

**Comprehensive
Annotations to
ACTEC
Commentaries
July, 2016**

Notice to Users: This document contains all the cases, ethics opinions, and related secondary materials contained in the published version of the ACTEC Commentaries, plus a number of additional cases, ethics opinions, and related materials that are relevant to trust & estate practice but were deemed of lesser importance and so not included in the ACTEC Commentaries. It includes a thorough review of cases and ethics opinions up to the end of 2015. All have been organized by jurisdiction (federal or national materials first), with references to relevant Model Rules and several related topics to make electronic searching easier. Nonetheless, this compilation does not purport to be exhaustive of the ethics cases and opinions relevant to trust & estate practice.

CASES

Foreign Law

England:

Ross v. Caunters, 3 All England Reports 580 (1979). Rules 1.1. Topics: Malpractice. In holding that a will's beneficiaries' lack of privity of contract with the attorney-drafter of the will was no bar to an action for negligence, the English court observed:

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

If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim. 3 All Eng. Reports at 582-583.

Federal Law

Artromick Intern., Inc. v. Drustar, Inc., 134 F.R.D. 226 (S.D. Ohio 1991). Rules 1.1, 1.4, 1.7, 1.16. Topics: Disqualification. In this disqualification case the court found that a pre-existing lawyer-client relationship had terminated.

It is unreasonable to continue to demand an attorney's undivided loyalty for an indefinite period of time when the attorney's last bill is both disputed and unpaid, and

when each of several new opportunities to use the attorney's services is directed to another firm. Even if, subjectively, plaintiff did consider Mr. Dunn to be their attorney in January, 1990, that belief became objectively unreasonable at some point prior to that date. The precise date need not be identified: it is enough to conclude, taking into account all the relevant facts, that the relationship ended before Schottstein accepted this litigated matter.

***Heathcoat v. Santa Fe International Corp.*, 532 F. Supp. 961 (E.D. Ark. 1982). Rules 1.4, 1.7, 1.9. Topics: Disqualification.** The court here found that the lawyer-client relationship between the individual plaintiff and her lawyer had ended after a will prepared by the lawyer had been executed by her in 1966 although in 1981 she received a form letter from the law firm. In the meantime, the individual lawyer who had provided the estate planning services had died. The salutation of the letter, which pointed out the significance of ERTA, was "Dear Friend."

***Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D. N.J. 1989). Rules 1.4, 1.7. Topics: Disqualification.** In this case the court found that the lawyer-client relationship which was established in 1976 still existed in 1989. The law firm performed estate planning services for the client and his spouse in 1976, advised the client regarding the renegotiation of an employment contract in 1983 and 1984 and sent the client estate planning reminder letters in 1983 and 1988.

***Shearing v. Allergan, Inc.*, 1994 WL 382450 (D. Nev. 1994). Rules 1.4, 1.7. Topics: Disqualification.** Here a lawyer was disqualified from representing a litigant whose interests were adverse to those of a corporation for which the lawyer had served as outside counsel although the lawyer had not been consulted for over a year.

***Estate of Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229 (D.D.C. 2006). Rules 1.5, 1.7.** This decision is summarized in the annotations to Model Rule 1.7.

***Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998). Rules 1.6. Topics: Evidence, A/C Privilege.**

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

***United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). Rules 1.6. Topics: Evidence, A/C Privilege.** The litigation involved the federal government's management of funds held by the government in trust for the benefit of the Jicarilla Apache Nation. The tribe sought discovery of documents and communications between the government and its lawyers concerning management of the funds, and the government asserted attorney-client

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

***United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011). Rules 1.6, 1.9. Topics: Evidence, A/C Privilege.** Husband and Wife were charged with Medicare fraud. W died, and H subpoenaed files from W’s attorneys, claiming that as Personal Representative of her estate, he was waiving attorney-client privilege. He wanted to use the files to shift blame to W. Eighth Circuit held that trial court judge properly quashed the subpoena. “A personal representative of a deceased client generally may waive the client’s attorney-client privilege ... only when the waiver is in the interest of the client’s estate and would not damage the client’s reputation.” H argued that W’s reputation was already damaged, but court held that waiving the privilege could cause further damage.

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

***Estate of Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229 (D.D.C. 2006). Rules 1.7, 1.9. Topics: Wrongful Death.** This is a wrongful death action by the survivors of servicemen killed in a bomb attack in Saudi Arabia in 1996 against the State of Iran (and others) under the “state sponsored terrorism” exception to the Foreign Sovereign Immunity Act. The court here enters judgment against the defendants for more than \$254 million after applying the state law of thirteen different jurisdictions. One of the issues before the court was whether plaintiffs’ law firm should be disqualified since it had represented the Government of Sudan, a co-defendant with Iran in a separate matter (see *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008), where it would have been required to make an argument exactly contrary to that being made in this proceeding. The court refused to disqualify the firm. First, “the Firm has withdrawn completely from representing Sudan in *Owens* as Rule 1.7 states it must in such situations.” As soon as the conflict became apparent, the firm instructed its lawyers who were representing Sudan to withdraw from that representation. As it happened, unbeknownst to the firm’s managers, those lawyers ignored that instruction and continued, for a time, to represent Sudan. Ultimately, however, the firm withdrew and the lawyers who disregarded the instructions

are no longer with the firm. Finally, neither they nor any remaining with the firm who were involved with the representation of Sudan have had any involvement with the Iran case. The Magistrate who heard evidence in the case did not think disqualification was required and the trial proceeded without it. Under these circumstances, disqualification was not required.

Jones ex rel. Jones v. Correctional Medical Services, Inc., 401 F.3d 950 (8th Cir. 2005). Rules 5.5. Administrator of the estate of the decedent, who died of cancer while incarcerated in federal prison, brought this action alleging medical malpractice and other claims. His claim was dismissed under 28 U.S.C. § 1654 because that statute, as interpreted, does not permit a non-lawyer personal representative to bring a legal action pro se where there are other beneficiaries of the estate (as there were here). Moreover, the court refused to allow the plaintiff to amend the complaint (although the statute of limitations had expired), finding the unauthorized practice of law a defect that could not be amended.

Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136 (1994). Rules 7.1. Topics: First Amendment. Where a Florida lawyer truthfully advertised that she was a certified public accountant (CPA) and certified financial planner (CFP), the Florida Board of Accountancy reprimanded her. The Supreme Court found this to be protected speech under the first amendment.

Peel v. Attorney Registration & Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S. Ct. 2281 (1990). Rules 7.1. Topics: First Amendment. Where an Illinois lawyer truthfully claimed to hold a certificate in civil trial advocacy, Illinois censured him for violating its disciplinary rule. The Supreme Court found this to be protected speech under the first amendment.

Browne v. Avvo Inc., 525 F. Supp. 2d 1249, 1252 (W.D. Wash. 2007). Rules 7.1. Topics: First Amendment. Avvo's attorney ranking system is protected from government prohibition by the first amendment: "Neither the nature of the information provided nor the language used on the website would lead a reasonable person to believe that the ratings are a statement of actual fact."

In re Weideman, 327 Fed.Appx. 215, 2009 WL 1227910 (2d Cir. 2009). Rules 1.8, 3.3, 8.5. Topics: Discipline. Lawyer was suspended from the practice of law by the State of Michigan for breaching his fiduciary obligations, as executor of a California decedent's estate, by loaning estate funds to himself and his law firm, and making misrepresentations regarding the availability of the funds to a California court, to counsel, and to the Grievance Administrator in Michigan. See notice of suspension of Weideman, effective Oct 27, 2007): <http://www.adbmich.org/coveo/notices/2008-01-16-05n-79a.pdf#search=%2247032%22>. (Later he was disbarred by Michigan for further misconduct. See notice of revocation of license of Weideman (July 8, 2008): <http://www.adbmich.org/coveo/notices/2008-07-09-07n-162.pdf#search=%2247032%22>.) Here, the Second Circuit reciprocally suspends him until two years after he is reinstated by Michigan (if ever). In the process of considering reciprocal discipline, the Second Circuit seems to have discovered that the lawyer had not actually been admitted to practice before the Second Circuit, but had been appearing nonetheless under the admission of another with the same name.

State Law

Alabama:

Line v. Ventura, 2009 Ala. LEXIS 100. Rules 1.1, 8.4. Topics: Malpractice. Former ward, upon attaining majority, and the guardianship bond insurer sued lawyer who had advised the guardian who had totally depleted a guardianship estate which had originally been valued at \$500,000. The plaintiffs' legal malpractice claim against the lawyer was dismissed because neither the ward nor the insurer was a client of the lawyer. But their claim for breach of fiduciary duty, arising from his assumption of joint responsibility for co-signing guardianship checks and monitoring investments, was tried to a jury which awarded them \$200,000 in compensatory and \$550,000 in punitive damages against the lawyer. Here, the Supreme Court affirmed the judgment: the lawyer had co-signed blank checks and had not monitored the investments being made.

F.L.C. v. Ala. State Bar, 38 So.3d 698 (2009). Rules 3.3, 8.4. Topics: Discipline. Attorney's failure to disclose existence and identity of decedent's principal heir during probate was a continuing violation not only of Rule 3.3 but also of Rule 8.4, so that the limitations period for filing disciplinary proceedings applicable in Alabama did not begin to run until this information was disclosed to the probate court almost two years after probate opened. Private reprimand & \$10,000 restitution affirmed.

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

Alaska:

Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983). Rules 1.1, 1.2. Topics: Malpractice. In this legal malpractice case the Supreme Court of Alaska held that a complaint alleging that an attorney-client relationship existed between family members of the decedent and the defendant lawyers and that the lawyers had negligently failed to advise the surviving spouse and her children with respect to the availability and consequences of the surviving spouse's right to disclaim her interest in the estate, as a result of which the surviving spouse incurred gift taxes and fees in connection with certain gifts made to her children in lieu of a disclaimer, stated a cause of action for professional negligence.

Pederson v. Barnes, 139 P.3d 552 (Alaska 2006). Rules 1.1, 1.2. Topics: Malpractice. This case affirms a malpractice verdict against a guardian's attorney where the guardian client had stolen almost all of the ward's property, relying on the Restatement of the Law Governing Lawyers §51 and comment h. Under that standard, said the court, an attorney for a guardian owes a duty of care to a minor ward if the lawyer "knows that appropriate action by the lawyer is necessary ...to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient." "Knows" under the Restatement means "actual knowledge," as it does under the Model Rules, but this encompasses "reason to know" as

used in the Restatement Second of Torts §12, which is to be distinguished from “should have known.” On the other hand, there was no basis for the award of punitive damages against the attorney and this was reversed.

In re Estate of Johnson, 119 P.3d 425 (Alaska 2005). Rules 1.5. This was a standard fee dispute in which the personal representative challenged the fees charged an estate. The state supreme court concluded that the law firm had failed to carry its burden of justifying at least \$68,500 of the fees approved by the lower court as reasonable and ordered that amount refunded to the estate.

Matter of Estate of McCoy, 844 P.2d 1131 (Alaska 1993). Rules 3.7. Topics: Disqualification, Evidence. A person holding a power of attorney from decedent contacted an attorney to revise the decedent’s will. “The ...will was drafted by attorney ...at request [of the attorney in fact]. [He] told [attorney] that [decedent] wished to leave everything to him. Although [decedent] was ostensibly [attorney’s] client, attorney did not consult with her, did not discuss the terms of the will with her, and did not supervise execution of the will. In fact, [attorney] never met [decedent], despite his intention to do so. [Attorney in fact] arranged for a Notary and witnesses when the will was executed.” The will was contested on grounds of undue influence and when attorney sought to represent attorney-in-fact, contestant moved to disqualify under Rule 3.7. Attorney was disqualified at a necessary witness.

Arizona:

Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976). Rules 1.14. Topics: Malpractice. In this malpractice action the court held that the lawyer for a guardian owed fiduciary duties to the guardian’s ward. Privity of contract between the lawyer and the ward was not required in order for the ward to pursue a claim for negligence against the lawyer for the guardian.

In re Estate of Shano, 869 P.2d 1203 (Ariz. Ct. App. 1993). Rules 1.7. Topics: Disqualification. This decision involves a lawyer who represented a friend of the decedent who was one of the primary beneficiaries of a holographic will executed by the decedent two days prior to his death. The lawyer obtained the friend’s appointment as special administrator. The lawyer also later undertook to represent an independent third-party who was appointed as administrator, whose legal positions included opposition to claims made against the estate by the decedent’s surviving spouse. This decision upholds an order disqualifying the lawyer from representing the administrator because of the conflict of interest between his duties to the decedent’s friend and to the administrator and, derivatively, to the persons entitled to receive the decedent’s estate. The decision follows *Fickett v. Superior Court* (discussed in the Annotations following the ACTEC Commentary on MRPC 1.14), stating that:

We conclude that at least where the surviving spouse is concerned, similar considerations apply to an attorney employed to represent the personal representative of an estate. First, “the lawyer is being compensated from the estate or trust, not by the fiduciary personally. His duty of loyalty and competence thus runs beyond the fiduciary to those whose property is being managed by the fiduciary.” . . . As discussed above, the surviving spouse is one whose interest in

the community property is managed by the personal representative. Second, in *Fickett*, although the guardian and not the attorney controlled the affairs of the guardianship, we held that the attorney for the guardianship owed a fiduciary duty to the ward. A stronger case exists for imposing a similar duty on the personal representative's attorney, who generally has some control over the administration of the decedent's estate. Because of his superior knowledge and position of trust, the attorney for the personal representative is in an excellent position to exert a positive influence on the personal representative to properly discharge the latter's fiduciary duty to the surviving spouse. The attorney representing the personal representative is more likely to exert such influence if the attorney's duty to the surviving spouse is congruent with that of his employer, the personal representative.

...

We turn now to the question of whether [Lawyer] represented conflicting interests. We begin with the principle that the attorney for the personal representative of an estate must be neutral and should not favor the interests of any claimant to the estate. . . . Thus, [Lawyer] owed the same duty of fairness and impartiality to [Surviving Spouse] as he owed to all the beneficiaries of decedent's holographic will, including [the Friend]. But, because [Lawyer] also represented [Administrator] in probating the holographic will, he owed to her as a client a duty of undeviating and single allegiance.

... Consequently, when [Lawyer] undertook the representation of Fiduciary [the Administrator], and with such representation the corresponding duty of fairness and impartiality, he undertook the representation of conflicting interests. 869 P.2d at 1208-1209.

In re Charna Johnson, No. 09-0717 Disciplinary Commission of Sup. Ct. of Ariz. (Oct. 13, 2010), aff'd Az. S.Ct. No. SB-10-0130-D (Feb. 8, 2011). Rules 1.7, 3.3, 4.1, 8.1, 8.4. Topics: Discipline. Lawyer began representing client in divorce proceedings but client's wife committed suicide, so lawyer then represented client in probating deceased wife's estate. Lawyer told client that she was channeling the deceased wife, who was trying to make amends for the trouble she caused during her life. There were emails between lawyer and client with sexual content but the lawyer claimed the sexual content was from the deceased wife. Client alleged a sexual relationship with lawyer but hearing officer found insufficient proof of an actual physical relationship. In a later case, lawyer was representing wife in divorce action, claimed to be channeling wife's dead father, and drafted a will for the wife leaving wife's entire estate to the lawyer. In proceedings approving a settlement of the disciplinary action from the second case, lawyer testified that she did not channel deceased persons. In the later disciplinary action which considered her actions in the first case, the hearing officer found that, although there was insufficient evidence to prove a sexual relationship, lawyer had a conflict of interest between the client's interests and her own personal interests because of the channeling claim. There was no finding of lying about the channeling when she told her clients she could speak for their deceased loved ones, but the hearing officer found that her most egregious violation was lying under oath when she denied the channeling. Presumably she was either lying to her clients about channeling, and telling the truth under oath that

she did not channel dead persons, or she really believed she was channeling dead persons and lied about it under oath. The hearing officer based his opinion on the second theory, and she was suspended for one year.

State v. Lang, 234 Ariz. 457, 459, 323 P.3d 740, 742 (Ct. App. 2014), review denied (Jan. 6, 2015). Rules 5.5, 8.5. Lawyer who holds a law degree and is admitted to practice law in the San Carlos Apache Tribal Court is found to have engaged in the unauthorized practice of law in Arizona outside of the tribal court and is enjoined from doing so in the future.

Arkansas:

Estate of Torian v. Smith, 564 S.W.2d 521 (Ark. 1978). Rules 1.6, 1.9. Topics: Evidence, A/C Privilege. The Supreme Court of Arkansas here held that the attorney-client communications privilege did not bar testimony by the attorney for the executor of the decedent's will relating to a consultation which took place before the will was filed for probate in another state since the executor, in consulting with the attorney, was necessarily acting for both itself as executor and for the beneficiaries under the will, all of whom were therefore to be treated as joint clients.

Purtle v. McAdams, 879 S.W.2d 401 (Ark. 1994). Rules 1.7. Topics: Disqualification. A lawyer could not reasonably believe that representing his niece by marriage would not adversely affect his representation of her former husband, a person with diminished capacity. Such a conflict cannot be permitted despite the consent of both parties.

Craig v. Carrigo, 12 S.W.3d 229 (Ark. 2000). Rules 1.7. Topics: Disqualification. An attorney should not represent a client if the representation will be directly adverse to another client. It is not necessarily a conflict of interest for an attorney to represent both the estate and the only devisee in the will. The core issue is whether the existence of a parallel legal position held by the personal representative for the estate, and one of the potential heirs of the estate, has been shown to be prejudicial to the other potential heirs. Actions taken by the attorney throughout the proceeding reflect conscientious legal services consistent with the duties of counsel for a personal representative in an ancillary probate. His obligations as estate counsel do not include advocacy for any individual heirs; however, his obligations do not prevent the estate from having positions that are consistent with the interests of some individual heirs. Here, disqualification was not warranted.

Smith v. Estate of Tola Wharton, 78 S.W.3d 79 (Ark. 2002). Rules 3.7. Topics: Disqualification, Evidence. The general rule is that a lawyer should not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. There are three exceptions under the rule when a lawyer may act as a witness: (1) when the testimony relates to an uncontested issue; (2) when the testimony relates to the nature and value of legal services rendered in the case; or (3) when the disqualification of the lawyer would work a substantial hardship on the client. The court stated that the term "disqualification" that appears in the third exception does not refer to the exclusion of a lawyer's testimony; rather, it refers to a lawyer's disqualification as an advocate. In other words, under the third exception, the lawyer should not be disqualified as an advocate if such disqualification would work substantial hardship on the client.

Kennedy v. Ferguson, 679 F.3d 998 (8th Cir. 2012). Rules 1.1. Topics: Malpractice. The

lawyer prepared a will for client that was executed in 2000, giving client's son a bequest significantly smaller than his intestate share. The lawyer prepared a later will for client in 2008, which was executed and left the son an even smaller gift. When the client died, the lawyer produced the 2000 will for probate. While the probate was still open, the lawyer revealed the existence of the 2008 will but it could not be found. Son asserted a claim based on the theory that the 2008 will revoked the 2000 will, but the fact that the 2008 will could not be found raised a presumption that the testator had destroyed it, dying intestate. Son settled with the other estate heirs and agreed not to contest the 2000 will, and then sued the lawyer for malpractice. The court held that the claim against the attorney was not ripe because the period for challenging the 2000 will was still open.

California:

Biakanja v. Irving, 320 P.2d 16 (Cal. 1958). Rules 1.1. Topics: Malpractice. This landmark decision abolished the privity defense in California in malpractice cases involving estate planning, and the Supreme Court of California set forth a "balancing" test for use in a given case to determine liability with respect to a plaintiff not in privity with the attorney. As modified over the years in California, and applied in several other jurisdictions, the test involves balancing the following five factors:

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

Estate of Rohde, 323 P.2d 490 (Ca. App. 1958). Rules 1.7, 1.8. This case upheld the revocation of the probate of a will benefiting the scrivener and appointing him executor because of a presumption of undue influence.

Potter v. Moran, 49 Cal. Rptr. 229 (Ct. App. 1966). Rules 1.7. A decree settling the accounts of a trustee was not binding on the beneficiaries because the lawyers had failed to inform the court that they represented both the trustee and the guardian for the beneficiaries.

Heyer v. Flaig, 74 Cal. Rptr. 225 (1969). Rules 1.1, 1.4. Topics: Malpractice. In this malpractice case the court held that a lawyer has a continuing duty to a client whose will the lawyer has drafted where the attorney-client relationship continues and the lawyer is aware of events reasonably foreseeable and subsequent to the client's execution of the will making revisions thereto necessary. The court held that an attorney may be liable for failing to appreciate the consequences of a post-testamentary marriage of which the attorney was advised.

Sodikoff v. State Bar, 121 Cal. Rptr. 467 (1975). Rules 1.8. Topics: Discipline. In this disciplinary action the court imposed a six month suspension on a lawyer who represented the administrator of an estate who violated a position of trust and confidence that he voluntarily

assumed vis-a-vis an elderly beneficiary, who lived in England. The lawyer, who had encouraged the beneficiary to sell real property, falsely advised the beneficiary that “one of our clients by the name of Acquistate, a California corporation” had made an offer to buy the property for \$20,000. The lawyer failed to disclose to the beneficiary that Acquistate was not a client of the law firm but was the lawyer’s alter ego. The lawyer also failed to disclose that the property had been appraised at \$46,500.

Smith v. Lewis, 118 Cal. Rptr. 621 (1975). Rules 1.1. Topics: Malpractice. This was a malpractice action involving the failure of the wife’s lawyer in a dissolution action to assert her possible community property interest in her husband’s military pension. The court stated that, “Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client.” 118 Cal. Rptr. at 628.

Bucquet v. Livingston, 129 Cal. Rptr. 514, 521 (Ct. App. 1976). Rules 1.1. Topics: Malpractice. In this malpractice case, in holding that, as with beneficiaries under a negligently drafted will, the beneficiaries of a trust have standing to sue the drafter, the court stated:

We are not aware of any cases or guidelines establishing in a civil case a standard for the reasonable, diligent and competent assistance of an attorney engaged in estate planning and preparing a trust with a marital deduction provision. We merely hold that the potential tax problems of general powers of appointment in inter vivos or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present. [Fn. omitted.] 129 Cal. Rptr. at 521.

Brandlin v. Belcher, 134 Cal. Rptr. 1 (Ct. App. 1977). Rules 1.1, 1.4. Topics: Malpractice. A client for whom the lawyer had previously drawn a will and trust discussed with a trust officer changing the trust to add other children as beneficiaries. The trust officer discussed the possibility with the lawyer, who said that he would have to hear from the client directly. The client died without having amended her trust. The Lawyer was granted a summary judgment in an action brought against him by the decedent’s children for negligence. “[Lawyer] fully discharged whatever duty his prior representation imposed by his request through the intermediary that the client communicate with him personally. [Lawyer’s] conduct satisfied rather than violated his duty as a lawyer. It was designed to assure that the personal nature of the attorney-client relationship was protected.” 134 Cal. Rptr. at 3.

Horne v. Peckham, 158 Cal. Rptr. 714 (Ct. App. 1979). Rules 1.1. Topics: Malpractice. This decision came in a malpractice case involving the creation of a Clifford trust with respect to which the lawyer failed to do the necessary research. The appellate opinion upholds a jury instruction that a general practitioner has a duty to refer the client to a specialist or recommend the assistance of a specialist if a reasonably careful and skillful general practitioner would do so.

Morales v. Field, DeGoff, Huppert & MacGowan, 160 Cal. Rptr. 239 (Ct. App. 1980). Rules 1.1, 1.2. Topics: Malpractice. In this malpractice action brought by a trust’s beneficiaries against the lawyer for the trustee, the court stated:

An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary. In contrast to the third-party asserting a claim in *Goodman*, appellant here was not someone with whom respondent's client, the trustee Wells Fargo, was to negotiate at arms' length. 160 Cal. Rptr. at 243.

***Davis v. Damrell*, 174 Cal. Rptr. 257 (Ct. App. 1981). Rules 1.1. Topics: Malpractice.** A lawyer was absolved from liability for a mistaken opinion because it resulted from the lawyer's reasoned exercise of informed judgment. "While we recognize that an attorney owes a basic obligation to provide sound advice in furtherance of a client's best interests ... such obligation does not include a duty to advise on all possible alternatives no matter how remote or tenuous." 174 Cal. Rptr. at 260.

***Lasky, Haas, Cohler & Munter v. Superior Court*, 218 Cal. Rptr. 205 (Ct. App. 1985). Rules 1.2. Topics: Evidence, Work Product.** This is an evidentiary privilege case in which the court denied the beneficiaries access to the work product generated by the lawyers for the trustee but not communicated to the trustee. The court stated that the beneficiaries of a private trust are not clients of the trustee's lawyers.

***Butler v. State Bar*, 42 Cal.3d 323, 721 P.2d 585, 228 Cal.Rptr. 499 (1986). Rules 1.1, 1.3, 1.4, 4.1, 4.3. Topics: Discipline.** A lawyer was disciplined for failure to inquire adequately regarding the existence of assets standing in decedent's name alone, failure to communicate with the person named as executor of decedent's will and his attorney, knowingly misrepresenting that probate was proceeding satisfactorily and improperly prolonging the probate proceeding.

"While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation... The attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients." 42 Cal. 3d at 329.

***Ridge v. State Bar*, 254 Cal. Rptr. 803 (1989). Rules 1.1, 1.3, 1.4, 1.15. Topics: Discipline.** A lawyer-executor was suspended for a year in part for mismanaging the estate of his father, for which he was serving as executor, and failing to communicate with a client. On discipline for service as executor, court relied on Annotation, Conduct of Attorney in Capacity of Executor or Administrator of Decedent's Estate as Ground for Disciplinary Action (1979), 92 A.L.R.3d 655.

***Estate of Trynin*, 264 Cal. Rptr. 93 (1989). Rules 1.5.** The Supreme Court of California, construing California's statute governing extraordinary compensation for attorneys, here held that in an appropriate case attorneys may be compensated for legal services rendered in preparing and prosecuting a claim for prior extraordinary legal services (so-called "fees on fees"). The Court observed that the trial court retains the discretion to reduce or deny additional compensation for fee-related services if the court finds that the fees otherwise awarded the attorneys for both ordinary and extraordinary services are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorneys for all services

rendered.

***Latten v. State Bar*, 268 Cal. Rptr. 845 (1990). Rules 1.1, 1.3. Topics: Discipline.** A lawyer was suspended from practice for his unreasonable delays in closing an estate administration while serving as executor and intentionally and recklessly failing to perform legal services competently. *Lewis v. State Bar*, 170 Cal. Rptr. 634 (1981). This was a disciplinary case in which the lawyer was disciplined for undertaking to administer estate without sufficient skill and without associating another more experienced lawyer.

***Goldberg v. Frye*, 266 Cal. Rptr. 483 (Ct. App. 1990). Rules 1.1, 1.2. Topics: Malpractice.** In this malpractice action the court stressed the absence of an attorney-client relationship between the lawyer for the personal representative and the beneficiaries:

Contrary to the allegations of the complaint, it is well established that the attorney for the administrator of an estate represents the administrator and not the estate... A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence... By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate. 266 Cal. Rptr. at 488.

***Pierce v. Lyman*, 3 Cal. Rptr. 2d 236 (Ct. App. 1991). Rules 1.2. Topics: Malpractice.** This case holds that the beneficiaries of a trust state a cause of action against the trustee's lawyer when the lawyer is alleged to have actively participated in the trustee's breach of fiduciary duty. "Active concealment, misrepresentations to court, and self-dealing for personal financial gain are described. We find this is sufficient to state a cause of action for breach of fiduciary duty [against lawyer for trustees]."

***Saks v. Damon, Raike & Co.*, 8 Cal. Rptr. 2d 869 (Ct. App. 1992). Rules 1.1, 1.2. Topics: Malpractice.** In this case the court rejected claims by a trust's beneficiary directly against the attorney for the trustee sounding in negligence, breach of contract and breach of fiduciary duty. *Goldberg v. Frye*, *supra*, is cited with approval.

***In re Respondent G.*, 1992 WL 204655 (Cal. Bar Ct. 1992). Rules 1.4. Topics: Discipline.** In this proceeding a lawyer was privately reprimanded for repeated failure to advise a client of the state inheritance tax owed by her with respect to an estate administration handled by the lawyer.

***Responsible Citizens v. Superior Court*, 20 Cal. Rptr. 2d 756 (Ct. App. 1993). Rules 1.13. Topics: Disqualification.** Representation of a partnership does not necessarily entail representation of the individual members of the partnership for purposes of determining whether counsel for the partnership must be disqualified if there is a conflict of interest between the partners. "Considering the mutability of circumstances surrounding an attorney's representation of a partnership, and the attorney's relationship with individual partners, we believe the rule's approach is sensible. All partnerships are not shaped by the same mould. The relationship a partnership attorney has with the individual partners will

vary from case to case. A rule which may seem appropriate for an attorney representing a two-person general partnership may be entirely inappropriate for an attorney representing a limited partnership with scores or even hundreds of partners.” 20 Cal. Rptr. 2d at 765.

***Worthington v. Rusconi*, 35 Cal. Rptr. 2d 169 (Ct. App. 1994). Rules 1.4. Topics: Malpractice.** The court here held that, for purposes of applying the statute of limitations, the continuation of a representation should be determined by examining the facts from “an objective point of view.” 35 Cal. Rptr. 2d at 175.

***Estate of Auen*, 35 Cal. Rptr. 2d 557 (Ca. App. 1994). Rules 1.8.** This decision upholds the invalidation of certain inter vivos gifts and a will that made gifts to testator’s lawyer and her family because of the presumption that the lawyer exercised undue influence over the client. “The relation between attorney and client is a fiduciary relation of the very highest character.... Transactions between attorneys and their clients are subject to the strictest scrutiny.... These general principles applicable to the attorney-client relationship support the trial court’s reasoning that, when an attorney is acting as an attorney, any benefit other than compensation for legal services performed would be ‘undue.’” 35 Cal. Rptr. 2d at 562-563.

***Radovich v. Locke-Paddon*, 41 Cal. Rptr. 2d 573 (Ct. App. 1995). Rules 1.1, 1.3. Topics: Malpractice.** The court held that the beneficiary of an un-executed will must prove facts that “manifest a commitment by the decedent to benefit” the beneficiary in order for the decedent’s lawyer to owe any duty to that beneficiary. The appellate court upheld summary judgment for the lawyer in a suit brought by the deceased client’s husband. The lawyer had met with the client in June to discuss the preparation of a new will that would increase the provisions to be made for her husband. Although the lawyer knew the client was terminally ill, the lawyer did not send a draft of the new will to the client until October and did not otherwise follow-up on the matter. The client died in December without having executed a new will. The court found that the lawyer did not have a duty, after sending the draft will to the client, to inquire whether she had any questions or wanted further assistance.

***Johnson v. Superior Court*, 45 Cal. Rptr. 2d 312, 317 (Ct. App. 1995). Rules 1.1, 1.2. Topics: Malpractice.** This case distinguishes the holding in *Morales v. Field*, discussed below, stating that California courts have not followed *Morales* and suggesting the decision should be limited to cases where the fiduciary’s attorneys have made affirmative representations of care to the beneficiaries.

***Sindell v. Gibson, Dunn & Crutcher*, 63 Cal. Rptr 2d 594 (Ct. App. 1997). Rules 1.1. Topics: Malpractice.** In this case the court held that the intended beneficiaries of a law firm’s estate planning services rendered for the beneficiaries’ father suffered “actual injury” (attorneys’ fees and litigation expenses) in defending a lawsuit by the surviving spouse’s conservator that plaintiffs alleged would not have been filed but for the law firm’s failure to obtain a waiver of community property rights from the allegedly willing spouse when she was competent.

***Moeller v. Superior Court (Sanwa Bank)*, 69 Cal. Rptr. 2d 317 (Ca. 1997). Rules 1.6, 1.9. Topics: Evidence, A/C Privilege.** This case holds that, since the powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee, when

a successor trustee (who in this case also happened to be a beneficiary of the trust) takes office, the successor assumes all powers of the predecessor trustee, including the power to assert (or waive) the attorney-client communications privilege.

Birbrower, Montalbano, Condon & Frank, P.C., et al., v. Superior Court, 70 Cal. Rptr. 2d 304 (1998). Rules 1.5, 5.5. The Supreme Court of California here held that New York law firm was engaged in the unauthorized practice of law in California and disallowed firm's recovery of legal fees for all services rendered which constituted the practice of law in California. None of the attorneys in the New York law firm was a member of the California Bar.

Estate of Condon, 76 Cal. Rptr. 2d 922 (Ct. App. 1998). Rules 1.5, 5.5. The court here held that an out-of-state (Colorado) co-executor reasonably chose Colorado counsel to handle the California-based estate of his decedent where firm chosen did business where out-of-state executor lived and had prepared the decedent's estate plan; and held further that the California Probate Code did not proscribe compensation for such attorneys. Furthermore, the court ruled, California's statutes proscribing the unauthorized practice of law in California did not proscribe an award of attorney fees to an out-of-state attorney for services rendered to an out-of-state client regardless of whether or not the attorney was either physically or virtually present within California.

Wells Fargo Bank v. Superior Court (Boltwood), 91 Cal. Rptr. 2d 716 (Ca. 2000). Rules 1.6. Topics: Evidence, A/C Privilege. This case holds that since the attorney for the trustee of a trust is not, by virtue of that relationship also the attorney for the beneficiaries of the trust, the beneficiaries are not entitled to discover the confidential communications of the trustee with the trustee's counsel, regardless of whether or not the communications dealt with trust administration or allegations of trustee misconduct. In addition, the work product of trustee's counsel is not discoverable. These results obtain regardless of the fact that the fees for the attorney's services are paid from the trust.

Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888 (Ct. App. 2003). Rules 1.1, 1.14. Topics: Malpractice. Because an attorney generally has no professional duty to anyone who is not a client, an attorney preparing a will has no duty to the intended beneficiaries to investigate, evaluate, ascertain or maintain the client's testamentary capacity. The duty of loyalty of the attorney to the client might be compromised by imposing such a duty to beneficiaries on the attorney. [Citing and quoting from the ACTEC Commentary on MRPC 1.14 (3rd Edition)].

Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Ct. App. 2004). Rules 1.1. Topics: Malpractice. When preparing a will or other testamentary instrument giving property to a beneficiary who, under applicable state law, is presumptively disqualified from receiving such a gift (in this, case, the decedent's caregiver), the testator's lawyer owes a duty of care to the nonclient intended beneficiary to try to ensure that the proposed transfer stands up (in this case meaning that the lawyer should have advised the client testator to obtain a "Certificate of Independent Review" from a totally disinterested and independent lawyer (without which the gift would and in this case did fail), declaring that the gift in question was clearly what the client intended and that the client had not been unduly influenced to make the gift.

***Boranian v. Clark*, 20 Cal. Rptr. 3d 405 (Ct. App. 2004). Rules 1.1, 1.4. Topics: Malpractice.** An estate planning attorney, at the direction of a third party and without meeting or speaking to the client, prepared a will and a “confirmation of gift” for a terminally ill individual. The “gift” was to the third party. When the testator signed the documents, she was lethargic, hallucinating, and in great pain. She died three days later. The testator’s son and daughter contested the will and the gift, and the third party settled by receiving a token amount of cash, but the estate was left with a debt related to the gift. In the subsequent malpractice action, the trial court found in favor of the son and daughter against the attorney. The Court of Appeal reversed, stating:

Although a lawyer retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the lawyer’s primary duty is owed to his client and his primary obligation is to serve and carry out the client’s intentions. Where, as here, there is a question about whether the third-party beneficiary was, in fact, the decedent’s intended beneficiary, and the beneficiary’s claim is that the lawyer failed to adequately ascertain the testator’s intent or capacity, the lawyer will not be held accountable to the beneficiary—because any other conclusion would place the lawyer in an untenable position of divided loyalty.

***Borissoff v. Taylor & Faust*, 15 Cal. Rptr. 3d 735 (2004). Rules 1.1, 1.2, 1.6, 1.9. Topics: Malpractice.** California’s Probate Code confers on a successor fiduciary the same powers and duties possessed by the predecessor. A fiduciary’s powers include the power to commence actions and proceedings for the benefit of the estate, thus giving the fiduciary who hired an attorney with estate funds the power to sue the attorney for malpractice. Therefore, a successor fiduciary has standing to sue a predecessor fiduciary’s attorney for malpractice.

***HLC Properties Ltd. v. Superior Court (MCA Records Inc.)*, 24 Cal. Rptr. 3d 1999 (2005). Rules 1.6. Topics: Evidence, A/C Privilege.** Construing California’s Evidence Code, the state’s Supreme Court held that, “the attorney-client privilege of a natural person transfers to the personal representative after the client’s death, and the privilege thereafter terminates when there is no personal representative to claim it.” Therefore, the company taking over responsibility for running the business ventures of the deceased entertainer Bing Crosby did not succeed to the entertainer’s attorney-client privilege.

***Sullivan v. Dorsa*, 27 Cal. Rptr. 3d 547 (Ct. App. 2005). Rules 1.2. Topics: Malpractice.** This case follows *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000), discussed in the Annotations following the ACTEC Commentary on MRPC 1.6, in holding that the trustee’s attorney owes no duty to the trust beneficiaries.

***Estate of Buoni*, 2006 Cal. App. Unpub. LEXIS 9368, 2006 WL 2988737 (2006). Rules 1.7. Topics: Disqualification.** A personal representative of the estate who was also a creditor was represented by one lawyer in both capacities. An estate beneficiary sought to disqualify the lawyer based on the conflict, but the court refused the disqualification. The conflict here is the PR’s, not that of his attorney, but even if there is a conflict for the attorney, it is cured by California law which contemplates that when the PR is a creditor, the creditor’s claim is submitted to the court for approval or rejection. If it is rejected, PR may sue to enforce the creditor’s claim and the court is empowered to appoint a separate lawyer to defend against the

claim. Given this procedure, representation of one person in both capacities is not a disqualifying conflict.

Adams v. Small, 2009 Cal. App. Unpub. LEXIS 9029, 2009 WL 3808295 (Cal. App. Nov. 16, 2009). Rules 1.7. Topics: Malpractice. Court reverses summary judgment that was entered against plaintiffs on their malpractice claim and remands for trial where lawyer concurrently represented estate planning clients and the promoters of a Ponzi scheme in which the estate planning clients were investing. There was a triable issue on actual conflict of interest because of evidence that lawyer knew that cease and desist orders had been entered against the promoter clients and he had failed to inform estate planning clients of this.

Baker Manock & Jensen v. Superior Court (Salwasser), 175 Cal.App.4th 1414 (2009). Rules 1.7. Topics: Disqualification. Law firm represented one son (George) of the decedent both as executor and in his own right as beneficiary. When the firm, on behalf of George personally, opposed a brother's petition that would have reduced the probate estate assets and also reduced the son's share personally, the brother sought to disqualify the firm for its conflict. The trial court granted the motion to disqualify but the court of appeals reversed reasoning that the positions taken by George personally and those he took as executor were the same: to avoid loss of probate assets. Even if the firm were viewed as representing two Georges (one personally, the other as executor) who could theoretically have adverse interests, that was not the case here so there was no conflict.

In re Elkins , 2009 WL 3878295 (Cal.Bar Ct. 2009). Rules 1.1, 3.5, 8.4. Topics: Discipline. A lawyer who sent 53 threatening and intimidating voicemail messages to the administrator of his deceased father's estate, the administrator's attorney, and the judge who was overseeing the estate, was suspended from practice for at least 90 days as part of a two-year probation for violating California rules not found in the Model Rules, but analogous to MR 3.5(a) and 8.4(d). Abusive threats and harassment such as this are not protected speech under the first amendment.

Chang v. Lederman, 172 Cal. App. 4th 67; 90 Cal. Rptr. 3d 758 (2009). Rules 1.1, 1.2, 1.14. Topics: Malpractice. Client, recently married and terminally ill, allegedly instructed his lawyer to revise his estate planning documents to leave the bulk of his estate to his wife. His lawyer refused, alerting him to the likelihood of a lawsuit if he did this, and insisting that the client get a psychiatric evaluation before making such a change. Client died without making the changes and his surviving spouse sued the lawyer for malpractice. But the court held that lawyer owed her no duty and granted judgment for the lawyer: “[T]estator's attorney owes no duty to a person in the position of [surviving spouse here], an expressly named beneficiary who attempts to assert a legal malpractice claim not on the ground her actual bequest... was improperly perfected but based on an allegation the testator intended to revise his or her estate plan to increase that bequest and would have done so but for the attorney's negligence. Expanding the attorney's duty of care to include actual beneficiaries who could have been, but were not, named in a revised estate plan, just like including third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict.... Moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has

died.”

Hall v. Kalfayan, 190 Cal. App. 4th 927, 937, 118 Cal. Rptr. 3d 629, 636 (2010). Rules 1.1, 1.3, 1.14. Topics: Malpractice. Lawyer was appointed by the court to assist in drafting an estate plan for an incapacitated woman. The estate plan would have benefitted the conservator and would have required court approval. Lawyer began work on the estate plan in 2004 but the plan had not been completed when the incapacitated woman died in 2007. The delay was due in part to the incapacitated woman’s difficulties in expressing her intentions and in part to involvement of others. The conservator sued the lawyer for malpractice, alleging the delay was negligent but the court rejected the malpractice claim. The lawyer owed no duty to the conservator as prospective beneficiary unless the beneficiary was named in executed estate planning documents, and that was not the case here. Moreover, here the incapacitated woman had not initiated the drafting of the plan and there was no guarantee that the court would have approved the plan even if completed.

Smith v. Cimmet, 199 Cal. App. 4th 1381; 132 Cal. Rptr. 3d 276 (2011). Rules 1.1. Topics: Malpractice. H and W hired lawyers in California to pursue claims against former business partner. H and W moved to Oregon, H died, and W was appointed personal representative of H’s estate. W authorized California lawyers to file suit against partner on behalf of H’s estate. The suit against partner resulted in large judgment against estate. H’s children contested H’s will, had W removed as personal representative, and had H’s son appointed as successor personal representative. Son sued the California lawyers for malpractice. California attorneys argued that (1) son lacked capacity to sue because his authority as Oregon personal representative did not extend to California, and (2) son did not have attorney-client relationship with them, and therefore lacked privity so could not sue them for malpractice. Court held that while Oregon law may prevent the successor personal representative from suing the former personal representative’s lawyer, California would allow it, based on statutory language that gave a successor PR all rights and powers of predecessor, as well as on policy reasons. Court found that California had greater interest in applying its law because it involved conduct of California lawyers, applied California law and held that the son had standing to sue. However, the court agreed that son did not have capacity to sue as Oregon PR and gave him the opportunity to file for ancillary probate appointment in California.

Estate of Wong, 207 Cal.App.4th 366 (2012). Rules 1.5. The estate executor replaced the estate attorney with another. The first attorney sought fees, and the executor resisted his petition. The attorney requested, in addition to statutory fees, extraordinary fees for having to respond to the executor’s objections. The court thoroughly reviewed the statutory scheme for probate fees and awarded the attorney his fees, but denied the request for extraordinary fees.

Transperfect Global, Inc. v. Motionpoint Corp., 2012 WL 2343908, 2012 U.S. Dist. LEXIS 129402 (N.D. Ca. 2012), relief from disqualification denied at 2012 WL 3999869 (N.D. Cal. 2012). Rules 1.7, 1.10. Topics: Disqualification. An estate planning lawyer represented the co-CEOs and 99% owners of a closely held corporation, Transperfect, and then moved to the law firm representing the defendant in a patent infringement case earlier brought by Transperfect. She continued to represent the co-CEOs with respect to estate planning and related matters after the move, without obtaining an adequate conflict waiver. Transperfect moved to disqualify defendant’s firm, and the federal magistrate upheld the

disqualification. The court noted that although this was a case of an after-acquired client (the CEOs) causing the disqualification of representation of a prior client (Motionpoint), it was nonetheless a concurrent conflict because the affairs of the estate planning clients were inextricably intertwined with the business and financial matters of Transperfect, and the applicable California rule required per se disqualification. The district court denied the defendant's motion for relief from the disqualification.

Fiduciary Trust Int'l of CA v. Superior Court, 218 Cal.App.4th 465 (App. 2d Dist. 2013). Rules 1.6, 1.9. Topics: Disqualification. This case is a cautionary tale about conflicts of interest when an attorney prepares an estate plan for a couple (sometimes a longterm client and the spouse) and then has an impermissible conflict in later disputes because of the representation of the spouse. Attorney drafted wills in 1992 for H and W that provided upon H's death, his significant separate property was to be put into a credit trust and QTIP trust for the life of W, remainder to his 3 children from prior marriage and their joint child. W's will provided that upon her death her estate would be distributed to the trusts set up under H's Will. H died, and W revised her will to give her entire estate (\$80M accumulated from distributions from the QTIP) to her daughter, thus cutting off the 3 stepchildren. Her executor claimed that the QTIP was required to pay the estate taxes on W's 80M estate (based on language in H's will) but the trustee of the QTIP (represented by firm where original attorney practiced) objected. W's executor moved to disqualify the trustee's firm because of the prior representation of W. Trial court denied, but on appeal court disqualified, holding that disqualification was required because prior representation of W was direct and substantially related to the current dispute. Court rejected arguments that disqualification not necessary because unlikely the lawyer had obtained confidential information when doing the estate plan ("The California Supreme Court has also repeatedly held that the disqualification rules are not merely intended to protect client confidences or other 'interests of the parties'; rather, '[t]he paramount concern ...[is] to preserve public trust in the scrupulous administration of justice and the integrity of the bar.'"), and arguments that joint representation with client consent allows later representation of one of the parties.

Stine v. Dell'Osso, 230 Cal.App.4th 834 (2014). Rules 1.1. Topics: Malpractice. An incapacitated woman's son was appointed her conservator and he misappropriated \$1 million of her property. He was removed as conservator, and the professional fiduciary appointed as successor conservator sued the lawyers for the son, alleging that they were aware of significant assets of the incapacitated woman that the son had not reported to the court. The court cited prior case law holding that as a matter of statute (which states a successor personal representative has all powers and duties as the former executor), a successor fiduciary has standing to sue the predecessor's attorney. The court further noted that such a malpractice action would not threaten attorney client privilege because the privilege would be held by the successor fiduciary. The lawyers claimed that the successor conservator would be attributed the former conservator's unclean hands and therefore barred from suing, but the court held otherwise, noting that unclean hands was an equitable remedy that should not apply here. The successor conservator only stepped into the son's fiduciary shoes and did not step into the "morass created by his personal malfeasance."

Sukhov v. Sukhov, 2015 WL 1942797 (Cal. Ct. App. Apr. 29, 2015), as modified (May 18, 2015), review denied (July 15, 2015). Rules 1.12. Topics: Disqualification. The parties to a dispute over a trust which disinherited two of them engage in mediation with a retired judge. After a settlement was reached and approved by the court, one of the parties sought to have it

set aside & to disqualify counsel for the defendants because of their association with the mediator/retired judge. The alleged “association” was not a formal one; rather the allegation was that the defense lawyers had paid for the mediation and had offered the mediator’s declaration in opposition to the motion to set aside the settlement. The court held that while the mediator was personally disqualified, movant had failed to demonstrate an association with defense counsel that required imputed disqualification.

***Paul v. Patton* 235 Cal. App. 4th 1088 (2015). Rule 1.1. Topics: Malpractice, Privity.**

Attorney drafted trust amendment that erroneously increased the gift to the spouse, to the detriment of the trustor’s children from a prior marriage. On appeal from dismissal, court reversed, holding that under alleged facts attorney owed a duty to the children as intended beneficiaries because there was sufficient evidence that the trustor intended them to benefit. It distinguished cases where the claim was made by a potential beneficiary, with the possibility that the testator could change his mind.

***Novak v. Fay*, 236 Cal.App.4th 329 (2015). Rule 1.5. Topics: Charging lien, fees.** Lawyer had contingent fee agreement with client for claim in deceased wife’s probate and won a significant settlement that gave his client an interest in a trust. Before receiving lawyer’s agreed fee, client died. The remaining beneficiary of the trust objected but the court upheld enforcement of the lien.

Colorado:

***People v. Van Nocker*, 490 P.2d 697 (Colo. 1971). Rules 1.3. Topics: Discipline.** In this disciplinary case the court held that “crass irresponsibility or callous indifference to a client’s affairs is inexcusable under any circumstances.” The lawyer who failed to file tax returns on two occasions for the same client and was not timely in sending a will to the client was suspended for an indefinite period.

***People v. James*, 502 P.2d 1189 (Colo. 1972). Rules 1.3. Topics: Discipline.** This is a disciplinary case in which a lawyer who had previously been disciplined for dereliction of duty to clients was disbarred for “failure to prepare a will for at least eight months after [being] employed to do so” by an aged and infirm client.

***Estate of Painter*, 567 P.2d 820 (Colo. Ct. App. 1977), appeal after remand, 628 P.2d 124 (Colo. App. 1980), appeal after remand, 671 P.2d 1331 (Colo. Ct. App. 1983). Rules 1.5.** Fee awards for personal representative and counsel based on expert testimony applying percentage method of determining fees were reversed. The Colorado legislature had repealed authorization for percentage fees and adopted a reasonable fee standard.

***People v. Berge*, 620 P.2d 23 (Colo. 1980). Rules 1.7, 1.8, 8.4. Topics: Discipline.** A lawyer who was left a substantial bequest under a will prepared by a lawyer who shared office space with the lawyer-beneficiary was suspended for 90 days. The will required the executor to engage a member of the lawyer-beneficiary’s firm as a condition of appointment. The lawyer-beneficiary also acted as witness to will that benefited him.

***Klancke v. Smith*, 829 P.2d 464 (Colo. Ct. App. 1991). Rules 1.2. Topics: Malpractice; Wrongful Death.** This case involved an action brought by the surviving children of an accident victim for breach of trust against the attorneys who had represented the victim’s

surviving spouse (the plaintiffs' step-mother) in a wrongful death action. The court held that the attorneys for the surviving spouse did not breach any duty they owed to the accident victim's surviving children when the attorneys paid the proceeds of a judgment entered in the wrongful death action directly to their client, the surviving spouse, without taking any steps to insure that the children received their claimed share of the proceeds.

Glover v. Southard, 894 P.2d 21 (Colo. Ct. App. 1994). Rules 1.1. Topics: Malpractice. This decision upholds dismissal of a malpractice claim brought by the intended beneficiaries against the scrivener of the decedent's will and trust agreement. "[I]n drafting testamentary instruments at the behest of a client, an attorney should not be burdened with potential liability to possible beneficiaries of such instruments." 894 P.2d at 25.

People v. Laden, 893 P.2d 771 (Colo. 1995). Rules 5.5. Topics: Discipline. Attorney received public censure for aiding nonlawyers in the practice of law by assisting them in selling living trust document packages from out of state.

People v. Vigil, 929 P.2d 1311 (Colo. 1996). Rules 1.7, 4.1, 8.4. Attorney was disbarred for misconduct occurring while he was a temporary conservator for a person named Doll who was injured in an auto accident. According to the court, he:

(1) served as conservator for Ms. Doll while providing legal representation to her brother, with whom Ms. Doll had a conflict of interest regarding the limited assets available for compensation in the automobile accident; (2) borrowed money from Ms. Doll's settlement trust fund, through his wife, to purchase a building; (3) allowed his parents to borrow \$73,000 for the purchase of a house; (4) failed to seek or obtain approval of the probate court of the agreement the respondent made with Mr. DeRose to handle Ms. Doll's personal injury matter; (5) failed to seek or obtain court approval of the trust agreement drafted by Mr. DeRose; (6) approved the trust fund document which was negligently drafted and did not protect Ms. Doll's settlement funds from a Medicaid lien; (7) exposed Ms. Doll to unnecessary legal risk by failing to report her personal injury settlement to Medicaid, as mandated by law; (8) continued to represent Ms. Doll after the conservatorship had expired; (9) unnecessarily delayed the progress of the trust dissolution; (10) intentionally obstructed the progress of the civil action filed against the respondent for damages and losses caused by him.

The court concluded that all this violated Colorado's version of MR 4.1 & 8.4.

In re Cohen, 8 P.3d 429 (Colo. 1999). Rules 1.7. Attorney should not have accepted employment or continued employment when a conflict existed between the multiple clients (father and son) and attorney's exercise of independent judgment was in conflict with attorney's financial interests.

People v. Woodford, 81 P.3d 370 (Colo. 2003). Rules 1.1, 1.2, 1.3, 1.5. Topics: Discipline. Attorney was suspended after he created an invalid trust that did not accomplish the purpose he was paid to achieve and failed to advise client of additional legal options.

Estate of Klarner, 98 P.3d 892 (Colo.App. 2003). Rules 1.7. Husband (Albert) had two daughters by a prior marriage and his wife (Marian) had two sons by a prior marriage. They had no children during the second marriage. After Albert died, Law firm became co-trustee of Albert's QTIP Trust whose remaindermen (at Marian's death) were his two daughters. Law firm was also a co-trustee of a trust set up by Marian after Albert died (Marian Trust). Marian's two sons were the beneficiaries; Albert's daughters were not. When Marian died, the Albert's QTIP trust was included in her estate for estate tax purposes. A decision had to be made whether she had waived her estate's right to reimbursement from Albert's QTIP trust in the amount of estate taxes incurred as a result of the inclusion of the QTIP in her estate. The court held that the law firm, as co-trustee of both trusts, had an insuperable conflict because claiming reimbursement was owed would benefit the beneficiaries of widow's estate (her sons) to the detriment of the beneficiaries of the QTIP trust (Albert's daughters). In fact, the Law firm claimed that the widow had not waived the right to reimbursement and did seek reimbursement, but this court found that this was error; she had waived. Noting that it was within the trial court's discretion whether to deny or reduce fees, it remanded for a determination of the appropriate remedy to be imposed as a result of the conflict.

People v. Rosen, 199 P.3d 1241 (Colo. 2007). Rules 4.1, 8.4. Topics: Discipline. Lawyer was suspended for six months, with suspension stayed on conditions, for multiple episodes of misrepresentation in connection with a personal injury settlement. The lawyer was hired to prosecute a personal injury action for an auto accident victim. During negotiations with the insurance company, the client died, but lawyer did not disclose this to the insurance company and later misrepresented the date on which he learned of his client's demise.

In re Haines, 177 P.3d 1239 (Colo. 2008). Rules 1.4, 1.15, 8.4. Topics: Discipline. Lawyer was disbarred for misappropriating at least \$65,000 from her estate client and failing to adequately inform the PR about the implications of this action.

People v. Rasure, 212 P.3d 973 (Colo. 2009). Rules 1.1, 1.3, 1.4, 1.15, 4.1, 8.4. Topics: Discipline. Lawyer was disbarred for neglecting multiple clients, including several probate matters, for failing to communicate with or misleading clients about status of their cases, and for misappropriating fees not yet earned.

Moye White LLP v. Beren, 320 P.3d 373, 375, reh'g denied (Aug. 1, 2013), cert. denied, (Colo. 2014). Rules 1.4, 7.1. Law firm brought breach of contract claim against probate client and client counterclaimed arguing firm had breached its fiduciary duty in failing to disclose that one of the attorneys working on his case had a history of disciplinary proceedings, mental illness, alcoholism, and related arrests. He also alleged that this was a violation of Rules 1.4 & 7.1. The court rejected the counterclaim, concluding that the information about the lawyer's history was not "material;" that disclosure of such information before adding another lawyer to a client matter was not the sort of communication that was called for by Rule 1.4; and that communications about the lawyer from the firm were not "advertising" covered by Rule 7.1, but rather communications with a current client.

People v. Auer, 332 P.3d 136 (Colo. O.P.D.J. 2014). Rules 5.5, 8.5. Topics: Discipline. Auer, an Oklahoma lawyer and a CPA in both Oklahoma and Colorado, formed a partnership with an accountant in Colorado and proceeded to do estate planning and other legal work for Colorado clients, even though he was not licensed in Colorado. He set up several partnerships with Colorado lawyers, ostensibly to obtain supervision while he applied for a license, but did not obtain the supervision and failed to disclose to clients that he was not admitted in Colorado. All the Colorado lawyers with whom he affiliated expressed their concerns that he was engaged in unauthorized practice, but his conduct continued for three years. He was found to have engaged in the unauthorized practice of law for over three years and disbarred by Colorado, where he was not admitted.

Baker v. Wood, Ris & Hames, PC, 364 P.3d 872 (Colo. 2016). Rule 1.1. Topics: Malpractice, privity. The children of the testator sued the firm that did the testator's estate plan and represented the estate, and the attorney who prepared their stepmother's estate plan, alleging that the attorneys had allowed the stepmother to divert their father's assets to her own child. The opinion discussed the strict privity rule, followed in Colorado. It further discussed the California test for legal malpractice that allows nonclients to sue in some circumstances, and declined to accept that approach for this case where the testator's intent as claimed by the plaintiffs was not clear on the face of the document. It then discussed the "Florida-Iowa rule" that allows third party beneficiary claims of breach of contract for certain disappointed estate beneficiaries. It declined to adopt that rule, in part because it was inconsistent with the policies underlying the strict privity rule and specifically because the rule would not give the plaintiffs relief in this case because the rule requires that the testator's intent be clear in the testamentary instrument. The court acknowledged that a claim of fraud or "a malicious or tortious act, including negligent misrepresentation" can be brought by a nonclient but the facts did not support such a claim in this case.

Connecticut:

Licata v. Spector, 225 A.2d 28 (Conn. Comm. Pleas 1966). Rules 1.1. Topics: Malpractice. The court here held that the named legatees under a will declared invalid and inoperative because the statutory requirements as to attesting witnesses were not met could maintain an action against the attorney-drafter of the will for the attorney's alleged negligence in failing to provide for the required number of witnesses.

Stowe v. Smith, 441 A.2d 81 (Conn. 1981). Rules 1.1. Topics: Malpractice. In holding that a disappointed will beneficiary's cause of action against the drafter may sound in both third-party beneficiary contract and tort theories, this court held that, absent a conflict between the rules of contract and tort, the plaintiff could proceed on either or both grounds.

Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988). Rules 1.3. Topics: Malpractice. In this malpractice action the attorneys, engaged by the client to prepare documents for the disposition of his estate, were sued for their allegedly negligent failure to provide the documents to the client for execution prior to the client's death. In reversing a trial court judgment against the attorneys in favor of the plaintiffs, the intended beneficiaries under the unexecuted documents, the Supreme Court of Connecticut observed:

We conclude that the imposition of liability to third parties for negligent delay in the

execution of estate planning documents would not comport with a lawyer's duty of undivided loyalty to the client... .

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

Rompre v. Rompre, 1995 WL 94728 (Conn. Super. Ct. 1995). Rules 1.9, 1.10. Topics: Disqualification. Wife in a divorce action seeks to disqualify her husband's lawyer on the ground that the lawyer's partner had done estate planning work for her and her husband only months before the divorce proceeding. The court disqualified the lawyer. Although the divorce lawyer and the estate planner were not, technically, partners, they were sufficiently associated by Rule 1.10 for the conflicts of one to be imputed to the other. The estate planning work was substantially related to the divorce and she and her husband were materially adverse in the divorce proceeding.

Gould, Larson, Bennet, Wells and McDonnell, P.C. v. Panico, 273 Conn. 315, 869 A.2d 653 (Conn. 2005). Rules 1.6, 1.9. Topics: Evidence, Attorney/Client Privilege. "The principal issue on appeal is whether, in the context of a will contest, the exception to the attorney-client privilege, as recognized by this court in *Doyle v. Reeves*, 112 Conn. 521, 152 A. 882 (1931), that communications between a decedent and the attorney who drafted the executed will may be disclosed, applies when the communications do not result in an executed will. Specifically, we consider whether, in a probate proceeding in the course of a dispute among heirs, an attorney may be compelled to disclose testamentary communications that have not culminated in an executed will. We conclude that the exception to the privilege does not apply when the communications do not culminate in the execution of a will." "[O]ur research reveals that the overwhelming majority of courts to consider the issue have not broadened the [testamentary] exception under such circumstances."

Salyer v. Carey, 2005 Conn. Super. LEXIS 980; 2005 WL 1095584. Rules 1.6, 1.9. Topics: Disqualification. This was an action brought by two siblings against a third alleging that while he was serving as executor and trustee of their parents' estates he had failed to properly distribute estate assets among them and had used some assets for his own benefit. Here, the court considers the defendant's motion to disqualify plaintiffs' lawyer (who also happens to be a "long-time companion" of one of the plaintiffs) on the ground that she had previously represented him on related matters. There was no dispute that the lawyer had represented the defendant, but the court concluded that the prior matters were not substantially related to the present dispute. Nonetheless, the court concluded that the lawyer had not only had access to but had acquired confidential information while representing the defendant that could be used to his disadvantage in this case. Accordingly, she was disqualified.

***Sandford v. Metcalfe*, 110 Conn. App. 162, 954 A.2d 188 (2008), appeal denied 289 Conn. 931, 289 Conn. 931, 958 A.2d 160 (2008). Rules 1.8, 5.5.** It was undisputed that Sandford, a lawyer licensed in NY, went to the home of her ill friend in Connecticut, who asked her to draft a will for her which would leave a substantial bequest to Sandford; that Sandford told her she was not licensed in Connecticut and could not draft the will; but that she relented and drafted a will in which she was the beneficiary of half of decedent's estate and a handyman the other half. Decedent died five days later at the hospital and her heirs at law failed to have the will denied probate and then sought to void the gift to Sandford on grounds of public policy. Noting that the permissibility of the gift under RPC 1.8(c) and/or the alleged unauthorized practice had not been adjudicated in the case, the court held it had no equitable power to void the gift to Sandford.

***Scates v. Capozziello*, 2008 Conn. Super. LEXIS 920, 2008 WL 1869207. Rules 1.9, 3.7. Topics: Disqualification.** This is an action by a former tenant against a trustee alleging illegal practices in trust properties. Defendant trustee sought to disqualify plaintiff's law firm on theory that one of the partners had represented the defendant trustee when the trust was established and thereafter. The court found that the lawyer had logged only 12 minutes of work for the defendant on what was apparently an unrelated matter and may have attended a hearing involving the defendant. But "there is no proof that [the lawyer] participated in the drafting of the trust documents or in the formation and operation of the Trust." As a consequence it was unlikely that the lawyer would be a necessary witness, nor was there a former client conflict, and there was an insufficient basis to disqualify her or her firm.

***Newlands v. NRT Associates, LLC*, 2008 WL 4415752 (Conn. Super. Ct. 2008). Rules 1.9, 1.10. Topics: Disqualification.** Newlands sought to dissolve NRT Associates of which Thompson was a principal. Thompson was a defendant in the case, and sought to disqualify the law firm representing Newlands in the dissolution action on the ground that the firm had done estate planning work for him three years before. The firm conceded that a lawyer with the firm had done that work, but he had left the firm taking the estate planning file with him. Another lawyer remaining with the firm had briefly done some follow up work, but there was no argument that the current matter was the same or substantially related to the estate planning work. Moreover, the movant failed to demonstrate either the nature of the estate planning information obtained by the lawyer still with the firm or that it was potentially usable against him in the dissolution proceeding. The motion was denied.

***Zelotes v. Rousseau*, Conn. Statewide Grievance Comm., No. 09-0412 (2010). Rules 7.1, 7.2. Topics: Discipline.** A three member committee rejected five grievances filed against Connecticut lawyers for their participation in an internet-based bankruptcy client lead service. The grievance alleged that the fee paid by the lawyers for lead generation violated Rule 7.2(c) but the committee concluded that despite allowing the participating lawyers to claim an exclusive territory, the website did not endorse the lawyers to which clients were referred and, to the contrary, contained a disclaimer making it clear to potential clients that the website was not endorsing the participating lawyers. The grievances were dismissed.

In re Smigelski, 124 Conn. App. 81, 4 A.3d 336 (2010). Rules 1.5, 1.15. Topics: Discipline. Lawyer represented estate in recovering asset, and also represented executor in probating estate. Lawyer charged contingent fee for recovery action, which was held to be unreasonable because of way contingency fee collected was calculated and because lawyer failed to show a nexus between fee and service provided. Also, lawyer paid himself the fee by withdrawing funds from the estate to which he had access as attorney for estate. Court held that this action was improper because his fees were subject to approval of probate court and his actions violated 1.15, which requires prompt delivery to a client of funds to which the client is entitled. He was suspended for one year and three months.

Gross v. Rell, 304 Conn. 234, 40 A.3d 240 (Conn. 2012). Rules 1.1, 1.14. Topics: Malpractice. Lawyer appointed by court to represent an elderly client who was the subject of a conservatorship proceeding was not entitled to quasi-judicial immunity from suit by the client. The Connecticut supreme court was responding to certified questions from the Second Circuit Court of Appeals. One of the questions was: under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? After extensive discussion of the roles of guardians (conservators) and of lawyers under MRPC 1.14, the court concluded that: “Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts,...a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation.” The discussion of the role of lawyers for conservators is also significant:

[Where a conservator has retained an attorney,] if a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary (“[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication”) In addition, if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary. We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them. 304 Conn. at 263-64; 40 A.3d at 259-60.

In re Probate Appeals Kennedy, 2013 Conn. Super. LEXIS 1219, 2013 WL 3119216 (unpublished). Rules 1.7, 3.7. Topics: Conflict of interest, representing client in dual fiduciary and individual capacities. Lawyer represented his father both as executor of lawyer's grandmother's estate and as beneficiary. Lawyer's uncle moved to disqualify him in suit against the uncle. The court held that there was no conflict in the client's dual roles and distinguished *Frank v. Frank, 1992 Conn. Super. LEXIS 3548 (unpublished)*, where the

court recognized that there could be a conflict of interest for the lawyer representing one client in a dual capacity with adverse interests.

Delaware:

Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976). Rules 1.2, 1.6. Topics: Evidence, A/C Privilege. This case involved a successful motion by the beneficiaries of a trust to compel the trustee to produce legal memoranda prepared by the lawyers for the trustee:

As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply the incidental beneficiaries who *chance* to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. 355 A.2d at 713–714.

Estate of Waters, 647 A.2d 1091 (Del. 1994). Rules 1.16, 3.7. Topics: Evidence. In this case the Supreme Court of Delaware ruled that the trial court had committed “plain error” by allowing an attorney to appear in a will contest both as trial advocate on behalf of the estate and as a necessary witness testifying on the *contested* issues of undue influence and testamentary capacity. The court observed:

Under the facts of this case, the centrality of [the lawyer’s] testimony to the contested issues of undue influence and testamentary capacity mandated his withdrawal as trial attorney. [Citations omitted.] Unlike other members of the Delaware Bar confronted by the same ethical obligation in the past, [the lawyer] failed to recognize his duty as a lawyer/witness to withdraw, even after opposing counsel called it to his attention. 647 A.2d at 1098.

Board Case No. 102 (1998). Rules 1.7, 1.9. Topics: Discipline. A lawyer was privately admonished by the Preliminary Review Committee of the Board on Professional Responsibility for preparing a new will for a wife that excluded her husband as beneficiary after the lawyer had represented both husband and wife in several legal matters and the husband had filed for divorce. The lawyer was also criticized for permitting the wife to name the lawyer as a fiduciary of her estate without the lawyer having disclosed his personal financial interest in serving as a fiduciary.

Board Case No. 52 (2001). Rules 1.4, 1.16. Topics: Discipline. Client approached the attorney in December of 2000 to assist her as surviving spouse of husband’s estate. In April 2001, the attorney sent the client his first and only written communication in which the attorney explained that he would not represent the client. During the period of lack of communication, the client lost significant rights with respect to her capacity as a beneficiary of her husband’s estate. The lawyer violated MRPC 1.4(b), regarding communication, by not explaining to the client the information necessary to allow the client to make informed decisions regarding the representation. He was privately admonished.

In re Benge, 783 A.2d 1279 (Del. 2001). Rules 1.1-1.5, 1.7, 1.9, 1.15, 3.4, & 8.4. Topics:

Discipline. Attorney was disbarred based on multiple counts of misconduct involving his estate planning and probate practice, in which he was found to have violated Rules 1.1-1.5, 1.7, 1.9, 1.15, 3.4, & 8.4.

In re Autman, 798 A.2d 1042 (Del. 2002). Rules 1.1, 1.2, 1.3, 1.4, 8.4. Topics: Discipline. Attorney failed to prepare and record a deed to transfer a client's real estate to a partnership established by the client. The deed preparation and recording was necessary to make the partnership an effective estate planning vehicle. In addition, the attorney failed to advise the client to obtain appraisals of the value of the real estate after the partnership was established. He also falsely notarized a deed of gift and sent a deceptive letter to a city based on the deed he had not prepared or recorded. Board Case No. 30 (2001)(<http://courts.delaware.gov/ocd/digest/?ID=60>).

Board Case No. 16 (2003). The lawyer here supervised the execution of certain testamentary documents. When the attorney arrived for the execution, the client was incapacitated and unable to speak or recognize the attorney. However, the client's son informed the attorney that both trust documents had been signed by the client earlier in the day when the client was alert and aware of his surroundings. The attorney then witnessed and notarized the client's signatures on each trust. The attorney replaced a page of the revocable trust with revised page that contained the change requested by the client's son. The attorney failed to conduct an independent evaluation of the client's competence and capacity for undue influence. The attorney also falsely notarized the testator's client's signature on the trusts. The lawyer was privately admonished.

Pinckney v. Tigani, C.A. No. 02C-08-129 FSS (Del. Super. Ct. 2004). Rules 1.1. Topics: Malpractice. Attorney drafted a trust to provide for the plaintiff. Pursuant to the scope of the engagement agreement, the attorney was not hired to investigate the client's finances to determine if funds were available to fund the bequest to the trust. In determining whether the beneficiary had standing, the court stated, "Where the drafting is correct [as in the instant case], yet the bequest fails for other reasons, the disappointed heir must allege facts that irrefutably lay the bequest's failure at the scrivener's door." The court held that the attorney did not owe a duty of care to the trust beneficiary to investigate the decedent's finances to ensure that the bequest would be funded because the scope of representation was limited to preparation of documents, and the engagement letter specifically excluded any investigation into the decedent's finances.

Unanue v. Unanue, 2004 WL 602096 (Del. Ch. 2004). Rules 1.7, 8.5. Topics: Disqualification. This decision rejects a motion to disqualify lawyers from representing one of the parties to a dispute over the control of Goya Foods, the largest Hispanic owned company in the country. At the time of the decision, "Goya's voting stock [was] owned by two estates and 17 'third generation' members of the Unanue family and related trusts." The motion to disqualify was based on the conduct of New Jersey lawyers that occurred in New Jersey, but the motion was made in a Delaware legal proceeding. The court concluded under Rule 8.5 that Delaware ethics rules controlled the motion. For purposes of the issues presented, however, the court noted that the Delaware and New Jersey rules were essentially the same.

In re McCann, 894 A.2d 1087 (Del. 2005). Rules 1.3, 1.5, 1.16. Topics: Discipline. Lawyer was disbarred for multiple counts of misconduct including a number of estate matters. He "failed to timely file inventories, disburse funds, and close seven estates. In one case, the

final distribution was not made until 19 years after the decedent died. In another case, [he] lost needed records, which were left sitting in boxes for years. Several estates required attention during the period from 1996 - 1998, when [he] was suspended from the practice of law, but [he] never made arrangements for another lawyer to handle those matters. In addition, [he] paid himself excessive attorneys' fees for his administration of some of those estates.”

In re Wilson, 900 A.2d 102 (Del. 2006). Rules 1.15, 1.3, 8.4. Topics: Discipline. Lawyer “admitted failure to act with reasonable diligence and promptness in the probate of over twenty estates; failure promptly to deliver to a third party funds that that party was entitled to receive from an estate; failure to place fiduciary funds in an interest-bearing account; and engaging in conduct prejudicial to the administration of justice by failing to probate over twenty estates.” He was suspended for 18 months.

In re Wilson, 900 A.2d 102 (Del. 2006). Rules 1.3, 1.15, 8.4. Topics: Discipline. Lawyer “admitted failure to act with reasonable diligence and promptness in the probate of over twenty estates; failure promptly to deliver to a third party funds that that party was entitled to receive from an estate; failure to place fiduciary funds in an interest-bearing account; and engaging in conduct prejudicial to the administration of justice by failing to probate over twenty estates.” He was suspended for 18 months.

In the Matter of Tonwe, 929 A.2d 774 (Del. Sup. Ct. 2007). Rules 5.5, 8.5. Topics: Discipline. Tonwe, also known as Glover, was “disbarred” in Delaware where she was not licensed, then reciprocally disbarred in Ohio. Disciplinary Counsel v. Glover, 116 Ohio St. 3d 1202 (2007).

In re Estep, 933 A.2d 763 (Del. 2007). Rules 5.5. Topics: Discipline This was an unauthorized practice action against an accountant. He was found to have engaged in nine counts of unauthorized practice, in violation of a pre-existing cease and desist order, by giving legal advice and preparing estate planning or probate documents. Some of this was done in conjunction with Kingsley (below). The accountant was fined more than \$35,000 and the cease and desist order was continued.

In re Kingsley, 950 A.2d 659 (Del. 2008). Rules 5.5, 8.5 Topics: Discipline. Court concluded that lawyer who was licensed in Pennsylvania and New Jersey, but not Delaware, maintained a continuous presence for the practice of law in Delaware and, in collaboration with an accountant, see *In re Estep, 933 A.2d 763 (Del. 2007)*, prepared estate planning documents for at least 75 Delaware clients. Accordingly he was disbarred in Delaware. “Disbarment in the context of an attorney not admitted in Delaware means `the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State.’” Kingsley received a reciprocal censure in New Jersey where he was licensed. *In re Kingsley, 204 N.J. 315, 9 A.3d 580 (2011)*.

In re Nadel, 82 A.3d 716, 718 (Del. 2013). Rules 5.5, 8.5. Topics: Discipline. Although not licensed in Delaware, Nadel was suspended from practice there for one year for engaging in the unauthorized practice of law there, and further enjoined from providing advice to any Delaware clients on matters of Delaware law for a period of one year and from acting pro hac vice on any matter in Delaware for a period of three years.

***In re Edelstein*, 99 A.3d 227 (Del. 2014). Rules 5.5, 8.5. Topics: Discipline.** Edelstein was a partner in a firm that had offices in both Pennsylvania (where he was licensed) and Delaware, where he was not. He was found to have engaged in unauthorized practice of law in Delaware after representing hundreds of Delaware clients, and suspended from practice there for one year. He was further enjoined from providing advice to any Delaware clients on matters of Delaware law for a period of one year and from acting pro hac vice on any matter in Delaware for a period of three years.

***In re Pelletier*, 84 A.3d 960, 964 (Del. 2014). Rules 5.5, 8.5. Topics: Discipline.** Pelletier, a member of the New Jersey, but not the Delaware bar, was found to have engaged in the unauthorized practice of law in Delaware and suspended from practice there, enjoined from providing advice to Delaware clients on matters of Delaware law, and from appearing pro hac vice in Delaware all for one year.

District of Columbia

***Donnelly v. Parker*, 486 F.2d 402 (D.C. Cir. 1973). Rules 1.1, 1.14, 1.16.** This case holds that where the physical and mental condition of a plaintiff in civil litigation might be the pivot upon which much of the case on its merits would turn, counsel acting on behalf of the plaintiff should be permitted to continue his representation until the question of the plaintiff's alleged incapacity could suitably be determined in the trial court. Therefore, the appellate court refused to enter an order requiring counsel for the plaintiff to prove his continuing authority to represent the plaintiff whose capacity defendant had put into question.

***Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983). Rules 1.1. Topics: Malpractice.** In a case of first impression, the court here held that the intended beneficiary of an allegedly negligently drafted will is not barred by the lack of privity from bringing a suit for malpractice against the attorney-drafter. (The attorney-drafter had admittedly failed to include a residuary clause in the will as executed.)

***Hopkins v. Akins*, 637 A.2d 424 (D.C. 1993). Rules 1.1, 1.2. Topics: Malpractice.** In this action for legal malpractice involving estate administration, the court held that the beneficiary of an estate may not sue the attorney for the personal representative for negligence absent an express undertaking between the attorney and the beneficiary, fraud or malice. Counsel for the estate is to be viewed as an employee of the personal representative in normal circumstances. The court cites with approval the analysis of the California court in *Goldberg v. Frye*, *supra*, discussed above.

***Griva v. Davison*, 637 A.2d 830 (D.C. 1994). Rules 1.13. Topics: Malpractice.** This decision reversed a summary judgment granted to two members of a three-member general partnership and to the law firm that represented both the partnership and the two individual members in an action for breach of fiduciary duties. Applying the modified form of MRPCs 1.7 and 1.13 that were adopted in D.C., the court concluded that, "a law firm ethically can represent several individuals in creating a partnership after obtaining their informed consent pursuant to MRPC 1.7(c)." 637 A.2d at 844. The court continued to say that, "with the informed consent of all affected clients, a law firm ethically can represent a partnership and one or more of its individual partners at the same time—including representation as to matters affecting the partnership, except when such dual or multiple representation would

result in an ‘actual conflict of positions,’ *Id.*, in which case the absolute prohibition of MRPC 1.7(a) comes into play.” *Id.*

In re Jones-Terrell, 712 A.2d 496 (D.C. 1998). Rules 1.7, 7.1, 8.4. Topics: Discipline. Lawyer is found to have violated DC Rule 7.1 for improperly soliciting an incapacitated person for employment as the person’s lawyer; Rule 8.4 for making false statements in applying to be appointed as a guardian for the incapacitated person; and Rule 1.7 for representing adverse parties. Lawyer is suspended for sixty days.

In re Harris-Smith, 772 A.2d 804 (D.C. 2001). Rules 1.1, 8.5. Harris-Smith is indefinitely suspended from practice in D.C. based on a similar sanction by the federal district court in Maryland for misfeasance and nonfeasance in connection with bankruptcy practice.

In re Gonzalez, 773 A.2d 1026, 1031 (D.C. 2001). Rules 1.6, 8.5. Topics: Discipline. Applying the ethics rules of Virginia, where the conduct occurred while lawyer was before a tribunal there, the court admonishes lawyer for improper disclosure of client confidences.

In re Soininen, 889 A.2d 294 (D.C. 2005). Rules 1.1, 1.5, 1.15, 8.4. Topics: Discipline. This is really an “incompetence as guardian” and a disability case, not a lawyer case) Include in Comprehensive he disbarment was stayed with three years of probation on conditions because of her psychiatric disability and addictions to prescribed drugs and alcohol. “[Her] misconduct occurred during her service as guardian and conservator ... [of an] estate between 1997 and 2000. [She] ...never acquired a full understanding of what a conservator is and does. ...never posted a bond as required by her appointment, failed to file any required accounts or reports with the court, and failed to file a suggestion of death after [the ward] passed away in 1999. In addition, without the court's knowledge or approval, [she] distributed estate funds and paid herself legal fees. [Her conduct violated Rules] 1.1 (a), 1.1 (b), 1.5 (a), 1.15 (a), and 8.4 (d).”

In re Ifill, 878 A.2d 465 (D.C. 2005). Rules 1.3, 1.4, 1.4, 1.15, 8.4, 8.5. Topics: Discipline. Lawyer collected \$10,000 from client to collect on four insurance policies he told her insured her deceased husband, but no evidence supported the existence of these policies and he failed to return the excess fees collected when he discovered this. Not only did he collect an unreasonable fee, he “failed to provide zealous, diligent and prompt representation; nor did he keep the client reasonably informed about her case; nor did he explain that she had no more non-frivolous claims against her husband's insurers.” He was suspended for a year on this count. On another count, he was hired to probate an estate in Maryland and withdrew \$21,000 from the estate account, without approval from the executor, for his personal benefit. He later returned the money. On this matter, which occurred in Maryland, lawyer was disbarred in Maryland and (reciprocally) in D.C.

In re Devaney, 870 A.2d 53 (D.C. 2005). Rules 1.1, 1.7, 1.8, 5.5. Topics: Discipline. Lawyer was disbarred for misconduct relating to estate planning for an elderly friend and neighbor in Virginia. Although not licensed in Virginia, lawyer “admits that he advised her on the tax consequences of non-charitable bequests, questioned her expressed intent to make certain changes to her will, and recommended his sons as alternate beneficiaries. He also admits that ...he drafted a codicil to [the friend's] will which increased the cash bequest to his wife from \$ 10,000 to \$ 30,000, and named her as the alternate executor

He also drafted a power of attorney naming himself as [the friend's] attorney-in-fact to transact all of her business and manage all of her property and affairs. [His wife] was named as the successor attorney-in-fact." Later he drafted another codicil making his wife the residuary beneficiary of the client's estate, and his sons and himself as alternative residuary beneficiaries. The court concluded that the Rule 1.8(c) (1.8(b) in D.C.) violations were enough to warrant disbarment without regard to the unauthorized practice or competence issues.

In re Daughtery, 870 A.2d 75 (D.C. 2005). Rules 1.15, 8.4. Topics: Discipline. Lawyer "converted approximately \$ 150,000 in estate funds to her personal use while serving as the executor of an estate in Virginia" and was convicted of embezzlement there. D.C. disbarred her.

In re Alexander, 865 A.2d 541 (D.C. 2005). Rules 1.15, 3.3, 8.1, 8.4. Topics: Discipline. Lawyer was disbarred for embezzling more than \$73,000 from an estate he was hired to help administer, and then making misrepresentations during disciplinary proceedings.

In re Cater, 887 A.2d 1 (D.C. 2005). Rules 1.1, 5.3. Topics: Discipline. Lawyer was suspended for six months in part as a result of misconduct while serving as a guardian and conservator for the estates of two incapacitated adults. The lawyer was the sole signatory on the two estate accounts but, unbeknownst to her, lawyer's secretary forged 36 checks on the two estate accounts and misappropriated more than \$47,000 from the accounts. Had the lawyer checked the regular bank statements, she would have discovered the misconduct, but instead she had delegated this work to the secretary who had engaged in the forgery. She did not discover the misappropriation even where her secretary disappeared. But only after one of the wards died and she was required to file an accounting. The court found the conduct violated Rules 1.1 and 5.3 (failure to supervise a nonlawyer subordinate.)

In re Bingham, 881 A.2d 619 (D.C. 2005). Rules 1.16. Topics: Discipline. Lawyer was publicly censured for neglecting a probate matter entrusted to him and, when his incapacity resulting from an inoperable brain tumor became apparent, for failing to withdraw.

In re Ponds, 888 A.2d 234, 247 (D.C. 2005). Rules 1.7, 8.5. Topics: Discipline. Applying the ethics rules of Maryland, where the conduct occurred, the court suspends a DC lawyer for one year based on a conflict of interest while representing a criminal defendant in Maryland.

In re Miller, 896 A.2d 920 (D.C. 2006). Rules 1.15, 8.5. Topics: Discipline. This was reciprocal discipline for misconduct that occurred and was disciplined for in Florida. Lawyer was "a co-trustee of an estate, had engaged in misconduct including the failure to deposit certain insurance proceeds into a segregated escrow account, and failure to insure that his co-trustee properly and prudently used trust monies for the benefit of the children of the settlor, who later died." This violated Rule 1.15 and the lawyer was suspended for 6 months (in Florida and in D.C.).

In re Evans, 902 A.2d 56 (D.C.2006). Rules 1.1, 1.7, 8.4. Topics: Discipline. Attorney, as owner of a real estate title company, was contacted to close a real estate loan to be secured by a residential property. He discovered that the borrower did not own the residential property because it was still owned by the unprobated estate of her deceased mother.

Thereupon he undertook, as lawyer, to represent the borrower and probate her mother's estate, without disclosing his conflict as owner of the title company with a financial interest in closing the loan, and failed to obtain an informed waiver of the conflict. In probating the estate, he failed to act competently in violation of Rule 1.1 and, further, engaged in actions prejudicial to the administration of justice in violation of Rule 8.4(d). He was suspended for six months.

In re Penning, 930 A.2d 144 (D.C. 2007). Rules 1.7, 1.14. This is a guardianship proceeding in which the lower court appointed a conservator over the property of a retired lawyer who had been diagnosed with Alzheimers. In addition, the court had disqualified her D.C. law firm for an "apparent conflict of interest." The court of appeals reversed the appointment of a conservator as lacking in sufficient evidence of incapacity and reversed the disqualification of the law firm. The possibility that there might be a conflict is not enough: "Without factual findings that [a lawyer] has a "conflict of interest which will prevent counsel from zealously representing the subject," ..., or some other genuine disability, the order disqualifying the firm from representing Penning cannot stand."

In re Bauer, 933 A.2d 300 (D.C. 2007). Rules 1.15, 8.5. This is a reciprocal discipline case based on misconduct that occurred and was disciplined in Illinois. Lawyer was serving as trustee for his brother's trust and pursuant to authority in the trust instrument, he borrowed funds from the trust. But then he failed to repay them. The Illinois disciplinary authorities charged him with breach of fiduciary duty and violation of the Illinois RPCs (unspecified in this decision). He stipulated to the misconduct and the sanction of nine months suspension. D.C. imposed the same discipline.

Estate of Brown, 930 A.2d 249 (D.C. 2007). Rules 1.8. Lawyer for personal representative entered into a contract to list the estate's principal asset, a townhouse, exclusively with a real estate company wholly owned by the lawyer. A year before, the townhouse had been appraised for \$258,000; the lawyer's real estate company sold it for \$300,000 (yielding a \$9,000 commission for her real estate company); roughly four months later the buyers resold the townhouse for \$730,000. The court held the burden was on lawyer to prove the brokerage contract between the estate and her brokerage firm complied with RPC 1.8(a) and she failed to do so. Quite apart from whether it was fair and reasonable under the market conditions at play, she had failed to recommend or give an opportunity for independent advice and had failed to get her client's informed consent confirmed in writing, as required by Rule 1.8(a). But the probate court erred in requiring the lawyer to disgorge her real estate commission. The heirs claim here is against the PR, not against the PR's lawyer, who may in turn be liable to the PR.

In re Long, 902 A.2d 1168 (D.C. 2007). Rules 1.1, 1.7. Topics: Discipline. Lawyer who had no experience in estate planning agreed to prepare a will for a client at the request of a mutual friend who was to be the principal beneficiary. "Sometime before [he] produced the final draft of the will, he spoke with [the client] at her home. [He elicited from her that she wanted to turn her farm over to the drafter's friend. [But he] ... did not become knowledgeable about the existence or identity [of the client's] other relatives, he had no specific knowledge of her finances, and he did not discuss her intentions in anything more than this perfunctory manner. He took no special precautions in light of Mrs. Lowery's advanced age and medical condition in anticipation of a challenge to the will." The court concluded that he had not exercised the requisite competence and had an undisclosed and

unwaived conflict (presumably his personal ties to her beneficiary). But his “foray into estate planning represented a one-shot event of a personal nature.” Accordingly, he was suspended for one month, but the suspension was stayed on conditions.

In re Wilson, 953 A.2d 1052 (D.C. 2008). Rules 1.15, 8.4. Topics: Discipline. Lawyer was disbarred for misappropriating \$10,000 from an estate for which she served as guardian for nine years.

In re Bach, 966 A.2d 350 (D.C. 2009). Rules 1.5, 1.15. Lawyer who was serving as a conservator for a 95 year old woman wrote himself a check for \$2,500 for his services even though he had not yet received court approval for this disbursement, which he knew he needed. Since his ward’s nursing home had submitted a claim for her care, he was concerned that by the time his fee petition was approved there would be no funds left in her estate to pay him. He was disbarred for taking a fee prohibited by law (Rule 1.5) and misappropriating entrusted funds (Rule 1.15). The result, the court held, was required by *In re Addams, 579 A.2d 190 (D.C. 1990)*.

In re Bach, 966 A.2d 350 (D.C. 2009). Rules 1.5, 1.15, 8.4. Topics: Discipline. Lawyer who was serving as a conservator for a 95 year old woman wrote himself a check for \$2,500 for his services even though he had not yet received court approval for this disbursement, which he knew he needed under the law. He was disbarred for taking a fee prohibited by law (Rule 1.5) and misappropriating entrusted funds (Rule 1.15). The result, the court held, was required by *In re Addams, 579 A.2d 190 (D.C. 1990)* which imposes disbarment in such cases except in “the most stringent of extenuating circumstances” which were not present here.

In re Jumper, 984 A.2d 1232 (D.C. 2009). Rules 3.3, 4.2, 4.3. Topics: Discipline. In this case the DC Court of Appeals affirmed a sanction award (based on court’s inherent power) of nearly \$20,000 jointly against an attorney who assisted his client in getting his client appointed as guardian for Jumper (in the course of which he evidently omitted material facts in representations made to the court in violation of RPC 3.3) and, when that guardianship was vacated, met with Jumper in order to induce her to change her existing estate planning documents in favor of the client. The meeting either violated RPC 4.3 if lawyer believes Jumper was unrepresented (as lawyer alleged), or RPC 4.2 if lawyer knew Jumper was represented. Bad faith litigation conduct was also part of the basis for the sanction.

Pair v. Queen, 2 A.3d 1063 (D.C. Ct. App. 2010). Rules 1.1, 1.3. Topics: Malpractice. Lawyer was co-executor with heirs and acted as attorney for estate with respect to preparation of tax returns. Estate (of approximately \$6 million) was assessed with over \$1 million in interest and penalties due to late and improper tax returns. Heirs sued lawyer for malpractice, and lower court dismissed, holding that filing of returns was a nondelegable duty of each co-executor, and as co-executors the heirs could not sue the lawyer co-executor. Court of appeals reversed, holding that suit could go forward because suit was against lawyer as attorney for estate, not as co-executor.

Hillbroom v. PricewaterhouseCoopers LLP, 17 A.3d 566 (D.C. Ct. App. 2011). Rules 1.1. Topics: Malpractice. This case involves the Estate of Larry Hillblom, the “H” in

DHL. (Plaintiff's name is Hillbroom.) Hillblom, a resident of Saipan, died in a plane crash in 1995, leaving a Will that left everything to charity, and also leaving several children from several different locations claiming to be his issue. The ensuing litigation has been called the "World Cup" of estate litigation; there is copious coverage of the case on the internet and a documentary about the case, "Billionaire," is available for download. The will contest settled in 2000, dividing the estate between the children and the charity, and this case involves the resolution of estate tax liability. In 1999, the executor paid \$43 million as an estate tax deficiency, and later that year filed an amended return showing due to increased administrative expenses it had overpaid by \$5.7M. A "Refund Claim Memorandum" was filed with the return. As part of the settlement in 2000, the estate was closed and an agent for the children was appointed to hire tax counsel to pursue the refunds. As there was significant additional administrative expense (and additional credits for foreign death tax), the agent asked about requesting further refund but tax counsel advised to wait until the first refund was "banked" before asking for additional refund, to avoid too much scrutiny on the first refund request (poor advice). Two years pass without further refund requests, and the agent hires new counsel who claimed that the Refund Claim Memorandum was a sufficient informal refund request to support additional refund requests. The IRS paid the requested refund due to foreign death tax credits but disputed the additional request. In 2007, the children settled with the IRS for an additional refund of \$4.5 million, and the children filed a malpractice suit against original tax counsel in 2009, claiming that they would have been entitled to at least \$5M more in refund if the request had been timely filed. Defendants claimed that the suit was barred because the statute of limitations began to run when the agent hired new counsel, but the plaintiffs argued the statute did not begin to run until they settled with the IRS. Court held that the statute began to run when the IRS disputed the refund claim, and remanded to determine that point in time. Plaintiffs made the additional argument that the statute should be tolled for the plaintiffs who were minors. Because it was unclear who was acting on behalf of the minors (there were persons identified as guardians ad litem and as trustees of trusts set up for the minors, as well as the agent appointed under the settlement), the court remanded to determine whether the statute should be tolled for the minor plaintiffs.

In re Szymkowicz, 124 A.3d 1078 (2015). Rules 1.7, Rule 1.14. Topics: Discipline, joint representation, requirement of informed consent. Lawyer initially represented son challenging mother's trust (of which he was a beneficiary). In the process of the trust challenge and as settlement, lawyer began representing mother as well in action to revoke the trust. Son-in-law was trustee and daughter was beneficiary, and attorney-in-fact for mother, and sought to uphold the trust. Mother gave a power of attorney to the son, then revoked it, and then reinstated son as attorney-in-fact. At some point in the litigation, lawyer withdrew and mother's representation was taken over by another lawyer, who was paid by the son and who regularly consulted son as attorney in fact. The trust actions were resolved in favor of daughter. In this disciplinary action, lawyer argued that he did not violate Rule 1.7, and he did not need informed consent, because the interests of the mother and son coincided. The court disagreed with the lawyer's assertion that informed consent was not needed, based on the potential for future conflict in light of the mother's favorable feelings towards her daughter and son-in-law and desire to avoid litigation. The court noted that "such risks are common where one lawyer represents multiple family members in estate planning matters, which is why Comment [20] to Rule 1.7 states that disclosure and informed consent 'are usually required' in that setting." The court remanded for a determination as to whether there was in fact informed consent, and which party bears the

burden of proving the existence or absence of informed consent. As to the other lawyer that took over the litigation, the court noted that under 1.14, the lawyer must maintain a typical relationship with the client as far as reasonably possible. Comment [4] to Rule 1.14 states that a lawyer can ordinarily look to a surrogate decisionmaker for decisions on behalf of the client, but here, the fact that the lawyer was being paid by the son/AIF and that the contemplated transactions involved self-dealing (i.e, giving benefit to the son), relying on the son as decisionmaker created conflicts requiring informed consent from mother, and so the disciplinary action against the second lawyer was also remanded.

Florida:

Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949). Rules 1.14. The Supreme Court of Florida here held that it was proper for a lawyer to prepare and supervise the execution of a codicil for a client who was “incurably ill and was in such pain that a great deal of medication to relieve him of his suffering was being administered, such as phenobarbital, novatrine, demerol, cobra venom, and so forth.” The court stated that:

We are convinced that the lawyer should have complied as nearly as he could with the testator’s request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.

Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator’s death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted. 42 So. 2d at 86.

The Florida Bar v. Lee, 396 So. 2d 169, 169 (Fla. 1981). Rules 1.16. Topics: Discipline. Lawyer is disbarred, among other violations for failing to deliver client’s will to her after she had paid his fees and executed it.

Florida Bar v. Betts, 530 So. 2d 928 (Fla. 1988). Rules 1.14. Topics: Discipline. In this case an attorney was publicly reprimanded for his actions in preparing two codicils to the will of his client at a time when the client was in a rapidly deteriorating physical and mental state. In the first codicil the testator removed his daughter and son-in-law as beneficiaries. The lawyer spoke with his client several times in an effort to persuade him to reinstate his daughter as a beneficiary. Subsequently, the lawyer prepared a second codicil to reach this result. However, when the codicil was presented to the testator, he was in a comatose state. The lawyer did not read the second codicil to the testator, the testator made no verbal response when the lawyer presented the codicil to him, and the lawyer had the codicil executed by an X that the lawyer marked on the document with a pen he had placed and guided in the testator’s hand. The court observed:

Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third-parties. It is undisputed that [Lawyer] did not benefit by

his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own. 530 So. 2d at 929.

Estate of Gory, 570 So. 2d 1381 (Fla. Dist. Ct. App. 1990). Rules 1.2, 1.7. Topics: Disqualification. In an action to disqualify the personal representative's lawyer from representing her at a compensation hearing, the court recognized that the lawyer for a personal representative owes fiduciary duties to the beneficiaries of the estate. However, the lawyer does not represent the beneficiaries. Moreover, no conflict of interest results merely because one or more of the beneficiaries takes a position adverse to that of the personal representative.

In Florida, the personal representative is the client rather than the estate or the beneficiaries. Rule 4-1.7, Rules Regulating the Florida Bar (Comment). It follows that counsel does not generate a conflict of interest in representing the personal representative in a matter simply because one or more of the beneficiaries takes a position adverse to that of the personal representative. A contrary result would raise havoc with the orderly administration of decedents' estates, not to mention the additional attorney's fees that would be generated.

Florida Bar v. DellaDonna, 583 So. 2d 307 (Fla. 1991). Rules 1.4, 1.5, 1.7, 1.15, 8.4. Topics: Discipline. A lawyer acting as personal representative was disbarred for five years for gross mismanagement of estate, conflicts of interest, and excessive fees. The court rejected the argument that discipline could not be imposed on the lawyer since the lawyer was not acting as a lawyer.

In re Estate of Platt, 586 So. 2d 328 (Fla. 1991). Rules 1.5. The court here held that it was inappropriate to determine the fees of a fiduciary and the fiduciary's lawyer solely according to a percentage of the value of the estate when governing statutes provide a number of factors to be considered in determining fees. (See discussion of Florida statute above).

Devins v. Peitzer, 622 So. 2d 558 (Fla. Dist. Ct. App. 1993). Rules 3.7. Topics: Disqualification, Evidence. In this will contest the court refused to disqualify the estate's lawyer solely because the contestants had announced their intention to call the lawyer as an adverse witness on their own behalf. The court found that MRPC 3.7 was not designed to permit a party to disqualify opposing counsel merely by calling him or her as a witness.

Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378 (Fla. 1993). Rules 1.1. Topics: Malpractice. In this malpractice action the Supreme Court of Florida observed:

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

* * *

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

negligence of the testator's lawyer. 612 So. 2d at 1380. [Emphasis added.]

***Murphy v. Fischer*, 618 So. 2d 238 (Fla. Ct. App. 1993). Rules 1.1, 1.2. Topics: Malpractice.** An attorney acting as personal representative for the estates of a husband and wife was surcharged for failing to disclaim certain assets on behalf of the husband's estate coming from the wife's estate to save estate taxes. The attorney had relied on erroneous advice from a CPA that no estate tax savings could be achieved by disclaimer.

***Barnett Nat'l Bank v. Compson*, 639 So. 2d 849 (Fla. Dist. Ct. App. 1993). Rules 1.2, 1.6. Topics: Evidence, A/C Privilege.** The court here rejected the analysis of *Riggs Nat'l Bank v. Zimmer*, *supra*. It held that the surviving spouse in litigation with the trustee of an inter vivos trust created by her deceased husband may not discover communications between counsel for the trustee and the trustee or between counsel for the trustee and counsel for other beneficiaries who were aligned with the trustee. "The trustee's charging its attorney's fees to the trust does not change our decision under the facts of this case."

***Kinney v. Shinholser*, 663 So. 2d 643 (Fla. Dist. Ct. App. 1995). Rules 1.1. Topics: Malpractice.** Applying Florida malpractice standards, the court here upheld the dismissal of a complaint against the lawyer who drew a will for a married client which did not preserve the tax benefit of the testator's unified credit. The will gave the testator's entire residuary estate to a trust for the benefit of his widow, over which she was given a general power of appointment. In effect, the will caused the widow's estate to pay some estate tax that was avoidable had she not been given a general power of appointment. According to the court, there was no evidence of malpractice by the scrivener as the will did not indicate any intent to minimize taxes on the death of the surviving spouse. However, the court held that the complaint stated a cause of action by the decedent's son, the remainderman under the husband's will and the sole beneficiary of the wife's will, against the lawyer and the accountant who were retained by the surviving spouse to probate the will and prepare the federal estate tax return for failing to advise her of the tax savings that would be achieved if she disclaimed the general power of appointment.

***Cone v. Culverhouse*, 687 So. 2d 888 (Fla. Dist. Ct. App. 1997). Rules 1.6. Topics: Evidence, A/C Privilege.** In this case the court discussed the "common interest" exception to the lawyer-client communications privilege. Under state statute there is no lawyer-client communication privilege where the communication is relevant to a matter of common interest between two or more clients, such as a husband and wife, with regard to their estate planning, if the communication was made by either of them to the lawyer whom they retained or consulted in common.

***Teague v. Estate of Hoskins*, 709 So. 2d 1373 (Fla. 1998). Rules 1.5.** In this case of first impression, the Supreme Court of Florida held that the attorneys' fees awarded to a widow's guardian against an estate's personal representative in the guardian's successful litigation with the personal representative over the widow's homestead, and elective share rights constituted a claim of the highest priority against the estate's assets. Two dissenting judges argued that the majority's opinion "exact[s] no toll from the personal representative for initiating and pursuing a fruitless claim."

***First Union Nat'l Bank of Florida v. Whitener*, 715 So. 2d 979 (Fla. Ct. App. 1998), review denied, 727 So. 2d 915 (1999). Rules 1.2, 1.6. Topics: Evidence, A/C Privilege.** In

this discovery dispute, a trust beneficiary who had brought a breach of fiduciary duty action against the trustee bank sought information and documents exchanged between the trustee and its attorneys. The court held that the attorney's client was the trustee and not the beneficiary. The attorney had been hired by the trustee after the beneficiary had retained counsel and was questioning the trustee's conduct. The court also found that Florida's version of the fraud exception to the attorney-client communications privilege did not apply and that the trustee's earlier voluntary production of certain letters from its attorney to the trustee did not waive the attorney-client privilege as to undisclosed documents.

Babcock v. Malone, 760 So. 2d 1056 (Fla. Dist. Ct. App. 2000). Rules 1.3. Topics: Malpractice. This is a malpractice case in which would-be beneficiaries under an unexecuted will lawyer had drafted for client sought damages on the theory lawyer had delayed unnecessarily in finalizing the will. Applying Florida's rule from *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 612 So. 2d 1378 (Fla. 1993)*, the court held that plaintiffs could not qualify as intended beneficiaries because testator's intent that they be beneficiaries was not expressed in his will.

Chase v. Bowen, 711 So.2d 1181 (Fla. Ct. App. 2000). Rules 1.7. This case holds that no conflict of interest exists when a lawyer revises a will to disinherit a beneficiary whom the lawyer represents on an unrelated matter.

Jacob v. Barton, 877 So.2d 935 (Fla. Dist. Ct. App. 2004). Rules 1.2, 1.6. Topics: Evidence, A/C Privilege, Work Product. A trust beneficiary sought discovery of the trustees' attorneys' billing records. In deciding whether the attorney-client privilege and work product doctrine applied to the billing records, a court must decide whose interests the attorneys represent—the trustee's or the beneficiary's. According to the court, to the extent the attorneys' work concerns the trustee's dispute with the beneficiary, their client is the trustee. Since the record before the appellate court was limited, it could not determine whether the billing records contained privileged information. The appellate court therefore quashed the circuit court's order granting unlimited discovery of the billing records and directed it to determine whether any of the billing records would be protected.

Harvey E. Morse P.A. v. Clark, 890 So. 2d 496 (Fla. App. 2004). Rules 1.7, 1.10. Topics: Disqualification. Court held that law firm representing Clark, the trustee of a revocable living trust, had an unwaived concurrent conflict of interest because it simultaneously represented Harvey E. Morse, PA, in an unrelated matter, and Morse was adverse to Clark in this case. Morse was the assignee of intestate heirs of the estate in this case and its interest was to maximize assets in the probate estate of which it was a partial assignee at the expense of the revocable trust of which Clark was trustee. Therefore the law firm must be disqualified from representing Clark.

Eccles v. Nelson, 919 So. 2d 658 (Fla. App. 2006). Rules 3.7. Topics: Disqualification, Evidence. After a daughter offered the will of her mother for probate and sought appointment as PR, another relative contested the first will and offered a later will. The daughter moved to disqualify the lawyer representing the contestant on the ground that he

had prepared the later will under circumstances raising questions about her mother's capacity, undue influence and the genuineness of her mother's signature. Consequently he was a necessary witness and should not be allowed to advocate for the contestant. The court here affirmed the lower court's order disqualifying the lawyer.

Florida Bar v. Maurice, 955 So.2d 535 (Fla 2007). Rules 1.1, 1.7. Topics: Discipline. Court imposed a 90 day suspension on an estate planner and attorney for the heirs for violating Rules 1.1 & 1.7. First, she helped the decedent execute and record a quitclaim deed conveying her condo to her son and grandson, but reserving a life estate in decedent. Later, she helped decedent execute a will which purported to give the condo to the son and grandson and another, but required them to sell it to decedent's caretaker. When decedent died, attorney was hired by the heirs and, failing to advise heirs that the condo was not subject to probate because it had been transferred by the deed, she unnecessarily opened a probate proceeding to enable the caretaker to buy the condo. This violated her duty of competence and her opening of the probate, motivated by her desire to assist the caretaker, constituted an impermissible conflict under Rule 1.7.

Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So. 2d 182 (Fla. App. 2007). Rules 1.7. Topics: Malpractice. Court affirms a \$1 million malpractice judgment in case brought by personal representatives against lawyer for decedent based on lawyers' failure to disclose conflict which may have impacted their recommendation to decedent that he appoint JP Morgan to a fiduciary role, and their failure to fund a revocable living trust before decedent's death.

Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So. 2d 182 (Fla. App. 2007). Rules 1.1, 1.2. Topics: Malpractice. This case relied on Espinosa (discussed in the annotation to MR 1.1) to hold that the personal representative was entitled to sue lawyers for the decedent for failure to disclose conflict which may have impacted their recommendation to decedent that he appoint JP Morgan to a fiduciary role, and their failure to fund a revocable living trust before decedent's death.

Yang Enters. v. Georgalis, 988 So. 2d 1180 (Fla. App. 2008). Rules 1.7, 1.9. Topics: Disqualification. Plaintiffs in a trade secret case against a former employee sought to disqualify counsel for employee on the ground that another office of the employee's law firm had done estate planning work for plaintiffs and continued as their lawyer. Court rejected claim that plaintiffs were current clients of the estate planning firm and commented that they had no legal basis for disqualification as former clients. But even had there been such a basis for disqualification at the time the employee hired their former estate planning firm, by waiting five years before raising the conflict question, the plaintiffs had waived the issue.

Littell v. Law Firm of Trinkle, Moody, Swanson, Byrd and Colton, 345 Fed.Appx. 415, 2009 WL 2749666 (11th Cir. 2009). Rules 1.1. Topics: Malpractice. Court affirms summary judgment for defendant law firm in this legal malpractice action. A husband and wife established an amendable, revocable trust for their joint lives. After the husband died, his wife amended the trust numerous times and made Littell, the plaintiff here, the residual beneficiary. When she died, the beneficiaries of the trust as of the time of the husband's death challenged the amendments made by the wife on the ground that the trust only allowed amendment by the spouses jointly and the probate court so held. Little then brought this malpractice case against the lawyers who drafted the estate plan during the

joint lives (contending that they were negligent in failing to draft a trust amendable by the survivor) and the estate planner that assisted in the amendments by the survivor (on the theory that they were negligent in failing to advise that the trust was no longer amendable). The court here affirmed summary judgment in favor of both law firms. Since the plaintiff was not a named beneficiary under the jointly executed trust, he had no standing to sue the first law firm. Since the trust did (contrary to probate court interpretation) allow amendment by the survivor, the second law firm was not negligent.

Kaplan v. Divosta Homes, L.P., 20 So. 3d 459 (Fla. App. 2009). Rules 1.7. Topics: Disqualification. Court rejects attempt by personal injury plaintiff Kaplan to disqualify defendant's law firm based on an alleged concurrent conflict of interest. The fact that the law firm represents the personal representative for an estate of which Kaplan is a primary beneficiary does not establish an attorney/client relationship between the firm and Kaplan as beneficiary and does not create a conflict justifying disqualification.

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

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

Witte v. Witte, 126 So.3d 1076 (Fla. App. 2012). Rules 1.6. Topics: Evidence, A/C Privilege. This is a marital dissolution case involving an elderly couple, which has relevance for communications with elderly clients. Husband asserted that wife could not claim attorney client privilege for communications with her attorney because her daughter and son-in-law were present during those communications. The court remanded, finding that the wife was elderly, had several cognitive impairments and needed her daughter and son-in-law to help her communicate with the lawyer. She also needed the daughter and son-in-law's help in translating several of her financial documents, which were written in Hebrew. The court remanded for a determination of whether the communications "were intended to remain confidential as to other third parties, and whether the disclosure to

[them], within the factual circumstances presented by this case, was reasonably necessary for the transmission of the communications.”

Brookman v. Davidson, 136 So.3d 1276 (Fla. App. 2014). Rules 1.1. Topics: Malpractice.

In a case of first impression, the Florida court of appeals allowed a successor personal representative of an estate to bring a malpractice action against the attorney for the predecessor personal representative. The court relied on the state statute that gave a successor personal representative the same power and duty as the original personal representative.

Dingle v. Dellinger, 134 So.3d 484 (Fla. App. 2014). Rules 1.1. Topics: Malpractice.

Grantees of quitclaim deed that was later invalidated could sue the attorney who prepared the deed. The court noted that attorneys who represent a client in a property transfer are generally not liable to nonclients, because the transactions are typically two-sided, with different interests held by the parties. However, in this case the transaction was one-sided and the parties’ interests did not conflict.

Saadeh v. Connors, 166 So.3d 959 (Fla. App. 2015). Rules 1.1. Topics: Malpractice, guardianship. Rule 1.1. Topics: Malpractice.

Elderly man began giving financial assistance to younger woman, alarming his children. They hired an attorney to seek a guardian for the father. A professional guardian was appointed as a temporary guardian and the lawyer represented the guardian. The lawyer and the court appointed lawyer for the elderly man submitted an agreed order that the man would execute an irrevocable trust to settle the guardianship, even though there were findings he was in fact competent. Ultimately, the guardianship was dismissed because of findings he was competent, and he then successfully sought to set aside the trust. He then sued those who brought the guardianship action, including the lawyer, for malpractice. The lawyer responded that she owed no duty to him as he was not her client and the lower court agreed, dismissing the case. The Florida Bar Real Property Probate and Trust Law section filed an amicus brief noting that lack of privity does not foreclose a duty of care to a third party who was intended to benefit from the lawyer’s services. Whether there was a breach of a duty “remained to be determined” but the court held that “the ward in situations as this, is both the primary *and* intended beneficiary of *his* estate. To tolerate anything less would be nonsensical and would strip the ward of the dignity to which the ward is wholly entitled.” The lawyer for the guardian therefore owed a duty to the alleged incapacitated person, and the case was remanded to determine whether the duty was breached.

Georgia:

Riser v. Livsey, 227 S.E.2d 88 (Ga. Ct. App. 1976). Rules 1.1. Topics: Malpractice. In this action for legal malpractice, the court assumed that a beneficiary under a will could bring an action for legal malpractice against the attorney-drafter; finding that the action sounded in contract, the court held that the action in question was barred by the applicable contract statute of limitations.

Blumenfeld v. Borenstein, 247 Ga. 406; 276 S.E.2d 607 (1981). Rules 1.7, 1.8, 1.10.

Topics: Disqualification. During the trial of a will contest, an attorney for the contestant was married to an attorney with the firm representing the personal representative and defending against the will contest. The court of appeals held that the husband and his law firm should have been disqualified, even though husband did not work on the will contest case and there was no evidence that confidences had been shared between the married couple. The supreme court reversed: “A per se rule of disqualification on the sole ground that an attorney's spouse is a member of a firm representing an opposing party would be not only unfair to the lawyers so disqualified and to their clients but would also have a significant detrimental effect upon the legal profession.” Note that disqualification based on familial status is now covered by MRPC 1.7, and this conflict of interest is “ordinarily...not imputed to members of firms with whom the lawyers are associated.” MRPC 1.7, cmt [11].

Estate of Peterson, 255 Ga. App. 303, 565 S.E.2d 524 (2002). Rules 1.7. Topics: Disqualification. Attorney who drafted will under which he was named as executor was disqualified from acting because, although he had informed testator orally of potential conflict of interest, he failed to either obtain client’s consent in writing or to give client written notice as required by applicable Georgia ethics opinion.

Bayshore Ford Truck Sales, Inc. v. Ford Motor Co, 380 F.3d 1331 (11th Cir. 2004)(Georgia Rules). Rules 1.6, 1.7, 1.9, 1.10. Topics: Disqualification. Law firm would not be disqualified for conflict of interest that arose as a result of a lateral hire. Firm had been counsel for Ford for years when a lateral hire brought with him a Ford dealer and the owner as clients. After joining firm, lateral hire and other firm lawyers did corporate and estate planning work for the dealer. When the dealer sued Ford, firm was hired to defend, and dealer refused to waive the conflict, the firm withdrew from his representation, continuing with Ford. Satisfied that firm had withdrawn promptly when it became clear the conflict would not be waived, and that no confidential information of dealer had been transmitted to those defending Ford, and because trial court had imposed a screen between former dealer attorneys and Ford attorneys in the firm, court denied motion to disqualify firm.

Rhone v. Bolden, 608 S.E.2d 22 (Ga. Ct. App. 2004). Rules 1.1, 1.2. Topics: Malpractice, Wrongful Death.

Attorneys representing decedent’s estate and attorneys who represented decedent’s heirs in prosecuting wrongful death action have no fiduciary duty to an heir not included in the wrongful death action and, therefore, are not liable for legal malpractice in an action brought by the decedent’s father who was not included in the settlement of the wrongful death claim. The decedent’s father was clearly not the client of the attorneys prosecuting the wrongful death action. With respect to the duty of the lawyers for the administrator of the estate, the court observed:

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

Rowen v. Estate of Hughley, 272 Ga. App. 55, 611 S.E.2d 735 (2005). Rules 1.5. This was a fee dispute over representation of children claiming a share of their deceased father’s intestate estate. The attorney had entered into a 40% contingency fee agreement with the children’s mother and

the agreement would have yielded a fee of something like \$79,000. But the fee required court approval and here the court affirmed a reduction of the fee to \$15,000 as a reasonable fee.

Hawaii:

Blair v. Ing, 21 P. 3d 452 (Haw. 2001). Rules 1.1. Topics: Malpractice. The beneficiaries of a trust brought legal malpractice action against the attorney who created the trust, alleging that attorney's negligence in drafting the trust caused adverse tax consequences that diminished their inheritance. In a case of first impression for that state, the Hawaii Supreme Court held:

Non-client beneficiaries have standing in legal malpractice action under both contract and negligence theories. In a testator-attorney relationship, the attorney is retained for the specific benefit of the named beneficiaries, thus the attorney owes the non-client beneficiaries a duty of care; 2) even where the testamentary instrument is valid on its face, extrinsic evidence will be allowed in a legal malpractice action to prove the testator's true intent; and 3) the statute of limitations for legal malpractice arising in the estate-planning context does not accrue at the time of drafting, but instead only begins to run when the plaintiff knew or reasonably should have known of the attorney's negligence.

Young v. Van Buren, 130 Haw. 349, 310 P.3d 1050 (Ct. App. 2010). Rules 1.1, 1.14. Topics: Malpractice. Court rejected malpractice claims by son who claimed attorney who drafted trust amendments for his mother had negligently failed to ascertain that the client lacked competence to execute the documents and/or was being unduly influenced. The son was not the intended beneficiary of the trust amendments and therefore was owed no duty by the lawyer for his mother.

Idaho:

Allen v. Stoker, 61 P.3d 622, 624 (Idaho Ct. App. 2002). Rules 1.2. Topics: Malpractice. Beneficiary of a fiduciary estate was an incidental beneficiary with regard to the employment agreement between the fiduciary and the fiduciary's attorney. Thus, the attorney owed no duty of care to the beneficiary.

Harrigfeld v. Hancock, 90 P.3d 884, 888 (Idaho 2004). Rules 1.1. Topics: Malpractice. The Idaho Supreme Court adopted the rule set forth above in *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378 (Fla. 1993), holding that a testator owed limited duties to the testator's beneficiaries. The attorney owed a duty to include beneficiaries as requested by the testator and to have the instruments properly executed. The attorney did not owe any duty to individuals who believed they did not receive their fair share of the testator's estate.

Soignier v. Fletcher, 151 Idaho 322, 325, 256 P.3d 730, 733 (2011). Rules 1.1. Topics: Malpractice. The Idaho Supreme Court reaffirmed the rule adopted in *Harrigfeld*. Testator's will left a named beneficiary "[a]ll beneficial interests that I have in any trusts," even though testator's interest in his mother's trust had recently been distributed to him and he had no trust interests at the time his will was prepared and executed. "Attorneys do not have to postulate whether a testator intended to do something other than what is expressed in the will...[and] attorneys have no ongoing duty to monitor the legal status of

the property mentioned in a testamentary instrument.”

Illinois:

In re Estate of Gleno, 200 N.E.2d 65, 67 (Ill. App. 1964) (no discussion of confidentiality). **Rules 1.6.** “We believe it was clearly the duty of the attorney ... to bring these proceedings for removal when there existed reasonable grounds for suspicion as to the executor’s management of the estate.”

In re Estate of Minsky, 376 N.E.2d 647, 650 (Ill. App. 1978) (no discussion of confidentiality). **Rules 1.6.** “As an attorney and officer of the court, the lawyer was under an obligation to inform the court of any suspicions of fraud or wrongdoing on the part of the executor.”

In re Estate of Knoes, 448 N.E.2d 935, 940 (Ill. App. 1983). **Rules 1.1, 1.2.** The attorney for the administrator, being “one who had a fiduciary duty to see that the estate was distributed to all who had an interest in it, was obligated to be a good deal more solicitous of the rights of possible heirs.”

Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984). **Rules 1.1. Topics: Malpractice.** The Supreme Court of Illinois here held that the beneficiaries under an allegedly negligently drafted will could sue the drafter directly in legal malpractice both under traditional negligence theory and third-party beneficiary/breach of contract theory given the plaintiffs’ allegations that, among other things, the testators’ purpose in employing the attorney was to draft the will not only for the benefit of the testators (plaintiffs’ uncle and aunt) but for the benefit of the intended contingent beneficiaries.

In re Marriage of Thornton, 138 Ill. App. 3d 906; 486 N.E.2d 1288 (1985). **Rules 1.12. Topics: Disqualification.** When a former judge, who had presided over an earlier stage of a divorce proceeding, joins the firm representing the husband, wife moves to disqualify the firm. Although Illinois had not yet adopted MRPC 1.12, the court looks to that rule and denies the motion on the ground that the firm had adequately established a screen to exclude the former judge from any involvement in the case.

In re Estate of Halas, 512 N.E.2d 1276, 1280 (Ill. App. 1987), appeal denied, 522 N.E.2d 1244 (Ill. 1988) (attorney’s fee dispute). **Rules 1.1, 1.2, 1.5.** Both parties conceded at argument that, “[t]he attorney for the executor, therefore, must act with due care and protect the interests of the beneficiaries.”

McLane v. Russell, 546 N.E.2d 499 (Ill. 1989). **Rules 1.1. Topics: Malpractice.** This case holds that the beneficiaries under the decedent’s will were intended beneficiaries of the decedent’s attorney-client relationship with the will’s drafter and could therefore bring an action for legal malpractice.

Neal v. Baker, 551 N.E.2d 704 (Ill. App. 1990), appeal denied, 555 N.E.2d 378 (Ill. 1990). **Rules 1.1, 1.2. Topics: Malpractice.** This case was an action brought by the beneficiary of a decedent’s estate against the lawyer for the personal representative for alleged negligence in advising the personal representative. In it, the court stated that the

lawyer does not owe a duty to a nonclient unless the nonclient was an intended third-party beneficiary of the contractual relationship between the lawyer and the personal representative. “Plaintiff’s mere assertion that the attorney was hired with the intent to directly benefit plaintiff is not sufficient to state a cause of action. The *intent* plaintiff referred to in her complaint was nothing more than the general intent implicit in an executor hiring an attorney to assist in administering an estate. We hold no duty extends to a beneficiary under these circumstances.” *Id.* at 706.

***Rutkoski v. Hollis*, 600 N.E.2d 1284 (Ill. App. 1992). Rules 1.1, 1.2. Topics: Malpractice.** In this case the decedent’s surviving spouse, as executor under her husband’s will, sued the attorney who had represented her deceased husband as executor of a third-party’s estate (of which the husband was also a beneficiary). The wife contended that her husband, as a beneficiary, had a claim against the attorney for providing negligent tax advice in the administration of the estate. The appellate court found that husband as executor had a claim against the lawyer but affirmed the trial court’s dismissal of the wife’s action on behalf of her husband as beneficiary.

***Jewish Hosp. v. Boatmen’s Nat’l Bank*, 633 N.E.2d 1267 (Ill. App. 1994), cert. denied, 642 N.E.2d 1282 (Ill. 1994). Rules 1.1, 1.2. Topics: Malpractice.** In this case the beneficiaries of the testator’s will sued the attorney who allegedly negligently prepared the will and who represented the personal representative of the testator’s estate and allegedly negligently prepared the federal estate tax return. Applying a third-party beneficiary/breach of contract theory, the Illinois appellate court held that the attorney owed the beneficiaries a duty in preparing the will but, as counsel for the estate representative, owed no duty to the beneficiaries in handling the probate administration. The court observed:

Our supreme court has strongly embraced the concept that third-party-beneficiary status should be easier to establish when the scope of the attorney’s representation involves matters that are non-adversarial, such as in the drafting of a will, rather than when the scope of the representation involves matters that are adversarial...Often, the estate’s adversary is a beneficiary of the estate who is contesting the will or making a claim against the estate or petitioning to have the executor removed or held liable for mismanagement of the estate. An attorney representing an estate must give his first and only allegiance to the estate, in the event that such an adversarial situation arises. Even though beneficiaries of a decedent’s estate are intended to benefit from the estate, an attorney for an estate cannot be held to a duty to a beneficiary of an estate, due to the potentially adversarial relationship between the estate’s interest in administering the estate and the interests of the beneficiaries of the estate. 633 N.E.2d at 1277-1278.

***Cripe v. Leiter*, 703 N.E.2d 100 (Ill. 1998). Rules 1.5.** The court here concluded that the Illinois Consumer Fraud Act did not apply to regulate the conduct of lawyers in representing clients. The matter involved a fee dispute brought on behalf of a trust beneficiary challenging the fees of the lawyer for the trustee.

***In re Estate of Pfoertner*, 700 N.E.2d 438 (Ill. App. 1998). Rules 1.5.** An attorney filed a successful will contest on behalf of some, but not all, of the intestate heirs of a decedent. The attorney moved for an order assessing his fees and costs against each heir’s intestate share of the estate to the extent such heir’s interest exceeded what the heir would have

received under the challenged will. The appellate court affirmed the trial court's authority and broad discretion to award fees and costs pursuant to the common fund doctrine (described as an equitable exception to the "American Rule" that each party to litigation must bear its own attorneys' fees). The appellate court nevertheless remanded the case to the trial court to make a *quantum meruit* award.

Gagliardo v. Caffrey, 800 N.E.2d 489 (Ill. App. 2003). Rules 1.2, 1.9, 1.13. Topics: Disqualification. An attorney, who formerly represented an estate for a limited time period, was disqualified from representing the executor individually in beneficiary's action against her. The court noted that where the estate beneficiaries challenge the executor, the attorney for the estate's executor does not have an attorney-client relationship with the beneficiaries. In this case, however, the sole beneficiary never challenged the executor's administration of the estate. Therefore, the court concluded that, for the time the attorney represented the estate, he represented the sole beneficiary thereby precluding him from representing the executor individually in that beneficiary's action against her.

Estate of Klehm, 363 Ill. App. 3d 373; 842 N.E.2d 1177 (2006). Rules 1.2, 1.9. Topics: Disqualification. In a citation proceeding to recover estate assets from certain relatives, the relatives moved to disqualify counsel for the executor on the ground that the law firm had previously represented them. The trial court granted the motion but the appeals court reversed. Insofar as the lawyers had represented the relatives, for a time, as co-executors, it did not represent them personally and so this did not establish the requisite attorney-client relationship. Insofar as the firm did represent the relatives personally as to certain real estate transactions and estate planning, the relatives had failed to show that these services were substantially related to the current action. Finally, even if it were, the relatives had waived their right to complain of the potential conflict by waiting four years to bring the motion to disqualify.

Estate of Lis v. Kwiatt & Rueben, LTD, 365 Ill. App. 3d 1; 847 N.E.2d 879 (2006). Rules 1.1, 1.2. This was an action to surcharge lawyers hired by the executor of an estate for failing to secure for the estate the proceeds of a profit-sharing plan the decedent had with his employer. The plan was governed by ERISA and the proceeds ultimately went to the person named under the plan documents. The court here affirms summary judgment in favor of the lawyers on the ground that they owed no duty to the estate heirs.

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

In re Cutright, 233 Ill. 2d 474 (2009). Rules 1.3, 1.4, 1.7. Topics: Discipline. This is a disciplinary case in which an attorney was suspended for two years, in part for failing to act diligently in closing an estate (which took almost 20 years) and failing adequately to inform his client about the status of the matter, in violation of Rules 1.3 & 1.4, and in part for assisting an elderly client to forgive a \$312,900 debt owed to her by another of the attorney's clients. The attorney failed to disclose his conflict of interest in violation of

Rule 1.7.

Dunn v. Patterson, 395 Ill.App.3d 914, 919 N.E.2d 404 (2009). Rules 1.1, 1.2, 1.14. It is not against public policy or a violation of duties under Rule 1.2 in Illinois for a lawyer to draft trusts, durable health care powers or living wills which require the drafter's written consent (or that of a court) to any amendment. Out of concern that others might be taking advantage of elderly clients, the drafter refused to consent until he could be satisfied that his clients were making competent decisions. He was carrying out his clients instructions in the documents they had knowingly executed.

Fitch v. McDermott, Will and Emery, LLP, 401 Ill. App. 3d 1006, 929 N.E.2d 1167 (2010). Rules 1.7. Topics: Malpractice. Son of decedent alleged that law firm committed malpractice in failing to advise him of its conflict of interest in simultaneously representing both him and the co-trustees of the trust set up by his mother when he wished to buy a farm held in the trust. The court held that because firm was representing him for purposes of prenuptial and estate planning matters, and was not advising him about purchase of the farm, it had no conflict.

Ball v. Kotter, 746 F. Supp. 2d 940 (N.D. Ill. 2010)(Ill. Law). Rules 1.7. Topics: Malpractice. Lawyer represented client in purchase of two condominiums. Title to one unit was placed in joint tenancy with rights of survivorship with client's ex-wife and "companion at the time of his death" and title to the other was put in a trust for the benefit of the ex-wife. Ex-wife acted as real estate agent for the purchases. When client died, administrators of his estate sued the lawyer for malpractice, claiming that lawyer was representing the ex-wife simultaneously in the transactions and therefore had a conflict, and that the lawyer failed to communicate to client the consequences of how the property was titled and the fact that the transaction was "fraudulent" because the ex-wife was both real estate agent and donee. Court held that malpractice was not established because plaintiffs offered no expert testimony on the effect of the conflict of interest or the level of communication that would have met the professional standard.

Baez v. Rosenberg, 409 Ill.App.3d 525, 949 N.E.2d 250 (Ill. 2011). Rules 1.5, 1.7. Topics: Wrongful Death. Attorney was retained by a special administrator to prosecute a wrongful death claim on behalf of parents of decedent. But a woman made a claim that she was pregnant with decedent's child, and once child was born, DNA established paternity. Parents continued to claim portion of suit proceeds based on their dependency on the decedent. Court held: Illinois wrongful death statute identifies claimants based on intestacy, and the child was the sole intestate heir of decedent. Attorney for parents of decedent was not entitled to fees because once the child was confirmed as the heir, attorney continued to argue that the child was not entitled to recovery and the parents qualified as wrongful death claimants. "An attorney retained by a special administrator of an estate to prosecute a wrongful death action for the benefit of the next of kin owes a fiduciary duty to those beneficiaries." The attorney's arguments breached that fiduciary duty to the statutory beneficiary of the wrongful death action, the child.

Scanlon v. Eisenberg, 913 F. Supp. 2d 591 (N.D. Ill. 2012). Rules 1.7. Topics: Malpractice. Plaintiff was beneficiary of discretionary trusts set up by her father and

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

In re W.R., 2012 IL App (3d) 110179; 966 N.E.2d 1139 (2012). Rules 1.11, 1.12. Topics: Disqualification. Attorney who had mediated a custody dispute between a father and mother was later (a) appointed to represent the father in a neglect proceeding and (b) petitioned for custody on behalf of the father. When it came to light that the attorney had mediated the former dispute, the court disqualified the lawyer and ordered a new trial. In the process, the court looked to MRPC 1.11, cmt [10] for guidance on what is considered the same "matter" under MRPC 1.12 and held that the matters were sufficiently the same to be covered. That comment states: "a 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." The court also ruled that a three year gap between the mediation and the later proceedings did not render the "matter" different.

In Re Karavidas, 999 NE 2d 296 (Ill 2013). Rules 1.1, 1.15, 8.4. Topics: Discipline. An attorney with no experience in trusts and estates was appointed as executor and trustee under his father's Will. In that role, he failed to fund trusts as directed, borrowed funds from the estate for his personal use (and later reimbursed the estate), and made unauthorized distributions to his mother, his sister and himself, all in violation of his fiduciary duties. The court held that his breach of fiduciary duties could not be the basis for professional discipline. His misuse of funds could not be considered conversion in violation of RPC 1.15, because he was not in possession of another's funds in the role of attorney. The court acknowledged that acts involving breach of fiduciary duty could violate RPC 8.4, if such acts were criminal (Ill RPC 8.4(a)(3)), such acts involved dishonesty, fraud, deceit or misrepresentation (Ill RPC 8.4(a)(4)), or such acts were prejudicial to the administration of justice (Ill RPC 8.4(a)(5)). This attorney was charged with violating Ill RPC 8.4(a)(4), but the hearing officer found no intent to deceive or defraud, and Ill RPC 8.4(a)(5), but the court held that in breaching his fiduciary duty, he was not acting as attorney and he was not involved in the judicial process. The charges against the attorney were dismissed. A dissenting judge disagreed with the majority's reading of Ill. Supreme court rule 770, which states, "Conduct of attorneys which violates the [RPCs] or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court." (emphasis added). The majority held that a violation of the RPCs was necessary to discipline a lawyer, but the dissent's position was that Rule 770 presented an independent ground for discipline. Note that at the time, Illinois' enumeration of the relevant subsections of Rule 8.4 differed from those found in the Model Rules.

Estate of Zagaria, 997 NE 2d 913 (Ill. App. 2013). Rules 1.5. Attorneys were hired by sister to open estate of absentee for her missing brother. The estate was opened, and in the

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

Estate of Powell v. John C. Wunsch P.C., 989 NE 2d 627 (Ill. App. 2013). Rules 1.1. Topics: Malpractice. Lawyer was hired by wife of decedent to pursue wrongful death claim. The statutory beneficiaries of the claim were the wife, and decedent's son and daughter. Lawyer was later sued by guardian of son, who was disabled, for not protecting the son's share of the settlement. Lawyer argued son was not a client but court held that lawyer owed a duty to all statutory beneficiaries in a wrongful death action.

Estate of DeMarzo, 2015 Il App (1st) 141766. Rule 1.8. Topic: Gift to Lawyer. Testator left bulk of her estate to her tenant/boyfriend/occasional lawyer. Brother, sole intestate heir, sued the lawyer beneficiary, claiming that he had drafted the will leaving him the bulk of the estate. The court held that there was no evidence that the lawyer wrote the will or unduly influenced the testator.

Indiana:

In re Matter of Deardorff, 426 N.E.2d 689 (Ind. 1981). Rules 1.1, 4.1. Topics: Discipline. The lawyer in this case was suspended for one year for lacking the skill to represent clients in an action involving the joint will of their father and stepmother and for misleading them in connection with the representation.

Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988). Rules 1.1. Topics: Malpractice. The Supreme Court of Indiana here held that an action will lie by a beneficiary under an allegedly negligently drafted will against the attorney-drafter based on a known third-party beneficiary/breach of contract theory.

Hermann v. Frey, 537 N.E.2d 529 (Ind. Ct. App. 1989). Rules 1.1, 1.2. Topics: Malpractice. The court here held that decedent's surviving spouse and sole heir at law had standing to pursue an action for legal malpractice against the attorney handling the estate where the surviving spouse, as personal representative, had retained the attorney and was therefore entitled to rely on the attorney's advice with respect to her personal cause of action for wrongful death.

In re Matter of Noel, 622 N.E.2d 154 (Ind. 1993). Rules 1.1, 1.3, 1.4. Topics: Discipline. A lawyer was suspended from practice for one year for multiple offenses, which included failures to provide services to the executors of an estate, to close the estate, to file an accounting, and to provide the executors and beneficiaries with information.

In re Matter of Gerard, 634 N.E.2d 51 (Ind. 1994). Rules 1.5, 4.1, 8.4. Topics: Discipline. A lawyer was here suspended for one year for enforcing a contingent fee agreement under which he received over \$150,000 with respect to largely administrative work in locating certificates of deposit that belonged to an elderly hospitalized client. The “enormity of Respondent’s fee in relation to the amount of service rendered is fraudulent.” 634 N.E.2d at 53.

Matter of Fletcher, 655 N.E.2d 58, 60 (Ind. 1995). Rules 8.5. Topics: Discipline. Indiana has jurisdiction to discipline a lawyer generally admitted in Illinois, but admitted only pro hac vice in Indiana.

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

Angleton v. Estate of Angleton, 671 N.E.2d 921 (Ind. Ct. App. 1996). Rules 1.9. Topics: Disqualification. Lawyer who acted as deputy prosecutor for state in a criminal case in which a man was convicted of killing his wife. The lawyer later entered an appearance to represent the personal representative of the wife’s estate in opposition to the convicted murderer’s attempt to secure the assets of his wife’s estate, including life insurance which named him as beneficiary. The murderer sought to disqualify the former prosecutor because of his conflict of interest, but the court refused to disqualify. In the estate proceeding “it was not necessary for [the former prosecutor] to prove [the murderer's] culpability for [his wife's] death or to delve into the facts of [the] criminal trial. Further, the interests of [the prosecutor]'s client in the criminal proceeding, the State, are in no way adverse to the interests of [that lawyer's] client in the probate proceedings, the Estate. Thus, [his] participation in [the] criminal conviction was not ‘substantially related’ to the constructive trustee proceedings.”

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

State ex rel. Indiana State Bar Ass'n v. United Financial Systems Corp., 926 N.E.2d 8 (Ind. 2010). Rules 5.5. Non-lawyer company marketing living trusts was held to be engaged in the unauthorized practice of law, where the attorneys involved were given information collected by nonlawyers, made one phone call to clients and prepared documents using the company’s forms, and had no other contact with clients.

In re Rocchio, 943 N.E.2d 797, 799 (Ind. 2011). Rules 5.5. Topics: Discipline. Lawyer was licensed in both Michigan and Indiana, but practiced in Michigan. At a time when he had listed his Indiana license as inactive, his website stated: “With my Indiana law license, I am capable of handling matters related to Indiana law, including real estate transactions, estate planning and probate administration, insurance compensation [sic] bodily injury and property damage claims, business and management law, and Social Security disability claims.” On a second website, Respondent stated: “I am licensed to practice law in both Indiana and Michigan.” Neither site indicated that Respondent's Indiana license was inactive. Indiana held that these misrepresentations were to be evaluated under the Indiana ethics code, since that is where they had their predominant effect. In Indiana, he was engaged in the unauthorized practice of law by means of these misrepresentations because he was holding himself out as authorized to practice there when he was not.

In re Rocchio, 943 N.E.2d 797, 799 (Ind. 2011). Rules 7.1, 8.5. Topics: Discipline. Lawyer was licensed in both Michigan and Indiana, but had his practice in Michigan. At a time when he had listed his Indiana license as inactive, his website stated he was authorized to practice in Indiana. Indiana held that these misrepresentations on a website about authority to practice in Indiana were to be evaluated under the Indiana ethics code, since that is where they had their predominant effect.

Ferguson v. O’Bryan, 996 NE2d 428 (Ind. Ct. App. 2013). Rules 1.1. Topics: Malpractice. Attorney was sued for malpractice by disappointed heirs. The testator had told the attorney she had a list of specific gifts for relatives, and that the residue would go to her alma mater. The attorney drafted the will referring to a separate list and leaving the residue to the school, and he gave her a form to use for the gifts. He told her it needed to be signed and dated but the form did not provide for a date and signature. After her death the form was found with a list of gifts but it was not signed. The court stated that drafting attorneys can be held liable to disappointed beneficiaries if they are known to the attorney, and held that even if attorney didn’t know who the intended beneficiaries were, he knew of their existence so he could be sued. A dissenting judge did not think knowledge of the testator’s intent to prepare a list was enough to trigger liability.

Iowa:

Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa 1979). Rules 1.8. Topics: Discipline. A lawyer was suspended for three years for drawing a will under which he was a major beneficiary. The court held that EC 5- 5 was not merely aspirational.

Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), cert. denied, 446 U.S. 946 (1980). Rules 1.8. Topics: Discipline. A lawyer was disbarred for preparing a will for a long-time client that left the client’s entire multi-million dollar estate to the scrivener.

Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987). Rules 1.1. Topics: Malpractice. The Supreme Court of Iowa here held that the lawyer drafting a will owes a duty of care to the direct, intended and specifically identifiable beneficiaries of the testator-client and that such a beneficiary has an action for legal malpractice against the attorney without regard to lack

of privity.

Committee on Professional Ethics v. Hutcheson, 504 N.W.2d 898 (Iowa 1993). Rules 1.1, 1.5, 1.15, 3.3, 4.1. Topics: Discipline. In this case a lawyer was suspended for one year for falsely certifying documents as a notary public, obtaining an ex parte order fixing fees in excess of amount allowed by statute, failing to disclose that two of decedent's children survived him, and mishandling the estate's assets.

Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995). Rules 1.1, 1.2. Topics: Malpractice. In this legal malpractice action the Supreme Court of Iowa found that an attorney retained to handle a decedent's estate had breached the duty of care he owed to the estate beneficiaries in negligently completing the estate's death tax returns and failing to recognize that the same parcel of land included on the return was being described three times and that some of the land included on the returns was subject to a life estate. The attorney also failed to thoroughly investigate and make reasonable efforts to verify the legal descriptions of the land set forth in the death tax returns after he was told that there was an error in the descriptions.

New Hope Methodist Church v. Lawler & Swanson, P.L.C., 791 N.W.2d 710 (Iowa Ct. App. 2010). Rules 1.1. Topics: Malpractice. Beneficiaries of a trust who are owed notice by the personal representative are owed no duty of care by the lawyer for the personal representative and thus lack standing to sue the lawyer for negligently failing to provide notice.

Iowa Supreme Court Atty. Disciplinary Bd. v. Casey, 761 N.W.2d 53 (Iowa 2009). Rules 1.3. Topics: Discipline. Lawyer was suspended for three months in part for neglecting a probate matter.

Iowa Supreme Court Atty. Disciplinary Bd. v. Curtis, 749 N.W.2d 694 (Iowa 2008). Rules 1.3. Topics: Discipline. Lawyer was suspended for one year in part for failing to probate an estate in a timely way.

Iowa Supreme Court Attorney Disciplinary Bd. v. Dunahoo, 730 N.W.2d 202 (Iowa 2007). Rules 1.3, 5.1. Topics: Discipline. Lawyer was publicly reprimanded in part for neglect of a probate matter. Lawyer had assigned the matter to a subordinate lawyer and had failed to adequately monitor what had happened to the estate, with the result that it was left open for four years unnecessarily.

Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (Iowa 2007). Rules 1.3, 3.3. Topics: Discipline. Lawyer was suspended for one year in part for failing, without good cause, to take action on an estate for more than 5 years, including a report with the probate court containing multiple misrepresentations about what had been done.

Iowa Supreme Court Atty. Disciplinary Bd. v. Joy, 728 N.W.2d 806 (Iowa 2007). Rules 1.3, 3.3. Topics: Discipline. Lawyer was suspended for 18 months in part for neglect of probate matters and misrepresentations made to the court in some of them.

Iowa Sup. Ct. Atty. Disciplinary Bd. v. Lesyshen, 712 N.W.2d 101 (Iowa 2006). Rules 1.3. Topics: Discipline. Lawyer is suspended for two years in part for neglect of a probate matter.

Iowa Supreme Court Atty. Disciplinary Bd. v. Marks, 759 N.W.2d 328 (Iowa 2009). Rules 1.3. Topics: Discipline. Lawyer is suspended for a month based on neglect of two probate matters and failure to close the estates in a timely fashion.

Iowa Supreme Court Atty. Disciplinary Bd. v. Moonen, 706 N.W.2d 391 (Iowa 2005). Rules 1.3, 1.8, 3.3. Topics: Discipline. Lawyer is suspended for 18 months for misconduct in relation to three trust and probate matters. In the first, he served as trustee and attorney for a trust that should have been wound up at the death of the settlor, his aunt, but he failed to distribute the trust assets in a timely manner, took loans from the trust estate in lieu of fees and tried to cover up the self-dealing, and made misrepresentations to the court during a proceeding to remove him as trustee. In two others, he neglected probate matters he was hired to process.

Iowa Supreme Court Atty. Disciplinary Bd. v. Schumacher, 723 N.W.2d 802 (Iowa 2006). Rules 1.3. Topics: Discipline. Lawyer is suspended for six months in part for neglect of a probate matter.

Iowa Supreme Court Atty. Disciplinary Bd. v. Box, 715 N.W.2d 758 (Iowa 2006). Rules 1.4, 4.2. Topics: Discipline. Lawyer is publicly reprimanded for communicating with and providing service to a client for whom he had previously provided estate planning services, after he had been notified by a subsequent estate planner that he now represented the client, without verifying the status of the intervening representation.

Iowa Supreme Court Atty. Disciplinary Bd. v. D'Angelo, 710 N.W.2d 226 (Iowa 2006). Rules 1.5, 3.3. Topics: Discipline. Lawyer is disbarred for six counts of misconduct, two of which involved probate work. In each of these two, he took fees without getting court authorization, as required. In one he made misrepresentations to the court about notice that should have been given, but wasn't.

Iowa Supreme Court Atty. Disciplinary Bd. v. Rickabaugh, 728 N.W.2d 375 (Iowa 2007). Rules 1.3, 3.3. Topics: Discipline. Lawyer was disbarred based on previous discipline and misconduct relating to three probate matters. In one of them he forged the PR's signature and filed an inventory that was not accurate; in another he misrepresented the reason why he could not close the estate; in all of them he failed to handle the estate matters diligently.

Iowa Supreme Court Atty. Disciplinary Bd. v. Rickabaugh, 728 N.W.2d 375 (Iowa 2007). Rules 1.3, 3.3. Topics: Discipline. Lawyer was disbarred based on misconduct relating to three probate matters. In one of them he forged the PR's signature and filed an inventory that was not yet accurate; in another he misrepresented the reason why he could not close

the estate; in all of them he failed to handle the estate matters diligently.

Iowa Supreme Court Atty. Disciplinary Bd. v. Van Beek, 757 N.W.2d 639 (Iowa 2008). Rules 3.3. Topics: Discipline. Prior to being suspended for a disability (alcoholism), lawyer engaged in multiple counts of misrepresentation in relation to probate matters. She substituted a new first page of a will before submitting it for probate and forged executors' names on various documents filed with the court. She was suspended for two years for this conduct.

Iowa Supreme Court Atty. Disciplinary Bd. v. Curtis, 749 N.W.2d 694 (Iowa 2008). Rules 1.1, 1.3, 1.4, 1.15. Topics: Discipline. Lawyer is suspended for one year for several counts of misconduct, one of them relating to work probating an estate in which, among other things, lawyer failed to communicate with the executor in violation of Rule 1.4.

Iowa Supreme Court Attorney Disciplinary Bd. v. Wagner, 768 N.W.2d 279 (Iowa 2009). Rules 1.3. Topics: Discipline. Attorney was suspended for six months in part for neglect of a probate matter which took three and a half years to close.

Sabin v. Ackerman, 846 NW2d 835 (Iowa 2014). Rules 1.1. Topics: Malpractice. The lawyer represented a married couple and prepared for them a lease of their farm with option to purchase to their son. Couple died, leaving their estate to their 3 children and naming the daughter as executor. The lawyer represented the daughter as executor. Son exercised the option to purchase from the estate and the lawyer handled the transaction. The lawyer did not advise the daughter that the option might be invalid. The daughter and the other son later sued the son who purchased the farm, challenging the validity of the option, settled the claim and then sued the lawyer, claiming that he should have advised the daughter about the option or advised her to seek independent counsel. The court held the lawyer had no duty to advise her as to her claims as beneficiary.

Iowa SCt Attorney Disciplinary Bd. V. Ouder Kirk, 845 NW2d 31 (Iowa 2014). Rules 1.2, 8.4. Topics: Discipline. Lawyer represented married couple for numerous real estate transactions. The husband killed someone over a land dispute and hid the body in a cistern. The lawyer represented the husband in the ensuing criminal case, in which the husband was claiming self-defense. The victim's widow filed a wrongful death action against the husband, which the lawyer also defended. The lawyer then assisted the couple in transferring millions of dollars of real estate into revocable trusts, with relatives serving as trustees. The couple asked about irrevocable trusts but the lawyer advised against it. The couple told the lawyer that they found a purchaser for the property, claiming they were bona fide when in fact the purchaser was an irrevocable trust for the benefit of the couple's sons. The lawyer drafted the transfer documents but did not participate in the closing and did not know of consideration passing. The husband was eventually convicted of manslaughter and the widow won a judgment in the wrongful death action, and successfully challenged the transfer of the property. The widow then filed a disciplinary complaint against the lawyer. The disciplinary commission found that the lawyer did not knowingly assist the clients in fraud, but a clause in the contract to sell to the irrevocable trust referring to the wrongful death suit made the fraudulent intent apparent so knowledge of the fraud was imputed. The supreme court overruled the commission's finding that the lawyer should have known of the fraud, because the court found the lawyer's explanation of his interpretation of that clause and his beliefs as to his clients' legitimate purposes, and

dismissed the ethical complaint against the lawyer.

Kansas:

In re Matter of Farmer, 747 P.2d 97 (Kan. 1987). Rules 1.5. It is improper for a lawyer to negotiate discounts on a client's medical expenses that were payable from personal injury settlement, charge the client for the full amount of the claims without disclosure, and retain the difference as an additional fee.

Pizel v. Zuspann, 795 P.2d 42 (Kan. 1990), modified on other grounds and reh'g denied, 803 P.2d 205, aff'd sub nom. Pizel v. Whalen, 845 P.2d 37 (Kan. 1993). Rules 1.1. Topics: Malpractice. The Supreme Court of Kansas here held that the lack of contractual privity between the potential beneficiaries under a testator's will and the attorney-drafter did not bar the beneficiaries' action for legal malpractice. The court applied the modified multifactor balancing test (first enunciated in *Biakanja v. Irving*, supra,) in coming to this conclusion.

In re Estate of Koch, 849 P.2d 977 (Kan. Ct. App. 1993). Rules 1.7. In this action two respected commentators on ethics testified on behalf of opposing parties. The court upheld a will that was drafted for the testator by a lawyer who also represented the testator and two of her sons in litigation involving a charitable foundation brought by her other two sons. Her will, which left the bulk of her estate to her four sons, included a no-contest clause and a provision that conditioned the gifts on the dismissal by a beneficiary of any litigation that was pending against her within 60 days following her death. The lawyer did not discuss the testator's will with her sons, including the two sons who were clients of the firm in the litigation. The sons were all unaware of the terms of their mother's will, which was prepared "without any evidence of extraneous considerations." *Id.* at 997. The court continued that:

The scrivener's representation of clients who may become beneficiaries of a will does not by itself result in a conflict of interest in the preparation of the will. Legal services must be available to the public in an economical, practical way, and looking for conflicts where none exist is not of benefit to the public or the bar. 849 P.2d at 998.

The court distinguished the instant case from *Haynes v. Nat'l State Bank*, discussed below, in which the lawyer who represented one of the testator's children drew a new will for the child's mother that drastically changed the disposition of her estate to favor that child over the descendants of a deceased child.

In re Matter of Jenkins, 877 P.2d 423 (Kan. 1994). Rules 1.1, 1.3, 1.4, 1.15. Topics: Discipline. A lawyer was suspended indefinitely for multiple offenses including failing to proceed with an estate administration proceeding, failing to communicate with the client and failing to respond to the client's request for the return of documents, accounting information and monies paid to the lawyer. The lawyer stipulated that his conduct violated MRPCs 1.1, 1.3, 1.4 and 1.15.

In re Flack, 272 Kan. 465; 33 P.3d 1281 (2001). Rules 1.4, 5.3, 5.5. Topics: Discipline.

Lawyer was suspended for two years for working with a company of nonlawyer “client service representatives” (ALMS) who solicited estate planning work “to be performed” by the lawyer. Lawyer knowingly authorized ALMS and the client service representatives to use his name to conduct client interviews; provide explanations of the different types of trusts, wills, powers of attorney and other legal documents; and obtain signatures and attorney fees prior to Respondent knowing the identity of the client. ALMS prepared and printed all the marketing material as well as the forms for the trust, will, and power of attorney documents in the name of the lawyer. The company’s employees were non-lawyers, and the attorney exercised little or no supervision over the company representatives. The attorney was assisting the non-lawyers in the authorized practice of law and sharing legal fees with the non-lawyers. The attorney also failed to maintain a direct relationship with the client and provide reasonably necessary explanations to the client.

In re Miller, 279 Kan. 912; 112 P.3d 169 (2005). Rule 1.1, 1.3. Topics: Discipline.

Lawyer was censured in part for neglecting a probate matter entrusted to him.

In re Myers, 280 Kan. 956; 127 P.3d 325 (2006). Rules 1.1, 1.2. Topics: Discipline.

Lawyer was censured for breaching his duty of competence in doing estate planning for his clients that failed to accomplish their objectives.

In re Alig, 285 Kan. 117, 169 P.3d 690 (Kan. 2007). Rules 1.1, 1.5. Topics: Discipline.

Lawyer was publicly censured for taking on a contested probate matter in an estate worth \$4 million that was beyond his competence: “Respondent's prior experience did not include significant experience in probate matters to take on this complicated, contested case. Respondent should have realized that he was not competent to handle a probate case of this complexity shortly after he undertook representing the administrator.” Evidence of his lack of competence was that he instructed the administrator to pay lawyer’s fees from the estate without judicial approval as was required by Kansas law. Lawyer stipulated to violating these rules and Rule 1.5 for charging an unreasonable fee.

In re Jones, 286 Kan. 544, 186 P.3d 746 (2008). Rules 1.1, 8.1, 8.4. Topics: Discipline.

While serving as an administrator of estate the attorney failed to act diligently to close the estate from 2000 (when it was ready to be distributed and closed) until 2006 (when a disciplinary complaint was filed). Thereafter, he failed to respond in a timely way to the disciplinary investigation. These actions were found to violate Rule 8.1 (failure to respond to lawful demand for information in disciplinary action) and 8.4 (prejudicial to administration of justice) and, having been the subject of prior attorney discipline, this attorney was suspended indefinitely. See next case.

In re Jones, 287 Kan. 112, 193 P.3d 893 (Kan. 2008). Rules 1.1, 1.3. Topics: Discipline.

Attorney was suspended for six months in part for failing to close an estate until a disciplinary complaint was filed, six years after all the assets had been collected, inventoried, and liquidated, and debts paid.

In re Rost, 289 Kan. 290; 211 P.3d 145 (Kan. 2009). Rules 5.5, 8.4, 8.5. Topics: Discipline.

Attorney retired as part of an agreement to resolve disciplinary matters. Thereafter, he continued to hold himself out as a lawyer and to practice by representing clients in two conservatorship matters, in violation of Rules 5.5 (unauthorized practice)

and 8.4 (prejudice to the administration of justice). Rejecting his claim that a retired lawyer was beyond the jurisdiction of the court and that what he was doing did not constitute the practice of law, the attorney was disbarred.

In re Shriver, 278 P.3d 964 (Kan. 2012). Rules 1.3, 3.3. Topics: Discipline. Attorney did estate planning for his parents and after they died, he was appointed as executor of the estate of his mother. He was suspended for six months for misconduct relating to this probate, including failure to act with “reasonable diligence and promptness” in handling the probate, which took six years to wind up.

Kentucky:

Cave v. O’Bryan, 2004 WL 869364 (Ky. Ct. App. 2004). Rules 1.1. Topics: Malpractice. An intended beneficiary of a will may maintain a malpractice action against the testator’s attorney alleging that the estate was not distributed according to the testator’s intent. After acknowledging that the “clear trend” among courts in other jurisdictions is to hold that estate beneficiaries are intended to benefit from the services rendered by attorneys to their testator-clients, the court held that an attorney owes a “duty of care to the direct, intended, and specifically identifiable beneficiaries of the estate planning client, notwithstanding a lack of privity.”

Kentucky Bar Ass’n v. Cameron, 262 S.W.3d 643 (Ky. 2008). Rules 1.15, 3.4, 8.1, 8.4. Topics: Discipline. Attorney was charged with two counts of misconduct, one of which involved his conduct while serving as a court-appointed conservator. In that role, he misappropriated at least \$13,490, double-charged the estate, and failed to file timely the required annual reports. He also failed to respond in a timely way to lawful disciplinary demands for information. He did not dispute the facts and was disbarred.

Branham v. Stewart, 307 S.W.3d 94, 101 (Ky. 2010). Rules 1.1. Topics: Malpractice. “[T]he attorney retained by an individual in the capacity as a minor’s next friend or guardian establishes an attorney-client relationship with the minor and owes the same professional duties to the minor that the attorney would owe to any other client.”

Kentucky Bar Ass’n v. Fernandez, 397 S.W.3d 383 (Ky. 2013). Rules 1.2, 1.5, 1.8, 3.3. Topics: Discipline. Experienced estate planner & probate attorney is suspended for a month (with another two months if she failed to complete ethics reeducation within a year) because she had charged excessive fees for a probate she was handling (\$175,000 rather than the maximum \$87,000 to which she was entitled) in violation of Rule 1.5, had charged fees for related estates to the wrong estate in violation of Rule 1.2, had accepted compensation for representing one estate from someone other than the client in violation of Rule 1.8(f); and because she had misrepresented the amount of her fees to the court in violation of Rule 3.3.

Pete v. Anderson, 413 SW 3d 291 (Ky. 2013). Rules 1.1. Topics: Malpractice. Attorney was hired by surviving spouse to pursue wrongful death action for death of husband. Husband was survived by spouse and two minor children. Case was dismissed and surviving spouse missed the deadline to sue for malpractice, so the two minor children filed the malpractice action. Attorney claimed that the children were not his clients because the

proper party in a wrongful death action is the personal representative. Court discussed the history of the wrongful death statute and held that because the real parties in interest were the beneficiaries, and lawyer owed a duty to them, the minor children could maintain the suit. A dissent argued that allowing statutory beneficiaries to sue for malpractice could allow an estate beneficiary to sue the estate personal representative's attorney.

Kentucky Bar Ass'n v. Roberts, 431 SW3d 400 (2014). Rules 1.7. “Again, it is clear that representing the estate, the executor of the estate, and two of the heirs (one of whom was accused and eventually found guilty of killing the testator) creates a conflict of interest.... Roberts could not have reasonably believed that the representation would not be adversely affected when one of the clients is on trial for killing the testator and a negative outcome in that case would bar that client from taking under the will. No amount of consent and consultation allows waiver of this limit.”

Louisiana:

Woodfork v. Sanders, 248 So. 2d 419 (La. Ct. App. 1971), cert denied, 252 So. 2d 455 (La. 1971). Rules 1.1. Topics: Malpractice. In this case the court rejected an attorney-drafter's privity defense in a legal malpractice action brought by a disappointed beneficiary and applied an intended third-party beneficiary/breach of contract theory.

Succession of Killingsworth, 270 So. 2d 196 (La. Ct. App. 1972), aff'd in part and rev'd in part, 292 So. 2d 536 (La. 1973). Rules 1.1. Topics: Malpractice. In this case the court permitted a legal malpractice action by a beneficiary not in privity with the attorney who acted as the officiating notary for execution of a will, basing its decision on a state statute permitting damages arising from “every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it.”

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

Succession of Wallace, 574 So. 2d 348 (La. 1991). Rules 1.2, 1.7, 1.16. Topics: Discipline. This decision upholds a disciplinary rule previously issued by the court which allows a client to discharge his or her lawyer at any time for any reason. Under the separation of powers provided for in the Louisiana constitution, the court invalidated a statute that allowed an executor to discharge a lawyer designated in a will only for “just cause.” Citing numerous authorities the court stated that, “[I]t is universally held that when an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as an attorney of the executor, and not of the estate, and for his services the executor is personally responsible.” 574 So. 2d at 357.

In re Cline, 756 So. 2d 284 (La 2000). Rules 5.3. Topics: Discipline. Lawyer relied on his client to get her previous lawyer's signature on settlement checks and the client forged

the other lawyer's endorsement. Finding that this violated Rule 5.3, Cline was suspended for 6 months.

In re Hoffman, 883 So.2d 425 (La. 2004). Rules 1.7, 1.8. Topics: Discipline. An attorney represented three siblings in a will contest. The court held that the attorney had violated Rule 1.7(b) by failing to obtain the informed consent of each client to the representation. The attorney relied upon the daughter of one of his clients to prepare an affidavit of representation, which in turn the attorney's other clients signed without having the benefit of the advice of counsel. More importantly, the attorney's failure to appreciate the potential conflict between his clients led him to directly violate Rule 1.8(g) in the course of settling their claims. Instead of giving all three clients the opportunity to exercise their absolute right to control the settlement decision, the attorney, after obtaining only one client's consent, accepted a settlement proposal on behalf of all of his clients. The attorney then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of only one client and over the objection of another client. He was suspended for three months, but the suspension was deferred on conditions.

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

In re Cabibi, 922 So. 2d 490 (La. 2006). Rules 1.8. Topics: Discipline. Attorney's daughter, a notary employed by him, drafted and typed a codicil at a client's request that made a substantial bequest to the attorney, her father, and sent it to the client. She did this while her father was absent from the office and without his knowledge. The client handwrote the codicil, based on the typed language, executed it as a holograph, and returned it to the office. Upon his return to the office, the attorney reviewed the codicil and filed it. He did not view the testator as a client but as a long-time personal friend who he knew had made similar bequests (apparently not drafted by the attorney) in the past. When she died, the codicil was challenged and set aside because of the bequest to the attorney. In disciplinary proceedings, the disciplinary board recommended a three month suspension, but the supreme court concluded that discipline was inappropriate. Although a technical violation had occurred which attorney should have corrected when he discovered the codicil, given the long-time friendship between the attorney and the decedent and his limited interaction with her as an attorney, discipline was not imposed.

In re Cofield, 937 So.2d 330 (La. 2006). Rules 1.1, 1.4, 1.7, 1.8, 1.14, 1.15, 1.16, 2.1. Topics: Discipline. Attorney was charged with five counts of misconduct, "the most egregious misconduct" of which was committed in connection with a trust matter. After being hired to establish a trust for the client's "disabled and spendthrift" son who had received a substantial tort award when he was injured as a child, the attorney drafted and the son executed an irrevocable trust naming the attorney as the trustee (contrary to the mother's direction). Thereafter, the attorney failed to competently discharge his fiduciary obligations as trustee. He requested and obtained a loan from the son. When the client and

her son sued the lawyer, he then engaged in a scheme intended to frustrate their attempts to remove him as trustee. Respondent's actions violated Rules 1.1(a), 1.4, 1.7, 1.8, 1.14, 1.15(a), 1.16, 2.1, 2.2, 3.4(c), 4.2, 8.4(a), 8.4(c), and 8.4(d) of the Rules of Professional Conduct. The attorney was disbarred.

In re Tyrrell, 998 So.2d 83 (La. 2009). Rules 1.15, 8.4, 8.5. Topics: Discipline. This is a reciprocal disbarment, apparently based on the attorney's stipulation to disbarment in Delaware for misappropriating \$8,492 from an estate which he was representing. Summary disposition in Delaware report at *In re Tyrrell*, 957 A.2d 2 (Del. 2008).

In re Nalls, 998 So.2d 697 (La. 2009). Rules 1.1, 3.4, 4.1, 8.4. Topics: Discipline. Lawyer was suspended for a year after violating an earlier disciplinary probation by his conduct in a probate matter. After having opened a probate and had decedent's son appointed as administrator, he found decedent's will which named his brother as executor. Thereafter lawyer refused to turn the will over to the attorney for the named executor and misled the attorney as to the location of the will.

In re Crabson, 115 So. 3d 452 (La. 2013),. Rules 8.4, 8.5. Topics: Discipline. Louisiana lawyer was convicted of assault in a parking altercation in Florida. The Louisiana court held that the ethics rules of Florida would apply to evaluate the conduct.

In re Cortigene & Schwartz, 144 So. 3d 915, reh'g denied (La. 2014). Rules 5.5, 8.5. Topics: Discipline. Lawyer generally admitted in Texas and Pennsylvania, but not Louisiana, is found to have engaged in the unauthorized practice of law in Louisiana and is barred from applying for admission, either general or temporary (including pro hac vice) admission, in Louisiana for three years.

Maine:

In re Estate of Davis, 509 A.2d 1175 (Me. 1986). Rules 1.5. The practice of basing a lawyer's fee on a percentage of the estate being handled should carry little or no weight in determining a reasonable fee.

Estate of Keatinge v. Biddle, 789 A.2d 1271 (Me. 2002). Rules 1.2. Topics: Malpractice. The mere retention of counsel by the holder of a power of attorney does not by itself create an attorney-client relationship between the attorney and the grantor. In such a case, the attorney has an attorney-client relationship with the holder only.

Smith v. Brannan, 2002 WL 1974069 (Me. Super. 2002). Rules 4.1, 5.5. Topics: Malpractice. An out-of-state estate planning attorney argued that Maine's courts had no jurisdiction over her in a case where the complainant claimed that the lawyer had tortiously interfered with a devisee's expectancy interest. The attorney also argued that the plaintiff lacked standing. The Maine Superior Judicial Court held that Maine courts did have jurisdiction under Maine's long arm statute since: (1) the testator's will had specifically provided that it be interpreted under Maine law; (2) the testator had both tangible personal property and intangible property in Maine when he died in Maine and was a Maine resident; (3) the complainant's welfare as a widow residing in Maine is of state interest; (4) a Maine lawyer participated in the drafting of the amendments to the testator's estate plan in conjunction with the defendant; and (5) if the tort occurred as alleged, it would have

an effect on the welfare of a Maine resident and the administration of a Maine estate. Therefore, the court held, Maine has a legitimate interest in the subject matter, the defendant reasonably could have anticipated litigation in Maine, and the exercise of jurisdiction by Maine courts “comports with traditional notions of fair play and substantial justice.”

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

Maryland:

Attorney Grievance Comm’n of Maryland v. Myers, 490 A.2d 231 (Md. 1983). Rules 1.1, 1.4. Topics: Discipline. This decision came in a disciplinary case in which, in addition to other offenses, the lawyer prepared a will without an attestation clause and signature lines for the witnesses and failed to instruct the client properly regarding manner of execution. The court upheld a three-year suspension.

Walton v. Davy, 586 A.2d 760 (Md. 1991). Rules 1.9. In this case an attempt was made to exercise a right of election on behalf of a widow with respect to the estate of her husband, who predeceased her by only three months. Both left large estates and were both survived by children of prior marriages. The lawyer who had previously represented one of the deceased husband’s children in connection with his divorce and some other matters also represented the child as personal representative of the father’s estate. The court held that it was not a conflict of interest with the estate or with the child for the lawyer to have discussed with the surviving spouse her right to elect against her husband’s will.

Noble v. Bruce, 709 A.2d 1264 (Md. 1998). Rules 1.1. Topics: Malpractice. The Court of Appeals (Maryland’s highest court) held that a testamentary beneficiary, who is not a client of the drafting lawyer, may not maintain a malpractice action against the lawyer for allegedly providing negligent estate planning advice to the testator or negligently drafting the testator’s will in a manner which resulted in significant estate and inheritance taxes that could have been avoided, thus re-establishing the strict privity rule in Maryland.

Ferguson v. Cramer, 709 A.2d 1279 (Md. 1998). Rules 1.1, 1.2. Topics: Malpractice. In this case, decided contemporaneously by the Court of Appeals (Maryland’s highest court) with *Noble v. Bruce*, supra, discussed in the Annotations following the ACTEC Commentary on MRPC 1.1, the court held that the strict privity doctrine barred a suit by the estate’s beneficiaries for alleged negligence on the part of the attorney retained by the personal representative to advise the representative with respect to the administration of the estate.

Attorney Grievance Comm'n of Maryland v. Harris-Smith, 356 Md. 72; 737 A.2d 567 (1999). Rules 5.5, 8.5. Topics: Discipline. Harris-Smith was admitted in the District of Columbia, Virginia, and Pennsylvania, and the federal district court in Maryland, but she was not generally admitted in Maryland. She was found to have engaged in the unauthorized practice of law in Maryland while purporting to engage only in bankruptcy practice, and suspended for thirty days.

Attorney Grievance Com'n v. Lanocha, 392 Md. 234, 896 A.2d 996 (Md. 2006). Rules 1.8, 8.4. Topics: Discipline. Lawyer drafted will for client which left the bulk of the client's estate to lawyer's adult daughter after client refused lawyer's recommendation that she consult another lawyer to draft the will. Neither lawyer nor his daughter were related to the client and so court found this a clear violation of Rule 1.8(c) and 8.4(d). The lawyer was reprimanded, although 3 of the justices dissented and would have suspended the lawyer indefinitely.

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

Attorney Grievance Com'n of Maryland v. Goff, 399 Md. 1, 922 A.2d 554 (Md. 2007). Rules 1.1, 1.3, 1.15. Topics: Discipline. Attorney was suspended indefinitely for trust account violations, delay and incompetence in the handling of two probate estates. "[T]he combination of Respondent's lackadaisical handling of trust funds, his unreliable recordkeeping system, his failure to routinely back up his computer, and his lack of urgency in correcting the errors once discovered rise to the level of incompetent representation."

Attorney Grievance Com'n v. Whitehead, 405 Md. 240, 950 A.2d 798 (Md. 2008). Rules 1.15, 8.4. Topics: Discipline. Attorney was appointed conservator for an adult disabled male and in that capacity, borrowed \$600,000 of the estate assets to purchase a property in New York with a business partner, without prior court approval. The Court held that this self-dealing violated Rule 1.15 and 8.4(a), (c), and (d) and disbarred the lawyer.

Attorney Grievance Com. v. Kimmel, 405 Md. 647, 955 A.2d 269 (2008). Rules 5.5, 8.5. Topics: Discipline. Kimmel and his partner were disbarred in Maryland where they were not licensed and Kimmel was reciprocally suspended in Pennsylvania and censured in New York. In re Kimmel, 2009 Pa. LEXIS 1451 (2009); In re Kimmel, 872 NYS2d 922, 59 A.D. 3d 923 (2009).

Atty. Griev. Comm'n v. Kendrick, 403 Md. 489; 943 A.2d 1173 (2008). Rules 1.1, 1.3, 1.5. Topics: Discipline. Lawyer was suspended for mishandling an estate on which she was co-executor and attorney. She collected excess fees without required court approval and failed to file final accounts diligently. Her misconduct “was not due to greed or dishonesty, but rather due to obstinateness and incompetence in probate matters.” She was suspended until she made full restitution of assets and excess fees to the estate.

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

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

Attorney Grievance Commission of Maryland v. Coppola, 419 Md. 370; 19 A.3d 431 (2011). Rules 1.2, 3.3, 8.4. Topics: Discipline. At the behest of a client’s daughter, an attorney prepared estate planning documents for the mother who was in the hospital. He believed the documents were consistent with the intent the mother had expressed to him a few months before. He then took the documents to the hospital for execution but discovered the mother was unconscious and unlikely to recover. It was believed that the documents would save the estate \$10,000 in attorneys fees and the mother’s four children persuaded the attorney to allow one of them to execute the documents on the mother’s behalf, that is, to forge her signature. He allowed this and notarized the falsely-executed documents. Then he directed two of his employees to attest (falsely) that they had witnessed the client sign the will, and he notarized their attestations. Finally he filed a falsely executed and notarized deed with the county land office. The court held that in doing all this, the attorney had formed an attorney-client relationship not only with the mother, but with her four children because he had given them legal advice and tried to assist them in reducing the fees that their mother’s estate would need to pay. As a consequence, he violated MRPC 1.2(d) by assisting his clients to engage in a crime and also MRPC 8.4(b) and (c). He was disbarred.

Atty. Griev. Comm'n of Md. v. Zeiger, 428 Md. 546, 53.A.3d 332 (Ct. App. 2012). Rules 3.3, 4.1, 8.4. Topics: Discipline. Maryland lawyer’s father had divorced lawyer’s mother and married much younger woman. Lawyer assisted his mother in divorce, and became estranged from father. Father and new wife moved to West Virginia, where father died. Lawyer and siblings suspected there was a will favoring them and wanted to force the new wife to produce the will. Lawyer filed a probate action in West Virginia to force new wife to reveal the existence of the will. His plan did not succeed and new wife filed a bar complaint in Maryland against him. Court held that he did not violate 8.4 by these actions,

even though the probate pleadings he filed were incomplete and he took no steps to administer the estate other than to try to obtain the will.

Atty Grievance Comm'n of Md v. Hodes, 441 Md. 136 (Ct. App. Md. 2014). Rules 1.7, 1.15, 8.1 & 8.4. Topics: Discipline. The attorney represented an elderly woman. After she entered assisted living, he and staff at his firm took over management of her finances. He used his positions as her attorney-in-fact while she was alive to make self interested distributions to himself; after she died, as trustee of a foundation set up under her Will, he transferred funds to his separate financial consulting business contrary to the terms of the trust. He argued that he was not subject to discipline because his actions were taken in a “personal or non-legal capacity.” The court rejected this argument, on the ground that some of the misconduct occurred while his client was alive and he was still representing her; but also because his roles as attorney-in-fact and trustee arose from the attorney-client relationship, and his intentionally dishonest conduct was a violation of Rule 8.4. He was disbarred.

Massachusetts:

Connecticut Junior Republic v. Doherty, 478 N.E.2d 735 (Mass. App. Ct. 1985), review denied, 482 N.E.2d 328 (Mass. 1985). Rules 1.1. Topics: Malpractice. In this case the court assumed that the attorney-drafter of a defective will could be held liable to the disappointed beneficiary but found no liability on the facts of this case since the testator had ratified the attorney’s error.

Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994). Rules 1.1, 1.2. Topics: Malpractice. This case upholds the dismissal of a malpractice action brought by some of the beneficiaries of a trust against the lawyers for the trustees. The court was concerned that if a trustee’s lawyer owed a duty in tort or contract to the beneficiaries, “conflicting loyalties could impermissibly interfere with the attorney’s task of advising the trustee.” The court also noted that the disciplinary rules require the lawyer to preserve the secrets of a client.

In re Matter of Tobin, 628 N.E.2d 1273 (Mass. 1994). Rules 1.5, 3.3, 4.1, 8.4. Topics: Discipline. A lawyer was suspended for 18 months for fraudulently inducing a client unnecessarily to probate an estate, all of the assets of which passed to her as surviving joint tenant, for charging excessive fees based on bar association’s former fee schedule, and misrepresenting facts to probate court.

In the Matter of Wayne H. Eisenhower, 689 N.E.2d 783 (Mass. 1998). Rules 1.7, 1.8. Topics: Discipline. Lawyer was retained to draft revocable trust which named lawyer as trustee and contained a provision giving lawyer veto power over the naming of any successor trustee. These provisions were “highly unusual” and “solely for the benefit” of the lawyer. There was no evidence that lawyer had disclosed the conflict of interest to the client-settlor or that the client had affirmatively consented to it. Lawyer was suspended indefinitely.

In re Lupo, 447 Mass. 345, 851 N.E.2d 404 (2006). Rules 1.8, 8.4. Topics: Discipline. Lawyer was suspended indefinitely. In one count, which involved the attorney’s estate planning for his elderly aunt, he persuaded her to sell him her home on terms that were neither fair, reasonable or fully disclosed to her without recommending independent

counsel, in violation of Rules 1.8(a) and 8.4(c).

Estate of Southwick, 66 Mass.App.Ct. 740, 850 N.E.2d 604 (2006). Rules 1.8. In 1994, in accordance with testator's instructions, attorney drafted and helped testator execute a will that made a bequest to a charity and gave the residue to the drafting attorney. The attorney was not related to the testator and, at the time, Massachusetts had no equivalent of MR 1.8(c) but did have conflict of interest rules. In 1995, Massachusetts adopted a rule similar to MR 1.8(c). In 2000, the testator died leaving no heirs. The drafting attorney had himself appointed as executor and later sought distribution of the residuary bequest (\$751,000) to himself. The probate court, on its own initiative, concluded that the change in ethics rules imposed a duty on the drafter to notify his client of the change and, if he still wished to give the drafter the bequest, to obtain independent counsel to do this. The probate court "reported the question whether that breach of duty rises to such level as to invalidate the residuary bequest to the attorney and preclude approval of the first and final accounting." The appeals court found the procedure deficient and dismissed the question. "Absent a challenge by an adversary party, on the present record and the facts found here, we discern no basis for concluding that the testator did not make the bequest with full knowledge and intent. However, we are also unable to conclude that he did.... On the other hand, the alternative suggested by the judge, invalidating a residuary bequest and escheating the residue to the Commonwealth, risks operating in derogation of the expressed wishes of a competent testator."

In re Carnahan, 449 Mass. 1003, 864 N.E.2d 1183 (Mass. 2007). Rules 1.7. Topics: Discipline. At the request of client 1, lawyer visited an elderly, hospitalized accident victim (client 2) to whom client 1 owed money and, at the request of client 2, helped him revoke a power of attorney previously conferred on his wife and helped him execute a new power of attorney in favor of client 1 which empowered client 1 to forgive the debts he owed to client 2. At no time did lawyer explain to client 2 the conflict of interest in representing both clients 1 and 2 or obtain a waiver of that conflict. Lawyer was publicly reprimanded.

Spinnato v. Goldman, 67 F.Supp.3d 457 (D.Mass. 2014). Rules 1.1, 1.6, 4.1. Topics: Malpractice, evidence. The attorney represented an elderly woman who left her estate to Spinnato, a man she befriended, rather than her relatives in Texas with whom she had little contact. The attorney and Spinnato were co-executors of her estate. When she died, the attorney contacted the Texas relatives and told them a significant amount of assets were transferred to Spinnato by the deceased during her life and that the transfers were a result of Spinnato's undue influence. The attorney put them in touch with a Massachusetts lawyer and testified that the decedent lacked capacity and was subject to undue influence at the time the transfers were made. Spinnato settled with the relatives and sued the attorney. On a motion to dismiss, the court held that: (1) while decedent was alive, the attorney owed no duty to Spinnato and thus his failure to disclose concerns about undue influence to Spinnato during decedent's life was not actionable; (2) his testimony was protected by the absolute witness privilege and not actionable; (3) one co-executor does not owe duties to the other co-executor; (4) the attorney owed duties to Spinnato as heir, so those claims were not dismissed; (5) Spinnato's allegations that the attorney assured him during decedent's life that the estate plan and transfers were enforceable (thus keeping him from taking steps to ensure enforceability), and that those were false misrepresentations, were not dismissed; (6)

Spinnato's allegations that the attorney's assurances after decedent's death that he would probate the will as written were false misrepresentations, were not dismissed; (7) Spinnato's claim of tortious interference with expectancy, based on alleged facts that attorney drafted the estate plan despite his concerns about undue influence, were not dismissed.

Brissette v. Ryan, 88 Mass. App. Ct. 606 (2015). Rule 1.1. Topics: Malpractice. Lawyer's advice to client to transfer home to children for Medicaid planning was faulty in that he failed to advise her to keep a life estate in the property. She obtained a malpractice verdict against him from the jury, reversed by trial court judge in judgment n.o.v. because the children stated they would allow the mother to remain. The judgment n.o.v. was reversed because the lack of a life estate was sufficient damage despite the children's assurances.

Michigan:

In re Karabatian's Estate, 170 N.W.2d 166 (Mich. Ct. App. 1969). Rules 1.8. A bequest to a lawyer who drew the will of an unrelated client was held to be void. Accordingly, the lawyer lacked standing to contest a later will.

Steinway v. Bolden, 460 N.W.2d 306 (Mich. Ct. App. 1990). Rules 1.13. "We conclude that the clear intent of the Revised Probate Code and of the court rule is that, although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative. The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion." But see Michigan Probate Court Rule 5.117(A), quoted below, reversing this court's decision.

In re Makarewicz, 516 N.W.2d 90 (Mich. Ct. App. 1994). Rules 1.14, 1.16. Topics: Discipline. A lawyer who was hired by a minor's conservator on a contingent fee basis to pursue the minor's claim does not, after discharge by conservator, have standing to petition the court to replace the conservator and require acceptance of settlement. The Presiding Judge directed the Clerk of the Court to forward a copy of the decision to Michigan's Attorney Grievance Committee. The opinion endorses the approach taken in the Comment to MRPC 1.14:

Under MRPC 1.14(b), a lawyer may take protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interests. The Comment accompanying MRPC 1.14 suggests that where a legal representative has already been appointed for the client, the lawyer ordinarily should look to the representative for decisions on behalf of the client. However, if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. 516 N.W.2d at 91-92.

Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996). Rules 1.1. Topics: Malpractice. The Supreme Court of Michigan here held that, although a beneficiary named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by reason of the beneficiary's third

party beneficiary status, the attorney could not be held liable to the testator's heirs for negligence inasmuch as the will in question fulfilled the intent of the testator *as expressed in the will*. (The will did not exercise the testator's power of appointment over her predeceased husband's marital trust, thereby permitting the testator's daughter, disinherited by the testator, to receive one-third of the assets held in the husband's trust.)

Sorkowitz v. Lakritz, Wissbrun & Assoc., P.C., 683 N.W.2d 210 (Mich. Ct. App. 2004). **Rules 1.1. Topics: Malpractice.** Non-client estate beneficiaries may maintain a malpractice action against the attorneys who drafted estate planning documents on the ground that they rendered inadequate advice about tax consequences. The court departed from prior Michigan precedent (see *Mieras v. DeBona, supra*) and allowed the beneficiaries here to use extrinsic evidence to show that the attorney's negligence in omitting a common tax savings clause from the estate planning documents had thwarted the testator's intent.

Taylor v. Shipley (In re Hughes Revocable Trust), 2005 Mich. App. LEXIS 2301, 2005 WL 2327095, appeal denied, 474 Mich. 1092, 711 N.W.2d 56 (2006). **Rules 1.14.** Court affirmed a probate court order invalidating a trust executed by the decedent, apparently on the ground that decedent was demonstrably incompetent at the time of execution. One issue in the case was whether the lawyer who had prepared the documents had adequately assessed decedent's competence and the court did not think so: An attorney is required to make "a reasonable inquiry into his client's ability to understand the nature and effect of the document she was signing." Here, the estate planner was "at least on notice that Gladys may not have been competent. He also stated that in both meetings with Eric and Gladys, Eric did all the talking while Gladys said nothing. By not talking to Gladys, Sheridan made no effort to determine whether she was competent, or even to determine that she approved of the proposed plan for her care."

Ervin v. Bank One Trust Co., 2005 Mich. App. LEXIS 528, 2005 WL 433573 (unpublished). **Rules 1.7, 1.10. Topics: Disqualification.** Decision affirms a disqualification of a law firm from representing a beneficiary against a bank trustee when the same firm represents an affiliate of the bank trustee and had signed a retention agreement making clear that its representation of one bank affiliate would be deemed representation of all affiliates and subsidiaries and waivers would not be granted. Here the clients were directly adverse.

Charfoos v. Schultz, 2009 Mich. App. LEXIS 2313, 2009 WL 3683314. **Rules 1.1, 1.14. Topics: Malpractice.** This is a malpractice case brought by the disinherited children of decedent who allege lawyer committed malpractice by drafting the offending will and trust amendment which bequeathed 70% of his estate to his surviving wife rather than to the children, even though lawyer knew their father was mentally incompetent. First, court held that in Michigan, the testator's intent to provide for the beneficiaries alleging malpractice must appear on the face of the will, which it did not. Second, Rule 1.14 does not provide a standard for civil liability. Summary judgment of the lawyer.

Minnesota:

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981). **Rules 1.1. Topics: Malpractice.** In this malpractice case the court applied the *Biakanja, supra*, multifactor balancing test in a case involving the alleged negligent drafting of a joint tenancy deed but found no liability since plaintiff failed to prove he was the direct and intended beneficiary of the lawyer's

services.

***In re Discipline of O'Brien*, 362 N.W.2d 307 (Minn. 1985). Rules 1.3, 1.16. Topics: Discipline.** This decision upheld the indefinite suspension, with right to petition for reinstatement after two years, of a lawyer with a chemical dependency, who failed to complete a will and return retainer, and similar actions with respect to two other cases. The lawyer had also practiced with a license suspended for failure to pay registration fees.

***In re Discipline of Helder*, 396 N.W.2d 559 (Minn. 1986). Rules 1.3, 1.4. Topics: Discipline.** In this case the court upheld the indefinite suspension, with right to petition after six months, of a lawyer who failed to communicate with a client who had repeatedly requested changes to the client's will for over six months, then withdrew as counsel, and was guilty of similar dilatory acts in defense of contract claim for another client.

***Fiedler v. Adams*, 466 N.W.2d 39 (Minn. Ct. App. 1991). Rules 1.7. Topics: Malpractice.** Summary judgment in favor of the lawyer in a malpractice action was reversed on appeal. The lawyer failed to inform the clients of multiple conflicts of interest, "arising from his duty as trustee [of employee benefit plan], his duty as [the Plaintiffs'] attorney, his personal interests in the real estate partnership and his interests as shareholder, director and attorney for [Trustee Bank]. [The lawyer] did not advise [the Plaintiffs] of alternative methods to deal with their financial difficulties, nor did he advise them to seek independent counsel." 466 N.W.2d at 41.

***In re Trust Created by Boss*, 487 N.W.2d 256 (Minn. Ct. App. 1992). Rules 1.5, 1.7, 1.8.** Attorney trustee failed to overcome the presumption of fraud that arose from his drafting a trust amendment in which he had a beneficial interest. Further, the attorney's failure to recommend that the client seek outside counsel regarding the amendment violated MRPC 1.8(c) and was unethical. Also, the attorney failed to advise the client that the trust did not need to be irrevocable. The trial court was within its discretion to declare the amendment void, validate the revocation of the trust, and order the attorney trustee to reimburse excessive fees.

***Matter of Trust Created by Louis W. Hill*, 499 N.W.2d 475 (Minn. Ct. App. 1993). Rules 1.7, 1.9. Topics: Disqualification.** This case involved a trustee's petition for instructions and objections to a beneficiary's unilateral attempt to remove and replace the trustee. The beneficiary unsuccessfully sought to disqualify the law firm that represented the trustee and had earlier represented her in matters that were not substantially related to the litigation. The court rejected the beneficiary's argument that she was a "current" client of the law firm as a result of which the firm was precluded from representing the trustee. On the contrary, the court found that the beneficiary had terminated her relationship with the firm in early 1989 before the current litigation began.

***In re MacGibbon*, 535 N.W.2d 809 (Minn. 1995). Rules 1.3, 3.2. Topics: Discipline.** An attorney's performance in administering an estate constituted neglect in violation of MRPCs 1.3 and 3.2. The attorney's neglect worsened the delays that are inherent in probate administration. The court noted that the attorney "could have sought and obtained an order determining heirs and adjudicating the final settlement and distribution of the estate."

***Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734 (Minn. Ct. App. 1995), review denied, 1995 Minn. LEXIS 859 (1995). Rules 1.1, 1.2. Topics: Malpractice.** In a lawsuit brought by the beneficiaries of an estate against a personal representative and its attorneys for alleged negligence, the court adopted a modified multifactor balancing test (first enunciated in *Biakanja v. Irving*, supra, discussed in the Annotations following the ACTEC Commentary on MRPC 1.1), and dismissed the beneficiaries' claim against the attorneys, holding:

Here, appellants are not the direct, intended beneficiaries of the personal representative's attorneys' services. As permitted by statute, the personal representative hired the attorneys to assist and advise him in fulfilling his fiduciary duty to manage the estate in accordance with the terms of the will and the law and "consistent with the best interests of the estate." The attorneys' services, therefore, must be directed towards serving the best interests of the estate, and, thus, all beneficiaries. If any "person" is a third-party beneficiary of the attorneys' services, it is the estate itself; at best, individual beneficiaries of the estate are only "incidental beneficiaries" of the attorneys' services. *Id.* at 738-739.

***Witzman v. Gross*, 148 F.3d 988 (8th Cir. 1998). Rules 1.1, 1.2. Topics: Malpractice.** In this action by a trust beneficiary against the trustee's law firm for legal malpractice where the beneficiary's claims included failure to file accountings, excessive compensation, self dealing and imprudent investment, the court, applying Minnesota law, held that the lack of any attorney/client relationship between the beneficiary and the law firm barred any cause of action. (The beneficiary in this case was the trustee's sister and had previously settled her breach of fiduciary claims against her brother.)

***In re Estate of Janecek*, 2000 WL 1780250 (Minn. Ct. App. 2000). Rules 1.9. Topics: Disqualification.** A beneficiary of the estate objects to the estate accounting and seeks to disqualify the lawyer for the personal representative, among other reasons, on the ground that the lawyer had previously represented the objectant when he was serving as personal representative and recommended his replacement when allegations of misappropriation surfaced. The court disqualified the lawyer.

***In re Peterson*, 718 N.W.2d 849 (Minn 2006). Rules 1.8, 1.15, 3.3. Topics: Discipline.** Lawyer, with substantial previous discipline, was disbarred for his misconduct as attorney in fact for an elderly client for whom he had previously done estate planning work. In an attempt to spend down her assets so as to qualify her for Medicaid, he purchased a car with her assets, taking title in their joint names (even though she had no drivers' license), and then purchased it from her at well below market value (a conflict of interest). He failed to pay the excise tax on his purchase of the car. He also misrepresented her assets on a Medicaid application and held the principal's assets in his personal account rather than in the principal's account.

***In re Holker*, 730 N.W.2d 768 (Minn. 2007). Rules 1.3, 1.4, 1.16, 4.1. Topics: Discipline.** Lawyer was suspended for a minimum of six months based on misconduct in probating an estate. He delayed work on the estate for more than two years after being retained, without good cause, and without adequate communication with the client; when he was fired by the client and replaced, he failed to turn over the complete file. Then, when called upon to

supply the rest of the file, he fabricated correspondence he claimed to have had with the client.

In re Disciplinary Action Against Overboe, 745 N.W.2d 852, 865 (Minn. 2008). Rules 1.15, 8.5. Topics: Discipline. Lawyer was licensed in both Minnesota and North Dakota but practiced primarily and had his trust account in North Dakota. He was charged by Minnesota with trust account violations. The court first held that under Rule 8.5, it was reasonable for the lawyer to have supposed that the predominant effect of his conduct would be in North Dakota, so the North Dakota ethics rules applied. But the rules were identical to those in Minnesota and he was held to have violated both codes. He was suspended for one year.

In re Disciplinary Action Against Lyons, 780 N.W.2d 629, 634 (Minn. 2010). Rules 4.1, 8.5. Topics: Discipline. While involved in litigation in Montana, Minnesota lawyer deceives opposing party about the date of client's death. He is found to have violated Montana's ethics rules and is suspended indefinitely, with no right to petition for reinstatement for a minimum of two years.

Discipline of Fett, 790 N.W.2d 840 (Minn. 2010). Rules 1.1, 1.4. Topics: Discipline. Client was attorney-in-fact for his brother and consulted lawyer with regard to Medicaid planning. Lawyer advised client in letter to liquidate brother's assets and transfer the assets into the client's name, even though the power of attorney did not allow transfers to the attorney in fact. Court held that lawyer's advice in the letter was incompetent and did not adequately disclose to the client the risks of the recommended course of action or the legal basis which would justify the self-gifting and therefore the client was not given sufficient information to participate intelligently in the decision whether to transfer the assets into his name. Lawyer was publicly reprimanded and placed on one year's probation.

Mississippi:

Blissard v. White, 515 So. 2d 1196 (Miss. 1987). Rules 1.7. The court here held that a lawyer was "competent to render independent legal advice despite the fact that he had done legal work for [the testator's brother and primary beneficiary under the will drafted by the lawyer] (preparing a deed and two wills [for the brother])." 515 So. 2d at 1200. The court continued that, "we are not concerned with [the lawyer's] independence so much as with [the testator's], of which there is evidence in abundance." *Id.* As in *Estate of Koch*, cited above, the court was concerned with the effect that a contrary rule would have: "Indeed, if we were to disqualify [the lawyer's] advice, we would create a trap which would void bona fide gifts and bequests among family members in small towns and rural areas all over this state." 515 So. 2d at 1200.

J.N.W.E. v. W.D.W., 922 So. 2d 12, 14 (Miss. Ct. App. 2005). Rules 1.12. Topics: Disqualification. In a child custody dispute, the father WDW sought to disqualify counsel for the mother on the ground that while serving as court chancellor, the attorney had presided over a prior custody dispute between them. The court disqualified the attorney, concluding that her signing of three orders in the prior proceeding, one staying unsupervised visitation temporarily, one setting the matter for trial, and a third extending the temporary order, was enough "personal and substantial involvement" to require disqualification under Rule 1.12.

Estate of McLemore, 63 So. 3d 468 (MS 2011). Rules 1.5, 3.3. This was an extremely

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

Missouri:

***Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. Ct. App. 1992). Rules 1.16. Topics: Evidence.** After decedent's estate was closed, widow, as beneficiary under his will, brought replevin and injunction action against her husband's attorneys, seeking work product relating to their representation of husband, arguing that the papers were tangible personal property to which she was entitled under the will. The court held that the widow had no property interest in the work product which, it said, was intangible personal property in any event; and (2) attorneys had no ethical duty to turn over the papers under Rule 1.16 where they had already turned over final work done for the client and there was no evidence that the client needed the files. "The only ostensibly justified need here, however, is the stated need to determine whether a malpractice action may exist. Neither ethics nor legal process should be used as the vehicle to satisfy that need." Compare Sage Realty (New York) noted below.

***Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995). Rules 1.1. Topics: Malpractice.** In this malpractice case the Supreme Court of Missouri aligned Missouri's law with the majority rule in holding that lack of privity was not a defense to an action for alleged malpractice in the drafting of a testamentary instrument.

***In re Mid-Am. Living Trust Associates, Inc.*, 927 S.W.2d 855 (Mo. 1996). Rules 5.5, 7.3, 8.4, 8.5.** In an extensive review of the authorities, court enjoins a nonlawyer trust marketing company and its 95% shareholder from engaging in the unauthorized practice of law by soliciting, advising about, and preparing living trusts and related documents in Missouri.

***Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42 (Mo. Ct. App. 1997). Rules 1.1. Topics: Malpractice.** Applying Missouri's recently adopted "modified balancing test" as enunciated in *Donahue*, supra, the court directed the trial court on remand to determine whether or not the decedent, in employing the defendant estate planning attorney, intended to benefit the non-client/beneficiary. The court noted that the lawyer, who had prepared a total amendment and restatement of an existing trust

instrument, could be held responsible for the entire instrument's contents even though large portions of the instrument were simply copied, verbatim, from the original trust document.

Estate of Perry, 978 S.W.2d 28 (Mo. Ct. App. 1998). Rules 1.5. This was an action brought by the decedent's son by a prior marriage to remove the decedent's surviving husband as personal representative and for an accounting. The trial court declined to remove the husband as personal representative but entered a money judgment against him for certain claims made on jointly secured obligations. The court also adjudicated the husband's request for an allowance of exempt property. The appellate court, reversing the trial court on the issue of attorneys' fees, held that the son was entitled to a fee award since the estate had benefited from the judgment against the husband and the fact that the son was not successful in his removal action was not determinative on the attorneys' fees issue.

Thiel v. Miller, 164 S.W.3d 76 (Mo.App. 2005). Rules 1.1, 1.14. Topics: Malpractice. Court affirms malpractice judgment for defendants where heirs alleged that estate planner was (a) negligent in failing to make the power of attorney prepared for client durable, thus precluding her husband from executing trust provisions to avoid federal estate taxes after she became incompetent and (b) negligent in failing to recognize that attempted trust was invalid (because of inadequate power of attorney) and taking action to establish conservatorship for incompetent client so as to reduce taxes. Even assuming negligence had been shown, plaintiffs failed to prove that but for this negligence that the damage would have been avoided.

Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1054 (W.D. Mo. 2011), dismissed per court approved class settlement, 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012). Rules 5.5. Court grants summary judgment for consumers in a class action after concluding that LegalZoom had engaged in the unauthorized practice of law in Missouri through the marketing of its electronic documents. Except as to documents relating to patent and trademark practice, the court also examines and rejects LegalZoom's constitutional arguments.

Montana:

Stanley L. and Carolyn M. Watkins Trust v. Lacosta, 92 P.3d 620 (Mont. 2004). Rules 1.1. Topics: Malpractice. The court ruled that it was a factual question, precluding summary judgment, whether non-client will and trust beneficiaries had standing to bring a legal malpractice action against the attorney who drafted the decedent's estate planning documents. The court also ruled that the statute of limitations for bringing the action did not begin to run until a claim was brought that jeopardized the validity of the documents.

Estate of Watkins v. Hedman, Hileman & Lacosta, 91 P.3d 1264 (Mont. 2004). Rules 1.1. Topics: Malpractice. In a companion case to Stanley L. and Carolyn M. Watkins Trust v. Lacosta, supra, the court also held the statute of limitations period in a malpractice action brought by the estate of the attorney's client against the attorney who negligently created an irrevocable, rather than revocable, trust. The court reasoned that the testator's wife's discovery of the negligence was delayed by the complexity of the trust documents and by the lawyer's assurances to the wife that the documents carried out the testator's wishes.

***Stanley L. and Carolyn M. Watkins Trust v. Lacosta*, 92 P.3d 620 (Mont. 2004). Rules 1.1, 1.2.** This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

***Hauck v. Seright*, 964 P.2d 749 (Mont. 1998). Rules 1.5.** In this will contest action where the decedent had executed two wills within four days, counsel for the personal representative was unsuccessful in defending the validity of the second will. Nevertheless, in admitting the first will to probate, the trial court awarded attorneys' fees to the personal representative under the second will. On appeal by the contestant, the Supreme Court of Montana, construing Montana's statute, held that a personal representative is entitled to recover fees from an estate when he defends or prosecutes a proceeding in good faith, whether successful or not.

***In re Engel*, 338 Mont. 179, 169 P.3d 345 (2007) & 341 Mont. 360; 177 P.3d 502 (2008). Rules 1.5, 1.15. Topics: Discipline.** Attorney was publicly censured and suspended for two months for collecting unreasonable fees for handling an uncontested proceeding to terminate her charitable remainder trust. After agreeing on an hourly rate, he inexplicably changed this to a contingent fee agreement and charged \$121,000 rather than the \$1,500-\$2,500 that might have been reasonable. (He also failed to deposit fee retainers in his trust account in violation of Rule 1.15.).

***In re Potts*, 336 Mont. 517; 158 P.3d 418 (2007). Rules 1.2, 1.6, 1.16, 3.3, 4.1. Topics: Discipline.** Attorney was publicly censured for assisting his clients to commit fraud during the mediation of a will contest and later, when presenting the agreement to the court. He assisted his clients to negotiate a settlement of the will contest that the other parties believed covered all estate assets, including joint tenancy assets, whereas his clients intended and later sought to obtain the joint tenancy assets outside of the settlement. He not only assisted his clients to commit fraud during the mediation of a will contest but also later, when presenting the agreement to the court. Rule 1.6 may have precluded attorney from disclosing his clients' confidences as to this, but he was obliged to withdraw rather knowingly to assist their fraud, as he did.

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

***Harrison v. Lovas*, 356 Mont. 380, 383, 234 P.3d 76 (2010). Rules 1.1. Topics: Malpractice.** Parents contacted lawyer to discuss giving larger trust shares to three of their children. The lawyer informed the clients she was waiting on additional information to complete the changes, but the parents did not follow up and died a few years later without making the changes. The children who would have received the larger shares sued the lawyer for malpractice, but the court held that the lawyer owed no duty to the children. Whether a drafting attorney owes a duty to named beneficiaries is a factual issue, and here there was no clear indication that the parents intended to go through with the changes.

Nebraska:

***Lilyhorn v. Dier*, 335 N.W.2d 554 (Neb. 1983). Rules 1.1. Topics: Malpractice.** The court here held that the beneficiary's lack of privity with the attorney-drafter barred an action for negligence in the preparation of the will.

***State ex rel. Nebraska State Bar Ass'n v. Neumeister*, 449 N.W.2d 17 (Neb. 1989). Rules 1.16, 3.7. Topics: Disqualification, Evidence, Discipline.** A lawyer was disciplined for failing to withdraw from representation of a client, now in a nursing home, the relatives of whom had petitioned for conservatorship, when the lawyer knew he would be a material witness for the client concerning her mental capacity.

***State ex rel. Counsel for Discipline v. Widtfeldt*, 271 Neb. 851, 716 N.W.2d 68 (Neb. 2006). Rules 1.5. Topics: Discipline.** Attorney was suspended for one year for entering into an agreement and attempting to collect excessive fees in two probate matters. In the first, he entered into an agreement to be compensated in the amount of 8% of the probate and non-probate property and collected that amount but the probate court ordered the fees to be repaid. In the other, the agreement called for a fee of 5% of the estate and he attempted to collect fees in the amount of 7%, but the probate court ordered fees in excess of 2% to be refunded.

***Platte Valley National Bank v. Lasen (In re Conservatorship of Anderson)*, 2006 Neb. App. LEXIS 20. Rules 1.7, 1.9, 3.7. Topics: Disqualification.** Daughter unsuccessfully opposed appointment of a conservator for her father, now deceased, and here challenges the final accounting by the conservator. Among other things, she argues that the court should have disqualified the law firm representing the conservator because it had also represented her father's grandchildren when they successfully petitioned for the conservatorship. The court rejects the disqualification argument, finding that the daughter and her husband, who were interested in the father's estate but were not the clients of the law firm, had no standing to assert a conflict between two client. In any event, they failed to present any evidence that the interests of the firm's clients were, in fact, adverse. Nor did the fact that a member of the law firm testified during the proceedings related to the final accounting justify disqualification under Rule 3.7 because daughter failed to utilize appropriate procedures and any substantive issues addressed in his testimony (apart from the reasonableness of fees) was caused by the daughter's injection of the issues during cross examination.

***Estate of Cooper*, 746 N.W.2d 653 (Neb. 2008). Rules 5.5.** It is not the practice of law to file a creditor's claim in a probate proceeding, even one for \$1,035,537.32, so a non-lawyer corporate employee of the creditor corporation may do it. It may be the practice of law to file a "Demand for Notice" in the probate proceeding on behalf of the same corporate creditor, but a lawyer not licensed in Nebraska may do this on behalf of her Tennessee client under the temporary practice exception spelled out in Rule 5.5(c)(4).

***State ex rel. Counsel for Discipline v. Yoesel*, 277 Neb. 179; 760 N.W.2d 931 (2009). Rules 1.1, 1.3, 1.16. Topics: Discipline.** Lawyer surrendered license and did not contest allegations that he had neglected a probate matter entrusted to him in that he "had not timely handled the estate proceedings, failed to attend one or more hearings, failed to timely provide [the client] with her file materials so that she could give them to her replacement attorney, and failed to refund the unused portion of the advance she paid to him."

Perez v. Stern, 279 Neb. 187, 198, 777 N.W.2d 545, 554 (2010). Rules 1.1. Topics: Malpractice; Wrongful Death. Unlike Lilyhorn, where the estate planner owed no duty to a potential will beneficiary, a lawyer hired by the personal representative to prosecute a wrongful death claim on behalf of the decedent's children as statutory beneficiaries does owe them a duty "as direct and intended beneficiaries of her services, to competently represent their interests."

Gallner v. Larson, 291 Neb. 205 (2015). Rules 1.1, 1.8. Topics: Gift to attorney, Existence of attorney-client relationship, Malpractice. Deceased was a divorced lawyer who had a longtime lawyer friend who assisted her in miscellaneous legal matters, particularly dealing with her divorce. There was correspondence between them indicating that she asked the lawyer friend to serve as trustee but he declined. She engaged another lawyer to prepare a will for her, naming lawyer friend as executor/trustee and leaving her estate to her son and granddaughter. That will was not signed. Deceased named lawyer friend as beneficiary on life insurance policies and a retirement account. Deceased's executor sued the lawyer friend for return of those funds. Among other claims, executor claimed that as deceased's attorney and that he breached his fiduciary duty to her. The court found that there was an attorney-client relationship, even though informal. The court referenced Rule 1.8(c) and comments, and held that he had the burden to show that the gift to him of the insurance policies was fair, but that he had met that burden. The facts that she was a lawyer and that she had hired another lawyer to assist in estate planning were noted. The court also noted that breach of an ethical rule is not a basis for civil liability.

Nevada:

Charleson v. Hardesty, 839 P.2d 1303 (Nev. 1992). Rules 1.1, 1.2. Topics: Malpractice. In an action brought by the beneficiaries of a trust against the lawyer who allegedly represented the trustee, the Supreme Court of Nevada stated:

We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law. In the present case if [Defendant Lawyer] was the attorney for the trustee, we conclude that he owed the [Plaintiff Beneficiaries] a duty of care and fiduciary duties. *Id.* at 1307.

In re Jane Tiffany Living Trust 2001, 124 Nev. 74; 177 P.3d 1060 (2008). Rules Preamble, 1.8, 1.10. A lawyer was made the beneficiary of the trust which was drafted by the lawyer's partner. The family member who had expected to receive the asset that went to the lawyer argued undue influence and violation of Nevada's equivalent of MRPC 1.8(c) and 1.10. The court held that although a presumption of undue influence had arisen because of the fiduciary relationship between the lawyer and the client, the lawyer had rebutted the presumption. Although the estate planner seems to have violated Nevada's equivalent of former MR 1.8(c) & 1.10 by drafting a trust which named his partner as the beneficiary of a house that was transferred to the trust, the court held that this breach of the rules did not create a private right of action in heirs seeking to set aside the gift.

In re Discipline of Arase, 2013 WL 690938 (Nev. 2013). Rules 1.1, 1.3, 1.5, 4.1,5.5, 7.1,

7.2, 8.5. Topics: Discipline. California lawyer who was affiliated with a nonlawyer company providing loan modification and foreclosure avoidance services in Nevada, but who was not admitted in Nevada, admits to violating Rules 1.1, 1.3, 1.5, 4.1, 5.5, 7.1 & 7.2. He is enjoined from the practice of law in Nevada for three years and if he should wish to ever practice law in Nevada again, either as a Nevada attorney or pro hac vice, he was required disclose this discipline.

New Hampshire:

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

Simpson v. Calivas, 650 A.2d 318 (N.H. 1994). Rules 1.1. Topics: Malpractice. This decision reverses the dismissal of a malpractice action against the scrivener of a will, who was charged with failing to draft a will that expressed the decedent's intent to leave all of his land to plaintiff. "We hold that where, as here, a client has contracted with an attorney to draft a will and the client has identified to whom he wishes his estate to pass, that identified beneficiary may enforce the terms of the contract as a third-party beneficiary." 650 A.2d at 323-324.

Sisson v. Jankowski, 148 N.H. 503, 809 A.2d 1265 (2002). Rules 1.1, 1.14. Topics: Malpractice. Lawyer had drafted estate planning documents for a client suffering from cancer and had taken them to him at a nursing home for execution. The client decided at that time, however, that he wanted a contingent beneficiary in his will. Rather than write in the addition, or make the change and return that day, the lawyer took the documents back to her office and returned with them 3 days later when she concluded client was incompetent to execute them. He died intestate and the intended beneficiary sued the lawyer for negligence. The court held that the estate planner owed no duty to the intended beneficiary to make sure the will was executed promptly.

In re Coffey's Case, 152 N.H. 503, 880 A.2d 403 (2005). Rules 1.4, 1.5, 1.7, 1.8, 2.1, 8.4. Topics: Discipline. Lawyer was disbarred for taking advantage of an elderly client, with diminished capacity, during estate litigation. Client had acquired a house by right of survivorship and lawyer was helping her to defeat claims to the house brought by dissatisfied estate heirs of one of the predeceasing joint tenants. When the client resisted his estimate of the likely cost of protecting her judgment on appeal, lawyer persuaded client to sell him a remainder interest in the house (she retained a life estate) in return for his fees, which were estimated at \$30,000 or more. The house was valued at \$200,000. Among many violations, the attorney charged an excessive fee of more than \$64,000 for handling an appeal when a reasonable fee would have been \$12,000 at most. The court found that he violated Rules 1.4, 1.5, 1.7, 1.8(a), 1.8(b)(using confidences to client's disadvantage), and 1.8(j), among other rules.

In re Lane's Case, 153 N.H. 10, 889 A.2d 3 (2005). Rules 1.6, 1.9. Topics: Discipline. Lawyer who had represented the executor in a probate that had closed was charged with disclosing confidences of his former client to the client's disadvantage. By the time the confidences were disclosed, the lawyer had married the former client's sister and lawyer's wife (the sister) was in litigation with her brother, her husband's former client, over the brother's management of the estate. Without the consent of his former client, lawyer disclosed to his wife's lawyer the existence of a \$100,000 life insurance policy that his former client denied existed. Although the court concluded that lawyer had used this information to the disadvantage of his former client, it credited the lawyer's argument that disclosure was permitted under an exception of NH's (then) version of Rule 1.6 which permitted disclosure to prevent a client from committing a crime the lawyer believes is "likely to result in ...substantial injury to the financial interest or property of another." The court affirmed the dismissal of the disciplinary proceedings.

In re Wyatt's Case, 159 N.H. 285; 982 A.2d 396 (2009). Rules 1.7, 1.9, 8.5. Topics: Discipline. Lawyer was suspended for two years for conflicting concurrent and successive representations. After persuading an adult client (the ward) to submit to a voluntary conservatorship, lawyer simultaneously represented the ward and the conservator, and later also the ward's wife, despite adversity between these clients, without a reasonable belief that these conflicts could be reconciled and without the informed consent of the clients. Later, after withdrawing from representation of the ward, he continued to represent the conservator and assisted him and the ward's wife in an attempt to establish a health care guardianship of the ward, and also defended conservator against charges by the ward that the conservator had mismanaged his estate, all without the ward's consent. The lawyer's conduct in connection with the guardianship proceeding, much of which occurred in Texas, was evaluated under the New Hampshire ethics rules because (a) he was not admitted in the Texas proceeding and (b) he is only licensed in New Hampshire. Note: New Hampshire's Rule 8.5 is considerably different than MRPC 8.5.

In re Stomper, 82 A.3d 1278 (NH 2013). Rules 1.6. Topics: Evidence, Attorney/Client Privilege. Dispute between children of deceased parents. One child had assisted parents in preparing estate plan leaving everything to that child. Other children challenged the estate plan and asked for file of an attorney who had consulted with parents but had withdrawn before documents were executed. Attorney claimed they were privileged but court ordered disclosure of the documents based on the exception to the privilege for communications relating to an issue between parties claiming through the same deceased client. The child opposing disclosure claimed the exception only applied if the estate plan was executed, but that argument was rejected.

Williams v. L.A.E. Association, (N.H. Super. Ct. 1/6/2016). Rules 1.3, 1.7, 1.9, 1.10. Topics: Disqualification. Lawyer had done estate planning work for two separate clients and after the estate planning work was complete, a partner of the estate planner undertook to represent property owners suing the estate planning clients in a dispute over elections to a property association board. Citing the ACTEC Commentaries and commentators relying on them, the court concludes that although the estate planning matters might be dormant, the estate planning clients remained current clients of the firm. Since they remained current clients of the estate planner, he would be disqualified from representing the plaintiffs in the adverse matter against his estate planning clients under Rule 1.7, and his conflict was imputed to his partner under Rule 1.10.

New Jersey:

Haynes v. First Nat'l State Bank, 432 A.2d 890 (N.J. 1981). Rules 1.7. At the behest of the testator's daughter, who had been a client for some time, the lawyer drew a will and trust for the testator, who was a new client, which drastically changed the disposition of the testator's estate in favor of the daughter who procured the will. "[T]here must be imposed a significant burden of proof upon the advocates of a will where a presumption of undue influence has arisen because the testator's attorney has placed himself in a conflict of interest and professional loyalty between the testator and the beneficiary." 432 A.2d at 900.

Albright v. Burns, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986). Rules 1.1, 1.2. Topics: Malpractice. Before his uncle's death, a nephew acting pursuant to a power of attorney employed counsel to advise him in connection with the sale of certain stock and the making of a loan to the nephew's business. The attorney performed the requested services which included distributing the proceeds of the stock sale to the nephew. After the uncle's death, the attorney represented the nephew as personal representative of the estate. In an action by the estate beneficiaries against the attorney, the court applied the *Biakanja v. Irving, supra*, multifactor balancing test (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) and found that the attorney had a duty to the beneficiaries for breach of which he could be held liable.

Rathblott v. Levin, 697 F. Supp. 817 (D.N.J. 1988). Rules 1.1. Topics: Malpractice. Here a federal court, applying New Jersey law, held that an attorney, whose alleged negligence in drafting a will caused the will's beneficiary to deplete the estate's assets in successfully defending a will contest, could be liable to the beneficiary for malpractice despite the lack of privity. In answer to the defendant lawyer's argument that cases from the majority of jurisdictions finding liability for negligence in will drafting should not be extended to the facts of this case, where the beneficiary had successfully defended a contest to the will, the court observed:

[W]e are unable to see a valid legal difference between a plaintiff who loses the right to one-half of an estate and a plaintiff who loses one-half of an estate in protecting her rights. If either was caused by an attorney's negligence in drafting, that attorney should be liable. 697 F. Supp at 820.

Lovett v. Estate of Lovett, 593 A.2d 382 (N.J. Super. 1991). Rules 1.1, 1.6, 1.7, 1.14. Topics: Malpractice. This case involved various charges of misconduct by a lawyer in connection with the preparation of a will, including a failure to meet with the husband-testator out of the presence of his second wife who would receive a share of his estate outright under the new will rather than in trust for her; a failure to counsel the client adequately with respect to tax matters; and a failure to obtain information regarding the husband's assets. Although the charges were rejected by the court, it stated that, "[i]n most circumstances, meeting with a client alone would be well advised." 593 A.2d at 387. A failure to counsel the client in detail regarding the tax consequences was permissible because the client had indicated that he was not interested in them. In addition, the court observed that obtaining information regarding a client's assets "in most cases, is important to the formulation of an adequate testamentary disposition." 593 A.2d at 387. The court stated that, "[a]lthough I agree that a lawyer has an obligation not to permit a client

to execute documents if he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1982 [Client] was incompetent or that [Lawyer] should have concluded that he was.” 593 A.2d at 386.

Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992). Rules 1.4. Topics: Malpractice. In a malpractice action arising from the defendant’s alleged failure properly to advise his client, the court noted that “the lawyer is obligated to keep the client informed of the status of the matter for which the lawyer has been retained, and is required to advise the client on the various legal and strategic issues that arise.” 607 A.2d at 1303.

Baldassarre v. Butler, 625 A.2d 458 (N.J. 1993). Rules 1.7. The Supreme Court of New Jersey observed:

This case graphically demonstrates the conflicts that arise when an attorney, even with both clients’ consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of [Lawyer’s] dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller. Therefore, we hold that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both give their informed consent. 625 A.2d at 466.

In re Matter of Ort, 631 A.2d 937 (N.J. 1993). Rules 1.1, 1.5, 1.15, 4.1. Topics: Discipline. A lawyer was disbarred for multiple offenses in connection with serving as counsel to the personal representative of an estate, including misrepresenting the value of the lawyer’s services, charging excessive and unreasonable fees, withdrawing money from estate for his own use, and failing to advise client fully, frankly and truthfully.

Greate Bay Hotel & Casino, Inc. v. Atlantic City, 624 A.2d 102 (N.J. Super. Ct. Law Div. 1993). Rules 1.13. A law firm that represents a business trust is treated as representing the entity and not the individual members of the trust. Accordingly, the law firm was not disqualified from representing a party adverse to a member of the business trust with whom the law firm had no other connection.

Bingham v. Zolt, 823 F. Supp. 1126 (S.D.N.Y. 1993). Rules 3.7. Topics: Evidence. A lawyer acting as ancillary administrator of a deceased singer’s estate was permitted to testify in an estate’s civil RICO action against the singer’s former legal and financial advisors since the lawyer was not representing the estate in the RICO action.

In the Matter of M.R., 638 A.2d 1274 (N.J. 1994). Rules 1.2, 1.14. In a family law case the New Jersey Supreme Court concluded that a developmentally disabled person’s choice of where to live should be honored if she is competent. “If not, the court should determine the place of residence according to M.R.’s best interests. Her attorney’s role should be to advocate her choice, as long as it does not pose

unreasonable risks for her health, safety, and welfare. If the court concludes that M.R. is incapable of deciding where to live, it may appoint a guardian *ad litem* to represent her best interests.” 638 A.2d at 1286.

Barner v. Sheldon, 678 A.2d 717 (N.J. Super. Ct. App. Div. 1996). Rules 1.1, 1.2. Topics: Malpractice. The court affirmed a summary judgment granted in favor of a lawyer who, while serving as the lawyer for the executor in an estate administration proceeding, had not advised the decedent’s children to disclaim the bequests to them. Doing so would have increased the amount of the decedent’s estate that would be received by the surviving spouse, thereby decreasing the estate tax liability of the decedent’s estate. The appellate court held that under the circumstances, “the defendant had no duty to inform the beneficiaries of the tax consequences of their failure to disclaim.” The court pointed to the decedent’s wish to minimize the amount that passed to his surviving spouse. “Had plaintiffs, the testator’s children, disclaimed, the testator’s wife would have benefited. This would have been contrary to the testator’s intent.” The trial court opinion (678 A.2d 767), which contains a useful summary of decisions regarding the duties the lawyer for a personal representative may owe to the beneficiaries, concludes that, “when an attorney is employed to render services in procuring admission of a will to probate or in settling the estate, he acts as attorney of the executor, and not of the estate and for his services the executor is personally responsible.”

A v. B v. Hill Wallack, 726 A.2d 924 (N.J. 1999). Rules 1.4, 1.6, 1.7. Construing New Jersey’s broad client-fraud exception to the state’s version of MRPC 1.6, the Supreme Court of New Jersey held that a law firm that was jointly representing a husband and wife in the planning of their estates was entitled to disclose to the wife the existence (but not the identity) of husband’s child born out of wedlock. The court reasoned that the husband’s deliberate failure to mention the existence of this child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under MRPC 1.6(c). Interestingly, the law firm learned about the child born out of wedlock not from the husband but from the child’s mother who had retained the law firm. The court also based its decision permitting disclosure on the existence of a written agreement between the husband and wife, on the one hand, and the law firm, on the other, waiving any potential conflicts of interest with the court suggesting that the letter reflected the couple’s implied intent to share all material information with each other in the course of the estate planning. The court cites extensively and approvingly to the *ACTEC Commentaries* and to the *Report of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility* discussed immediately below.

Santacroce v. Neff, 134 F. Supp. 2d 366, 367 (D.N.J. 2001). Rules 1.7, 1.9. Topics: Disqualification. This was a palimony action brought by Santacroce against the estate of her former lover, Goldberg. Here, she seeks to disqualify the firm representing the estate on the ground that it had been representing her and the estate when they were adverse, and continued to represent the estate after “firing” her as a client. The court applies the so-called “hot potato” doctrine to disqualify the firm. It found that while the firm was representing both the plaintiff and the Estate on ostensibly unrelated matters, it got wind that she was planning to file a palimony claim against the estate and so dropped her as a client “like a hot potato” to avoid a concurrent conflict with the estate, the more remunerative

client. The court refused to let the firm convert her into a “former client” by such behavior and disqualified it under Rule 1.7. But it also disqualified the firm under Rule 1.9 on the ground that its representation of Santacroce in a business context was substantially related to her palimony claim against the estate because while representing her business it prepared an affidavit for her claiming her business was operating efficiently, which is contradicted by her claim in this action.

Fitzgerald v. Linnus, 765 A.2d 251 (N.J. Super. Ct. App. Div. 2001). Rules 1.1, 1.2. Topics: Malpractice. An attorney who represented the surviving spouse as executor of her deceased husband’s estate was found not liable in negligence for failing to advise the surviving spouse to consider disclaiming certain insurance proceeds payable on the death of the husband in favor of the couple’s children. The court found that the attorney was retained by the surviving spouse solely in her capacity as executor, and the attorney had specifically disclaimed in writing any duty to advise the surviving spouse about her own estate planning. The attorney owed no duty to the children (who also sued) because they were not beneficiaries of the deceased spouse.

Estate of Albanese v. Lolio, 923 A.2d 325 (N.J. Super. 2007). Rules 1.1. Topics: Malpractice. Where retainer agreement between personal representative and law firm purported to be between the firm and the client “individually and as executrix,” this was enough to defeat summary judgment entered by the trial court on the malpractice claim brought by the personal representative for damages she allegedly suffered as beneficiary. “[She] may have had a reasonable expectation of representation as an ‘individual’ as well as executrix.” Summary judgment against her co-beneficiary sisters, however, was affirmed as no duty was owed them.

Estate of Spencer v. Gavin, 400 N.J. Super. 220; 946 A.2d 1051 (2008). Rules 1.1, 8.3. Topics: Malpractice. “[A] lawyer, while acting in his capacity as an executor and administrator, stole \$ 400,000 or more from his clients' three related estates. Within months after absconding with those funds and dissipating them, the lawyer-executor died of cancer. The primary question before us is whether a fellow attorney who evidently did not participate in the thievery, but who had a close and interdependent business relationship with the lawyer-executor, and who concurrently performed legal work at the lawyer-executor's request for at least one of the same estates, had a duty to report the lawyer-executor's malfeasance upon allegedly learning of it. We hold that a reporting duty in such circumstances is mandated by principles of legal ethics, tort law, and public policy, so long as the attorney is shown to have had actual knowledge of the other lawyer's wrongdoing.” “[A] failure by [the fellow attorney] to abide by his professional reporting duties under R.P.C. 8.3(a) only strengthens our conclusion that such inaction exposes him to civil liability to those who were harmed by his silence.”

In re Opinion 39 of Comm. on Attorney Adver., 197 N.J. 66, 79, 961 A.2d 722, 731 (2008). Rules 7.1. Topics: First Amendment. Court vacated, on first amendment grounds, Opinion 39 of its Attorney Advertising Committee which had ruled that advertisements describing attorneys as “Super lawyers,” “Best Lawyers in America,” or similar comparative titles violated New Jersey’s advertising rules as inherently misleading or likely to create unjustified expectations about results.

Estate of Ehrlich, 47 A.3d 12 (N.J. Ct. App. 2012). Rules 1.5, 3.1. In this highly publicized case, the New Jersey court upheld an unexecuted document as the valid last will of a trust and estates lawyer. The successful proponents of the will asked for attorneys' fees against those opposing the will under the Frivolous Litigation statute but the court denied fees, holding that objecting to probate of an unexecuted document as a valid will was not frivolous.

New Mexico:

Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982). Rules 1.1, 1.2. Topics: Malpractice. In this legal malpractice case involving estate administration, the court applied California's multifactor balancing test in holding that lack of privity was no defense to an action brought by decedent's niece and nephew against an attorney who had incorrectly determined that the estate should be distributed *per stirpes* rather than *per capita*.

Leyba v. Whitley, 907 P.2d 172 (N.M. 1995). Rules 1.1, 1.2. Topics: Malpractice, Wrongful Death. In this case involving a suit by the conservator for the minor beneficiary of his father's estate against the lawyers representing the personal representative in a wrongful death claim, where the proceeds from the settlement of the claim were paid to the minor beneficiary's mother who then squandered the funds, the Supreme Court of New Mexico, applying the *Biakanja, supra*, (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) multifactor balancing test, found that the attorneys owed a duty to the minor beneficiary.

In re Stein, 143 N.M. 462, 177 P.3d 513 (2008). Rules 1.7, 1.9, 1.14, 3.3, 4.1. Topics: Disqualification, Discipline. This is a disciplinary case in which a lawyer was disbarred for multiple conflicts of interest and misrepresentations to courts and a former client. At first, lawyer represented a husband (Bruce) who had set up trusts totaling more than \$11 million and his wife (Ruth) who held a durable power of attorney for her husband. When a daughter sought to establish a guardianship for her father, lawyer ostensibly continued to represent both Bruce and Ruth. After a guardian ad litem was appointed for Bruce, and while the guardianship proceedings were pending, lawyer sought to have the trustee distribute the trust income to Ruth, even though Bruce was the income beneficiary. When that failed, without notifying Bruce's guardian ad litem, lawyer filed two federal actions to obtain control over the assets for Ruth. He was disqualified from continuing to represent Bruce because his interests were adverse to those of his wife Ruth, and he was later disqualified from representing Ruth, as well, since she was adverse to his former client Bruce from whom he had not obtained consent. The lawyer was disbarred for these conflicts and related misconduct.

Spencer v. Barber, 299 P.3d 388 (NM 2013). Rules 1.7. Topics: Malpractice, Wrongful Death. This is a case involving multiple claims against an attorney who represented the personal representative in two wrongful death claims. The PR (Sam) was the mother of one of the decedents and grandmother of the other; she was also the driver of the vehicle that was involved in the fatal accident. The lawyer (Barber) hired to represent Sam as PR on these claims knew that the father/grandfather (Spencer) –Sam's ex-husband-- was also alive, but Sam told Barber that her position was that Spencer had no right to wrongful death shares because he had abandoned their daughter. Prior to settling the wrongful death claims,

Barber met with Spencer and got him to agree to accept a specified amount in lieu any claim as a statutory beneficiary of the wrongful death claim. When the claims settled for a much higher amount, Spencer sued Barber for malpractice and misrepresentation. In this case, the Supreme Court held that (a) Barber owed duties to Spencer as a statutory beneficiary which were complicated by the conflict of interest between his client Sam and Spencer; (b) Barber could have resolved that conflict in a number of ways, one of which would have been to notify Spencer that he, Barber, was not his lawyer, that Spencer could not rely on Barber to act for his benefit, and provide Spencer with sufficient information that he could understand why he needed independent representation; and (c) Spencer's right to sue Barber for misrepresentation did not depend on any fiduciary duties owed Spencer. When Barber learned that Sam may have been liable for the accident, he developed still another potential conflict of interest between his duties to her as PR and her individual interests. For all these reasons, the court found that summary judgment had been improperly granted in favor of Barber and remanded for trial.

New York:

In re Bond and Mortgage Guarantee Co., 103 N.E.2d 721 (N.Y. 1952). Rules 1.8. The lawyer for a trustee for the holders of mortgage certificates may not purchase certificates under any circumstance.

In re Flasterstein's Estate, 210 N.Y.S.2d 307 (Surr. Ct. 1960). Rules 1.7. Topics: Disqualification. In this case the surrogate court denied a motion to disqualify a law firm that represented the executors, who were also residuary beneficiaries, because of an alleged inherent conflict of interest. The court observed:

It is axiomatic that executors and fiduciaries generally are entitled to representation by attorneys of their own choosing. The fact that the executors are financially interested in the estate as residuary legatees and may profit individually through the services of their attorneys is immaterial and does not lead to a conflict of interest. In instances where an executor may assert a personal claim against the testator or the estate it may be claimed that an attorney representing the executor in his representative capacity and individually appears for conflicting interests as the allowance of such a claim may reduce the shares of others beneficially interested in the estate. Such is not the situation here presented.....210 N.Y.S.2d at 308.

In re Estate of Clarke, 188 N.E.2d 128 (N.Y. 1962). Rules 1.2, 1.5, 1.7. A lawyer who received part of a commission that was paid to a real estate broker in connection with the sale of property belonging to a corporation controlled by the executors and trustees was not entitled to any compensation for services to the personal representative and trustee because of the conflict of interest. The court observed, “[a]n attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself. [Citation omitted.]” 188 N.E.2d at 130.

Maneri v. Amodeo, 238 N.Y.S.2d 302 (Sup. Ct. 1963). Rules 1.1. Topics: Malpractice. The court here upheld the privity defense in an action for legal malpractice and specifically rejected the California approach.

In re Estate of Weinstock, 351 N.E.2d 647 (N.Y. 1971). Rules 1.7. The appointment of a father and son team of lawyers as fiduciaries was struck down for overreaching of the

82-year-old client in obtaining the appointment.

***Victor v. Goldman*, 344 N.Y.S.2d 672 (Sup. Ct. 1973), aff'd mem., 351 N.Y.S.2d 956 (App. Div. 1974). Rules 1.1, 1.3. Topics: Malpractice.** The court here held that the absence of privity prevented the decedent's intended beneficiaries from bringing an action against the lawyer who allegedly failed to draw a new will for a client prior to her death.

***In re Estate of Freeman*, 311 N.E.2d 480 (N.Y. 1974). Rules 1.5.** This case lists the factors to be taken into account by a surrogate judge in determining the fees of counsel in estate matters, which include the amount involved, results obtained and the skill and time required.

***Baer v. Broder*, 436 N.Y.S.2d 693 (Sup. Ct. 1981), aff'd on other grounds, 447 N.Y.S.2d 538 (App. Div. 1982). Rules 1.1, 1.2. Topics: Malpractice, Wrongful Death.** In an action by the executor of a decedent's estate against the attorney whom he had hired to pursue a wrongful death claim (of which the executor was also a statutory beneficiary in his individual capacity), the court held that the plaintiff had a cause of action despite the lack of contractual privity because of several "face to face" meetings between the attorney and the plaintiff.

***Matter of Birnbaum*, 460 N.Y.S.2d 706 (Surr. Ct. 1983). Rules 1.7. Topics: Disqualification.** The court denied a motion to disqualify the firm that represented one of the co-executors in her representative and individual capacities. In the opinion the court stated that, "It is well settled that the common practice of having one attorney or one law firm represent an executor as fiduciary as well as a beneficiary of an estate does not create a conflict of interest for the attorneys.... On the other hand, where the attorney represents his client in both capacities, he may not act to advance the *personal interests* of a fiduciary in such a way as to harm his other client, the estate." 460 N.Y.S.2d at 707.

***Kramer v. Belfi*, 482 N.Y.S.2d 898 (App. Div. 1984). Rules 1.1, 1.2. Topics: Malpractice.** Applying New York's strict privity doctrine, the court here denied standing to the beneficiary of a decedent's estate to sue the attorney for the executor for allegedly failing to give tax advice that would have saved estate taxes.

***Viscardi v. Lerner*, 510 N.Y.S.2d 183 (App. Div. 1986). Rules 1.1. Topics: Malpractice.** The court here described the privity rule as "firmly established" in New York and to be applied to bar actions for legal malpractice by non-clients absent fraud, collusion, malice or other "special circumstances."

***Will of Elsa Tank, Dec'd*, 503 N.Y.S. 2d 495 (Surr. Ct. 1986). Rules 1.8.** Lawyer preparing the will of a woman in failing health who insisted that the lawyer include a bequest to himself had the ethical duty to discourage and refuse the bequest, particularly when the relationship between the attorney and the client was not founded upon any friendship. The court cites Code of Professional Responsibility EC 1-1 et seq., and EC 5-5, which states that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. Other than in exceptional circumstances, a lawyer should insist that an instrument in

which his client desires to name him beneficially be prepared by another lawyer selected by the client.”

***Hoopes v. Carota*, 531 N.Y.S.2d 407 (App. Div. 1988), aff'd mem., 543 N.E.2d 73 (N.Y. 1989). Rules 1.6. Topics: Evidence, A/C Privilege.** In this case the court allowed the beneficiaries of a trust to discover communications between the defendant- trustee and the lawyer who advised the defendant generally with respect to administration of the trust. The opinion recognizes the distinction between a representation of the trustee *qua* trustee and a representation of the trustee “in an individual capacity.” The Appellate Division opinion states that the lawyer-client evidentiary privilege:

[D]oes not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure, on the ground that a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought to his own private interests under the guise of privilege. 531 N.Y.S.2d at 410.

***Will of Cromwell, Dec'd*, 552 N.Y.S. 2d 480 (Surr. Ct. 1989). Rules 1.8.** The gift of \$500,000 to an attorney drafts- man was held valid where it was not procured by fraud or undue influence and where there was a long- standing professional relationship between the attorney and the testator involving close family ties.

***Weingarten v. Warren*, 753 F. Supp. 491 (S.D.N.Y. 1990). Rules 1.1, 1.2. Topics: Malpractice.** In this lawsuit by the remainder beneficiaries of a trust against the trustee's attorney for allegedly negligently permitting trust principal to be converted to income, the federal district court, applying New York law, dismissed the beneficiaries' malpractice claim under New York strict privity rule. The court did hold however that the beneficiaries could state a cause of action against the attorney for breach of fiduciary duty based on the New York Court of Appeals' decision in *In re Estate of Clarke*, noted above.

***Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159 (S.D.N.Y. 1991). Rules 1.1, 1.4, 1.16. Topics: Malpractice.** This case involves a U.S. holding company and its foreign parents who brought an action against a law firm and trust company alleging various causes of action arising from the defendants' alleged failure to inform the plaintiffs of changes in U.S. tax laws affecting the plaintiffs' investments. Applying New York law, the federal district court held that the complaint properly stated a cause of action against the law firm for legal malpractice (among other claims). According to the allegations of the complaint a partner at the law firm, in response to a specific inquiry as to the possible effect on plaintiffs' interests of tax legislation then pending in Congress, replied there were no significant tax changes enacted as of that time, but that the firm would inform the plaintiffs if any significant amendments to U.S. tax laws were enacted in the future.

***In re Estate of Lowenstein*, 600 N.Y.S.2d 997 (Surr. Ct. 1993). Rules 1.7.** In a suit brought by a lawyer to enforce a contract under which he was to be named as executor the court found the contract unenforceable and attorney had no claim for damages in amount of lost commissions. “[A] contract provision requiring the nomination of the attorney draftsman

as fiduciary of the testator's estate is unenforceable unless it is clearly demonstrated to the satisfaction of the court that special circumstances required the services of the attorney draftsman and that the nomination was not the product of overreaching." 600 N.Y.S.2d at 998-999.

In re Matter of Ryan, 594 N.Y.S.2d 168 (App. Div. 1993). Rules 1.7. Topics: Discipline. A lawyer was censured for exercising undue influence over client in drafting instruments that appointed lawyer's unqualified wife as fiduciary.

Matter of Frank T. D'Onofrio, Jr., 618 N.Y.S.2d 829 (App. Div. 1994). Rules 1.3. Topics: Discipline. In this action a lawyer was censured for multiple offenses including a failure to timely file an inventory of the estate and a New York state estate tax return as a result of which the estate incurred penalties and interest.

In re Matter of Levine, 609 N.Y.S.2d 664 (App. Div. 1994). Rules 1.1, 1.3, 1.15, 8.4. Topics: Discipline. A lawyer was disbarred for converting funds to his own use from a decedent's estate of which he was the personal representative and for keeping the estate open for over 12 years.

In re Matter of Margolis, 613 N.Y.S.2d 149 (App. Div. 1994), appeal denied, 641 N.E.2d 159 (N.Y. 1994). Rules 1.1, 1.15, 8.4. Topics: Discipline. A lawyer was disbarred for multiple violations of the Code of Professional Responsibility, including misappropriation of trust and escrow funds.

Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30; 689 N.E.2d 879 (1997). Rules 1.16. Topics: Evidence. Following the draft Restatement (Third) Law Governing Lawyers, section 58 [now 46], the NY Court grants former client's petition to obtain additional documents from its former law firm relating to that firm's representation of the former client, including "internal legal memoranda, drafts of instruments, mark-ups, notes on contracts and transactions and ownership structure charts [and] firm correspondence with third parties and conference negotiation notes." According to the New York's highest court: "A majority of courts and State legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney's file on a represented matter with narrow exceptions." Compare Corrigan (Missouri) noted above.

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

***Mayorga v. Tate*, 752 N.Y.S. 2d 353 (App. Div. 2002). Rules 1.6. Topics: Evidence, A/C Privilege.** A decedent's personal representative may waive the attorney-client privilege to obtain disclosure in a malpractice case against the decedent's former attorney.

***In re Power*, 3 A.D.3d 21; 768 N.Y.S.2d 455 (2003). Rules 7.1, 8.5. Topics: Discipline.** Topics: Discipline. Power was reprimanded in New Jersey for false advertisements regarding living trusts in the following particulars: "a) costs, expenses, and time associated with the probate of a will, as opposed to under a living trust, b) the impact of having a living trust in the event of incapacitation, c) the avoidance of probate by the creation of a living trust, d) the tax consequences of having a living trust, and e) the inadequacy of a will without a living trust in order to protect assets." Here, New York reciprocally censures Power for this misconduct in New Jersey.

***Bishop v. Maurer*, 823 N.Y.S.2d 366 (N.Y. App. 2006). Rules 1.7. Topics: Malpractice.** Conflicts waivers in an engagement letter—and in a related estate planning document-- which plaintiff signed were enough to avoid a malpractice claim brought by husband against firm that did estate planning for him and his wife, notwithstanding his allegation that more was expected of the firm in light of the "apparently hostile relationship with his wife." The engagement letter waiver stated: "Any relationship between a lawyer and a client is subject to Rules of Professional Conduct. In estate planning, ethical rules applicable to conflicts of interest and confidentiality are of primary concern. By countersigning a copy of this letter, you each acknowledge that you have had the opportunity to consult independent legal counsel with respect to your estate planning, and you each affirmatively waive with full understanding any conflict of interest inherent in your both relying on the advice of this firm and its attorneys." These waivers were sufficient to rebut the client's claim that defendants had failed to advise him of the conflict implicit in their simultaneous representation of him and his wife.

***Estate of Tenenbaum*, 2006 N.Y. Misc. LEXIS 9013; 235 N.Y.L.J. 2 (NY Surrog. 2006). Rules 1.7, 1.9. Topics: Disqualification.** This is a dispute between one of five co-executors (H), in her personal capacity, and several of the other co-executors. H argues that she is entitled to a particular piece of property based on a written note from the decedent. One of the respondent co-executors (M) seeks to disqualify the law firm which is representing H, claiming it is a conflict for the firm to represent H in both her personal capacity and as a co-executor where it must defend against her personal claim. Court denies M's motion to disqualify H's counsel, finding that while the law firm is representing her in both her personal and her fiduciary capacity, it is not representing her in her fiduciary capacity in defending against her personal petition here; indeed, she is not a respondent in this proceeding, even in her fiduciary capacity, but appears in the action only as the petitioner. Moreover, all the other co-executors have separate representation. Thus, the court found no conflict. Under the circumstances, the fact that her lawyer is representing her in her fiduciary capacity as to other estate administration matters does not require counsel's disqualification. Another motion to disqualify M's lawyer by another co-executor is described under MRPC 1.9. In another motion, another of the co-executors (R) seeks to disqualify counsel for co-executor (M) on the ground that the firm formerly represented both R and M. Court denies R's motion to disqualify M's counsel based on the firm's former representation of her. It is clear that there was a former attorney/client relationship, but the court finds that R's and M's interests are now aligned, so there is no adversity between the former representation and this. Moreover, R has failed to show that she might have imparted any confidences to the firm

that could be used against her here.

***Lamotte v. Beiter*, 2006 N.Y. Misc. LEXIS 3254; 235 N.Y.L.J. 116 (NY S.Ct. 2006). Rules 1.9. Topics: Disqualification.** This is a dispute between the estate of one of two owners of a pair of companies against the surviving owner. The estate, as 50% owner, seeks to disqualify the law firm which is representing the surviving owner and the companies against the estate. The court denies the motion to disqualify based on a former client conflict. It holds that the companies, not the decedent, were represented by the law firm before the death of the co-owner, rather than the co-owner personally, and so no attorney client relationship with the decedent was formed, or will be imputed to the law firm. Nor is there any evidence to show law firm acquired confidential information about the decedent that was related to the current proceeding. Finally, even if the firm had represented the decedent, the matters are not substantially related.

***Estate of Gallagher*, 2007 N.Y. Misc. LEXIS 7639; 238 N.Y.L.J. 83 (NY Surrog. 2007). Rules 1.6, 1.9. Topics: Disqualification.** This is a will contest in which the contestants argue that the decedent lacked testamentary capacity to execute the will offered and/or it was the result of undue influence by the named executor who is offering it. The contestants moved to disqualify the lawyer for the executor and another lawyer who had withdrawn from participation in the will contest, but who was still representing the executor on post-mortem matters relative to the estate. The court disqualified the lawyer who was representing the executor on post-mortem non-contest matters because he had served as counsel for both the executor and the contestant when the two had been appointed as co-guardians for the decedent. The contestant “has the right to be free from any concern that [her former lawyer] may, even inadvertently, betray any confidences which she may have imparted to him.Any doubts should be resolved in favor of disqualification.” On the other hand, there was no evidence that executor’s current counsel in the will contest (who had not previously represented the contestant) had been privy to any confidences communicated to the contestant’s former lawyer and the court refused to disqualify this lawyer.

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

***Estate of Garrett*, 2007 N.Y. Misc. LEXIS 5748; 238 N.Y.L.J. 24 (NY Surrog 2007). Rules 1.7, 1.16. Topics: Disqualification.** A lawyer representing co-executors (L & B) files an unopposed motion on behalf of B to remove L, for permission to withdraw from representing L, and for permission to continue to represent B. The motion to withdraw is based on the failure of L to communicate with counsel, her failure to appear on the date set for her removal hearing, and because she “has taken a position, contrary to advice of counsel that is antithetical to the best interests of the estate,” thus making “effective representation unreasonably difficult.” The court grants the motion to withdraw, but disqualifies the lawyer from continuing to represent the remaining executor. By representing B in a petition to remove L,

who is also a client, the lawyer has violated NY's conflict rule, should have withdrawn from representing the remaining executor, and is disqualified from doing so any more.

Estate of Maura, 17 Misc. 3d 237; 842 N.Y.S.2d 851 (NY Surrog. 2007). Rules 1.6, 1.9. Topics:

Evidence. In a dispute over whether a second spouse, who survived the decedent, is precluded from claiming an elective share by virtue of a prenuptial agreement which she argues was based on fraud, the court orders the law firm who prepared the prenuptial agreement to make a clone of its hard drive and submit, under seal, any data files relating to the Maura matter, whereupon it would hear any claims of privilege and confidentiality that the firm might wish to make.

Estate of Walsh, 17 Misc.3d 407, 840 N.Y.S.2d 906 (N.Y.Sur. 2007). Rules 1.6, 1.9, 3.7.

Topics: Evidence, Attorney/Client Privilege, Disqualification. Lawyer who formerly represented the decedent and now is personal representative of an estate is representing himself as PR and petitions for discovery. Court holds he has waived the a/c privilege as to communications he had with another lawyer about the decedent's affairs insofar as he has attached those communications to his petition. As personal representative, he may waive decedent's a/c privilege. Furthermore, the lawyer who is personal representative of an estate must be disqualified from representing himself as personal representative because he is a necessary witness to key transactions and so the witness/advocate rule applies. Although there is an exception to that rule in NY for lawyers appearing pro se, where a lawyer represents himself as personal representative, this is not pro se representation. As with representation of an entity, the personal representative does not proceed in his/her own interest but on behalf of those interested in the estate.

Matter of Blumstein, 22 A.D.3d 163; 801 N.Y.S.2d 299 (2007). Rules 1.15, 8.4. Topics: Discipline.

Lawyer who had been a partner at a major NY law firm for more than 25 years, and who then retired, was disbarred for misappropriating \$517,750 from his aunt's trust over which he was a co-trustee. "[The lawyer] testified at the hearing that the money taken from his aunt's trust account was not used for emergencies, but rather was used to maintain the affluent lifestyle for his wife and family that he could not sustain after his retirement from the firm. ...he knew he had done a terrible thing, but could not stop because he feared that a scaled-back lifestyle would jeopardize his marriage.he had a drinking problem in the past and suffered a relapse in 2001. ...his marriage ended in 2003 because of his alcohol problems and financial pressures."

Matter of Garber, 42 A.D.3d 74; 833 N.Y.S.2d 892 (2007). Rules 1.15, 8.4. Topics: Discipline.

Lawyer pled guilty to misappropriating more than \$50,000 from the estate he was hired to represent. He subsequently repaid the funds. Here he resigns his license to practice based on this misconduct, which was part of his plea agreement.

Estate of Harris, 21 Misc. 3d 239; 862 N.Y.S.2d 898 (NY Surrog. 2008). Rules 1.9.

Topics: Disqualification. A one-third legatee of an estate brings an action to remove the executor and the executor moved to disqualify the legatee's counsel on the ground that the lawyer had previously represented the executor in administering the estate. The court granted the motion of disqualify: The lawyer had been retained (for a year) by the executor to assist in administering the estate but had been terminated; the matters were substantially related since

the executor's actions in administering the estate were at the basis for the petition to remove the executor; and the legatee was adverse to the executor.

Estate of Lillian Piazza, 2008 N.Y. Misc. LEXIS 2660; 239 N.Y.L.J. 82 (N.Y. Sur. Ct. 2008). Rules 1.9. Topics: Disqualification. This is a contested probate in which one of two nominated co-executors argues that the other should not be appointed. The other nominated co-executor moved to disqualify counsel for the objectant arguing that he had previously represented her. Court found that the previous representation was remote in time and subject matter from the probate matter and did not warrant disqualification. Although the two nominated co-executors had met, together, with the lawyer, apparently in anticipation of retaining him to represent them both in the probate proceeding, in fact they had not retained him and the consultation had ended before any confidences were transmitted, so there was no prior client conflict arising from that consultation that justified disqualification.

Matter of Bacot v. Winston, 21 Misc. 3d 1123A; 873 N.Y.S.2d 509 (NY Surrog. 2008). Rules 1.9. Topics: Disqualification. Bacot petitioned for a guardianship of her father, Winston, and Winston's son opposed the petition and moved to disqualify Bacot's lawyer arguing that the firm had previously represented his father in an action for an accounting. The court refused to disqualify the firm first because it had not actually represented Winston in the accounting action but instead had represented the daughter (Bacot) on behalf of her father and the firm never met with or spoke to the father in that representation and second because the action for an accounting was not substantially related to the guardianship matter. "While concededly, one of the issues that shall be explored in this action is the claims made in the former [accounting action], the actions are independent, the issues are different and the questions of law are not at all related." Third, there was no evidence that the firm had acquired confidences of Winston's that could be used against him in the guardianship matter.

Matter of Coleman, 22 Misc. 3d 830, 868 N.Y.S.2d 882 (2008), rev'd in part 2010 N.Y. App. Div. LEXIS 489 (N.Y. App. Div. 2010). Rules 1.12, 3.7. Topics: Disqualification, Evidence. This was an action to compel an executor to distribute a legacy in which petitioner and the defendant executor moved to disqualify petitioners counsel and petitioner counter-moved to disqualify executor's counsel. Both motions were granted by the trial court. On the MR 1.12 issue, petitioner's counsel was disqualified because they were associated in the same firm with the former chief court attorney who had been responsible for overseeing cases referred to the law department, of which this was one. The court thought it unnecessary to ask whether he had specific involvement with this case as an appearance of impropriety was raised in any event. This second ruling, however, was reversed on appeal under NY's version of Rule 1.12. It was only appropriate to disqualify the former chief court attorney if he had been personally and substantially involved in a case while with the court, and there was no evidence of that here. Moreover, his involvement in developing court policies was not a sufficient basis for disqualifying him or his firm. On the MR 3.7 issue, executor's counsel was disqualified under NY's version of Rule 3.7 because he had represented the executor at the closing of a transaction that was at issue in the motion to compel and so was a necessary witness. For the MR 1.12 issue, see annotations under that rule.

Cheney v. Wells, 23 Misc. 3d 161; 877 N.Y.S.2d 605 (NY Surrog. 2008). Rules 1.14, 1.16. Executors for Cheney continued an action previously commenced by the decedent against decedent's daughter alleging harassment, threats and mistreatment of the mother while she was

alive. Here, the fifth lawyer for the defendant daughter moves to withdraw on the eve of trial arguing that withdrawal is mandated given a conflict of interest with the client. Noting from its own observations that the client was “incapable of managing the instant litigation, but also that she was unable to appreciate the consequences of that incapacity, “ and after a detailed discussion of ethics authorities, the court here grants the motion to withdraw, but only on the condition that this lawyer file a petition for a limited guardianship of defendant’s property. “[I]t appears that there is no ethical impediment to [the lawyer’s] bringing a limited guardianship proceeding for her client, and to disclosing to the [court] whatever information may be necessary. Such a proceeding is the ‘least restrictive alternative’ available, and [this lawyer] is the only available person with significant knowledge to bring it.”

In re Zalk, 10 N.Y.3d 669; 892 N.E.2d 369; 862 N.Y.S.2d 305 (2008). Rules 1.5, 1.15, 8.4. Topics: Discipline, Evidence. Lawyer withdrew roughly \$100,000 from his escrow account from the proceeds of the sale of a client’s real estate shortly after she died. In this disciplinary proceeding, he presented evidence that the deceased client intended for him to withdraw this money as attorney fees for a decade of otherwise uncompensated legal services. The Bar took the position that this evidence had to be excluded under NY’s dead man’s statute and the intermediate appeals court agreed that the evidence was subject to the deadman’s statute on the merits of the allegations and imposed a two year suspension. Here, the NY Court of Appeals disagreed and reversed for further proceedings: the NY dead man’s statute does not apply in disciplinary proceedings.

Evans v. Perl, 19 Misc. 3d 1119A; 862 N.Y.S.2d 814 (NY SCt 2008). Rules 1.7. Topics: Disqualification. The underlying action was brought by a financial guardian for one of two sisters (S) and co-trustee of a family trust against the other sister (A) who was the other co-trustee, and companies in which the trust had an interest. The underlying allegation was that A had mismanaged the trust and the controlled companies and had engaged in self-dealing. Here, the guardian moved to disqualify the law firm for A as co-trustee and the company co-defendants on the ground that the law firm was engaged in dual representation of conflicting interests. If, as alleged, A was engaged in misconduct, it was in the interest of the companies for this to be shown. The court found that there was potentially conflicting dual representation and that the conflict had not been waived, but refused to disqualify the firm. It concluded that such an action would not serve the interests of the business entities involved, given that they were under the management of A as co-trustee and any substitute counsel for them would need to take direction from A in any event.

Garner v. DII Industries, LLC, 2008 WL 4934060 (W.D.N.Y. 2008). Rules 5.5. Under New York law, a nonlawyer who is proceeding in a representative capacity as the personal representative and who has no beneficial interest in the claim may not prosecute a wrongful death claim pro se; she must, instead, be represented by counsel.

Gabayzadeh v. Taylor, 639 F.Supp.2d 298 (E.D.N.Y. 2009). Rules 1.9, 3.7. Topics: Disqualification, Evidence. Plaintiff trustee seeks to disqualify law firm representing one of the co-defendants in this civil fraud action arising from previous corporate work in which the law firm participated as counsel for another co-defendant. Court holds, first, that plaintiff may not maintain this action pro se, as she is doing, because she is not licensed to practice. It then goes on to address the merits of the plaintiff’s motion and denies it. The witness-advocate rule does not require disqualification because the lawyers who may be

necessary witnesses in this action as a result of their previous corporate work are not serving as advocates and it is too early to determine whether NY's version of Rule 3.7, which would prohibit others in the firm from serving if their testimony may be prejudicial to the client, would require disqualification. The possibility that plaintiff may actually name the law firm as a defendant does not require disqualification because if that happens, the firm is permitted to represent itself under federal law: 28 U.S.C. § 1654. The fact that the attorney/client privilege may protect certain communications between the law firm and its former client, co-defendant here, is not affected by whether the firm continues to represent another co-defendant here, and so is not a ground for disqualification. Finally, the appearance of impropriety, devoid of substance, is an insufficient ground for disqualification.

***Matter of Hathaway*, 67 A.D.3d 207; 886 N.Y.S.2d 198 (NY AD 2009). Rules 1.3, 1.15, 8.5. Topics: Discipline.** Lawyer resigned from Connecticut Bar in lieu of discipline for the wrongful handling of the proceeds of a sale of real property owned by a decedent's estate (delay; failure to place in trust account; disbursement from an account with insufficient funds). In this action, NY reciprocally disbars the lawyer on the basis of the misconduct found in Connecticut.

***Estate of Goodman*, 2009 N.Y. Misc. LEXIS 2445; 241 N.Y.L.J. 102 (N.Y.S.Ct. 2009). Rules 1.9, 3.7. Topics: Disqualification, Evidence.** Surviving husband of decedent and petitioner for appointment as executor moved to disqualify lawyer representing a party opposed to his appointment on the ground that lawyer representing the opponent had previously represented decedent in estate planning and was a necessary witness as to her testamentary intentions and, moreover, lawyer had represented both decedent and her surviving husband, petitioner here, in estate planning. Court disqualified the contestant's lawyer on the ground that he would be a necessary witness, but more importantly on the ground that he was now adverse to his former client (the surviving husband) on a matter substantially related to his former representation of the husband.

***Tischler v. Fahnestock & Co., Inc.*, 871 N.Y.S.2d 887 (NY S.C. 2009). Rules 1.5, 1.7.** Mother (R) of a disabled adult child (E) hired lawyer (L) who had formerly represented R to prosecute an action against a securities broker on behalf of E for malfeasance. Defendant counterclaimed against R alleging that she was responsible for any losses to E. L had court appoint a guardian ad litem for E who then continued the retention of L. L advised mother R that he did not represent her, and R retained separate counsel. Amidst several changes in the guardianship for E, L was dismissed and a replacement GAL also served as counsel for E. When L sought quantum meruit fees (roughly \$80,000) for his work for E, R challenged the lawyer's fee petition for fees on the ground that he had a conflict because he simultaneously represented both her (R) and E. Court, however, rejected the objection finding that the lawyer had never represented R but only E and therefore had no conflict. Indeed, L had avoided taking direction from R (who had contracted to pay his fees) once he discovered she did not have authority to act for E. The court granted the fee request to be paid from E's recovery, rather than by R.

***Matters of Koplovitz*, 62 A.D.3d 1205; 880 N.Y.S.2d 214 (NY AD 2009). Rules 1.7, 1.15, 8.4. Topics: Discipline.** Two brothers --- lawyers --- were appointed as co-executors and co-trustees under the will & trusts of their Uncle. On one of the trusts, their aunt had a life estate and they were remaindermen with their cousin. They purchased an annuity for their aunt so as

to accelerate the vesting of their remainder interest, contrary to the express terms of the trust. They also appropriated executors' fees without the required court authority. The court found this to be professional misconduct: they had converted estate funds in violation of NY's equivalent of MRPC 8.4 & 1.15; and they had a conflict of interest in violation of NY's version of MRPC 1.7. They were suspended for one year, but the suspension was stayed on conditions.

***In re Goldsmith*, 61 A.D.3d 132, 874 N.Y.S.2d 28 (N.Y.A.D. 2009). Rules 1.3, 8.5. Topics: Discipline.** This was a reciprocal disciplinary proceeding. Licensed in both NY and NJ, the lawyer was found by NJ to have grossly neglected an estate worth more than \$500,000 for two years, failing, among other things, promptly to distribute \$591,000 of assets that were available to beneficiaries. Significantly, his neglect was as executor rather than attorney for the estate. "Although he was acting as executor, as opposed to the attorney for [the] estate, he still had a fiduciary relationship with the beneficiaries, and an obligation to conduct himself in accordance with the rules." He was publicly censured for this conduct in NJ and also in NY. See *In re Goldsmith*, 190 N.J. 196, 196, 919 A.2d 812 (2007)(lacking details).

***Estate of Schneider v. Finmann*, 15 N.Y.3d 306 (2010). Rules 1.1. Topics: Malpractice.** Lawyer allegedly gave client bad advice regarding titling of life insurance, causing life insurance to be included in client's taxable estate. The New York court relaxed its strict privity rule and held that the executor of the estate could sue for malpractice. See the New York Bar ethics opinion, discussed above, issued in response to Schneider case.

***Leff v. Fulbright & Jaworski LLP*, 911 N.Y.S.2d 320 (2010). Rules 1.1. Topics: Malpractice.** Law firm represented a husband and wife (his third wife) for estate planning, but separately. When husband died, an agreement was found that required him to leave half his estate to a son from prior marriage. His wife sued the law firm, alleging law firm should have known about and discussed the agreement with husband, and that he would have devised a way to give her a larger share of the estate than she received had he known of the obligation to the son. The court held that the wife had no privity with law firm with respect to her husband's estate plan, and under New York's privity rule, she could not sue for malpractice. "Plaintiff's subjective belief that she had engaged in joint estate planning or was jointly represented with her late husband is insufficient to establish such privity.... There is no evidence that [lawfirm] knew and intended that their advice to plaintiff's late husband was aimed at affecting plaintiff's conduct or was made to induce her to act. Nor is there evidence that plaintiff relied upon defendants' advice to her detriment. Significantly, the standard is not satisfied when the third party was only 'incidentally or collaterally' affected by the advice." (This case was decided after *Schneider*, noted below, and that case was distinguished). Note that these Commentaries caution that separate representation of H and W is "generally inconsistent with the lawyer's duty of loyalty to each client." Commentaries, MRPC 1.7 "Joint or Separate Representation." *Leff* may present a requirement that clients be informed in advance of the separate representation of the effect of lack of privity in jurisdictions that restrict a beneficiary's right to sue a drafting attorney.

***Steinbeck v. Steinbeck Heritage Foundation*, 400 Fed. Appx. 572 (2d. Cir. 2010). Rules 1.1. Topics: Malpractice.** In a longstanding dispute among the Steinbeck heirs over copyright interests in the author's works, the court held that deceased author's son could

not claim an attorney-client relationship with lawyers who worked for the literary agency simply because they held themselves out as copyright experts, told him they had his best interests in mind, and expressed sympathy for him, particularly in light of the fact that son was represented by other counsel at the time. His claim for breach of fiduciary duty against the literary agency on this basis therefore failed.

Will of McElroy, 34 Misc.3d 689, 935 N.Y.S. 2d 855 (N.Y. 2011). Rules 1.7, 1.9. Topics: Disqualification. Decedent left a will that put 2/3 of her residuary estate into a special needs trust for her only daughter and gave the remaining estate to grandchildren. A Guardian ad litem was appointed for the daughter, and the GAL filed objections to the will on her behalf. The lawyer who drafted will was named as executor and he was being represented by his law firm, which had represented daughter in the past and currently provided her with financial management assistance. The GAL moved to disqualify law firm for conflict of interest. The court agreed that the law firm had a conflict of interest and disqualified the law firm.

In re Ginzburg, 89 A.D.3d 938, 941, 932 N.Y.S.2d 534, 537 (2011.) Rules 1.1. Topics: Malpractice. A medical malpractice action was brought by husband and wife for injuries to husband. While case was pending, H died, and son was appointed as his estate's PR, and then W died, and son applied to be PR of that estate too. Son claimed to be only heir. The case settled and the proceeds were paid to the lawyer. The lawyer was directed to pay the net proceeds to son as executor of H's and W's estates, but lawyer issued checks to son in his individual capacity. Another son showed up and sued the lawyer. This son won summary judgment against lawyer for amount equal to what he would have been entitled to as heir of his parents' estates on the theory that lawyer had breached his fiduciary duty to abide by the terms of the decree.

Estate of Benware, 86 A.D. 3d 687, 927 N.Y.S.2d 173 (2011). Rules 1.5. This was a challenge of the fees awarded as part of the final accounting for an estate administration. Court upheld order directing 20% of the fees to be taken from one beneficiary's share, because that beneficiary, "by her actions, caused the estate to incur unnecessary legal expenses" and the applicable statute (SPCA 2110(2)) authorized such an allocation of fees. But the court remanded for a potential reduction of the fees awarded because they exceeded what had been requested and the record did not support an upward adjustment.

In re Sucklal, 89 A.D.3d 36; 928 N.Y.S.2d 598 (2011). Rules 5.5, 8.5. Topics: Discipline. After Sucklal is "disbarred" from practice in Maryland, where she was not admitted, for engaging in the unauthorized practice of law there, Sucklal is reciprocally suspended from practice for one year by New York, where she is admitted.

Hayes v. New York Attorney Grievance Comm. of the Eight Judicial Dist., 672 F.3d 158 (2d Cir. 2012). Rules 7.1, 7.4. Topics: First Amendment. New York adopted disclaimer rules for lawyers advertising that they were specialists as follows: "A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "[1] The [name of the private certifying organization] is not affiliated with any governmental authority[,] [2] Certification is not a

requirement for the practice of law in the State of New York and [3] does not necessarily indicate greater competence than other attorneys experienced in this field of law.” The federal court struck down the second and third components of the disclaimer rules as violative of the first amendment, and held that the requirement that the disclaimers be “prominently made” was unconstitutionally vague.

In re Lawrence, No. 149, 2014 WL 5430622 (N.Y. Oct. 28, 2014). Rules 1.5. This case is the culmination of an almost 15 year dispute over fees earned by the law firm Graubard Miller and gifts made to 3 of its partners for representing the widow of Sylvan Lawrence and her 3 children in claims against the executor of his \$1 billion estate (Cohn). In 2005, the underlying estate litigation settled for \$111 million, triggering a 40% contingent fee that Lawrence had agreed on with Graubard. When Lawrence refused to pay it this action was commenced. By this time, Lawrence had already paid at least \$18 million in fees for twenty years of estate litigation and had made additional gifts to Graubard partners that totaled more than \$5 million. Lawrence (herself) died in 2008 and the dispute was continued by her estate. The court held that the contingency fee agreement here was neither procedurally nor substantively unconscionable and so it was enforceable. The court further held that Lawrence’s attempt to recoup the gifts made to Graubard partners was time-barred since the doctrine of “continuous representation,” which would have tolled the statute until the end of the law firm’s representation, did not apply.

Matter of Bodkin, 9 N.Y.S.3d 510 (2015). Rule 3.7. Topics: Lawyer as Witness. In will contest, plaintiffs sought to disqualify the estate’s counsel because another lawyer in the firm had drafted the will. The New York rule prohibited representation if another lawyer in the firm is likely to be called as witness if the “testimony may be prejudicial to the client.” The court denied the motion to disqualify because the objectants failed to show that any testimony from the firm’s lawyers would be prejudicial to the firm’s client.

North Carolina:

Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. Ct. App. 1984), review denied, 321 S.E.2d 136 (N.C. 1984). Rules 1.1, 1.2. Topics: Malpractice. In this action by an estate’s sole heir against, among others, the estate administrator and counsel for the administrator, the court found that the heir had standing to sue the attorney in tort where the heir alleged that the attorney had failed to list the wrongful death action as an asset of the estate, gave incorrect legal advice to the administrator and continued the representation of conflicting interests. Interestingly, the court also held that the heir’s alleged contributory negligence was no bar to the cause of action of malpractice.

Ingle v. Allen, 321 S.E.2d 588 (N.C. Ct. App. 1984), review denied, 329 S.E.2d 593 (N.C. 1985). Rules 1.1, 1.2, 1.7. Topics: Malpractice. This case involved an action brought by a beneficiary of a decedent’s estate against the lawyer who represented a co-executor who was also a co-trustee of a testamentary trust. The court stated that the lawyer “owed a duty of care to the plaintiff as a beneficiary under the will.” However, the court concluded that the lawyer had acted with the care and skill required of a lawyer for the personal representative. Moreover, it was not a conflict of interest for the lawyer to represent the co-executor personally in an ejectment action against the plaintiff.

Estate of Smith v. Underwood, 487 S.E.2d 807 (N.C. Ct. App. 1997). Rules 1.5, 4.1. The

appellate court here upheld a trial court's award in favor of the beneficiaries of a trust who had sued the attorney/trustee (together with an accountant and the accountant's firm) for breach of fiduciary duty and professional negligence. The attorney had filed an initial trust accounting and obtained approval of his fees and commissions in 1955, the year after the decedent died, but from 1956 until 1991 filed no annual accountings and did not obtain the probate court's approval of the fees and commissions that he collected. The award against the attorney included statutory double damages allowed under state law when an attorney has committed a fraudulent practice.

Pritchett & Burch, PLLC v. Boyd, 169 N.C.App. 118, 609 S.E.2d 439 (2005). Rules 1.5, 1.8. Law firm entered into a contingent fee agreement to represent will contestants. It negotiated what it believed was a settlement to which clients agreed, but ultimately clients rejected settlement, fired lawyers, hired a new firm, and lost entirely at trial. Original law firm then sought recovery on the fee agreement (which would have yielded \$300,000) or, in lieu of that, quantum meruit (\$62,000). In this decision, the appeals court denied firm any fee on the ground that no recovery was ever obtained. It did, however, allow firm to recover expenses of litigation under Rule 1.8(e) on a theory of quantum meruit (\$32,000) since a lawyer may not assume these expenses in NC.

Babb v. Bynum & Murphrey, PLLC, 182 N.C.App. 750, 643 S.E.2d 55 (2007). Rules 1.1. Topics: Malpractice. Beneficiary/co-trustee brought a malpractice claim against partner & law firm of another lawyer who served as a co-trustee for failure to monitor the trustee lawyer's conduct. The trustee lawyer was alleged to have engaged in fraud, conversion & embezzlement of trust funds. Court rejected the plaintiff's theories that defendants owed plaintiff a duty to monitor under either the state limited liability act or the law firm operating agreement.

North Carolina State Bar v. Ethridge, 188 N.C.App. 653, 657 S.E.2d 378 (2008). Rules 1.8, 1.14, 8.4. Topics: Discipline. Lawyer was disbarred for taking advantage of an elderly client with dementia. When client sought his assistance to safeguard property she owned, he had her deed her residence to him personally and transfer more than \$14,000 to him which he deposited in his own personal bank account. Two weeks later the client was placed in a family care home and just over a month later a court declared her incompetent and appointed a guardian. The lawyer for the guardian demanded the return of the ward's property from the respondent lawyer and he ultimately deeded the residence back to the former client and repaid most of the funds he had obtained from her, but not before he had tried to misappropriate some of them for his personal use.

Kingsdown, Inc. v. Hinshaw, 2015 WL 1406311 (N.C. Super. 2015). Rules 1.9, 1.10. Topics: Disqualification. Plaintiff sued its former CEO alleging fiduciary breaches. Defendant moved to disqualify the plaintiff's law firm alleging that one of its founders, since deceased, had represented him personally for more than twenty years, including extensive estate planning work and advice relevant to the current lawsuit. The law firm argued that the lawyer who had done the work had died and so was no longer with the firm. The court disqualified the firm under Rule 1.10(b), nonetheless, because it had failed to convince the court that it did not continue to possess confidential information that was relevant to the current case.

North Dakota:

In re Disciplinary Action Against Garcia, 366 N.W.2d 482 (N.D. 1985). Rules 1.3, 1.15, 4.1, 8.4. Topics: Discipline. In this case the court upheld a 90 day suspension of a lawyer for misconduct in conversion of a client's funds, neglect, misrepresentation, and deceit. (The lawyer failed to prepare a will or return retainer and lost file for over three years.) The lawyer had a prior disciplinary record.

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

In re Disciplinary Action Against Giese, 662 N.W.2d 250 (N.D. 2003). Rules 1.8 Attorney entered into contract to purchase land from clients (husband and wife), whom he was representing in a separate matter involving a dispute over the land. He notified clients in writing that he was unable to represent them in the sale of the land, and advised them to seek independent counsel. After husband died, attorney asked wife to execute a warranty deed to attorney, without advising wife to seek independent counsel. Because of the nature of the attorney-client relationship, including the attorney's superior knowledge in business transactions, the mere suggestion that the client should seek independent counsel's review of the transaction is insufficient to satisfy the attorney's obligation imposed by MRPC 1.8.

In re Christensen, 2005 ND 87; 696 N.W.2d 495 (N.D. 2005). Rules 1.7, 1.14. Topics: Discipline. Lawyer was reprimanded for misconduct in three matters, one of which involved estate planning. After preparing a trust and power of attorney for a client, the client married and the attorney in fact questioned his competence to do so. So he authorized the lawyer to commence annulment proceedings and a guardianship proceeding, which the lawyer did on behalf of the AIF. The court held that although the lawyer would have been authorized under Rule 1.14 to commence guardianship proceedings to protect his client, whose competency he questioned, he was not entitled to do so on behalf of a third person, the attorney in fact, and the lawyer stipulated that this was a violation of Rule 1.7. The court relied on ABA Op. 96-404.

In re Hellerud, 714 N.W.2d 38 (N.D. 2006). Rules 1.5. Topics: Discipline. Attorney was reprimanded and ordered to refund \$5,000 in fees out of roughly \$15,000 received in a relatively simple cash probate administration of an estate valued at about \$65,000. Lawyer admitted charging the administrator more than he had charged any other client because he was unfamiliar with North Dakota probate law, and also admitted (inadvertently) billing his paralegal's time at the same rate as his own.

Discipline of Kuhn, 785 N.W.2d 195 (N.D. 2010). Rules 1.7, 1.9, 1.14. Topics: Discipline. Lawyer had prepared client's will and later represented client's 2 sons in having a guardian appointed for the client. After receiving a call that client wanted to change his will, without consulting with the guardian, lawyer prepared a new will which provided a larger bequest than previously to the 2 sons who were the lawyer's former clients. Disciplinary counsel charged lawyer with violation of RPC 1.7, but court held there was no violation of RPC 1.7 because

sons were former clients rather than current clients and RPC 1.7 required a conflict between current clients. It was also a violation of MR 1.14. Note that the North Dakota version of Rule 1.7 does not expressly state that the rule might be breached because of duties owed to former clients, as does Model Rule 1.7(a)(2). Lawyer was suspended for 90 days.

Disciplinary Action against McIntee, 833 NW2d 431 (ND 2013). Rules 1.7, 1.9. Topics: Discipline. Attorney prepared will for testatrix, and when she died, represented a son and a daughter who were appointed as co-executors (who were also beneficiaries under the will). Attorney was aware that there were potential problems in interpreting the will but did not advise co-executors of potential conflicts in the joint representation and did not get their consent. During the administration of the estate, the daughter executor complained about lack of information but the attorney did not advise her that she could get independent representation for her role as co-executor. After the probate was closed, attorney began to represent the son co-executor individually and filed suit against the daughter and other siblings for interpretation of the will terms regarding use of farmland. Court held: attorney violated 1.7 by not getting consent for the common representation, and violated 1.9 by filing suit against the daughter, a former client, in a substantially related matter in which her interests were materially adverse.

Runge v. Disciplinary Bd. Of N.D., 858 NW2d 901 (N.D. 2015). Rule 1.14. Topics: Clients with Diminished Capacity. The North Dakota Supreme Court held that the attorney acted properly in assisting an elderly client revoke a power of attorney given to the client's daughter. The attorney talked with the client and in his judgment the client had capacity to make the decision but did not consult with the daughter as attorney-in-fact. The court noted that there was no requirement that the lawyer consult with the attorney-in-fact since the client still retained decisionmaking authority, and contrasted the *Kuhn* case where the lawyer drafted a will for a client without consulting the client's court-appointed guardian. The court noted that Rule 1.14 directs lawyers to maintain a normal client-lawyer relationship with the client as far as possible, and that lawyers are not subject to discipline under Rule 1.14 when their action is the product of reasonable deliberation, has a plausible professional basis and arguably serves the client's interests.

Estate of Amundson, 870 NW2d 208 (N.D. 2015). Rule 1.5. Topic: Fees. Trial court held lawyer's fees in administration of estate were unreasonable and ordered him to repay \$95,000. He objected to the evidence used by the trial court and to the personal judgment, arguing that his professional corporation should be the entity liable. The trial court order was upheld. The court noted testimony of what would typically be charged, and that the lawyer did not use paralegals and much of the work he billed for was secretarial in nature. The court noted that the district court is considered an expert in determining reasonableness of attorneys fees and that there was sufficient evidence on the record to support the trial court's findings. The court further held that because a lawyer is prohibited from charging an unreasonable fee, "responsibility for doing so cannot be shifted to the lawyer's professional corporation to avoid liability."

Ohio:

Allison v. Allison, 238 N.E.2d 768 (Ohio 1968). Rules 1.7. If the executors-plaintiffs, as individuals, have a financial interest in the outcome of the will contest adverse to the

financial interests of other parties in interest, and the powers of the executors, as such, may be used to their advantage as individuals and to the disadvantage of other parties in interest, in a trial of said contest, the executors may continue in that capacity, providing the will contest is dismissed and the estate distributed according to the terms and provisions of the will, or if the executors, as individuals, wish to continue the contest they may do so if they resign and impartial fiduciaries are appointed for the estate. 238 N.E.2d at 771. The opinion notes that the same law firm represented the plaintiffs both as individuals in the will contest and as executors of the decedent's will. Although the court did not comment on the propriety of the law firm serving in this dual capacity, the decision at least implies that doing so was improper.

Bar Ass'n of Greater Cleveland v. Cook, 480 N.E.2d 436 (Ohio 1985). Rules 1.4. Topics: Discipline. In this case the lawyer's failure to advise an executor of his rights and responsibilities regarding the filing of accountings was one charge involved in a multi-count case that resulted in the lawyer's disbarment.

Bar Ass'n of Greater Cleveland v. Shillman, 402 N.E.2d 514 (Ohio 1987). Rules 1.1, 1.4, 1.7, 1.15. Topics: Discipline. This was a disciplinary case in which the lawyer who served as personal representative and attorney loaned estate assets to another client, which involved serious conflicts of interest, and failed to inform the beneficiary of a trust of conflicts of interest. An indefinite suspension was imposed.

Toledo Bar Ass'n v. Wroblewski, 512 N.E.2d 978 (Ohio 1987). Rules 1.1. Topics: Discipline. In this disciplinary case the lawyer made no attempt to determine whether or not the decedent was survived by next of kin; failed to include assets in estate inventory; and improperly prepared some tax returns. An indefinite suspension was imposed.

Office of Disciplinary Counsel v. Mauk, 512 N.E.2d 670 (Ohio 1987). Rules 1.3, 1.4, 5.5. Topics: Discipline. A lawyer was suspended indefinitely for unauthorized practice of law, failure to prepare will or communicate with client, followed by lawyer's withdrawal from practice, claiming Agent Orange disorder.

Mahoning County Bar Ass'n v. Theofilos, 521 N.E.2d 797 (Ohio 1988). Rules 1.8. A lawyer was suspended for one year for drawing a will for a client he had known for only four months that gave the client's entire estate to the scrivener and his minor son. All of the decedent's assets passed to the lawyer under joint and survivor bank accounts.

Elam v. Hyatt Legal Serv., 541 N.E.2d 616 (Ohio 1989). Rules 1.1, 1.2. Topics: Malpractice. In this case the Supreme Court of Ohio permitted a law suit brought by beneficiaries contending they had lost their inheritance through the negligence of the estate's attorney who had recorded a certificate of title to certain real estate in the name of the deceased testator's husband alone, despite the fact that the decedent's will had bequeathed the husband only a life estate in the property with the remainder devised to the plaintiff beneficiaries. The court distinguished *Simon v. Zipperstein, supra*, (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) and found that the estate's beneficiaries were in privity with the estate attorney because here their interests were vested, whereas in *Simon* the beneficiaries' interests were contingent and not vested.

Firestone v. Galbreath, 976 F.2d 279 (6th Cir. 1992). Rules 1.1, 1.2. Topics:

Malpractice. In this case the beneficiaries of a trust brought claims, *inter alia*, against the attorneys for the trustee. Applying Ohio law and resolving questions unanswered by *Simon v. Zipperstein, supra*, (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) and *Elam v. Hyatt Legal Services, supra*, the federal appellate court approved the federal district court's dismissal of the beneficiaries' claims against the trustee's attorneys based on an analysis of when the beneficiaries' rights in the trust vested.

Lewis v. Star Bank, N.A., 630 N.E.2d 418 (Ohio Ct. App. 1993). Rules 1.1, 1.2. Topics: Malpractice. This decision upholds dismissal of a malpractice action brought by the beneficiaries of a revocable trust against the trustee and the lawyers for the deceased trustor for alleged failures to advise her properly regarding the generation-skipping transfer tax. Dismissal was proper because the beneficiaries were not in privity of contract with the trustee or the lawyers during the trustor's lifetime. In addition, the court observed that "While [the Trustor] was alive, the Law Firm owed her a duty of complete and undivided loyalty. If we were to hold that the duty was owed to [the Trustor] and to all the plaintiffs, as plaintiffs implicitly urge us to do, the Law Firm would have found itself representing divided and disparate interests, which is impermissible." 630 N.E.2d at 421.

Office of Disciplinary Counsel v. Ball, 67 Ohio St. 3d 401, 618 N.E.2d 159 (Ohio 1993). Rules 1.1, 5.3. Topics: Discipline. A lawyer was suspended from practice for six months for neglect in failing to supervise a secretary who embezzled \$200,000 from client funds over a ten-year period. "As the record demonstrates, respondent relinquished significant aspects of his probate practice to [his secretary] and failed to set up any safeguards to ensure proper administration of the matters entrusted to him by clients. Delegation of work to nonlawyers is essential to the efficient operation of any law office. But, delegation of duties cannot be tantamount to the relinquishment of responsibility by the lawyer." 618 N.E.2d at 161.

Arpadi v. First MSP Corp., 628 N.E.2d 1335 (Ohio 1994). Rules 1.13. In this action brought by the limited partners of a partnership against the general partner and the law firm that represented the partnership, the Supreme Court of Ohio held that:

[W]hether the duty arising from an attorney-client relationship is owed to the limited partnership itself or to the general partner thereof, it must be viewed as extending to the limited partners as well. Inasmuch as a limited partnership is indistinguishable from the partners which compose it, the duty arising from the relationship between the attorney and the partnership extends as well to the limited partners. Where such duty arises from the relationship between the attorney and the general partner, the fiduciary relationship between the general partner and the limited partners provides the requisite element of privity recognized under *Elam, supra*. Such privity, in turn, extends the duty owed to the general partner to the limited partners regarding matters of concern to the enterprise. 628 N.E. 2d at 1338-1339.

Estate of Haller, 689 N.E.2d 612 (Ohio Ct. App. 1996). Rules 1.5. An attorney/administrator sought fees for his firm's representation of himself in an estate administration. Introducing no expert testimony, the attorney did support his application with a 67-page itemization of his services. In affirming the trial court's approval of the entire fee requested (approximately \$39,000), the court observed that, "[w]hile the better practice may

be to introduce expert testimony as to the reasonableness of the fees, a probate court judge is nevertheless qualified to make a determination, upon evidence, of the reasonable attorney fees to be paid from the estate without the necessity of expert testimony.” 689 N.E.2d at 615.

Clermont County Bar Association v. Bradford, 685 N.E.2d 515 (Ohio 1997). Rules 1.8. Topics: Discipline. In this attorney disciplinary proceeding the Supreme Court of Ohio held that an attorney’s misconduct in representing the husband’s heirs after doing preliminary work for the wife’s heirs and in drafting revisions to a will under which he was a contingent remainderman warranted public reprimand.

Cincinnati Bar Assn. v. Kathman, 92 Ohio St. 3d 92, 748 N.E.2d 1091 (2001). Rules 5.4, 5.5, 7.2, 7.4. Topics: Discipline. Attorney is suspended for six months for assisting in unauthorized practice of law when he or she assists nonattorneys to market or sell living trusts and sharing fees with the nonlawyers.

Columbus Bar Assn. v. Fishman, 98 Ohio St. 3d 172; 781 N.E.2d 204 (2002). Rules 5.5, 7.1, 7.2. Topics: Discipline. Lawyer was suspended for one year for assisting the unauthorized practice of law by nonlawyer living trust company.

Kutnick v. Fischer, 2004 WL 2251799 (Ohio Ct. App. 2004). Rules 1.1, 1.6, 1.14. Topics: Malpractice. The court here held that the attorneys for an incapacitated person did not breach any duty of confidentiality owed to their client by requesting the appointment of one of the client’s lawyers as the client’s guardian since the court appointed someone else. Acknowledging that an attorney representing an “incompetent” [sic] client has special responsibilities under the ethical rules, the court observed:

We do not believe that any tort duty of loyalty precludes an attorney from pursuing the client’s best interests by seeking a court determination of the client’s competency and the appointment of a guardian in a proceeding separate from that in which the attorney is representing the client. The torts of malicious prosecution and abuse of process are available to the extent the client claims the attorney pursued the guardianship action without probable cause or for some ulterior purpose.

Akron Bar Ass'n v. Holder, 105 Ohio St. 3d 443; 828 N.E.2d 621 (2005). Rules 1.7. Topics: Discipline. Lawyer is suspended indefinitely for multiple violations arising from his unwaived conflicts of interest in representing a petitioner for bankruptcy and his wife, and the company she owned, and the trustee of a trust the lawyer established for the wife to hold the company stock and thus protect her assets from the bankruptcy.

Disciplinary Counsel v. Wheatley, 107 Ohio St. 3d 224; 837 N.E.2d 1188 (2005). Rules 5.4, 5.5, 7.1, 7.2. Topics: Discipline. Lawyer was suspended for six months for entering into a business relation with a nonlaw company marketing living trusts in the state and thus assisting the company in the unauthorized practice of law, splitting fees with a nonlawyer, and giving the company value in return for recommending his services.

Cincinnati Bar Ass'n v. Diehl, 105 Ohio St. 3d 469; 828 N.E.2d 1004 (2005). Rules 1.15, 8.4. Topics: Discipline. Lawyer was suspended for two years, with 18 months of this stayed on conditions, for converting to his own use funds he had received as executor of an estate.

Disciplinary Counsel v. Hunter, 106 Ohio St. 3d 418; 835 N.E.2d 707 (2005). Rules 1.15, 8.4. Topics: Discipline. Lawyer was disbarred for misappropriating \$180,000 from one estate for which he had been appointed as guardian and \$100,000 from another estate over which he was appointed as executor and trustee.

Disciplinary Counsel v. Kramer, 113 Ohio St.3d 455, 866 N.E.2d 498 (2007). Rules 5.5, 7.1, 7.2. Topics: Discipline. Lawyer contracted with a Texas non-law company which promoted living trusts and sold life insurance. He agreed and understood that the company would promote his legal services in connection with its products and assisted it in its sales and promotion. He was found to have engaged in improper acceptance of referrals from the company and to have assisted it in the unauthorized practice of law. He was suspended for six months, all stayed on conditions.

Disciplinary Counsel v. Johnson, 113 Ohio St. 3d 344; 865 N.E.2d 873 (2007). Rules 1.5. Topics: Discipline. Attorney was hired by an elderly client from whom a previous attorney had stolen \$800,000 to help her and her sister recover some of the funds. The client executed a power of attorney naming the attorney as AIF and he was appointed guardian for both sisters, The court concluded that in pursuing the sisters' claims he had charged excessive fees, spending time and money long after it was economically justified. All in all, he charged almost \$160,000 to collect just under \$198,000. The court found his fees excessive and suspended him for one year, with six months of this stayed on conditions, among which was that the condition that he repay \$50,000.

Columbus Bar Assn. v. DeVillers, 116 Ohio St.3d 33, 876 N.E.2d 530 (2007). Rules 1.1, 1.3. Topics: Discipline. Lawyer was suspended for two years after stipulating to multiple instances of misconduct, several of which involved probate matters which he badly neglected or handled incompetently. On one of these, he included decedent's house as a probate asset, without learning that it was held in joint tenancy with her brother, and then sold the house at a price (\$115,000) well below its appraised value (\$168,000) and even further below its market value two years later (\$216,000).

Disciplinary Counsel v. Fumich, 116 Ohio St.3d 257 (2007). Rules 1.1, 1.15, 8.4. Topics: Discipline. Lawyer was charged with two counts of misconduct. In one case, he was hired to probate a will and apparently filed a frivolous medical malpractice case on behalf of the decedent. When that case was dismissed, he did not admit this to the heirs and when one of them instructed him to settle the malpractice case, he told her it could be settled for \$16,000 and he used his personal funds to pay this amount and close the case. He was found to have neglected this matter and to have engaged in dishonesty in relation to it. He was suspended for 12 months, but with all stayed on conditions.

In re Estate of Born, 2007 WL 2773373 (Ohio App 2007). Rules 1.5. Lawyer for probate estate valued at \$87,000 submitted a second fee petition for almost \$8,000 after having an earlier petition for roughly \$4,000 approved and paid. The second petition was denied and

this was affirmed on appeal: “[T]he court observes [lawyer] created his own confusion, resulting in extra time and work put into this case by all parties involved. [Lawyer] failed to make proper service to the beneficiaries of the inventory and the first account, delaying the estate administration process and precluding the beneficiaries from timely objecting to the inventory or account while [he] took early payment for his work. Even though [his] errors initiated the contention, [he] requests additional payment for time spent to defend those errors. [His] objections [to the denial of his fees] are not well taken.”

***Disciplinary Counsel v. Robertson*, 113 Ohio St.3d 360, 865 N.E.2d 886 (2007). Rules 1.5, 1.8, 1.15, 8.4. Topics: Discipline.** Lawyer was suspended indefinitely on four counts of misconduct, three of which were related to estate planning and probate. In two of the cases, he borrowed funds from clients without complying with Rule 1.8(a); he also misappropriated client property and could not later account for it; and he charged an excessive fee against the death benefit annuity received by a client.

***Toledo Bar Assn. v. Cook*, 114 Ohio St.3d 108, 868 N.E.2d 973 (2007). Rules 3.3, 4.1, 8.4. Topics: Discipline.** Lawyer was disbarred for preparing multiple false deeds for an elderly client to make it appear she had transferred property three years before she had actually done so, apparently done to qualify the client for Medicaid. Then, mistakenly believing the deeds had transferred client’s property to herself individually, lawyer donated the property to a church and claimed charitable deductions on the transfer for herself. When others became worried about her client’s well being, lawyer sought to be made guardian for the client and obtained exculpatory statements from the client.

***Disciplinary Counsel v. Young*, 113 Ohio St. 3d 36; 862 N.E.2d 504 (2007). Rules 5.3. Topics: Discipline.** Lawyer was appointed as guardian of the estate of a veteran who had been declared incompetent to manage his own affairs. Over a number of years, lawyer became uninterested in carrying out his duties and turned over his responsibilities to his nonlawyer secretary, although he never sought to withdraw as guardian. As a consequence the ward’s estate lost \$40,000, although this was repaid by sureties. The lawyer was suspended indefinitely.

***Cincinnati Bar Assn. v. Heisler*, 113 Ohio St.3d 447, 866 N.E.2d 490 (2007). Rules 5.4, 5.5, 7.2. Topics: Discipline.** Lawyer who assisted a non-lawyer estate planning company to prepare and market living trusts and related estate planning documents stipulated to several violations including a rule prohibiting lawyers from practicing under a trade name, a rule prohibiting a lawyer from engaging a person or organization to promote the lawyer’s professional services, the rule prohibiting a lawyer from aiding a nonlawyer in the unauthorized practice of law), and the rule prohibiting a lawyer generally from sharing fees with a nonlawyer. He was suspended for six months but the suspension was stayed on conditions.

***Shoemaker v. Gindlesberger*, 118 Ohio St. 3d 226; 887 N.E.2d 1167 (2008). Rules 1.1. Topics: Malpractice.** Ohio is one of the minority of jurisdictions holding that lack of privity is a valid defense to a disappointed beneficiary’s action against a lawyer for negligent drafting of a will. Under Ohio’s strict privity rule, estate legatees have no standing to sue their mother’s estate planner for malpractice. See *Simon v. Zipperstein*,

512 N.E.2d 636 (Ohio 1987). The estate planner here assisted the decedent to transfer a life estate in a farm to one of her children allegedly without advising her of the tax consequences, thus shifting substantial tax liabilities to estate. In this case, the court refused to relax the privity requirement announced in *Simon v. Zipperstein*. In general, the only exception is for “fraud, bad faith, collusion or other malicious conduct.” However, see *Elam v. Hyatt Legal Services*, discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Disciplinary Counsel v. Hoskins, 119 Ohio St.3d 17, 891 N.E.2d 324 (2008). Rules 1.15, 1.3, 1.5, 8.4. Topics: Discipline. Lawyer was disbarred for nine counts of misconduct, two of which involved probate matters. While serving as executor and lawyer for two estates, lawyer failed to file accounts as required; took fees without court approval; and made withdrawals from the estates for his personal creditors.

Akron Bar Ass'n v. Watkins, 120 Ohio St. 3d 307; 898 N.E.2d 946 (2008). Rules 1.5, 1.15. Topics: Discipline. Asked to help manage the financial affairs of an elderly client in residential care, attorney prepared a power of attorney naming himself as attorney in fact and then, acting on that power, set up a trust for the client, naming himself as trustee. In that role, he paid himself more than \$46,000 in fees over the space of 20 months, taking some of this in advance of services but failing to place funds in his trust account. The court found that the fees charged were excessive by \$28,000 for the services rendered, and that lawyer had violated the trust account rules. He was suspended for six months, but the suspension was stayed on conditions.

Columbus Bar Ass'n v. Gueli, 119 Ohio St. 3d 434; 894 N.E.2d 1231 (2008). Rules 1.7. Topics: Discipline. Lawyer’s brother caused a fatal auto accident when he fell asleep at the wheel. Thereafter, lawyer undertook to represent the estate of the victim (a passenger in the car) in the probate and in a wrongful death action against the lawyer’s brother, and simultaneously to represent the brother. The court found that he was in flagrant violation of the conflicts rules and lawyer badly mishandled the probate, failing to secure claims owed the estate. For this and multiple other counts of misconduct, he was disbarred.

Disciplinary Counsel v. Taylor, 120 Ohio St. 3d 366; 899 N.E.2d 955 (2008). Rules 1.7, 1.14, 3.3, 4.1. Topics: Discipline. Lawyer had represented a husband and wife for 20 years and was their friend. When both clients became terminally ill, the husband became concerned his wife’s daughter was stealing from him and sought to disinherit her, leaving everything to his own daughter. The lawyer sought to effectuate these wishes by preparing a will for the husband that provided nothing for his wife, and a quitclaim deed to the couple’s home in favor of the husband’s daughter, for both to sign. He had the husband execute the will and had both husband and wife execute the quitclaim deed, although there was evidence that the wife was incompetent at the time. Two days later, the husband died and the lawyer prepared a will for the wife making her step daughter the sole beneficiary without telling client of her husband’s death and despite her statement that she wanted her husband to receive her estate. When the widow’s granddaughter brought a petition for a guardianship for her grandmother, the lawyer sought to intervene by telling court he was representing the husband, omitting to tell the court the husband had died. The court had no difficulty in finding that the lawyer had violated the concurrent conflict rule and had deceived the court in a guardianship proceeding for the widow. He was suspended for one

year, but the court stayed the suspension on conditions, finding that he meant well.

Disciplinary Counsel v. Tomlan, 118 Ohio St.3d 1, 885 N.E.2d 895 (2008). Rules 1.8. Lawyer was suspended indefinitely for his conduct relative to a single, elderly estate planning client with diminished capacity. After befriending her, he persuaded her to transfer at least \$1.4 million into their joint names, with rights of survivorship and to execute a will making him executor. When she died, he delayed opening probate for more than a year and the court appointed another; the lawyer then concealed the existence of at least \$200,000 in probate assets; and lied about the existence of heirs to the administrator.

Stark Cty. Bar Assn. v. Marosan, 119 Ohio St.3d 113, 892 N.E.2d 447 (2008). Rules 1.8. Topics: Discipline. Lawyer was disbarred after persuading a client to invest in a land trust established by the lawyer. The lawyer continued to represent the client and also to serve as trustee of the land trust and represent the trust. He did not advise the client of his conflict and the advisability of retaining separate counsel.

Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009). Rules 1.7, 1.8, 1.14, 4.1. Topics: Discipline. Lawyer was charged with misconduct relative to one client who had originally hired him to help him with a dispute involving his mother's estate. Concerned about the client's mental health and financial affairs, the lawyer improperly loaned the client \$5,000 in violation of Rule 1.8(e) and had him execute a power of attorney appointing the lawyer as his attorney in fact. After having his client admitted to a hospital for depression, lawyer proceeded to clean up the client's property without his consent, and to lie about his condition and the condition of the property, to his children. The lawyer was suspended for one year with this suspension stayed on conditions.

Toledo Bar Assn. v. Johnson, 121 Ohio St.3d 226, 903 N.E.2d 306 (2009). Rules 1.5, 1.15. Topics: Discipline. Attorney stipulated to a six month suspension, all stayed on conditions, for charging excessive fees to estate planning clients and entering into a fee splitting agreement with another attorney for some of this work without the consent of the client, and for failing to account properly for the fees advanced.

Toledo Bar Assn. v. Sawers, 121 Ohio St.3d 229, 903 N.E.2d 309 (2009). Rules 1.1, 1.5, 1.15. Topics: Discipline. Attorney stipulated to a public reprimand for working with attorney in prior case to provide estate planning documents without the requisite competence, charging an excessive fee for the same and failing properly to account for the fees advanced.

Akron Bar Assn. v. Maher, 121 Ohio St.3d 45, 901 N.E.2d 803 (2009). Rules 1.1, 1.3, 1.4. Topics: Discipline, Wrongful Death. Lawyer was suspended indefinitely for multiple violations, two of them estate matters. In one case, he was hired to prosecute a wrongful death claim for the death of a disabled resident of a care facility and failed to do so diligently and competently, with the result that it was dismissed. He also failed to adequately communicate with the client about this matter. In another, he failed to diligently assist in the probate of a small estate (\$20,000) for the executor with the result that it unnecessarily remained open for ten years.

Dayton Bar Assn. v. Brown, 124 Ohio St.3d 221, 921 N.E.2d 220 (2009). Rules 1.1, 1.3, 1.15, 4.1. Topics: Discipline. Lawyer is suspended indefinitely for two matters involving

neglect, incompetence and dishonesty in connection with client trusts. In each instance he failed to transfer assets into the trusts in a timely fashion. In attempting to do this late in one case, after one of two co-clients (spouses) had died, he sent the widow an affidavit to sign on which he had already signed and sealed the authenticity of her signature as notary.

Cincinnati Bar Assn. v. Brown, 121 Ohio St.3d 445, 905 N.E.2d 184 (2009). Rules 1.4, 1.15, 8.1, 8.4. Topics: Discipline. Lawyer is suspended indefinitely based on findings that he misappropriated a client's funds given to him as an advance on fees and other property given for deposit as estate property, failed to administer a decedent's estate after losing the original copy of the will, ignored the client's requests for information and to return property, and then was uncooperative in the efforts to investigate the client's grievance.

Geauga Cty. Bar Assn. v. Patterson, 124 Ohio St.3d 93, 919 N.E.2d 206 (2009). Rules 1.3. Topics: Discipline. Lawyer was suspended for one year, in part for “neglecting an entrusted [probate] matter” (DR 6-101(A)(3)). Note that the neglect related to his conduct as co-executor and co-trustee of a client’s estate, rather than as lawyer for the estate, in that he permitted his co-fiduciary to misappropriate estate assets.

Lake County Bar Assn. v. Rozanc, 123 Ohio St.3d 78, 914 N.E.2d 192 (2009). Rules 1.3, 1.4. Topics: Discipline. Lawyer was suspended for 6 months for neglecting an estate whose executor had hired him to assist in probate. He improperly delayed in opening the probate, failed to return client’s calls and failed to respond promptly to inquiries from the client’s new lawyer.

Mahoning Cty. Bar Assn. v. Jones, 123 Ohio St.3d 285, 915 N.E.2d 1212 (Ohio 2009). Rules 1.1, 1.3. Topics: Discipline. Lawyers was suspended for six month, all stayed on conditions, for neglecting a probate matter entrusted to him.

Cincinnati Bar Assn. v. Mid-South Estate Planning, L.L.C., 121 Ohio St.3d 214, 903 N.E.2d 295 (2009). Rules 5.5. Ohio Bar Association brought civil injunction proceeding against Mid-South and its successor Louisiana corporation Senior Estate Planning Services of America, Inc. and a non-lawyer individual for engaging in the unauthorized practice of law by marketing living trusts and other estate planning documents in Ohio. The proceeding was largely unopposed and, in addition to an injunction, the maximum civil penalty of \$50,000 was imposed on the company and the individual, jointly and severally. This is the same company with which Heisler, the subject of the preceding disciplinary decision, was associated.

Columbus Bar Assn. v. Am. Family Prepaid Legal Corp., 123 Ohio St.3d 353, 916 N.E.2d 784 (2009), reconsideration den. 123 Ohio St.3d 1502 (2009). Rules 5.5. Ohio Bar Association brought a civil injunction proceeding against American Family and a related company, Heritage Marketing & Insurance Services, both California companies, along with their co-owners, for engaging in the unauthorized practice of law in Ohio by marketing and selling living trusts and other estate planning documents. The defendants entered into a consent agreement to cease and desist, but they continued engage in the same conduct in breach of the consent agreement. The court here affirmed a Board determination that all the defendants had breached the consent agreement and enjoined them from such conduct in the future. In addition, the court substantially increased the

penalties sought by the CBA and assessed a \$6,387,990 civil penalty, jointly and severally, against American Family, Heritage, and their co-owner principals, and assessed much smaller penalties against various agents.

Cleveland Metro. Bar Assn. v. Parrish, 121 Ohio St.3d 610, 906 N.E.2d 1113 (2009). Rules 1.15, 8.4. Topics: Discipline. Lawyer was disbarred for misconduct involving two different matters. On one of them, while representing a trust, he misappropriated \$172,000 “to maintain [the] illusion” that he “was still a successful sole practitioner.” He was pled guilty to third-degree felony theft for this misappropriation and received a four year suspended sentence.

Damron v. CSX Transp., Inc., 184 Ohio App. 3d 183; 920 N.E.2d 169 (2009). Rules 3.7, 4.1, 4.2. Topics: Disqualification. CSX moves to disqualify one of the lawyers representing multiple personal representatives in wrongful death claims against the railroad after decedents were killed when a train collided with their car. The motion to disqualify was based on the lawyer’s contacts with the CSX employee in charge of field investigations who had investigated the crash. But court denied the motion to disqualify: the employee had contacted the lawyer about his disability claim against CSX and they had carefully limited their discussions to that matter, rather than the car/train collision, so there was no violation of Rule 4.2. Any evidence lawyer might have relative to the employee’s dissatisfaction with his employer is either uncontested or cumulative and so the lawyer would not be a necessary witness, disposing of the witness/advocate claim under Rule 3.7. Although at one point the lawyer told CSX he had not had any contact with the employee, arguably in violation of Rule 4.1, the court thinks that dishonesty insufficient to disqualify the lawyer.

Estate of Barney v. Manning, 2011 Ohio 480 (Ohio App. 2011). Rules 1.1. Topics: Malpractice. Lawyer who was serving as executor of estate and successor trustee misappropriated funds. The clients sued the law firm for malpractice, but the court affirmed dismissal of the case. The law firm did not know of the lawyer’s misconduct, the lawyer’s actions were beyond the scope of his employment and the lawyer’s actions were not “calculated to promote the employer’s business,” so there was no liability under respondeat superior or agency law.

Svaldi v. Holmes, 2012-Ohio-6161, 986 NE2d 443 (Ct. App. 2012). Rules 1.1, 1.2 Topics: Malpractice. Lawyer drafted a power of attorney for an elderly client that appointed two neighbors as attorneys-in-fact. The lawyer included a provision in the power of attorney, intended to protect the client, that required the attorneys-in-fact to deliver an inventory of the principal’s assets within 30 days to the lawyer, and to give the lawyer annual accountings. The attorneys-in-fact failed to satisfy those duties, and proceeded to steal approximately \$800,000 from the client, who then sued the lawyer for malpractice. He alleged lawyer had negligently failed to monitor the neighbors as provided for in the power of attorney. The court held that by including this provision, the lawyer had increased the scope of his representation, and had assumed a responsibility to attempt to make it work. The court relied on Restatement (Third) of the Law Governing Lawyers § 50 comment (a lawyer “must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation.”)

Ivancic v. Enos, 2012-Ohio-3639, 978 N.E.2d 927 (Ohio Appeals 2012). Rules 1.1, 1.4,

1.5, 1.7. Enos hired lawyer Davies – who had formerly represented her deceased father – to probate her father’s estate. Davies did not tell client he was the estate’s largest creditor (\$50,000) or that shortly before decedent had died, Davies had filed a lien against the decedent’s home to secure an alleged promissory note for services rendered to the decedent. Davies satisfied the lien from the estate assets without filing a creditor’s claim with the estate – which was required by Ohio law. Finally, although Enos had told Davies that she had a half sister who had been raised by someone other than their father, Davies failed to investigate whether the half sister had been adopted by the person who raised her. The appeals court affirmed a trial court determination that Davies breached a fiduciary duty owed to Enos in (a) failing to disclose his creditor status and obtaining a conflicts waiver or withdraw (b) collecting the lien without adequate disclosure to his client and without properly using the creditors’ claim process –a claim which he could not adequately document; and (c) failing to investigate whether the client’s half sister’s adoption status. He was ordered to return fees paid to him and to pay the plaintiffs’ fees. “Where it is revealed an attorney has not in fact augmented or preserved a fund, but, rather, has diminished, squandered, or mismanaged the fund with which he was entrusted,reduction, or even outright denial, of attorney fees is appropriate.”

Dayton Bar Assn. v. Parisi, 131 Ohio St. 3d 345, 965 N.E.2d 268 (2012). Rules 1.5, 1.7, 1.14, 8.4. Topics: Discipline. The lawyer had become concerned that the client --- in a nursing home --- was incompetent and began a guardianship proceeding for the client. Seven weeks later, while this was pending, lawyer had the client execute a durable power of attorney appointing the lawyer as attorney-in-fact. Then she withdrew the first guardianship petition and refiled on behalf of the client’s niece. Later, using the power of attorney, the lawyer paid her own fees without court authority. Court found the representation of the niece to be a RPC 1.7 conflict and the payment of fees to be prejudicial to the administration of justice under RPC 8.4(d). Lawyer was suspended for six months, with suspension stayed on conditions.

Cincinnati Bar Assn. v. Mezher & Espohl, 134 Ohio St. 3d 319; 982 N.E.2d 657 (2012). Rules 1.5, 7.1. Topics: Discipline. Law firm advertised a “free consultation.” Lawyers met with probate clients for a half hour, after which they signed a fee agreement, and the lawyers spent another hour with them. Clients were charged for the last hour. One of the lawyers was found to have violated Rule 7.1 for deceptive advertising, and the other to have violated Rule 1.5 for failing to make clear that fees would be charged once a fee agreement was signed. The lawyers were reprimanded.

Disciplinary Counsel v. Harris, 137 Ohio St. 3d 1, 996 N.E.2d 921 (2013). Rules 5.5, 8.5. Topics: Discipline. Court holds that it has no disciplinary authority over a lawyer admitted in the District of Columbia, but not in Ohio (except for admission in the federal court in Ohio). It refers allegations that he engaged in the unauthorized practice of law in Ohio to that state’s unauthorized practice committee.

Disciplinary Counsel v. Ward, 143 Ohio St. 3d 23 (2015). Rules 1.7(a)(2), 1.8(b). Topics: Conflict of interest, using client confidence. Lawyer was suspended for one year for using confidences obtained in his firm’s prior representation of now deceased uncle (John F. “Bud” Koons III) to assist nephew in suing the uncle’s estate. The court held that the lawyer violated both Rule 1.8(b), prohibiting use of client confidence to the disadvantage of the client, and Rule 1.7(a)(2), prohibiting use of client confidence for benefit of the lawyer or

another person. The court distinguished between revealing confidences and using confidences improperly.

Oklahoma:

Hesser v. Central Nat'l Bank, 956 P.2d 864 (Okla. 1998). Rules 1.1. Topics: Malpractice. Joining the majority of jurisdictions that permit a lawsuit for alleged negligent will drafting by a disappointed beneficiary, the court here applied the third-party/intended beneficiary contract theory to permit a suit for malpractice by the intended beneficiary of a will that the testator's lawyer allegedly failed to have properly executed.

State ex rel. Okla. Bar Ass'n v. Franklin, 2007 OK 18; 163 P.3d 507 (2007). Rules 1.1, 1.3, 1.5, 1.8, 1.15. Topics: Discipline. Lawyer was named to serve as trustee of trust he prepared for a client and when she died, he assumed his role. In that role, for three years, he failed to handle trust matters competently and diligently; mishandled the sale of a business held by the trust, paid himself excessive fees, commingled trust assets in his other law office trust account, and made loans from the trust to himself and other clients without collateral or promissory notes. He was suspended for two years. Note that the violations all seem to have been based on his conduct while serving as trustee, not as lawyer for the trust.

State ex rel. Oklahoma Bar Ass'n v. Hulett, 2008 OK 38; 183 P.3d 1014 (2008). Rules 1.3, 1.4. Topics: Discipline. Lawyer was suspended for 3 months, in part for lack of diligence in completing estate planning for a client for whom time was of the essence. Apparently he prepared the will for the client and sent it to him, but it was returned because of an address change and the lawyer failed thereafter to return calls from the client and did not complete the matter for a year and a half.

Estate of Hughes, 90 P.3d 1000 (Ok. 2004). Rules 1.5. The court has authority to examine a written contract between attorney and personal representative before approving attorney's fee as an expense. The contract here was found ambiguous because it was unclear what portion of a contingent fee was for representation of the personal representative in estate matters and what portion was for representing her individually.

State ex rel. Oklahoma Bar Ass'n v. Besly, 136 P.3d 590 (Okla. 2006). Rules 1.3, 1.5, 1.8, 3.3. Topics: Discipline. Lawyer was suspended for six months for misconduct related to her handling of the estates of a married couple. Lawyer drafted wills for a couple with a combined estate of somewhere between \$1.8 and 2.5 million, making herself the beneficiary of bequests worth \$500,000 at the death of the survivor, apparently at the request of the clients. At the death of the first, she became attorney in fact for the survivor while also serving as executor and attorney for the estate of the first, and when the survivor died she served also as executor and lawyer for the second estate as well, while also being a beneficiary of a substantial bequest. Lawyer stipulated to a violation of Rule 1.8(c) but the court rejected this stipulation and exonerated her on this charge because at the time the wills were prepared making this bequest there was no Rule 1.8(c) or comparable express prohibition in force in Oklahoma, the rule having not been adopted until the following year. Nonetheless, court found that lawyer had neglected the couple's estates and had paid herself fees without the required court approval. She also made misrepresentations to the

disciplinary authorities and failed to comply with other obligations owed them.

State ex rel. Oklahoma Bar Ass'n v. Clausing, 224 P.3d 1268, 2009 OK 74 (2009). Rules 1.1, 1.7, 1.8. Topics: Discipline. Lawyer was suspended for one year for misconduct as the trustee of and attorney for a trust he had established for a client. He made two unauthorized withdrawals from the trust for personal use, which he called loans, one in the amount of \$18,000 which he only fully repaid when the beneficiaries complained and demanded his resignation, and a second in the amount of \$27,000 which he repaid with interest after three days, both admittedly without complying with Rules 1.8(a) or 1.7. He admitted these actions also fell below the requisite standard of competence required by Rule 1.1.

Pappas v. Waggoner's Heating & Air, Inc., 2005 OK CIV APP 11; 108 P.3d 9 (Okl App 2005). Rules 1.10, 1.12. Topics: Disqualification. Lawyer unsuccessfully mediated a court ordered mediation in a multi-car collision case. Later other lawyers in the lawyer/mediator's law firm entered an appearance for the plaintiff and defendants sought to disqualify the plaintiff's lawyer. The court held that the matter was governed by Oklahoma's version of Rule 1.12 (which did not, at the time, cover mediators), rather than Rule 1.10, so lawyer/mediator was disqualified from representing any of the parties. The court further held, however, that the mediator and his law firm had presented uncontradicted affidavits as to the screening it had done of the lawyer/mediator, so the motion to disqualify was denied.

State ex rel. Okla. Bar Ass'n v. Franklin, 2007 OK 18; 163 P.3d 507 (2007). Rules 1.1, 1.3, 1.5, 1.8, 1.15, 8.4. Topics: Discipline. Lawyer was named to serve as trustee and served in that role for three years during which time he failed to handle trust matters competently and diligently; mishandled the sale of a business held by the trust; paid himself excessive fees, commingled trust assets in his other law office trust account, and made loans from the trust to himself and other clients without collateral or promissory notes. He was suspended for two years.

State ex rel. Oklahoma Bar Ass'n v. Morris, 2008 OK 54, 187 P.3d 727 (2008). Rules 1.8, 1.14, 3.3, 8.4. Topics: Discipline. Lawyer is allowed to resign with discipline pending. He was charged with 9 counts of misconduct, several of which related to estate planning and probate work. Among the charges were charges that he had misappropriated property of an estate over which he was guardian; had misappropriated property from trusts for which he had responsibility; had failed to act in the best interests of a client that knew was under a disability; and had made misrepresentations to a court about the date on which a will had been executed.

Oregon:

In re Greene, 557 P.2d 644 (Or. 1976). Rules 1.1. Topics: Discipline. A lawyer was put on probation for selling estate property without properly ascertaining its value and for failing to discover other assets of the estate.

In re Hendricks, 580 P.2d 188 (Or. 1978). Rules 1.8. Topics: Discipline. A lawyer was disciplined for borrowing from a client without properly documenting the loan or advising the client to obtain independent counsel.

Hale v. Groce, 744 P.2d 1289 (Or. 1987). Rules 1.1. Topics: Malpractice. The court here held that a malpractice action for negligence in the drafting of a will sounds under both tort and contract theories.

In re Stauffer, 956 P.2d 967 (Or. 1998). Rules 1.5, 1.7. Topics: Discipline. While representing the personal representative of an estate, lawyer took action to recover assets for the estate in order to collect an attorney fee the lawyer claimed was owed to him by the decedent, to the detriment of the personal representative (title to the asset was in the name of the personal representative). The lawyer failed to apprise the personal representative client of his conflict of interest and failed to obtain consent. The lawyer was suspended from practice for two years.

In re Schenck, 345 Or. 350, 194 P.3d 804 (2008). Rules 1.7, 1.8. Topics: Discipline. Lawyer was suspended for a year for multiple violations in connection with estate planning for sisters. A number of years after preparing a will for one of them, he borrowed money from her, which he did not pay back promptly. Around the same time this sister contacted him to help her collect a different debt, and he renegotiated his loan with her in violation of Rule 1.8(a). Thereafter, he prepared a new will for this sister which made a bequest of furniture worth \$1000 to the lawyer's wife and gave her at least half the residue of the client's estate, in violation of Rule 1.8(c). He also drafted wills for both sisters while knowing that they were feuding at the time and had adverse interests (had an "actual conflict") as to the disposition they intended relative to one another, in violation of Oregon's then version of MRPC 1.7.

In re Paulson, 346 Or. 676, 216 P.3d 859 (2009). Rules 1.1, 1.3, 1.5, 8.4. Topics: Discipline. Lawyer was disbarred based on 13 counts of misconduct, three of which involved his handling of an estate matter. On this matter, lawyer had prepared a trust and pour over will for a disabled client and, when the client died, lawyer became executor and trustee. In that capacity, he delayed for 17 months to open a small estate proceeding; improperly denied the state's claim for cost of care of decedent; and delayed to distribute the estate, forcing legatees to retain separate counsel and ultimately have him removed. After removal he sought a fee which the probate court had told him he could not collect. Much of this misconduct was charged & conceptualized as a violation of Rule 8.4(a)(4)(conduct prejudicial to the administration of justice).

In re Hostetter, 238 P.3d 13 (Or. 2010). Rules 1.9. Topics: Discipline. In what appears to be the first reported case on this issue in Oregon, the court found that the Rule 1.9 duty to former clients can under some circumstances survive the death of the client. Lawyer had represented borrower in a series of loans from lender, and when borrower died, represented lender in collecting amounts that were still owing at the borrower's death. The claims were settled but the executor of borrower's estate complained to the bar association about the lawyer's conflict of interest. The court stated that "an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and are adverse to the current client during the subsequent representation." It further held that in this case, the deceased former client's interest in minimizing the amounts owed survived death and was adverse to the debt collection action, so lawyer had violated Rule 1.9. Lawyer is suspended for 150 days.

Pennsylvania:

In re Trust Estate of LaRocca, 246 A.2d 337 (Pa. 1968). Rules 1.5. Estate and trust counsel are provided guidance with respect to the setting of fees for their services. Factors include the amount of work, difficulty of the problems involved, amount of money or value of the property in question and degree of responsibility incurred.

Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). Rules 1.1. Topics: Malpractice. Criticizing California's multifactor balancing test as too broad, the Supreme Court of Pennsylvania here applied a third-party beneficiary contract theory in permitting a suit by the intended beneficiaries of a negligently drafted will against the attorney-drafter. The court observed that the contract between the testator and attorney must be for the drafting of a will that clearly manifests the intent of the testator to benefit the legatees who are the intended beneficiaries of the contract and are named in the will.

In re Estate of Sonovick, 541 A.2d 374, 376 (Pa. Super. 1988). Rules 1.5. In this case the compensation of the lawyer and the fiduciary were reduced. The court stated that: "Thus, the fiduciary's entitlement to compensation should be based upon actual services rendered and not upon some arbitrary formula."

In re Estate of Preston, 560 A.2d 160, 165 (Pa. Super. 1989). Rules 1.5. The compensation allowed by the lower court was reduced: "The lower court's use of the Attorney General's [percentage] schedule for calculating fees is clearly improper and must cease."

In re Bloch, 625 A.2d 57 (Pa. Super. Ct. 1993). Rules 1.8. A will that named the scrivener's father and his paramour as residuary legatees was not proved to be the result of undue influence. The court observed:

To the extent that the scrivener's conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, MRPC 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct.... We have been presented with no evidence of undue influence engaged in by the scrivener as to the decedent, nor was there proof of a weakened intellect associated with the testatrix during the period the will in question was prepared.... Accordingly, we are not prepared to invalidate the will on the grounds that the scrivener acted in violation of the Code of Professional Conduct. 625 A.2d at 62-63.

Pew Trusts, 16 Fid. Rep. 2d. 73 [Montg. Cty (Pa.) 1995]. Rules 1.13. Lawyer representing the executor or administrator does owe "derivative duties" to beneficiaries and has an obligation to rectify a situation where the lawyer observes his client taking action that is improper or otherwise to the detriment of the beneficiaries.

Pew Trust (2), 16 Fid. Rep. 2d 80 [Montg. Cty (Pa.) 1995]. Rules 1.2, 3.7. Topics: Disqualification, Evidence. The Pennsylvania Orphans Court granted the petition of certain trust beneficiaries to disqualify the law firm representing the trustee in related actions challenging, among other things, the prudence of the trustee's reliance on certain tax

and legal opinions previously rendered by the law firm to support a material corporate transaction entered into by the trustee. The court found that certain of the firm's lawyers were "likely to be called as necessary witnesses" and that the firm and its lawyers must be disqualified from trying the case. Although the court acknowledged that the law firm had never served as counsel for the trust's beneficiaries and, consequently, the firm's only client was the trustee, disqualification of the entire firm was warranted in light of the "derivative" duties owed by the law firm to the trust's beneficiaries. *Pew, supra*, citing 16 Fid. Rep. 2d at 84-85 (citing extensively to the ACTEC Commentary on MRPC 1.2).

***Gregg v. Lindsay*, 649 A.2d 935 (Pa. Super. 1994), appeal denied, 661 A.2d 874 (Pa. 1995). Rules 1.1, 1.3. Topics: Malpractice.** This decision reversed a judgment entered on a jury verdict that the lawyer's failure to see that a client's will was executed constituted a breach of a third-party beneficiary contract. The lawyer prepared a new will on the same day that a friend of the decedent told the lawyer of the client's wish to execute a new will that made the friend the principal beneficiary. When the lawyer took the will to the hospital for execution, the client said it was acceptable. However, as no witnesses were available, it was not signed. The lawyer agreed to change the name of a charitable beneficiary designated in the will and bring it back the following day for execution. The client was moved to another hospital, where he died the next day. The court stated:

To hold otherwise, under the circumstances of this case, would open the doors to mischief of the worst type. To permit a third person to call a lawyer and dictate the terms of a will to be drafted for a hospitalized client of the lawyer and to find therein a contract intended to benefit the third person caller, even though the will was never executed, would severely undermine the duty of loyalty owed by a lawyer to the client and would encourage fraudulent claims. 649 A.2d at 940.

***Estate of Newhart*, 22 Fid. Rep. 2d 383 [Montg. Cty (Pa.) 2002]. Rules 1.1. Topics: Malpractice.** Scrivener has an obligation to record and retain information about the mental status of the client at the time he or she executes the will and also to properly oversee the execution of the will.

***Follansbee v. Gerlach and Reed Smith*, 2002 WL 31425995 (Pa. Ct. Com. Pleas), 22 Fid. Rep. 2d. 319 [Civ. Div. Allegh. Ct. (Pa.) 2002]. Rules 1.1, 1.2, 1.6. Topics: Evidence, A/C Privilege.** The beneficiaries of a trust have a right to see routine correspondence between the trustee and its counsel during the trust administration and that right may not be denied unless the correspondence was developed in the contemplation of litigation and has been appropriately cloaked with the attorney-client privilege.

***Jones v. Wilt*, 871 A.2d 210 (Pa. Super. 2005). . Rules 1.1. Topics: Malpractice.** Surviving spouse had standing as beneficiary to sue his deceased wife's estate planner for malpractice, but not as executor because he could not show harm to the estate. Nonetheless, his claim that estate planner was negligent for failing to advise the decedent of the value of using a QTIP trust and/or other means of saving estate and inheritance taxes, failed because it lacked foundation: there was no evidence that testator wanted to minimize taxes or that she wanted her surviving husband to receive the use of the assets which she gave to her sister under an inter vivos trust.

***Office of Disciplinary Counsel v. Kiesewetter*, 585 Pa. 477, 889 A.2d 47 (Pa. 2005). Rules**

1.15, 8.4. Topics: Discipline. Lawyer was disbarred for misappropriation of family assets. The Court agreed with the Board's conclusion that "Respondent's parents had transferred virtually all of their assets, amounting to over \$2.4 million, to Respondent and his two sisters, and that Respondent misappropriated these assets for his own use." See related civil proceeding. *Elliott v. Kiesewetter*, 98 F.3d 47 (3d Cir. 1996).

In re Deed of Trust of Fiel, 2005 Phila. Ct. Com. Pl. LEXIS 613 (2005). Rules 1.1, 1.5, 1.7, 5.4. When the sole shareholder of a "high volume, low value" personal injury law firm died, he named an accountant as executor and trustee. In those roles, the executor/trustee (trustee) hired an outside lawyer to supervise the law firm rather than rely on a lead associate who had been working at the firm and who was negotiating to acquire the firm from the estate. Here, surviving family members contested the trustee's account and sought to surcharge him for continuing to operate the law firm, as he had, rather than wind it up more promptly. The court rejected the position of the objectors and refused to surcharge the trustee; instead it approved fees for him and for the law firm hired to advise him. The decedent's will quite expressed decedent's wish that his trustee should have full discretion to operate his law firm "subject to accepted ethical constraints." Rule 5.4 precluded the trustee, as a nonlawyer, from operating the law firm and required him to delegate this to a lawyer and it also precluded the estate from simply negotiating a percent of each open case to be transferred to a new attorney: fee splitting had to be done on the basis of quantum meruit. It would have been a conflict of interest to turn the supervision of the firm over to the senior associate who was, at the same time, negotiating to acquire the firm assets. And the delays in shutting down the firm were necessitated by the duties owed its clients to avoid malpractice and the litigation brought by the decedent's family. See also *Stuart David Fiel, Testamentary Trust, 2008 Phila. Ct. Com. Pl. LEXIS 205* (fee award for defending against surcharge action).

In re Estate of Reeves-Timothy, 2006 Pa. Dist. & Cnty. Dec. LEXIS 213 (Pa Common Pleas 2006). Rules 1.7, 1.8. Topics: Disqualification. Son seeks to remove his father as executor of decedent mother/wife's estate on the ground that the father has been taking rent owed to the estate by a school (on whose board the father sits) and giving it to petitioner's siblings. Here, son sought to disqualify the lawyer who entered an appearance on behalf of his siblings, against his petition, on the ground that she was also a member of and had done legal work for the school's board and therefore had a conflict, and she also had a proprietary interest in the cause. The court rejected both claims. The movant had failed to show lawyer had a proprietary interest in the cause, but even if she did the court thought this could be cured by fair terms and the clients' informed consent (apparently confusing 1.8(a) with 1.8(i)). The court also found no evidence that the lawyer's position on the board posed a significant risk of materially limiting her representation of the siblings and that Rule 1.7 gave her discretion to determine whether she could do so adequately. It denied the motion and ordered the lawyer, if she had not already done so, to obtain the informed consent of her clients to the risks.

Estate of Shelton, 29 Fiduc.Rep.2d 433, 2009 Phila. Ct. Com. Pl. LEXIS 170, 2009 WL 8558393 (2009). Rules 1.5, 1.6, 3.3. Lawyer represented the executor of this estate for 17 years from 1991 to 2008. A dispute arose over which of several churches was entitled to the estate assets and in 1999, the Orphans Court ordered that there should be no further distributions until this was resolved. In 2007, however, lawyer learned that the executor planned to make further distributions against his advice and failed to take sufficient

remedial action to prevent this. As a consequence, \$1.6 million was distributed from the estate in violation of the court order. When this came to light, executor was replaced and, in this decision, lawyer is surcharged for the amount of the improper distribution and is also required to refund \$130,000 in attorneys fees previously paid to him. Conflicting expert views were heard about lawyer's ethical obligations when it became clear to him that his client was going to and/or had violated the court order, but the court ultimately concluded that disclosure to the banks to prevent this, and ultimately to the court, was permitted under Pennsylvania's Rule 1.6 and required under Pennsylvania's Rule 3.3 to remedy this fraudulent conduct by the client. (Note that Pennsylvania RPC 1.6(b) now requires disclosure of client confidences if necessary to comply with RPC 3.3.)

In re Temkin, 2012 Pa. Dist. & Cnty. Dec. LEXIS 454 (unreported). Rules 1.6, 1.9. Topics: Disqualification. In a suit over a trust, between daughters of the trustor who were serving as co-trustees and their mother, who was the income beneficiary, the mother sought to disqualify the daughters' attorney. The attorney had previously represented the mother for her estate planning. The court held that disqualification was proper under the substantial relationship test because there was enough similarity and overlap between the two representations to raise the inference that information gained in the prior representations could be used to the beneficiary mother's detriment in the current adverse representation.

Estate of Agnew v. Ross, 110 A.3d 1020 (Pa. Super. Ct. 2015). Rule 1.1. Topics: Malpractice, privity. Lawyer forgot to bring a document to meeting with dying client that would have benefited the plaintiffs. Plaintiffs sued the lawyer for negligence and breach of contract. The negligence claim was dismissed but the court reversed the lower court's dismissal of the breach of contract claim. Even though the plaintiffs were not named as beneficiaries in an executed document, they could still bring an action for breach of contract as third party beneficiaries.

ODC v. Weinstein, No. 54 DB 2011 (Pa 2014). Rules 1.2, 1.4, 1.5, 1.7, 5.1, 5.5, 5.7, 8.4. Topics: Discipline. Attorney was disbarred for assisting nonlawyer companies to engage in the unauthorized practice of law (marketing & selling estate plans) in association with another lawyer (Bohmüller), and for his activities in connection with that practice. Supreme Court report at <http://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/54DB2011-Weinstein.pdf> .

ODC v. Bohmüller, No. 53 DB 2011 (Pa 2015). Rules 1.2, 1.4, 1.5, 1.7, 5.1, 5.5, 5.7, 8.4. Topics: Discipline. Attorney was disbarred for assisting nonlawyer companies to engage in the unauthorized practice of law (marketing & selling estate plans) in association with another lawyer (Weinstein), and for his activities in connection with that practice. Supreme Court report at <http://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/53DB2011-Bohmüller.pdf>

Rhode Island:

In re Levine, 840 A.2d 1098, 1099 (R.I. 2003). Rules 3.3, 8.5. Topics: Discipline. Lawyer generally admitted in Massachusetts but admitted only pro hac vice is disciplined in Rhode Island for misrepresentations on his pro hac vice application.

Haffenreffer v. Coleman, 2007 U.S. Dist. LEXIS 75432, 2007 WL 2972575 (D.R.I. 2007). Rule 1.9. Topics: Disqualification. Law firm represented a son of decedent

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

In re Saxton, 91 A.3d 348 (R.I. 2014). Rules 5.5, 7.3, 8.5. Topics: Discipline. Lawyer admitted in Georgia, but not in Rhode Island, is found to have improperly solicited home foreclosure avoidance clients in Rhode Island (applying Rhode Island ethics rules). Convinced that the misconduct was the result of "unprofessional inattention and lack of supervision on the part of the respondent rather than a deliberate disregard of the Rules," the court orders him to provide pro bono services to 12 Georgia clients within one year of the order.

South Carolina:

In re James, 229 S.E.2d 594 (S.C. 1976). Rules 1.4, 1.7. Topics: Discipline. A lawyer for an estate who caused the estate to engage in unnecessary litigation with respect to which he received a substantial fee and deceitfully concealed his dual capacity as executor and attorney for the executor was indefinitely suspended.

Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991). Rules 1.6, 1.7, 4.1. Topics: Malpractice. Lawyer Dobson had a long standing attorney-client relation both with Hotz and her father Minyard. After Dobson had done some estate planning for Minyard relative to succession to his car business, Hotz met with Dobson to request a copy of her father's will. The will was favorable to Hotz and Dobson discussed the will with Hotz without telling her it had been revoked by a second will that he had also prepared. According to Dobson, Minyard had instructed him not to disclose the existence of the second will to his daughter. Hotz sued Dobson for malpractice. In reviewing summary judgment that had been granted in favor of Dobson, the court concluded that although Dobson represented Hotz's father, not Hotz, regarding the will, "Dobson did have an ongoing attorney/client relationship with [Hotz] and there is evidence she had 'a special confidence' in him." While Dobson had no duty to disclose the existence of a second will against the wishes of his client (Hotz's father), he owed Hotz a duty to deal with her in good faith and to not actively misrepresent the first will. Thus, the court concluded that summary judgment had been improperly granted to Dobson on this cause of action and remanded for a trial.

***Matter of Kenyon*, 491 S.E.2d 252 (S.C. 1997). Rules 1.1, 4.1, 8.4. Topics: Discipline.** The court held that law partners' misconduct in connection with the disposition of a deceased client's property and assets warranted an indefinite suspension for the more culpable partner and a public reprimand for the less culpable partner. The misconduct included the attorneys' involvement in transfers in fraud of creditors, including conveyances aimed at defeating valid tax liens levied by the IRS.

***Doe v. Condon*, 532 S.E.2d 879 (S.C. 2000). Rules 5.5.** A paralegal's proposed activities were held to constitute the unauthorized practice of law, and the proposed fee arrangement violated the prohibition against fee-splitting. A paralegal employed by an attorney was denied the right to conduct seminars on wills and trusts without the attorney being present. Conducting meetings with clients to answer specific estate planning questions without supervision of the attorney was the unauthorized practice of law. Meaningful attorney supervision must be present throughout the process. This case was presented as a request for declaratory judgment by the petitioner paralegal.

***Sims v. Hall*, 592 S.E.2d 315 (S.C. Ct. App. 2003). Rules 1.1, 1.2. Topics: Malpractice.** The court here found an attorney liable in negligence for failing to advise the plaintiff's deceased mother about the opportunity for a disclaimer. The estate of the plaintiff's sister passed to the mother by intestacy, and the mother died less than eight months later. A disclaimer by the mother's estate would have saved almost \$200,000, for which the court found the attorney liable.

***Floyd v. Floyd*, 615 S.E.2d. 465 (S.C. Ct. App. 2005). Rules 1.6. Topics: Evidence, A/C Privilege.** Distinguishing *Barnett Nat'l Bank v. Compson*, supra, and instead relying on *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, supra, the court here found that the beneficiary of a trust was entitled to review the opinions of the trustees' counsel to ensure that the trustee was acting in accordance with the dictates of his fiduciary duties, particularly where, as here, the opinions in question were paid for with trust funds.

***Smith v. Hastie*, 367 S.C. 410; 626 S.E.2d 13 (S.C. App. 2005). Rules 1.7. Topics: Malpractice.** In this malpractice case, appeals court reversed summary judgment that had been entered in favor of lawyer Hastie and remanded for trial on negligence and breach of fiduciary duty. Lawyer had represented husband and wife in setting up a family limited partnership and, in that role, had allegedly encouraged wife to transfer assets into the FLP without advising her of the potential conflict he had in representing both her and her husband, without inquiring into actual conflicts between them (there was substantial marital discord at the time), and without advising her of the implications of the FLP were the couple to divorce.

***In re Wilmeth*, 373 S.C. 631, 647 S.E.2d 185 (2007). Rules 1.1, 1.3, 1.5, 1.15, 8.4. Topics: Discipline.** Lawyer was disbarred in part for mishandling an estate matter. In the estate matter, she served as executor and lawyer for two related estates and failed to exercise the requisite competence and diligence, so that they incurred unnecessary tax penalties and interest. She also charged these estate excessive fees and, finally, misappropriated over \$861,000 from one or both of them.

***In re Cunningham*, 371 S.C. 503, 640 S.E.2d 461 (2007). Rules 1.3, 1.4, 1.15, 4.1, 8.4. Topics: Discipline.** Lawyer was disbarred (by agreement) for mishandling two probates

whose PRs had hired him: “[He] used approximately \$70,000 received and collected for the beneficiaries of the estates to pay his personal household, medical and business expenses.[He] also ...failed to hold funds of clients and third persons separate from his own. Finally, [he] failed to diligently handle the estates and failed to adequately communicate with his client regarding the estates. He also provided false information to his client regarding the estates in an attempt to conceal his misappropriation of estate funds.”

***Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007). Rules 5.5.** Where nonlawyer drafted a will and a power of attorney for a neighbor, and was then appointed to serve as executor under the will, court holds that the nonlawyer did engage in the unauthorized practice of law and would be denied any fees for serving as executor given that he drafted the will naming himself. But he would not be removed as executor and the will contestants had no private right of action against him for unauthorized practice.

***In re Hanna*, 376 S.C. 511, 657 S.E.2d 766 (2008). Rules 1.8. Topics: Discipline.** Lawyer was disbarred for misconduct (which he did not dispute) on 9 different matters a few of which involved estate matters. In one, lawyer drafted a will for a client which made a substantial bequest to the lawyer in violation of Rule 1.8(c). He also purchased a car from this client without complying with Rule 1.8(a). In another matter, after failing to get a corrected deed from the heirs of the grantor on behalf of grantees, lawyer recorded a forged deed and then sought to enlist grantees in an action to help resolve the problems, without disclosure of his conflict in representing both them and the title company.

***Rydde v. Morris*, 381 S.C. 643; 675 S.E.2d 431 (2009). Rules 1.1, 1.3. Topics: Malpractice.** Client’s estate planning questionnaire indicated that she wanted a will drafted in plaintiffs’ favor, but lawyer did not get this done in the 6 days before client became incapacitated. Following Connecticut, Florida and New Hampshire, the court rejects the notion of imposing a duty on an attorney in favor of a prospective beneficiary for alleged negligent failure to draft a will in a timely fashion.

***Argoe v. Three Rivers Behavioral Center*, 697 S.E.2d 551 (S.C. 2010). Rules 1.1. Topics: Malpractice.** An attorney in fact hired a lawyer to assist with the principal’s (his mother’s) incapacity. She had allowed a loan against a condominium to go into default. The principal was unhappy with some of the things her attorney in fact son had the lawyer do for him and sued the lawyer on several claims, including malpractice. The court held that the principal was not the client of the lawyer and so lacked standing to sue the lawyer for her attorney in fact.

***Spence v. Wingate*, 395 S.C. 148; 716 S.E.2d 920 (2011). Rules 1.9. Topics: Malpractice.** Wife of hospitalized Congressman was told he would not recover from coma, so she hired lawyer Wingate to advise her of her rights in her husband’s estate, in light of prenuptial agreement. In the course of the representation, she also consulted with him about her husband’s \$500,000 FEGLI life insurance policy and advised him that her husband had named her as the sole beneficiary. Wingate negotiated an agreement between wife and the Congressman’s children from another marriage. The Congressman then died, and Wingate was hired to represent estate, telling wife that she no longer needs a lawyer. He then tried to convince her to relinquish her rights in the FEGLI life insurance policy. She asks him to “put his hat back on” as her lawyer, but he refuses. She succeeds in having the agreement set aside and then sues Wingate for breaching his duty to her as a former client. She alleged that

he failed to get her informed consent to his representation of the estate, and failed to protect her interests regarding the life insurance. The court holds that S.C. Code 62-1-109, which states that a lawyer for a fiduciary does not owe a duty to the beneficiaries, did not apply in this case because the life insurance policy was not an asset of the probate estate. The court further held that whether a fiduciary relationship existed between lawyer and wife was a question of law for the court, whereas breach of the duty is a question fact. Relying on *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991), a case holding that a lawyer breached his duty to a client when he misled her regarding her father's estate plan, where the father was also a client, the court held that lawyer owed a duty to the wife as a former client under RPC 1.9(a), and remanded the case for trial.

***Fabian v. Lindsay*, 410 SC 475 (2014). Rules 1.1. Topics: Malpractice.** The South Carolina supreme court held that an intended beneficiary named in a will or trust may sue the drafting attorney for faulty drafting. The court limited the action to beneficiaries named or otherwise identified by status in the document but held that extrinsic evidence was admissible to establish the decedent's intent.

***In re Berger*, 408 S.C. 313, 759 S.E.2d 716 (2014). Rules 5.5, 8.5. Topics: Discipline.** Lawyer licensed in Florida and Pennsylvania, but not South Carolina, is found to have engaged in the unauthorized practice of law in South Carolina (applying South Carolina ethics rules) and is "debarred" for five years from applying for any kind of admission in South Carolina.

***In re Brunty*, 411 S.C. 434, 769 S.E.2d 426 (2015). Rules 5.5, 8.5. Topics: Discipline.** Attorney was disbarred for misconduct in connection with a loan modification and foreclosure avoidance practice. He was admitted only in South Carolina but misconduct involved not only South Carolina clients, but also clients in 20 other states. The court applied the ethics rules of each of the 20 other states as to clients who had their homes in those states.

South Dakota:

***Persche v. Jones*, 387 N.W.2d 32 (S.D. 1986). Rules 1.1, 5.5. Topics: Malpractice.** In this case a bank and its president who drafted and supervised the execution of wills and a codicil resulting in the documents' invalidity were held liable both in negligence and for the unauthorized practice of law.

***Gold Pan Partners, Inc. v. Madsen*, 469 N.W.2d 387 (S.D. 1991). Rules 1.7.** An order affirming sale of real property of estate was vacated because of defects in proceedings, including "confused legal advice given the executrix and the decedent's sons." The court observed: "Counsel may have become involved in representing conflicting interests by

advising the executrix in her personal capacity and advising the sons. We recognize estate attorneys often find themselves being ‘peacemakers.’ Nevertheless, they should exercise caution to avoid being compromised in the representation of conflicting interests.” 469 N.W.2d at 390, n. 4.

In re Discipline of Martin, 506 N.W.2d 101 (S.D. 1993). Rules 1.7, 1.8. Topics: Discipline. In this case a lawyer was suspended for two years for multiple infractions including preparation of a will that named the lawyer as executor and trustee, which would allow him to manage the estate, including his debts to it. Lawyer never advised aged client to obtain independent advice.

Estate of O’Keefe, 583 N.W.2d 138 (S.D. 1998). Rules 1.5. In this action decedent’s two nephews, who had acted as fiduciaries in taking care of his property, were found liable for both compensatory and punitive damages for breach of their fiduciary duties, conversion, fraud and deceit. The plaintiff, who, with the nephews, was the only other beneficiary of the estate, sought an order to prevent the two nephews from receiving any part of the punitive damages as estate beneficiaries and requested the court to assess the estate’s attorneys’ fees incurred in the prior litigation against the nephews’ distributive shares. After the trial court so ruled, the Supreme Court of South Dakota, interpreting that state’s version of the Uniform Probate Code, upheld the trial court’s order regarding the punitive damages but reversed the award of attorneys’ fees, finding that such fees could only be awarded by contract or when explicitly authorized by statute.

In re Discipline of Mattson, 651 N.W.2d. 278 (S.D. 2002). Rules 1.8. Topics: Discipline. Elderly uncle appointed his attorney/nephew to be his attorney-in-fact. After execution of the power of attorney, the attorney and his wife received over \$325,000, resulting from transfers or beneficiary designations authorized by attorney. Attorney advised uncle to reduce inheritance taxes by gift-giving, without advising uncle to obtain advice from independent counsel. Attorney was found to have violated MRPC 1.8, even though attorney did not prepare a particular instrument by which he received the testamentary gift. Attorney placed his personal monetary gain over uncle’s best interests.

Friske v. Hogan, 698 N.W.2d 526 (S.D. 2005). Rules 1.1. Topics: Malpractice. South Dakota here joins the vast majority of states rejecting the rule that the lack of contractual privity between a testator’s lawyer and the beneficiaries bars an action for legal malpractice against the attorney. The court found that the privity rule does not apply where it can be shown that the nonclient was the direct, intended beneficiary of the lawyer’s services to the testator. The court cites favorably to the *Restatement (Third) of the Law Governing Lawyers* §51(3) (2000).

Tennessee

Petty v. Privette, 818 S.W.2d 743 (Tenn. Ct. App. 1989). Rules 1.7. The court held that the scrivener of a will that appointed him as executor could be protected by the terms of an exculpatory clause that exonerated him from liability for any act of negligence that did not amount to bad faith, if the scrivener rebuts the presumption that the inclusion of the exculpatory clause in the will resulted from undue influence exerted by the scrivener.

Matlock v. Simpson, 902 S.W. 2d 384 (Tenn. 1995). Rules 1.8. This will contest action involved a will drawn by a lawyer that left the lawyer almost all of the unrelated client's estate. The earlier wills that the lawyer had drawn for the client left the client's estate to his son or to his son and his daughter. The client also had executed a general power of attorney that named the lawyer as his attorney-in-fact, "with full authority to handle his business affairs and assets as fully" as the client could. The court reviewed the presumptions that apply to transactions between persons in a confidential relationship. The court held that, as a matter of law, a confidential relationship existed, and the validity of a subsequent transaction that benefits the dominant party is rebuttably presumed to be the product of undue influence. The court continued that the presumption of undue influence arising out of a confidential relationship can only be overcome by clear and convincing evidence. A remand for a retrial was necessary to apply these rules.

Walker v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee, 38 S.W.3d 540, 549 (Tenn. 2001). Rules 7.4. Topics: First Amendment. Court upholds constitutionality of Tennessee DR 2-101(C)(3) which provides that where a lawyer communicates that he or she practices in a specific area of law, the lawyer must disclose that he or she is not certified in that area of practice by Tennessee.

Akins v. Edmondson, 207 S.W.3d 300 (Tenn. App. 2006). Rules 1.1, 4.1, 5.5. Topics: Malpractice. This was an unsuccessful malpractice claim brought by a former attorney-in-fact (AIF) operating under a power of attorney against a law (and an accounting) firm which advised the principal. The AIF, who was also an attorney at law, was also the beneficiary of her principal's farm under the principal's will. Acting under the Power of Attorney, the AIF hired an accounting firm to provide tax and estate planning advice and the accountants recommended a limited partnership be established with the principal as the general partner and the AIF as the limited partner. The principal accepted this advice and a law firm was hired to draft the limited partnership agreement, which it did. It provided the agreement to the principal who executed it on the advice and assistance of her personal attorney. The farm was transferred into the partnership, in which the AIF had only an 8.5% interest, thus rendering the testamentary gift of the farm to the AIF adeemed. After the principal died, and the AIF discovered the ademption, she brought this malpractice claim against the accounting firm and the law firm claiming to have been a co-client or at least an intended beneficiary of the services. The court rejected the AIF's standing to bring the malpractice claim because all services were provided to her principal, not to her personally; so she was not a client. It also rejected her claim that the firm had provided false information to the principal on which the AIF was expected to rely, finding the record devoid of any evidence of such false information supplied by the law firm. Finally, the court rejected a claim that the accounting firm had engaged in the unauthorized practice of law in providing the estate planning advice it did, and that the law firm had assisted this unauthorized practice. The unauthorized practice action was time barred, said the court, and breach of the Rules of Professional Conduct does not provide a private cause of action.

Estate of Weisberger, 224 S.W.3d 154 (Tenn. App. 2006). Rules 1.5. In this case, the appeals court approved a fee sought by a lawyer hired to represent a probate estate based on an oral contract entitling the firm to 3% of the estate value, against the estate's claim that the fee was excessive and had not been agreed upon. As it turned out, the estate had a value of

about \$1 million and the lawyer's estimate of the hours he had expended on the probate (7 hours) yielded an hourly fee rate in excess of \$4,000/hour. The trial and appeals courts recognized that these fees seemed excessive in hindsight. But the court upheld the fees as reasonable because the agreement was reasonable at the outset. The executors had entered into the agreement knowingly, it was the lawyer's usual rate, and was within the range of the Probate Court guidelines for fees in an estate such as this (albeit at the upper end of those guidelines). "The contract at issue was not a contingency fee contract, because Cooper was certain to be paid, but the amount of his fee was uncertain at the outset because the ultimate value of the estate's assets were unknown.The agreement was more of a flat-fee arrangement in which the percentage was certain, the value of the assets was believed to be approximately \$1 million, but the amount of work that would be required of Cooper was unknown at the time the contract was signed. By agreeing to charge a small percentage of the estate's assets at the outset of the case, Cooper bore the risk of these unforeseen circumstances. As it turned out, however, less work was required of him. However, had a great deal of work been required of Cooper, he likewise would be bound by the bargain he struck."

Estate of Green v. Carthage General Hosp., Inc., 246 S.W.3d 582 (Tenn. App. 2007). **Rules 5.5.** "[F]iling a claim for debts due from a decedent does not require the exercise of the professional judgment of a lawyer. Such claims are in essence demands for payment. Many employees or owners of businesses make similar demands daily and are quite competent to make an informal statement of the amount due with necessary backup documentation. Although the claims statutes require some specific inclusions, they are straightforward and do not require legal training to understand.[Thus] ... filing a claim against an estate is not the practice of law and, consequently, the claim filed herein by a corporate officer or employee was not the unauthorized practice of law."

Nevin v. Board of Professional Responsibility of Supreme Court, 271 S.W.3d 648 (Tenn. 2008). **Rules 1.3, 1.15. Topics: Discipline.** Lawyer was suspended for six months as a result of misconduct in three guardianship matters which he handled as a public guardian. Lawyer had served as a public guardian for more than 20 years and had handled hundreds of cases involving guardianships and conservatorships. In these three cases, all occurring in the late 1990s, he had mishandled guardianship assets by placing them in his trust account rather than in the appropriate guardianship account and had failed to take actions on behalf of the estates he was required to take to protect the estate assets.

Shamblin v. Sylvester, 304 S.W.3d 320 (TN App 2009). **Rules 1.5. Topics: Wrongful Death.** This was a fee dispute arising from a wrongful death claim filed by the father of the victim against the driver of the car in which his daughter was killed. The father hired a lawyer on a 33% contingent fee contract and a wrongful death claim was filed and quickly settled for the limits of two insurance policies. The settlement (\$300,000) entitled the lawyer to a fee of \$100,000. The victim's surviving mother, entitled to half the proceeds of the settlement, objected to sharing any of her share with the attorney, whose fee she contended was unreasonable. The trial court and appeals court upheld the fee as reasonable and assessed half of it against the objecting mother under the common fund doctrine.

Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 183 (Tenn. 2011). **Rules 1.5.** In this case, the court decided whether a contingent fee contract should be enforced where a personal injury action had been settled favorably to a minor. The court held that it should

not: “In the context of cases involving minors....a proposal to enforce a contingency fee agreement automatically is contrary to law. In this state a next friend representing a minor cannot contract with an attorney for the amount of the attorney's fee so as to bind the minor. ...Therefore, the trial court should not place weight on the nature of the fee agreement and instead should review the case on the premise that there is no enforceable fee contract. In other words, the proper question is not whether the contract amount is reasonable but rather what the reasonable fee would be in the absence of a contract.” After applying the factors in Rule 1.5(a), the court upheld a fee of \$131,000 against a \$425,000 settlement (the contingent fee would have yielded \$141,000), which translated to an hourly rate of over \$1,000/hour.

Texas:

Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716 (Tex. Ct. App. 1986), writ dismissed by agreement, 729 S.W.2d 690 (Tex. 1987). Rules 1.1, 1.2, 1.3. Topics: Malpractice. In this case the lack of privity between the lawyer and the decedent’s intended beneficiaries barred them from bringing a negligence action against the lawyer for failing to prepare a new will in accordance with decedent’s instructions prior to death.

Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. Ct. App. 1993). Rules 1.1, 1.2. Topics: Malpractice. Texas is one of the minority of jurisdictions applying the strict privity rule, and on that ground the court here barred an action by the beneficiaries of a trust against the trustee’s attorneys for alleged negligence in the attorneys’ distribution of the trust assets.

Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996). Rules 1.1. Topics: Malpractice. The Supreme Court of Texas here reaffirms the application of the strict privity rule to bar an action for legal malpractice brought by the beneficiaries under an allegedly negligently drafted trust against the attorney-drafter. One of the dissenting Justices in this 4-3 decision noted:

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

By refusing to recognize a lawyer’s duty to beneficiaries of a will, the Court embraces a rule recognized in only four states, [footnote omitted] while simultaneously rejecting the rule in an overwhelming majority of jurisdictions. [Footnote omitted] Notwithstanding the fact that in recent years the Court has sought to align itself with the mainstream of American jurisprudence, [footnote omitted] the Court inexplicably balks in this case. 923 S.W.2d at 579-580.

Lesikar v. Rappeport, 33 S.W.3rd 282 (Tex. Ct. App. 2000, pet. denied). Rules 4.1. Attorney has no duty to reveal information about his client-executor’s fraud to a third party (even a co-executor who is not his client) when his “client is perpetrating a nonviolent, purely financial fraud through silence.”

Combs v. Gent, 181 S.W.3d 378 (Tex.App.2005). Rules 1.1. Topics: Malpractice. Court affirmed a jury verdict for lawyer in this malpractice case. Lawyer had established a trust

for his client and had served as trustee for two years, naming his children as successor trustees, all with client's consent. He had lent money at a usurious rate to client's caretaker and had also borrowed funds from the client's sister to pay his fees. But plaintiff had failed to show how any of this had damaged the estate. The jury's verdict that there was no malpractice or breach of fiduciary duty was not against the weight of the evidence and so should stand.

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex 2006). Rules 1.1. Topics: Malpractice. Having rejected in Barcelo (above) the rule followed in the "overwhelming majority of jurisdictions" that allows intended beneficiaries to sue a decedent's estate planners for legal malpractice, the Texas Supreme Court decided here whether the decedent's executor had standing to do so. This was a malpractice case brought by the executors of the estate of their father against his estate planners, alleging that their negligence caused the estate to incur \$1.5 million in taxes that could have been avoided by competent estate planning. The Court holds that the claim for legal malpractice accrued during the decedent's life and survived to his estate; therefore the executors were entitled to pursue the survival claim against the decedent's lawyers. Thus, contrary to the concern of the dissenters in Barcelo, the estate planners are not insulated from the consequences of their malpractice.

Baker Botts LLP v. Cailloux, 224 S.W.3d 723 (Tex. App. 2007). Rules 1.7. Court reverses an equitable trust in the amount of \$65.5 million imposed on Baker Botts & Wells Fargo (as executor) to remedy fiduciary breaches in their representation of a widow who disclaimed this amount from the estate of her deceased husband. The law firm had concurrently represented the widow, her deceased husband's executor (Wells Fargo) and the charitable foundation that was the beneficiary of her disclaimer. Allegedly the widow's waiver of the conflict was not sufficiently informed, and the trial court held that this was a fiduciary breach. But the court of appeals reversed for lack of evidence that the fiduciary breach caused the widow to execute the disclaimer and because establishment of the equitable trust was without basis in fact or law.

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

Ray v. T.D., 2008 Tex. App. LEXIS 986, 2008 WL 341490 (2008)(unpublished). Rules 1.5, 1.7. Topics: Wrongful Death. Lawyer was hired by a decedent's mother individually and as executrix of decedent's estate, and on behalf of the decedent's minor daughter by her mother, and effectuates a \$100,000 settlement of a wrongful death claim and another \$300,000 on an underinsured motorist insurance claim. Lawyer claimed a right to a 1/3 contingent fee in all

amounts recovered but had failed to comply with rules for entering into a contingent fee contract; he had also failed to comply with the conflicts rules by obtaining informed waivers to the conflicts between his three clients; and he had failed to adequately make out a claim for quantum meruit. He is denied any fee for his work.

In re Murphy, 2009 Tex. App. LEXIS 3934, 2009 WL 707650. Rules 1.9. Topics: Disqualification. Widow and surviving daughter, a lawyer, are fighting over who gets to administer the decedent's estate (and over whether it even needs to be administered). The widow seeks, here, to disqualify her daughter from representing decedent's estate on the ground that she provided legal advice to her and her deceased husband. It was established that while married couple were considering estate planning, this daughter advised them to execute a survivorship community property agreement. Trial court found that this created a former client conflict because the matters were substantially related and disqualified the daughter. But the appeals court reversed, concluding that neither the movant nor the trial court had identified with sufficient specificity how the matters were related and the record fails to reveal how the matters are related.

Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009). . Rules 1.1. Topics: Malpractice. This was a malpractice case brought by the executor of an estate (O'Donnell) against the law firm (Smith) that advised the executor's decedent (Corwin) in his role as executor of his deceased wife's estate. The Texas Supreme Court holds here that the executor is in privity with his decedent and may bring this malpractice claim against the decedent's lawyer who advised him as executor for his wife's estate. The case thus extends the holding of *Belt* (above) by concluding that not only do the decedent's claims for malpractice in estate planning survive to his executor, but so also do other legal malpractice claims that arise outside the estate planning context. At issue was the law firm's advice to Corwin, when he was executor for his deceased wife's estate, about the dangers of mischaracterizing community property as separate property and thus excluding it from his wife's estate. The law firm had assisted the decedent in filing tax returns which took the position (alleged to be a mischaracterization) that certain oil stock was the separate property of Corwin rather than the community property of Corwin and his wife. After both had died, their children as beneficiaries of their mother's estate sued Corwin's estate for this mischaracterization and Corwin's executor (O'Donnell) settled their claims for almost \$13 million. The Court allowed his malpractice claim against Corwin's law firm to proceed.

In re de Brittingham, 319 S.W.3d 95 (Tx. 2010). Rules 1.12. Topics: Disqualification. Lawyer had been a court of appeals judge and sat on a panel deciding a proceeding in a hotly contested probate. She then left the bench and entered private practice, and was representing some of the heirs in a subsequent proceeding in the probate. Court disqualified the lawyer from the representation, finding that "matter" for purposes of the ethical rule included the entire probate, not just isolated proceedings in the probate.

Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron & Blue, 843 F. Supp. 2d 673 (N.D. Tex. 2011), appeal dismissed 582 F. App'x 522 (5th Cir. 2014). Rules 1.5, 1.8. This opinion resolved lingering attorney fee disputes arising out of the Hunt family trust litigation in Texas. Albert Hill III and his family and their attorneys had entered into a contingency fee agreement with three law firms that would pay 30% of gross recovery from a settlement of the trust litigation. After the litigation settled for something in excess of \$114 million, 30% yielded something in excess of \$33 million. But the Hill III family disputed the fees on several grounds. Among the court's holdings: (a) the contingency fee

agreement did not comply with the Texas fee splitting rule, but since it did not violate public policy, the court was not willing to limit the law firms to quantum meruit (even though the Texas version of MR 1.5(e) would seem to have limited them to quantum meruit); (b) the law firms had engaged in negotiations with the GAL about their fees but this was not a sufficient basis for the client to discharge the law firms and was not a breach of their fiduciary duty; (c) the law firms had attempted to secure a release from Hill which the court refused to enforce because of the firms' failure to comply with Texas' version of MRPC 1.8(g), but this was not an abuse of the firms' fiduciary duty; (d) although the three law firms withdrew before a settlement was reached and the agreement stated that withdrawal would waive the contingency, the court found that the firms had been forced to withdraw when the client (Hill) challenged their fees and concluded that the contingent fee agreement would be enforced; (e) but the 30% amount could be adjusted by the court with respect to portions of the settlement that were to be paid into trusts for the minor children of Albert Hill III, and reduced the fee to 10% of those amounts. The court also held that the amount of the settlement earmarked for estimated gift taxes that Hill III would owe on establishment of the trusts for his children could not be included in the "gross recovery from settlement" figure used to determine the fees owed. In the end, the court reduced the fees from something in excess of \$33 million to something just under \$22 million.

Utah:

Oxendine v. Overturf, 973 P.2d 417 (Utah 1999). Rules 1.1, 1.2. Topics: Malpractice, Wrongful Death. In analyzing a claim by a statutory beneficiary against the attorneys for the personal representative regarding a wrongful death claim, the Court adopted an "intended third party beneficiary" analysis of when the attorneys would owe a duty of care to the beneficiaries. The Court reasoned that there "can be no other purpose" in a wrongful death case than to provide benefits to the statutory beneficiaries. Nonetheless, the Court held that no duty attached in the circumstances of this case based on a "conflicts exception" explaining that the statutory beneficiary was adverse to the personal representative throughout the case.

Vermont:

Professional Conduct Board Decision No. 25 (1992). Rules 1.3. Topics: Discipline. In this case the respondent lawyer, who took over as personal representative for an estate in 1982 and failed to take any action to close the estate until after he was required to appear before the probate court following an heir's complaint over the delay in 1989, was given a private admonition for his misconduct. The Professional Conduct Board observed:

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

Virginia:

Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989). Rules 1.1. Topics: Malpractice. In this action brought by a decedent's grandchildren against the decedent's estate planning

attorney for alleged negligence, the court held that lack of privity barred any cause of action in tort and the plaintiffs' allegations based on a third-party beneficiary contract theory were insufficient to confer standing to sue since the plaintiffs failed to show that they were "clear-ly intended" beneficiaries of testator's contract with the law firm.

Estate of Andrews v. U.S., 804 F. Supp. 820 (E.D. Va. 1992)(VA Rules). Rules 3.7. Topics: Disqualification, Evidence. The court disqualified counsel for the estate from representing the estate in a tax refund action where counsel's law partner not only was a party to the action in his representative capacity as a co-executor of the will but also was to be called to testify as a material witness at trial.

Rutter v. Jones, Blechman, Woltz & Kelly, 568 S.E.2d 693 (Va. 2002). Rules 1.1. Topics: Malpractice. Virginia, one of the very few "privity" jurisdictions left in the country whose courts hold that no intended beneficiary may sue the decedent's estate planning lawyer for alleged negligence when the testator's estate plan fails to achieve its intended purposes as a result of the estate planner's alleged negligence, retains its consistent approach to this issue by refusing to permit the personal representative of a decedent's estate (clearly "in privity" with the estate planning lawyer) to bring a negligence action for an estate planning lawyer's alleged failure to properly plan to avoid otherwise clearly avoidable estate taxes by holding that, since the action for malpractice did not arise until after the client had died, the personal representative (limited under Virginia law to bringing only actions that arose before death) could present no viable claim for malpractice.

Washington:

In re Roberts, 45 Wash. 2d 317, 274 P.2d 343 (1954). Rules 7.3. Attorney was suspended for thirty days because he solicited, in person, probate administration work from the heirs of a decedent.

Ward v. Arnold, 328 P.2d 164 (Wash. 1958). Rules 1.1. Topics: Malpractice. In this malpractice action the court found an attorney liable for breach of contract where the beneficiary had employed the defendant attorney to draw a will for her husband, and the will was defective.

In re Fraser, 523 P.2d 921 (Wash. 1974). Rules 1.2, 1.14, 1.16. In this case the court held that the lawyer for a guardian should not "be faulted for refusing to abandon the ward at the guardian's request." 523 P.2d at 928. The court stated:

[T]he attorney owes a duty to the ward, as well as to the guardian. Since the guardian in this case manifested a greater interest in herself than in serving the interest of the ward, it would have been hazardous to the interests of the ward to turn the assets of her small estate over to the guardian. *Id.*

In re Estate of Shaughnessy, 702 P.2d 132 (Wash. 1985). Rules 1.7. In this case the court allowed the payment of fees to a lawyer-scrivener for services as executor and as counsel to the executor although the lawyer was the beneficiary of a \$5,000 bequest and was a residuary beneficiary. The court expressed general disapproval of a lawyer drawing a will which names the lawyer as fiduciary or beneficiary.

Estate of Larson, 694 P.2d 1051 (Wash. 1985). Rules 1.2, 1.5. The court was here asked to pass upon the reasonableness of the lawyer's fees in an estate administration. The Supreme Court of Washington overturned decisions of a court commissioner, the superior court and the court of appeals affirming the lawyer's fees. In the opinion the court stated that:

The personal representative stands in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs. . . . The personal representative employs an attorney to assist him in the proper administration of the estate. Thus, the fiduciary duties of the attorney run not only to the personal representative, but also to the heirs. 694 P.2d at 1054.

Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974 (Wash. 1987). Rules 1.7. In this case excessive compensation was recovered from the scrivener of a will who was subsequently appointed co-trustee of a large testamentary trust. The court held that an exoneration clause did not protect the scrivener against liability: "As the attorney engaged to write the decedent's will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect." 732 P.2d at 980.

Stangland v. Brock, 747 P.2d 464 (Wash. 1987). Rules 1.1, 1.4. Topics: Malpractice. The court here ruled that, after a will is prepared and executed, "the attorney has no continuing obligation to monitor the testator's management of his property to ensure that the scheme originally established in the will is maintained."

Morgan v. Roller, 794 P.2d 1313 (Wash. Ct. App. 1990). Rules 1.2, 1.14. Topics: Malpractice. In this malpractice action brought by the beneficiaries under a will to recover from the scrivener of the will the costs of successfully defending a will contest, the court held that the scrivener of the will was not required to inform intended beneficiaries under the will of his view, based on subsequent contacts with the testator, that she was incompetent at the time the will was executed.

Trask v. Butler, 872 P.2d 1080 (Wash. 1994). Rules 1.1, 1.2. Topics: Malpractice. In this decision the Supreme Court of Washington holds that the *Biakanja v. Irving*, supra, multifactor balancing test (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) should be applied in determining whether the beneficiary of a decedent's estate may bring an action against the lawyer who represented the executor in her fiduciary capacity. It modified that test, however, by making the "intent to benefit" factor a critical threshold inquiry. "After analyzing our modified multifactor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries." 872 P.2d at 1085.

Leipham v. Adams, 894 P.2d 576 (Wash. Ct. App. 1995), review denied, 904 P.2d 1157 (Wash. 1995). Rules 1.1, 1.2. Topics: Malpractice. In this legal malpractice action the court, applying the modified multifactor balancing test for determining when an attorney

owes a duty of care to a non-client (see *Trask v. Butler*, *infra*) held that the beneficiaries of an estate were barred from suing the lawyer for the estate for the lawyer's alleged negligent failure to advise the decedent's surviving spouse with respect to a possible disclaimer of a joint tenancy account. The court found that the limited scope of the lawyer's undertakings on behalf of the surviving spouse distinguished this case from *Linck v. Barokas & Martin*, *supra*, (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1).

***Estate of Morris*, 949 P.2d 401 (Wash. Ct. App. 1998). Rules 1.5.** A corporate personal representative personally incurred attorneys' fees in successfully defending a suit for removal brought by the beneficiaries of two estates. Its request for reimbursement from the estates was disallowed. The appellate court affirmed the trial court's decision denying any fees on the grounds that the bank's conduct had conferred no "substantial benefit" on the estate as required by the applicable Washington statute.

***Bennett v. Ruegg*, 949 P.2d 810 (Wash. Ct. App. 1999). Rules 1.5.** In this case the court, interpreting statutory law, found that the state's broadly drawn statute permitting attorneys' fees to be awarded in a probate proceeding "as justice may require" applies to permit the personal representative's recovery of attorneys' fees from a beneficiary who has unsuccessfully sought removal of the personal representative.

***In re Robinson*,**

<https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=436> (2001). **Rules 1.7, Topics: Discipline.** Lawyer represented the personal representative of an estate in her fiduciary capacity and personally as claimant to the proceeds of a bank account that stood in names of herself and her father with rights of survivorship, which was contested by her two siblings. He was reprimanded for doing so without complying with MRPC 1.7. The reprimand concluded that "[lawyer's] conduct in acting as the lawyer for both the estate and beneficiary, without consultation and full disclosure of all material facts regarding the conflict between the estate's interests and beneficiary's interests and/or without obtaining either clients' [sic] written consent to the conflict violated MRPC 1.7(a)."

***Janssen v. Topliff (Guardianship of Karan)*, 38 P.3d 396 (Wash. Ct. App. 2002). Rules 1.1, 1.2. Topics: Malpractice.** Following *Trask v. Butler*, *infra*, and applying the *Biakanja*, *supra*, (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) multifactor balancing test, the court held that the attorney for the guardian of a minor ward owes a direct duty of care to the guardian's ward and could be liable in malpractice for failing to ensure that guardian either posted a bond or deposited guardianship proceeds in a blocked account.

***Estate of Treadwell*, 61 P.3d 1214 (Wash. Ct. App. 2003). Rules 1.1, 1.2. Topics: Malpractice.** This case follows *Janssen v. Topliff (Karan)*, *supra*, in finding a duty of care owed directly to the ward by the lawyer for the guardian of an incapacitated adult.

***Estate of Deigh v. Perkins*, 2006 Wash. App. LEXIS 2160, 2006 WL 2895073 (unpublished). Rules 1.1. Topics: Malpractice.** This was a malpractice claim against the lawyer for a discharged, predecessor executor. The successor executor of Deigh's estate

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

***In re Stansfield*, 164 Wn.2d 108; 187 P.3d 254 (2008). Rules 1.2, 1.9, 4.1. Topics: Discipline.** Lawyer was retained by the widow of a victim of a fatal car crash and was asked by him also to represent the widow of the other (second) victim. Without authority to do so, in violation of Rule 1.2(f) the lawyer represented to the second victim's insurance company and to the sheriff that he represented the second victim, and also filed a lien on property owned by this victim for services rendered. Later, after completing the estate work for which he had been retained, he agreed to represent the driver who had caused the car crash in a substantially related criminal action when he was charged with vehicular homicide, without consent of the widow, in violation of Rule 1.9. The lawyer was reprimanded for this misconduct.

***Estate of Jensen*, 2009 Wash. App. LEXIS 268. Rules 1.9. Topics: Disqualification.** Executor moved to disqualify a law firm that had filed two creditor claims against the estate arguing that before her husband's death, she had been the firm's client on various joint business matters. The appeals court affirmed a denial of the motion finding that there "simply is not enough information to establish that the previous representation matters are sufficiently related to the current one."

***Estate of Williams*, 2009 WL 5092865, 153 Wash. App. 1047 (2009)(unpublished). Rules 1.1, 1.2. Topics: Malpractice, Wrongful Death.** This case holds that the attorney for a personal representation owed a duty of care to the statutory beneficiaries of a wrongful death claim to ensure that settlement proceeds were not misappropriated by the personal representation from an unblocked account. Compare *Campbell v. Johnson*, 2007 WL 3133883, 141 Wash. App. 1016 (2007)(unpublished)(holding that attorney for personal representative did not owe a duty of care to the statutory beneficiaries who were not included in a wrongful death claim brought by the personal representative).

***In re Eugster*, 166 Wn.2d 293 (2009). Rules 1.1, 1.6, 1.7, 1.14. Topics: Discipline.** An 18-month suspension—not disbarment as recommended by the Disciplinary Board—is the proper sanction for a lawyer who, when fired by his elderly client, asked a court to declare her incompetent without first investigating whether she was actually impaired. The court rejected the lawyer's claim that he justifiably feared his former client was suddenly unable to manage her affairs and was at risk of being taken advantage of. The court noted the lawyer had evidence that his client had recently had a mental health exam which determined she was competent; had been satisfied of her competence only months before when he had her execute documents he had prepared; and had failed to explain why his abrupt "epiphany" about his ex-client's mental state came on the same day he was fired. "[If a] lawyer reasonably believes that her client is suffering diminished capacity and is

under undue influence, the lawyer may take protective action under RPC 1.14 without fear of provoking charges of ethical misconduct... [But a] lawyer's decision to have her client declared incompetent is a serious act that should be taken only after an appropriate investigation and careful, thoughtful deliberation." "Lawyers who act reasonably under RPC 1.14 are not subject to discipline. Eugster did not."

In re Disciplinary Proceeding Against Shepard, 169 Wash. 2d 697; 239 P.3d 1066 (2010). Rules 1.1, 1.4, 5.3, 5.5. Topics: Discipline. Lawyer was suspended for two years for assisting the unauthorized practice of law in violation of Rule 5.5 and failing to adequately supervise nonlawyers in violation of Rule 5.3 as a result of his working with a nonlawyer "living trust" company. Among other violations, he failed to adequately explain to clients the effect of the documents they were signing, the availability of alternatives to the package he was selling, and the risks and benefits of living trusts compared to other estate-planning options for their specific situation.

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

LK Operating, LLC v. Collection Group, LLC, 168 Wn.App. 862, 279 P.3d 448 (2012), amended on reconsideration, 287 P.3d 628 (Wash. App. 2012) and aff'd on other grounds, 181 Wash. 2d 48, 331 P.3d 1147 (2014) and aff'd on other grounds, 181 Wash. 2d 48, 331 P.3d 1147 (2014). Rules 1.7, 1.8. This case involved a complicated estate plan in which two law partners set up irrevocable trusts for the benefit of their children and then set up a company called LK Operating ("LKO") to manage the trusts. Each trust was the sole shareholder of a corporation and the five corporations were the sole members of LKO. LKO contributed funds to a business started by a client of the attorneys. LKO and the clients went to court over a dispute as to exact percentage owned by LKO. The court held that the attorney who arranged for the LKO investment had violated both 1.7 and 1.8(a). The trial court had relied on the 1.7 violation to order rescission of the agreement. The appeals court found no Washington authority for granting rescission based on RPC 1.7 and refused to do so in this case, worrying that burden of the rescission remedy could easily fall on innocent clients who should not pay for "the sins of its lawyer." The court of appeals held that the 1.8(a) violation justified rescission. Even though the lawyer had not personally been a party to the transaction, the lawyer's family interest in LKO was enough to trigger 1.8(a).

***Parks v. Fink*, 173 Wash. App. 366, 293 P.3d 1275 review denied, 177 Wash. 2d 1025, 309 P.3d 504 (2013). Rules 1.1, 1.3. Topics: Malpractice.** An attorney did not owe duty of care to prospective beneficiary of client's will to execute client's will promptly.

***Linth v. Gay*, 190 Wn.App. 331, 360 P3d 844 (Wash. App. 2015). Rules 1.1, 1.3. Topics: Malpractice.** Relying on the Parks case above, the court held that an estate planner does not owe a duty to an intended beneficiary to make sure a critical document was attached to a trust prepared for and executed by the decedent. Relying on Trask v. Butler, above, the court also held that the same attorney, while serving as attorney for the personal representative after trustor's death, did not owe a duty to the beneficiary.

West Virginia:

***Brammer v. Taylor*, 338 S.E.2d 207 (W.Va. 1985). Rules 1.1, 5.5. Topics: Malpractice.** In this malpractice action by a disappointed beneficiary under an invalid codicil, the question of whether or not bank employees had not only acted as typists and attesting witnesses, but also engaged in the unauthorized practice of law (in which event the court found their supervision of the codicil's execution would be prima facie negligence) was held to be a question for the trier of fact.

***State ex rel. DeFrances v. Bedell*, 446 S.E.2d 906 (W.Va. 1994). Rules 1.7, 1.9, 3.7. Topics: Disqualification.** This case (also discussed in the Annotations following the ACTEC Commentary on MRPC 3.7) concludes that a lawyer who had held one estate planning meeting with the now deceased testator, during which the testator did not divulge any confidential information and was not interested in retaining the firm's services, was not disqualified from later representing persons who contested the decedent's will.

***Lawyer Disciplinary Bd. v. Allen*, 198 W. Va. 18, 33, 479 S.E.2d 317, 332 (1996). Rules 7.4. Topics: First Amendment.** Court concluded that West Virginia RPC 7.4, barring truthful advertisement of a legal specialty, failed to comply with the first amendment protections for commercial speech under the United State Constitution.

***Lawyer Disciplinary Bd. v. Simmons*, 219 W.Va. 223, 632 S.E.2d 909 (2006). Rules 1.3, 1.4. Topics: Discipline.** Lawyer was suspended for 20 days for lack of diligence and failure to communicate adequately on four counts of misconduct, two of which were probate matters.

***Lawyer Disciplinary Bd. v. Ball*, 219 W. Va. 296; 633 S.E.2d 241 (2006). Rules 1.5, 1.7, 1.8, 8.4. Topics: Discipline.** Lawyer is disbarred and ordered to pay restitution of more than \$2.8 million as the result of estate planning work and probate/trust work that followed. In several cases he named himself (and collected) as executor under client wills compensation fixed at 7.5% of the estate value, well above the generally accepted maximum charge of 5%. He also drafted wills for two clients that gave substantial bequests to himself in violation of Rule 1.8(c); assisted a client to name lawyer's two sons as beneficiaries of the client's annuity; drafted gifts to a Foundation that would permit him to collect an "oversight" fee in violation of Rule 1.7; and drafted trusts and wills appointing himself as fiduciary and authorizing him to collect excessive fees as trustee in violation of Rule 1.5 and/or determine his own fee in violation of Rule 1.7 and/or 8.4.

State ex rel. Office of Disciplinary Counsel v. Albright, 225 W.Va. 105, 690 SE2d 113 (2009). Rules 1.3, 1.4. Topics: Discipline. Lawyer was reprimanded in January 2007 for violating Rules 1.3 & 1.4 in the handling of a probate administration, and ordered to complete the administration promptly. More than two years later the estate had not been closed. Lawyer was ordered to show cause and found in contempt and the court here suspended him from practice, but stayed the suspension on the condition he wind up the state within four months.

State ex rel. York v. W. Virginia Office of Disciplinary Counsel, 231 W. Va. 183, 744 S.E.2d 293 (2013). Rules 5.5, 8.5. Topics: Discipline. This decision holds that a lawyer authorized to practice before the patent and trademark office, but not licensed in West Virginia, is subject to West Virginia disciplinary authority even though not license there. In notes that the PTO Office of Enrollment and Discipline regulations specify that “nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law....” 37 C.F.R. § 10.1 (2012). Moreover, the PTO regulations also contemplate reciprocal discipline and require a practitioner to notify that office of any discipline imposed by another jurisdiction. 37 C.F.R. § 11.24 (2012). According to the regulations, a “final adjudication in another jurisdiction or Federal agency or program that a practitioner, whether or not admitted in that jurisdiction, has been guilty of misconduct shall establish a prima facie case by clear and convincing evidence that the practitioner violated [PTO disciplinary regulations].” 37 C.F.R. § 11.24(e) (2012).18. The court denies a writ of mandamus (prohibition) that was intended to stop the disciplinary proceedings.

Wisconsin:

State v. Collentine, 159 N.W.2d 50 (Wis. 1968). Rules 1.8. Topics: Discipline. The Supreme Court of Wisconsin held that an attorney who, as conservator of an estate, prepared a will bequeathing the residue of the conservatee’s estate to himself, was guilty of unprofessional conduct. However, the court held that he was subject only to being admonished rather than disciplined where the evidence showed the attorney had attempted to persuade the testator to get another attorney to draft the will and had taken pains to establish that it was the testator’s independent and uninfluenced volition to have such a will prepared (and where there was no natural recipient of the testator’s bounty and the residuary estate was of no value).

State v. Gulbankian, 54 Wis.2d 605, 196 N.W.2d 733 (1972). Rules 1.7, 7.3. Topics: Discipline. The Gulbankians (brother and sister in partnership) were found to have improperly solicited their appointment as executors and/or probate attorneys when they were drafting wills, but since this was the first disciplinary case in Wisconsin that had raised this “important issue,” the court dismissed the disciplinary complaint against them. The court stated:

An attorney should not use a will form which provides for a designation of an attorney for the probate of the estate or executor for submission to the testator on the theory it is properly a part of a standard form of a will; no such form of suggestion may be used. An attorney, merely because he drafts a will, has no preferential claim to probate it. ...Nor do we approve of attorneys' ‘safekeeping’ wills. In the old days this may have been explained on the ground many people did not have a safe place to keep their valuable papers, but there is little justification today because most people do have safekeeping boxes, and if not, [Wisconsin law] provides for the

deposit of a will with the register in probate for safekeeping during the lifetime of the testator.

Estate of Devroy, 325 N.W.2d 345 (Wis. 1982). Rules 1.7, 7.3. Notwithstanding *Gulbankian* (supra), this opinion recognized the general rule that the personal representative is free to employ the counsel of his or her own selection but upheld a will provision conditioning the appointment of an executor upon the executor's employment of the scrivener of the will as the executor's lawyer. It was not against public policy for the scrivener to include such a clause at the request of the client, where there is no evidence of solicitation by the scrivener and the client's reasons for choosing the scrivener are clear.

Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983). Rules 1.1. Topics: Malpractice. The court here applied the *Biakanja v. Irving*, supra, multifactor balancing test (discussed in the Annotations following the ACTEC Commentary on MRPC 1.1) in permitting an action by disappointed beneficiaries against the drafter of an allegedly defective will.

In re Disciplinary Proceedings Against Haberman, 376 N.W.2d 852 (Wis. 1985). Rules 1.1, 1.3, 1.7. Topics: Discipline. An attorney was suspended for two years for neglecting seven estates in which he served as attorney or personal representative, engaging in conflicts of interest in one, and failing to cooperate with the disciplinary board.

In re Disciplinary Proceedings Against Mueller, 377 N.W.2d 158 (Wis. 1985). Rules 1.3, 8.1. Topics: Discipline. This decision upheld a two year suspension of a lawyer who neglected estate and family matters of clients and who failed to respond to numerous inquiries by disciplinary board.

Anderson v. McBurney, 467 N.W.2d 158 (Wis. Ct. App. 1991). Rules 1.1, 1.8, 3.3. Topics: Malpractice. In this case the decedent's only child was omitted from the will drafted by an attorney to whom the decedent gave his estate. The attorney's law firm represented the attorney as executor, and the lawyer filed an affidavit with the court incorrectly stating that the decedent had no heirs. The child's guardian sued the attorneys for negligence in failing to discover her status as a pretermitted heir. The court affirmed the dismissal of the child's claim holding that, under Wisconsin's intended third-party beneficiary/breach of contract test, the child lacked standing to sue.

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

In re Strasburg, 577 N.W.2d 1 (Wis. 1998). Rules 4.1, 5.5. Topics: Discipline. While suspended from the practice of law, the suspended attorney continued to engage in the practice of law and misrepresented to clients that he was an attorney. He continued to operate a business, providing advice for qualification for Medicaid benefits and preparing legal documents including trusts, powers of attorney and living wills. The business did not

employ a licensed attorney to review documents prepared by the suspended attorney or his staff. The fact that the attorney refused to cease the unauthorized activities after the suspension was determined to be contempt of the court. The attorney's license to practice law (previously suspended) was revoked.

In re Disciplinary Proceedings Against Marks, 265 Wis. 2d 1, 665 N.W.2d 836 (2003). Rules 4.1, 8.5. Topics: Discipline. Lawyer admitted in both Michigan and Wisconsin, but whose primary practice is in Michigan, is suspended for 60 days by Wisconsin based on a violation of Michigan's ethics rules (misrepresentation) while representing a client in Michigan.

In re Konnor, 279 Wis.2d 284, 694 N.W.2d 376 (2005). Rules 1.1, 1.3, 1.4, 1.15, 3.3, 4.1, 8.4. Topics: Discipline. Lawyer was hired to handle the probate of an estate and the court found he had "seriously neglected [the] probate matter, had failed to keep the beneficiaries advised of the status of the matter, had not appropriately handled the estate assets because he had not deposited them in accounts bearing interest, had not made timely deposits, and had not attempted to collect rents on the estate property." He also engaged in deceptive conduct relating to certain estate matters. He was publicly reprimanded.

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

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

In re Acker, 305 Wis.2d 11, 738 N.W.2d 554 (2007). Rules 1.3, 1.4, 3.3. Topics: Discipline. Lawyer was suspended from practice for 18 months for 7 counts of misconduct, all of them relating to probate work. In two cases he made multiple misrepresentations to the court; in the other he failed to act diligently and to communicate adequately.

In re Jones, 309 Wis. 2d 585; 749 N.W.2d 603 (2008). Rules 1.3, 1.4, 1.16. Topics: Discipline. Lawyer was suspended for four months for misconduct in four client matters one of which was a probate matter and a related guardianship matter. He neglected the probate matter and failed to communicate his failure to file the inventory with his client so that both he and his client were removed. He also failed to repay fees taken for the work he did not do.

In re Zajac, 309 Wis.2d 19, 748 N.W.2d 774 (2008). Rules 1.3, 1.4, 1.8. Topics: Discipline. Lawyer was suspended for two months after stipulating to misconduct, all of it relating to her handling of two probate matters. Misconduct included lack of diligence and

communication and paying a claim against the estate from lawyer's personal funds in violation of Rule 1.8(a)(impermissible loan) and/or 1.8(e)(impermissible financial assistance).

In re Elverman, 308 Wis. 2d 524; 746 N.W.2d 793 (2008). Rules 4.1, 8.4. Topics: Discipline.

Lawyer was suspended for 2 months for failing to report as income on his tax returns some \$230,000 received in trustee fees, thus violating Wisconsin Rule 8.4 which, among other things, makes it misconduct to violate a statute. On the other hand, the court affirmed the conclusion that lawyer did not knowingly violate Rule 8.4(c) by failing to turn over to his law firm these fees as was required by the firm partnership agreement.

In re Berlin, 306 Wis.2d 288, 743 N.W.2d 683 (Wis. 2008). Rules 1.8, 8.4. Topics: Discipline. Lawyer was suspended from practice for 6 months, in part for misconduct relating to an estate matter. He was hired to assist an accident victim on a personal injury claim, but the victim then died from unrelated causes. The widow of the decedent asked Lawyer to assist in bringing the personal injury action on behalf of the decedent and on her own behalf as well. Before the client had authority to act for the decedent's estate, lawyer settled the personal injury action on behalf of both the estate and the widow and allocated all of the settlement proceeds to the widow in her individual capacity and none to the estate, although the lawyer knew there were state child support liens against the estate. In doing so, the lawyer failed to adequately advise the widow of the conflict and of the allocation being made, in violation of Rule 1.8(g) and deceived the probate court about the settlement in violation of rule 8.4.

In re McNeely, 313 Wis.2d 283, 752 N.W.2d 857 (2008). Rules 1.8. Topics: Discipline. Lawyer was suspended for two months after being found to have engaged in several instances of misconduct in relation to an estate he was handling. After having a former client's widow appointed as his administrator and beginning a personal injury action on behalf of the decedent's estate and the widow individually, he settled the matter without adequately consulting with the client as required for aggregate settlements and made misrepresentations to the probate court about the settlement although he knew there were child support claims pending against the decedent's estate.

Tensfeldt v. Haberman & LaBudde, 319 Wis.2d 329, 768 N.W.2d 641 (2009). Rules 1.1, 1.2, 8.4. Topics: Malpractice. This was a malpractice case brought by the decedent's children which included a claim for aiding & abetting an unlawful act of a deceased estate planning client. The decedent had been party to a divorce agreement, which had been incorporated in the divorce decree, under which he was obligated to keep in place an estate plan providing 2/3 of his estate to the couple's adult children. Lawyer knowingly prepared an estate plan for the client that violated the divorce agreement and was thus "liable as a matter of law for intentionally aiding and abetting his client's unlawful act" and subject to damages for that tort.

In re Nussberger, 2009 WI 103; 775 N.W.2d 525 (2009). Rules 1.1, 1.3. Topics: Discipline. Lawyer was publicly reprimanded for lack of competence and diligence in administering an estate. First, he failed to determine whether the estate was required to file

state and federal estate tax returns prior to the filing deadlines; and then filed an inventory that incorrectly used the redemption value of the decedent's savings bonds rather than the date of death value. Second, he failed to file an estate inventory until almost a year after the filing deadline and failed to file estate tax returns for almost three years after the filing deadline.

In re Guardianship of Jennifer M., 323 Wis.2d 126, 779 N.W.2d 436 (Wis.App. 2009). Rules 1.14, 4.2. Where an attorney has been appointed as the guardian ad litem of a partially disabled person who is known to be represented by counsel and needs to meet with the ward, Rule 4.2 does not directly prohibit the GAL from meeting with the ward without the consent of her counsel because the GAL would be acting pursuant to court order. Nonetheless, the policies behind the no contact rule and the ward's statutory right to counsel justify extending it to this situation and so the court holds that a GAL may not meet with ward without the ward's counsel being present.

In re Winch, 318 Wis.2d 408, 769 N.W.2d 474 (2009). Rules 1.4, 1.15, 1.16, 3.3, 8.1, 8.4. Topics: Discipline. Lawyer was suspended for three years for multiple matters, one of which was an estate matter. Lawyer failed to hold in trust some \$6,000 of the decedent's property and, in fact, converted much of it for personal use, in violation of Rules 1.15 & 8.4. He refused to turn estate file over to heirs in violation of Rule 1.16 and misrepresented to the disciplinary authorities various things about his administration of decedent's estate in violation of Wisconsin Rule 8.4.

In re Nunnery, 320 Wis.2d 422, 769 N.W.2d 858 (2009). Rules 1.15, 3.3. Topics: Discipline. Lawyer was suspended for three years for multiple matters and counts of misconduct. One of the matters involved an estate matter. Lawyer had power of attorney for client and handled his financial affairs before he died. After he died, lawyer continued to act under power of attorney, although it had expired, before opening a probate and, when he applied to open the probate, misrepresented the client's date of death to hide his improper use of the power of attorney. He also failed to properly account for client's assets and the fees he was claiming after client's death.

Discipline of Roethe, 780 N.W.2d 139 (WI 2010). Rules 1.5, 5.3, 8.4. Topics: Discipline. Lawyer represented estate with co-executors, numerous heirs and numerous delays. He had executors sign undated personal representative deeds and other documents and later inserted dates other than the date of execution and had the documents notarized. Court held that lawyer had violated 5.3 by directing his assistant to notarize documents with an incorrect date, and 8.4 because his fee agreement violated a statute. On another count, he had entered into an illegal contingency fee agreement for probating estate which was based on a percentage of the estate's value. A Wisconsin statute prohibits that. Wis. Stat. 851.40(2)(e). The court publicly reprimanded the lawyer.

In re Disciplinary Proceedings against Hooker, 354 Wis. 2d 651, 656, 847 N.W.2d 829, 831 (2014). Rules 5.5, 8.5. Topics: Discipline. Lawyer admitted in Wisconsin has a federal practice (bankruptcy, immigration & intellectual property) in Colorado, where she is not generally admitted. She is "disbarred" in Colorado and then consents to have her license revoked in Wisconsin.

Wyoming:

Clark v. Alexander, 953 P.2d 145 (Wyo. 1998). Rules 1.1, 1.2, 1.14. Attorney who is guardian-ad-litem is obligated to explain to the child that the attorney (GAL) is charged with protecting the child's best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship. However, counsel appointed to represent a child must, as far as reasonably possible, maintain a normal client-lawyer relationship with the child and is not free to determine the child's "best interests" if contrary to the preferences of the child.

ETHICS OPINIONS

ABA

ABA Inf. Op. 1397 (1977). Rules 1.16. "No lawyer can continue to represent a client who does not wish to be represented."

ABA Inf. Op. 86-1517 (1986). Rules 1.5. A lawyer may bill a corporation for personal services provided to the corporation's shareholder, director, officer or employee, if the corporation and the attorney's personal client agree and the bill identifies the services as personal services and the amount of the charge for the services.

ABA Inf. Op. 89-1530 (1989). Rules 1.6, 1.14. A lawyer has implied authority to consult diagnostician regarding the condition of a client.

ABA Op. 92-366 (1992). Rules 1.6, 1.16. A lawyer who knows that the lawyer's client is using or will use the lawyer's services or work product to perpetrate a fraud must withdraw and may disaffirm any documents used by the client to further the fraud even if such a so-called "noisy" withdrawal inferentially reveals attorney-client confidential communications. A lawyer whose client has used the lawyer's services in the past to perpetrate a fraud which is no longer continuing, may but is not required to withdraw. Any such withdrawal may not be "noisy."

ABA Op. 93-379 (1993). Rule 1.5. This opinion articulates more particularly the duties of a lawyer to disclose the basis of fees and charges as provided in MRPC 1.5. In addition, in matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour). A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services provided in house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered. A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct costs of the third-party services. It states, in part, that, "if a

lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements.”

ABA Op. 94-380 (1994). Rules 1.6. This opinion emphasizes the ABA’s view of the overriding importance of MRPC 1.6, the effect of which is not diminished by the fact that the client is a fiduciary. Accordingly, in the ABA Ethics Committee’s view, the lawyer for a fiduciary may not disclose breaches of duty by the fiduciary. The opinion states that disclosures of breaches of duty by the fiduciary are not impliedly authorized. [*Caveat:* This opinion was decided several years before the 2003 revisions to MRPC 1.6.]

ABA Op. 96-404 (1996). Rules 1.2, 1.14, 1.16. “Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer’s authority to act when a client becomes incompetent ... ” The opinion goes on to observe that the lawyer in question may consult with the client’s family, and may even petition the court for the appointment of a guardian, but may not represent a third party petitioning for appointment. It is not impermissible for the lawyer to support the appointment of a guardian who the lawyer expects will retain the lawyer as counsel.

ABA Op. 99-413 (1999). Rules 1.6. A lawyer has a reasonable expectation of privacy in the use of email to convey client information without the use of encryption and therefore email is a reasonable means of protecting client confidentiality.

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

ABA Op 05-434 (2005). Rules 1.7. This opinion is discussed in the text of the Commentary. It addresses the responsibilities of a lawyer who represents a client (testator) who asks the lawyer to draft a new will, the effect of which is to disinherit the testator's son whom the lawyer is representing on an unrelated matter. The Committee concluded that drafting the will is not directly adverse to the son, and the lawyer does not need the son's consent to do the will. The Committee also concludes that ordinarily this situation does

NOT pose a significant risk of material limitation of the estate planning work unless (perhaps) the lawyer begins advising the testator about whether to disinherit the son. The Committee does point out scenarios under which the lawyer may not be able to do the will, which we will not elaborate on here.

ABA Op 05-436 (2005). Rules 1.7, 1.9. This opinion is discussed in the text of the Commentary. It addresses when it is appropriate to ask a client to consent to a future conflict and when a client's informed consent to a future conflict of interest is likely to be effective. "Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [of Model Rule 1.7]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b)."

ABA Op. 06-442 (2006). Rules 1.6, 4.4. The model rules do not preclude a lawyer who has received a document containing metadata from reviewing that metadata, although if the transmission of the metadata was inadvertent, the recipient lawyer is required to notify the sender of its receipt. MR 4.4(b). The transmission of such data may, however, violate the sending lawyer's duty to take reasonable precautions to protect a client's confidences.

ABA Op. 08-51 (2008). Rules 1.1, 1.6, 5.1, 5.3, 5.5. "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them. In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5."

ABA Op 08-450 (2008). Rules 1.4, 1.6, 1.7, 1.16. This opinion concentrates on the

insurance defense scenario, but has useful things to say for estate planners representing multiple clients on the same or related matters. With regard to the interplay between the duty of confidentiality and the duty to inform:

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

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

ABA Op. 09-455 (2009). Rules 1.6, 1.7. An exception to the duty of confidentiality necessarily must be read into MR 1.6 in order to allow lawyers to comply with the conflicts rules. (Note that this opinion was issued before MR 1.6 was amended to add an express exception for conflicts screening as MR 1.6(b)(7). But many states have not yet adopted new MR 1.6(b)(7).)

ABA Op. 13-464 (2013). Rules 1.5, 5.4. This opinion addresses fee splitting between lawyers who are not of the same firm and jurisdiction where the jurisdiction of one of the lawyers permits fee splitting with nonlawyers. The question was whether such a fee splitting agreement between the lawyers, even if consistent with MRPC 1.5(e) would place a lawyer in a model rule jurisdiction in violation of MRPC 5.4(a) which in most settings prohibits fee splitting between a lawyer and a nonlawyer. The District of Columbia, for example, permits lawyers to practice law in partnership with nonlawyers, contrary to the model rules. So do the rules of various foreign jurisdictions, including the United Kingdom and Australia. The opinion concludes that the fee agreement would not put the model rules lawyer in violation of Model Rule 5.4. It reasons that so long as the model rule lawyer complies with MRPC 1.5(e), that lawyer will be in compliance with the rules governing that lawyer. The model rule lawyer's agreement is with the non-model rule lawyer, not with that lawyer's nonlawyer partner. "In summary, a division of a legal fee by a lawyer or law firm in a Model Rules jurisdiction with a lawyer or law firm in another jurisdiction that permits the sharing of legal fees with nonlawyers does not violate Model Rule 5.4(a) simply because a nonlawyer could ultimately receive some portion of the fee under the applicable law of the other jurisdiction."

ABA Op. 13-465 (2013). Rules 7.1, 7.2. In this opinion, the ABA addresses the use of new marketing techniques such as “coupon” and “prepaid” sales (not to be confused with prepaid insurance). In the former, a lawyer may use an intermediary to sell coupons that entitle the buyer to a certain amount of legal service at a discount, with the client paying for such services directly to the lawyer. In the latter, a lawyer may use an intermediary to sell a certain amount of a lawyer’s legal services at a discount, with no further payment to go the lawyer. In each case, the intermediary will charge a fee for the marketing of the discounted services, but the Committee concludes that neither involves impermissible fee splitting with a nonlawyer intermediary. It further concludes, however, that a lawyer must proceed with great caution to make sure that a consumer fully understands what services are being advertised and what the consumer’s rights are if the lawyer is unable to perform the services when the client requests them, whether because of conflict of interest or other reasons. In general, the Committee sees fewer ethical problems with “coupon” programs than with “prepaid” programs, and is unsure whether a prepaid program can be structured so as to comply with the ethics rules.

Alabama:

AL Op. 87-137 (1987). Rules 1.14. A lawyer whose client has become incompetent may file a petition for appointment of a guardian. A lawyer is “required to do so” if the lawyer believes it is in the client’s best interests.

AL Op. 89-77 (1987). Rules 1.6, 1.16. The lawyer for a guardian who discovers embezzlement by the guardian may not disclose misconduct that is confidential information, must call on client to restore funds, and if client refuses to do so lawyer must withdraw. The lawyer may not present an account that fails to account for the embezzled funds.

AL Op. 90-12 (1990). Rules 1.6, 1.14. A lawyer who believes that a client lacks capacity to act in the client’s own interests may divulge confidential information to an independent diagnostician without the consent of the client.

Alaska:

AK Op. 87-2 (1987). Rules 1.6, 1.14, 1.16. The discharged lawyer for a conservator could ethically disclose to the ward’s personal lawyer that the conservator was not acting in the ward’s interests.

AK Op. 91-2 (1991). Rules 1.1, 1.2, 1.6, 1.7. An attorney representing the personal representative of an estate is not prohibited from representing the personal representative in disputes with heirs. The attorney may not, however, represent the personal representative in such disputes if the attorney has obtained relevant confidential information from the heirs while acting for the personal representative nor may the attorney assist or counsel the personal representative in conduct inconsistent with the best interests of the estate.

AK Op. 2008-1. Rules 1.15. Notwithstanding Alaska’ adoption of the Uniform Electronic Transactions Act, a lawyer must still maintain in original form any client documents entrusted for safekeeping. Further, the Uniform Electronic Transactions Act recognizes that certain types of documents, including wills and testamentary trusts, must be maintained in original form. AS 09.80.010(b).

AK Op. 2009-2. Rules 7.1, 7.2. Committee agrees with and adopts the approach of the Connecticut Statewide Grievance Committee (below). A lawyer does not act unethically in advertising his or her selection or ranking in a commercial publication, including SUPER LAWYERS and BEST LAWYERS OF AMERICA, so long as the complete context is provided -- meaning that the lawyer's advertising must state accurately the publication by which he or she was ranked, the year of the ranking, and the field of the ranking, if one was specified. Sample acceptable statements are set forth.

Arizona:

AZ Op. 86-13 (1986). Rules 1.7, 1.14. A lawyer who was appointed as guardian *ad litem* for a minor may also serve as lawyer for the minor so long as there is no conflict of interest. If a conflict exists, the lawyer must request the court to appoint a new guardian *ad litem*. The lawyer may not continue to act as a guardian and ask that a new lawyer be appointed to represent the minor. If a new guardian is appointed, the lawyer should follow the client's wishes although contrary to the guardian's wishes. If the guardian believes that the minor's wishes are not in the minor's best interests, the matter should be presented to the court.

AZ Op. No. 94-09 (1994). Rules 1.5, 1.6, 8.3. For a more detailed summary see the Annotations following the ACTEC Commentary on MRPC 1.6.) A lawyer who believes that the fees charged by another lawyer in connection with the administration of an estate are clearly excessive has a duty to report the other lawyer's violation of the rules to the state bar.

AZ Op. 94-09 (1994). Rules 1.6, 8.3. A lawyer, who has extensive experience in trust and estate law, is obligated to report the misconduct of another lawyer who charged clearly excessive fees (by "a factor of 10") in connection with the administration of an estate. However, "Because A acquired the fee information through his representation of the [client beneficiary], it would appear that he must obtain the consent of the client before he discloses information to the state bar."

AZ Op. 11-02 (2011). Rules 7.1, 7.2. "A lawyer may ethically participate in a group advertising program that limits participation to a single lawyer for each ZIP code from which prospective clients may come, provided that the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed in a particular ZIP code. To remain a permissible group advertising program, such a service may do nothing more to match clients with lawyers than provide inquiring clients with the name and contact information of participating lawyers, without communicating (expressly or by implication) any substantive endorsement. A lawyer may ethically participate in Internet advertising on a pay-per-click basis in which the advertising charge is based on the number of consumers who request information or otherwise respond to the lawyer's advertisement, provided that the fee is not based on the amount of fees ultimately paid by any clients who actually engage the lawyer."

California:

L.A. County Op. 443 (1987). Rules 1.7. A lawyer may not accept payments from a physician to whom the lawyer refers clients for medical treatment.

LA Op. 450 (1988). Rules 1.2, 1.7, 1.9, 1.14. Initiating a conservatorship proceeding for a present or former client without the client's authorization involves an impermissible conflict of interest.

CA Op. 1989-112 (1989). Rules 1.6, 1.7, 1.14. Without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client's behalf, even though the lawyer has concluded it is in the best interests of the client. Initiation of the proceeding would breach confidences of the client and constitute a conflict of interest.

San Diego Op. 1989-2 (1989). Rules 1.7. A lawyer for the executor of a decedent's estate may not ethically demand payment of a referral fee by a real estate broker as a condition to retention of the broker. "Disclosure and consent by the client (per Rule 3-300) does not cure the abuse."

San Diego Op. 1990-3 (1990). Rules 1.7, 1.14. This opinion discusses the position of a lawyer who is asked by a son or daughter to prepare a new will for the child's parent. The opinion concludes that the person who is to sign the instrument is the client of the lawyer:

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

Another portion of this opinion deals with the capacity of a client. It advises that, "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." The opinion continues, suggesting that once an issue of capacity is raised in the attorney's mind it must be resolved. "The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship."

CA Op. 1993-130 (1993). Rules 1.5, 1.7. An attorney who serves as both attorney for and executor of an estate may not receive compensation for legal services rendered to the estate. However, the attorney is not precluded from performing and receiving compensation for specific work that is properly the responsibility of the executor.

SF Op. 99-2 (1999). Rules 1.7, 1.14. Criticizing the result reached in California Formal Opinion 1989-112 (1989), *supra*, this opinion concludes after a careful analysis:

An attorney who reasonably believes that a client is substantially unable to manage his

or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client. [Citations omitted.]

CA Op. 2007-173 (2007). Rules 1.6. A lawyer may not deposit a will with a private will depository under California statutes without the client's express consent. A lawyer may not register identifying information about a client's testamentary documents with a private will registry unless the lawyer has a basis in the client file and/or in statements made by the client and all the other facts and circumstances that this would further the client's interest and be neither embarrassing nor likely to be detrimental to the client.

San Diego Op. 2013-1 (2013). Rules 1.7, 1.9. This opinion addresses what should happen when an attorney has entered into a joint representation pursuant to a general waiver of potential conflicts, but then an actual conflict develops. Although it does not involve trust and estate practice, it has clear implications for such practice. Attorney represented Client 1 & 2 jointly, defending them against land boundary disputes brought by plaintiff. Clients 1 and 2 each owned land bordering plaintiff's and plaintiff alleged each had built a fence that trespassed on plaintiff's land. Plaintiff approached attorney and offered to dismiss his claim against Client 1 if Client 1 would join plaintiff in his litigation against Client 2. Client 1 asked attorney not to disclose the settlement offer to Client 2. Attorney asked whether it would be proper to refrain from disclosing the offer to Client 2, but to continue representing Clients 1 & 2 in defending them against plaintiff's claim, but to advise both that attorney could not continue to represent them in settlement negotiations. The Opinion noted that "[a]s a preliminary matter, Attorney cannot keep the settlement offer secret from Client 2. Rather, she would have to disclose the settlement offer not only to Client 1, but also to Client 2." Further, the general waiver would no longer be adequate now that an actual conflict had developed and noting further that lawyer has a duty of loyalty and communication to both clients. The opinion concludes that unless the lawyer can obtain informed written consent from both clients, the lawyer must withdraw entirely from representing them.

Connecticut:

CT Op. 86-11 (1986). Rules 1.6, 1.7, 1.14. A lawyer serving as a testamentary trustee may institute an involuntary conservatorship proceeding for an improvident beneficiary provided doing so would not involve the disclosure of information obtained by the lawyer while acting as the beneficiary's attorney.

CT Op. 89-18 (1989). Rules 1.7. Because of the conflicts of interest the same lawyer may not represent three clients, of whom two are heirs and one is a claimant against the estate if the estate does not have sufficient assets to satisfy all claims.

CT Op. 97-1 (1997). Rules 1.8. A lawyer is in violation of MRPC 1.8 if a lawyer prepares a will under which he or she is named as a beneficiary even at the express request of the testator, regardless of the fact that the testator is referred to another attorney in the same law office as the lawyer who prepared the will for the purpose of execution of the will.

CT Op. 00-22 (2000). Rules 1.2, 1.5. Attorney had previously represented a corporate fiduciary on unrelated estate matters. No written fee agreement is required for lawyer's representation of same corporate executor of a new estate.

CT Op. 03-06 (2003). Rules 1.16. Pursuant to MRPC 1.16(d) a law firm in possession of original will should furnish that will to new lawyer on written request of testator's attorney-in-fact, noting that testator through her attorney-in-fact could retain new counsel and authorize transfer of all papers to new counsel.

CT Op. 07-00188-A (2007). Rules 7.1, 7.2. Committee finds the designation "Connecticut Super Lawyer" potentially misleading because it connotes a superior quality to an attorney in violation of Rule 7.1. Use of the designation in attorney advertisements requires an appropriate explanation and disclaimer in order to avoid confusing consumers and creating unjustified expectations. An appropriate explanation and disclaimer could alleviate consumer confusion. Any statement regarding the designation of "Super Lawyer" should be explained and placed in the context of a designation by a commercial magazine for a particular year. The disclaimer should also detail the particularities of the selection process for 2007 and, at a minimum include specific empirical data regarding the selection process. The Committee also concludes that it is inherently misleading to claim that the list of Connecticut Super Lawyers 2007 represents "among the best" and "the top 5%" of attorneys in the State of Connecticut, and such statements are therefore prohibited under Rule 7.1.

CT Inf. Op. 15-07 (2015). Rules 1.14. Committee was asked (a) whether a Court-appointed attorney for a conservatee is required to "assist" the client in filing an appeal of a Probate Court Order when the attorney believes the appeal is "frivolous" and may be financially "detrimental" to the client (not only as a result of the fees and expenses incurred in the appeal itself but, especially, if the appeal were to cause a delay in liquidating assets needed for the individual's care); (b) whether the Court-appointed attorney risks grievance proceedings for filing the appeal or for refusing to "assist" the client; and (c) whether the Conservator, if an attorney, is obligated to report the attorney's behavior to the Grievance Committee. The Committee's short answers to the three questions were as follows:

1. No. The Court-appointed attorney has no duty to assist the client/conservatee in filing a frivolous or financially detrimental appeal.
2. Yes. All attorneys risk being the subject of a grievance proceeding.
3. No. The Conservator is not required to report the attorney's behavior to the Grievance Committee if he or she acts as we suggest.

The Committee reached its conclusions after relying on and quoting extensively from the Connecticut case *Gross v. Rell*, 304 Conn. 234 (2012) which is summarized in the case section above.

Delaware:

DE Op. 80-6 (1980). Rules 1.7. With full disclosure to a competent and knowledgeable beneficiary the lawyer for the personal representative of a decedent's estate could, after distribution to a beneficiary, purchase from the beneficiary shares in a country club at their established price. The opinion relies in part on ABA Informal Opinion 677 (1963), which allowed a lawyer to purchase property from an estate prior to distribution if the purchase was approved by the court.

District of Columbia:

DC Op. 246 (revised, Oct. 1994). Rules 1.6, 8.3. Without the informed consent of the client a lawyer who represents a client in a malpractice action against the client's former lawyer may not report an ethical violation by the client's former lawyer if doing so would make use of information that came to the lawyer during the course of representing the client. Consent to file the malpractice case is not the same as consent to a disciplinary report. The lawyer should inform the client of her concern that subjecting the client's former lawyer to disciplinary action might limit the former lawyer's ability to pay any judgment that might ultimately be obtained against him in the malpractice action. If the client gives informed consent specifically to disclosure to disciplinary authorities, however, then Rule 8.3 requires the report.

DC Op. 259 (1995). Rules 1.7. Attorney for three conservators of an incapacitated person's estate improperly provided opinion letter to two conservators about the propriety of fees that were being paid to the third conservator in his capacity as trustee of a trust benefiting the incapacitated person's estate. The attorney had argued that her client was the estate. The committee concluded that the lawyer represents the conservators rather than the estate.

DC Op. 296 (2000). Rules 1.4, 1.6, 1.7, 1.16. A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another. Without express consent in advance, the lawyer who receives relevant information from one client should seek consent of that client to share the information with the other or ask the client to disclose the information to the other client directly. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.

DC Op. 324 (2004). Rules 1.6, 1.9. A decedent's former attorney may reveal confidences obtained during the course of the professional relationship between the decedent and the attorney only where the attorney reasonably believes that the disclosure is impliedly authorized to further the decedent's interest in settling her estate. In "rare situations" where the attorney is unsure what the client would have wanted the attorney to do, the attorney should seek an order from the court supervising disposition of the estate and present the materials at issue for an in camera review. For example, if the surviving spouse needed the information to fulfill the spouse's duties as executor to administer the estate, disclosure is clearly warranted. If on the other hand, the surviving spouse is or was engaged in litigation with the deceased spouse, disclosure, absent a court order, might be inappropriate.

DC Op. 353 (2010). Rules 1.2, 1.14, 1.16. Lawyer had been hired by attorney-in-fact to represent disabled principal in challenging a mortgage. Defendant mortgage company responded with allegations of wrongdoing by attorney-in-fact. Lawyer asked attorney-in-fact to step down as fiduciary but she refused. Opinion states that ordinarily, lawyer should look to the client's chosen surrogate decisionmaker. If that surrogate is in conflict with the principal, however, or is endangering the success of the legal matter, the lawyer can seek a guardian to be appointed. The lawyer must evaluate the danger of allowing the surrogate to

continue in that role. The lawyer could not, however, withdraw, because withdrawal could in this case harm the disabled client.

Florida:

FL Op. 76-16 (1977). Rules 1.2, 2.3. The attorney for the personal representative has the right and in some circumstances a duty, to inform the surviving spouse of the existence of elective share or other statutory rights. “The purpose of the Florida Probate Code is to provide a procedure to pay a decedent's debts and taxes and transfer and distribute the remaining assets as efficiently and inexpensively as possible to those entitled to them under the will or by intestacy. It is normal in most instances that the persons entitled to those assets will look to the personal representative or the lawyer for the estate to find out what they may expect to receive from the estate. A beneficiary or heir always has the right, of course, to retain independent counsel. We believe that the lawyer for the personal representative has the right to provide those persons with that information and to provide the surviving spouse with information about his or her rights under the Probate Code. This is to be distinguished from counseling or giving legal advice....When the personal representative is someone other than the surviving spouse, the surviving spouse may be looking to the lawyer for the personal representative for information even though there is no attorney-client relationship between them. If the lawyer knows this, we believe he may have a duty to inform the surviving spouse of these statutory rights.”

FL Op. 95-4 (1997). Rules 1.4, 1.6, 1.7, 1.16. “In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.” The opinion also discusses whether a lawyer engaged in estate planning has an ethical duty to counsel a husband and wife concerning any separate confidences which either the husband or wife might wish the lawyer to withhold from the other. It holds that until such time in a joint representation that an objective indication arises that the interests of the husband and wife have diverged or it objectively appears to the lawyer that a divergence of interests is likely to arise, a conflict of interest does not exist and, thus, the disclosure and consent requirements under the Florida Rules are not triggered.

FL Op. 96-94 (1996). Rules 1.14. Since a person adjudicated incapacitated is the intended beneficiary of the guardianship, an attorney who represents a guardian of such a person and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

FL Op. 24894 (2003). Rules 5.5. Florida attorney sought an ethics opinion concerning the appropriate response he should give to out-of-state counsel who wrote demand letters and other correspondence to the Florida's attorney's clients. The communications indicated that the out-of-state attorney was giving advice about Florida law. The Florida attorney refused to communicate with the non-Florida attorney and requested that a Florida attorney be retained to handle the issue. Opinion found that the Florida attorney acted appropriately in alerting out-of-state practitioner to avoid the unlicensed practice of

law. In subsequent correspondence, the Division Director clarified its position for the Florida Real Property, Probate and Trust Law Section and advised that a Florida attorney is not prohibited from reviewing documents, such as real estate or estate planning documents, drafted by out-of-state attorneys.

FL Op. 10-2 (2010). Rules 1.6, 5.3. A lawyer needs to take reasonable precautions to protect confidential client information stored on hard drives, including such devices as computers, printers, copiers, scanners, cell phones, personal digital assistants, flash drives, memory sticks, fax machines and other devices which contain storage capacity. A lawyer has a duty to supervise not only the lawyer's employees, but those outside the lawyer's firm who are hired to care and maintain such devices if such persons will have access to confidential information. A lawyer has a duty to obtain adequate assurances that a storage device has been stripped of all confidential information before disposing of the device. A lawyer must also take reasonable care, when using such devices in public places such as copy centers, hotel business centers, and outside offices where the lawyer has little or no control, to inquire and determine whether use of such devices would preserve client confidentiality.

FL Advisory Opinion No. 2011-4, SC14-211. Rule 5.5. The Florida Supreme Court approved an advisory opinion on the unauthorized practice of law, addressing Medicaid planning activities by nonlawyers. Nonlawyers engage in UPL if they draft personal service contracts or qualified income trusts for clients who are doing Medicaid planning, but under federal law nonlawyers may prepare Medicaid applications for others.

Georgia:

GA Op. 91-1 (1991). Rules 1.4, 1.7. A lawyer who neither promotes his or her appointment nor exercises undue influence on the client may draft an instrument appointing the lawyer as fiduciary if the lawyer makes full disclosure to the client, obtains the client's written consent, and charges a reasonable fee.

Hawaii:

Opinion 38 (1999). Rules 1.6, 1.9. An estate planning attorney may disclose confidential information about a deceased client if the attorney reasonably and in good faith determines that doing so would carry out the deceased client's estate plan or if the attorney is authorized to do so by other law or court order. A waiver by the personal representative of the deceased client's estate is not a proper basis for disclosing confidential information.

Illinois:

IL Op. 91-24 (1991). Rules 1.6, 1.14. The lawyer retained by a guardian represents both the guardianship estate and the guardian in a representative capacity. It was assumed that the guardian did not reasonably believe that the lawyer represented her personally. Accordingly, "[t]he guardian is not represented personally by the attorney but is represented only in his capacity as guardian for closing out the guardianship estate." The lawyer's duty to the estate

requires that “he take the steps necessary to protect the estate from the possibly fraudulent action of the guardian. If the attorney does not take steps to have the propriety of the taking of the money determined now, he runs the risk that both his and the guardian’s actions will later be determined fraudulent.”

IL Op. 92-8 (1993). Rules 1.5, 7.2. This opinion approved an arrangement under which a law firm that represents a corporation would represent corporate employees at reduced rates in return for the corporate president’s recommendation that the employees use the law firm’s services. However, the opinion observes that the promise of “reduced” rates may be misleading unless the fees charged are less than the firm’s normal and customary fees. The same may be true unless the fees charged are less than the fees generally charged in the locality for similar legal services. There is also a substantial risk of a conflict of interest between the employees and the employer.

IL Op. 96-05 (1996). Rules 1.1, 1.2, 1.7. Although under some circumstances it may be professionally improper for a lawyer to represent both a renouncing spouse and a creditor in the same proceedings, it is not improper for a lawyer to represent the same person both in a representative capacity as executor and in an individual capacity as debtor of the estate where an independent special administrator has been appointed to collect the debt.

IL Op. 98-01 (1998). Rules 1.6, 1.9. This opinion advises that a lawyer may represent the beneficiary of a trust in a breach of fiduciary duty action against the trustee even though the lawyer had previously represented the trust, the beneficiary and the trustee in a condemnation suit involving trust real property. The opinion observes that the scope and nature of the lawyer’s prior representation of the trustee were limited to the trust’s real estate subject to the condemnation proceeding during which time the lawyer may have gained confidential information regarding the trust’s property in general. However, since the beneficiary was not contesting the trustee’s activities in connection with the condemnation, the information the lawyer may have received “does not appear to be relevant to the Beneficiary’s claim against the Trustee.” Thus, the proposed representation of the beneficiary was not substantially related to the subject matter of the prior joint representation.

IL Op. 98-07 (1999). Rules 1.6, 3.3, 4.1. Lawyer who had represented a guardian and in the course of the representation had prepared accountings for the guardian and presented them to the court later discovered that the accountings were false. The lawyer no longer represented the guardian. The lawyer has a duty to take appropriate remedial action to avoid assisting the guardian in concealing the misappropriation of estate assets from the court even if the lawyer must disclose what would otherwise be confidential client information. Illinois version of MRPC 3.3(b), like the parallel Model Rule, provides that a lawyer’s duty to take remedial action is a continuing duty, even though the fraud was committed by a former client.

IL Op. 99-08, 2000 WL 1597066 (2000). Rules 1.4, 1.7. Lawyer engaged to prepare a trust for a client may, at the client’s direction, include a provision directing the trustee administering the trust to retain the lawyer for legal services, so long as (i) adequate disclosure (including disclosing that the trustee also would have the right to discharge the lawyer as its lawyer) is made, (ii) the client consents to the representation, and (iii) the lawyer concludes that his representation of the client will not be adversely affected by including such a provision.

IL Op. 00-01 (2000). Rules 1.7. This opinion is discussed in the text of the Commentary.

IL Op. 00-02, 2000 WL 33313185 (2000). Rules 1.6, 1.14. A lawyer may not provide a copy of a psychiatric report relating to the lawyer's client with diminished capacity to the client's father. The father previously had retained the lawyer to represent the child (an adult). Lawyer should advise father to seek independent counsel.

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

IL Op. 13-01 (2013). Rules 1.5. If fees are disallowed by the probate court as unreasonable, the lawyer cannot require the executor to pay the disallowed fees. Fees deemed excessive by the court are excessive under the ethics rules.

Indiana:

IN Op. 2-2001 (2001). Rules 1.2, 1.7, 1.14, 4.2, 5.3. Attorney, preparing a power of attorney for the agent without interviewing the principal, may be aiding in perpetrating a fraud in violation of MRPC 1.2; the attorney has an ethical responsibility of further inquiry. In this case, the attorney may have violated MRPC 4.2 in contacting an individual the lawyer knew to be represented by another lawyer in the matter. If the grandfather (principal) is the attorney's client, he has a duty to discover if the client is impaired, see MRPC 1.14, and may need to take the protective action of seeking appointment of a legal representative. If both granddaughter (agent) and grandfather (principal) are the attorney's joint clients, MRPC 1.7 requires written consent after consultation is given. Further, attorney violated MRPC 5.3 in his failure to supervise the paralegal who was asked to exceed her notary duties in determining the capacity of an 88 year old gentleman and in determining if he was free of undue influence in signing the power of attorney.

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

IN Op. 2-2003 (2003). Rules 1.2, 1.6, 1.16. The hypothetical asks whether an attorney for

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

Iowa:

Op. 91-24 (1991). Rules 1.6, 1.9. Topics: Evidence, A/C Privilege. In this opinion the Iowa Supreme Court Board of Professional Ethics and Conduct opined that an original unsigned and unexecuted will of a deceased client constituted a privileged lawyer-client communication which the lawyer could not disclose in the absence of a court order issued pursuant to evidence satisfactory to the court and directing such disclosure. The Committee stated its view that this opinion was not inconsistent with Iowa Formal Opinion 88-11 (December 1988) wherein the attorney-client communications privilege was held not to apply in certain litigation after a client's death between parties all of whom claim under the client.

Op 98-11 (1998). Rules 1.6, 1.9. Topics: Evidence, A/C Privilege. The Board in this case was asked to provide an opinion on what types of matters involving his deceased clients an attorney could testify to in a deposition. The Board noted the existence of its earlier Opinions 88-11 and 91-24 (discussed above) and the recent decision of the U.S. Supreme Court in *Swidler & Berlin v. U.S.*, supra. Noting that the United States Supreme Court had held that the attorney-client communications privilege survives the death of the client and that a series of narrow tests must be met before an exception to the general rule that privileged communications survive the death of the testator may be applied, the Board stated, "these tests require findings of fact, which are legal questions which must be determined by a court of law and not by this Board. Upon the determination of these fact questions, it may well be that ethical questions may arise but in the meantime this Board does not have jurisdiction to issue an opinion in this kind of a question."

IA Op. 07-07 (2007). Rules 1.7, 1.9, 3.7. Topics: Evidence. It is not necessarily a conflict of interest for a lawyer who drafted a will to represent the personal representative. But if a will contest emerges, the estate planner may be a necessary witness and, as such, would be precluded from advocating for the personal representative and simultaneously serving as a witness since this would violate Rule 3.7. In some cases it may be appropriate for another lawyer in the witness' firm to serve as advocate, provided that this would not violate Rule 1.7.

Kentucky:

Op. 401 (1997). Rules 1.6, 1.7. In representing a fiduciary, the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. The lawyer's obligation to preserve client's confidences under MRPC 1.6 is not altered by the circumstance that the client is a fiduciary. A lawyer has a duty to advise multiple parties who are involved with a decedent's estate or trust regarding the identity of the lawyer's client and the lawyer's obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term "lawyer for the estate" or the term "lawyer for the trust" on documents or correspondence or in other dealings with the fiduciary or the beneficiaries. A lawyer may represent the fiduciary of a decedent's estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer's actions in the event a conflict arises and the consequences to the clients if a conflict occurs. The Committee quotes at length from the *ACTEC Commentaries* and describes them as "helpful" to the Committee's analysis. The Committee, however, adopts the position taken in ABA Formal Opinion 94-380 (1994).

Maine:

Op. 84 (1988). Rules 1.6, 1.7, 1.14. The lawyer for an elderly client believed to be incapable of making rational financial decisions may inform the client's son if the son has no adverse interest. Alternatively, the lawyer may seek help from the state adult guardianship service, etc.

Op. 192 (2007). Rules 1.6, 1.9. Topics: Evidence, Attorney/Client Privilege. A lawyer may not disclose confidential information of a deceased client to a court-appointed personal representative simply because the personal representative requests it and waives the attorney-client privilege. The lawyer is required to make an independent investigation as to the requested disclosure. "If... the attorney believes that the information sought to be disclosed would not further the client's purpose or would be detrimental to a material interest of the client, the attorney may waive the privilege only as required by law or by court order. Thus, despite a PR's waiver of the attorney-client privilege, the attorney may still be ethically obligated to claim the privilege on behalf of his former client if, for example, the information had been specifically sought to be kept unqualifiedly confidential by the client or if disclosure of the information would embarrass or otherwise be detrimental to a material interest of the client."

Maryland

MD Op. 89-14 (1989). Rules 1.9, 1.16. A lawyer who represented a client in a divorce ten years earlier in which the client's ex-spouse received a note may represent the estate of the ex-spouse. However, if there are problems in connection with the note, the lawyer must withdraw from representing the estate unless the former client consents to the representation after consultation.

MD Op. 2003-08 (2003). Rules 1.7. A lawyer who chairs his church's committee that

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

MD Op. 2009-05 (2008). Rules 1.6, 1.9, 1.15. Where a firm drafts a will for a client who dies before executing it and the decedent's personal representative requests it, the firm must deliver the will to the PR. The PR is deemed the firm's client in the matter and the letters of administration constitute a court order entitling the PR to possession of the decedent's property, including the draft will. Delivery of the draft does not amount to an impermissible disclosure under the confidentiality rules.

Massachusetts

MA Op. 94-3 (1994). Rules 1.6, 3.3. This opinion discusses the rights and duties of the lawyer for the administratrix of her husband's estate who has received a check payable to the administratrix in settlement of personal injuries to the decedent. The lawyer holding the check believes that the administratrix will use the proceeds to pay the current expenses of herself and her minor children rather than paying the lawful debts of the estate. The opinion advises that the lawyer "should in the first instance advise the administratrix as to the existence of any available bases for seeking court permission to apply the funds of the estate for that purpose [paying current expenses]. If no such alternative is available and the administratrix persists in demanding that the settlement funds be paid over to her, the lawyer should seek instructions from the Probate Court as to disposition of the funds. In seeking such instructions, the lawyer should avoid revealing client's confidences without consent, if possible, but it may be necessary to reveal some confidential information to prevent client from committing a crime. DR 4-101(C)(3)."

MA Op. 06-01 (2006). Rules 1.7, 1.8. There is no per se rule against a lawyer drafting an estate planning document that names the lawyer as a fiduciary and, as such, retaining themselves as counsel, but these are personal interests of the lawyer that require analysis under Rule 1.7. The possibility of material limitation requires the lawyer to satisfy himself that the role is in the best interests of the client and will typically require discussion of alternatives and of the method for calculating fees as fiduciary and as counsel. There is no requirement that Rule 1.8(a) be followed, but comment 8 to Model Rule 1.8 provides relevant guidance.

Michigan

MI RI 76 (1991). Rules 1.7, 1.14. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client with a history of mental illness who has refused to accept a personal injury settlement or pay for its appeal if the lawyer reasonably believes the client cannot adequately act in the client's own interest. Such action does not involve a conflict of interest.

MI RI 176 (1993). Rules 1.7, 1.14. The adverse interests of a mother and daughter preclude the same lawyer from representing both of them in connection with the revocation of a durable power of attorney and petitioning for the appointment of a guardian for the mother.

MI Op. RI-342 (2007). Rules 1.2, 1.13. “When a lawyer undertakes representation at the request of a fiduciary in a situation involving an estate, trust, conservatorship or guardianship, his or her client is the fiduciary, not a fictional entity to which the fiduciary owes its duties.” Note that Probate Court Rule 5.117(A) states: “[a]n attorney filing an appearance on behalf of a fiduciary or trustee shall represent the fiduciary or trustee.” The comment by the Probate Rules Committee stated that the amendment “clarifies that the lawyer represents the fiduciary or trustee and not the estate.”

Mississippi:

MS Op. 73 (1990). Rules 1.7, 1.8. A lawyer may at client’s request draft a will naming scrivener as attorney for the estate.

Missouri:

MO Op. 930122 (1993). Rules 1.9. Attorney who counsels the two children and second wife of a deceased client concerning the estate of that deceased client cannot later represent the children against the second wife in dispute over estate unless second wife consents to such representation after full disclosure

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

MO Informal Op. 940013 (1994). Rules 1.6, 1.9. Confidentiality restrictions apply in a situation where an attorney prepared a will for a decedent and the decedent’s heirs and their attorneys wanted to discuss the matter with decedent’s attorney with respect to a possible will contest action. This prohibition against disclosing confidential information prohibits any disclosure of decedent’s competency without a court order to do so.

MO Op. 950115 (1995). Rules 1.7, 1.8, 7.1. If a life insurance agent advertises for an estate planning seminar at which the agent makes a presentation on life insurance and an attorney makes a presentation on estate planning, then the attorney is under a duty to make sure that the agent’s advertising for the seminar was not false, misleading, or deceptive in any manner. If the attorney would like to hire the agent to assist clients in funding a living trust, then the attorney would have to make sure that clients were fully informed of the relationship between the agent and the attorney and that they consent to such a relationship. In this business endeavor, the agent’s duties must be relegated to non-legal responsibilities and he is prohibited from engaging in any activity that would be in violation of the MRPC.

MO Op. 960048 (1996). Rules 1.9, 1.14. Attorney who represented a client in

administering the estate of client's spouse and created an estate plan for that client has a conflict of interest under MRPC 1.9 if he serves as attorney to client's child in a guardianship proceeding where the child wants a guardian appointed for the client. If the client's child believes that the client now needs a guardian and the attorney obtained information during the course of his service to the client that could be used adversely against the client, the attorney's assistance of the child in a guardianship proceeding would be a violation of the Rules of Professional Conduct.

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

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

MO Informal Op. 990146 (1999). Rules 1.6, 1.9. An attorney who prepared a will and filed the will in probate but never opened an estate for a deceased client may not voluntarily provide the estate planning file or information about the advice provided to the deceased to a personal representative, unless the deceased expressly consented to such a disclosure. The duty of confidentiality survives the death of a client. If the attorney, whose services are eventually terminated by the personal representative, is subpoenaed to provide such information, he may "only do so after the factual and legal issues related to confidentiality are fully presented to the court" and the court issues an order to disclose the information.

MO Informal Op. 20000090 (2000). Rules 1.5. Attorney who represents the children of a decedent on a contingent fee basis in an attempt to secure their portion of an intestate estate may later represent them in a suit involving other family members under a representation contract with terms providing for a small retainer up front and a later contingency fee basis. The fee assessed at the conclusion of the representation must be assessed for its reasonableness.

MO Informal Op. 20000208 (2000). Rules 1.6, 1.14. Attorney prepared a will for a client in the past and had ceased contact with that client since that transaction. Second attorney contacted the first attorney as to the mental capacity of the client during the period of drafting the will, for the purpose of representing the client in another action. The first attorney may discuss the competency of the client without a court order if client is capable of giving consent. If the client is incapable of giving consent to the disclosure by the first attorney concerning his mental state at the time of the drafting, the attorney is prohibited from disclosing information related to his representation of client without a court order. Also, if no court order exists for the disclosure and the client is incapable of giving his consent, an attorney may discuss the client's competency with client's child if the

client's child has been named as attorney-in-fact under a durable power of attorney, dependent upon the exact terms of that power of attorney.

MO Op. 20020024 (2002). Rules 1.6, 1.7, 1.8, 7.3. It is allowable for an attorney to have a financial planning/insurance practice, independent of the attorney's law practice. The attorney does not violate any ethics rules if he refers his legal clients to his financial planning/insurance practice so long as he advises the clients in writing of: (1) the differences in confidentiality, (2) the fact that he will receive compensation if they purchase the products from the attorney's financial planning practice, and (3) that they have the right to consult with independent legal counsel regarding the advisability of purchasing these products. The attorney is allowed to let clients of the financial planning/insurance practice know that he is an attorney and his affiliation with his firm. Also, the attorney must notify the clients that they have the right to purchase the products from a different financial planning/insurance business. However, it would be a violation of "in-person solicitation" provisions under the model rules for the attorney, or any employee of his financial planning/insurance business, to refer a client of that business to the attorney's legal practice.

MO Op 2006-0004 (2006). Rules 1.6, 1.9. Topics: Evidence, Attorney/Client Privilege. A lawyer who prepared an agreement for the decedent has been subpoenaed in litigation between the heirs, various entities, and the decedent's estate to produce all files and documentation regarding the decedent. The lawyer may not divulge confidential information until ordered to do so after the issue of confidentiality has been fully presented. The lawyer should seek to ensure that any such order is as specific and limited as possible. It is not necessary for the inquiring lawyer to present the issue of confidentiality if he knows that another lawyer will fully present the issue.

MO Op 2006-0073 (2006). Rules 1.7. A lawyer may offer a discount on estate planning to clients who leave a portion of their estates to a not-for-profit organization if the lawyer clearly and fully discloses his relationship with the organization and objectively advises and consults with the clients about their options and the effects of their choices.

Montana:

MT Op. 951231 (1995). Rules 1.7, 1.8. This opinion holds that neither MRPC 1.8(c) nor any applicable Comment admits of a broader prohibition than the prohibition against a lawyer preparing an instrument giving the lawyer or a person related to the lawyer any substantial gift, although it does observe that EC 5-6 (contained in the Model Code of Professional Responsibility) cautions attorneys to avoid "consciously influence[ing] a client to name him as executor, trustee, or lawyer in an instrument." The opinion therefore concludes "it is appropriate for an attorney, upon the client's request, to draft a will in which the attorney is named personal representative or trustee."

MT Op. 960731 (1996). Rules 1.4, 1.7, 1.8. This opinion concludes that, absent an existing conflict or evidence that the lawyer's independent professional judgment is likely to be adversely affected by the joint representation of a married couple who have retained the lawyer for estate planning services, the lawyer need not communicate the potential for conflicts of interest under MRPC 1.7 nor obtain a written conflict waiver from the married couple. However, although a written conflict waiver is

not required, the opinion observes, “we believe that for the lawyer’s purpose it is wise practice to obtain a written waiver.”

Nebraska:

NE Op. 91-4 (1991). Rules 1.6, 1.14. A lawyer who reasonably believes that a client is not able to act in the client’s best interests may disclose confidential information to the extent necessary to protect the client’s best interests.

NE Informal Ethics Advisory Op. No. 12-08. Rules 1.7, 1.9. Lawyer’s representation of co-trustees who were also beneficiaries of the trust was challenged on ground that the co-trustees/beneficiaries had conflicts. The validity of a trust amendment was being challenged by two other beneficiaries, and if successful their claim would reduce the share of the co-trustees/beneficiaries. The Advisory Committee concluded that there was no conflict since trustee clients were seeking to enforce the terms of the trust as written, and there was no conflict with another client or former client.

Nevada:

NV Op. 38 (2007). Rules 1.7. A lawyer who is a member of the board of directors of a corporation may not provide estate planning services to a client who wishes to make a bequest to the corporation. “The lawyer ... holds a fiduciary relationship to the company and is under the duties of loyalty, confidentiality and impartiality. The lawyer's duties to the company would limit his ability to be a fair advisor to the estate planning client because of the inability to disclose information that could be pertinent to the client's decision. Further, the lawyer's knowledge of the company's financial situation and interest in advancing the economic goals of the company would create a conflict of interest.” Moreover, the lawyer “must disclose to the client that [he] is associated with the company and that there may be a conflict of interest.”

NV Op. 47 (2011). Rules 1.7. A lawyer who is on the board of directors of a company may not prepare the estate for a client who wishes to name the company as a beneficiary, at least not without a conflicts waiver. The lawyer is a fiduciary for the company and owes it duties of loyalty, impartiality, and confidentiality which would preclude him from fully disclosing to the estate planning client company information that might be relevant. Further, the lawyer’s information as to the company’s financial situation and his interest in furthering the economic goals of the company would create a conflict of interest were he to do the estate planning in question. If the lawyer reasonably believes that the client will not be adversely affected, however, he is entitled to ask the client for consent after full disclosure of the conflicts. The committee relied, among other things, on *Maryland Bar Association Ethics Opinion 2003-08* to the same effect as to a lawyer who sits on a church’s legacy committee.

New Hampshire:

NH Op. 1987-8/9 (1988). Rules 1.5, 1.7, 1.8. With proper disclosure to a client, a lawyer may serve as fiduciary and as counsel to the fiduciary, provided the fees charged are reasonable.

NH Op 2008-09/1 (2008). Rules 1.7, 1.8. A lawyer may, at a client's request, draft an estate-planning document naming the lawyer as a fiduciary, but first must ensure that he is

competent to perform the fiduciary role; discuss the client's options in choosing a fiduciary, including the relative costs of having the lawyer or someone else serve as fiduciary; and make a reasonable determination whether his personal interest in serving as fiduciary requires the client's informed consent. A lawyer may not nominate himself by default to serve as fiduciary in estate-planning documents he presents to a client. If a lawyer actively solicits clients to nominate the lawyer to serve as fiduciary, Rule 1.8(a) may apply.

NH Op. 2011-12/7 (2012). Rules 1.7, 1.8. An estate planning client wishes to leave (a) a gift in trust to his brother (who happens to be lawyer's son-in-law) of a sports car; (b) a gift in trust to his sister-in-law (lawyer's daughter) of a valuable painting; (c) a \$50,000 endowment in trust to a hospital on whose endowment committee both client and lawyer (who is chair) sit; and (d) an unsolicited outright gift of theater tickets and the price of a nice dinner to lawyer. The committee concluded that: (a) the gift to client's brother fits within the exception for gifts to those in a close familial relationship with the client (unless the client and the brother are estranged); (b) the gift to the lawyer's daughter (client's sister-in-law) is presumptively prohibited and would only fall within the exception if factual analysis were to show that client has a close familial relationship also with the sister-in-law comparable to other relationships clearly covered in MR 1.8(c); (c) the endowment gift is not precluded by MR 1.8(c) because it does not personally benefit lawyer, but must be analyzed under MR 1.7 given the potential conflict caused by lawyer's interest in furthering the hospital's goals. The lawyer should therefore not proceed here without reasonably concluding that he can draft such a gift competently and impartially and obtaining the client's informed consent – relying on Maryland Bar Association Ethics Op. 2003-08 (2003). Finally, the unsolicited gift of theater and dinner tickets was permissible as an insubstantial gift given that the client's estate was \$3 million.

NH Op. 2014-15/5. (2015). Rules 1.6, 1.14. A lawyer who believes his client is a victim of elder abuse must make inquiries or otherwise gather evidence (such as observations of the client) and seek consent of the client, before invoking the Rule 1.6(b)(5) exception (to prevent reasonably certain death or substantial bodily harm) and revealing confidential information to stop the abuse. Mere suspicion is not enough. The opinion also noted that Rule 1.14 only allows limited intervention when the client's diminished capacity prevents the client from protecting his or her own interests. Making inquiries about the client's capacity to invoke Rule 1.14 could trigger adverse consequences, such as waiving privilege or, if information is revealed to a health care provider who is a mandatory reporter of elder abuse, the potential result of reporting could create consequences to the client that the client opposes, such as prosecution of a family member. The lawyer should therefore consider the potential consequences when making inquiries. Determination of diminished capacity, however, is not required to trigger the Rule 1.6(b)(6) exception, however, in cases of suspected physical abuse.

New Jersey:

NJ Op. 514 (1983). Rules 1.5, 1.7. This opinion is summarized in the Annotations following the ACTEC Commentary on MRPC 1.7.

NJ Op. 683 (1996). Rules 1.7. This opinion holds that, subject to the applicable

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

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

NJ Op. 701 (2006). Rules 1.15. "Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property..... Such documents cannot be preserved within the meaning of RPC 1.15 merely by digitizing them in electronic form."

NJ Op. 719 (2010). Rules 1.6, 1.7, 1.8, 1.16, 2.1, 5.4. Lawyer representing personal representative with bad credit history asked whether it was ethical to comply with surety company's demands that in order to issue fiduciary bond for client, lawyer would have to, among other items, agree to be liable to the surety if the lawyer does not remain involved as promised; provide a retainer agreement indicating the client's agreement to the lawyer's continuing involvements; pay the bond premiums; "work to protect the interests of the administrator and surety"; provide legal services for the benefit of the surety in connection with the joint control agreement; provide the surety with full details about any disputes regarding estate matters; and notify the surety of any change in legal representation, any allegations of breach of fiduciary duty on the part of the administrator, and any objections to a request by the administrator for commissions or fees. The ethics committee found that the agreement would violate several ethics rules, including confidentiality, conflicts of interest, giving financial assistance to a client, independent judgment of lawyer, allowing third parties to affect lawyer's judgment, lawyer's right to practice and requirements of withdrawal of representation. The opinion noted similarities with issues raised with respect to third party financing of litigation.

New Mexico:

NM Op. 2001-1 (2001). Rules 1.1, 1.2, 1.3, 1.6, 1.7, 1.9, 5.5, 7.1. This opinion deals generally with the permissibility of a lawyer participating in a listserve where the lawyer responds to questions asked by participants. The opinion states that the permissibility depends entirely on the specificity of the questions asked and the answers given, along with the reasonableness of the inquirer's expectations. Response to general questions with general answers generally presents no difficulties. But if the inquirer seeks specific guidance and the attorney responds with such specific guidance, an attorney-client relationship may have been established with the attendant risks of violating Rules 1.6 and 1.7. If specific guidance is deployed and nonlawyers use it to provide legal services, Rule 5.5 may be triggered. If the lawyer misrepresents what advice he/she is able to provide over the internet, then Rule 7.1 may be violated.

NM Op. 2005-01. Rules 1.15. New Mexico's version of Rule 1.15 requires lawyers to

maintain client files for 5 years. However, “[t]he lawyer contemplating destruction of a client file should note ... that some instances may require that files be retained for a period of longer than five years in light of the circumstances surrounding the case.The most obvious of these situations is the preparation of a will or a trust by a lawyer, the interpretation of which may become an issue many years after it was prepared. To accommodate such situations, the lawyer should identify the types of files which should be kept beyond the five year period required by Rule 16-115(B) and retain any such files.”

New York:

NY Op. 481 (1977). Rules 1.7. A lawyer may prepare a will in which the lawyer is appointed to a fiduciary office if the testator is competent, there has been a longstanding relationship between the lawyer and client and the suggestion that the lawyer serve as fiduciary originates with the client. A lawyer should not draft a document that contains a gift to the lawyer. A will or trust that contains a gift to a lawyer should be prepared by independent counsel.

Nassau County Op. 81-3 (1981). Rules 1.7. A lawyer may not represent both the residuary legatee of a decedent’s estate and a party against whom the personal representative is asserting a claim on behalf of the estate.

NY Op. 555 (1984). Rules 1.4, 1.6, 1.7, 1.9, 1.16. A lawyer retained by A and B to form a partnership, who received communication from B indicating that B was violating the partnership agreement, may not disclose the information to A although it would not be within the lawyer-client evidentiary privilege. The lawyer must withdraw from representing the partners with respect to partnership affairs. A minority of the Ethics Committee dissented on the ground that “the attorney must at least have the discretion, if not the duty in the circumstances presented, to disclose to one partner the facts imparted to him by the other partner, that gave rise to the conflict of interests necessitating the lawyer’s withdrawal as attorney for the partnership.”

New York City Op. 1987-7 (1987). Rules 1.6, 1.14. A lawyer may disclose confidential information in seeking the appointment of a guardian if that is necessary to protect the client’s interests. Request should be made in camera and information should be filed under seal.

Nassau County Op. 89-26 (1989). Rules 1.6, 1.9. A lawyer who drafted a prior will for a client, now deceased, may not disclose the contents of the will except as required by law in an action involving the probate, validity, or construction of a will. The result was based on Canon 4 of the Model Code of Professional Responsibility.

Nassau County Op. 90-17 (1990). Rules 1.6, 1.14. A lawyer may not reveal to the relatives of a client the lawyer’s observations regarding the client’s competency; consultations with the client are confidential.

NY Op. 610 (1990). Rules 1.5, 1.7. This opinion states that, “[e]xcept in limited and extraordinary circumstances, an attorney should not serve as draftsman of a will that names

the lawyer as an executor and as a legatee.” The opinion refers to Surrogate’s Court Rules in Suffolk County that require that a will appointing an attorney as fiduciary be accompanied by an affidavit of the testator setting forth the following:

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

Nassau County Op. 90-11 (1990). Rules 1.7, 1.9. The lawyer who represented a decedent’s former wife in advancing a claim against the decedent’s estate may not later undertake to represent the decedent’s personal representative. “Because the interests of the former wife are different from the interests of the estate, inquiring counsel must not undertake to represent the estate. (See Disciplinary Rule 5-105).”

NY Op. 619 (1991). Rules 1.8. Because of the conflict of interest involved, it is impermissible for a lawyer engaged in estate planning to offer life insurance products to clients who come to the lawyer for counseling in estate and trust matters, if the lawyer has a financial interest in the particular products recommended. Because of the wide array of insurance products that are available at differing costs, etc., there could not be “meaningful consent by the client to the lawyer having a separate business interest of this kind.”

NY Op. 649 (1993). Rules 1.6. New York’s State Bar Committee on Professional Ethics was here asked to review the duties of an attorney representing an executor when the attorney learns that the executor intends to or has committed a breach of trust. In advising that an attorney “should” disclose a breach of trust in some cases but not in others, the Committee observed:

We have held that while the executor’s attorney has a “duty to represent the executor with undivided loyalty,” the executor’s counsel is prohibited from “taking any position antagonistic to the estate or inconsistent with the executor’s duty to carry out the testatrix’s will.” ... [T]he attorney, although retained by the executors, has a duty not only to represent them individually, but also to serve the best interest of the estate to which they, in turn, owe their fiduciary responsibilities.

New York City Bar Op. 1993-2 (1993). Rules 1.5. This opinion concludes that a lawyer may enter into a contingent fee contract with a client in connection with a dispute involving a will. The lawyer may not enter into a joint fee agreement among the lawyer, clients and a private investigator under which the investigator would receive a contingent fee.

NY Op. 711 (1999). Rules 1.8, 2.1. A lawyer may not sell long-term care insurance to the lawyer’s own clients if the representation relates to estate planning or other matters or areas of practice that might reasonably cause the lawyer’s professional judgment on behalf of the client to be affected by the lawyer’s own financial or business interest.

NY Op. 746 (2001). Rules 1.7, 1.14. A lawyer serving as a client’s attorney-in-fact may not petition for the appointment of a guardian without the client’s consent unless the

lawyer determines that (i) the client is incapacitated, (ii) there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests and (iii) there is no one else available to serve as petitioner.

Nassau County Bar Op. 304 (2003). Rules 1.6, 1.9. A lawyer who was representing a wife in secret planning for divorce may not after her death disclose confidences to her husband as personal representative. Husband had sought return of a retainer and then sought the lawyer's file. Acknowledging the general rule that a decedent's personal representative may waive the attorney-client privilege, the committee concluded that such a waiver was appropriate "if and when acting in the interest of the decedent-client and his or her estate."

NY Op. 775 (2004). Rules 1.4, 1.14. When a possibly incapacitated former client sends a lawyer a letter, evidently prepared by someone else, requesting the return of the client's original will, the lawyer may communicate with the former client and others to make a judgment about the client's competence and to ascertain his or her genuine wishes regarding the disposition of the original will. In this case, the lawyer had reason to believe that the client might be acting under the influence of a family member who would benefit by the destruction of the will.

NY Op. 796 (2006). Rules 1.16, 4.1. If a lawyer who represents the administrator of an estate has advised the attorney for a creditor of the decedent's death, and the creditor's attorney subsequently withdraws a court action on the claim in the apparent but erroneous belief that the estate has no assets, assuming the lawyer for the estate has done nothing directly or by implication to suggest the estate is insolvent, the estate lawyer has no ethical duty to contact the creditor's attorney to advise the creditor's attorney that the estate has assets and that the creditor should file a claim.

NY Op. 797 (2006). Rules 1.6, 1.16, 3.3. A lawyer hired by the named executor and decedent's only heir to probate the estate files a petition to have the heir appointed as executor and he is appointed. Thereafter lawyer learns that the client is a convicted felon who is not permitted to serve as executor under state law. Committee opines that under NY's ethics confidentiality rules, lawyer is not permitted to disclose this secret to the tribunal, but is permitted to withdraw his own certification that the client is authorized to serve. He must, therefore, withdraw that certification and is permitted to disclose the secret only to the extent that disclosure is implicit in the withdrawal. Thereafter, lawyer may be required to withdraw from representation if continuing to represent the client would require the lawyer to violate another rule, such as that prohibiting him from assisting his client in an illegal act.

NY City Op 2006-3. Rules 1.1, 5.3. This opinion addressed outsourcing of legal support services overseas to nonlawyers. In principle it applies to outsourcing of legal work to nonlawyers, whether foreign or domestic. The opinion concludes that a New York lawyer may ethically do so provided the New York lawyer sufficiently supervises the nonlawyer to guard against the unauthorized practice of law; to ensure that the lawyer is competently representing the client; to ensure that the client's confidences are protected; and to avoid conflicts of interest. The opinion also notes that the client must be billed properly for this kind of outsourcing and, under some circumstances, may need to give advance consent.

NY Op 836 (2010). Rules 1.7, 1.14. Lawyer who previously represented incapacitated client in guardianship proceeding inquired whether lawyer could now represent client and the guardian in proceeding to terminate the guardianship. The opinion concludes that this is a consentable conflict (assuming lawyer reasonably believes that lawyer will be able to competently represent both clients) that requires informed consent of both the client and the guardian. Obtaining informed consent of client must take into account any limits on client's capacity, but client's existing determination of incapacity does not bar obtaining client's consent. The requirement of the court's approval of the termination of the guardianship mitigated concerns about the client's ability to give informed consent.

NY Op. 842 (2010). Rules 1.6, 5.3. A lawyer may use online "cloud" computer data backup system to store client files provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. Reasonable care may include (1) online data storage provider has an enforceable obligation to preserve confidentiality and security, and will notify lawyer if served with process requiring production of information; (2) investigating online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate; (3) employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or (4) investigating the provider's ability to purge and wipe any copies of the data, and to move the data, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

NY Op 865 (2011). Rules 1.1, 1.4, 1.7, 1.9, 1.16. Topics: Malpractice. Lawyer who drafted estate plan is asked by executor to represent estate of client. Lawyer asks whether, in light of Estate of Schneider v. Finmann, 15 N.Y.3d 306 (2010)(case in annotations for Model Rule 1.1), he can represent the estate of a client for whom he drafted the estate plan. Estate of Schneider held that an executor of an estate had privity to sue the drafter of the estate plan. The ethics opinion concludes that a lawyer who drafted the estate plan may represent the executor of the client's estate as long as the lawyer does not perceive any colorable claim for malpractice for the estate planning work. If the lawyer perceives at the outset that there is a colorable claim of malpractice against him as a result of the estate planning, the lawyer must decline the representation and must advise the executor of the colorable claim of malpractice against himself. If the lawyer begins representing the estate and discovers a basis for a malpractice claim, the lawyer must withdraw and must (again) advise the executor of the malpractice claim.

NY Op 982 (2013). Rules 1.6, 1.9, 1.16, 3.3, 4.1. Lawyer discovered that his client, an estate beneficiary, gave him false information that lawyer then gave to adverse party. Client refused to allow attorney to correct information, and before the probate was filed the attorney withdrew. The lawyer may not disclose the falsity of the information. Rule 3.3 did not apply.

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

North Carolina:

NC Op. 22 (1987). Rules 1.7. A lawyer may not represent an administrator in individual and official capacities if the individual interests of the administrator conflict with those of the estate.

NC Op. 28 (1987). Rules 1.7. A lawyer may, with informed consent, represent the estates of a husband and wife both of whom were killed in the crash of an airplane piloted by the husband if the lawyer is convinced that the husband was not negligent in any way. In such a case it would be frivolous for an action to be brought by the wife's estate.

NC Op. RPC 229 (1996). Rules 1.4, 1.6, 1.7. This opinion holds that a lawyer who jointly represents a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will adversely affect the interests of the other spouse or each spouse has agreed not to change the estate plan without informing the other.

NC 99 Op, 1 (1999). Rules 1.7. A lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

NC 2000 Op. 9 (2001). Rules 1.7, 1.8, 7.3. Lawyer who is also a CPA may provide legal services and accounting services from the same office if he discloses his self-interest. Lawyer may offer legal services to existing client of accounting practice because this is a prior professional relationship with a prospective client.

NC 2002 Op. 3 (2002). Rules 1.6, 1.7. Lawyer for the personal representative may seek removal of his client if the personal representative has breached fiduciary duties and has refused to resign. Lawyer should first determine if actions of representative constitute grounds for removal under the law.

NC 2002 Op. 7 (2003). Rules 1.6, 1.9. A lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney-client privilege does not apply to the lawyer's testimony.

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

NC Op 2007-1. Rules 1.2, 4.3. Topics: Wrongful Death. A lawyer representing an estate

represents the personal representative in his or her official capacity and the estate as an entity. Although the heirs are interested parties and may benefit from a successful wrongful death action, they are not clients of the lawyer in the matter. The personal representative and the estate are the lawyer's clients, whereas the heirs of the estate are non-clients. Communications with the heirs should be governed by Rule 4.3, but “[w]ith the consent of the estate's personal representative, the lawyer may provide the heirs with factual information concerning the wrongful death action.” The lawyer may also negotiate on behalf of the estate with a person arguably entitled to participate in the wrongful death recovery and/or file an action on behalf of the estate to determine a person's right to participate in such recovery.

NC Op. 2011-13 (2011). Rules 1.5, 1.15. Attorney agreed to represent the Estate of a deceased lawyer and his work consisted of collecting assets and paying claims of the decedent's law practice, with the goal of dissolving the practice and paying remaining assets to the decedent's estate. Attorney deposited \$3,000 in “estate assets” and \$100,000 of the decedent's firm's assets in his trust account. When the estate administrator terminated the attorney's representation and asked for all the assets held in trust to be returned, the attorney sought to withhold \$29,000 which, he said, constituted fees he had earned in representing the estate. The committee concluded that the attorney was not entitled to hold any of the trust assets back because they were turned over to the attorney not for the payment of fees, but as estate assets. “[P]ayment of administrative expenses of an estate from estate assets, including attorney's fees, is only permitted on the issuance of an order of the clerk of superior court and requires the clerk to exercise judicial discretion in such matters. A personal representative must file a petition seeking an order from the clerk enabling the payment of attorney's fees by an estate. ...Attorney was obliged to deliver all of the funds as directed by Administrator.”

North Dakota:

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

Ohio:

Cleveland Bar Op. 86-5 (1986). Rules 1.6, 1.7, 1.14. A lawyer who represented a husband and wife may initiate a guardianship proceeding for the incompetent husband but may not take a position contrary to the interests of the wife. However, if interests of the husband and wife conflict, the lawyer must withdraw from representing either.

Cleveland Bar Op. 89-3 (1989). Rules 1.6, 1.7, 1.14. The lawyer for a person with diminished capacity has a duty to choose a course of action in accordance with the best interests of the client, which may include moving for the appointment of a guardian for purposes of a tort action, but must avoid unnecessarily revealing confidential information. The lawyer should avoid the conflict involved in representing the client and petitioning for the appointment of a guardian.

OH Op. 2001-4 (2001). Rules 1.6, 1.7, 1.8. It is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer's interest in selling an annuity and a client's interest in receiving independent professional legal counsel free of compromise are differing interests. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer's sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance.

Columbus Bar Ass'n v. Willette, 119 Ohio St.3d 1232 (2008). Rules 1.6, 1.8, 5.4, 5.5, 7.1, 7.2, 7.3, 8.4. Topics: Discipline. Lawyer was suspended for a year, with six months stayed, for his activities in connection with Estate Planning Legal Services, a Michigan law firm, that was marketing living trusts and estate planning documents in Ohio. H was found to engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and conduct that adversely reflected on his fitness to practice law; he was also found to have used false, fraudulent, or misleading advertisements; to have improperly solicited legal business by telephone; to have compensated an organization for a referral or to recommend his services; to have shared legal fees with a nonlawyer; to have disclosed client confidences without consent; and to have attempted improperly to limit his liability to a client for personal malpractice.

Oregon:

OR Op. 525 (1989). Rules 1.7. A lawyer who is on the board of a charity and also represents it may not represent both the charity and a donor in a unitrust transaction. However, the lawyer may draft the donor's will in which the charity is designated as a beneficiary if the lawyer discloses his representation of the charity to the donor.

OR Op. 1991-41 (1991). Rules 1.6, 1.14. A lawyer who has represented Client for many years and has begun to observe extraordinary behavior by Client that is contrary to Client's best interests, may take action on behalf of Client. This opinion states that, "[a]s the language of [former] DR 7-101(C) makes clear, an attorney in such a situation must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

OR Op. 1991-62 (1991). Rules 1.13. The lawyer for a personal representative represents the personal representative and not the estate or the beneficiaries as such. See also Or. Op. 1991-113 (1991).

OR Op. 2000-159 (2000). Rules 1.2, 1.14. A lawyer may seek the appointment of a guardian for a mentally incapacitated parent client involved in a juvenile dependency case. Lawyer who believes that his client cannot adequately represent his own interests must take the least restrictive action with respect to the client. In determining whether the client can adequately act in his or her own interests, the lawyer needs to examine whether the client can give direction on the decisions that the lawyer must ethically

defer to the client. After the guardian *ad litem* is appointed, the lawyer must take directions from the guardian *ad litem*.

OR Op. No. 2003-177 (2003). Rules 1.5. A lawyer does not charge or collect an illegal fee in a probate case if the lawyer requests and receives an initial payment or interim payments from the personal representative's own funds. The personal representative client may later seek court approval for reimbursement from the estate assets of some or all of the money advanced for legal fees. Lawyer who is serving as a personal representative of an estate must obtain court approval before withdrawing any compensation for services.

OR Op. 2005-11. Rules 1.9. "Matters can be 'substantially related' in either of two ways: (1) the lawyer's representation of the current client will work some injury or damage to the former client in connection with the same matter in which the lawyer represented the former client; or (2) there is a risk that confidential factual information learned in representing the former client could be used to advance the new client's position. ...The 'substantial relationship' limitation in Oregon RPC 1.9(a) is similar to the "matter-specific" and former client conflicts described in *In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985). Given these similarities, we believe it is appropriate to continue to refer to matter-specific and information-specific former client conflicts. We strongly caution, however, against an overbroad interpretation that would dilute the requirements that must be met before two matters can be said to be 'the same or . . . substantially related.' For example, the fact that two matters may both involve the same disputants, the same industry, and some of the same facts will generally be insufficient, standing alone, to create a matter-specific conflict. See, e.g., *PGE v. Duncan, Weinberg, Miller & Pembroke*, 162 Or App 265, 986 P2d 35 (1999). Similarly, merely acquiring confidential information in a prior representation does not create an 'information-specific' conflict if the information is not material to the new matter and cannot be used to materially advance the new client's position."

OR Op. 2005-17. Rules 1.6, 1.9. If a lawyer prepares a will for Client A and later is approached by Client B to assist in the sale of a boat to former Client A or to collect a debt from former Client A, whether this implicates the successive conflict rule and requires the informed consent of the two clients will depend on whether the matters are substantially related. Neither of the situations described above presents a representation adverse to a former client involving the same transaction or legal disputes. Thus, there is no matter-specific conflict. See *In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985), discussing and creating the matter-specific and information-specific former-client conflicts categories used in subsequent cases and in OSB Formal Ethics Op No 2005-11. It follows that unless the lawyers have acquired some confidential information in representing the former client that could be used to materially advance the new client's position, Rule 1.9(c), there is no information-specific conflict and the matters are not substantially related within the meaning of Oregon RPC 1.9(a). This does not seem likely with regard to the boat sale, but seems more likely with regard to the debt collection action.

OR Op. 2005-62. Rules 1.7, 1.9. If a lawyer represents a personal representative and that PR resigns and a second is appointed, the lawyer may continue to represent the first in seeking compensation for services rendered and for expenses. Whether the lawyer may represent the second PR will depend on whether the second is adverse to the first on a substantially related matter. The lawyer could not represent the second PR in opposition

to a claim by the first for fees and expenses, absent the informed consent of the former client.

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

OR Op. 2005-87. Rules 5.5, 7.2. Lawyer may not refer clients to, accept referrals from, or otherwise assist an entity named "Estate Planning Service" (EPS) which is owned by a CPA, a stockbroker who is a certified financial planner, a life insurance agent, and a casualty insurance agent, and who as EPS will offer services to their clients that constitute the unlawful practice of law.

OR Op. 2005-119 (2005). Rules 1.6, 1.7, 1.16. A lawyer who represents widow as an individual and widow in her capacity as personal representative, has only one client. The fact that widow may have multiple interests as an individual and as a fiduciary does not mean that lawyer has more than one client, even if widow’s personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7, do not apply to lawyer’s situation. If the client confides in the lawyer that she has breached her duties as fiduciary in the past, he is not free to disclose this unless one of the exceptions to Rule 1.6 applies. Neither may he make affirmative misrepresentations about such conduct. The lawyer may be required to withdraw if not withdrawing would involve the lawyer in misconduct. If the client informs lawyer she plans to engage in criminal conduct in the future he is permitted (but not required) to disclose this to prevent the crime under Oregon Rule 1.6(b)(1)(future crime exception).

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

divorce would require the lawyer to seek to undo as dissolution attorney.

OR Op. 2005-175 (2005). Rules 7.1, 7.2. A lawyer may not participate in a professional “networking association” whose purpose is to facilitate business referrals between members and in which making referrals is a condition of membership and members are required to follow up on referrals received through the association.

Pennsylvania:

PA Op. 88-72 (1988). Rules 1.6, 1.14. A lawyer who believes a client is being taken advantage of by relatives may seek appointment of guardian if the lawyer believes the client is unable to act in his own interests.

PA Op. 89-90 (1989). Rules 1.7, 1.14. A lawyer for a competent client who decided to refuse medical treatment for progressively disabling disease may serve both as her lawyer and as her guardian *ad litem*.

PA Op. 90-89 (1990). Rules 1.6, 1.14. A lawyer representing a client in a civil case who believes the client is incompetent should seek a continuance to investigate, discuss with a psychiatrist, and initiate a guardianship if necessary. But the information must remain confidential unless the lawyer determines it is necessary to pursue the appointment of a guardian.

PA Op. 91-36 (1991). Rules 1.6, 1.14. A lawyer who is convinced that disclosure is necessary may disclose confidential information to the extent necessary to protect the client’s interests, including seeking a guardianship or other protective measures.

PA Op. 91-62A (1991). Rules 1.13. The lawyer who is retained by an administrator of a decedent’s estate represents the estate and not the administrator “at least where the interests of the estate diverge from those of the administrator.”

Phila. Bar Op. 91-4 (1991). Rules 1.6, 1.9. A lawyer may not disclose to a client’s children the contents of a deceased client’s prior will: “The earlier will constitutes confidential information relating to your representation of the testator, and your duty not to reveal its contents continues even after your client’s death.”

Phila. Bar Op. 93-5 (1993). Rules 1.6, 1.15. A lawyer represented the seller of real estate at a closing and seller has since died. Because the inheritance tax had not been paid the title company required that an amount sufficient to pay the tax be held in escrow by the lawyer. The lawyer has encouraged the executrix to file the inheritance tax return but she has failed to do so. Under the present circumstances MRPC 1.6 prevents the lawyer from informing the title company or the other beneficiary that no inheritance tax return has been filed unless he concludes that the executrix is engaging in a crime or fraud. Instead, the lawyer “should seek to persuade the [executrix] to take suitable action.”

PA Op. 97-66 (1997). Rules 1.8. A lawyer had prepared a will for a woman who died. Her husband was named executor but had refused to probate the will for nine months after his wife’s death. The will was in the possession of the lawyer. This opinion holds that the attorney has an absolute obligation to take steps to see that the will is given effect.

PA Op. 98-97 (1998). Rules 1.6, 1.9. Unless permission has been granted by the client or the client's personal representative, information about a decedent's estate planning or other aspects of the representation may not be released without specific order of court.

PA Op. 2000-100 (2000). Rules 1.5, 1.7 & 1.8. Lawyers may accept referral fees from insurance agents, investment advisors, or other persons who provide products or services to the lawyer's client subject to MRPCs 1.7(b) and 1.8(f).

PA Op. 2001-300 (2001). Rules 1.7, 1.8. A lawyer's retention of a will at the client's request does not constitute a violation of the Rules of Professional Conduct.

PA Op. 2003-11 (2003). Rules 1.6, 1.9. The executor of the testator's estate does have the authority to consent to the disclosure of confidential information pertaining to the estate planning and other aspects of the representation of the testator.

PA Op. 2003-16 (2003). Rules 1.5, 1.7, 1.8. Although it is conceivable that an estate planning attorney could be ethically permitted to sell life insurance, securities, or other financial products to his or her client as part of the estate planning process, it is highly unlikely that the lawyer could satisfy MRPCs 1.7(b), 1.8(a) and 1.8(f).

PA Op. 2004-7 (2004). Rules 1.2. An attorney's duty to a client who was a guardian of a ward, now deceased, must be considered in light of duties to beneficiaries of the ward's estate. The opinion provides that attorney may and should notify the personal representative of the ward's estate when the guardian requests return of the attorney's unearned retainer. If consent is not given, the attorney may seek court instructions.

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

PA Op 2006-20 (2006). Rules 1.7, 1.9. It is permissible for a lawyer to represent a resigning trustee of a testamentary trust and also the successor trustee (who is a remainder beneficiary), notwithstanding the temporary overlap between the two representations and the potential for conflict, provided that the successor trustee will not oppose the accounting presented by the resigning trustee. Procedurally, the resigning trustee should prepare a preliminary verified accounting for the proposed successor and the successor should file a conditional waiver to the effect that "the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of successor trustee does not intend to object to the official account when filed; and the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed

successor in the capacity of remainder beneficiary of the trust does not intend to object to the official account when filed.”

Philadelphia Bar Op. 2007-6 (2007). Rules 1.6, 1.9. A lawyer who did estate planning for a decedent, and knew his wish that his daughter receive no share of his estate, is permitted to disclose contents of decedent’s will to daughter, even though it was not probated and is not public, if disclosure was impliedly authorized. Relying on and quoting the ACTEC Commentaries, the committee notes that “If the inquirer feels that doing so would likely promote the husband’s estate plan, forestall litigation, preserve assets, and further his daughter’s understanding of his intentions then it would be permissible. However, if the inquirer does not feel that there is such implied authorization, then without being required by the Court to produce the will, he may not disclose its contents. The Committee notes that even if the inquirer concludes that he has implied authorization to reveal the contents of the will that he is not required to do so, only that he may choose to do so.”

PA Op. 2008-18 (2008). Rules 1.5, 1.10, 7.1. It is permissible for two law firms to enter into a joint venture which will use the talents of an associate employed by one of them to provide estate planning services for clients of both provided that the associate’s relationship with both firms is made clear under Rule 7.1, the fee splitting rules in Rule 1.5(e) are complied with and it is understood that the conflicts of each firm’s members are imputed to all the lawyers in both firms.

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

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

Philadelphia Bar Op. 2008-10 (2008). Rules 1.6, 1.9, 1.18, 8.5. Eleven years after lawyer had prepared estate planning documents for a client (C), the client’s step-daughter (D) and her son (S) came to lawyer and said that C wanted lawyer to revise the will to provide bequests to D, S and a sibling of S. There were significant discussions about C’s mental health and the reasons for the change. Lawyer went with D and S to visit C in the hospital and lawyer concluded C lacked mental competency and refused to prepare the documents. C died a year later and a will contest was mounted in New Jersey which, among other things, called into question the work of lawyer in helping C execute the

original documents. The executor of C's estate has asked about the procedures followed when C executed the documents and lawyer wants to know what he can disclose about this and about the conversations with D & S 11 years later. Committee, relying on and quoting ACTEC Commentaries, says that disclosures about advice and procedures followed when the will was executed may be impliedly authorized if they will promote former client's interests but even if they are not, the executor may waive the deceased client's right to confidentiality. Moreover, PA's equivalent of MR 1.6(b)(5) permits disclosure since lawyer's conduct has now been called into question. As for conversations with D & S, since they were not prospective clients but rather seeking to have lawyer provide additional legal work for C, "such discussions are not confidential and can be revealed to whomever the inquirer and his partner wish." Finally, committee cautions that under the conflict of laws provision of Rule 8.5, New Jersey ethics rules may apply to the NJ will contest, rather than Pennsylvania ethics rules.

PA Op. 2009-09 (2009). Rules 1.6, 1.9. A lawyer assisted a married couple to execute reciprocal wills; all communications occurred in the presence of both. On the understanding that the lawyer has no information that could be used to the disadvantage of the former client, the lawyer may later represent the husband in the couple's divorce. The matters do not seem to be the same or substantially related. Moreover, as information that was transmitted was done so with another person present, there is as an arguable waiver of any possible confidentiality should there be confidential information that was transmitted.

Philadelphia Op. 2011-4 (2011). Rules 1.16, 3.3, 4.3. Lawyer was hired by the PR of an estate to assist in the administration of the estate. Client had obtained letters after falsely claiming she was the sole intestate heir, but informed lawyer she had 3 siblings. Lawyer filed an inventory and inheritance tax return which properly disclosed existence of the siblings. When client informed lawyer that her siblings were willing that she receive all the estate assets, he prepared a family agreement for them to sign and sent it to the siblings, but received no response. Lawyer advised client of her duties to distribute assets of the estate as required by law, but client has been unresponsive. Committee concludes that (a) lawyer's knowledge of fraud in obtaining letters of administration triggered lawyer's duty to take remedial measures under MR 3.3(b), but the filing of the inventory and tax return with proper disclosures satisfied that duty. (b) No further disclosure to the siblings was required unless lawyer concludes that disclosure of his adverse representation when the proposed family agreement was sent was incomplete under MR 4.3, in which case lawyer must supplement to comply with MR 4.3. (c) Pennsylvania law (outside of the ethics code) may require additional disclosures of the sister's misconduct given the "derivative duties" owed to estate beneficiaries. (d) Lawyer must remonstrate with client to comply with law but if client is unresponsive, lawyer should withdraw.

Philadelphia Bar Op. 2013-6 (2013). Rules 1.1, 1.4, 1.6, 1.9, 1.14. Client is in a coma and near death. Lawyer had prepared a power of attorney naming friend as agent, and a will leaving the estate primarily to charity and naming lawyer as executor. Lawyer has just learned that the client placed her financial accounts into JTWROS with friend, with assistance from financial advisor. Friend states that the reason was to facilitate the friend paying bills. The lawyer: (a) must try to communicate with client to determine if client intended to give the accounts to friend at death, and if so, take no other action; (b) if unable to determine client's intent, may notify the state attorney general if the lawyer believes consistent either with competent representation of client while alive or with gathering

estate assets as executor, provided that during client's life lawyer must limit disclosure to only information as is necessary to effectuate the client's intent, under 1.6(a) and 1.14.

PA Op. 2013-005 (2013). Rules 1.7, 1.18. The attorney represents an estate as plaintiff in litigation against a company for negligent damage to property. The estate's administrator was added as defendant under a contributory negligence theory. The estate and the administrator want the lawyer to represent both of them, but the lawyer cannot represent both because the estate has a directly adverse interest in establishing liability of the administrator. The lawyer cannot use or disclose any harmful information obtained from the administrator as a potential client.

PA Op. 2014-300 (2014). Rules 1.1, 7.1, 7.2. This opinion examines an attorney's ethical responsibilities as they relate to social media. On the issue of competence, it concludes that "a lawyer should (1) have a basic knowledge of how social-media websites work and (2) advise clients about the issues that may arise as a result of their use of these websites." While an attorney is not responsible for content that others persons, who are not agents of the attorney, post on the attorney's social-networking websites, nonetheless the attorney "(1) should monitor his or her social-networking websites, (2) has a duty to verify the accuracy of any information posted and (3) has a duty to remove or correct any inaccurate information."

Rhode Island:

RI Op. 88-15 (1988). Rules 1.14, 1.16. The lawyer for the guardian of a minor's estate, who sent the guardian six letters over 15 months requesting client to file accounts, without compliance by client, may withdraw based on client's conduct making representation difficult.

Op. 92-1, 627 A.2d 317 (R.I. 1993). Rules 1.6, 8.3. A lawyer to whom the former lawyer for client confessed embezzlement from client may not report misconduct by former lawyer without client's consent. The information was learned during the course of representing the client, which is within the scope of the Rhode Island version of MRPC 1.6: "Even though the attorney-client evidentiary privilege may not protect this information, MRPC 1.6 prevents the inquiring attorney from disclosing it because it relates to the representation of a client." 627 A.2d at 321. The Advisory Panel asked the Supreme Court Committee to study the rules, canvass other jurisdictions and to consider amending Rhode Island's version of MRPC 1.6 to deal with this anomalous situation.

RI Op. No. 99-08 (1999). Rules 1.8. Lawyer may not provide both legal services and investment services to same client. Inherent conflict makes it impossible to satisfy requirements of fairness and reasonableness to client.

RI Op. No. 99-16 (1999). Rules 1.8. Lawyer may purchase asset from client/guardian if (i) written disclosure of transaction is provided to guardian; (ii) guardian is advised to seek independent counsel; and (iii) guardian consents in writing to terms of transaction.

RI Op. No. 2000-6 (2000). Rules 1.16. Lawyer must turn over copy of joint file of clients A and B to client B as required under MRPC 1.16(d).

RI Op. 2007-01. Rules 1.12. A lawyer who formally served as a probate judge may appear before the same probate court on which he served, “provided that he/she does not represent anyone in connection with a matter in which he/she participated personally and substantially as the probate judge.”

Op 2013-05. Rules 1.6, 1.9. Topics: Evidence, Attorney/Client Privilege. A lawyer who drafted and supervised execution of a trust amendment for a now deceased client must assert confidentiality and privilege when the trustee (client’s daughter) is questioning the amendment. If a court orders disclosure the lawyer must try to minimize the disclosure when complying.

Op. 2014-04. Rules 1.2, 1.6, 3.3. The lawyer’s client, an executor of an estate, told the lawyer he borrowed estate funds to pay personal expenses. The lawyer (a) cannot disclose the information with the client’s consent, (b) cannot file a false accounting with the court, and (c) should move to withdraw.

South Carolina:

SC Op. 90-16 (1990). Rules 1.7. With full disclosure to its clients of all relevant factors, a law firm may refer estate planning clients to an insurance agency in which the law firm owns a 50% or greater interest. A similar arrangement regarding title insurance had previously been approved.

SC Op. 91-07 (1991). Rules 1.7, 1.8. It is not unethical for a lawyer to prepare a will at the direction of a client that names the lawyer as personal representative and trustee except under the circumstances proscribed under MRPC 1.8(c).

SC Op. 92-12 (1992). Rules 1.5, 1.8. An attorney may draft a will which names himself as personal representative with the power to sell the home and pay himself at his regular hourly rate. He should not pay himself the personal representative’s statutory fees on top of his attorney’s fees or vice versa. The attorney should explain the situation to the client as reasonably necessary. Although the attorney would not be prohibited from witnessing the execution of the will, he would be well advised to obtain independent witnesses.

SC Op. 93-04 (1993). Rules 1.4, 1.6, 1.9, 1.14. A lawyer drafted a trust agreement and pour-over will for a competent client who, at the same time, executed a durable general power of attorney to a friend authorizing the friend “to do and perform all and every act, deed, matter and thing whatsoever in [sic] about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present...” When the friend asked the lawyer for a copy of the will and trust agreement the lawyer should inform the client of the request and not provide the friend with the information without the client’s consent. If the client becomes incompetent, the lawyer is authorized to open his file to the friend, absent prior instruction from the client to the contrary.

SC Op. 93-34 (1993). Rules 1.2, 1.7, 2.3, 4.3. An attorney for an estate in probate or an attorney acting as personal representative for an estate in probate has no ethical duty to inform a surviving spouse of the right to claim an elective share in the absence of a present or past attorney-client relationship with the surviving spouse. The attorney for the

estate in probate should take care to see that the spouse does not rely on him for legal advice and is informed of the right to independent counsel. The attorney acting as personal representative for the estate in probate should take care that the beneficiaries not misunderstand the attorney's role by assuming that he represents them.

S.C. Op. 93-94 (1993). Rules 1.2, 1.4. This opinion holds that an attorney for an estate does not have an ethical or a legal duty to inform a surviving spouse of his right to claim a 1/3 elective share of the probate estate provided there is no present or past attorney-client relationship with the surviving spouse. The attorney for an estate in probate is retained by and owes a duty to the personal representative, who is the fiduciary for the estate and its beneficiaries. The opinion holds the same for an attorney who is acting as personal representative of an estate under the theory that the attorney as fiduciary owes a duty to act in the best interests of the beneficiaries of the estate within the framework of the will.

SC Op. 94-14 (1994). Rules 1.2, 1.9, 1.14, 1.16. Attorney represented grandmother as personal representative of the estate of her son and as conservator of her grandson. The grandson was the beneficiary of a life insurance policy on the life of his father. The grandmother, as conservator, allegedly assigned the life insurance policy to a funeral home to pay the funeral expenses of her son. The attorney prepared an accounting on the conservatorship, reflecting that the life insurance funds had been improperly paid to the funeral home. The grandmother refused to sign the accounting. The conflict of interest between the grandmother and grandson required the attorney to withdraw from representation of the grandmother and also would prohibit the attorney from assuming representation of the grandson without the grandmother's consent.

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

SC Op 09-10. Rules 7.1, 7.2. If a lawyer "claims" a website listing about the lawyer, even one created by another, this constitutes a "placement" or "dissemination" by the lawyer of all communications made at or through that listing after the time the listing is claimed. "Likewise, a lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer's knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. ...Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the

content of the listing.” (Note that South Carolina’s version of MR 7.1-7.3 differ substantially from the Model Rules.)

South Dakota

SD Op 92-19 (undated) on Prepaid legal services. Rules 7.1, 7.2. A South Dakota lawyer may not participate in a program offered for a fee to members of a large national organization by a manufacturer and administrator of various forms of legal benefits programs regarding revocable living trusts where the lawyer would prepare certain documents for a fixed and predetermined fee, and would offer further services at designated reduced rates, from information provided in a client questionnaire and where the lawyer is described as “specially qualified” in the area of practice and agrees not to participate in any other group membership plans without written consent of the above manufacturer/administrator.

Op. 2007-3 (2007). Rules 1.2, 1.6, 1.14. A lawyer who has prepared a will for an elderly client and who has been instructed by the client to reveal the contents to no one is bound by that instruction notwithstanding that the inquirer holds a durable power of attorney from the client. Here, the holder of the power demanded (through an attorney) to see the principal’s will under the authority of the durable power. Subsequent to the execution of the power, the lawyer consulted the client (again) about his wishes and he again instructed that no one should see his will. Based on the circumstances and the communications from the client, “the Niece is not a ‘client’ for the ‘specific purpose’ of reviewing Client’s Will. First, absent a guardianship, conservatorship or other legal limitation, Client can revoke or modify the attorney-in-fact’s authority. Second, if the general POA ever gave the Niece the authority to review the Will, the [subsequent] communication from Client to Attorney revoked it. Attorney believes that Client is slipping, but, until he is adjudicated unable to make such decisions, Rules 1.6, and 1.14(a) & (c) require that Attorney continue to protect Client’s confidences.”

Tennessee:

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

Texas:

TX Op. 439 (1987). Rules 3.7. Topics: Evidence. An attorney prepared a will, signed by two witnesses, and acted as notary thereof. After filing the will for probate and acting as

counsel for the petitioner, a contest of the will was filed claiming that the document was not executed in accordance with the applicable law and that the testator did not have testamentary capacity. Contestant filed a motion to disqualify the attorney who had prepared and notarized the will, and the issue presented was whether or not the attorney should be disqualified from continuing to act as attorney for the executor (who was also the sole beneficiary under the will). The Texas Committee on Professional Ethics held that the attorney could not continue to act under these circumstances (following Texas Opinion 234 (1961), holding that the law partner of a lawyer who had drafted a will, deed and contract for a client, the validity of which instruments were attacked after the client's death on grounds of fraud, undue influence and mental incapacity of the client, could not serve as counsel since the lawyer knew his partner would be a material witness). Note that Texas' version of the witness advocate rule, unlike MRPC 3.7, imputes the lawyer witness conflict to other lawyers in the lawyer witness' law office.

TX Op. 536 (2001). Rules 1.7. A lawyer may not receive referral or solicitation fees for referring a client to an investment adviser while the lawyer's client continues to receive services from the investment adviser because the client would be adversely affected by the lawyer's own financial interests and his obligations to the investment adviser.

Utah:

UT Op. No. 146A (1995). Rules 1.5, 1.7, 1.8. This opinion held that a lawyer may sell life insurance products to an existing client if the lawyer complies with MRPC 1.8(a).

UT Op. No. 97-09 (1997). Rules 1.1, 1.2, 1.4, 1.5, 1.6, 1.7, 5.3, 5.5, 7.3. This is an extensive opinion relating to the permissibility of a Utah lawyer working with a nonlawyer "Estate Planner" organization which will solicit clients, refer them to the lawyer, and depend on the lawyer for review of the estate plan that has been drafted. While the opinion is too lengthy and detailed to summarize adequately here, it opines that the proposed arrangement is replete with risks of violating Rules 1.1, 1.2, 1.6, 1.7, 5.3, 5.5, and 7.3, even if it is not unethical per se. A case by case analysis is necessary to determine if a particular representation would be ethical. Because the inquiring attorney was seeking approval of a set procedure to be followed in every case, the lawyer was likely precluded from participating in the arrangement.

UT Op. No. 99-07 (1999). Rules 1.5, 1.7, 1.8. It was not "per se unethical" for a lawyer to refer a client to a financial advisor and to receive a referral fee, but the lawyer "has a heavy burden to insure compliance with applicable ethical rules." The opinion noted that several states hold, as do the Commentaries, that the practice is "per se unethical."

UT Op. No. 01-04 (2001). Rules 1.5, 1.8. Charging an annual fee for estate planning or asset protection services based on a percentage of the value of the client's assets would be ethical "only in extraordinary circumstances." The opinion does not suggest any circumstances where the arrangement would be appropriate.

UT Op. 06-02 (2006). Rules 1.16. Under Utah Rule 1.16, at the end of the representation the lawyer must return the client's "file" and there is no exception conferring a retaining

lien against the client's file in the event of nonpayment. The But an unexecuted trust and will prepared by the lawyer, for which the client has not paid, are not part of the client's "file" which must be returned to the client at the end of a representation.

Virginia:

VA Op. 932 (1987). Rules 1.6, 1.7, 1.14. A lawyer who is a residuary legatee and attorney-in-fact for an incompetent client may petition for appointment as guardian, provided the lawyer can exercise independent judgment despite any personal interest.

VA Op. 1358 (1990). Rules 1.7, 7.3. A lawyer may draft a will naming the lawyer as personal representative or trustee or in which the fiduciary is directed to retain the lawyer as attorney if the client consents after being informed of alternate representatives, all fees involved, and of the lawyer's own financial interest. A lawyer's suggestion of himself as fiduciary may constitute improper solicitation.

VA Op. 1387 (1990). Rules 1.7. A law firm of which a co-fiduciary is a member may be retained to represent the fiduciaries with the consent of all fiduciaries. However, "the committee urges that the co-fiduciaries rather than the fiduciary/partner maintain the necessary communications with the firm throughout the administration of the estate."

VA Op. 1391 (1991). Rules 1.7. A lawyer who drafted a will and advised the beneficiaries may serve as successor trustee and foreclose on a deed of trust. However, in connection with the foreclosure, the lawyer must obtain consent of the beneficiaries if the lawyer had advised them with respect to the note or deed of trust.

VA Op. 1473 (1992). Rules 1.7. A lawyer who was retained "to represent the interests of the estate" is treated as having represented the co-executors (each of whom had separate counsel) and not "the estate." The same lawyer may represent two of the executors in their capacity as trustees of a testamentary trust only with the consent of the third co-executor.

VA Op. 1720 (1998). Rules 1.2, 1.9. The client of a lawyer representing the estate's interest is the executor and not the beneficiaries. The lawyer who represented the estate's interest could not subsequently represent a beneficiary on a related matter adverse to the estate's interest.

VA Op. 1754 (2001). Rules 1.5, 1.7, 1.8, 5.4. It is not unethical for an attorney and an insurance agent to share the commission generated by the purchase of a survivorship life insurance policy to fund client's irrevocable life insurance trust provided full and adequate disclosure is made to the client.

VA Op. 1769 (2003). Rules 1.7, 1.14. A lawyer may not represent the daughter in gaining guardianship of incompetent mother, who is currently a client of the lawyer in another matter.

VA Op. 1778 (2003). Rules 1.2, 1.7. A lawyer may represent an administrator (surviving spouse) who is taking his elective share as spouse of the decedent. The lawyer may represent the administrator with respect to his individual legal needs provided they are not in conflict with the administrator's fiduciary duties to the beneficiaries of the estate.

VA Op. 1845 (2009). Rules 5.3, 5.5, 8.4. Bar authorities have evidence that a nonlawyer—a paralegal who worked for an estate planner now deceased – has continued to draft wills and other estate planning documents without being licensed to do so. “Ethics Counsel and/or Assistant Ethics Counsel who staff the UPL Committee” ask whether they are permitted to direct bar staff to engage in an undercover sting operation. Based on a Virginia comment to Rule 5.3 and an earlier opinion concurred in by the state supreme court that recognizes a “law enforcement exception” to Rule 8.4, the opinion concludes that “it is ethical for staff counsel of the VSB to direct a bar investigator or other outside investigator/volunteer to engage in covert investigative techniques in the investigation of the unauthorized practice of law in any case in which no other reasonable alternative is available to obtain information against the person engaging in the unauthorized practice of law.”

Washington:

WA Op. 946 (1986). Rules 1.7, 1.8. A lawyer may draft a document for an unrelated client that appoints the lawyer as fiduciary if the client is fully informed regarding the alternatives and costs and is advised that he or she is free to consult independent counsel.

WA Op. 2107 (2006). Rules 1.7, 1.8, 1.14. Insofar as the duties of a guardian for an incapacitated person diverge from those owed by the trustee of a special needs trust for the same person, for a lawyer who is guardian and counsel for the guardian to accept appointment as the trustee of a special needs trust would create an actual or a potential conflict. “[S]ince the incapacitated person probably lacks the mental capacity to understand a full disclosure and consent to the dual representation, the conflict cannot be waived pursuant to RPC 1.7(a) or 1.7(b).” Moreover, accepting the role of trustee for compensation would constitute a business transaction with a client, the “guardianship,” which would be governed by Rule 1.8(a). Accordingly, some other person should be appointed to serve as trustee.

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

WA Op. 2188 (2008). Rules 1.6, 1.9, 1.15, 1.16. A lawyer was hired by a wife to assist her in a legal action for separation and pays him fees in advance; but then dies before the work is done. The lawyer has a duty to take reasonable steps to identify who is entitled to these fees and to pay them to that person. If doing so requires communications with the husband, the lawyer is impliedly authorized to disclose that he holds funds in trust, but is not permitted to disclose the basis for the representation except to the extent determined by

a court.

Rules variations

District of Columbia:

DC RPC 8.5(b)(2). Rules 8.5. DC’s rule departs from MRPC 8.5(b) by providing: “(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.”

Washington:

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

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

WA RPC 8.3(c). Rules 8.3. Washington has revised the model rule provision that protects against the reporting of otherwise confidential information as follows:

WRPC 8.3(c): This Rule does not permit a lawyer to report the professional misconduct of another lawyer or a judge to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6.

Statutes

California:

Cal. Prob. Code §§ 10810-10811. Rules 1.5. California has a statute governing the ordinary compensation of an attorney for a personal representative based on the value of the estate accounted for by the personal representative. “For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Cal. Prob. Code § 10810. California also allows additional compensation for “extraordinary” legal services rendered to a personal representative. Cal. Prob. Code § 10811. The same statute allows for an attorney and personal representative to agree upon the provision of extraordinary services on a contingent fee basis provided the court approves the agreement as reasonable and other statutory conditions are met.

Cal.Prob.C. §§10804, 15642(b)(6). Rules 1.7. California has adopted detailed legislation restricting the methods by which a client may appoint the client’s lawyer as a fiduciary. Any individual who has a fiduciary relationship to the transferor who drafts, transcribes or causes to be drafted or transcribed any instrument of transfer (i.e., will, trust, deed, etc.) (including relatives, cohabitants and partners and employees of such individuals) is defined as a “disqualified person.” Such an individual who is named as a sole trustee may be removed unless the court finds that it is fair, just and equitable that the trustee continue to serve as such. “Disqualified” status may be avoided if the otherwise disqualified person is related by blood or marriage to or is a cohabitant with the transferor or if an *independent* attorney certifies (on a statutorily prescribed form) that the transfer was not the product of fraud, menace, duress or undue influence. The legislation also places limits on dual compensation for an attorney who is also acting as a fiduciary.

Cal. Prob. Code §§21380-92. Rules 1.8. California has enacted detailed legislation presuming undue influence (and therefore voiding any gift) where (among other things) a gift is made to the drafter of the instrument or someone in a fiduciary or employment relationship with the donor, or to relatives by blood or marriage of or cohabitants with such persons. The presumption is irrebutable if the gift is to the drafter, or someone related to the drafter as provided above. Exceptions to disqualification include: (i) if the otherwise disqualified person is related by blood or marriage to or a cohabitant with the transferor; or (ii) if an *independent* attorney certifies that the transfer was not the product of fraud, menace, duress or undue influence.

Cal. Prob. C. §§10804, 15687. Rules 1.5, 1.7, 1.8. California by statute prohibits lawyers who are serving as fiduciaries from collecting dual compensation unless such dual compensation is specifically authorized by the court in the conservatorship, guardianship or estate context or, in the case of inter vivos trusts, following advance notice to the beneficiaries and no objection by the beneficiaries. A purported waiver of these provisions in any instrument of transfer is void as against public policy.

Florida:

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

South Carolina:

SC Code §62-1-109. Rules 1.1, 1.2. Topics: Malpractice. This statute states that, unless provided otherwise in written employment agreement, the attorney representing a fiduciary does not have duties to other persons interested in the estate or trust, even if fiduciary funds are used to compensate the lawyer for services rendered to the fiduciary.

Wisconsin:

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

Texas:

Texas Probate Code §58b. Rules 1.8. The statute provides in subsection (a): “A devise or bequest of property in a will to an attorney who prepares or supervises the preparation of the will or a devise or bequest of property in a will to an heir or employee of the attorney who prepares or supervises the preparation of the will is void.” Subsection (b) exempts “a bequest made to a person who is related within the third degree by consanguinity or affinity to the testator....”

Related Secondary Materials

FATF

Rules 1.2; 1.6; 3.3; 4.1. Topics: Money Laundering.

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

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

(FATF RBA Guidance at ¶12)(emphasis added).

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

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

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

“Legal arrangements” refers to express trusts or other similar legal arrangements.

See FATF 40 Recommendations (2004)(Glossary) available on-line at <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%202040%20Recommendations%20rc.pdf> (8-13-2013).

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

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

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

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

In August 2010 the ABA’s policymaking House of Delegates adopted the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing

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

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

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

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

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved. For example, the fact that clients are deemed to be “Politically Exposed Persons,” (e.g., domestic or foreign senior government, judicial, or military officials) may justify enhanced due diligence on the part of the lawyer because of the potential for corruption. Clients or legal matters associated with countries that are subject to sanctions or embargoes issued by the United Nations, or those identified by credible sources as having significant levels of corruption or other criminal activity or that provide funds or support to terrorist organizations, may require greater examination. Furthermore, clients who ask that the lawyer handle actual receipt and transmission of funds or those who request accelerated real estate transfers for no apparent reason may also require an extra level of scrutiny.

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

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

In October 2014, the ABA collaborated with the International Bar Association and the Council of Bars and Law Societies of Europe to publish *A LAWYER'S GUIDE TO DETECTING AND PREVENTING MONEY LAUNDERING*.

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventin_gmoneylaundering_authcheckdam.pdf (last visited November 10, 2015). Unlike the other ABA publications noted above, this Lawyer's Guide is addressed to lawyer around the world. It provides useful guidance for American lawyers doing cross border work.

See also *Combating Threats to the International Financial System: The Financial Action Task Force*, 59 N.Y.L. Sch. L. Rev. 417–602 (2014–2015) available on-line at <http://www.nyslawreview.com/201415-volume-59-number-3/>.

American Bar Association Materials

ABA Materials on FATF. See FATF section above.

ABA Probate and Trust Division, Report of the Special Study Committee on Professional Responsibility, Report: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife; Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary; and Counseling the Fiduciary. 28 *Real Property, Probate & Trust Journal* 765-863 (1994). [Rules 1.4, 1.6, 1.7, 1.16] The representation of a husband and wife is one of the subjects that has been studied by the ABA Probate and Trust Division Special Study Committee on Professional Responsibility (“the ABA Special Committee”). *Id.* at 765-802. The ABA Special Committee recommends the practice of having an agreement that sets out the ground rules of representation. *Id.* at 801. Absent such an agreement, a representation of husband and wife is a joint representation. *Id.* at 778. The ABA Committee takes the position that a lawyer may represent a husband and wife separately, agreeing to maintain the confidences of each, provided the mode of representation is clearly spelled out in an agreement. *Id.* at 794. Even where there is such an agreement to represent spouses separately, however, if a lawyer's independence of judgment and duty to one spouse are compromised by the disclosure of adverse confidences by the other, the lawyer must be prepared to withdraw. *Id.* at 800. In the context of a joint representation, problems arise where one spouse tells the lawyer of a fact or goal that he or she desires to remain confidential from the other spouse. *Id.* at 783-93. If a confidence is communicated by one spouse, the Report suggests that the lawyer must inquire “into the nature of the confidence to permit the lawyer to determine whether the couple's difference that caused the information to be secret constitutes either a material potential for conflict or a true adversity.” *Id.* at 784, 28. The Report goes on to describe three broad types of confidences that may cause the lawyer to conclude that the differences between the spouses make the spouses' interests truly adverse: (1) Action-related confidences, in which the lawyer is asked to give advice or prepare documents without the knowledge of the other spouse, that would reduce or defeat the other spouse's interest in the confiding spouse's property or pass the confiding spouse's property to another person; (2) Prejudicial confidences, which seek no action by the lawyer, but nonetheless indicate a substantial potential of material harm to the interests of the other spouse; and (3) Factual confidences which indicate that the expectations of one spouse with respect to an estate plan, or the spouse's understanding of the plan, are not true. *Id.* at 785-86. Because an unexpected letter of withdrawal may not protect a confidence from disclosure, the ABA Committee concluded that “[t]he lawyer must balance the potential for material harm arising from an unexpected withdrawal against the potential for material harm arising from the failure to disclose

the confidence” to the other spouse.” Id. at 792.

ABA Standing Committee on Paralegals, Model Guidelines for the Utilization of Paralegals (2004 rev.), available at <http://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf>. [Rules 5.3]

ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 22 (Reciprocal Discipline and Reciprocal Disability Inactive Status), sets out the ABA recommendations for reciprocal discipline. [Rules 8.5]

The Commentary is instructive:

Commentary

If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

Disciplinary counsel in the forum jurisdiction should be notified by disciplinary counsel of the jurisdiction where the original discipline or disability inactive status was imposed. Upon receipt of such information, disciplinary counsel should promptly obtain and serve upon the lawyer an order to show cause why identical discipline or disability inactive status should not be imposed in the forum jurisdiction. The certified copy of the order in the original jurisdiction should be incorporated into the order to show cause.

The imposition of discipline or disability inactive status in one jurisdiction does not mean that every other jurisdiction in which the lawyer is admitted must necessarily impose discipline or disability inactive status. The agency has jurisdiction to recommend reciprocal discipline or disability inactive status on the basis of public discipline or disability inactive status imposed by a jurisdiction in which the respondent is licensed. The agency should consider any difference, in kind or scope, between the sanction imposed in the originating jurisdiction and the sanctions available in the forum jurisdiction.

A judicial determination of misconduct or disability by the respondent in another jurisdiction is conclusive, and not subject to relitigation in the forum state. The court should impose identical discipline or disability inactive status unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the

grounds specified in paragraph D exists. This Rule applies whether or not the respondent is admitted to practice in that jurisdiction. See also Model Rule 8.5, Comment [1], Model Rules of Professional Conduct.

American Law Institute

Selections from the Restatement (Third) of the Law Governing Lawyers (2000)

Restatement (Third) of the Law Governing Lawyers (2000), §14 Formation of a Client-Lawyer Relationship, Comments f and i. [Rules 1.2]

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

Comment i. Others to whom lawyers owe duties. In some situations, lawyers owe duties to nonclients resembling those owed to clients. Thus, a lawyer owes certain duties to members of a class in a class action in which the lawyer appears as lawyer for the class (see Comment f) and to prospective clients who never become clients (see §15). Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer, to trust beneficiaries by a lawyer representing the trustee, and to certain nonclients in other situations (see §134, Comment f; see also Comment f hereto). What duties are owed can be determined only by close analysis of the circumstances and the relevant law and policies. A lawyer may also become subject to duties to a non-client by becoming, for example, a trustee, or corporate director. On conflicts between such duties and duties the lawyer owes clients, see §135; see also §96. On civil liability to nonclients, see §§51 [Duty of Care to Certain Nonclients] and 56 [Liability to a Client or Nonclient under General Law].

Restatement (Third) of the Law Governing Lawyers (2000), §51 Duty of Care to Certain Nonclients [Rules 1.1, 1.2]

For purposes of liability under §48 [*Professional Negligence—Elements and Defenses Generally*], a lawyer owes a duty to use care within the meaning of §52 [The Standard of Care] in each of the following circumstances:(4) to a nonclient when and to the extent that:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the

- client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the nonclient is not reasonably able to protect its rights; and
 - (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Illustrations:

5. Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures (see §67 [Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss]). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.
6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though Lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.
7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

Restatement (Third) of Law Governing Lawyers §59, comments d & e. [Rules 1.6]

d. Generally known information. Confidential client information does not include information that is generally known. Such information may be employed by lawyer who possesses it in permissibly representing other clients (see § 60, Comments g & h) and in other contexts where there is a specific justification for doing so (compare Comment e hereto). Information might be generally known at the time it is conveyed to the lawyer or might become generally known thereafter. At the same time, the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Moreover, if a current client specifically requests that information of any kind not be used or disclosed in ways otherwise permissible, the lawyer must either honor that request or withdraw from the representation (see § 32; see also §§ 16(2) & 21(2)).

Comment e. Information concerning law, legal institutions, and similar matters. Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. Such information is part of the general fund of information available to the lawyer. During legal research of an issue while representing a client, a lawyer may discover a particularly important precedent or devise a novel legal approach that is useful both in the immediate matter and in other representations. The lawyer and other members of the lawyer's firm may use and disclose that information in other representations, so long as they thereby disclose no confidential client information except as permitted by § 60. A lawyer may use such information-about the state of the law, the best way to approach an administrative agency, the preferable way to frame an argument before a particular judge-in a future, otherwise unrelated representation that is adverse to the former client. On the otherwise general prohibition against adverse use or disclosure of confidential information of a former client, see § 132, Comment f.

Restatement (Third) of the Law Governing Lawyers (2000), §60 A Lawyer's Duty to Safeguard Confidential Client Information. [Rules 1.6]

- (1) Except as provided in §§61-67, during and after representation of a client:
 - (a) the lawyer may not use or disclose confidential client information as defined in §59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information;
 - (b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.
- (2) Except as stated in §62, a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

Restatement (Third) of the Law Governing Lawyers (2000), §67 Using or Disclosing

Information to Prevent, Rectify, or Mitigate Substantial Financial Loss. [Rules 1.6]

- (1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:
 - (a) the crime or fraud threatens substantial financial loss;
 - (b) the loss has not yet occurred;
 - (c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and
 - (d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.
- (2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.
- (3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss. The lawyer must, if feasible, also advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.
- (4) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

Restatement (Third) of the Law Governing Lawyers (2000), §81A Dispute Concerning a Decedent's Disposition of Property, Comment b. [Rules 1.6]

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

Restatement (Third) of the Law Governing Lawyers (2000) §135 (A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient). [Rules 1.7]

This section addresses conflicts of interest that arise as a result of serving as a fiduciary, such as a personal representative or trustee. See, in particular, comment c and related illustrations.

Restatement (Third) of Law Governing Law § 127 (2000). [Rules 1.8]

- (3) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

(4) A lawyer may not accept a gift from a client, including a testamentary gift, unless:

- (a) the lawyer is a relative or other natural object of the client's generosity;
- (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or
- (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

Restatement (Third) of the Law Governing Lawyers (2000) §123 (Imputation of a Conflict of Interest to an Affiliated Lawyer) covers imputation of conflicts of interest among “affiliated lawyers” and & §124 (Removing Imputation) covers removal of such imputation by screening. [Rules 1.7, 1.9, 1.10]

Note that the circumstances under which the Restatement would allow removal of imputation are narrower than under MRPC 1.10.

Restatement (Third) of the Law Governing Lawyers (2000) §§44 (Safeguarding and Segregating Property), 45 (Surrendering Possession of Property) and 46 (Documents Relating to a Representation). [Rules 1.15]

These sections address the issues covered by MRPC 1.15.

Restatement (Third) of Law Governing Law § 11 (2000). [Rules 5.3]

Section 11 is virtually identical to MRPC 5.3, but there are much more extensive comments to the Restatement section.

Miscellaneous

Douglas R. Richmond, “Watching over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants,” 61 U. Kan. L. Rev. 441, 448-49 (2012). Rules 5.3.

Charles F. Gibbs, The Marketing of Living Trusts by Non-Attorney Promoters, 20 ACTEC Notes 193 (1994)

Estate Planning Specialist Programs. [Rules 7.4]

There is one ABA-accredited program for becoming certified as an estate planner. For further information, see http://www.naepc.org/designations/estate_law .

The ABA also maintains a list of states with certification programs. www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html . As of August 2015, the ABA identified ten states that certify lawyers as specialists in trust and estate practice, as follows:

Arizona certifies lawyers as “estate and trust” specialists. For further information, see

http://www.azbar.org/media/93752/estate_and_trust_standards.pdf .

California certifies lawyers as “Estate Planning, Trust and Probate Law” specialists. For further information, see <http://ls.calbar.ca.gov/LegalSpecialization/LegalSpecialtyAreas.aspx> .

Florida certifies lawyers as “Wills, Trusts, and Estates Lawyers.” For further information, see <http://www.floridabar.org/divexe/rrtfb.nsf/FV/84FEFCCB8F67617585256BC20072E1B1>

Louisiana certifies lawyers in “estate planning and administration. For further information, see http://www.lascmcle.org/specialization/EP_Standards-Revised_1-17-15.pdf.

New Mexico certifies lawyers in “estate planning, trusts and probate law.” For further information, see <http://www.nmlegalspecialization.org/forms/EstatePlanningProbateAndTrustsStandards.pdf>.

North Carolina certifies lawyers in “estate planning law.” For further information, see http://www.nclawspecialists.org/certification_standards.pdf.

Ohio certifies lawyers in “estate planning, trust and probate law.” For further information, see <https://www.ohiobar.org/forlawyers/certification/attorney/Pages/StaticPage-57.aspx> .

South Carolina certifies lawyers in “estate planning and probate law.” For further information, see <http://www.commcle.org/pdf/epps&p.pdf> .

Tennessee certifies lawyers as “estate planning specialists.” See <http://www.cletn.com/index.php/general-information/specialist/>. Tennessee lawyers with access can obtain further information at <https://www.cletn.com/index.php/for-attorneys> .

Texas certifies lawyers as “Estate Planning and Probate” specialists. For further information, see <http://www.tbls.org/SpecialtyAreas.aspx>