AGENDA

ACTEC Professional Responsibility Committee Meeting

Friday, March 21, 2025, 3:30 p.m. to 6:00 p.m. PDT

Palm Springs, California

Agenda Item:

1. **Call to Order.** Introduction of Guests; Recognition of Red and Blue Dots; Sponsor Introductions; Request for support of ACTEC Foundation; Mention of EC and Foundation Liaison Reports; reminder to sign in online. Review and Approval of the September 22, 2024 meeting minutes; appointment of Secretary for this meeting. — 3:30 p.m.

2. ***Engagement Letters: A Guide for Practitioners Update.*** — 3:40 p.m.

   A. Compensation of Drafting Lawyer for Responding to Subpoena/Testimony. On January 24, 2025, the North Carolina State Bar issued 2024 Formal Ethics Opinion 3 which analyzed the provision in ACTEC's form engagement letters requiring payment of legal fees and costs for a drafting lawyer's participation in legal proceedings concerning the client's estate plan. While recognizing that an engagement letter may require the payment of such fees and costs, the opinion found that the current provision violated certain aspects of Model Rule 1.5. The Committee will discuss this recent opinion as well as South Carolina Ethics Advisory Op. 23-01 (2023) addressing the same topic.

   B. Proposed Revisions. The Committee will then continue its focus on updating our ACTEC publication *Engagement Letters: A Guide for Practitioners*. Following up on our discussion at the last ere meeting, Professor Elizabeth Carter will present her final proposed changes to Chapter 1 of the *Guide* concerning representation of spouses and individuals in estate planning. The letters in Chapter 1 address many issues and disclosures which are fairly consistent throughout each letter and chapters in the *Guide*. Time permitting we will also work on Chapter 2 of the *Guide* dealing with representation of multiple family members in estate planning.

3. **Model Rule 4.2- Can a Lawyer Representing Themselves Pro Se Communicate Directly with Represented Person?** Rich Gorini will lead a discussion on Formal Opinion 502 issued by the ABA Standing Committee on Ethics and Professional Responsibility as well as recent case law developments on the ability of lawyers representing themselves to communicate directly with a represented person. The discussion will focus on situations where the lawyer serves as a fiduciary and wishes to communicate directly with a beneficiary represented by counsel. — 5:30 p.m.

4. **New Cases of Interest**. — 5:50 p.m.

5. **Adjourn.** — 6:00 p.m.

ACTEC
THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

ACTEC Executive Committee Liaison Report
2025 Annual Meeting

1. Thanks to the Program Committee chaired by Stephanie Loomis-Price (WA), all the Committee members, show-runners and speakers for an impactful line-up of Professional Programs (CLE) for this Annual Meeting.

2. The *L. Henry Gissel, Jr. Spirit of ACTEC Lecture* is Friday, March 21, 10:15 a.m. to 11:15 a.m., presented by Past President, Ann B. Burns, examining the importance of collaborative relationships in our profession. Saturday's schedule features *The Annual Joseph Trachtman Memorial Lecture*, 9:45 a.m. to 10:45 a.m., Counting Down, Counting Up: Flourishing, presented by Past President Stephen (Steve) R. Akers, exploring well-being and how estate planners can help clients and families thrive.

3. As ACTEC Fellows are aware, there is a current shortage of law school graduates pursuing careers in trust and estate law. On behalf of the College, President Susan D. Snyder has reached out to the directors of law school career centers in the U.S., with an invitation to arrange an ACTEC presentation for students about the exceptional career prospects in the trust and estate practice. This initiative is coordinated by the Long Range Planning Committee.

4. Please take a moment to reach out and thank the sponsors supporting this Annual Meeting. The sponsor display area is in the Flores Ballroom Foyer.

5. Following the conclusion of the Annual Meeting, a survey seeking feedback on your meeting experience including the program schedule, opportunities to network, tours, special events and the meeting venue will be sent to all attendees.

6. The 2025 Summer Meeting is scheduled **June 18-22, Montreal, Quebec, Canada at the Le Centre Sheraton.** The Summer Meeting Schedule of Events will be available after the conclusion of the Annual Meeting.

7. The 2025 Fall Meeting dates in Austin, TX have changed. New dates were announced in January and are **October 20-23, 2025.**

8. To be considered at the 2025 Fall Meeting at the Fairmont Austin in Austin, TX, nominations must be received by the national office, ready to poll by these deadlines: Nominations for **International Fellows Monday, June 23, at 4:30 p.m. Eastern Time** and Nominations for **Fellows and Academic Fellows Monday, July 28, 4:30 p.m. Eastern Time**. Nominations received after these deadlines will be held over for the 2026 Annual Meeting at the JW Marriott Water Street & Tampa Marriott Water Street in Tampa, FL.

9. See the *Meetings Announcements* sent each Monday for the list of upcoming National, State, Regional, and ACTEC Fellows Institute Meetings.

10. Keep up with the news, educational opportunities, webinars plus resources of the College and read the *Weekly Update* issued each Friday.

THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

ACTEC

FOUNDATION

ACTEC Foundation Liaison Report
2025 Annual Meeting

1. The ACTEC Foundation welcomed the 10th Class of Dennis I. Belcher Young Leaders in September 2024. To date, fifteen former Young Leaders have been elected to the College through this Foundation grant-funded program of ACTEC's Diversity, Equity and Inclusivity Committee.

2. Stop by the Foundation's booth for a copy of The ACTEC Foundation's 2025 Annual Meeting Newsletter.

3. The Foundation-funded ACTEC Trust and Estate Talk Podcast has had over 633,000 total podcast downloads from 2018 to 2024.

4. The ACTEC Foundation website has a brand new look! Check it out, and get updates on the programs the Foundation supports and the stories of the people the Foundation has impacted: www.actecfoundation.org

5. The 2025 Mary Moers Wenig Student Writing Competition is now open. 2L and 3L students in ABA-accredited law schools should submit papers by June 30, 2025, and winners will be announced by July 15, 2025.

6. The Foundation is reviewing a new Mission Statement. Come to the Board of Directors meeting on Saturday, March 22 at 1:15 pm Pacific to hear the discussion. The Foundation will also be considering several interesting grant proposals.

Please support your ACTEC Foundation with a donation at actecfoundation.org/DonateNow.

The American College of Trust and Estate Counsel

Professional Responsibility Committee

Fall National Meeting
Chicago, Illinois

Sunday, September 22, 2024
8:00 AM – 10:30 AM Central Standard Time

MEETING MINUTES

1. Call to Order and Administrative Matters.

Chair William Hennessey called the meeting of the Professional Responsibility Committee (PRC) to order at 8:00am CST.

a. Appointment of Secretary.

Deborah Packer Goodall was appointed as Secretary for the meeting.

b. Introduction of Members and Visitors and Reminder of Online Sign In for Attendance.

The Chair asked the Committee members and visitors present to introduce themselves and recognized the red dots and blue dots in attendance. The Chair reminded all that attendance is recorded by checking in on the App.

c. Thank you to our Sponsors. The Chair recognized and thanked our sponsors.

d. ACTEC Foundation Liaison.

The Chair announced that the Foundation Liaison Report is attached to the meeting agenda and asked all to support the Foundation.

e. ACTEC Executive Committee Liaison:

The Chair introduced Margaret Lodise, the ACTEC Secretary and PRC Committee Member, as our Executive Committee Liaison, and referred to the written report included in the meeting agenda.

f. Approval of Minutes from June 21, 2024 Meeting in Toronto, Ontario, Cananda

The minutes from the last meeting in Toronto were unanimously approved by motion duly made by Member Charles Pieterse and seconded by Member Margaret Lodise. The Chair thanked Past Chair Linda Reitz for her service as secretary for the Toronto meeting.

2. When Is an Estate Planning Lawyer Subject to the Long Arm Jurisdiction of Another State? Neal v. Lamb-Ferrara

a. The Chair announced that this is item 4 on the Agenda but it will be discussed first today.

b. The Chair introduced Committee Member Charles Pieterse to discuss the Florida jurisdictional case of *Neal v. Lamb-Ferrara*, 338 So.3d 1112 (Fla. 3d DCA 2024) which is included at the end of the PRC Agenda package.

c. Charles Pieterse led the discussion of an Illinois law firm (the Firm) hired by the surviving spouse of decedent Matthew Lamb, a promising artist, who owned homes in Florida and Illinois. The case addressed the scope of long-arm statutes and personal jurisdiction over out of state lawyers. Mr. Pieterse informed the Committee that, because the case is an appeal from a motion to dismiss for lack of personal jurisdiction, the record is fairly bare on the underlying facts; however, he shared some facts with the Committee:

- The Firm's engagement letter was broadly drafted.
- The surviving spouse had served first as Personal Representative and then she stepped away.
- The Firm received over $1Million dollars in attorney fees.
- The Firm unsuccessfully argued that it had never appeared in the court in Florida, that all legal work was done in Illinois, that the Decedent had died in Illinois, that the surviving spouse had signed the engagement letter in Illinois, that no attorney of the Firm was admitted to the Florida Bar, that only a small percentage of the legal work had anything to do with Florida law, and that the Firm should not be haled into court in Florida.
- The Court rejected all of the Firm's arguments. The Court found that the Firm had appeared at a hearing telephonically, the Firm's attorney had spoken on the record at the hearing, and this was tantamount to appearing in court.
- Local counsel had filed an affidavit stating that all instructions had come from the Firm. The affidavit seemed to be an important factor to the court in determining that the Firm should have foreseen being haled into court in Florida.
- Moral of the Story: If you are an out-of-state attorney preparing wills for a client residing in another jurisdiction, you may end up satisfying that jurisdiction's minimum contacts and subject yourself to personal jurisdiction based upon the long arm statute.

d. Discussion: What should the Illinois law firm have done? Perhaps make a business decision to decline the matter in the first instance. Perhaps include limiting language in the engagement letter. Perhaps engage Florida counsel in a much more active role. Attorneys should proceed with caution when asked to prepare estate planning documents governed by laws of another state – for example, Delaware Trusts. Attorneys should be careful about execution requirements because documents that an out of state lawyer prepares for a client in another state may be ineffective and that may subject the drafting attorney to

liability. It was asked whether the Illinois attorney had engaged in the Unauthorized Practice of Law (UPL) in Florida. It was noted that this point was not specifically addressed in the case. It was noted that UPL in Florida is a third-degree felony. UPL is also a crime in California. It was questioned whether Florida local counsel who admittedly took all direction from the Illinois firm and did not act as an independent advisor might also be liable for abdicating the Florida counsel's professional responsibility. Mention was made of current pending cases in other jurisdictions dealing with similar issues arising from out of state lawyers preparing documents for clients residing in states where the lawyer is not admitted to practice law, and when the formalities of execution of documents in the clients' states are not met, the end result is litigation against the drafting lawyer. The Chair pointed out an important sometimes overlooked point under Florida law is that a Revocable Trust containing testamentary provisions must be executed with the same formalities as Last Will and Testament.

3. Engagement Letters: A Guide for Practitioners Update (the Guide).

a. The Chair gave a summary of the PRC task of updating the Guide.

b. Professor Elizabeth Carter continued her discussion on proposed changes to the General Checklist and to Chapter 1 of the Guide concerning representation of spouses and individuals in estate planning. She referred to the redline of the Guide found in the Agenda materials.

c. Professor Carter reviewed the changes that were discussed at the prior PRC Meeting with a focus on the General Checklist beginning on page 8 of the Guide - including use of gender neutral terms (rather than his/her), consistently using the term "lawyer" rather than "attorney" throughout, and including the concept of "chosen family" for dealing with conflicts of interest that may be outside of the conventional definition of family. The checklist includes reference to communications with other professionals and the effect on lawyer-client privilege.

d. Professor Carter discussed section 2 of the General Checklist dealing with Defining the Scope of Representation. She discussed the addition of subsection (c) addressing legal services that are specifically excluded. Suggestions were made about additional topics that may be mentioned in this section, for example, Corporate Transparency Act (CTA) compliance and funding of trusts.

e. Professor Carter discussed a change to the "style" of representation section to include consideration of how all parties involved in a representation will be informed if one party is in charge of making decisions. A suggestion was made that the Guide include a recommendation to have a document dealing with delegation and communication when multiple parties are involved.

f. On page 10 of the Guide, in section 3 of the General Checklist titled "Identify the Client or Clients", after discussion, it was determined that the sentence including "unmarried romantic partner" would be deleted.

g. In Section 4 of the General Checklist titled "Explain the Lawyer's Duty to Avoid Conflicts of Interest and How Potential or Actual Conflicts of Interest Will be Resolved," section (b) was added asking each client to tell the lawyer if the client becomes aware of the conflict. Section (c) was modified to delete reference to the

lawyer's continued representation of 1 client after an actual conflict arises based on the previous decision by the Committee to eliminate that option from the joint representation engagement letter.

h. In Section 6 of the General Checklist titled "Explain the Fee of the Basis for the Determination of the Fee and the Billing Arrangements", Professor Carter discussed the addition of subsection (c) in order to preserve client confidentiality if detailed bills are being sent to a payor who is not the client.

i. In Section 7 of the General Checklist titled "Firm Policies of which Clients Should Be Made Aware", Professor Carter pointed out the addition of the word "Digitization" in the list of what may be done to client files.

j. In Section 9 of the General Checklist titled "Recommended Procedures", Professor Carter discussed the additions suggested and found on page 13 of the Guide included in the Agenda materials. These additions address consideration of the client's accessibility needs (including appropriate font size) and using easy to understand language in the engagement letter.

k. Chapter 1 of the Guide is currently titled "Estate Planning Representation of One Person or Spouses" and Professor Carter reviewed the suggested new title "Estate Planning Representation of One Person, Spouses, or Unmarried Romantic Partners". After lively debate, the decision was made to eliminate the word "Romantic Partners" and change to read Unmarried Persons.

l. In the Introduction section of Chapter 1, the Committee discussed and approved the deletion of the last sentence which had read "The same is true for unmarried romantic partners."

m. The Introduction section of Chapter 1 lead to a significant discussion regarding how the topic of separate representation by one firm of two spouses or unmarried persons should be addressed. Because the Committee has recommended the deletion of the sample engagement letter for concurrent separate representation, it was decided that some explanation should be included. One suggestion was "Because ACTEC does not encourage separate representation by one law firm of both spouses, we are no longer including an example of that engagement letter." An extensive discussion ensued about whether the use of the term "does not encourage" should be changed to "discourage." The Committee decided that "discourage" is perhaps a bridge too far given that the Guide is meant to be helpful to lawyers. An alternative was suggested "Because ACTEC does not generally recommend separate representation by one law firm of both spouses, we are no longer including an example of that engagement letter." Professor Carter agreed to go back and look at how this topic is addressed in the ACTEC Commentaries on the subject and will report back to the Committee.

n. Next, the Committee next discussed the topic of the Supplemental Checklist for Joint Representation of Spouses or Unmarried Persons (the newly revised title) beginning on page 15 of the Agenda materials. Professor Carter mentioned that several items that appear in the redline as new are actually existing provisions that have been moved to better organize the topics.

o. There was lively discussion on new subsection (c) and concern was voiced about including concepts of disparate estates and mention of abuse.

p. It was suggested that perhaps the language throughout should change the frame of reference from "In a joint representation" to "In considering whether to have a joint representation" because this checklist is designed to help lawyers determine if a joint representation is appropriate in a particular situation.

q. In subsection (c) on page 15, it was suggested that the sentence beginning with "Potential conflicts to consider" be changed to "Issues to consider"

r. In subsection (d) on page 15, it was decided that "must" would be changed to "should" and that the phrase "or might give the appearance of bias" would be deleted.

s. There was discussion about the wording in new subsection (a) of Section 2 titled "Define the Scope of Representation" Consideration was given to changing "Define the scope of representation as narrowly as possible" to "Consider defining the scope of representation." Some members of the Committee feel that it is important to be clear about what tasks the lawyer will be handling because clients tend to think that hiring a lawyer means that the lawyer represents them generally for everything. Professor Carter referred the Committee's attention back to the General Checklist on page 9 dealing with scope of the representation. Ultimately, it was recommended that the language be changed to "Define the scope of representation as clearly as possible." It was suggested that sending a Conclusion of Representation Letter once the engagement has been completed may solve many issues regarding client expectations.

t. There was discussion that newly renumbered section 4 on page 16 titled "Explain How Potential or Actual Conflicts of Interest Will be Addressed" required revision to eliminate the reference to continued representation of 1 client after an actual conflict of interest arises between joint clients.

u. Discussion moved to the Form of Engagement Letter beginning on page 17.

v. There was substantial discussion regarding the idea of waiving conflict of interest contained in the final paragraph on page 18 and whether or not signing the engagement letter can be an actual waiver of potential conflicts of interest that may arise. There was discussion about possible conflicts when law firms represent charities and individuals who may name those charities in estate planning documents. There was discussion about law firms that represent banks and corporate fiduciaries as well as individuals who may name those entities as executors or personal representatives or trustees. There was discussion about particular challenges this may present for large law firms and for planners who may not know at the beginning of the representation that a client wants to name a charity that the lawyer also represents as a beneficiary. The California attorneys on the Committee expressed concern that these types of prospective waivers in the Engagement Letter would not be effective as Waivers in California. Perhaps one solution would be adding an explicit warning in the Guide that your jurisdiction may not recognize advance waivers. Another suggestion was to add initial lines for the client to initial the waiver language in the engagement letter. It was suggested that the capitalized language in the brackets on page 20 be augmented with the phrase "AND WHETHER A FULLY INFORMED CONFLICT WAIVER IS NECESSARY'

w. The next section of the Engagement Letter that was discussed was Confidentiality of Information and Communication. It was suggested that the sentence "We cannot generally disclose that information to anyone else without the consent of both of you" be deleted.

x. The next section of the Engagement Letter that was discussed was the section titled "Our Policies Concerning Client Files and Original Documents." Professor Carter added the language authorizing the digitization of the entire client file. There was discussion about adding a provision that attorney work product is not part of the

client file.

y. Finally, and appropriately for the time of the meeting, there was discussion about changing the word "terminate" to "end" representation.

z. The Chair stated that it is his goal to include the revisions to the materials covered today and take a vote to approve at the next meeting.

4. Model Rule 4.2 – Can a Lawyer Representing Themselves Pro Se Communicate Directly with Represented Person?

a. Given the short amount of time remaining for our meeting, the Chair asked presenter Richard Gorini to postpone this topic until the next PRC meeting which will be held in Palm Springs on Friday, March 21, 2025.

b. The Chair invited all in attendance to reach out to him if you have ideas or topics that should be discussed at a future meeting.

5. Adjourn. The Chair adjourned the meeting at 10:30.

Respectfully submitted,

Deborah P. Goodall
ACTIVE:35669485.1

ACTEC 2024 Fall Meeting

Chicago, Illinois

Professional Responsibility Committee

Sunday, September 22, 2024
8:00am - 10:30am

Chair	William Thomas Hennessey III
Member and EC Liaison	Margaret G. Lodise
Member and Foundation Liaison	John T. Rogers Jr.
Member	Steven A. Benefield
Member	Professor Karen Elizabeth Boxx
Member	Professor Elizabeth R. Carter
Member	Joseph J. Cassioppi
Member	Melissa Osorio Dibble
Member	Deborah Packer Goodall
Member	Richard A. Gorini
Member	Professor Amy Morris Hess
Member	John M. Jolley
Member	Jonathan P. Lee
Member	David E. Lieberman
Member	Peter T. Mott
Member	Cynda C. Ottaway
Member	Charles W. Pieterse
Member	William H. Pokorny Jr.
Member	Professor Mary F. Radford
Member	Catherine Romania
Member	Andrew D. Rothstein
Member	Jeanine Steffy
Member	Vickie R. Wilcox
Member	Geraldine A. Wyle
Member	Julian C. Zebot
Visitor	Jared Cloud
Visitor	Julia Meister

ACTEC 2024 Spring Program - PALM SPRINGS - March 2024

Underlying facts:

Client is Trustee of a special needs trust established by her parents for her brother, with remainder to Client's daughter. Client is a retired attorney (not handling any T&E work). Daughter is also a licensed attorney who purports to specialize in T&E work.

The Trust initially held about $450,000 in cash and a parcel of real property in the Santa Cruz Mountains worth about $400,000. Also, Daughter was the successor Trustee if Client could not serve.

In November, 2023, Daughter filed an extensive ex parte petition seeking suspension, removal, accounting, surcharge, etc. against Client. I filed extensive objections. As is the policy with the Santa Clara County Superior Court, the initial hearing was set for hearing in mid-December, 2023. At that hearing, Daughter had retained counsel. The court continued the matter to March, 2024. I represented to the court that I would prepare a formal accounting as demanded, which I did on a timely basis.

Between the first and second hearings, Daughter fires her counsel and proceeds in pro per.

Extensive discovery ensued from both sides. During the correspondence exchanged as discovery proceeded, Daughter sends Client (via email with copy to me) a flaming email that essentially threatened my client with a determination of mental incapacity and a subsequent conservatorship if she continued to object to Daughter's demands, which asked for $1,000,000 in monetary damages plus the real property together with resignation of my Client as trustee. That email made no attempt to discuss the merits of Daughter's case, or lack thereof. I objected to that email, to which Daughter replied that she could communicate directly with my client whenever and regarding whatever she wanted.

Initially I thought that such a communication was prohibited by the California Rules of Professional Conduct (Rule 4.2), which are modeled after the ABA Rules and use the same numbering system. What I discovered was unexpected and has led to this presentation to the ACTEC Professional Responsibility Subcommittee.

to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) Statutes may require a prosecutor to preserve certain types of evidence in criminal matters. (See Pen. Code, §§ 1417.1-1417.9.) In addition, prosecutors must obey file preservation orders concerning rights of discovery guaranteed by the Constitution and statutory provisions. (See People v. Superior Court (Morales) (2017) 2 Cal.5th 523 [213 Cal.Rptr.3d 581]; Shorts v. Superior Court (2018) 24 Cal.App.5th 709 [234 Cal.Rptr.3d 392].)

[8] Under paragraph (g), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

(Amended Apr. 23, 2020, eff. June 1, 2020; Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

Comment

This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by rules 4.1 through 4.4. This rule does not require a lawyer to disclose a client's identity.

(Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this rule depends on the specific facts. (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670].) A statement that the lawyer will pursue "all available legal remedies," or words of similar import, does not by itself violate this rule.

[3] This rule does not apply to: (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377 and 1378.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. (See rule 3.8(a).)

[5] As used in paragraph (b), "governmental organizations" includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

(Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

CHAPTER 4
TRANSACTIONS WITH PERSONS* OTHER THAN CLIENTS

Rule 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 Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[3] Under rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

(Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

Rule 4.2 Communication with a Represented Person*

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person* the lawyer knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this rule prohibits communications with:

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* An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

(1) A current officer, director, partner,*or managing agent of the organization; or

(2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

(c) This rule shall not prohibit:

(1) communications with a public official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

(d) For purposes of this rule:

(1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

(2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] This rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this rule.

[2] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This rule applies to communications with any person,* whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3] The prohibition against communicating "indirectly" with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer's client. This rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, rules 3.35 – 3.37, 5.425 [Limited Scope Representation].)

[5] This rule does not prohibit communications initiated by a represented person* seeking advice or representation from an independent lawyer of the person's* choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this rule.

[7] This rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and article I, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person* pursuant to paragraph (c) is subject to other restrictions in communicating with the person.* (See, e.g. Bus. & Prof. Code, § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.)

(Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

Rule 4.3 Communicating with an Unrepresented Person*

(a) In communicating 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* incorrectly believes* the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding. If the lawyer knows* or reasonably should know* that the interests of the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.

(b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's* interests is so great that the rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's* signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

(Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*

Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].) In providing notice required by this rule, the lawyer shall comply with rule 4.2.

[2] This rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person.* (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].)

(Adopted Sept. 26, 2018, eff. Nov. 1, 2018.)

CHAPTER 5
LAW FIRMS* AND ASSOCIATIONS

Responsibilities of Managerial and Supervisory Lawyers. Rule 5.1.
Responsibilities of a Subordinate Lawyer. Rule 5.2.

* An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 502 **September 28, 2022**

Communication with a Represented Person by a Pro Se Lawyer

Under Model Rule 4.2,[1] *if a person is represented in a matter, lawyers for others in the matter may not communicate with that represented person about the subject of the representation but instead must communicate about the matter through the person's lawyer, unless the communication is authorized by law or court order or consented to by the person's lawyer.*

When a lawyer is self-representing, i.e., pro se, that lawyer may wish to communicate directly with another represented person about the subject of the representation and may believe that, because they are not representing another in the matter, the prohibition of Model Rule 4.2 does not apply. In fact, both the language of the Rule and its established purposes support the conclusion that the Rule applies to a pro se lawyer because pro se individuals represent themselves and lawyers are no exception to this principle.

Accordingly, unless the pro se lawyer has the consent of the represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. In this context, if direct pro se lawyer-to-represented person communication about the subject of the representation is desired, the pro se lawyer and counsel for the represented person should reach advance agreement on the permissibility and scope of any direct communications.

I. Introduction

Model Rule 4.2, Communication with Person Represented by Counsel, is commonly known as the "no-contact" or "anticontact" rule.[2] It has been part of the ABA Model Rules of Professional

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] ELLEN J. BENNETT & HELEN W. GUNNARSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 454 (9th ed. 2019).

Conduct since their 1983 inception in largely its present form.[3] The rule is "universally followed" in American jurisdictions.[4] It provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

Viewed broadly, the rule requires that a lawyer's communications about a legal matter be routed through a represented person's lawyer; direct communication with the represented person about the subject of the representation is prohibited unless the lawyer has the consent of the represented person's lawyer or is authorized to engage in the communication by law or a court order. The rule "contributes to the proper functioning of the legal system" by preventing lawyers from overreaching, from interfering in other lawyers' relationships with their clients, and from eliciting protected information via "uncounselled disclosure."[5]

When a lawyer engages in self-representation in a legal matter in which that lawyer is personally involved, in other words, when a lawyer is acting pro se,[6] application of Model Rule 4.2 is less straightforward. Such a lawyer might not appear to be "representing a client" in the matter because the lawyer is acting solely on the lawyer's own behalf, i.e., "without a lawyer."[7] Moreover, the commentary to Rule 4.2 specifically states that "Parties to a matter may communicate directly with

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[3] In 1995, an amendment proposed by the ABA Standing Committee on Ethics and Professional Responsibility changed the term "party" to "person" in the text of the rule and revised the Comment. In 2002, amendments proposed by the ABA Ethics 2000 Commission added a reference to "court order" in the text of the rule and revised the Comment. *See* ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, 558-66 (2013). Model Rule 4.2 can be traced back to Canon 9 of the 1908 ABA Canons of Professional Ethics, which stated that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." The concept carried forward into the 1969 ABA Model Code of Professional Responsibility, DR 7-104(A)(1), which provided that a lawyer should not "communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 3-4 (1995) (recounting long history of anti-contact rule); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 799 (2009).

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99 cmt. b (2000) [hereinafter RESTATEMENT THIRD].

[5] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) ("the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests"). *See also* RESTATEMENT THIRD, *supra* note 4 (purpose is to "protect against overreaching and deception of nonclients," protect "the relationship between the represented nonclient and that person's lawyer" and "assure [] the confidentiality of the nonclient's communications with the lawyer").

[6] Pro se is defined as "For oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* definition of propria persona as "In his own person." *Id.*

[7] Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 325 (2003) ("On its face, the reference in the Rule to a lawyer 'representing a client' can be read to suggest a negative inference that it does not apply to communication by a lawyer who is acting pro se, or is represented by another lawyer, in a matter in which she is interested.").

each other . . . ."[8] However, a pro se lawyer *is* representing a client. Pro se individuals represent themselves and lawyers are no exception to this principle.[9]

This opinion analyzes applicability of Model Rule 4.2 and the rationale for the anticontact rule in the context of a lawyer engaged in self-representation. The opinion also provides guidance on the advisability in these situations of reaching advance agreement on the permissibility and scope of any direct pro se lawyer-to-represented person communications.[10]

II. ANALYSIS

Although the general prohibition of Model Rule 4.2 is ubiquitous in U.S. jurisdictions, as applied to pro se lawyers the scope of the rule is less clear.[11] Interpretation of the Rule in this circumstance involves consideration of both its plain language and policy purposes.

The language in the Rule that is primarily at issue in this analysis is its first clause: "*In representing a client*, a lawyer shall not . . . ."[12] The key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounselled disclosures, including inappropriate acquisition of confidential lawyer-client communications.[13] In the context of pro se lawyers, balanced against these policy goals is the principle that, as a general proposition, parties to a matter may communicate directly with each other.[14]

Yet, both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers. Pro se lawyers represent themselves as "a client," and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures. That risk outweighs the sometimes-salutary benefit of direct communication. That said, it is important to remember that Model Rule 4.2 applies only when a communication is "about the subject of the representation," i.e., the Rule is matter specific, and a lawyer may speak with another represented person about matters that do not constitute the subject

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[8] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4].

[9] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("when a lawyer represents himself pro se, Rule 4.2 can be interpreted to prohibit the lawyer-party from communicating directly with an opposing represented party"); *In re* Haley, 156 Wash. 2d 324, 338, 126 P.3d 1262, 1269 (2006) ("we hold that a lawyer acting pro se is 'representing a client' for purposes of RPC 4.2(a)").

[10] This opinion does not address the related question of applicability of Rule 4.2 when a lawyer is represented by another lawyer and the represented lawyer wishes to communicate with another represented person about the matter.

[11] Samuel J. Levine, *The Law and the "Spirit of the Law,"* 2015 Prof. Law. 1, 17 (2015) (noting the Model Rules do not expressly address a case in which a lawyer is proceeding as a pro se party to a matter) [hereinafter *Spirit of the Law*]; Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 37 (2011) (issue of whether a lawyer who is pro se is constrained by the no-contact rule when the opposing party is represented by counsel was not explicitly addressed in Model Rule 4.2).

[12] MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

[13] *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; RESTATEMENT THIRD, *supra* note 4.

[14] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client and observing that in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

of the representation. *See* Model Rules R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").[15]

A. Model Rule 4.2 and Pro Se Lawyers

Application of the Rule 4.2 anticontact principle to pro se lawyers is a well-documented ethical dilemma. There are decades worth of disciplinary cases,[16] civil cases,[17] and ethics opinions[18] concluding that a lawyer acting in a pro se capacity may not communicate directly with a represented adversary or other represented person about the subject of the representation without the consent of that person's lawyer, unless the communication is authorized by law or court order.[19] These authorities reason that a pro se lawyer is "representing a client" for purposes of Model Rule 4.2, and that the policy underlying the prohibition makes it clear that such communications are "ripe with potential for overreaching and exploitation,"[20] and that "the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."[21]

Viewed in this light, it is not possible for a pro se lawyer to "take off the lawyer hat" and navigate around Rule 4.2 by communicating solely as a client. Consequently, the proposition, set forth in Comment [4] to Model Rule 4.2, that "[p]arties to a matter may communicate directly with each

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[15] Note, however, that perspectives can differ in this context about whether a lawyer's effort to communicate with a represented person is beyond the scope of the rule. *See In re* Steele, 181 N.E.3d 976 (Ind. 2022) (rejecting respondent's contention that an email was not "about the subject of the representation" but rather "spoke only of matters involving friendship," a contention that was belied both by the language of the email itself, which thrice explicitly requested that the adverse party bypass their lawyer, and by the context in which it was sent, after two weeks of unsuccessful discussions with opposing counsel and the filing of a lawsuit).

[16] *In re* Steele, 181 N.E.3d 976 (Ind. 2022); The Florida Bar v. Faro, Report of Referee, Florida Bar File 2014-70, 913 (11J) (July 24, 2017), *available at* https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/$FILE/_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018); *In re* Hodge, 407 P.3d 613 (Kan. 2017); Medina County Bar Association v. Cameron, 958 N.E.2d 138 (Ohio 2011); *In re* Lucas, 789 N.W.2d 73 (N.D. 2010); *In re* Haley, 126 P.3d 1262 (Wash. 2006); *In re* Schaefer, 25 P.3d 191 (Nev. 2001); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241 (Tex. Ct. App. 1999); Office of Disciplinary Counsel v. Donnell, 684 N.E.2d 36 (Ohio 1997); Runsvold v. Idaho State Bar, 925 P.2d 1118 (Idaho 1996); *In re* Smith, 861 P.2d 1013 (Or. 1993) (application to corporate representation); *In re* Segall, 509 N.E.2d 988 (Ill. 1987) (application to corporate representation).

[17] Fichelson v. Skorupa, 13 Mass. L. Rptr. 458 (Mass. Super. Ct. July 31, 2001) (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (4th ed.)); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1993).

[18] Ala. State Bar Op. RO-85-52 (1985); Alaska Bar Ass'n Op. 95-7 (1995); D.C. Bar Op. 258 (1995); Haw. Disciplinary Bd. Op. 44 (2003); Mass. Bar Ass'n Op. 97-1 (1997); State Bar of Mich. Op. CI-1206 (1988); State Bar of Nev. Standing Comm. On Ethics & Prof 'l Responsibility, Formal Op. 8 (1987); N.Y. City Bar, Formal Op. 2011-01 (2011); Va. State Bar Op. 1527 (1993) (application to corporate representation); Va. State Bar Op. 1890 (2020).

[19] Oregon has adopted a modified version of Model Rule 4.2 to address this issue. Or. Rules of Prof'l Conduct R. 4.2 ("In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject . . . .").

[20] The Florida Bar v. Faro, Report of Referee, Florida Bar File 2014-70, 913 (11J), at 10 (July 24, 2017), https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/$FILE/_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018).

[21] *In re* Schaefer, 25 P.3d 191, 199 (Nev. 2001).

other"[22] does not apply to pro se lawyers. This proposition recognizes that, in general, the rules of professional conduct establish limits on lawyer behavior, not that of their clients.[23]

The first clause of Model Rule 4.2— "*In representing a client*, a lawyer shall not . . . ."[24]—may be seen as creating an ambiguity as applied to lawyers representing themselves. The conclusion of many jurisdictions is more persuasive and consistent with the purposes of Model Rule 4.2.[25] A pro se lawyer is self-representing, i.e., "representing a client" for purposes of Model Rule 4.2. The risk in this situation of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures, is acute, outweighing the potential benefit of direct client-to-client communication.[26] Accordingly, unless a pro se lawyer has the consent of the other represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited.[27]

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[22] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) ("Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.").

[23] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Model Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("The rule governs lawyer, not their clients . . . ."). It is well established, however, that a lawyer cannot direct client-to-client communication as a way of evading Model Rule 4.2's prohibition. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) (when advising a client about direct client-to-client communication, the line between permissible advice and impermissible assistance "must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2"). In the pro se lawyer situation, it is not feasible to parse the distinction between a lawyer acting as a lawyer and a lawyer acting as a client.

[24] MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

[25] *See, e.g.*, Md. Bar Ass'n Ethics Comm., *Can Pro Se Lawyer Speak with A Represented Party over the Objection of the Party's Lawyer?*, MD. B.J., Sept./Oct. 2006, at 57, 59 ("We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive."). We recognize that a handful of authorities, including the Restatement of the Law Governing Lawyers, have come to a different conclusion. *See* RESTATEMENT THIRD, *supra* note 4, cmt. e, at 73 ("[a] lawyer representing his or her own interests pro se may communicate with an opposing represented non-client on the same basis as any other principals."). The Reporter's Note, however, recognizes that "The position of the ABA ethics committee is probably contrary to that in the Section and Comment . . . ." *Id.* Reporter's Note on Illustration 3 (citing ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967)). *See also In re* Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003); Texas Ethics Comm'n Advisory Op. 653 (Jan. 2016); Cal. Rules of Prof'l Conduct R. 4.2, cmt. 3 ("The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter."). *Cf.* N.Y. Rules of Prof'l Conduct R. 4.2(c) ("A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.").

[26] *See generally Spirit of the Law*, *supra* note 11 ("The methodologies courts have employed to expand the scope of the no-contact rule to include pro se lawyers exemplify the potential relevance of a spirt of the law approach for the interpretation of ethics codes."). Recognizing the significance of Rule 4.2's underlying public policy, an Illinois appellate court upheld application of Rule 4.2 to a non-lawyer pro se plaintiff in a civil case. *See* Zemater v. Village of Waterman, 157 N.E.3d 1069, 1074 (Ill. App. 2020) ("Protecting defendant under these circumstances also furthered public policy regarding the confidential and fiduciary nature of the attorney-client relationship.").

[27] This conclusion is consistent with this Committee's 1967 analysis of Canon 9 of the former Canons of Professional Ethics. *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967) (attorney who is a

B. Obtaining Consent for Client-to-Client Communication

In certain situations, otherwise prohibited client-to-client communications involving a pro se lawyer may be beneficial.[28] If a pro se lawyer wishes in good faith to communicate with another represented person about the subject of the representation, that lawyer should contact the represented person's counsel and seek to obtain consent, providing an opportunity for that lawyer to object, consent, or consent by agreement to conditions under which such communications are to take place. If a lawyer receives such a request from a pro se lawyer, it is prudent to discuss with the client in advance the advisability of such communication, along with the risks and benefits of such communication.[29] In some circumstances it may be appropriate to advise the client not to communicate with the pro se lawyer.

Although a lawyer's decision to consent to a pro se lawyer's communication with the lawyer's client is within the lawyer's discretion and will depend on the circumstances, there are certain situations in which direct communication between a pro se lawyer and the represented person are likely necessary or appropriate such that consenting to the communication makes sense.

Conversely, consenting to a communication where the pro se lawyer appears to be overreaching for a strategic advantage—such as seeking the communication for a concession to an extension of time to produce documents, renegotiating terms of an agreed-upon contract, or calling to elicit disclosures—is not advisable.

Advance agreements between counsel for the represented person and the pro se lawyer are important to avoid disputes about compliance and ensure no disruption of Model Rule 4.2's protections. Thus, the agreement should be clear about the scope of any direct pro se lawyer-to-represented person communications. It would be prudent to memorialize the agreement in writing.

III. CONCLUSION

Under Model Rule 4.2, in representing a client, a lawyer may not communicate with a person the lawyer knows is represented by counsel about the subject of the representation, unless that person's counsel has consented to the communication, or the communication is authorized by law or court order. When a lawyer is participating in a matter pro se, that lawyer is engaged in self-representation and is therefore subject to Model Rule 4.2's prohibition.

DISSENT

I must respectfully dissent from the conclusion of the well-written majority opinion because I cannot agree that "both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers." While the *purpose* of the rule would clearly be

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defendant in a case may not settle the case directly with the plaintiff who is represented by counsel without the knowledge of the plaintiff's counsel).

[28] *See* Att'y Grievance Comm'n of Maryland v. Trye, 444 Md. 201, 221, 118 A.3d 980, 991 (2015) (noting that "direct communication between the principals—leaving the lawyers out of the room—is sometimes the path to settlement of a dispute").

[29] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

served by extending it to self-represented lawyers, its language clearly prohibits such application. Again, Model Rule 4.2 states:

> *In representing a client*, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order. [Emphasis added.]

Our majority opinion thoughtfully and candidly discusses the split of authority interpreting the rule. It is not uncommon for ethics committees to weigh in when there is such a split. But it is, I hope, unusual for a committee to nullify plain language through interpretation, especially when the committee has jurisdiction to propose rule amendments.

The interpretation of our majority opinion and the ethics and discipline opinions cited therein depend upon the conclusion that, "A pro se lawyer is self-representing, i.e., 'representing a client' for purposes of Model Rule 4.2." Majority Opinion, at p. 5. This logic provides the rationale for cases holding that the rule applies to pro se lawyers.[1] The number of opinions following this approach is not convincing if the analysis is not persuasive; error compounded is still error.

Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. See *In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley,* at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction.[2]

It is also simply wrong to perpetuate language that *was* clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it

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[1] *See, e.g.*, *In re* Haley, 126 P.3d 1262 (Wash. 2006) (forthrightly summarizing authorities and all of the reasons one might think the rule means what it says, but noting that jurisdictions considering the question "have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se"). *See also* Runsvold v. Idaho State Bar, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996) ("We thus construe the phrase of Rule 4.2, 'in representing a client' to include the situation in which an attorney is acting pro se because this interpretation better effectuates the purpose of Rule 4.2.").

[2] *See* "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

does in Connecticut, Kansas, and Texas?[3] Or, does it mean what we wish it said, as several other states have declared?

Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement,[4] cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process,[5] and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers.[6]

Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves.[7] By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.

Mark Armitage
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[3] *See* Pinsky v. Statewide Grievance Comm., 216 Conn. 228, 236, 578 A.2d 1075, 1079 (1990) ("plaintiff's letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client"); *In re* Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003) ("violation of KRPC 4.2 was not shown to have occurred, as the rule applies only to acts done '[i]n representing a client.'"); and Texas Comm. on Prof'l Ethics Op. 653 (2016) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer.").

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99(1)(b), and cmt. (e) thereto ("A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals").

[5] *See, e.g.*, *In re* Discipline of Shaeffer, 25 P.3d 191, 199-202 (Nev. 2001), and *In re* Disciplinary Proceeding Against Haley, 156 Wash. 2d 324, 1267-69; 126 P.3d 1262 (2006).

[6] *See, e.g.*, Or. Rules of Prof'l Conduct R. 4.2: "In representing a client *or the lawyer's own interests*, a lawyer shall not communicate . . ." (emphasis added).

[7] *See, e.g.*, Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 324-329 (2003) (tracing the Ethics 2000 Commission's failure to address the problem pointed out by the author and others and recommending that states adopt a rule with language clearly prohibiting contact by pro se lawyers); Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 38 (2011) (recognizing the split, asserting that the rule does not answer the question and consulting the purpose should be done, but stating: "It would, of course, be optimal for rule drafters to consider explicitly whether particular rules apply to pro se lawyers."); and Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 831 (2009) (also recognizing this mess and concluding: "We therefore propose changing the text of the Rule from 'In representing a client, a lawyer shall not . . . .' to 'A lawyer participating in a matter shall not . . . .'").

2024 WL 3056655
Only the Westlaw citation is currently available.

Court of Appeals of Texas, San Antonio.

William W. RUTH, Appellant
v.
COMMISSION FOR LAWYER DISCIPLINE, Appellee

No. 04-22-00796-CV
|
Delivered and Filed: June 20, 2024

Synopsis

Background: Commission for Lawyer Discipline initiated disciplinary proceeding against attorney. The 216th District Court, Gillespie County, Roy B. Ferguson, J., granted Commission's motion for summary judgment and denied attorney's motion for summary judgment. Attorney appealed.

The Court of Appeals, Rios, J., held that as a matter of first impression, attorney representing himself pro se was subject to "no-contact" rule of professional conduct, and thus attorney violated rule by communicating directly with members of Commission.

Affirmed.

Procedural Posture(s): On Appeal; Proceeding on Attorney Discipline; Motion for Summary Judgment.

From the 216th Judicial District Court, Gillespie County, Texas, Trial Court No. 16965, Honorable Roy B. Ferguson, Judge Presiding

Attorneys and Law Firms

APPELLANT ATTORNEY: Timothy A. Hootman, Attorney At Law, 2402 Pease Street, Houston, TX 77003.

APPELLEE ATTORNEY: Benjamin Hackett, 711 Navarro, Suite 750, San Antonio, TX 78205, Michael Graham, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487.

Sitting: Patricia O. Alvarez, Justice, Luz Elena D. Chapa, Justice, Irene Rios, Justice

OPINION

Opinion by: Irene Rios, Justice

***1** This appeal arises from an attorney disciplinary proceeding in which the trial court found as a matter of law that appellant William Ruth—an attorney who represented himself—violated Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct when he communicated with the opposing party who was represented by counsel. In his sole issue, Ruth contends the rule allowed him to communicate with the opposing party without counsel's consent because the no-contact rule does not apply to a pro se lawyer so long as the pro se lawyer does not also represent any other client in the matter. We affirm.

BACKGROUND

The Commission for Lawyer Discipline (the "Commission") initiated a disciplinary action against Ruth for alleged violations of the Texas Disciplinary Rules of Professional Conduct.[1] In that litigation, Ruth appeared pro se. Ruth e-filed two motions and directly served individual members of the Commission by adding them to the e-service list. Disciplinary counsel for the Commission informed Ruth this conduct was improper communication with her client and requested Ruth cease these communications. Ruth continued to directly serve filings on members of the Commission and wrote a letter directly to the Commission chair.

After Ruth failed to heed counsel's warning to cease communications with her client, the Commission initiated the underlying disciplinary proceeding,[2] alleging Ruth violated the no-contact rule under Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct.[3] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9). Predicated on its allegation of a Rule 4.02(a) violation, the Commission also alleged Ruth violated Rule 8.04(a)(1), which prohibits a lawyer from violating the Texas Disciplinary Rules of Professional Conduct whether or not such violation occurred in the course of a client-lawyer relationship. *See id.* R. 8.04(a)

(1). The Commission filed a traditional partial motion for summary judgment asserting the uncontroverted evidence showed that Ruth communicated with members of the Commission without their counsel's consent, there are no genuine issues of material fact regarding the communications, and the Commission is entitled to judgment as a matter of law. Ruth filed a competing motion for summary judgment, contending the no-contact rule only applies to a lawyer who is representing a client and does not apply to a lawyer who is representing himself pro se.

The trial court denied Ruth's motion for summary judgment and granted the Commission's motion for summary judgment regarding violations of Rules 4.02(a) and 8.04(a)(1) of the Texas Disciplinary Rules of Professional Conduct. Specifically, the trial court found "there is no genuine issue of material fact that [Ruth] communicated or caused or encouraged another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knew to be represented by another lawyer regarding that subject, without the consent of the other lawyer to do so, or being authorized by law to do so." Following a trial on sanctions, the trial court signed a final judgment of suspension suspending Ruth from the practice of law for five years. Ruth appeals.

STANDARD OF REVIEW

***2** We review a trial court's ruling on a summary judgment motion de novo. *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274, 278 (Tex. 2018). To prevail on a traditional summary judgment motion, the movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). In reviewing a trial court's summary judgment ruling, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Knott*, 128 S.W.3d at 215. When competing summary judgment motions are filed, each movant has the burden of establishing its entitlement to judgment as a matter of law. *Tarr*, 556 S.W.3d at 278. When both parties move for summary judgment and the trial court grants one party's motion for summary judgment—while denying the other party's motion for summary judgment—the unsuccessful party may appeal both the grant of the prevailing party's motion and the denial of its own motion. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). Typically, in such a case, a reviewing court should review both parties' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

DISCUSSION

In his sole issue, Ruth argues the Commission was not entitled to judgment as a matter of law because Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct does not apply to a pro se lawyer so long as the pro se lawyer does not also represent any other client in the matter. [4] Consequently, Ruth argues the Commission's legal theory is flawed and the trial court erred when it granted the Commission's motion for summary judgment.

We must decide whether the rule prohibiting a lawyer from contacting an opposing party without the consent of that party's counsel applies to a pro se lawyer Though there are persuasive authorities addressing this issue, we have found no Texas caselaw that is directly on point; thus, this appears to be an issue of first impression in Texas.

We apply principles of statutory construction when interpreting the disciplinary rules. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *see also In re CMH Homes, Inc.*, No. 04-13-00050-CV, 2013 WL 2446724, at *5 (Tex. App.—San Antonio June 5, 2013, orig. proceeding) ("Although the disciplinary rules are not legislative statutes, the analysis of such should be no different."). "We review issues of statutory construction de novo." *In re A.R.G.*, 645 S.W.3d 789, 795 (Tex. App.—San Antonio 2022, no pet.) (citing *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010)). Our primary objective in construing statutes is to give effect to the drafter's intent. *A.R.G.*, 645 S.W.3d at 795. We rely on the plain meaning of the text as expressing intent unless a different meaning is supplied by definition or is apparent from the context, or the plain meaning leads to absurd results. *Id.* We presume the drafter chose its words carefully intending all words in a statute to have meaning and for none of them to be useless. *In re C.J.N.-S.*, 540 S.W.3d 589, 591 (Tex. 2018).

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct states:

> In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02(a).

Ruth does not contest the Commission's status as an entity of government, nor does he contest that the Commission was represented by counsel who informed Ruth to stop communicating directly with Commission members. Instead, Ruth argues the prefatory clause "[i]n representing a client" shows the supreme court intended for Rule 4.02(a) to apply only to attorneys who are representing a client's interest as opposed to their own interest. [5] The Commission argues Ruth is representing himself as a client; therefore, the no-contact rule applies to him regardless of his status as a pro se litigant. The parties point to non-binding and conflicting authorities to support their respective arguments.

A. Restatement and Ethics Opinions

***3** Ruth points to the restatement of the law governing lawyers as well as an ethics opinion from the Texas Committee on Professional Ethics. The restatement provides that a lawyer may not communicate with a nonclient who the lawyer knows is represented by another lawyer—about the subject of the representation—without the nonclient's lawyer's consent unless "the lawyer is a party and represents no other client in the matter[.]" RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 99(1)(b) (AM. L. INST. 2000).

Likewise, Texas ethics opinion 653 states: "In the opinion of the Committee, Rule 4.02(a) of the Texas Disciplinary Rules does not apply to a lawyer who is a party to a lawsuit or transaction but does not represent any other party in the matter" and the lawyer "is not prohibited by Rule 4.02(a) from communicating directly with an adverse party in the matter without the consent of the adverse party's lawyer." TEX. COMM. ON PROF'L ETHICS, Op. 653, 79 Tex. B.J. 234 (2016).

However, the American Bar Association's Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") came to the opposite conclusion when analyzing the model rule that is nearly identical to the Texas rule. *See* ABA COMM. ON ETHICS & PRO. RESP., Formal Op. 22-502 (2022). In formal opinion 22-502, a majority of the ABA Ethics Committee determined "the language of [the no-contact rule] and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers." *See id.* The committee reasoned pro se lawyers "represent themselves as 'a client,' and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of [uncounseled] disclosures." *Id.*

The ethics opinions are advisory and—like the restatement—not binding on this court. *See Abdel Hakim Labidi v. Sydow*, 287 S.W.3d 922, 929 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (noting Texas ethics opinions are advisory and not binding authorities); *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 866 (Tex. App.—Dallas 2010, no pet.) ("Such opinions are concerned with matters of attorney discipline and are advisory rather than binding."); *see also* *In re Thetford*, 574 S.W.3d 362, 381 (Tex. 2019) (orig. proceeding) (Brown, J., dissenting) (recognizing model rules and ABA ethics opinions are not binding authorities).

B. Courts in Other Jurisdictions

Courts in all but one other jurisdiction that have addressed this issue have concluded the no-contact rule applies to lawyers representing themselves pro se. *See* *In re Steele*, 181 N.E.3d 976, 980 (Ind. 2022) (holding a pro se lawyer is subject to the no-contact rule); *In re Disciplinary Action Against Lucas*, 789 N.W.2d 73, 76 (N.D. 2010) (same); *In re Disciplinary Action Against Haley*, 156 Wash.2d 324, 126 P.3d 1262, 1269 (2006) (same); *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191, 199–200 (2001) (same); *Runsvold v. Idaho State Bar*, 129 Idaho 419, 925 P.2d 1118, 1120 (1996) (same); *Sandstrom v. Sandstrom*, 880

P.2d 103, 109 (Wyo. 1994) (same); *In re Segall*, 117 Ill.2d 1, 109 Ill.Dec. 149, 509 N.E.2d 988, 990 (1987) (same); *see also* *Medina Cnty. Bar Ass'n v. Cameron*, 130 Ohio St.3d 299, 958 N.E.2d 138, 140–41, 141 n.1 (2011) (stating in dicta that a pro se lawyer is subject to the no-contact rule). *But see* *Pinsky v. Statewide Grievance Comm.*, 216 Conn. 228, 578 A.2d 1075, 1079 (1990) (concluding the no-contact rule did not apply to a lawyer because the court concluded the lawyer was not representing a client when he made the alleged improper communication).

***4** Our sister court in Houston has also indicated a lawyer representing himself pro se is subject to Rule 4.02's no-contact provision. *See* *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259–60 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). In that case, Vickery, who was a lawyer, induced another lawyer to communicate a settlement offer directly to Vickery's spouse in a divorce proceeding without the consent of the spouse's counsel. *Id.* at 258–59. The *Vickery* court held Vickery violated the Texas Disciplinary Rules of Professional Conduct by inducing the other lawyer to violate Rule 4.02. *Id.* at 259 n.11. Although *Vickery* is distinguishable from the case at bar, the court noted Vickery may have violated Rule 4.02 in his communication with his spouse because there was "some evidence Vickery acted as his own attorney." *Id.* at 259–60.

C. Rule 4.02 Applies to Pro Se Lawyers

Having considered the conflicting authorities, we agree with those courts that have concluded the no-contact rule applies to pro se lawyers for two reasons.

First, the plain language of Rule 4.02 applies to pro se lawyers because a pro se lawyer "does represent a client when representing himself or herself in a matter[.]" *Runsvold*, 925 P.2d at 1120; *see also* *Haley*, 126 P.3d at 1269 ("[W]e hold that a lawyer acting pro se is 'representing a client' for purposes of [the no-contact rule]."). We begin with the premise that *all* lawyers admitted to practice law in Texas are subject to the disciplinary rules. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.05(a) & cmt. 1. There is no distinction between pro se lawyers and lawyers representing other clients in the application of the disciplinary rules of professional conduct. Ruth essentially argues that he took his lawyer hat off to put on his client hat when he represented himself in the underlying disciplinary proceeding. However, "an attorney who proceeds pro se in a matter functionally occupies the roles of both attorney and client." *Steele*, 181 N.E.3d at 979; *see also* *Sandstrom*, 880 P.2d at 109 ("An attorney who is himself a party to the litigation represents himself when he contacts an opposing party." (quoting *Segall*, 109 Ill.Dec. 149, 509 N.E.2d at 990)); ABA COMM. ON ETHICS & PRO. RESP., Formal Op. 22-502 (2022) ("[I]t is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around [the no-contact rule] by communicating solely as a client.").

Second, the purpose of Rule 4.02 is "to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer." *In re News Am. Pub., Inc.*, 974 S.W.2d 97, 100 (Tex. App.—San Antonio 1998, orig. proceeding). Further, the rule "is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02 cmt. 1. "Most courts have held [the no-contact rule] applies to attorneys representing themselves because it is consistent with the purpose of the rule." *Lucas*, 789 N.W.2d at 76. A party is not entitled to less protection from the superior knowledge and skill of an opposing lawyer merely because the lawyer is appearing pro se. *See* *Schaefer*, 25 P.3d at 199 ("The lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."). And, a party who has employed counsel as an intermediary between himself and opposing counsel should not lose the protection of the rule merely because opposing counsel is also a party to the litigation. *Segall*, 109 Ill.Dec. 149, 509 N.E.2d at 990. If we were to accept Ruth's contention that Rule 4.02 does not apply to him, the intent of the rule would be frustrated. *See* *Runsvold*, 925 P.2d at 1120.

***5** Because a lawyer acting pro se represents himself as a client, and the purpose of Rule 4.02 would be subverted if it were inapplicable to pro se lawyers, we hold a pro se lawyer is subject to Rule 4.02. As such, the pro se lawyer is prohibited from communicating about the subject matter of the representation with a party who the lawyer knows is represented by counsel, unless counsel consents.

Accordingly, Ruth's sole issue is overruled.

CONCLUSION

We affirm the trial court's judgment.

All Citations

--- S.W.3d ----, 2024 WL 3056655

Footnotes

1 The underlying disciplinary proceeding arose from Ruth's conduct in another disciplinary action initiated against Ruth.

2 We refer to the disciplinary action that is the subject of this appeal as the underlying disciplinary proceeding. This underlying disciplinary proceeding is the second disciplinary action brought against Ruth by the Commission.

3 The Commission alleged other violations of the disciplinary rules that were later abandoned by the Commission.

4 The trial court's finding that Ruth violated Rule 8.04(a)(1) of the Texas Disciplinary Rules of Professional Conduct was predicated on its finding that Ruth violated Rule 4.02(a).

5 “The disciplinary rules were promulgated by the Texas Supreme Court and ratified by the members of the bar.” *Children's Medical Ctr. Of Dallas v. Richardson*, No. 05-94-01157-CV, 1995 WL 307484, at *4 (Tex. App.—Dallas May 18, 1995, no writ) (mem. op., not designated for publication) (citing TEX. GOV'T CODE ANN. § 81.024).

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Fourth Edition 2025

For use with the *ACTEC Commentaries on the Model Rules of Professional Conduct,* Sixth Edition 2023

Developed by the
Professional Responsibility Committee of
The American College of Trust and Estate Counsel

GENERAL CHECKLIST

1. ISSUES A LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION

(a) Is there any previous or existing client or advisory relationship between/among the lawyer (or the lawyer's firm) and any of the parties, their families (including chosen families), or their business partners? If so, does the lawyer have a conflict in representing any of the parties?

(b) Does the lawyer (or the lawyer's firm) currently represent any of the parties, their families (including chosen families), their business, or partners. Has the lawyer (or the lawyer's firm) previously represented any of the parties, their families (including chosen families), their businesses, or partners? What connections do the parties have with each other (e.g., familial, business or personal relationships, fiduciaries or beneficiaries of an estate or trust)? If there is a current or prior representation, consider the nature of the representation and whether it might create a conflict of interest.

(c) How well does the lawyer know the parties?

(d) Are the parties U.S. citizens? Are the parties U.S. residents? What are the domiciles of the parties? If any entity is involved, is the entity duly organized and in good standing in all appropriate jurisdictions? In which jurisdiction or jurisdictions will the entity be organized or authorized to do business? If a trust or estate is involved, in what jurisdiction is it being or will it be administered?

(e) Under guidelines issued by the Financial Action Task Force on Money Laundering, before agreeing to represent a person or entity, the best practice consists of:

1. Confirming the prospective client's identity by examining a government-issued photo identification.

2. Identifying the persons managing and the persons having beneficial interests in business entities and trusts.

3. Making sure the client's circumstances and businesses are understood.

4. At a minimum, doing an internet search for suspicious circumstances or activities in which the prospective client is or may be involved. The Task Force also recommends checking the website for the Treasury Department's Office of Foreign Assets Control to see if the prospective client's name appears on its list of individuals with whom U.S. persons are prohibited from dealing.

(f) Do all parties appear to have adequate capacity to enter into the engagement?

(g) What other professionals are involved (e.g., accountants, appraisers, brokers, financial advisors)? Are they known to be competent? What referral relationships exist? How will

communications with other professionals occur? What effect will communications with other professionals have on attorney-client privilege?

(h) Are the expectations of the parties as to the outcome and timing of the lawyer's work reasonable and obtainable? Do the parties have a common goal and agree on the way to go about achieving it?

(i) What are the fee arrangements?

2. DEFINE THE SCOPE OF THE REPRESENTATION.

(a) Describe with appropriate specificity the objectives of the representation and the means by which those objectives are to be pursued. Define the scope as narrowly as possible. Defining the scope of the representation narrowly helps manage client expectations. For example, a narrow scope of representation will help avoid having clients expect more than you can deliver or that it is cost-effective to deliver. Defining the scope of the representation narrowly can also help avoid conflicts of interest that may arise between the clients in a joint representation or between the client and other clients.

(b) Make it clear that the lawyer (or the firm) is not obligated to provide services beyond the scope of the engagement described in the original letter absent an updated or separate engagement letter by which the lawyer (or the firm) agrees to render other services.

(c) Consider whether any items or issues should be specifically excluded from the scope of the representation. Some lawyers may want to specify that will not provide legal advice on certain issues such as tax matters, changing beneficiary designations, community property issues, foreign assets, or special needs planning.

(d) Describe the nature and consequences of any limitations on the scope of the representation, and obtain the client's consent to those limitations. For example, if the laws of another jurisdiction come into play in the legal services to be performed and the lawyer is not licensed to practice in that jurisdiction, point out that the client may have to retain legal counsel in that jurisdiction. Similarly, if due to the nature of estate or trust assets (e.g., intellectual property) or a client's personal circumstances (e.g., a child custody dispute) the lawyer or firm lacks the expertise to attend to all of the client's legal needs, consider pointing out what issues must be addressed by lawyers of different disciplines.

(e) What do the parties expect the "style" of the representation to be (e.g., separate meetings with each party or some parties or are meetings to be attended by all interested parties)? Is one party in charge of making certain types of decisions? If so, how will the lawyer ensure that all parties are participating in the representation and making informed decisions? Consider how to document any delegation of decision-making.

(f) Consider describing the time frame within which the various phases of the engagement will be completed and mentioning any foreseeable delays or periods during which the lawyer may not be available during the engagement. Consider identifying other attorneys,

legal assistants, and support personnel in the lawyer's office who may or should be consulted in the event of the lawyer's absence or unavailability.

(g) Consider describing the extent to which the lawyer will rely upon information furnished by the parties and the extent, if any, to which the lawyer will attempt to verify this information. Describe the circumstances under which the lawyer may be required to verify some or all of the information furnished by the parties in order to comply with the applicable standards of practice (e.g., Circular 230).

3. IDENTIFY THE CLIENT OR CLIENTS.

(See also the Supplemental Checklist for each Chapter.)

(a) If a prospective client is married, will the lawyer (or firm) represent one spouse or both spouses? If the client has an unmarried person, will the lawyer (or firm) represent one partner or both partners?

(b) If two or more prospective clients are related (personally or professionally) but not married, will the lawyer (or firm) represent one, some or all of the parties affected by the subject matter of the engagement?

(c) Are there any doubts about a prospective client's capacity? If so, how will they be resolved? If the doubts cannot be resolved, will the lawyer (or firm) represent the prospective client's legal representative instead?

(d) Identify all clients. See the ACTEC Commentaries on Model Rule 1.7 as to who can sign on behalf of an entity (someone other than the represented principal). Consider having the clients represent that their interests are not adversarial.

(e) Consider describing how the diminished capacity or death of a client will affect the representation, including those persons who may be given copies of an estate planning client's documents.

4. EXPLAIN THE LAWYER'S DUTY TO AVOID CONFLICTS OF INTEREST AND HOW POTENTIAL OR ACTUAL CONFLICTS OF INTEREST WILL BE RESOLVED.

(a) Describe the effect and consequences of any simultaneous representation of multiple clients, including potential conflicts of interest. Note that some jurisdictions may require the lawyer to give examples of conflicts of interest that can arise under the circumstances.

(b) Ask each client to notify the lawyer if the client becomes aware of a potential conflict of interest.

(c) Describe how an actual conflict of interest will be resolved. Explain that the firm may have to withdraw from representing some or all parties if an actual conflict arises .

(d) Obtain the informed consent of all clients to the specific type of a simultaneous representation of multiple clients (joint or separate). Confirm in the engagement letter that the lawyer discussed the implications of joint versus separate representation with the clients.

If appropriate, describe how a *prior* representation may give rise to a conflict of interest. (See Model Rule of Professional Conduct 1.8 concerning conflicts of interest among current clients and Model Rule 1.9 concerning duties to former clients.) Consider requesting authorization from all of the clients to disclose to all interested parties the actions of any one of the clients constituting fraud, a breach of trust, a violation of the governing documents of any entity involved, or in contravention of a mutual estate plan (if permitted in the jurisdiction in which you practice).

(e) If appropriate, describe the possible conflict of interest if the lawyer is to receive an interest in any business as a part of the lawyer's fee.

(f) Consider whether each party should be advised to consult independent counsel before consenting to the joint representation.

5. EXPLAIN THE LAWYER'S DUTY OF CONFIDENTIALITY AND HOW CONFIDENTIAL INFORMATION WILL BE HANDLED.

(a) Describe the lawyer's duty of confidentiality and whether and to what extent confidential information will be shared with the various clients. Obtain the clients' consent to the sharing of information (or refusal to share) in this manner.

(b) Describe how electronic communications and the inclusion of non-clients in meetings can compromise confidentiality and the attorney-client privilege.

(c) Consider describing how the diminished capacity or death of a client will affect the disclosure of confidential information.

6. EXPLAIN THE FEE OR THE BASIS FOR THE DETERMINATION OF THE FEE AND THE BILLING ARRANGEMENTS [INCLUDING THE MATERIAL REQUIRED UNDER RULE 1.5 (b)].

(a) If a contingent fee is involved, obtain the client's consent in writing. (Check local rules to determine the extent to which other types of engagements must be agreed to in writing.)

(b) Describe factors that might cause the fee to be different from any estimate and how and when changes in standard billing rates may affect the fee. If appropriate, describe how the fee will be shared with other lawyers outside the firm. If someone other than the client will pay the lawyer's fees, then in keeping with Model Rule of Professional Conduct 1.8(f): (i) Make sure that the client gives informed consent to the arrangement; and (ii) consider having the person paying the fees acknowledge in writing that all communications with the client are strictly confidential and that the payor may in no way interfere with the lawyer's relationship with the client or with the lawyer's independent professional judgment.

(c) Consider whether the lawyer's normal billing practices may impact client confidentiality. If appropriate, consider sending generic invoices to the payor and sending more detailed invoices to the client. Alternatively, consider explaining to the client that detailed invoices may reveal confidential or sensitive information to the payor and obtain the client's consent to sending detailed invoices to the payor.

(d) Describe who is responsible for paying the lawyer's fees and expenses. If the representation involves multiple clients, describe the extent to which each client is or may be liable for the lawyer's fees and expenses and whether the liability of multiple clients is to be individual or joint and several. Describe the lawyer's billing and collection policies.

(e) Verify each client's billing address and contact information.

(f) Consider whether you want to ask clients to agree to arbitrate or mediate any fee dispute. (Check local rules on the enforceability of an agreement of this kind.)

7. FIRM POLICIES OF WHICH CLIENTS SHOULD BE MADE AWARE.

(a) Retention, digitization, destruction and sharing of clients' files and original documents. (Check local rules about the transfer of files on a lawyer's retirement or death.)

(b) Some jurisdictions may require a lawyer who does not carry professional liability insurance to reveal the lack of coverage to clients.

8. TERMINATION OF THE REPRESENTATION

(a) Describe the events, dates, or circumstances that will terminate the representation.

(b) If relevant, describe the difference between mandatory and permissive withdrawal and any prior Court approval that may be needed before the lawyer (or firm) may cease representing the client(s).

(c) If the representation involves multiple clients, consider describing what information, if any, the lawyer will give to the clients if the lawyer is required to withdraw from the representation.

(d) Describe what will happen when the lawyer withdraws and to whom the records will be sent.

9. RECOMMENDED PROCEDURES.

(a) Send an engagement letter to all of the prospective clients prior to the first meeting or telephone conference or immediately following it.

(b) Review the more important terms of the engagement letter with the client.

(c) Require that all clients sign the engagement letter or agreement or otherwise acknowledge the terms of any multiple representation.

(d) Consider the accessibility needs of the client when preparing and discussing the engagement letter. Generally, documents should be prepared using an easy-to-read font that is 12 pt or larger. The lawyer should also ask the client whether the client has any specific accessibility needs

(e) Consider the relative sophistication and experience of the client when writing the engagement letter. Generally, the lawyer should err on the side of writing a letter that is easier to understand. Use short sentences, active verbs, and plain language. Avoid legal jargon and acronyms to the extent possible.

(f) Consider whether the engagement letter should be revised if the scope or nature of the representation changes.

CHAPTER 1. ESTATE PLANNING REPRESENTATION OF ONE PERSON, SPOUSES, OR UNMARRIED PERSONS

Introduction

Two forms follow for the representation of clients in their estate planning affairs. The first form is for use in the joint representation of spouses. That form lends itself to modification for unmarried persons. The second form can be used for the individual representation of one spouse or unmarried persons. The second form can also be used for the representation of a single person. ACTEC does not generally recommend the separate representation by one law firm of two spouses or unmarried persons (where information may be withheld selectively from a spouse while both spouses are represented).

References to the *ACTEC Commentaries* (Sixth Edition 2023):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question. *Page numbers to be updated later*

Terminology (re Informed Consent and Writing), p. 14
General Principles (re Scope of Representation), p. 36
Formal and Informal Agreements, p. 37
Limitation on the Representation Must be Reasonable, p. 38
Avoiding Misunderstandings as to Scope of Representation, p. 40
Encouraging Communication; Discretion Regarding Content, p. 61
Communications During Active Phase of Representation, p. 62
Dormant Representation, p. 62
Termination of Representation, p. 63
Basis of Fees for Trusts and Estates Services, p. 66
Disclosures to Client's Agent, p. 80
Joint and Separate Clients, p. 83
Confidences Imparted by One Joint Client, p. 84
General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients, p. 101
Disclosures to Multiple Clients, p. 102
Joint or Separate Representation, p. 102
Consider Possible Presence and Impact of Any Conflict of Interest, p. 103
Conflicts of Interest May Preclude Multiple Representation, p. 104
Prospective Waivers (of Conflicts), p. 105
Duties to Former Clients p. 138
Retention of Original Documents, p. 170
Mandatory Withdrawal/Prohibited Representation, p. 173

Supplemental Checklist for Joint Representation of Spouses or Unmarried Persons

(Refer also to the General Checklist on pages ___ through ___.)

1. ISSUES THE LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION

(a) Determine the obligations of each prospective client to third parties (such as child, spousal or parental support) arising, for example, under an agreement, divorce decree, retirement plans, or under applicable law.

(b) In a joint representation, determine what duties, if any, the prospective clients owe to each other, and how these duties might affect the representation. For example, duties created in existing pre- or post-marital agreements, cohabitation agreements, contracts to make wills, and rights under pension plans may impact the representation.

(c) In a joint representation, determine what conflicts of interest exist, or may exist, between the two prospective joint clients. Consider how actual or potential conflicts might affect the representation. Potential conflicts to consider include, but are not limited to, potential conflicts arising from disparate estates between the two clients; power imbalances between the clients; conflicts arising from blended families; conflicts arising from fundamentally different goals between the joint clients; or the existence of physical, financial, or psychological abuse.

(d) If relevant, consider whether the lawyer's (or firm's) pre-existing relationship with one of the joint clients will affect the representation. In a joint representation where the lawyer has a pre-existing relationship with one of the joint clients, the lawyer should consider whether that pre-existing relationship might create a conflict or might give rise to the appearance of bias towards that client. A pre-existing relationship is not limited to a lawyer-client relationship.

2. DEFINE THE SCOPE OF THE REPRESENTATION

(a) Define the scope of the representation as narrowly as possible. If possible, the scope of the representation might be described by reference to the specific documents that will be executed as part of the estate plan.

(b) Consider whether certain tasks, such as changing beneficiary designations or funding a revocable trust, should be specifically excluded from the scope of the representation.

3. IDENTIFY THE CLIENT OR CLIENTS.

(a) Will the lawyer represent one person individually, or will the lawyer represent both spouses or unmarried persons jointly?

(b) If and when an actual conflict of interest arises, it is imperative that another letter be sent to the clients informing them that an actual conflict has arisen which requires the lawyer to withdraw from the representation of either or both of them and indicating who the lawyer will represent going forward (if anyone). See Chapter 9.

4. EXPLAIN HOW ACTUAL OR POTENTIAL CONFLICTS OF INTEREST WILL BE RESOLVED.

If a joint representation fails, the lawyer should address which, if either, of the clients the lawyer may continue to represent in the matter at hand or in related matters. (If the lawyer will continue to represent one client, presumably that is due to a long-standing relationship the lawyer had with that client before the lawyer agreed to represent the other joint client.) In the alternative, will the lawyer withdraw from representing either client in the matter at hand or in related matters? Describe the possibility of a future prohibition on the lawyer's representation of either one of the clients in the matter at hand or in related matters.

Form of an Engagement Letter for the Representation of Both Spouses or Unmarried Persons Jointly in Estate Planning Matters

(Sample in Word)

[*DATE*]

[*NAME(S) and ADDRESS*]

Subject: Engagement Letter for Joint Representation in Estate Planning Matters

Dear [*CLIENTS*]:

Thank you for asking our firm, [*NAME OF FIRM*], to represent you in your estate planning affairs. This letter sets forth the terms and scope of that representation.

Scope of the Engagement. The legal services to be rendered consist of the following: [*DESCRIBE SERVICES TO BE RENDERED*].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*].

[*OPTION - for use in jurisdictions allowing drafting lawyers to be paid their hourly rates for testimony in a Will or Trust Contest.*]

Compensation for Future Litigation. You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of your estate plan, we will be compensated for that person's services at the person's hourly rate to clients at the time of the deposition, other testimony or other discovery. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only you but also anyone managing your financial affairs (before and after your death), your heirs and the beneficiaries under your estate planning documents.

Joint Representation. Spouses often ask the same law firm to represent them, jointly, in estate planning matters, as you have requested us to do. Because we are representing the two of you jointly, there are certain ethical obligations imposed on our firm. We must generally reveal to both of you all relevant information, including, among other things, emails, correspondence and oral communications, that comes to our attention in the course of our joint representation. If either of you provides us with information which you direct us not to disclose to the other of you , we may be required to withdraw as your lawyers. If this will in any way restrain you, then our joint representation of both of you is inappropriate and one or both of you will need to retain other lawyers. Further, estate planning clients can sometimes have differing interests and objectives regarding their estate plans. For example, you may have different views on how property should pass after the death of one or both of you, or we may recommend that assets be restructured or retitled to take advantage of available tax benefits.

If a conflict of interest arises between the two of you during the course of your planning, or if the two of you have a difference of opinion on any subject, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other. We will not take any action or refrain from taking an action (pertaining to the subject matter of our representation of you) that affects one of you without the other's knowledge and consent..

Please notify us promptly if you believe a conflict of interest has arisen or is likely to arise between the two of you. If an actual conflict of interest arises between you that, in our judgment, prevents us from ethically representing both of you jointly, we will withdraw as your joint lawyers. Following the termination of the joint representation, we may be able and willing to represent one or both of you individually. In some instances, however, we would advise one or both of you to retain new lawyers.

By signing this letter, you acknowledge the material advantages and disadvantages of the proposed representation of both of you in connection with your estate planning, that you understand that other options are available, including seeking separate law firms to represent you in connection with your estate planning, that you agree to the terms set forth above, and that you waive potential conflicts of interest that can arise by virtue of the fact that we represent the two of you jointly.

Other Conflicts of Interest. [If there are additional conflicts or potential conflicts that should be addressed, address them here.]

[*OPTION if firm may represent charitable beneficiary or fiduciaries*]

Representation of Charities and Fiduciaries. Kindly note that our firm represents, and our lawyers sometimes serve as volunteers and on the boards of various charitable organizations.

You may decide to name one or more of these organizations to receive a gift or bequest. The decision as whether to make a gift to particular charity is yours alone. We also represent banks and trust companies which serve as professional executors and trustees, as well as lawyers, accountants, business managers and other professional advisors. You may decide to name one or more of these companies or individuals as an Executor or Trustee and they may ultimately retain our firm as counsel to assist them in performing their fiduciary duties given that we are the preparer of your documents. 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). Your Executor or Trustee will generally be entitled to reasonable compensation determined under applicable law. Banks and trust companies typically charge fees as set forth in their standard schedule of rates unless they agree in writing to charge another fee. You should have a discussion with any fiduciary that you select about the services they will provide and how they intend to charge for their services. You acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations. By signing this letter, you confirm that you waive any conflict of interest which may arise from our relationships with charities or fiduciaries under consideration by you. [CONSIDER ANY ADDITIONAL DISCLOSURE REQUIREMENTS WHICH MAY BE REQUIRED IN YOUR PARTICULAR JURISDICTION]..

Confidentiality of Information and Communications. One of our goals is to encourage open communication and collaboration during our representation of you. Generally, all communications between the client (you two) and the lawyers (us)—outside the presence of other parties—must remain confidential unless the client(s) authorizes the lawyers to disclose the information or if disclosure is required or permitted by law or the rules governing the professional conduct of lawyers. In other words, any communications that the two of you have with us in private that relate to this representation are confidential. We cannot generally disclose that information to anyone else without the consent of both of you.

With few exceptions under the law, communications among us are protected by the lawyer - client privilege. However, if someone else (such as a family member of yours or financial planner) is included in meeting or other communication, then the lawyer-client privilege may be lost as to things disclosed in that meeting or other communication. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our lawyer-client relationship.

Some forms of communication may be less secure from inadvertent disclosure to others than other forms of communication. You acknowledge that by furnishing us with an e-mail, address, cell phone number, mailing address, or fax number, you authorize us to communicate with you using those modes of communication notwithstanding any potential risk of inadvertent disclosure to others.

[*OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.*]

Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all

paper and electronic copies of your signed estate planning documents, drafts of any estate planning documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to your estate plan. You agree that all other materials pertinent to your estate plan (such as our notes and internal memoranda) are proprietary to us and not part of your client file. With the exception of original documents, you agree that we can digitize the entirety of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[*Pick OPTION 1 or OPTION 2*]

[*Option 1: Firm does not hold clients' original documents*]

We do not hold original estate planning documents for clients. Therefore, you will have to make arrangements to safeguard your own original documents. If you leave original documents with us, we cannot find you, and it has been more than [*NUMBER*] years since our last contact with you, then we have the right to destroy those documents.

[*Option 2: Firm will hold clients' original documents. Be sure to consult applicable state law about firm's safekeeping responsibilities and modify option 2 accordingly.*]

At your request, we will retain your original estate planning documents other than documents associated with your health care. It is important that you place original documents pertaining to your health care in a safe place that is accessible by your health care agents twenty-four hours a day, seven days a week. Original documents retained by us may be requested by you during normal business hours. Kindly request documents at least [*NUMBER*] days before they are needed.

If you die or someone claims that you are no longer competent and we receive a request for an original document of yours, the document will be released only to the person legally entitled to it in our sole discretion. We reserve the right to petition the Court to determine the person legally entitled to the document. It will be your responsibility to inform the trustees, executors and agents named in your estate planning documents that we hold your original estate planning documents and to instruct them to notify us immediately of your death or inability to continue to manage your financial affairs. We can assume no responsibility for keeping abreast of changes in your personal circumstances.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the other (or the other's legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Guarantee of Favorable Outcomes. Although your estate plan may be designed to achieve certain goals such as tax savings or the avoidance of conservatorship or probate proceedings, these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as your diligence in keeping assets titled in the name of the Trustee of a particular trust, the proper management of a trust and changes in the law).

In connection with planning your estate, we may make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust that may be created as part of your estate plan). Once the recommendations have been made, it is understood and agreed that we will have no responsibility to make sure that you follow our advice.

Conclusion of Representation.

[OPTION if Scope of Representation is described by particular documents]

Once the estate planning documents described above are executed, our representation of you will end. We will be happy to provide additional or continuing legal services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to either of you with respect to future or ongoing legal issues, nor will we have any duty to notify you of changes in the law or upcoming filing or other deadlines.

[*OPTION for Voluntary Termination*]

You may end our representation of you at any time by providing us with written notice. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may end our representation of you at any time by providing you with written notice. However, whether you end the representation or we end the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation of both of you on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF LAWYER IN CHARGE*]

CONSENT

Each of us has read this letter and understands its contents. We consent to [*NAME OF FIRM*]'s representation of both of us on the terms and conditions set forth in it.

Signed: _____ , 20___

(Client 1)

Signed: _____ , 20___

(Client 2)

Form of an Engagement Letter for the Representation of One Person, Individually, in Estate Planning Matters

(Sample in Word)

[*DATE*]

[*NAME(S) and ADDRESS*]

Subject: Representation of You in Estate Planning Matters

Dear [*CLIENT*]:

Thank you for asking our firm, [*NAME OF FIRM*], to represent you in your estate planning affairs. This letter sets forth the terms and scope of that representation.

Scope of the Engagement. The legal services to be rendered consist of the following: [*DESCRIBE SERVICES TO BE RENDERED*].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*].

[*OPTION - for use in jurisdictions allowing drafting attorneys to be paid their hourly rates for testimony in a Will or Trust contest.*]

Compensation for Future Litigation. You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of your estate plan, we will be compensated for that person's services at the person's hourly rate to clients at the time of the deposition, other testimony or other discovery by you or from your assets. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only you but also anyone managing your financial affairs (before and after your death), your heirs and the beneficiaries under your estate planning documents.

Confidentiality of Information and Communications. Generally, all communications between the client (you) and the lawyers (us)—outside the presence of other parties—must remain confidential unless the client authorizes the lawyers to disclose the information or if disclosure is required or permitted by law or the rules governing the professional conduct of lawyers. In other words, any communications that you have with us in private that relate to this representation are confidential.

With few exceptions under the law, communications among us are protected by the lawyer-client privilege. However, if someone else (such as a family member of yours or financial planner) is included in meeting or other communication, then the lawyer-client privilege may be lost as to things disclosed in that meeting or other communication. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context

of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our lawyer-client relationship.

Some forms of communication may be less secure from inadvertent disclosure to others than other forms of communication. You acknowledge that by furnishing us with an e-mail, address, cell phone number, mailing address, or fax number, you authorize us to communicate with you using those modes of communication notwithstanding any potential risk of inadvertent disclosure to others.

[*Option: Consider including for married clients*]

We have agreed to represent you, individually. We do not represent your spouse [or unmarried partner]. Because we represent you individually, anything you tell us is confidential and it would be unethical for us to disclose information to your spouse or anyone else without your consent. Accordingly, if you want us to discuss any aspect of your estate plan or related issues with your spouse, you will need to direct us to do so.

[*OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.*]

Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed estate planning documents, drafts of any estate planning documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to your estate plan. You agree that all other materials pertinent to your estate plan (such as our notes and internal memoranda) are proprietary to us and not part of your client file. With the exception of original documents, you agree that we can digitize the entirety of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[*Pick OPTION 1 or OPTION 2*]

[*Option 1: Firm does not hold clients' original documents*]

We do not hold original estate planning documents for clients. Therefore, you will have to make arrangements to safeguard your own original documents. If you leave original documents

with us, we cannot find you, and it has been more than [*NUMBER*] years since our last contact with you, then we have the right to destroy those documents.

[*Option 2: Firm will hold clients' original documents. Be sure to consult applicable state law about firm's safekeeping responsibilities and modify option 2 accordingly.*]

At your request, we will retain your original estate planning documents other than documents associated with your health care. It is important that you place original documents pertaining to your health care in a safe place that is accessible by your health care agents twenty-four hours a day, seven days a week. Original documents retained by us may be requested by you during normal business hours. Kindly request documents at least [*NUMBER*] days before they are needed.

If you die or someone claims that you are no longer competent and we receive a request for an original document of yours, the document will be released only to the person legally entitled to it in our sole discretion. We reserve the right to petition the Court to determine the person legally entitled to the document. It will be your responsibility to inform the trustees, executors and agents named in your estate planning documents that we hold your original estate planning documents and to instruct them to notify us immediately of your death or inability to continue to manage your financial affairs. We can assume no responsibility for keeping abreast of changes in your personal circumstances.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the other (or the other's legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

Conflicts of Interest. [If there are conflicts or potential conflicts that should be addressed, address them here.]

[*OPTION if firm may represent charitable beneficiary or fiduciaries*]

Representation of Charities and Fiduciaries. Kindly note that our firm represents, and our lawyers sometimes serve as volunteers and on the boards of, various charitable organizations. You may decide to name one or more of these organizations to receive a gift or bequest. The decision as whether to make a gift to particular charity is yours alone. We also represent banks and trust companies which serve as professional executors and trustees, as well as lawyers, accountants, business managers and other professional advisors. You may decide to name one or more of these companies or individuals as an Executor or Trustee and they may ultimately retain our firm as counsel to assist them in performing their fiduciary duties given that we are the preparer of your documents. 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). Your Executor or Trustee will generally be entitled to reasonable compensation determined under applicable law. Banks and trust companies typically charge fees as set forth in their standard schedule of rates unless they agree in writing to charge another fee. You should have a discussion with any fiduciary that you select about the services they will provide and how they intend to charge for their services. You

acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations. By signing this letter, you confirm that you waive any conflict of interest which may arise from our relationships with charities or fiduciaries under consideration by you. [CONSIDER ANY ADDITIONAL DISCLOSURE REQUIREMENTS WHICH MAY BE REQUIRED IN YOUR PARTICULAR JURISDICTION].

No Guarantee of Favorable Outcomes. Although your estate plan may be designed to achieve certain goals such as tax savings or the avoidance of conservatorship or probate proceedings, these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as your diligence in keeping assets titled in the name of the Trustee of a particular trust, the proper management of a trust and changes in the law).

In connection with planning your estate, we will make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust that may be created as part of your estate plan). Once the recommendations have been made, it is understood and agreed that we will have no responsibility to make sure that you follow our advice.

Conclusion of Representation.

[*OPTION if Scope of Representation is described by particular documents*]

Once the estate planning documents described above are executed, our representation of you will end. We will be happy to provide additional or continuing legal services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to you with respect to future or ongoing legal issues, nor will we have any duty to notify you of changes in the law or upcoming filing or other deadlines.

[*OPTION for Voluntary Termination*]

You may end our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may end our representation of you at any time by providing you with written notice.. However, whether you end the representation or we end the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation of you on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

CONSENT

I have read this letter and understands its contents. I consent to [*NAME OF FIRM*]'s representation of me on the terms and conditions set forth in it.

Signed: _____ , 20___

(Client)

ACTIVE:35662616.1

Chapter 2- New Proposed Form of Conflict Waiver Letter to be Signed in Connection with the Separate Representation of the Same Family in Estate Planning Matters

[Date]

[Name(s) and Address(es)]

Subject: Representation of Multiple Family Members in Estate Planning

Dear [CLIENTS]:

As you know, our firm [REPRESENTS/HAS REPRESENTED] [SPOUSES] in connection with their estate planning. We have now been asked to represent [OTHER FAMILY MEMBER(S)]. There is no reason we cannot represent more than one unit in a family in connection with their respective estate planning as long as everyone is aware of the potential conflicts of interest that may arise and consents to the proposed representation. The purpose of this letter is to discuss ethical issues associated with the separate representation of [OTHER FAMILY MEMBER(S)].

We have agreed that our representation of [OTHER FAMILY MEMBER(S)] will be separate from our representation [SPOUSES]. When we represent clients separately, we give them independent advice and have a duty to act solely in the best interests of each client, without being influenced by the conflicting personal interests of any other clients or anyone else. This means that our representation of [SPOUSES] will remain personal to them. Likewise, our representation of [OTHER FAMILY MEMBER(S)] will remain personal to [HIM/HER/THEM] We will not discuss any aspect of [SPOUSES] estate planning with [OTHER FAMILY MEMBER(S)] unless we are given permission to do so by [SPOUSES], even if that information might be important to [HIM/HER/THEM]. Similarly, we will not discuss any aspect of [OTHER FAMILY MEMBER(S)] estate plan with [SPOUSES] unless we are given permission to do so. In other words, we will not be representing [OTHER FAMILY MEMBER(S)] in connection with any aspect of [SPOUSES] estate planning and vice versa.

During the course of a separate representation of multiple family members in estate planning, it is certainly possible and even likely that decisions will be made which could have financial impacts on other parties to the separate representation. For example, [SPOUSES] may make decisions from time to time in connection with their estate planning which could adversely affect [OTHER FAMILY MEMBER(S)] such as the decision to reduce or eliminate a bequest to [OTHER FAMILY MEMBER(S)] under their wills or trusts. Likewise, [OTHER FAMILY MEMBER(S)] may decide to modify their documents in a manner which [SPOUSES] may not agree with.

Prior to our agreeing to proceed with this separate representation, you have confirmed and agreed that we may prepare estate planning documents for [SPOUSES] and [OTHER FAMILY MEMBERS] and give separate advice with respect to those documents even if such advice may have an adverse impact upon the other clients to the separate representation and that our Firm

will have no duty to share any changes or decisions which are made in connection with the separate representations.

Because each party may choose to make changes in their estate planning documents from time to time which may financially impact the other, our representation of multiple family members creates the potential for conflicts of interest within the meaning of our rules of professional conduct. A separate representation may not be appropriate when there are agreed-upon estate planning objectives or shared assumptions which would limit the ability of the clients to the separate representation to make their own independent decisions with respect to estate planning. You have acknowledged that there are no such limitations and that each of you understands that the [SPOUSES] and [OTHER FAMILY MEMBER(S)] are free to make their own choices and decisions.

By signing this letter, each of you acknowledges the material advantages and disadvantages of the proposed representation of you in connection with your estate planning, that you understand that other options are available, including seeking separate law firms to represent you in connection with your estate planning, that you agree to the terms of the representation set forth above, and that you waive any conflicts of interest which may exist.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

CONSENT

Each of us has read this letter and understands its contents. We consent to [*NAME OF FIRM*]'s representation of both of us jointly and to [*NAME OF FIRM*]'S representation of [*OTHER FAMILY MEMBERS*] separately on the terms and conditions set forth in it.

Signed:_____, 20___ _____
(Client 1)

Signed:_____, 20___ _____
(Client 2)

Existing Forms for Chapter 2

Form of an Engagement Letter to be Signed by a Married Couple in Connection with the Separate Representation of Other Members of the Same Family in Estate Planning Matters

[Date]

[Name(s) and Address(es)]

Subject: Representation of You and [*Other Family Members*] in Estate Planning Matters.

Dear [CLIENTS]:

Thank you for asking our firm to represent you in your estate planning affairs. This will confirm the terms of our agreement to represent you.

Scope of the Engagement. The legal services to be rendered consist of the following: [*DESCRIBE SERVICES TO BE RENDERED*].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*]

[*OPTION - for use in jurisdictions allowing drafting attorneys to be paid their hourly rates for testimony in a Will or Trust contest.*]

You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of your estate plan, we will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony or other discovery by you or from your assets. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only you but also anyone managing your financial affairs (before and after your death), your heirs and the beneficiaries under your estate planning documents.

Representation of Other Family Members

As you know, our firm [*REPRESENTS/HAS REPRESENTED/ HAS BEEN ASKED TO REPRESENT*] [*OTHER FAMILY MEMBERS*] in connection with their estate planning. There is no reason why we cannot represent [*OTHER FAMILY MEMBERS*] and you in your respective estate planning affairs as long as everyone is aware of the potential conflicts of interest that may arise when our firm undertakes to represent more than one unit of the family.

Separate or Joint Representation – Confidential Information and Potential Conflicts of Interest

Lawyers may represent clients separately or jointly. We will represent the two of you jointly as spouses. However, our representation of the two of you, on the one hand, will be separate and apart from our representation of [*OTHER FAMILY MEMBERS*], on the other hand. These different forms of representation have the following implications:

A. Separate Representation

We will not discuss any aspect of [*OTHER FAMILY MEMBERS'*] estate plan with you unless we are given permission to do so by [*OTHER FAMILY MEMBERS*], even if we think the information might be important to you. By the same token, we will not discuss any aspect of your estate plan with [*OTHER FAMILY MEMBERS*] unless you give us permission to do so. When we represent clients separately, we give them independent advice and we have a duty to act solely in the best interests of each client, without being influenced by the conflicting personal interests of any other clients or anyone else.

B. Joint Representation

When we represent clients jointly (as we do the two of you), we are obligated to disclose to each client any information that is relevant and material to the subject matter of the engagement. You cannot make disclosures to us and expect that information which, in our judgment, falls into this category will be withheld from the other of you.

In a joint representation, we are not permitted to become an advocate for either client's personal interests. Rather, we assist the clients in developing a coordinated plan for the accomplishment of their common and mutual objectives. We encourage the resolution of any individual differences between you in your mutual best interests. Relevant and material information shared with us by one of you, although confidential as to all third parties, will not be kept from the other of you. However, we will generally not disclose information made known to us that we do not think is relevant and material to the subject matter of our engagement.

It is important that you understand the differences in these forms of representation. We ask that you confirm by signing below that you request that we represent the two of you jointly and [*OTHER FAMILY MEMBERS*] separately from the two of you.

If a conflict of interest arises between you during the course of your estate planning or if the two of you have a difference of opinion as to your respective property rights or interests or as to other issues, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other.

By signing this letter, you waive potential conflicts of interest that can arise by virtue of the fact that we represent the two of you jointly or that we represent you, on the one hand, and [*OTHER FAMILY MEMBERS*], on the other hand, separately. [*NOTE THAT IN SOME JURISDICTIONS, IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.*]

[*Pick OPTION 1 or OPTION 2*]

[*Option 1: If an actual conflict arises, lawyer withdraws from representation of all family members*]

If an actual conflict of interest arises between the two of you or between you and other clients of ours that, in our judgment, makes it impossible for us to live up to our ethical obligations to the clients in question, we will withdraw as their attorneys and advise all concerned to seek other legal counsel.

[*Option 2: If an actual conflict arises, lawyer will continue to represent one family member but not the others*]

If an actual conflict of interest arises between you or between you and other clients of ours that, in our judgment, makes it impossible for us to live up to our ethical obligations to the clients in question, we will seek to continue to represent [*NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT*], to the extent that we determine that we may appropriately do so, and withdraw as [*NAME OF CLIENTS LAWYER WILL NO LONGER REPRESENT*]'s legal counsel. Your signature below constitutes your consent to our continued future representation of [*NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT*] and each of you agrees not to seek to disqualify us from representing [*HIM/HER/THEM*] in the future. Notwithstanding this agreement, we may be required to withdraw or disqualified from representing [*NAME OF CLIENTS FIRM WISHES TO CONTINUE TO REPRESENT*] after an actual conflict arises.

[*OPTION if firm may represent charitable beneficiary or fiduciaries*]

Kindly note that we represent several charitable organizations. You may decide to name one or more of these organizations to receive a gift or bequest. We also represent banks and trust companies which serve as professional executors and trustees, as well as lawyers, accountants, business managers and other professional advisors. You may decide to name one or more of these companies or individuals as an Executor or Trustee and may excuse them from being sued for their actions as Trustees or Executors (to the extent permitted by law). In addition, the estate planning documents we prepare for you may allow a professional advisor who serves as an Executor or Trustee to be paid for services rendered in that capacity, in addition to his or her professional services. By signing this letter, you waive any conflict of interest which may arise from these circumstances.

Attorney-Client Communications. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

[*OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.*]

Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed estate planning documents, drafts of any estate planning documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to your estate plan. You agree that all other materials pertinent to your estate plan (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[*Pick OPTION 1 or OPTION 2*]

[*Option 1: Firm does not hold clients' original documents*]

We do not hold original estate planning documents for clients. Therefore, you will have to make arrangements to safeguard your own original documents. If you leave original documents with us, we cannot find you, and it has been more than [*NUMBER*] years since our last contact with you, then we have the right to destroy those documents.

[*Option 2: Firm will hold clients' original documents. Be sure to consult applicable state law about firm's safekeeping responsibilities and modify option 2 accordingly.*]

At your request, we will retain your original estate planning documents other than documents associated with your health care. It is important that you place original documents pertaining to your health care in a safe place that is accessible by your health care agents twenty-four hours a day, seven days a week. Original documents retained by us may be requested by you during normal business hours. Kindly request documents at least [*NUMBER*] days before they are needed.

If you die or someone claims that you are no longer competent and we receive a request for an original document of yours, the document will be released only to the person legally entitled to it in our sole discretion. We reserve the right to petition the Court to determine the person legally entitled to the document. It will be your responsibility to inform the trustees, executors and agents named in your estate planning documents that we hold your original estate planning documents and to instruct them to notify us immediately of your death or inability to continue to manage your financial affairs. We can assume no responsibility for keeping abreast of changes in your personal circumstances.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on who is entitled to these things, we may petition the Court to make that determination. If you

agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the other (or the other's legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Guarantee of Favorable Outcomes. Although your estate plan may be designed to achieve certain goals such as tax savings or the avoidance of conservatorship or probate proceedings, these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as your diligence in keeping assets titled in the name of the Trustee of a particular trust, the proper management of a trust and changes in the law).

In connection with planning your estate, we will make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust that may be created as part of your estate plan). Once the recommendations have been made, it is understood and agreed that we will have no responsibility to make sure that you follow our advice.

Conclusion of Representation. Once the following documents are executed, the engagement of this firm will be concluded: [*LIST DOCUMENTS TO BE PREPARED.*] We will be happy to provide additional or continuing legal services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to you with respect to future or ongoing legal issues, nor will we have any duty to notify you of changes in the law or upcoming filing or other deadlines.

[*OPTION for Voluntary Termination*]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation of the two of you jointly and to our representation of [*OTHER FAMILY MEMBERS*] separately on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

CONSENT

Each of us has read this letter and understands its contents. We consent to [*NAME OF FIRM*]'s representation of both of us jointly and to [*NAME OF FIRM*]'S representation of [*OTHER FAMILY MEMBERS*] separately on the terms and conditions set forth in it.

Signed:_____, 20___ _____
(Client 1)

Signed:_____, 20___ _____
(Client 2)

Form of an Engagement Letter for the Joint Representation of Multiple Members of the Same Family (Other Than Spouses) in Non-Litigated Matters of Common Interest[1]

[Date]

[Name(s) and Address(es)]

Subject: Joint Representation of All of You

Dear [CLIENTS]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [*SUBJECT MATTER OF THE ENGAGEMENT*]. This will confirm the terms of our agreement to represent you.

Identification of the Clients. You have asked us to represent all of you jointly in connection with [*SUBJECT MATTER OF THE ENGAGEMENT*]. Before agreeing to this joint representation, it is important that all of you understand and agree to the terms and conditions of this form of representation.

Scope of the Engagement. We will provide legal services in connection with [*SPECIFIC DESCRIPTION OF THE SUBJECT MATTER AND SCOPE OF THE ENGAGEMENT*].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*]

You agree that you will be jointly and severally responsible for the payment of all amounts owed to us and that we can seek payment in full from any one of you at our election. Any agreement [*BETWEEN/AMONG*] you to limit your responsibility for the payment of amounts owed to us will not be binding upon us unless we agree in writing to those limitations.

Separate or Joint Representation – Confidential Information and Potential Conflicts of Interest

Lawyers may represent clients separately or jointly. We will represent [*BOTH/ALL*] of you jointly. Here are the basic differences between joint and separate representation:

[1] Not intended for use when firm represents multiple family members (other than spouses) in their estate planning affairs. Intended for use in situations where clients have a common goal (e.g., beneficiaries similarly situated inquire into Trust terms and the Trustee's duties).

A. Separate Representation

When clients are represented separately, we are required to preserve any confidential client information unless we are authorized by our client or by law to disclose that information to someone else. In other words, we are ordinarily prohibited from revealing to anyone else any information known to us relating to our client, even if we think the information might be important to the other person. When we represent a client separately, we advocate for that client's personal interests and give him or her totally independent advice. We have a duty to act solely in the best interests of our client, without being influenced by the conflicting personal interests of any other clients or anyone else.

B. Joint Representation

When we represent two or more clients jointly (as we will represent you), we are obligated to disclose to each client any information made known to us that is relevant and material to the subject matter of the engagement. Information of this nature that is shared with us by any of you, although confidential as to all third parties, will not be kept from the [*OTHER/OTHERS*] of you. However, we would generally not disclose information made known to us that we do not think is relevant and material to the subject matter of the engagement.

If there is a difference of opinion [*BETWEEN/AMONG*] you, we can point out the pros and cons of your respective positions or differing opinions. However, in a joint representation, we are prohibited from advocating one of your positions over the [*OTHER/OTHERS*]. Instead, we will assist [*BOTH/ALL*] all of our clients in developing a coordinated plan for the accomplishment of their common and mutual objectives. We encourage the resolution of any individual differences in the best interests of the clients collectively.

You may have differing and conflicting interests and objectives at different points during our representation. Because each of your interests and objectives could potentially be affected by those of the [*OTHER/OTHERS*] of you, it is important that you understand the differences between representing clients separately and representing clients jointly.

In agreeing to our joint representation of you, each of you authorizes us to disclose to the [*OTHER/OTHERS*] of you information that [*ANY/EITHER*] of you [*SHARE/SHARES*] with us or that we acquire from another source which is relevant and material to our representation of you in this matter. By signing this letter, you also waive potential conflicts of interest that can arise by virtue of the fact that we represent [*BOTH/ALL*] of you jointly. [*NOTE THAT IN SOME JURISDICTIONS, IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.*]

[*Pick Option 1 or 2*]

[*Option 1: If an actual conflict arises, lawyer withdraws from representation of all family members.*]

If actual conflicts of interest arise of such a nature that in our judgment it is impossible for us to fulfill our ethical obligations to [*BOTH/ALL*] of you, we will withdraw as your attorneys and advise [*BOTH/ALL*] of you to seek other legal counsel.

[*Option 2: If an actual conflict arises, lawyer will continue to represent one family member but not the others*.]

If an actual conflict of interest arises [*BETWEEN/AMONG*] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [*BOTH/ALL*] of you, we will seek to continue to represent [*NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT*], to the extent that we determine that we may appropriately do so, and withdraw as [*NAME OF CLIENTS LAWYER WILL NO LONGER REPRESENT*]'s legal counsel. Your signature below constitutes your consent to our continued future representation of [*NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT*] and each of you agrees not to seek to disqualify us from representing [*HIM/HER/THEM*] in the future. Notwithstanding this agreement, we may be required to withdraw or disqualified from representing [*NAME OF CLIENTS FIRM WISHES TO CONTINUE TO REPRESENT*] after an actual conflict arises.

Attorney-Client Communications. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

[*OPTION: Firm's Policies on File Storage. Make sure the definition of "client files" is consistent with local rules*.]

Our Policies Concerning Client Files. You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed documents, drafts of any documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to the subject matter of our representation of you. You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file,

subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the [*OTHER/OTHERS*] (or the [*OTHER'S/OTHERS'*] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Guarantee of Favorable Outcomes. Although our mutual goal is to achieve certain outcomes such as [*DESCRIBE GOALS*], these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as [*DESCRIBE VARIABLES*]).

Conclusion of Representation. After the [*SUBJECT MATTER OF THE ENGAGEMENT*] has been completed, the engagement of this firm will be concluded unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to any of you in connection with any future or ongoing legal issues nor will we have a duty to notify you of changes in the laws.

[*OPTION for Voluntary Termination*]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

Consent to the Terms of the Engagement. Before we begin, it is important that you consider all of the factors discussed in this letter and consent to the joint form of our representation of you. After each of you has considered this decision carefully, we ask that each of you sign the statement that follows this letter to indicate your consent to the terms and conditions of the representation. If, after considering this matter, any one of you prefers a different form of representation, please let us know.

If any one of you has any questions about in this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of separate and joint representation, and we choose to have [*LAW FIRM*] represent all of us jointly in connection with [*SUBJECT MATTER OF THE ENGAGEMENT*] on the terms and conditions set forth in it.

Signed: _____, 20___ _____
(Client 1)

Signed: _____, 20___ _____
(Client 2)

Signed: _____, 20___ _____
(Client 3)

Signed: _____, 20___ _____
(Client 4)

No Title in Original

December 8, 2004

American Bar Association Standing Committee on Ethics and Professional Responsibility
Formal Opinion ***05-434***

Lawyer Retained by Testator to Disinherit Beneficiary that Lawyer Represents on Unrelated Matters

Core Terms

testator, beneficiary, disinherit, unrelated matter, legal right, significant risk, the will, testamentary, professional responsibility, just cause, concurrent, advice

Text

> *There ordinarily is no conflict of interest when a lawyer is engaged by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters, unless doing so would violate a legal obligation of the testator to the beneficiary, or unless there is a significant risk that the lawyer's representation of the testator will be materially limited by the lawyer's responsibilities to the beneficiary.*

This opinion addresses whether, under the Model Rules of Professional Conduct, [1]there is a conflict of interest if a lawyer is retained by a testator [2]to prepare instruments disinheriting [3]a beneficiary whom the lawyer represents on unrelated matters. [4]

Except as provided in Rule 1.7(b), [5]a lawyer may not represent a client if the representation involves a concurrent conflict of interest. There is a concurrent conflict of interest if either (a) the representation of one client will be "directly adverse" to another client, [6]or (b) there is a significant risk that the representation of one client will be

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions control.

[2] The analysis and conclusions of this opinion also apply to a lawyer retained by a grantor to amend a revocable trust so as to reduce or eliminate beneficial interests created in an existing trust instrument.

[3] As used in this opinion, "disinherit" means to make a disposition that adversely affects a prospective beneficiary's expectancy under an existing instrument. The effect may be indirect. For example, if the lawyer's other client is a residuary beneficiary, a new provision making specific bequests that deplete the residue of the estate would have an adverse effect on the prospective beneficiary. The conclusions expressed in this opinion also would apply to the circumstance in which the lawyer assists a testator in preparing an instrument that fails to make a bequest to another client the lawyer represents (in unrelated matters) who is a person who would be considered a natural object of the testator's bounty, such as a child or spouse, or who is a person that would, if there were no testamentary disposition, take under the laws of intestate succession.

[4] See also ABA Comm. on Ethics and Professional Responsibility Formal Op. 02-428 (Aug. 9, 2002) (Drafting Will on Recommendation of Potential Beneficiary Who Also is Client) (discussing conflicts issues when the beneficiary has recommended the lawyer or pays the lawyer's fee).

[5] Notwithstanding the existence of a concurrent conflict, a lawyer may represent a client if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, and each affected client gives informed consent, confirmed in writing." Rules 1.7(b)(1), (2), and (4).

[6] Rule 1.7(a)(1).

"materially limited" by the lawyer's responsibilities to another client. [7] We consider the extent to which these provisions impact the issue here being addressed.

Direct adversity requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. [8] There may be direct adversity even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflict involves the legal rights and duties of the two clients vis-a-vis one another.

Applying this analysis to the circumstances dealt with in this opinion, a testator is, unless limited by contractual or quasi-contractual obligations [9]or by state law, [10]free to dispose of his estate as he chooses, or to consume his entire estate during his lifetime or give it all away, leaving nothing to pass under his will. A potential beneficiary, even one who has been informed by the testator that he has been named in a testamentary instrument, has no legal right to that bequest but has, instead, merely an expectancy. [11]Thus, except where the testator has a legal duty to make the bequest that is to be revoked or altered, there is no conflict of legal rights and duties as between the testator and the beneficiary and there is no direct adversity. [12]

Even though there is no direct adversity, a concurrent conflict of interest exists when there is a significant risk that the lawyer's representation of the testator (i.e., the lawyer's exercise of independent professional judgment in considering, recommending, and carrying out an appropriate course of action to implement the testator's directions), will be materially limited by the lawyer's responsibilities to her other client.

The preparation of an instrument disinheriting a beneficiary ordinarily is a simple, straightforward, almost ministerial task, without call for the lawyer to consider alternative courses of action, and it is difficult to imagine a circumstance

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[7] Rule 1.7(a)(2). There is a concurrent conflict under Rule 1.7(a)(2) if there is a significant risk that the lawyer's representation 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. This opinion addresses only limitations arising out of the lawyer's responsibilities to another client in connection with the lawyer's representation of that other client on an unrelated matter.

[8] For example, where a lawyer may have represented two clients in unrelated matters and both clients were in competition to sell foods to a third party, the representation of one of those clients in negotiating a sale to a third party would not constitute a violation of Rule 1.7(a). See Rule 1.7 cmt. 6.

[9] If the testator is bound by a contractual or quasi-contractual obligation to the beneficiary, such as a contract to make a will, then there is a conflict of legal rights and duties, the testator and beneficiary are directly adverse, and the lawyer could not prepare instruments in derogation of her other client's legal rights.

[10] For example, in Louisiana, a child under the age of twenty-three or under a permanent disability cannot be disinherited of a specified portion of the parent's estate except for just cause. See LA. REV. STAT. ANN. art. 1493 (West 2004). Louisiana Civil Code article 1621 prescribes "just causes" for disinheritance. Because the statutory language defining "just cause" is subject to interpretation, see e.g., LA. CIV. CODE ANN. art. 1621A(2) (West Supp. 2003) ("The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury."), or LA. CIV. CODE ANN. art. 1621A(8) ("The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years...."), the lawyer would have to advise the testator as to his legal right to disinherit the lawyer's other client. This differs from a widow's dower rights to elect to take against a testamentary instrument, which cannot be avoided for "just cause." See generally, LA. CIV. CODE ANN. arts. 889, 894, and 2434-37.

[11] See George Gleason Bogert & George Taylor Bogert, LAW OF TRUSTS & TRUSTEES § 103, 242-43 (rev'd 2d ed. 1984) ("The theory of the operation of a will or transaction which has a testamentary effect is that … until the testator dies leaving the will in effect the donee has a mere expectancy, and … the testator has power, up to the moment of his death, to revoke the will or amend it by a codicil, or to consume, sell, or give away the property which was the subject matter of the gift described in the will.").

[12] See Chase v. Bowen, 771 So.2d 1181, 1185-86 (Fla. App. 2000) (no conflict exists when lawyer revises will to disinherit beneficiary that lawyer represents on unrelated matter).

in which a responsibility of the lawyer to her other client (even a client who is a presumptive beneficiary of the testator's bounty) would pose a significant risk of limiting the lawyer's ability to discharge her professional obligations to the testator. The lawyer's representation of a testator does not, of itself, create responsibilities owed by the lawyer to prospective beneficiaries (even one who is the lawyer's client as to an unrelated matter), other than the duty to effect the testator's intent as expressed explicitly or implicitly in the instrument. [13]If, however, because of her relationship with the other client, the lawyer finds it repugnant or distasteful to carry out the assignment, or has good faith doubts as to whether there is a significant risk that she will be able to exercise independent professional judgment on behalf of the testator, then the lawyer may decline the engagement. [14]

The issue becomes more complicated if the testator asks for the lawyer's advice as to whether the beneficiary should be disinherited, or if the lawyer initiates such advice, either as a matter of the lawyer's usual practice in dealing with such matters, or because the lawyer believes that such advice is, in the circumstances, in the testator's interest. [15]By advising the testator whether, rather than how, to disinherit the beneficiary, the lawyer has raised the level of the engagement from the purely ministerial to a situation in which the lawyer must exercise judgment and discretion on behalf of the testator. In such circumstances, there is a heightened risk that the lawyer may, perhaps without consciously intending to do so, seek to influence the testator to change his objectives [16] in favor of her other client, thus permitting her representation of the testator to be materially limited by her responsibilities to the beneficiary or by a personal interest arising out of her relationship with the beneficiary.

Problems also can arise in situations where the lawyer has represented both the testator and other family members in connection with family estate planning. [17] If proceeding as the testator has directed violates previously agreed-upon family estate planning objectives, the lawyer must consider her responsibilities to other family members who have been her clients for family estate planning.

If, for instance, a family has made its estate plans on the shared assumption (never reduced to an enforceable agreement) that the testator has provided for a disabled family member, thus relieving the others of that burden, then the lawyer may conclude that, in light of her responsibilities to her other clients, she cannot in good conscience implement the testator's intended disinheritance of that disabled family member, especially if the testator refuses to permit the lawyer to reveal the disinheritance.

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[13] RESTATEMENT (THIRD) OF LAW GOVERNING LAW. § 51 (2000). See also Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 135 Cal. Rptr.2d 888, 895-96 (Cal. Ct. App. 2003) (lawyer amending will owes no duty to disinherited heirs to ascertain client's testamentary capacity). See also ABA Comm. on Ethics and Professional Responsibility Formal Op. 02-428, supra note 4, at n.12 (lawyer ordinarily does not owe a current client any duty in connection with estate planning services performed for another client). If the heir were an intended beneficiary of the testator's engagement of the lawyer, then under the "third party beneficiary" test, the heir might be able to maintain a legal malpractice action against the lawyer for negligent performance of the engagement. See generally Neal v. Baker, 551 N.E.2d 704, 705 (Ill. App. 1990), appeal denied, 555 N.E.2d 378 (Ill. 1990) (nonclient must prove that primary purpose and intent of the attorney-client relationship is to benefit or influence third party). See also Osornio v. Weingarten, 21 Cal.Rptr.3d 246, 263-68 (Cal. Ct. App. 2004) (intended beneficiary of will who lost testamentary rights because of failure of lawyer who drew will to fulfill obligations under contract with testator properly may recover as third-party beneficiary); Trask v. Butler, 872 P.2d 1080, 1083-84 (Wash. 1994) (whether lawyer owes duty of care to nonclient depends in part on extent to which transaction was intended to benefit nonclient).

[14] See Rule 1.16(a)(1) (lawyer must withdraw if representation will result in violation of rules of professional conduct), and Rule 1.16(b)(4) (lawyer may withdraw if client insists upon taking action that lawyer considers repugnant or with which lawyer has a fundamental disagreement).

[15] See Rule 2.1 cmt. 5 (lawyer may initiate unrequested advice to client when doing so appears to be in client's interest).

[16] The lawyer ordinarily should abide by the testator's decision concerning the objectives of the representation, as required by Rule 1.2(a). This does not mean that a lawyer may not challenge the testator's decision, but that she must do so solely in the testator's interest, and without considering the interest of her other client (whom we have assumed the lawyer represents only as to unrelated matters).

[17] Such family representation is not uncommon, see ABA Comm. on Ethics and Professional Responsibility Formal Op. 02-428, supra note 4, at n.2 and accompanying text, and may desirably facilitate efficient, quality representation by enabling the lawyer and her firm to achieve a deep understanding of a family and its businesses, assets, documents, and personalities.

In summary, ordinarily there is no conflict of interest when a lawyer undertakes an engagement by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters. However, this may not be the case if the testator is restricted by a contractual or quasi-contractual legal obligation from disinheriting the beneficiary, or if there is a significant risk that the lawyer's responsibilities to the testator will be materially limited by the lawyer's responsibilities to the beneficiary, as may be the case if the lawyer finds herself advising the testator whether to proceed with the disinheritance.