’s right to practice generally in Georgia [MRPC 5.5(b)(2); see also *Advertising and Websites* below].

Effect of Non-Admitted Jurisdiction’s Disciplinary Rules. A lawyer who either offers to provide services or provides services in a non-admitted jurisdiction under either MRPC 5.5(c) or (d) will be subject to the non-admitted jurisdiction’s rules of professional conduct and will be subject to discipline pursuant to the non-admitted jurisdiction’s disciplinary rules. See MRPC 8.5(a) (Disciplinary Authority; Choice of Law).

Advertising and Websites. A lawyer engaged in a multijurisdictional practice should consider whether the lawyer advertises the lawyer’s services in non-admitted jurisdictions. Continuous advertising in non-admitted jurisdictions regarding legal services (other than those services authorized to be provided by federal or state law in the non-admitted jurisdiction) would constitute the “unauthorized practice of law” based on paragraph (b)(2). Advertising on national radio and television stations, in national newspapers, in national magazines, and in other national publications, even if directed primarily at potential clients in the lawyer’s admitted jurisdiction, will also reach potential clients in non-admitted jurisdictions. In addition, the majority of lawyers engaged in multijurisdictional practices have websites providing information about the lawyers, including representative clients, fields of expertise, and other relevant information. By their nature, websites offer opportunities for a lawyer to communicate with potential clients in non-admitted jurisdictions. Thus, pursuant to paragraph (b)(2), if a lawyer uses any advertising that has a potential audience beyond the lawyer’s admitted jurisdictions, the lawyer’s advertising should clearly state that the lawyer is admitted in only those jurisdictions in which the lawyer is a member of the state bar and not in any other jurisdictions.

Fundamentally, MRPC 5.5 is based on the premise that certain types of multijurisdictional practices are acceptable because there is no “unreasonable risk to the interests of [the lawyer’s] clients, the public or the courts” (Comment 5 to MRPC 5.5). When it comes to advertising, however, Comment 21 expressly provides: “Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5” (Comment 21 to MRPC 5.5).

The provisions of MRPC 7.1 through MRPC 7.5 contain several provisions that affect a lawyer engaged in advertising concerning a lawyer’s multijurisdictional practice. First, MRPC 7.1 (Communication Concerning a Lawyer’s Services) directs the lawyer “not to make false or misleading” representations or “omit a fact” necessary to prevent the communication from being “materially misleading.” Second, MRPC 7.3(c) (Direct Contact with Prospective Clients) requires advertising to include the words “advertising material” on the outside of the envelope of any correspondence and at the beginning and the ending of any electronic material. It is unclear whether this requirement applies to a lawyer’s or law firm’s website. A website differs from traditional advertising since it requires the potential client to search for the website. On the other hand, a website can be a passive source of information about the lawyer and the lawyer’s practice or a fully integrated document generation system, selling forms and services. Third, a lawyer may identify those areas in which the lawyer practices, such as estate planning, estate administration or estate litigation; however, unless certified by a state, state bar, the American Bar Association or an organization otherwise

authorized to certify specialties under state or federal law, the lawyer may not imply that the lawyer is certified as a specialist in a practice area [Comment 3 to MRPC 7.4 (Communication of Fields of Practice and Specialization)].

If a lawyer providing estate legal services has a website, the lawyer should take steps to protect potential clients, the public and the courts from any unreasonable risk. At a minimum, the website should identify the lawyer or each lawyer in the law firm and each lawyer's admitted jurisdictions. While a passive website may not be considered advertising, a lawyer should consider identifying the website as "advertising materials." A lawyer should also consider including a disclaimer indicating that the lawyer is not offering any legal services or advice through the website.

Although an interactive website providing estate document preparation and related services may be financially attractive, the lawyer should recognize that the risk to the public is substantially greater, as is the likelihood a non-admitted state would begin disciplinary proceedings. In addition, unhappy "customers" might seek to recover payments by arguing that the contract for services rendered is void.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Federal:

Jones ex rel. Jones v. Correctional Medical Services, Inc., 401 F.3d 950 (8th Cir. 2005). Administrator of the estate of the decedent, who died of cancer while incarcerated in federal prison, brought this action alleging medical malpractice and other claims. His claim was dismissed under 28 U.S.C. § 1654 because that statute, as interpreted, does not permit a non-lawyer personal representative to bring a legal action *pro se* where there are other beneficiaries of the estate (as there were here). Moreover, the court refused to allow the plaintiff to amend the complaint (although the statute of limitations had expired), finding the unauthorized practice of law a defect that could not be amended.

California:

Birbrower, Montalbano, Condon & Frank, P.C., et al., v. Superior Court, 70 Cal. Rptr. 2d 304 (1998). The Supreme Court of California here held that New York law firm was engaged in the unauthorized practice of law in California and disallowed firm's recovery of legal fees for all services rendered which constituted the practice of law in California. None of the attorneys in the New York law firm was a member of the California Bar.

Estate of Condon, 76 Cal. Rptr. 2d 922 (Cal. App. 1998). The court here held that an out-of-state (Colorado) co-executor reasonably chose Colorado counsel to handle the California-based estate of his decedent where firm was located in Colorado and had prepared the decedent's estate plan there. The court held further that the California Probate Code did not proscribe compensation for such attorneys. Furthermore, the court ruled, California's statutes proscribing the unauthorized practice of law in California did not proscribe an award of attorney fees to an out-of-state attorney for services rendered to an out-of-state client regardless of whether or not the attorney was either physically or virtually present within California.

Colorado:

People v. Laden, 893 P.2d 771 (Colo. 1995). Attorney received public censure for aiding nonlawyers in the practice of law by assisting them in selling living trust document packages from out of state.

People v. Auer, 332 P.3d 136 (Colo. O.P.D.J. 2014). Auer, an Oklahoma lawyer and a CPA in both Oklahoma and Colorado, formed a partnership with an accountant in Colorado and proceeded to do estate planning and other legal work for Colorado clients, even though he was not licensed in Colorado. He set up several partnerships with Colorado lawyers, ostensibly to obtain supervision while he applied for a license, but did not obtain the supervision and failed to disclose to clients that he was not admitted in Colorado. All the Colorado lawyers with whom he affiliated expressed their concerns that he was engaged in unauthorized practice, but his conduct continued for three years. He was found to have engaged in the unauthorized practice of law for over three years and disbarred.

Delaware:

In re Estep, 933 A.2d 763 (Del. 2007). This was an unauthorized practice action against an accountant. He was found to have engaged in nine counts of unauthorized practice, in violation of a pre-existing cease and desist order, by giving legal advice and preparing estate planning or probate documents. Some of this was done in conjunction with *Kingsley* (below). The accountant was fined more than \$35,000, and the cease and desist order was continued.

In re Kingsley, 950 A.2d 659 (Del. 2008). Court concluded that lawyer who was licensed in Pennsylvania and New Jersey, but not Delaware, maintained a continuous presence for the practice of law in Delaware and, in collaboration with an accountant, prepared estate planning documents for at least 75 Delaware clients. Accordingly he was disbarred in Delaware. "Disbarment in the context of an attorney not admitted in Delaware means `the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State.'" (It is also likely to lead to reciprocal discipline in the licensing states. *See, e.g., Disciplinary Counsel v. Glover*, 116 Ohio St. 3d 1202 (2007)).

Indiana:

State ex rel. Indiana State Bar Ass'n v. United Financial Systems Corp., 926 N.E.2d 8 (Ind. 2010). Non-lawyer company marketing living trusts was held to be engaged in the unauthorized practice of law, where the attorneys involved were given information collected by nonlawyers, made one phone call to clients and prepared documents using the company's forms, and had no other contact with clients.

In re Rocchio, 943 N.E.2d 797, 799 (Ind. 2011). Lawyer was licensed in both Michigan and Indiana, but practiced in Michigan. At a time when he had listed his Indiana license as inactive, his website stated: "With my Indiana law license, I am capable of handling matters related to Indiana law, including real estate transactions, estate planning and probate administration, insurance compensation [sic] bodily injury and property damage claims, business and management law, and Social Security disability claims." On a second website, Respondent stated: "I am licensed to practice law in both Indiana and Michigan." Neither site indicated that Respondent's Indiana license was inactive. Indiana held that these misrepresentations were to be evaluated under the Indiana ethics code, since that is where they had their predominant effect. In Indiana, he was engaged in the unauthorized practice of law by means of these misrepresentations because he was holding himself out as authorized to practice there when he was not.

Kansas:

In re Rost, 289 Kan. 290, 211 P.3d 145 (2009). Attorney retired as part of an agreement to resolve disciplinary matters. Thereafter, he continued to hold himself out as a lawyer and to practice by representing clients in two conservatorship matters, in violation of Rules 5.5 (unauthorized practice) and 8.4 (prejudice to the administration of justice). Rejecting his claim that a retired lawyer was beyond the jurisdiction of the court and that what he was doing did not constitute the practice of law, the attorney was disbarred.

Maine:

Smith v. Brannan, 2002 WL 1974069 (Me. Super. 2002). An out-of-state estate planning attorney argued that Maine's courts had no jurisdiction over her in a case where the complainant claimed that the lawyer had tortiously interfered with a devisee's expectancy interest. The Maine Superior Judicial Court held that Maine courts did have jurisdiction under Maine's long-arm statute since: (1) the testator's will had specifically provided that it be interpreted under Maine law; (2) the testator had both tangible personal property and intangible property in Maine when he died in Maine and was a Maine resident; (3) the complainant's welfare as a widow residing in Maine is of state interest; (4) a Maine lawyer participated in the drafting of the amendments to the testator's estate plan in conjunction with the defendant; and (5) if the tort occurred as alleged, it would have an effect on the welfare of a Maine resident and the administration of a Maine estate. Therefore, the court held, Maine has a legitimate interest in the subject matter, the defendant reasonably could have anticipated litigation in Maine, and the exercise of jurisdiction by Maine courts "comports with traditional notions of fair play and substantial justice."

Missouri:

In re Mid-Am. Living Trust Associates, Inc., 927 S.W.2d 855 (Mo. 1996). In an extensive review of the authorities, court enjoins a nonlawyer trust marketing company and its 95% shareholder from engaging in the unauthorized practice of law by soliciting, advising about, and preparing living trusts and related documents in Missouri.

Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1054 (W.D. Mo. 2011), *dismissed per court approved class settlement*, 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012). Court grants summary judgment for consumers in a class action after concluding that LegalZoom had engaged in the unauthorized practice of law in Missouri through the marketing of its electronic documents. Except as to documents relating to patent and trademark practice, the court also examines and rejects LegalZoom's constitutional arguments.

Nebraska:

Estate of Cooper, 746 N.W.2d 653 (Neb. 2008). It is not the practice of law to file a creditor's claim in a probate proceeding, even one for \$1,035,537.32, so a non-lawyer corporate employee of the creditor corporation may do it. It may be the practice of law to file a "Demand for Notice" in the probate proceeding on behalf of the same corporate creditor, but a lawyer not licensed in Nebraska may do this on behalf of her Tennessee client under the temporary practice exception spelled out in Rule 5.5(c)(4).

New York:

Garner v. DII Industries, LLC, 2008 WL 4934060 (W.D.N.Y. 2008). Under New York law, a nonlawyer who is proceeding in a representative capacity as the personal representative and who has no

beneficial interest in the claim may not prosecute a wrongful death claim *pro se*; she must, instead, be represented by counsel.

Ohio:

Cincinnati Bar Assn. v. Heisler, 113 Ohio St.3d 447, 866 N.E.2d 490 (2007). Lawyer who assisted a nonlawyer estate planning company to prepare and market living trusts and related estate planning documents stipulated to several violations including a rule prohibiting lawyers from practicing under a trade name, a rule prohibiting a lawyer from engaging a person or organization to promote the lawyer's professional services, the rule prohibiting a lawyer from aiding a nonlawyer in the unauthorized practice of law, and the rule prohibiting a lawyer generally from sharing fees with a nonlawyer. He was suspended for six months but the suspension was stayed on conditions. See also *Columbus Bar Assn. v. Am. Family Prepaid Legal Corp.*, 123 Ohio St.3d 353, 916 N.E.2d 784 (2009), *reconsideration den.* 123 Ohio St.3d 1502 (2009); *Cincinnati Bar Assn. v. Mid-South Estate Planning, L.L.C.*, 121 Ohio St.3d 214, 903 N.E.2d 295 (2009); *Disciplinary Counsel v. Kramer*, 113 Ohio St.3d 455, 866 N.E.2d 498 (2007).

South Carolina:

Doe v. Condon, 532 S.E.2d 879 (S.C. 2000). A paralegal's proposed activities were held to constitute the unauthorized practice of law, and the proposed fee arrangement violated the prohibition against fee splitting. A paralegal employed by an attorney was denied the right to conduct seminars on wills and trusts without the attorney being present. Conducting meetings with clients to answer specific estate planning questions without supervision of the attorney was the unauthorized practice of law. Meaningful attorney supervision must be present throughout the process. This case was presented as a request for declaratory judgment by the petitioner paralegal.

Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007). Where nonlawyer drafted a will and a power of attorney for a neighbor, and was then appointed to serve as executor under the will, court holds that the nonlawyer engaged in the unauthorized practice of law and would be denied any fees for serving as executor given that he drafted the will naming himself. But he would not be removed as executor, and the will contestants had no private right of action against him for unauthorized practice.

Tennessee:

Estate of Green v. Carthage General Hosp., Inc., 246 S.W.3d 582 (Tenn. App. 2007). “[F]iling a claim for debts due from a decedent does not require the exercise of the professional judgment of a lawyer. Such claims are in essence demands for payment. Many employees or owners of businesses make similar demands daily and are quite competent to make an informal statement of the amount due with necessary backup documentation. Although the claims statutes require some specific inclusions, they are straightforward and do not require legal training to understand.[Thus] ... filing a claim against an estate is not the practice of law and, consequently, the claim filed herein by a corporate officer or employee was not the unauthorized practice of law.”

Wisconsin:

In re Strasburg, 577 N.W.2d 1 (Wis. 1998). While suspended from the practice of law, the suspended attorney continued to engage in the practice of law and misrepresented to clients that he was an attorney. He continued to operate a business, providing advice for qualification for Medicaid benefits and preparing legal documents including trusts, powers of attorney and living wills. The business did

not employ a licensed attorney to review documents prepared by the suspended attorney or his staff. The fact that the attorney refused to cease the unauthorized activities after the suspension was determined to be contempt of the court. The attorney's license to practice law (previously suspended) was revoked.

Ethics Opinions

Florida:

Op. 24894 (2003). Florida attorney sought an ethics opinion concerning the appropriate response he should give to out-of-state counsel who wrote demand letters and other correspondence to the Florida's attorney's clients. The communications indicated that the out-of-state attorney was giving advice about Florida law. The Florida attorney refused to communicate with the non-Florida attorney and requested that a Florida attorney be retained to handle the issue. Opinion found that the Florida attorney acted appropriately in alerting out-of-state practitioner to avoid the unlicensed practice of law. In subsequent correspondence, the Division Director clarified its position for the Florida Real Property, Probate and Trust Law Section and advised that a Florida attorney is not prohibited from reviewing documents, such as real estate or estate planning documents, drafted by out-of-state attorneys.

Oregon:

Op. 2005-87. Lawyer may not refer clients to, accept referrals from, or otherwise assist an entity named "Estate Planning Service" (EPS) which is owned by a CPA, a stockbroker who is a certified financial planner, a life insurance agent, and a casualty insurance agent, and who as EPS will offer services to their clients that constitute the unlawful practice of law.

Utah:

Op. No. 97-09 (1997). This is an extensive opinion relating to the permissibility of a Utah lawyer working with a nonlawyer "Estate Planner" organization which will solicit clients, refer them to the lawyer, and depend on the lawyer for review of the estate plan that has been drafted. While the opinion is too lengthy and detailed to summarize adequately here, it opines that the proposed arrangement is replete with risks of violating Rules 1.1, 1.2, 1.6, 1.7, 5.3, 5.5, and 7.3.

MRPC 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

ACTEC COMMENTARY ON MRPC 7.1

MRPC 7.1 is the introductory and arguably most important section of the Model Rules title addressing "information about legal services." But it needs to be considered in connection with MRPC 7.2 (Advertising); 7.3 (Solicitation of Clients); 7.4 (Communication of Fields of Practice and Specialization); 7.5 (Firm Names and Letterhead); and 7.6 (Political Contributions to Obtain Government Legal Engagements or Appointments by Judges). Rather than provide a commentary for each of these subsections,

the ACTEC Commentary on MRPC 7.1 will address each of the sections of title 7 insofar as they have special impact on trusts and estates practice.

MRPC 7.1 sets out the fundamental point that communications about the lawyer or the lawyer's services cannot be false or misleading and that material omissions may also be considered misleading. Unlike MRPC 3.3 which pertains to candor to a tribunal and MRPC 4.1 which pertains to candor to others in the course of representing a client, this rule focuses specifically on candor to clients, potential clients and the public at large in the context of communications about the lawyer or legal services the lawyer offers or has offered. The most common setting in which this rule is at issue is in lawyer advertising. But in the modern age, lawyers communicate about themselves or their services in a variety of very different kinds of settings: (a) during meetings with prospective, current or former clients; (b) statements on a lawyer's own website or the website of another; (c) brochures; (d) mailings; (e) ads run in bar journals or newspapers or on websites or radio or TV; (f) professional networking or rating websites; (g) in educational settings; (h) during media interviews, guest appearance, or columns; (i) blogs and comments in web-based discussions and/or (j) at service organization or other professional meetings. All of these provide opportunities for a lawyer to communicate about himself or herself and about his or her legal services. The statements made about the lawyer or legal services may be made by the lawyer personally or they may be made by the lawyer's law firm or organization. The statements may be made with significant input from the lawyer involved or with very little. Accordingly, each provides a context in which a trust and estate lawyer may violate MRPC 7.1, whether intentionally or inadvertently. Interestingly, MRPC 7.1 and its companion rules do not have a "knowledge" requirement, so the rules may be violated inadvertently.

MRPC 7.1 does not just deal with lawyer advertising. At the most basic level, it is triggered whenever a lawyer is talking about himself or herself or the services he or she can or will provide to clients or prospective clients, in the office, over the phone, or elsewhere. It is violated if the lawyer claims to have experience or expertise that the lawyer does not have, or claims to be capable of doing something in a time frame or at a cost that is false or misleading.

A trust and estate lawyer who makes "an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." MRPC 7.1, cmt [3]. Similarly, claims by an estate planner to have special expertise in this practice area can be viewed as misleading if they create unjustified expectations. These rules vary significantly among states, so it is dangerous to rely simply on what is contained in the model rules: "Some jurisdictions have ... extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against 'undignified' advertising." MRPC 7.2, cmt [3].

Whether a lawyer may truthfully claim to "specialize" in trusts, estates and/or probate practice absent some approved "certificate" is unclear even under the model rules. MRPC 7.4(d) states: "A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication." Comment [1] to the same rule, however, states that "[a] lawyer is generally permitted to state that the lawyer is a 'specialist,' practices a 'specialty,' or 'specializes in' particular fields, but such communications are subject to the 'false and misleading' standard applied in Rule 7.1 to communications concerning a lawyer's services." The comment thus suggests that one can truthfully

advertise a specialty but may simply not falsely state or imply that one has been *certified* as a “specialist.” Such a possible implication could be negated by careful wording or even a disclaimer. State rules vary greatly around the issue of specialization. A number of states have departed from the model rules by requiring specific disclaimers if one claims to be a specialist. Moreover, as the annotations below show, the constitutional law in this area remains uncertain. It is clear, however, that truthful claims to being a “certified” specialist are generally permissible, provided any required disclosures accompany such claims. There are various certification programs available to estate planners. There is an ABA-accredited program for certification as an “Estate Planning Law Specialist (EPLS).” There are also state programs, such as those in California, Florida, and Texas, which certify lawyers as “estate planning” specialists. More information is provided in the annotations.

The model rules no longer outlaw the use of trade names as the name of a law firm, so it should be possible for a lawyer to include something about the area of practice in the law firm name. MRPC 7.5(a). Thus a name such as “Estate Planning for Seniors” or “We Do Probate LLC” would be permissible, provided it is not false or misleading.

Under the model rules and most state codes, lawyers may not solicit professional employment for pecuniary gain by “in-person, live telephone or real-time electronic contact” even in many relatively benign settings. MRPC 7.3(a). Thus, for example, if a family member of one of the lawyer’s deceased estate planning clients comes to pick up the original of the client’s will which the lawyer has been safekeeping, it may violate this rule for the lawyer to initiate a solicitation of legal work from the person, including settling the client’s estate, unless the lawyer has a “family, close personal, or prior professional relationship” with the family member who is the potential client. MRPC 7.3(a)(2). On the other hand, solicitation of professional employment *by written or recorded communication* from “a person known to be in need of legal services in a particular matter” is generally permissible provided the solicitation includes the words “advertising matter” on the outside of the envelope or at the beginning and end of the recorded communication. MRPC 7.3(c). Thus, for example, a lawyer is permitted to track deaths from publicly available sources and send targeted offers to provide probate services to survivors, provided the lawyer complies with the additional disclosures required in the particular jurisdiction. The First Amendment jurisprudence around such matters continues to develop, so there are substantial gray areas around the legality of some of these rules.

It is not uncommon for trust and estate lawyers to get referrals from other lawyers who do not do this kind of work, or from nonlawyers who may be providing nonlegal services to the potential client. As a general matter, the recipient of such a referral (or a lawyer seeking such a referral) may not give “anything of value to a person recommending the lawyer’s services.” MRPC 7.2(b). One of the few exceptions is that a lawyer may enter into a “reciprocal referral agreement” with another lawyer, or even with a nonlawyer such as an accountant or doctor. But the referral arrangement may not be exclusive, and the client must be informed of the existence and nature of the agreement. MRPC 7.2(b)(4).

The prohibition on misleading communications presents particular challenges in the context of internet networking websites that contain information about a lawyer. Some of the information presented about a lawyer may not have been generated by the lawyer but may, instead, have been collected from other sources. Third parties, for example, may be permitted to post endorsements without the endorsements (and statements contained therein) having been approved by the lawyer. Some of these endorsements or statements may communicate false or misleading information about the lawyer. Insofar as the lawyer has not participated in making such misleading communications, it should not violate MRPC 7.1. But if the

lawyer has actively “claimed” his or her profile, including misleading information posted by others, or has in other ways actively participated in what has been posted about the lawyer, this may present a problem. In some cases, lawyers participating in such websites can control what is said about them by, for example, hiding endorsements. But in other cases, they cannot. Trust and estate lawyers need to avoid playing any kind of active role in a site that is posting misleading information about the lawyer.

Similarly, the prohibition on giving something of value in return for a recommendation or referral presents particular problems in the context of a variety of internet websites that generate leads for lawyers or recommend the services of a lawyer for a fee paid by the lawyer. “A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.” MRPC 7.2, cmt [5]. Clearly lawyers are entitled to pay the ordinary cost of advertising, including internet-based advertisements. “Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads.” *Id.* But such paid lead generators may “not recommend the lawyer,” any payment must be consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications must not be false or misleading. *Id.* “To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.” *Id.* See also MRPC 5.3 (supervision of nonlawyers) and MRPC 8.4(a) (violating the rules through the acts of another).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Federal Law:

Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy, 512 U.S. 136 (1994). Where a Florida lawyer truthfully advertised that she was a certified public accountant (CPA) and certified financial planner (CFP), the Florida Board of Accountancy reprimanded her. The Supreme Court of Florida found this to be protected speech under the First Amendment.

Browne v. Avvo Inc., 525 F. Supp. 2d 1249, 1252 (W.D. Wash. 2007). Avvo’s attorney ranking system is protected from government prohibition by the First Amendment: “Neither the nature of the information provided nor the language used on the website would lead a reasonable person to believe that the ratings are a statement of actual fact.”

Hayes v. New York Attorney Grievance Comm. of the Eight Judicial Dist., 672 F.3d 158 (2d Cir. 2012). New York adopted disclaimer rules for lawyers advertising that they were specialists as follows: “A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: “[1] The [name of the private certifying organization] is not affiliated with any governmental authority[,] [2] Certification is not a requirement for the practice of law in the State of New York and [3] does not necessarily indicate greater competence than other attorneys

experienced in this field of law.” The federal court struck down the second and third components of the disclaimer rules as violative of the First Amendment, and held that the requirement that the disclaimers be “prominently made” was unconstitutionally vague.

Colorado:

Moye White LLP v. Beren, 320 P.3d 373, 375, *reh'g denied* (Aug. 1, 2013), *cert. denied*, (Colo. 2014). Law firm brought breach of contract claim against probate client, and client counterclaimed arguing firm had breached its fiduciary duty in failing to disclose that one of the attorneys working on his case had a history of disciplinary proceedings, mental illness, alcoholism, and related arrests. He also alleged that this was a violation of Rules 1.4 & 7.1. The court rejected the counterclaim, concluding that the information about the lawyer’s history was not “material;” that disclosure of such information before adding another lawyer to a client matter was not the sort of communication that was called for by Rule 1.4; and that communications about the lawyer from the firm were not “advertising” covered by Rule 7.1, but rather communications with a current client.

District of Columbia:

In re Jones-Terrell, 712 A.2d 496 (D.C. 1998). Lawyer is found to have violated D.C. Rule 7.1 for improperly soliciting an incapacitated person for employment as the person’s lawyer; Rule 8.4 for making false statements in applying to be appointed as a guardian for the incapacitated person; and Rule 1.7 for representing adverse parties. Lawyer is suspended for sixty days.

New Jersey:

In re Opinion 39 of Comm. on Attorney Adver., 197 N.J. 66, 79, 961 A.2d 722, 731 (2008). Court vacated, on First Amendment grounds, Opinion 39 of its Attorney Advertising Committee which had ruled that advertisements describing attorneys as “Superlawyers,” “Best Lawyers in America,” or similar comparative titles violated New Jersey’s advertising rules as inherently misleading or likely to create unjustified expectations about results.

New York:

In re Power, 3 A.D.3d 21, 768 N.Y.S.2d 455 (App. Div. 2003). Power was reprimanded in New Jersey for false advertisements regarding living trusts in the following particulars: “a) costs, expenses, and time associated with the probate of a will, as opposed to under a living trust, b) the impact of having a living trust in the event of incapacitation, c) the avoidance of probate by the creation of a living trust, d) the tax consequences of having a living trust, and e) the inadequacy of a will without a living trust in order to protect assets.” Here, New York reciprocally censures Power for this misconduct in New Jersey.

Ohio:

Cincinnati Bar Assn. v. Mezher & Espohl, 134 Ohio St. 3d 319, 982 N.E.2d 657 (2012). Law firm advertised a “free consultation.” Lawyers met with probate clients for a half hour, after which they signed a fee agreement, and the lawyers spent another hour with them. Clients were charged for the last hour. One of the lawyers was found to have violated Rule 7.1 for deceptive advertising, and the other to have violated Rule 1.5 for failing to make clear that fees would be charged once a fee agreement was signed. The lawyers were reprimanded.

Washington:

In re Roberts, 45 Wash. 2d 317, 274 P.2d 343 (1954). Attorney was suspended for thirty days because he solicited, in person, probate administration work from the heirs of a decedent.

Ethics Opinions

ABA:

Op. 13-465 (2013). (Lawyers' Use of Deal-of-the-day Marketing Programs). In this opinion, the ABA addresses the use of new marketing techniques such as "coupon" and "prepaid" sales (not to be confused with prepaid insurance). In the former, a lawyer may use an intermediary to sell coupons that entitle the buyer to a certain amount of legal service at a discount, with the client paying for such services directly to the lawyer. In the latter, a lawyer may use an intermediary to sell a certain amount of a lawyer's legal services at a discount, with no further payment to go to the lawyer. In each case, the intermediary will charge a fee for the marketing of the discounted services, but the Committee concludes that neither involves impermissible fee splitting with a nonlawyer intermediary. It further concludes, however, that a lawyer must proceed with great caution to make sure that a consumer fully understands what services are being advertised and what the consumer's rights are if the lawyer is unable to perform the services when the client requests them, whether because of conflict of interest or other reasons. In general, the Committee sees fewer ethical problems with "coupon" programs than with "prepaid" programs, and is unsure whether a prepaid program can be structured so as to comply with the ethics rules.

Alaska:

Op. 2009-2. Committee agrees with and adopts the approach of the Connecticut Statewide Grievance Committee (below). A lawyer does not act unethically in advertising his or her selection or ranking in a commercial publication, including SUPER LAWYERS and BEST LAWYERS OF AMERICA, so long as the complete context is provided—meaning that the lawyer's advertising must state accurately the publication by which he or she was ranked, the year of the ranking, and the field of the ranking, if one was specified. Sample acceptable statements are set forth.

Arizona:

Op. 11-02 (2011). "A lawyer may ethically participate in a group advertising program that limits participation to a single lawyer for each ZIP code from which prospective clients may come, provided that the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed in a particular ZIP code. To remain a permissible group advertising program, such a service may do nothing more to match clients with lawyers than provide inquiring clients with the name and contact information of participating lawyers, without communicating (expressly or by implication) any substantive endorsement. A lawyer may ethically participate in Internet advertising on a pay-per-click basis in which the advertising charge is based on the number of consumers who request information or otherwise respond to the lawyer's advertisement, provided that the fee is not based on the amount of fees ultimately paid by any clients who actually engage the lawyer."

Connecticut:

Op. 07-00188-A (2007). Committee finds the designation "Connecticut Super Lawyer" potentially misleading because it connotes a superior quality to an attorney in violation of Rule 7.1. Use of the

designation in attorney advertisements requires an appropriate explanation and disclaimer in order to avoid confusing consumers and creating unjustified expectations. An appropriate explanation and disclaimer could alleviate consumer confusion. Any statement regarding the designation of "Super Lawyer" should be explained and placed in the context of a designation by a commercial magazine for a particular year. The disclaimer should also detail the particularities of the selection process for 2007 and, at a minimum include specific empirical data regarding the selection process. The Committee also concludes that it is inherently misleading to claim that the list of Connecticut Super Lawyers 2007 represents "among the best" and "the top 5%" of attorneys in the State of Connecticut, and such statements are therefore prohibited under Rule 7.1.

Oregon:

Op. 2005-175 (8/2005). A lawyer may not participate in a professional "networking association" whose purpose is to facilitate business referrals between members and in which making referrals is a condition of membership and members are required to follow up on referrals received through the association.

Pennsylvania:

Op. 2014-300. While an attorney is not responsible for content that other persons, who are not agents of the attorney, post on the attorney's social-networking websites, nonetheless the attorney "(1) should monitor his or her social-networking websites, (2) has a duty to verify the accuracy of any information posted and (3) has a duty to remove or correct any inaccurate information."

South Carolina:

Op. 09-10 (2009). If a lawyer "claims" a website listing about the lawyer, even one created by another, this constitutes a "placement" or "dissemination" by the lawyer of all communications made at or through that listing after the time the listing is claimed. "Likewise, a lawyer who adopts or endorses information on any similar website becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer's knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. ...Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing." (Note that South Carolina's version of MR 7.1-7.3 differ substantially from the Model Rules.)

South Dakota:

SD Opinion 92-19 (undated) on Prepaid legal services. A South Dakota lawyer may not participate in a program offered for a fee to members of a large national organization by a manufacturer and administrator of various forms of legal benefits programs regarding revocable living trusts where the lawyer would prepare certain documents for a fixed and predetermined fee, and would offer further services at designated reduced rates, from information provided in a client questionnaire and where the lawyer is described as "specially qualified" in the area of practice and agrees not to participate in any other group membership plans without written consent of the above manufacturer/administrator.

Related Secondary Materials

Estate Planning Specialist Programs

There is one ABA-accredited program for becoming certified as an estate planner. For further information, see http://www.naepc.org/designations/estate_law .

The ABA also maintains a list of states with certification programs. www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html. As of August 2015, the ABA identified ten states that certify lawyers as specialists in trust and estate practice, as follows:

Arizona certifies lawyers as “estate and trust” specialists. For further information, see http://www.azbar.org/media/93752/estate_and_trust_standards.pdf .

California certifies lawyers as “Estate Planning, Trust and Probate Law” specialists. For further information, see <http://ls.calbar.ca.gov/LegalSpecialization/LegalSpecialtyAreas.aspx> .

Florida certifies lawyers as “Wills, Trusts, and Estates Lawyers.” For further information, see <http://www.floridabar.org/divexe/rrtfb.nsf/FV/84FEFCCB8F67617585256BC20072E1B1>

Louisiana certifies lawyers in “estate planning and administration. For further information, see http://www.lascmcle.org/specialization/EP_Standards-Revised_1-17-15.pdf.

New Mexico certifies lawyers in “estate planning, trusts and probate law.” For further information, see <http://www.nmlegalspecialization.org/forms/EstatePlanningProbateAndTrustsStandards.pdf>.

North Carolina certifies lawyers in “estate planning law.” For further information, see http://www.nclawspecialists.org/certification_standards.pdf.

Ohio certifies lawyers in “estate planning, trust and probate law.” For further information, see <https://www.ohiobar.org/forlawyers/certification/attorney/Pages/StaticPage-57.aspx> .

South Carolina certifies lawyers in “estate planning and probate law.” For further information, see <http://www.commcle.org/pdf/epps&p.pdf> .

Tennessee certifies lawyers as “estate planning specialists.” See <http://www.cletn.com/index.php/general-information/specialist/>. Tennessee lawyers with access can obtain further information at <https://www.cletn.com/index.php/for-attorneys> .

Texas certifies lawyers as “Estate Planning and Probate” specialists. For further information, see <http://www.tbls.org/SpecialtyAreas.aspx>

MRPC 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

- (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
 - (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

ACTEC COMMENTARY ON MRPC 8.5

Disciplinary Authority. This Model Rule reaffirms the long-standing legal principle that a lawyer licensed in a jurisdiction is subject to the disciplinary authority of that jurisdiction no matter where the lawyer's conduct occurred. Thus, if a lawyer engages or attempts to engage in unauthorized practice in a jurisdiction where he or she is not admitted, the jurisdiction where the lawyer is admitted will be able to initiate disciplinary proceedings against the lawyer under MRPC 5.5 (unauthorized practice) and 8.4(a) (violating or attempting to violate a rule oneself or assisting or inducing another to do so). More interesting is its prescription that lawyers not generally admitted in a jurisdiction are also subject to that jurisdiction's disciplinary authority insofar as they provide or even offer to provide legal services in the jurisdiction. This prescription is of considerable importance to any lawyer who practices across state lines even temporarily. Lawyers engaged in trust and estate practice are frequently called on to do that.

The most immediate question that this rule raises is how the jurisdiction where a lawyer is not licensed can actually discipline the unlicensed lawyer. Presumably if the lawyer has been admitted *pro hac vice* for a particular proceeding, the court admitting the lawyer will have some kind of jurisdiction over the lawyer, but even such a "*pro hac vice*" court will not typically have general disciplinary authority unless the court happens to be the supreme court of the jurisdiction. Moreover, as often as not a lawyer practicing outside of the jurisdiction where the lawyer has been admitted will not be appearing *pro hac vice*, particularly if the lawyer is engaged in trust and estate practice. While it may be possible to reprimand a lawyer who has never been admitted by the reprimanding court, it is quite another thing for such a court to disbar or suspend a lawyer who has not been admitted to practice. How is this rule supposed to work? The answer to this question is found in the concept of reciprocal discipline. Most jurisdictions impose identical "reciprocal" discipline on lawyers admitted to practice there if they have been disciplined by another jurisdiction, frequently giving conclusive effect to the adjudication in the original jurisdiction. See Rule 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement (excerpted in Annotations below). Thus, if a jurisdiction where a lawyer is not admitted concludes that the lawyer has engaged in misconduct in the jurisdiction, the jurisdiction where the lawyer is admitted is likely to give conclusive effect to that determination and impose

identical discipline or lesser discipline if it concludes that is more appropriate. Several cases where this has occurred are collected in the Annotations.

In addition to the potential for reciprocal discipline, comment [1] to this model rule points out that “[t]he fact that the lawyer is subject to the disciplinary authority of [a given] jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.”

Trust and estate lawyers who are mindful of this rule will realize that it considerably expands the risks attendant on engaging in multijurisdictional practice. See generally MRPC 5.5(c) and (d) and the ACTEC Commentaries to that rule.

Choice of Law. This rule also prescribes a choice of law rule where a lawyer’s conduct is potentially subject to more than one set of rules of professional conduct. The choice of law rule will apply where the lawyer is admitted in all the relevant jurisdictions, but also where the lawyer is not admitted in one or more of them. In this respect, the choice of law principle laid out here needs to be understood in conjunction with the first part of this rule which asserts jurisdiction over non-admitted lawyers and MRPC 5.5 which involves unauthorized practice of law and the exceptions to unauthorized practice, both temporary (MRPC 5.5(c)) and permanent (MRPC 5.5(d)). It also needs to be borne in mind that while these commentaries deal almost exclusively with the Model Rules of Professional Conduct, the rules of professional conduct actually adopted around the country vary in many important details from these Model Rules. In certain multijurisdictional practice, the rules of professional conduct of foreign countries may also be at issue. Thus, there will often be real differences among jurisdictions as to what is expected of lawyers engaged in conduct there.

If a lawyer is involved in a matter before a tribunal, then the rules of jurisdiction where the tribunal sits will govern. It should be noted that a “tribunal” is defined to denote “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” MRPC 1.0(m). Trusts and estates lawyers frequently find themselves involved in probate proceedings, tax court, or administrative agencies adjudicating tax or other disputes, so this portion of the rule should provide guidance to such a lawyer as to the applicable rules of professional conduct.

Perhaps more often, trust and estate lawyers engage in multijurisdictional practice on matters that are not pending before a tribunal. In such a case, the model rules adopt a “predominant effect” test. Typically the predominant effect will be where the lawyer’s conduct occurred, but if the predominant effect is in a different jurisdiction, then the rules of professional conduct of that jurisdiction are supposed to control.

This test will provide adequate guidance as to the applicable rules in most instances. But in complex multijurisdictional matters, it may be less clear where the predominant effect will be. For that reason, the rule provides a safe harbor, providing that the lawyer should not be subject to discipline if he or she conforms to the rules of the jurisdiction where the lawyer “reasonably believes” the predominant effect will be.

Trust and estate lawyers need to understand that this rule may require them to educate themselves about and then comply with any idiosyncratic rules of professional conduct that might exist in a jurisdiction where they are not admitted but where their actions might have their predominant effect. This choice of law rule requires even the lawyer’s home jurisdiction to apply the ethics rules of another jurisdiction if the

predominant effect of the conduct will be in that other jurisdiction. Fortunately the rules of most United States jurisdictions are relatively easy to find over the internet. But the rules of foreign countries where the lawyer's activities will have a predominant effect may not be so easily ascertainable. In such cases, the expertise of local counsel may need to be tapped before the lawyer proceeds.

Example 8.5-1. Lawyer (L), admitted and practicing only in H, is advising Client (C) about the effect of the C's divorce on C's estate plan, including C's life insurance designations. C advises L that C is about to move to another state (S) where L is not admitted. L advises C that C's life insurance designations will be automatically revoked and the contingent beneficiary will take, since this is the rule in L's own state, H, where the advice is being given. Unbeknownst to L, S law provides that a divorce does not automatically revoke a life insurance designation made in favor of a divorced spouse, as does L's jurisdiction. Moreover, given that C has advised L that C is about to move to S, L cannot reasonably believe that the predominant effect of L's advice will be in H, L's home state. L's conduct should be adjudged under the rules of professional conduct in place in S, not those in place in H. L's competence should be adjudicated based on what would be considered competent in S, not H.

Example 8.5-2. Lawyer (L) prepares a will for a foreign domiciliary (FD) while FD is temporarily resident in L's home state (HS). L assists FD in executing the will. L knows that FD will return to his/her home country (FC) in the near future. Unbeknownst to L, FC has special will execution formalities that L has not complied with. L's conduct should be adjudicated based on the rules of professional conduct of FC, not those of HS.

Example 8.5-3. Same facts as example 8.5-2 except that FD is closely related to L by blood and the will that has been drafted and executed leaves a substantial bequest to L. L is familiar with MRPC 1.8(c) which permits such a bequest, but not with the ethics rules of FC. Unbeknownst to L, the rules of professional conduct of FC totally prohibit such a bequest to be drafted by the beneficiary lawyer. L's conduct should be evaluated under the professional responsibility rules of FC, not those of HS.

Example 8.5-4. Lawyer (L) licensed to practice in one state (HS) advertises over the internet (or on TV) that L is an expert in establishing offshore trusts to protect clients from their creditors. The internet (or TV) advertisement reaches potential clients in states other than HS. L is not admitted or licensed in those other states (OS). Absent some disclaimer, L is offering to provide legal services in OS. As to such OS offers, L's ads should be evaluated under the rules of professional conduct of OS rather than those of HS.

Example 8.5-5. Lawyer (L) is admitted to practice in one state (S) and is handling a probate for a personal representative (PR) of an estate whose decedent died in S. L has also been admitted *pro hac vice* to handle an ancillary probate for PR in another state (OS) where L is not generally admitted, because decedent owned land in OS. L discovers that PR has been engaged in misconduct as a fiduciary. L withdraws from representing PR as is permitted (perhaps required) by the ethics rules of both S and OS. In withdrawing, L also notifies the probate court in both S and OS of the PR's fiduciary breach. The rules of professional conduct of S permit this disclosure, but the rules of OS prohibit it. Whether or not L is before the disciplinary authority of S or OS, L's disclosure to the OS probate court should be evaluated under the ethics rules of OS, not those of S.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Reciprocal discipline

Delaware:

In re Kingsley, 950 A.2d 659 (Del. 2008). This case is summarized in the Annotations to MRPC 5.5. Kingsley was disbarred by Delaware, where he was not admitted, and was reciprocally disciplined in New Jersey where he was licensed. *In re Kingsley*, 204 N.J. 315, 9 A.3d 580 (2011).

Discipline of lawyers not admitted:

Colorado:

People v. Auer, 332 P.3d 136, 137 (Colo. O.P.D.J. 2014). This case is summarized in the Annotations to MRPC 5.5. Auer was disbarred by Colorado, where he was not admitted.

Choice of Law

Delaware:

Unanue v. Unanue, 2004 WL 602096 (Del. Ch. 2004). This decision rejects a motion to disqualify lawyers from representing one of the parties to a dispute over the control of Goya Foods, the largest Hispanic owned company in the country. At the time of the decision, “Goya's voting stock [was] owned by two estates and 17 ‘third generation’ members of the Unanue family and related trusts.” The motion to disqualify was based on the conduct of New Jersey lawyers that occurred in New Jersey, but the motion was made in a Delaware legal proceeding. The court concluded under Rule 8.5 that Delaware ethics rules controlled the motion. For purposes of the issues presented, however, the court noted that the Delaware and New Jersey rules were essentially the same.

New Hampshire:

In re Wyatt's Case, 159 N.H. 285, 289, 982 A.2d 396, 400 (2009). Lawyer’s conduct in connection with a guardianship proceeding, much of which occurred in Texas, is evaluated under the New Hampshire ethics rules because (a) he was not admitted in the Texas proceeding and (b) he is only licensed in New Hampshire. Note: New Hampshire’s Rule 8.5 is considerably different than MRPC 8.5.

Ethics Opinions

Pennsylvania:

Philadelphia Bar Op. 2008-10. After client’s death, lawyer who drafted estate planning documents for the client is asked for information about conversations with the client in connection with a will contest mounted in New Jersey. Among other matters, the opinion cautions that under the conflict of laws provision of Rule 8.5, New Jersey ethics rules may apply to the New Jersey will contest, rather than Pennsylvania ethics rules.

