ACTEC

Commentaries

ON THE MODEL RULES OF PROFESSIONAL CONDUCT

Fourth Edition 2006

COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT

Fourth Edition 2006

The American College of Trust and Estate Counsel Foundation

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ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT

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Fourth Edition, 2006

Neither the Model Rules of Professional Conduct (MRPC) nor the Comments to them provide sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. Recognizing the need to fill this gap, ACTEC has developed the following Commentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others regarding their professional responsibilities. First published in 1993, the Commentaries continue to assist courts, ethics committees and others concerned with issues regarding the professional responsibility of trusts and estates lawyers. Although the Commentaries refer specifically to the MRPC, their content is also usually applicable to the Code of Professional Responsibility, which remains in effect in a few states and, like the MRPC, does not provide sufficient guidance to trusts and estates lawyers. The Commentaries generally seek to identify various ways in which common problems can be dealt with, without expressly mandating or prohibiting particular conduct by trusts and estates lawyers. While the Commentaries are intended to provide general guidance, ACTEC recognizes and respects the wide variation in the rules, decisions, and ethics opinions adopted by the several jurisdictions with respect to many of these subjects.

 March 2006

TABLE OF CONTENTS

THE COMMENTARIES

REPORTER'S NOTE
First Edition

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

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

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

Duties of Trusts and Estates Lawyers Incompletely and Inconsistently Described. In large measure the duties of trusts and estates lawyers are defined in many states by opinions rendered in malpractice actions, which provide incomplete and insufficient guidance regarding the ethical duties of lawyers. Compounding the problem, the decisions in malpractice actions and the legal principles upon which they are based vary considerably from jurisdiction to jurisdiction. Courts have perhaps had the most difficulty in defining the role and duties of the lawyer who represents a fiduciary in the fiduciary's representative capacity with respect to a fiduciary estate (who might be said to represent the fiduciary generally). For example, in a malpractice action brought by the beneficiaries of a fiduciary estate against the lawyer for the fiduciary, a California appellate court stated that the lawyer owed no duty to the beneficiaries of the estate. *Goldberg v. Frye*, 266 Cal. Rptr. 483 (Cal. App. 1990). Other appellate courts have reached the opposite conclusion, including courts in California. Thus, in *In re Estate of Halas*, 512 N.E.2d 1276, 1280 (Ill. App. 1987), the court stated that, "The attorney for the executor, therefore, must act with due care and protect the interests of the beneficiaries." Similarly, in *Charleson v. Hardesty*, 839 P.2d 1303 (Nev. 1992), the court wrote that the lawyer for a personal representative owes the beneficiaries "a duty of care and fiduciary duties." *Id*. at 1307. See also *Fickett v. Superior Court*, 588 P.2d 988 (Ariz. App. 1976), in which the court held that the lawyer for the guardian owed a duty directly to the ward to protect the ward's interests.

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

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

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

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

Good Faith, Fairness and Impartiality. The lawyer who represents a fiduciary generally is required to act in good faith and with fairness toward the beneficiaries. In addition, the lawyer should advise the fiduciary to act impartially with respect to the beneficiaries and to provide the beneficiaries with information regarding material matters affecting their interests in the fiduciary estate. Consistent with the provisions

of the MRPC, especially MRPC 4.1 (Truthfulness in Statements to Others), the lawyer may not deliberately misinform or mislead the beneficiaries or withhold information from them. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

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

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

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

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

October 1993

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

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

REPORTER'S NOTE
Second Edition

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

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

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

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

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

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

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

March 1995

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

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

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

REPORTER'S NOTE
Third Edition

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

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

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

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

June 1999

Bruce S. Ross,
Reporter for the Third Edition

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

REPORTERS' NOTE
Fourth Edition

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

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

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

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

August 2005

Charles M. Bennett
Co-Reporter for the Fourth Edition

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

INTRODUCTION

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

Excerpts from Preamble

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

* * * * *

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

Excerpts from Scope

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

* * * * *

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

JURISDICTIONS THAT HAVE ADOPTED THE MODEL RULES OF PROFESSIONAL CONDUCT

Forty-six states, the District of Columbia, and the Virgin Islands have adopted the MRPC, often with significant modifications. In addition, one state (New York) amended its version of the Model Code to reflect certain Model Rules provisions. One state, California, did not originally base its Rules of Professional Conduct on the Model Code and declined to base the 1989 revision of its Rules on the MRPC. The following jurisdictions have adopted the MRPC, often with state-specific amendments, with the effective dates shown:

Alabama	January 1, 1991
Alaska	July 15, 1993
Arizona	February 1, 1985
Arkansas	January 1, 1986
Colorado	January 1, 1993
Connecticut	October 1, 1986
Delaware	October 1, 1985
District of Columbia	January 1, 1991
Florida	January 1, 1987
Georgia	June 12, 2000
Hawaii	January 1, 1995
Idaho	November 1, 1986
Illinois	August 1, 1990
Indiana	January 1, 1987
Iowa*	April 20, 2005
Kansas	March 1, 1988
Kentucky	January 1, 1990
Louisiana	January 1, 1987
Maryland	January 1, 1987
Massachusetts	January 1, 1998
Michigan	October 1, 1988
Minnesota	September 1, 1985
Mississippi	July 1, 1987
Missouri	January 1, 1986
Montana	July 1, 1985
Nebraska*	June 8, 2005
Nevada	March 28, 1986
New Hampshire	February 1, 1986
New Jersey	September 10, 1984
New Mexico	January 1, 1987
North Carolina	October 7, 1985
North Dakota	January 1, 1988
Oklahoma	July 1, 1988
Oregon*	January 1, 2005
Pennsylvania	April 1, 1988

Rhode Island	November 15, 1988
South Carolina	September 1, 1990
South Dakota	July 1, 1988
Tennessee*	August 27, 2002
Texas	January 1, 1990
Utah	January 1, 1988
Vermont	March 9, 1999
Virgin Islands	January 28, 1991
Virginia	January 25, 1999
Washington	September 1, 1985
West Virginia	January 1, 1989
Wisconsin	January 1, 1988
Wyoming	January 12, 1987

*These states adopted the MRPC for the first time after the ABA's 2002 revisions to the Model Rules.

CAVEAT TO ANNOTATIONS

Limiting the Scope and Purpose of the Annotations

The Annotations that follow each Commentary include references to a broad (but not exhaustive) range of cases, ethics opinions and secondary authorities that deal with the professional responsibility of trusts and estates lawyers. Reflecting various approaches taken in different jurisdictions, the cases and ethics opinions are often inconsistent and cannot be harmonized. The summaries of the cases and ethics opinions are not part of the Commentaries. They are included for illustrative purposes only and do not necessarily reflect the judgment of the Reporters or ACTEC regarding the issues involved.

MRPC 1.0: TERMINOLOGY

…

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

…

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

…

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

…

ACTEC COMMENTARY ON MRPC 1.0

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

Confirmed in Writing. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained informed consent, the lawyer may act in reliance on that consent, so long as it is confirmed in writing within a reasonable time thereafter.

The lawyer must make reasonable efforts to ensure that the client possesses information as to the law and the facts reasonably adequate to make an informed decision. Not all consents must be confirmed in writing to be binding, however. See, e.g., MRPC 1.2(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent); MRPC 1.6(a) (Confidentiality of Information) (providing that a lawyer with certain exceptions shall not reveal information relating to the representation of a client unless the client gives informed consent). Generally, a client or other person who is independently represented by other counsel in giving the consent may be assumed to have given informed consent.

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

MRPC 1.1: COMPETENCE

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

ACTEC COMMENTARY ON MRPC 1.1

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

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

Importance of Facts. A lawyer who is engaged by a client in an estate planning matter should inform the client of the importance of giving the lawyer complete and accurate information regarding relevant matters such as the ownership and value of assets and the state of beneficiary designations under life insurance policies and employee benefit plans. Having so cautioned a client, the lawyer is generally entitled to rely upon information supplied by the client, unless the circumstances indicate that the information should be verified. The lawyer should verify the information provided by the client if the client appears to be uncertain about it or if other circumstances create doubts about its accuracy.

Supervising Execution of Documents. Generally, the lawyer who prepares estate planning documents for a client should supervise their execution. Of course, he or she may arrange for another lawyer to do so. If it is not practical for a lawyer to supervise the execution or if the client so requests, the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which they should be executed. The lawyer should do so only if the lawyer reasonably believes that the client is sufficiently sophisticated and reliable to follow the instructions. Note that in some jurisdictions the supervision of the execution of estate planning documents constitutes the practice of law, which a lawyer may not delegate to a member of the lawyer's staff who is not a lawyer.

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

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

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

A lawyer should provide adequate training, supervision and oversight of the lawyer's staff in order to protect the interests of the lawyer's clients.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Disciplinary Cases

California:

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

Latten v. State Bar, 268 Cal. Rptr. 845 (1990). 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.

Colorado:

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

Indiana:

In re Matter of Deardorff, 426 N.E.2d 689 (Ind. 1981). 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.

In re Matter of Noel, 622 N.E.2d 154 (Ind. 1993). 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.

Iowa:

Committee on Professional Ethics v. Hutcheson, 504 N.W.2d 898 (Iowa 1993). 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.

Kansas:

In re Matter of Jenkins, 877 P.2d 423 (Kan. 1994). 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.

Maryland:

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

New Jersey:

In re Matter of Ort, 631 A.2d 937 (N.J. 1993). 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.

New York:

In re Matter of Levine, 609 N.Y.S.2d 664 (App. Div. 1994). 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). A lawyer was disbarred for multiple violations of the Code of Professional Responsibility, including misappropriation of trust and escrow funds.

Ohio:

Bar Ass'n of Greater Cleveland v. Shillman, 402 N.E.2d 514 (Ohio 1987). 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.

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

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

Oregon:

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

South Carolina:

Matter of Kenyon, 491 S.E.2d 252 (S.C. 1997). 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.

Malpractice Cases

England:

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

> In broad terms, the question is whether solicitors who prepare a will are liable to a beneficiary under it if, through their negligence, the gift to the beneficiary is void. The solicitors are liable, of course, to the testator or his estate for a breach of the duty that they owed to him, though as he has suffered no financial loss it seems that his estate could recover no more than nominal damages. Yet it is said that however careless the solicitors were, they owed no duty to the beneficiary, and so they cannot be liable to her.
>
> If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim. 3 All Eng. Reports at 582-583.

Alaska:

Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

California:

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

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

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

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

Borissoff v. Taylor & Faust, 15 Cal. Rptr. 3d 735 (2004). 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.

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

> We are not aware of any cases or guidelines establishing in a civil case a standard for the reasonable, diligent and competent assistance of an attorney engaged in estate planning and preparing a trust with a marital deduction provision. We merely hold that the potential tax

> problems of general powers of appointment in inter vivos or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present. [Fn. omitted.] 129 Cal. Rptr. at 521.

Davis v. Damrell, 174 Cal. Rptr. 257 (Ct. App. 1981). 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.

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

Horne v. Peckham, 158 Cal. Rptr. 714 (Ct. App. 1979). 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.

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

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

Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573 (Ct. App. 1995). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.3.

Sindell v. Gibson, Dunn & Crutcher, 63 Cal. Rptr 2d 594 (Ct. App. 1997). In this case the court held that the intended beneficiaries of a law firm's estate planning services rendered for the beneficiaries' father suffered "actual injury" (attorneys' fees and litigation expenses) in defending a lawsuit

by the surviving spouse's conservator that plaintiffs alleged would not have been filed but for the law firm's failure to obtain a waiver of community property rights from the allegedly willing spouse when she was competent.

Smith v. Lewis, 118 Cal. Rptr. 621 (1975). 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.

Colorado:

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

Connecticut:

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

Stowe v. Smith, 441 A.2d 81 (Conn. 1981). 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.

Delaware:

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

District of Columbia:

Hopkins v. Akins, 637 A.2d 424 (D.C. 1993). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

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

Florida:

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

> In the area of will drafting, a limited exception to the strict privity requirement has been allowed where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third-party. [Citations omitted.]
>
> * * *
>
> [W]e adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's lawyer. 612 So. 2d at 1380. [Emphasis added.]

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

Murphy v. Fischer, 618 So.2d 238 (Fla. Ct. App. 1993). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Georgia:

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

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

Riser v. Livsey, 227 S.E.2d 88 (Ga. Ct. App. 1976). In this action for legal malpractice, the court assumed that a beneficiary under a will could bring an action for legal malpractice against the attor-

ney-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.

Hawaii:

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

> 1) 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.

Idaho:

Harrigfeld v. Hancock, 90 P.3d 884, 888 (Idaho 2004). 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.

Illinois:

Jewish Hosp. v. Boatmen's Nat'l Bank, 633 N.E.2d 1267 (Ill. App. 1994), *appeal denied*, 642 N.E.2d 1282 (1994). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

McLane v. Russell, 546 N.E.2d 499 (Ill. 1989). 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.

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

Rutkoski v. Hollis, 600 N.E.2d 1284 (Ill. App. 1992). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Indiana:

Hermann v. Frey, 537 N.E.2d 529 (Ind. Ct. App. 1989). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

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

Iowa:

Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

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

Kansas:

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). 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.

Kentucky:

Cave v. O'Bryan, No. 2002-CA-002601-MR, 2004 WL 869364 (Ky. Ct. App. 2004). An intended beneficiary of a will may maintain a malpractice action against the testator's attorney alleging that the estate was not distributed according to the testator's intent. After acknowledging that the "clear trend" among courts in other jurisdictions is to hold that estate beneficiaries are intended to benefit from the services rendered by attorneys to their testator-clients, the court held that an attorney owes a "duty of care to the direct, intended, and specifically identifiable beneficiaries of the estate planning client, notwithstanding a lack of privity."

Louisiana:

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). 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."

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

Maryland:

Ferguson v. Cramer, 709 A.2d 1279 (Md. 1998). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Noble v. Bruce, 709 A.2d 1264 (Md. 1998). The Court of Appeals (Maryland's highest court) held that a testamentary beneficiary, who is not a client of the drafting lawyer, may not maintain a malpractice

action against the lawyer for allegedly providing negligent estate planning advice to the testator or negligently drafting the testator's will in a manner which resulted in significant estate and inheritance taxes that could have been avoided, thus re-establishing the strict privity rule in Maryland.

Massachusetts:

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

Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Michigan:

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

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

Minnesota:

Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734 (Minn. Ct. App. 1995), *review denied,* 1995 Minn. LEXIS 859 (1995). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981). 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.

Witzman v. Gross, 148 F.3d 988 (8th Cir. 1998). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Missouri:

Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. 1995). In this malpractice case the Supreme Court of Missouri aligned Missouri's law with the majority rule in holding that lack

of privity was not a defense to an action for alleged malpractice in the drafting of a testamentary instrument.

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

Montana:

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

Estate of Watkins v. Hedman, Hileman & Lacosta, 91 P.3d 1264 (Mont. 2004). 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.

Nebraska:

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

New Hampshire:

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

New Jersey:

Albright v. Burns, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Barner v. Sheldon, 678 A.2d 717 (N.J. Super. Ct. App. Div. 1996). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Fitzgerald v. Linnus, 765 A.2d 251 (N.J. Super. Ct. App. Div. 2001). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Lovett v. Estate of Lovett, 593 A.2d 382 (N.J. Super. 1991). This case involved various charges of misconduct by a lawyer in connection with the preparation of a will, including a failure to meet with the husband-testator out of the presence of his second wife who would receive a share of his estate outright under the new will rather than in trust for her; a failure to counsel the client adequately with respect to tax matters; and a failure to obtain information regarding the husband's assets. Although the charges were rejected by the court, it stated that, "[i]n most circumstances, meeting with a client alone would be well advised." 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.

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

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

New Mexico:

Leyba v. Whitley, 907 P.2d 172 (N.M. 1995). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

New York:

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). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Kramer v. Belfi, 482 N.Y.S.2d 898 (App. Div. 1984). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

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

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

Weingarten v. Warren, 753 F. Supp. 491 (S.D.N.Y. 1990). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

North Carolina:

Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. 1984), *review denied*, 321 S.E.2d 136 (N.C. 1984). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Ohio:

Elam v. Hyatt Legal Serv., 541 N.E.2d 616 (Ohio 1989). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Kutnick v. Fischer, 2004 WL 2251799 (Ohio Ct. App. 2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.14.

Lewis v. Star Bank, N.A., 630 N.E.2d 418 (Ohio Ct. App. 1993). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Simon v. Zipperstein, 512 N.E.2d 636 (Ohio 1987). 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. However, see *Elam v. Hyatt Legal Services*, discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Oklahoma:

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

Oregon:

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

Pennsylvania:

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

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

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

Estate of Newhart, 22 Fid. Rep. 2d 383 [Montg. Cty (Pa.) 2002]. 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.

South Carolina:

Sims v. Hall, 592 S.E.2d 315 (S.C. Ct. App. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

South Dakota:

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

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

Texas:

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

> With an obscure reference to "the greater good" [citation omitted], the Court unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing, and unjustly denies legal recourse to the grandchildren for whose benefit [Testator] hired a lawyer in the first place….
>
> By refusing to recognize a lawyer's duty to beneficiaries of a will, the Court embraces a rule recognized in only four states, [footnote omitted] while simultaneously rejecting the rule in an overwhelming majority of jurisdictions. [Footnote omitted] Notwithstanding the fact that in recent years the Court has sought to align itself with the mainstream of American jurisprudence, [footnote omitted] the Court inexplicably balks in this case. 923 S.W.2d at 579-580.

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 141 S.W.3d 706 (Tex. Ct. App. 2004). The court refused to allow the executrixes of the testator's estate to bring a malpractice action against the attor-

neys who provided estate planning services to the testator during his lifetime. According to the court, the executrixes could not bring a legal malpractice claim against the attorneys because they were not in privity with the attorneys and therefore could not establish that the attorneys owed them a duty.

Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. Ct. App. 1993). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Utah:

Oxendine v. Overturf, 973 P.2d 417 (Utah 1999). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Virginia:

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

Rutter v. Jones, Blechman, Woltz & Kelly, 568 S.E.2d 693 (Va. 2002). Virginia, one of the very few "privity" jurisdictions left in the country whose courts hold that no intended beneficiary may sue the decedent's estate planning lawyer for alleged negligence when the testator's estate plan fails to achieve its intended purposes as a result of the estate planner's alleged negligence, retains its consistent approach to this issue 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:

Leipham v. Adams, 894 P.2d 576 (Wash. Ct. App. 1995), *review denied,* 904 P.2d 1157 (Wash. 1995). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Trask v. Butler, 872 P.2d 1080 (Wash. 1994). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

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

West Virginia:

Brammer v. Taylor, 338 S.E.2d 207 (W.Va. 1985). 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.

Wisconsin:

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

Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983). 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.

Ethics Opinions

Delaware:

Board Case No. 30 (2001). 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.

New Mexico:

Op. 2001-1 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Utah:

Op. No. 97-09 (1997). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

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

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

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

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

ACTEC COMMENTARY ON MRPC 1.2

General Principles. The client and the lawyer, working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client. If multiple clients are involved, the lawyer should discuss with them the scope of the representation and any actual or potential conflicts and determine the basis upon which the lawyer will undertake the representation. As stated in the Comment to MRPC 1.7 (Conflict of Interest: Current Clients) with respect to estate administration, "the lawyer should make clear the lawyer's relationship to the parties involved." Also, as indicated in the ACTEC Commentaries on MRPCs 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients) and former MRPC 2.2 (Intermediary), it is often permissible for a lawyer to represent more than one client in a single matter or in related matters. A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.

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

Multiple Fiduciaries. A lawyer may represent co-fiduciaries in connection with the administration of a fiduciary estate subject to the requirements of the MRPC, particularly MRPC 1.7 (Conflict of Interest: Current Clients). Before accepting the representation, the lawyer should explain to the co-fiduciaries the implications of the representation, including the extent to which the lawyer will maintain confidences as between the co-fiduciaries. If the co-fiduciaries become adversaries with respect to matters related to the representation, the lawyer may be permitted to continue the representation of one co-fiduciary with the informed consent and waiver of the other co-fiduciary. If the lawyer has been engaged to act as an intermediary under former MRPC 2.2 (Intermediary), the lawyer would be required to withdraw from the representation ("as intermediary") upon the request of one of the co-fiduciaries.

Communication with Beneficiaries of Fiduciary Estate. The lawyer engaged by a fiduciary to represent the fiduciary generally in connection with a fiduciary estate may communicate directly with the beneficiaries regarding the nature of the relationship between the lawyer and the beneficiaries. However, the fiduciary is primarily responsible for communicating with the beneficiaries regarding the fiduciary estate. An early meeting between the fiduciary, the lawyer, and the beneficiaries may provide all parties with a better understanding of the proceeding and lead to a more efficient administration. See ACTEC Commentaries on MRPCs 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

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

Representation of Fiduciary in Representative and Individual Capacities. The lawyer may represent the fiduciary in a representative capacity and as a beneficiary, except as otherwise proscribed, as it may be in some cases by MRPC 1.7 (Conflict of Interest: Current Clients).

> Example 1.2-1. Lawyer (*L*) drew a will for *X* in which *X* left her entire estate in equal shares to *A* and *B* and appointed *A* as executor. *X* died, survived by *A* and *B*. *A* asked *L* to represent her both as executor and as beneficiary. *L* explained to *A* the duties *A* would have as personal representative, including the duty of impartiality toward the beneficiaries. *L* also described to *A* the implications of the common representation, to which *A* consented. *L* may properly represent *A* in both capacities. However, *L* should inform *B* of the dual representation and indicate that *B* may, at his or her own expense, retain independent counsel. In addition, *L* should maintain separate records with respect to the individual representation of *A*, who should be charged a separate fee (payable by *A* individually) for that representation. *L* may properly counsel *A* with respect to her interests as beneficiary. However, *L* may not assert *A*'s individual rights on *A*'s behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits *L*'s ability to function as *A*'s lawyer in both capacities, *L* should withdraw from representing *A* in one or both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

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

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

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

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

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

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

Disagreement Between Lawyer and Client as to Means for Accomplishing Client's Objectives. If an adequately informed client directs the lawyer to take action contrary to the lawyer's advice, and the action is neither illegal nor unethical, the lawyer should generally follow the client's direction. See MRPCs 1.4(a)(5) and 1.4(b) (Communication), and 1.16(b) (Declining or Terminating Representation). A client might insist, for example, that a "simple" will alone is all that is needed to accomplish the client's estate planning objectives. The lawyer, however, might disagree. In the lawyer's professional opinion, a revocable inter vivos trust and a pour-over will would better achieve those objectives. Provided the lawyer obtains the client's informed con-

sent, the lawyer may proceed against the lawyer's better professional judgment to prepare the "simple" will. See ACTEC Commentary on MRPC 1.0(e) (Terminology) (defining *informed consent*).

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

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

Representation of Fiduciary in Representative, Not Individual, Capacity. If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity—the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries—not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is appropriate for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and Example 1.7-2.

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

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

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

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

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

Lawyer Serving as Fiduciary and Counsel to Fiduciary. Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer

previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long-standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Statute

South Carolina:

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

Cases

Alaska:

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

Arizona:

In re Estate of Shano, 869 P.2d 1203 (Ariz. 1993). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

California:

Borissoff v. Taylor & Faust, 15 Cal. Rptr. 3d 735 (2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

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

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

Johnson v. Superior Court, 45 Cal. Rptr. 2d 312, 317 (Ct. App. 1995). 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.

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

Morales v. Field, DeGoff, Huppert & MacGowan, 160 Cal. Rptr. 239 (Ct. App. 1980). 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.

Pierce v. Lyman, 3 Cal. Rptr. 2d 236 (Ct. App. 1991). 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). 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.

Sullivan v. Dorsa, 27 Cal. Rptr. 3d 547 (Ct. App. 2005). 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.

Colorado

Klancke v. Smith, 829 P.2d 464 (Colo. Ct. App. 1991). This case involved an action brought by the surviving children of an accident victim for breach of trust against the attorneys who had represented the victim's surviving spouse (the plaintiffs' step-mother) in a wrongful death action. The court held that the

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

People v. Woodford, 81 P.3d 370 (Colo. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Delaware:

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

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

District of Columbia:

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

Florida:

Barnett Nat'l Bank v. Compson, 639 So. 2d 849 (Fla. Dist. Ct. App. 1993). 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."

First Union Nat'l Bank of Florida v. Whitener, 715 So. 2d 979 (Fla. Dist. Ct. App. 1998), *review denied*, 727 So. 2d 915 (1999). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

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

> In Florida, the personal representative is the client rather than the estate or the beneficiaries. Rule 4-1.7, Rules Regulating the Florida Bar (Comment). It follows that counsel does not generate a conflict

> of interest in representing the personal representative in a matter simply because one or more of the beneficiaries takes a position adverse to that of the personal representative. A contrary result would raise havoc with the orderly administration of decedents' estates, not to mention the additional attorney's fees that would be generated.

Jacob v. Barton, 877 So. 2d 935 (Fla. Dist. Ct. App. 2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

Murphy v. Fischer, 618 So. 2d 238 (Fla. Ct. App. 1993). 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.

Georgia:

Rhone v. Bolden, 608 S.E.2d 22 (Ga. Ct. App. 2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Idaho:

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

Illinois:

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). 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."

In re Estate of Knoes, 448 N.E.2d 935, 940 (Ill. App. 1983). 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."

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). 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 mismanage-

ment 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.

Neal v. Baker, 551 N.E.2d 704 (Ill. App. 1990), *appeal denied*, 555 N.E.2d 378 (Ill. 1990). 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). 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.

Indiana:

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

Iowa:

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

Louisiana:

Succession of Wallace, 574 So. 2d 348 (La. 1991). This decision upholds a disciplinary rule previously issued by the court which allows a client to discharge his or her lawyer at any time for any reason. Under the separation of powers provided for in the Louisiana constitution, the court invalidated a statute that allowed an executor to discharge a lawyer designated in a will only for "just cause."

Citing numerous authorities the court stated that, "[I]t is universally held that when an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as an attorney of the executor, and not of the estate, and for his services the executor is personally responsible." 574 So. 2d at 357.

Maine:

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

Maryland:

Ferguson v. Cramer, 709 A.2d 1279 (Md. 1998). In this case, decided contemporaneously by the Court of Appeals (Maryland's highest court) with *Noble v. Bruce*, *supra*, discussed in the Annotations 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.

Massachusetts:

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

Minnesota:

Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734 (Minn. Ct. App. 1995), *review denied,* 1995 Minn. LEXIS 859 (1995). In a lawsuit brought by the beneficiaries of an estate against a personal representative and its attorneys for alleged negligence, the court adopted a modified multifactor balancing test (first enunciated in *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). 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.)

Montana:

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

Nevada:

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

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

New Jersey:

Albright v. Burns, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986). Before his uncle's death, a nephew acting pursuant to a power of attorney employed counsel to advise him in connection with the sale of certain stock and the making of a loan to the nephew's business. The attorney performed the requested services which included distributing the proceeds of the stock sale to the nephew. After the uncle's death, the attorney represented the nephew as personal representative of the estate. In an action by the estate beneficiaries against the attorney, the court applied the *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.

Barner v. Sheldon, 678 A.2d 717 (N.J. Super. Ct. App. Div. 1996). The court affirmed a summary judgment granted in favor of a lawyer who, while serving as the lawyer for the executor in an estate administration proceeding, had not advised the decedent's children to disclaim the bequests to them. Doing so would have increased the amount of the decedent's estate that would be received by the surviving spouse, thereby decreasing the estate tax liability of the decedent's estate. The appellate court held that under the circumstances, "the defendant had no duty to inform the beneficiaries of the tax consequences of their failure to disclaim." The court pointed to the decedent's wish to minimize the amount that passed to his surviving spouse. "Had plaintiffs, the testator's children, disclaimed, the testator's wife would have 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."

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

New Mexico:

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

Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982). 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*.

New York:

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). 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.

In re Estate of Clarke, 188 N.E.2d 128 (N.Y. 1962). In this case, discussed more fully in the Annotations following the ACTEC Commentary on MRPC 1.5, the court observed, "[a]n attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself."

Kramer v. Belfi, 482 N.Y.S.2d 898 (App. Div. 1984). 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.

Weingarten v. Warren, 753 F. Supp. 491 (S.D.N.Y. 1990). 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.

North Carolina:

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

Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. Ct. App. 1984), *review denied*, 321 S.E.2d 136 (N.C. 1984). 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.

Ohio:

Elam v. Hyatt Legal Serv., 541 N.E.2d 616 (Ohio 1989). 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). 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). 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.

Pennsylvania:

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

Pew Trust (2), 16 Fid. Rep. 2d 80 [Montg. Cty (Pa.) 1995]. This case is discussed in the Annotations following the ACTEC Commentary on MRPC 3.7.

South Carolina:

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

Texas:

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

Utah:

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

Washington:

Janssen v. Topliff, 38 P.3d 396 (Wash. Ct. App. 2002). 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 Larson, 694 P.2d 1051 (Wash. 1985). The court was here asked to pass upon the reasonableness of the lawyer's fees in an estate administration. The Supreme Court of Washington overturned decisions of a court commissioner, the superior court and the court of appeals affirming the lawyer's fees. In the opinion the court stated that:

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

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

Trask v. Butler, 872 P.2d 1080 (Wash. 1994). 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. "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.

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

Ethics Opinions

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

. . .

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

. . .

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

. . .

i. *Others to whom lawyers owe duties*. In some situations, lawyers owe duties to nonclients resembling those owed to clients. Thus, a lawyer owes certain duties to members of a class in a class action in which the lawyer appears as lawyer for the class (see Comment f) and to prospective clients who never become clients (see §15). Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer, to trust beneficiaries by a lawyer representing the trustee, and to certain nonclients in other situations (see §134, Comment f; see also Comment f hereto). What duties are owed can be determined only by close analysis of the circumstances and the relevant law and policies. A lawyer may also become subject to duties to a nonclient by becoming, for example, a trustee, or corporate director. On conflicts between such duties and duties the lawyer owes clients, see §135; see also §96. On civil liability to nonclients, see §§51 [Duty of Care to Certain Nonclients] and 56 [Liability to a Client or Nonclient under General Law].

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

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

. . .

(4) to a nonclient when and to the extent that:
   (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
   (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the

client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Illustrations:

5. Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures (see §67 [Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss]). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though Lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

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

Alaska:

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

Delaware:

Board Case No. 30 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Illinois:

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

Indiana:

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

Op. 2-2001 (2001). Attorney, preparing a power of attorney for the agent without interviewing the principal, may be aiding in perpetrating a fraud in violation of MRPC 1.2; the attorney has an ethical responsibility of further inquiry. In this case, the attorney may have violated MRPC 4.2 in contacting an individual the lawyer knew to be represented by another lawyer in the matter. If the grandfather (principal) is the attorney's client, he has a duty to discover if the client is impaired, see MRPC 1.14, and may need to take the protective action of seeking appointment of a legal representative. If both granddaughter (agent) and grandfather (principal) are the attorney's joint clients, MRPC 1.7 requires written consent after consultation is given. Further, attorney violated MRPC 5.3 in his failure to supervise the paralegal who was asked to exceed her notary duties in determining the capacity of an 88 year old gentleman and in determining if he was free of undue influence in signing the power of attorney.

Kentucky:

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

Pennsylvania:

Op. 2004-7 (2004). 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.

South Carolina:

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

Utah:

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

Virginia:

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

MRPC 1.3: DILIGENCE

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

ACTEC COMMENTARY ON MRPC 1.3

Timetable. Whether the representation relates to inter vivos estate planning or the administration of a fiduciary estate, it is usually desirable, early in the representation, for the lawyer and client to establish a timetable for completion of various tasks. Insofar as consistent with providing the client with competent representation, the lawyer should adhere to the established schedule and inform the client of any revisions that are required, whether attributable to the lawyer or to circumstances beyond the lawyer's control. The client or others may be seriously disadvantaged if the lawyer fails, within a reasonable time, to provide the client with the agreed legal services. In such cases the client may be harmed, and intended beneficiaries may not receive the benefits the client intended them to have.

Avoiding Misunderstandings as to Scope of Representation. The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sends the client an appropriate engagement letter at the outset of the representation. If a lawyer is retained by a new client with respect to a single matter, the representation may terminate when the work on the matter is completed; on the other hand, the representation may become dormant. See the discussion of a dormant representation in the ACTEC Commentary on MRPC 1.4 (Communication). Where the lawyer has served a client in a variety of matters, the client may reasonably assume that the representation is active or that the client may reactivate the representation at any time. A lawyer in these circumstances should clarify with the client the scope of the representation and the expectations of the client. A client may terminate a representation at any time, and, subject to the requirements of MRPC 1.16 (Declining or Terminating Representation), a lawyer may also terminate a representation at any time.

Planning the Administration of a Fiduciary Estate. The lawyer and the fiduciary should plan the administration of an estate or trust in light of the fiduciary's obligations to the courts, tax authorities, creditors and beneficiaries. The lawyer and fiduciary may subsequently decide to accelerate or delay some planned payments or distributions in order to improve the tax position of the fiduciary estate or of its beneficiaries. The lawyer's obligation to be diligent includes the duty to advise the fiduciary competently regarding the tax and nontax impact of sales, distributions and other administrative actions. In connection with the administration of an estate or trust, it is appropriate for the lawyer and the fiduciary to consider the circumstances of the beneficiaries and to communicate with them regarding the fiduciary estate. See ACTEC Commentary on MRPC 2.1 (Advisor). However, the lawyer and the fiduciary should adhere to their general duties, including the duty to act impartially with respect to the beneficiaries.

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

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

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

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

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

Cases

California:

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

Colorado:

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

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

People v. Woodford, 81 P.3d 370 (Colo. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Connecticut:

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

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

Minnesota:

In re Discipline of Helder, 396 N.W.2d 559 (Minn. 1986). 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.

In re MacGibbon, 535 N.W.2d 809 (Minn. 1995). 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."

In re Discipline of O'Brien, 362 N.W.2d 307 (Minn. 1985). 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.

New York:

Matter of Frank T. D'Onofrio, Jr., 618 N.Y.S.2d 829 (App. Div. 1994). 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.

Victor v. Goldman, 344 N.Y.S.2d 672 (Sup. Ct. 1973), *aff'd mem.*, 351 N.Y.S.2d 956 (App. Div. 1974). 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.

North Dakota:

In re Disciplinary Action Against Garcia, 366 N.W.2d 482 (N.D. 1985). 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.

Ohio:

Office of Disciplinary Counsel v. Mauk, 512 N.E.2d 670 (Ohio 1987). 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.

Pennsylvania:

Gregg v. Lindsay, 649 A.2d 935 (Pa. Super. 1994), *appeal denied*, 661 A.2d 874 (Pa. 1995). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

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). In this case the lack of privity between the lawyer and the decedent's intended beneficiaries barred them from bringing a negligence action against the lawyer for failing to prepare a new will in accordance with decedent's instructions prior to death.

Vermont:

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

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

Wisconsin:

In re Disciplinary Proceedings Against Haberman, 376 N.W.2d 852 (Wis. 1985). 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 Meuller, 377 N.W.2d 158 (Wis. 1985). 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.

Ethics Opinions

Delaware:

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.

Board Case No. 30 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

New Mexico:

Op. 2001-1 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

MRPC 1.4: COMMUNICATION

(a) A lawyer shall:
  (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  (3) keep the client reasonably informed about the status of the matter;
  (4) promptly comply with reasonable requests for information; and
  (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ACTEC COMMENTARY ON MRPC 1.4

Encouraging Communication; Discretion Regarding Content. Communication between the lawyer and client is one of the most important ingredients of an effective lawyer-client relationship. In addition to providing information and counsel to the client, the lawyer should encourage communications by the client. More complete disclosures by a client may be encouraged if the lawyer informs the client regarding the confidentiality of client information. See MRPC 1.6 (Confidentiality of Information). The nature and extent of the content of communications by the lawyer to the client will be affected by numerous factors, including the age, competence and experience of the client, the amount involved the complexity of the matter, cost controls and other relevant considerations. The lawyer may exercise informed discretion in communicating with the client. It is generally neither necessary nor appropriate for the lawyer to provide the client with every bit of information regarding the representation.

In order to obtain sufficient information and direction from a client, and to explain a matter to a client sufficiently for the client to make informed decisions, a lawyer should meet personally with the client at the outset of a representation. If circumstances prevent a lawyer from meeting personally with the client, the lawyer should communicate as directly as possible with the client. In either case the elements of the engagement should be confirmed in an engagement letter.

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

Communications During Active Phase of Representation. The need for communication between the lawyer and client is reflected in Rules respecting the lawyer's duties of competence and diligence. See ACTEC Commentaries on MRPCs 1.1 (Competence) and 1.3 (Diligence). The lawyer's duty to communicate with a client during the active period of the representation includes the duty to inform the client reasonably regarding

the law, developments that affect the client, any changes in the basis or rate of the lawyer's compensation [See ACTEC Commentary on MRPC 1.5 (Fees)], and the progress of the representation. The lawyer for an estate planning client should attempt to inform the client to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). In addition, the lawyer should inform the client of any recommendations that the lawyer might have with respect to changes in the scope and nature of the representation. The client should also be informed promptly of any substantial delays that will affect the representation. For example, the client should be informed if the submission of draft documents to the client will be delayed for a substantial period regardless of the reason for the delay.

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

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

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

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

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

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

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

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Enabling Estate Planning Client to Make Informed Decisions

Cases

California:

Butler v. State Bar, 228 Cal. Rptr. 499 (1986). This case is summarized in the Annotations following the ACTEC Commentary on MRPC 1.1.

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

Ridge v. State Bar, 254 Cal. Rptr. 803 (1989). A lawyer-executor was disciplined for mismanaging the estate and failing to communicate with the lawyer's client.

Kansas:

In Re Flack, 33 P.3d 1281 (Kan. 2001). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 5.5.

New Jersey:

A v. B v. Hill Wallack, 726 A.2d 924 (N.J. 1999). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992). 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.

Ohio:

Bar Ass'n of Greater Cleveland v. Cook, 480 N.E.2d 436 (Ohio 1985). 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.

Ethics Opinion

Delaware:

Board Case No. 52 (2001). 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.

Extent of Continuing Duty to Client

Cases

California:

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

Heyer v. Flaig, 74 Cal. Rptr. 225 (1969). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

New York:

Lama Holding Co. v. Shearman & Sterling, 758 F. Supp. 159 (S.D.N.Y. 1991). This case involves a U.S. holding company and its foreign parents who brought an action against a law firm and trust company alleging various causes of action arising from the defendants' alleged failure to inform the plaintiffs of changes in U.S. tax laws affecting the plaintiffs' investments. Applying New York law, the federal district court held that the complaint properly stated a cause of action against the 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.

Washington:

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

Termination of Lawyer-Client Relationship

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

Cases

Federal:

Artromick Intern., Inc. v. Drustar, Inc., 134 F.R.D. 226 (S.D. Ohio 1991). 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). The court here found that the lawyer-client relationship between the individual plaintiff and her lawyer had ended after a will prepared by the lawyer had been executed by her in 1966 although in 1981 she received a form letter from the law firm. In the meantime, the individual lawyer who had provided the estate planning services had died. The salutation of the letter, which pointed out the significance of ERTA, was "Dear Friend."

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

Shearing v. Allergan, Inc., 1994 WL 382450 (D. Nev. 1994). 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.

California:

Worthington v. Rusconi, 35 Cal. Rptr. 2d 169 (Ct. App. 1994). 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.

MRPC 1.5: FEES

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

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:
  (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
  (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
  (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
  (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
  (3) the total fee is reasonable.

ACTEC COMMENTARY ON MRPC 1.5

Basis of Fees for Trusts and Estates Services. Fees for legal services in trusts and estates matters may be established in a variety of ways provided that the fee ultimately charged is a reasonable one taking into account the factors described in MRPC 1.5(a) (Fees). Fees in such matters frequently are primarily based on the hourly rates charged by the attorneys and legal assistants rendering the legal services or upon a mutually agreed upon fee determined in advance. Based on the revisions to MRPC 1.5 (Fees) in 2002, unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. As revised in 2002, the rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representation, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel. Any changes in the basis or rate of the fee or expenses shall be communicated to the client. Basing a fee for legal services solely on any single factor set forth in MRPC 1.5 (Fees) is generally inappropriate unless required or allowed by the law of the applicable jurisdiction. In recent years courts in several states have, in effect, prohibited or seriously limited the use of fees based upon a percentage of the value of the estate.

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

Fee Paid by Person Other than Client. One person, perhaps an employer, insurer, relative or friend, may pay the cost of providing legal services to another person. Notwithstanding the source of payment of the fee, the person for whom the services are performed is the client, whose confidences must be safeguarded and whose directions must prevail. Under MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules), the lawyer may accept compensation from a person other than a client only if the client consents after consultation, there is no interference with the lawyer's independence of judgment or with the lawyer-client relationship, and the client's confidences are maintained. See ACTEC Commentary on MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules).

No Rebates, Discounts, Commissions or Referral Fees. The lawyer should not accept any rebate, discount, commission or referral fee from a nonlawyer or a lawyer not acting in a legal capacity in connection with the representation of a client. Even with full disclosure to and consent by the client, such an arrangement involves too great a risk of overreaching by the lawyer and the potential for actual or apparent abuse. The client is generally entitled to the benefit of any economies that are achieved by the lawyer in connection with the representation. The acceptance by the lawyer of a referral fee from a nonlawyer may involve an improper conflict of interest. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). In those jurisdictions that permit referral fees between lawyers, the lawyer should comply with the requirements of local law governing such matters, including full disclosure to the client. A lawyer is generally prohibited from sharing legal fees with nonlawyers. See MRPC 5.4 (Professional Independence).

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Percentage, Excessive and Reasonable Fees

Statute

Florida:

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

Cases

California:

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

Colorado:

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

People v. Woodford, 81 P.3d 370 (Colo. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Florida:

Florida Bar v. DellaDonna, 583 So. 2d 307 (Fla. 1991). 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). 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 below.)

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

Illinois:

Cripe v. Leiter, 703 N.E.2d 100 (Ill. 1998). 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). 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.

Indiana:

In re Matter of Gerard, 634 N.E.2d 51 (Ind. 1994). A lawyer was here suspended for one year for enforcing contingent fee agreement under which the lawyer received over $150,000 with respect to largely administrative work in locating certificates of deposit that belonged to an elderly hospitalized client. The lawyer's conduct involved fraud and charging a clearly excessive fee.

Maine:

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

Massachusetts:

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

Missouri:

Estate of Perry, 978 S.W.2d 28 (Mo. Ct. App. 1998). This was an action brought by the decedent's son by a prior marriage to remove the decedent's surviving husband as personal representative and for an accounting. The trial court declined to remove the husband as personal representative but

entered a money judgment against him for certain claims made on jointly secured obligations. The court also adjudicated the husband's request for an allowance of exempt property. The appellate court, reversing the trial court on the issue of attorneys' fees, held that the son was entitled to a fee award since the estate had benefited from the judgment against the husband and the fact that the son was not successful in his removal action was not determinative on the attorneys' fees issue.

Montana:

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

New York:

In re Estate of Freeman, 311 N.E.2d 480 (N.Y. 1974). 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.

North Carolina:

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

Ohio:

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

Oregon:

In re Stauffer, 956 P.2d 967 (Or. 1998). 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.

Pennsylvania:

In re Trust Estate of LaRocca, 246 A.2d 337 (Pa. 1968). 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.

In re Estate of Preston, 560 A.2d 160, 165 (Pa. Super. 1989). 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 Estate of Sonovick, 541 A.2d 374, 376 (Pa. Super. 1988). 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."

South Dakota:

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

Washington:

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

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

Ethics Opinions

ABA:

ABA Formal Op. 93-379 (1993). 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.

Arizona:

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

Connecticut:

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

Oregon:

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

Contingent Fee Agreements

Cases

Indiana:

In re Matter of Gerard, 634 N.E.2d 51 (Ind. 1994). This case, summarized above, involved a contingent fee agreement that resulted in an excessive fee. The "enormity of Respondent's fee in relation to the amount of service rendered is fraudulent." 634 N.E.2d at 53.

Oklahoma:

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

Ethics Opinions

Missouri:

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

New York:

New York City Bar Formal Op. 1993-2 (1993). 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.

Payment of Fee by Person Other than Client

Ethics Opinion

ABA:

ABA Inf. Op. 86-1517 (1986). 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.

Reduced Rates for Employees of Corporate Client

Ethics Opinion

Illinois:

Ill. Op. 92-8 (1993). 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.

Rebates, Discounts, Commissions or Referral Fees

Cases

Kansas:

In re Matter of Farmer, 747 P.2d 97 (Kan. 1987). 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.

New York:

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

Ethics Opinions

ABA:

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

California:

L.A. County Op. 443 (1987). A lawyer may not accept payments from a physician to whom the lawyer refers clients for medical treatment.

San Diego Op. 1989-2 (1989). 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."

New Jersey:

N.J. Op. 514 (1983). This opinion is summarized in the Annotations following the ACTEC Commentary on MRPC 1.7.

New York:

N.Y. Formal Op. 610 (1990). This opinion is summarized in the Annotations following the ACTEC Commentary on MRPC 1.7.

North Carolina:

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

Pennsylvania:

Op. 2003-16 (2003). 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).

Op. 2000-100 (2000). 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).

Texas:

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

Utah:

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

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

Op. No. 146A (1995). This opinion held that a lawyer may sell life insurance products to an existing client if the lawyer complies with MRPC 1.8(a).

Virginia:

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

MRPC 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  (1) to prevent reasonably certain death or substantial bodily harm;
  (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
  (4) to secure legal advice about the lawyer's compliance with these Rules;
  (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  (6) to comply with other law or a court order.

ACTEC COMMENTARY ON MRPC 1.6

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

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

Implied Authorization to Disclose. The lawyer is also impliedly authorized to disclose otherwise confidential information to the courts, administrative agencies, and other individuals and organizations as the lawyer believes is reasonably required by the representation. A lawyer is impliedly authorized to make arrangements,

in case of the lawyer's death or disability, for another lawyer to review the files of his or her clients. As stated in ABA Formal Opinion 92-369 (1992), "[r]easonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded."

Other Rules Affecting a Lawyer's Duty of Confidentiality. There are other rules that may impact the lawyer's duties regarding a client's confidential information. For example, see IRC Section 7525, Treasury Department Circular 230, SEC disclosure rules under Sarbanes-Oxley, and MRPC 1.6(b)(6) (right to disclose when required by other law). See also MRPC 1.6(b)(2).

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

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

As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. See MRPC 3.3(c) (Candor Toward the Tribunal), which requires disclosure to the court "even if compliance requires disclosure of information otherwise protected by MRPC 1.6." In addition, the lawyer may not knowingly provide the beneficiaries or others with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communication with Person Represented by Counsel; and Dealing with Unrepresented Person).

Disclosure of a Fiduciary's Commission of, or Intent to, Commit a Fraud or Crime. When representing a fiduciary generally, the lawyer may discover that the lawyer's services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests

of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.

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

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

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

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

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

Conditioning Appointment of Fiduciary on Permitting Disclosure. A lawyer may properly assist a client by preparing a will, trust or other document that conditions the appointment of a fiduciary upon the fiduciary's agreement that the lawyer retained by the fiduciary to represent the fiduciary with respect to the fiduciary estate may disclose to the beneficiaries or an appropriate court any actions of the fiduciary that might constitute a breach of trust. Such a conditional appointment of a fiduciary should not increase the lawyer's duties other than the possible duty of disclosing misconduct to the beneficiaries. If the lawyer retained pursuant to such an appointment learns of acts or omissions by the fiduciary that may, or do, constitute a breach of trust, the lawyer should call them to the attention of the fiduciary and recommend that remedial action be taken. Depending upon the circumstances, including the nature of the actual or apparent breaches, their gravity, the potential that the acts or omissions might continue or be repeated, and the actual or potential injury suffered by the fiduciary estate or the beneficiaries, the lawyer for the fiduciary whose appointment has been so conditioned may properly disclose to the designated persons and to the court any actions of the fiduciary that may constitute breaches of trust.

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

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

Joint and Separate Clients. Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients. The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation

of any inherently adversarial contract (e.g., a marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.

Multiple Separate Clients. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, some experienced estate planners regularly undertake to represent husbands and wives as separate clients. Similarly, some estate planners also represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. For example, without disclosing a confidence of one spouse, the lawyer may be unable adequately to represent the other spouse. However, within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. It is unclear whether separate representation could be provided within the scope of former MRPC 2.2 (Intermediary). The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

Confidences Imparted by One Joint Client. A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, *inter alia*, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and, (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement, I intend to leave her…" or "All of the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or

both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

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

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

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Joint and Separate Clients

Cases

Florida:

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

New Jersey:

A v. B v. Hill Wallack, 726 A.2d 924 (N.J. 1999). Construing New Jersey's broad client-fraud exception to the state's version of MRPC 1.6, the Supreme Court of New Jersey held that a law firm that was joint-

ly representing a husband and wife in the planning of their estates was entitled to disclose to the wife the existence (but not the identity) of husband's child born out of wedlock. The court reasoned that the husband's deliberate failure to mention the existence of this child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under MRPC 1.6(c). Interestingly, the law firm learned about the child born out of wedlock not from the husband but from the child's mother who had retained the law firm. The court also based its decision permitting disclosure on the existence of a written agreement between the husband and wife, on the one hand, and the law firm, on the other, waiving any potential conflicts of interest with the court suggesting that the letter reflected the couple's implied intent to share all material information with each other in the course of the estate planning. The court cites extensively and approvingly to the *ACTEC Commentaries* and to the *Report* of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility discussed immediately below.

Ethics Opinions

District of Columbia:

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

Florida:

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

New York:

N.Y. Op. 555 (1984). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Secondary Authorities

ABA, Special Probate and Trust Division 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.* The representation of a husband and wife is one of the subjects that has been studied by the ABA Special Probate and Trust Division Study Committee on Professional Responsibility ("the ABA Committee"). A published summary of

the ABA Committee's *Report* on the representation of both spouses discusses the *Report's* two main recommendations: (1) That in the absence of a contrary agreement the husband and wife are joint clients, which involves the application of implicit disclosure rules; and (2) That the lawyer "may define and limit his or her duty to require immediate disclosure and withdrawal and may agree that in some cases the lawyer will determine neither to disclose nor to withdraw, despite the existence of an adversity." Moore & Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 Prob. & Prop. 26, 30 (July/Aug. 1993). The ABA Committee "recommends the practice of having an agreement, preferably in writing, that sets out the ground rules of representation." *Id*. at 31. Although the ABA Committee recognizes that a lawyer may represent a husband and wife separately, agreeing to maintain the confidences of each, it recommends that "such a representation [should] be undertaken only by those who believe they can represent independently each spouse despite the knowledge of the other spouse's plan." *Id*. at 30.

According to the *Report*, "[t]he greatest threat to a joint representation is the confidence blurted to the lawyer by one spouse that is clearly intended to be kept secret from the other spouse in a joint representation." *Id*. at 29. Reflecting that concern, the *Report* states that "[r]eceipt or acceptance of confidences from either spouse is a clear threat to the lawyer's independent judgment." *Id*. at 29.

If a confidence is communicated by one spouse, the *Report* suggests that the lawyer must determine "how best to handle the situation between two spouses at the time the confidence is imparted." *Id*. at 29. According to the *Report* 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 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. Because an unexpected letter of withdrawal may not protect a confidence from disclosure, the ABA Committee concluded that "the 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 30.

Restatement (Third) of the Law Governing Lawyers (2000), §60 A Lawyer's Duty to Safeguard Confidential Client Information

(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

(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.

Obligation Continues After Death

Cases

United States Supreme Court:

Swidler & Berlin v. U.S., 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998):

> [T]he general rule with respect to confidential communications … is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs. [Citation omitted.] The rationale for such disclosure is that it furthers the client's intent. [Citation omitted.] Indeed, in *Glover v. Patten*, 165 U.S. 394, 406-408, 17 S.Ct. 411, 416, 41 L.Ed. 760 (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.]

California:

HLC Properties Ltd. v. Superior Court (MCA Records Inc.), 24 Cal. Rptr. 3d 1999 (2005). 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.

New York:

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

Ethics Opinions

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

. . .

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

District of Columbia:

Opinion 324 (2004). A decedent's former attorney may reveal confidences obtained during the course of the professional relationship between the decedent and the attorney only where the attorney reasonably believes that the disclosure is impliedly authorized to further the decedent's interest in settling her estate. In "rare situations" where the attorney is unsure what the client would have wanted the attorney to do, the attorney should seek an order from the court supervising disposition of the estate and present the materials at issue for an in camera review. For example, if the surviving spouse needed the information to fulfill the spouse's duties as executor to administer the estate, disclosure is clearly warranted. If on the other hand, the surviving spouse is or was engaged in litigation with the deceased spouse, disclosure, absent a court order, might be inappropriate.

Hawaii:

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

Iowa:

Opinion 98-11 (1998). The Board in this case was asked to provide an opinion on what types of matters involving his deceased clients an attorney could testify to in a deposition. The Board noted the existence of its earlier Opinions 88-11 and 91-24 (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."

Eth. Op. 91-24 (1991). 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.

Missouri:

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

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

New York:

N.Y. Op. 555 (1984). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

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

Nassau County Op. 89-26 (1989). 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.

North Carolina:

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

Pennsylvania:

Op. 2003-11 (2003). 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.

Op. 98-97 (1997). 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.

Phila. Bar Op. 93-5 (1993). A lawyer represented the seller of real estate at a closing. 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. Instead, the lawyer "'should seek to persuade the [executrix] to take suitable action.'"

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

Client with Diminished Capacity

Ethics Opinions

ABA:

ABA Inf. Op. 89-1530 (1989). A lawyer has implied authority to consult diagnostician regarding the condition of a client.

Alabama:

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

California:

Cal. Formal Op. 1989-112 (1989). This opinion states that a lawyer may not take steps to protect a client that might involve disclosure of the client's condition if the client objects. This opinion is also discussed in the Annotations following the ACTEC Commentary on MRPC 1.14.

Illinois:

Op. 00-02, 2000 WL 33313185 (2000). A lawyer may not provide a copy of a psychiatric report relating to the lawyer's client with diminished capacity to the client's father. The father previously had retained the lawyer to represent the child (an adult). Lawyer should advise father to seek independent counsel.

Maine:

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

Missouri:

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

Ohio:

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

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

Oregon:

Or. Op. 1991-41 (1991). Without any discussion of the confidentiality issue, this opinion suggests that a lawyer who believes that a client is acting in a manner contrary to the client's interests could disclose his or her concerns to members of the client's family: "[If] 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." For a more complete summary of this opinion, see the Annotations following the ACTEC Commentary on MRPC 1.14.

Pennsylvania:

Pa. Op. 90-89 (1990). 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.

Pa. Op. 88-72 (1988). 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.

Virginia:

Va. Op. 932 (1987). 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.

Disclosures by Lawyer for Fiduciary

Cases

Arkansas:

Estate of Torian v. Smith, 564 S.W.2d 521 (Ark. 1978). 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.

California:

Borissoff v. Taylor & Faust, 15 Cal. Rptr. 3d 735 (2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

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

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

Delaware:

Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 713-14 (Del. Ch. 1976). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Florida:

Barnett Nat'l Bank v. Compson, 639 So.2d 849 (Fla. Ct. App. 1993). This case is discussed in the Annotations following the ACTC Commentary on MRPC 1.6.

First Union Nat'l Bank of Florida v. Whitener, 715 So. 2d 979 (Fla. Ct. App. 1998), *review denied*, 727 So. 2d 915 (1999). In this discovery dispute, a trust beneficiary who had brought a breach of fidu-

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

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

Illinois:

In re Estate of Gleno, 200 N.E.2d 65, 67 (Ill. App. 1964) (no discussion of confidentiality). "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). "As an attorney and officer of the court, the lawyer was under an obligation to inform the court of any suspicions of fraud or wrongdoing on the part of the executor."

New York:

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

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

Pennsylvania:

Follansbee v. Gerlach and Reed Smith, 2002 WL 31425995 (Pa. Ct. Com. Pleas), 22 Fid. Rep. 2d. 319 [Civ. Div. Allegh. Ct. (Pa.) 2002]. This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

South Carolina:

Floyd v. Floyd, 615 S.E.2d. 465 (S.C. Ct. App. 2005). 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.

Ethics Opinions

ABA:

ABA Formal Op. 94-380 (1994). 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.]

Illinois:

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

Advisory Op. 91-24 (1991). The lawyer retained by a guardian represents both the guardianship estate and the guardian in a representative capacity. It was assumed that the guardian did not reasonably believe that the lawyer represented her personally. Accordingly, "[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."

Kentucky:

Eth. Op. 401 (1997). In representing a fiduciary, the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. The lawyer's obligation to preserve client's confidences under MRPC 1.6 is not altered by the circumstance that the client is a fiduciary. A lawyer has a duty to advise multiple parties who are involved with a decedent's estate or trust regarding the identity of the lawyer's client and the lawyer's obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term "lawyer for the estate" or the term "lawyer for the trust" on documents or correspondence or in other dealings with the fiduciary or the beneficiaries. A lawyer may represent the fiduciary of a decedent's estate or a trust and the beneficiaries of an estate or trust if the lawyer

obtains the consent of the multiple clients, and explains the limitations on the lawyer's actions in the event a conflict arises and the consequences to the clients if a conflict occurs.

Massachusetts:

Mass. Op. 94-3 (1994). 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)."

New York:

N.Y. Op. 649 (1993). 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.

North Carolina:

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

Oregon:

Or. Op. 1991-119 (1991). This opinion follows Opinion No. 1991-62 (1991) in holding that "an attorney for a personal representative represents the personal representative and not the estate or the beneficiaries as such. It follows that when Attorney *A* represents Widow as an individual and Widow in her capacity as personal representative, Attorney *A* has only one client." The opinion continues to say that, "[a]lternatively stated, the fact that Widow may have personal interests that may conflict with her fiduciary obligations does not mean that Attorney *A* has more than one client." Under the Code of Professional Responsibility, the lawyer for a personal representative may not disclose wrongs committed by the personal representative: "It follows that unless one of the exceptions to the attorney-client privilege rule applies, Attorney *A* must not reveal Widow's past wrongs. Attorney *A* may, however, call upon Widow to correct her past wrongs. If Widow refuses to do so, Attorney *A*

may also seek leave to resign…. In fact, Attorney would be obligated to seek leave to withdraw if the failure to do so would cause Attorney to become directly involved in wrongdoing." The opinion also concludes that the lawyer for the trustee of an employee benefit plan represents the trustee and not the beneficiaries of the plan.

Washington:

WRPC 1.6 allows a lawyer to inform the court of misconduct by a *court-appointed* fiduciary.

Duty to Report Violations of Rules of Professional Conduct

Ethics Opinions

Arizona:

Ariz. Op. 94-09 (1994). 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."

District of Columbia:

D.C. Op. No. 246 (*revised*, Oct. 1994). 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. 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.

Rhode Island:

In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I. 1993). 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.

Disclosure to Third Party

Case

California:

Borissoff v. Taylor & Faust, 15 Cal. Rptr. 3d 735 (2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Ethics Opinions

Missouri:

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

South Carolina:

Op. 93-04 (1993). A lawyer drafted a trust agreement and pour-over will for a competent client who, at the same time, executed a durable general power of attorney 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.

MRPC 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  (1) the representation of one client will be directly adverse to another client; or
  (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  (2) the representation is not prohibited by law;
  (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  (4) each affected client gives informed consent, confirmed in writing.

ACTEC COMMENTARY ON MRPC 1.7

General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them: Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family." Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

Disclosures to Multiple Clients. Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as

in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

Before accepting a representation involving multiple parties, a lawyer may wish to consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest.

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

Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. However, some experienced estate planners regularly represent husbands and wives as separate clients. They also undertake to represent other related clients separately with respect to related matters. Such representations should only be undertaken with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining *informed consent*) and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). The writing may be contained in an engagement letter that covers other subjects as well.

> Example 1.7-1. Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation. The representation of a husband and wife as joint clients does not ordinarily require the informed consent of either or both of them. However, some experienced estate planners believe that a lawyer may represent a husband and wife as separate clients between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

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

Example 1.7-2. Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge *T* for any substantial personal services that *L* performs for *T*.

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

Conflicts of Interest May Preclude Multiple Representation. Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a pre-nuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 or act as an intermediary pursuant to former MRPC 2.2 (Intermediary).

A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration.

Prospective Waivers. A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter. These conflicts are said to be "waivable." Thus, a surviving spouse who serves as the personal representative of her husband's estate may give her informed consent, confirmed in writing, to permit the lawyer who represents her as personal representative also to represent a child who is a beneficiary of the estate. The lawyer also would need an informed consent from the child that is confirmed in writing before undertaking such a dual representation.

However, a conflict might arise between the personal representative and the beneficiary that would preclude the lawyer from continuing to represent both, or either, of them.

Comment 22 to MRPC 1.7, as amended in 2002, states:

> [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.

ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b), provides: "A lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest" in a "wider range of future conflicts than would have been possible under the Model Rules prior to their amendment."

Comment 22 to MRPC Rule 1.7 continues:

> The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. ... [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

As used in Comment 22 and ABA Formal Ethics Opinion 05-436 (2005), the term "waiver" means "informed consent," as defined in MRPC 1.0 (Terminology).

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

Lawyers should also note that neither Comment 22 nor ABA Formal Opinion 05-436 will be binding on the jurisdiction in which a lawyer practices. This is important because MRPC 1.7 limits the circumstances to which it applies under both paragraph (a) and (b) to situations where "a concurrent conflict of interest [exists] under paragraph (a)." Accordingly, a state disciplinary authority could argue that Rule 1.7 requires a concurrent conflict of interest, that neither Comment 22 nor ABA Formal Ethics Opinion 05-436 (2005) accurately reflect of text of MRPC 1.7, and that MRPC 1.7(b) would not control a future conflict of interest.

In addition, the lawyer should consider the impact, if any, that MRPC 1.8 (h) could have on a state disciplinary authority. It provides: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." A claim that a

lawyer asserted the interests of another party in conflict with a client's interest normally constitutes a breach of fiduciary duty, rather than malpractice. Even so, both as a matter of substantive law and pursuant to the Rules of Professional Conduct of a particular state, the disciplinary authority or court may believe that of the two types of misconduct, a client's right to bring a claim in the future for breach of the lawyer's fiduciary duty to the client deserves greater protection that a client's right to bring a future claim for malpractice. Thus, a state disciplinary authority or court could apply MRPC 1.8(h) to a future conflict of interest on the basis that "malpractice" includes a "breach of fiduciary duty" to the client.

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

Appointment of Scrivener as Fiduciary. An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). None of the provisions of the MRPC deals explicitly with the propriety of a lawyer preparing for a client a will or other document that appoints the lawyer to a fiduciary office. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer.

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

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

Designation of Scrivener as Attorney for Fiduciary. The ethical propriety of a lawyer drawing a document that directs a fiduciary to retain the lawyer as his or her counsel involves essentially the same issues as does the appointment of the scrivener as fiduciary. However, although the appointment of a named fiduciary is generally necessary and desirable, it is usually unnecessary to designate any particular lawyer to serve as counsel to the fiduciary or to direct the fiduciary to retain a particular lawyer. Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm [see MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules)] as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction

in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction.

Client with Diminished Capacity. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. Doing so does not constitute an impermissible conflict of interest between the lawyer and the client. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

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

Confidentiality Agreements. A lawyer generally should not sign a confidentiality agreement that bars the lawyer from disclosing to the lawyer's other current and future clients the details of an estate planning strategy developed by a third party for the benefit of the lawyer's client. As stated in Ill. Op. 00-01, a lawyer who signs such a confidentiality agreement creates an impermissible conflict with the lawyer's other clients who might benefit from the information learned in the course of representing this client. "In the case at hand, the Lawyer's own interests in honoring the Confidentiality Agreement would 'materially limit' [the Lawyer's] responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D."

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Conflicts of Interest

Cases

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

Arizona:

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

from representing the administrator because of the conflict of interest between his duties to the decedent's friend and to the administrator and, derivatively, to the persons entitled to receive the decedent's estate. 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.

Arkansas:

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

Purtle v. McAdams, 879 S.W.2d 401 (Ark. 1994). 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.

California:

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

Estate of Rohde, 323 P.2d 490 (Ct. App. 1958). 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). 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.

Colorado:

In re Cohen, 8 P.3d 429 (Colo. 1999). 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.

Florida:

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

Georgia:

Estate of Peterson, 465 S.E.2d 524 (Ga. Ct. App. 2002). Attorney who drafted will under which he was named as executor was disqualified from acting because, although he had informed testator orally of potential conflict of interest, he failed to either obtain client's consent in writing or to give client written notice as required by applicable Georgia ethics opinion.

Illinois:

In re Estate of Marks, 569 N.E.2d 1342 (Ill. App. 1991), *modified and aff'd after remand,* 595 N.E. 2d 717 (Ill. App. 1992). This decision sets aside a receipt and approval of funding of marital bequest that the decedent's surviving spouse signed at the request of her two adult sons who, with her, served as co-executors of the decedent's will. According to the court the widow received "incomplete and unsatisfactory information" and was not independently advised. In particular, the court said that the sons, who were the "dominant" and self-interested executors, breached their fiduciary duties to their mother who "was left to fend for herself without independent counsel, armed only with incomplete and unsatisfactory information …." 569 N.E.2d at 1352.

Kansas:

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

tator 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.

Louisiana:

In re Hoffman, 883 So.2d 425 (La. 2004). An attorney represented three siblings in a will contest. The court held that the attorney 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.

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

Succession of Wallace, 574 So. 2d 348 (La. 1991). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Minnesota:

Fiedler v. Adams, 466 N.W.2d 39 (Minn. Ct. App. 1991). Summary judgment in a malpractice action against a lawyer 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). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.8.

Matter of Trust Created by Louis W. Hill, 499 N.W.2d 475 (Minn. Ct. App. 1993). This decision upheld a trial court's determination that the law firm that represented the trustee no longer represented the beneficiary at the time the litigation arose. Hence, the propriety of the law firm's action was not subject to MRPC 1.7. For a more detailed summary, see the Annotations following the ACTEC Commentary on MRPC 1.9.

Mississippi:

Blissard v. White, 515 So. 2d 1196 (Miss. 1987). 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)." 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.

New Jersey:

Baldasarre v. Butler, 625 A.2d 458 (N.J. 1993). 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.

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

Haynes v. First Nat'l State Bank, 432 A.2d 890 (N.J. 1981). At the behest of the testator's daughter, who had been a client for some time, the lawyer drew a will and trust for the testator, who was a new client, which drastically changed the disposition of the testator's estate in favor of the daughter who procured the will. "[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.

New York:

In re Estate of Clarke, 188 N.E.2d 128 (N.Y. 1962). 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.

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

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

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

North Carolina:

Ingle v. Allen, 321 S.E.2d 588 (N.C. Ct. App. 1984), *review denied*, 329 S.E.2d 593 (N.C. 1985). In this case a summary judgment in favor of the lawyer for a co-trustee was affirmed. Plaintiff, the other co-trustee, was independently represented in connection with the administration of the fiduciary estate. It was not a conflict of interest for the lawyer to represent the first co-trustee in an ejectment action against the other co-trustee.

Ohio:

Allison v. Allison, 238 N.E.2d 768 (Ohio 1968). 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.

South Carolina:

In re James, 229 S.E.2d 594 (S.C. 1976). 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.

South Dakota:

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

West Virginia:

State ex rel. DeFrances v. Bedell, 446 S.E.2d 906 (W.Va. 1994). 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.

Wisconsin:

Estate of Devroy, 325 N.W.2d 345 (Wis. 1982). 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.

Ethics Opinions

ABA:

ABA Formal Opinion 05-436 (2005). This opinion is discussed in the text of the Commentary.

California:

San Diego Op. 1990-3 (1990). 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.

Connecticut:

Conn. 89-18 (1989). 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.

Delaware:

Board Case No. 102 (1998). 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.

Del. Op. 80-6 (1980). 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.

Illinois:

Op. 00-01 (2000). This opinion is discussed in the text of the Commentary.

Maryland:

Op. 2003-08 (2003). 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.

Montana:

Eth. Op. 960731 (1996). 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."

New York:

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

Nassau County Op. 81-3 (1981). 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.

North Carolina:

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

N.C. Op. 28 (1987). 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.

N.C. Op. 22 (1987). 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.

Ohio:

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

Oregon:

Or. Op. 1991-119 (1991). A lawyer may represent a widow individually and as personal representative of her deceased husband's estate; she is really only one client. The lawyer may not disclose the widow's breach of fiduciary duties but may not assist her in wrongdoing and may request that she remedy the wrongs; lawyer could disclose her intention to commit future crimes.

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

Pennsylvania:

Op. 2003-16 (2003). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Op. 2001-300 (2001). A lawyer's retention of a will at the client's request does not constitute a violation of the Rules of Professional Conduct.

South Carolina:

Op. 93-34 (1993). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 2.3.

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

Utah:

Op. No. 99-07 (1999). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Op. No. 97-09 (1997). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Joint Representation: Disclosures

Case

Louisiana:

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

Ethics Opinions

Florida:

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

Indiana:

Op. 2-2001 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

New York:

N.Y. Op. 555 (1984). A lawyer retained by A and B to form a partnership, who received communication from B indicating that B was violating the partnership agreement, may not disclose the infor-

mation 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."

North Carolina:

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

Virginia:

Op. 1778 (2003). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Washington:

Op. No. 00-00204 (2000). A lawyer who 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, 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)."

Joint Representation: Co-Fiduciaries

Case

New York:

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

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

Ethics Opinions

District of Columbia:

Ethics Opinion 259 (1995). 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.

Virginia:

Va. Op. 1769 (2003). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.14.

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

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

Appointment of Scrivener as Fiduciary

Statute

California:

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.C. §§10804, 15642(b)(6).

Cases

New York:

In re Estate of Weinstock, 351 N.E.2d 647 (N.Y. 1971). 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.

Tennessee:

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

Washington:

Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974 (Wash. 1987). In this case excessive compensation was recovered from the scrivener of a will who was subsequently appointed cotrustee 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.

In re Estate of Shaughnessy, 702 P.2d 132 (Wash. 1985). 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.

Wisconsin:

State v. Gulbankian, 196 N.W.2d 733 (Wis. 1972). In a disciplinary action the court condemned the lawyer's consistent practice of drafting wills that named the lawyer or relatives of the lawyer as fiduciaries or as counsel for the fiduciary.

Ethics Opinions

California:

Op. 1993-130 (1993). 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.

Georgia:

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

Illinois:

Op. 99-08, 2000 WL 1597066 (2000). 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.

Michigan:

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

Montana:

Eth. Op. 951231 (1995). 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."

New Jersey:

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

New York:

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

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

N.Y. Op. 481 (1977). 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.

South Carolina:

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

Virginia:

Va. Op. 1391 (1991). 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. 1358 (1990). A lawyer may draft a will naming the lawyer as personal representative or trustee or in which the fiduciary is directed to retain the lawyer as attorney if the client consents after being informed of alternate representatives, all fees involved, and of the lawyer's own financial interest. A lawyer's suggestion of himself as fiduciary may constitute improper solicitation.

Washington:

Wash. Inf. Op. 86-1 (1986). 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.

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

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  (1) the client gives informed consent;
  (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:
  (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
  (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

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

ACTEC COMMENTARY ON MRPC 1.8

Business Transactions with Client. MRPC 1.8(a) provides mandatory procedural safeguards when a lawyer engages in business transactions with a client. As explained in this Commentary, lawyers often provide services for clients that could be considered business transactions but should not be so considered. Like any lawyer, an estate lawyer who desires to enter a business transaction with a client should follow the procedures set forth in MRPC 1.8(a).

As to lawyers who seek or receive a commission or referral fee from a third party when providing legal services to a client, see ACTEC Commentary on MRPC 1.5 (*No Rebates, Discounts, Commissions or Referral Fees*).

Prohibited Transactions. Unless the lawyer complies with the requirements of MRPC 1.8(a), a lawyer generally should not enter into purchase or sale transactions with a client or with the beneficiaries of a fiduciary estate if the lawyer is serving as fiduciary or as counsel to the fiduciary.

Gifts to Lawyer. MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term "related person" is defined in MRPC 1.8(c) and may include a person who is not related by blood or marriage but has a close familial relationship. However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. See MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules).

For the purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts. As noted in ABA Formal Opinion 02-426 (2002), the client's appointment of the lawyer as a fiduciary is not a gift to the lawyer and is not a business transaction that would subject the appointment to MRPC 1.8. Nevertheless, such an appointment is subject to the general conflict of interest provisions of MRPC 1.7 (Conflict of Interest: Current Clients).

Exculpatory Clauses. Under some circumstances and at the client's request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fidu-

ciary office. (An exculpatory provision is one that exonerates a fiduciary from liability for certain acts and omissions affecting the fiduciary estate.) The lawyer ordinarily should not include an exculpatory clause without the informed consent of an unrelated client. An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary.

Payment of Compensation by Person Other than Client. It is relatively common for a person other than the client to pay for the client's estate planning services. Examples include payment by a parent or other relative or by an employer. A lawyer asked to provide legal services on such terms may do so provided the requirements of MRPCs 1.5 (Fees), 1.7 (Conflict of Interest: Current Clients), and 1.8(f) are satisfied.

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

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

Retention of Original Documents. A lawyer who has drawn a will or other estate planning documents for a client may offer to retain the executed originals of the documents subject to the client's instructions. However, a lawyer who retains a client's documents for safekeeping should provide the client with a written receipt, which may be in the form of a letter, acknowledging that the documents are held subject to the client's order. The receipt may, but need not, also indicate that the fiduciary designated in the documents is not required to retain as counsel the lawyer with whom the documents were left for safekeeping. The documents should be held by the lawyer in a manner consistent with the requirements of MRPC 1.15 (Safekeeping Property) regarding the duties of a lawyer who receives and holds property on behalf of a client. In particular, the documents should be properly identified and appropriately safeguarded. Subject to otherwise applicable law, the lawyer should comply with the client's written directions regarding disposition of the documents.

The retention of the client's original estate planning documents does not itself make the client an "active" client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status. Similarly, sending a client periodic letters encouraging the client to

review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Gifts to Lawyer

Statutes

California:

California has enacted detailed legislation voiding any gift to a "disqualified person," a term defined to include any individual having a fiduciary relationship to the transferor who drafts, transcribes or causes to be drafted or transcribed any instrument of transfer (i.e., will, trust, deed, etc.), relatives by blood or marriage of or cohabitants with such persons, and partners, shareholders and partnerships or corporations in which disqualified persons have a ten percent or more interest, and employees of any such entity. Exceptions to disqualification include: (i) if the otherwise disqualified person is related by blood or marriage to or a cohabitant with the transferor; (ii) if an *independent* attorney certifies that the transfer was not the product of fraud, menace, duress or undue influence. Cal. Prob.C. §§21350-21356.

Texas:

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

Cases

California:

Estate of Auen, 35 Cal. Rptr. 2d 557 (Ct. App. 1994). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Estate of Rohde, 323 P.2d 490 (Ct. App. 1958). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Colorado:

People v. Berge, 620 P.2d 23 (Colo. 1980). 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.

Iowa:

Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa 1979). 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). 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.

Louisiana:

In re Hoffman, 883 So. 2d 425 (La. 2004). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Michigan:

In re Karabatian's Estate, 170 N.W.2d 166 (Mich. Ct. App. 1969). 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.

New Hampshire:

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

New York:

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

Will of Elsa Tank, Dec'd, 503 N.Y.S. 2d 495 (Surr. Ct. 1986). 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."

North Dakota:

In re Disciplinary Action Against Boulger, 637 N.W.2d 710 (N.D. 2001). Attorney drafted will for client/friend that gave attorney a 20% contingent devise of a large estate. The terms of the contingency were that the testator's sons would have to predecease the testator, without issue. The contingency never

materialized, and the attorney received no property from the estate. Nevertheless, the attorney was reprimanded. MRPC 1.8 prohibits an attorney from drafting an instrument giving herself a substantial gift. The extreme unlikelihood of the occurrence of the contingencies is immaterial. Simply because a gift is contingent, it is not rendered "insubstantial."

Ohio:

Clermont County Bar Association v. Bradford, 685 N.E.2d 515 (Ohio 1997). 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.

Mahoning County Bar Ass'n v. Theofilos, 521 N.E.2d 797 (Ohio 1988). 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.

Pennsylvania:

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

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

South Dakota:

In re Discipline of Martin, 505 N.W.2d 101 (S.D. 1993). In this case a lawyer was suspended for two years for multiple infractions, including preparation of a will that named the lawyer as executor and trustee, which would allow the lawyer to manage the estate, including his debts to the estate. The lawyer never advised his aged client to obtain independent advice.

In re Discipline of Mattson, 651 N.W.2d. 278 (S.D. 2002). 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.

Tennessee:

Matlock v. Simpson, 902 S.W. 2d 384 (Tenn. 1995). 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.

Wisconsin:

State v. Collentine, 159 N.W.2d 50 (Wis. 1968). 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).

Ethics Opinion

Connecticut:

Eth. Op. 97-1 (1997). 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.

Transactions with Client or Beneficiary

Cases

California:

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

Massachusetts:

In the Matter of Wayne H. Eisenhauer, 689 N.E.2d 783 (Mass. 1998). 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.

Minnesota:

In re Trust Created by Boss, 487 N.W.2d 256 (Minn. Ct. App. 1992). 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.

New York:

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

North Dakota:

In re Disciplinary Action Against Giese, 662 N.W.2d 250 (N.D. 2003). 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.

Oregon:

In re Stauffer, 956 P.2d 967 (Or. 1998). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

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

Ethics Opinions

Delaware:

Del. Op. 80-6 (1980). This opinion allows the lawyer to purchase an asset from a beneficiary with full disclosure at a fair price. The opinion is summarized in more detail in the Annotations following the ACTEC Commentary on MRPC 1.7.

Indiana:

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

Missouri:

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

Informal Advisory Op. 950115 (1995). 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.

New York:

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

N.Y. Op. 619 (1991). 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."

Ohio:

Op. 2001-4 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Pennsylvania:

Op. 2003-16 (2003). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Op. 2000-100 (2000). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Rhode Island:

Op. No. 99-16 (1999). 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.

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

Utah:

Op. No. 01-04 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Op. No. 99-07 (1999). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Op. No. 146A (1995). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Virginia:

Op. 1754 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.5.

Appointment of Scrivener as Attorney for Fiduciary

Ethics Opinions

Mississippi:

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

Montana:

Eth. Op. 960731 (1996). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Retaining Original Documents

Ethics Opinions

Pennsylvania:

Op. 2001-300 (2000). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Op. 97-66 (1997). 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.

Serving as Fiduciary and Counsel for Fiduciary

Statute

California:

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

Cases

Massachusetts:

In the Matter of Wayne H. Eisenhauer, 689 N.E.2d 783 (Mass. 1998). 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.

Minnesota:

In re Trust Created by Boss, 487 N.W.2d 256 (Minn. Ct. App. 1992). 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.

South Dakota:

In re Discipline of Martin, 506 N.W.2d 101 (S.D. 1993). In this case a lawyer was suspended for two years for multiple infractions including preparation of a will that named the lawyer as executor and

trustee, which would allow him to manage the estate, including his debts to it. Lawyer never advised aged client to obtain independent advice.

Ethics Opinions

Missouri:

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

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

New Hampshire:

N.H. Op. 1987-8/9 (1988). With proper disclosure to a client, a lawyer may serve as fiduciary and as counsel to the fiduciary, provided the fees charged are reasonable.

South Carolina:

Op. 92-12 (1992). 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.

MRPC 1.9: DUTIES TO FORMER CLIENTS

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

ACTEC COMMENTARY ON MRPC 1.9

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

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

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

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

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

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Cases

Illinois:

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

Maryland:

Walton v. Davy, 586 A.2d 760 (Md. 1991). 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.

Minnesota:

Matter of Trust Created by Louis W. Hill, 499 N.W.2d 475 (Minn. Ct. App. 1993). 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.

Ethics Opinions

Illinois:

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

Maryland:

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

Missouri:

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

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

New Mexico:

Op. 2001-1. This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

South Carolina:

Op. 94-14 (1994). 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.

Virginia:

Op. 1720 (1998). 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.

MRPC 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the persons involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
   (1) asking for reconsideration of the matter;
   (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
   (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ACTEC COMMENTARY ON MRPC 1.13

Subject to the requirements of other rules, including both MRPC 1.6 (Confidentiality of Information) and MRPC 1.7 (Conflict of Interest: Current Clients), the lawyer who represents a corporation, partnership or limited liability company may appropriately undertake to represent individuals who are interested in the business or are employed by it. The common interests of multiple clients with respect to matters concerning the business or family enterprise may predominate over any separate interests they may have. Multiple representation in such cases may be in the best interests of the clients and may provide them with better and more economical representation. The lawyer may, with full disclosure and the

informed consent, confirmed in writing, of the business enterprise and an employee, represent both with respect to matters that affect both (e.g., an employment agreement) if their interests are not seriously adversarial. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients).

The lawyer may similarly represent both a fiduciary that owns an interest in a business enterprise and the business enterprise itself, unless to do so would violate MRPC 1.7 (Conflict of Interest: Current Clients).

A very small minority of cases and ethics opinions have adopted the so-called entity approach under which the fiduciary estate is characterized as the lawyer's client. However, most cases and ethics opinions treat the fiduciary as the lawyer's client and the beneficiaries as persons to whom the lawyer may owe some duties. See ACTEC Commentaries on MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients), 1.9 (Duties to Former Clients) and 1.18 (Duties to Prospective Client). The lawyer and the fiduciary, with the fiduciary's informed consent, confirmed in writing, may agree that the fiduciary estate and not the fiduciary shall be the lawyer's client. See MRPC 1.7(b) (Conflict of Interest: Current Clients) (when representation is permissible notwithstanding a concurrent conflict of interest); MRPC 1.0(e) (Terminology) (defining *informed consent*); and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). Such an agreement may significantly affect the extent of the lawyer's duties to the fiduciary, including the duty of confidentiality. However, such an agreement may not limit the duties that the lawyer or the fiduciary otherwise owe to the beneficiaries of the fiduciary estate.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

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

Cases

California:

Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756 (Ct. App. 1993). Representation of a partnership does not necessarily entail representation of the individual members of the partnership for purposes of determining whether counsel for the partnership must be disqualified if there is a conflict of interest between the partners. "Considering the mutability of circumstances surrounding an attorney's representation of a partnership, and the attorney's relationship with individual partners, we believe the rule's approach is sensible. All partnerships are not shaped by the same mould. The relationship a partnership attorney has with the individual partners will vary from case to case. A rule which may seem appropriate for an attorney representing a two-person general partnership may be entirely inappropriate for an attorney representing a limited partnership with scores or even hundreds of partners." 20 Cal. Rptr. 2d at 765.

District of Columbia:

Griva v. Davison, 637 A.2d 830 (D.C. 1994). This decision reversed a summary judgment granted to two members of a three-member general partnership and to the law firm that represented both the partnership and the two individual members in an action for breach of fiduciary duties. Applying the mod-

ified 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*.

Illinois:

Gagliardo v. Caffrey, 800 N.E.2d 489 (Ill. App. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.9.

Michigan:

Steinway v. Bolden, 460 N.W.2d 306 (Mich. Ct. App. 1990). "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.

New Jersey:

Greate Bay Hotel & Casino, Inc. v. Atlantic City, 624 A.2d 102 (N.J. Super. Ct. Law Div. 1993). 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.

Ohio:

Arpadi v. First MSP Corp., 628 N.E.2d 1335 (Ohio 1994). 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.

Pennsylvania:

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

Ethics Opinions

Michigan:

Probate Court Rule 5.117(A) states: "[a]n attorney filing an appearance on behalf of a fiduciary or trustee shall represent the fiduciary or trustee." The comment by the Probate Rules Committee stated that the amendment "clarifies that the lawyer represents the fiduciary or trustee and not the estate."

Oregon:

Or. Op. 1991-62 (1991). 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).

Pennsylvania:

Pa. Op. 91-62A (1991). The lawyer who is retained by an administrator of a decedent's estate represents the estate and not the administrator "at least where the interests of the estate diverge from those of the administrator."

Virginia:

Va. Op. 1473 (1992). A lawyer who is retained to represent "the estate" will be treated as counsel to all co-executors although each co-executor may have independent counsel.

MRPC 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ACTEC COMMENTARY ON MRPC 1.14

Preventive Measures for Competent Clients. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

Risk and Substantiality of Harm. For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.

Disclosure of Information. ABA Informal Opinion 89-1530 (1989) stated the authority of the attorney to disclose confidential and non-confidential information as follows:

> [T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is impliedly authorized within the meaning of Model Rule 1.6 [Confidentiality of Information]. Thus, the inquirer may consult a physician concerning the suspected disability.

The 2002 amendments to MRPC 1.14 support this conclusion.

Determining Extent of Diminished Capacity. In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.

Lawyer Representing Client with Diminished Capacity May Consult with Client's Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminshed capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct. See MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).

As suggested in the Commentary to MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons.

Person with Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

Wishes of Person with Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client. A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

May Lawyer Represent Guardian or Conservator of Current or Former Client? The lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients). Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. See MRPC 1.7(a)(2) (Conflict of Interest: Current Clients). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. See MRPC 1.0(e) (Terminology) (defining *informed consent*).

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Cases

Arizona:

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

California:

Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 135 Cal. Rptr. 2d 888 (Ct. App. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

District of Columbia:

Donnelly v. Parker, 486 F.2d 402 (D.C. Cir. 1973). 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.

Florida:

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

> Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third-parties. It is undisputed that [Lawyer] did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own. 530 So. 2d at 929.

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

> We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.
>
> Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted. 42 So. 2d at 86.

Michigan:

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

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

New Jersey:

Lovett v. Estate of Lovett, 593 A.2d 382 (N.J. Super. 1991). The court stated that, "[a]lthough I agree that a lawyer has an obligation not to permit a client to execute documents if he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1982 [Client] was incompetent or that [Lawyer] should have concluded that he was." 593 A.2d at 386.

In the Matter of M.R., 638 A.2d 1274 (N.J. 1994). 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.

Ohio:

Kutnick v. Fischer, 2004 WL 2251799 (Ohio Ct. App. 2004). 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.

Washington:

In re Fraser, 523 P.2d 921 (Wash. 1974). 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.*

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

Wyoming:

Clark v. Alexander, 953 P.2d 145 (Wyo. 1998). 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:

Formal Op. 96-404 (1996). "Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent … " The opinion goes on to observe that the lawyer in question may consult with the client's family, and may even petition the court for the appointment of a guardian, but may not represent a third party petitioning for appointment. It is not impermissible for the lawyer to support the appointment of a guardian who the lawyer expects will retain the lawyer as counsel.

Alabama:

Ala. Op. 90-12 (1990). 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.

Ala. Op. 87-137 (1987). A lawyer whose client has become incompetent may file a petition for appointment of a guardian. A lawyer is "required to do so" if the lawyer believes it is in the client's best interests.

Alaska:

Alaska Op. 87-2 (1987). 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.

Arizona:

Ariz. Op. 86-13 (1986). 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.

California:

Cal. Formal Op. 1989-112 (1989). 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.

L.A. Op. 450 (1988). Initiating a conservatorship proceeding for a present or former client without the client's authorization involves an impermissible conflict of interest.

San Diego Op. 1990-3 (1990). The portion of this opinion dealing with the capacity of a client advised that, "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." The opinion continues, suggesting that once an issue of capacity is raised in the attorney's mind it must be resolved. "The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship."

S.F. Op. 99-2 (1999). Criticizing the result reached in California Formal Opinion 1989-112 (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.]

Connecticut:

Conn. Op. 86-11 (1986). 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.

Florida:

Attorney General Op. 96-94 (1996). Since a person adjudicated incapacitated is the intended beneficiary of the guardianship, an attorney who represents a guardian of such a person and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

Illinois:

Op. 00-02, 2000 WL 33313185 (2000). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

Advisory Op. 91-24 (1991). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

Indiana:

Op. 2-2001 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Michigan:

Mich. RI 176 (1993). The adverse interests of a mother and daughter preclude the same lawyer from representing both of them in connection with the revocation of a durable power of attorney and petitioning for the appointment of a guardian for the mother.

Mich. RI 76 (1991). 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.

Nebraska:

Neb. Op. 91-4 (1991). 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.

New York:

Formal Op. 775 (2004). When a possibly incapacitated former client sends a lawyer a letter, evidently prepared by someone else, requesting the return of the client's original will, the lawyer may communicate with the former client and others to make a judgment about the client's competence and to ascertain his or her genuine wishes regarding the disposition of the original will. In this case, the lawyer had reason to believe that the client might be acting under the influence of a family member who would benefit by the destruction of the will.

Formal Op. 746 (2001). A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that (i) the client is incapacitated, (ii) there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests and (iii) there is no one else available to serve as petitioner.

Nassau County Op. 90-17 (1990). 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.

New York City Op. 1987-7 (1987). 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.

Oregon:

Op. 2000-159 (2000). 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.*

Op. 1991-41 (1991). A lawyer who has represented Client for many years and has begun to observe extraordinary behavior by Client that is contrary to Client's best interests, may take action on behalf of Client. This opinion states that, "[a]s the language of [former] DR 7-101(C) makes clear, an attorney in such a situation must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

Pennsylvania:

Op. 91-36 (1991). 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.

Op. 90-89 (1990). If the lawyer believes a client is incompetent, the information must remain confidential unless the lawyer determines it is necessary to pursue the appointment of a guardian.

Op. 89-90 (1989). A lawyer for a competent client who decided to refuse medical treatment for progressively disabling disease may serve both as her lawyer and as her guardian *ad litem*.

Rhode Island:

Op. 88-15 (1988). 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.

South Carolina:

Op. 93-04 (1993). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

Virginia:

Op. 1769 (2003). A lawyer may not represent the daughter in gaining guardianship of incompetent mother, who is currently a client of the lawyer in another matter.

MRPC 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  (1) the representation will result in violation of the rules of professional conduct or other law;
  (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
  (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
  (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

ACTEC COMMENTARY ON MRPC 1.16

Mandatory Withdrawal/Prohibited Representation. A lawyer should never accept representation of a client or, having commenced the representation, continue same, unless the lawyer can perform the required work competently [see MRPC 1.1 (Competence) and ACTEC Commentary thereon]; can avoid conflicting interests [see MRPCs 1.7 (Conflict of Interest: Current Clients) and 1.8 (Conflict of Interest: Current Clients: Specific Rules) and ACTEC Commentaries thereon]; and is not physically or mentally impaired from diligently completing the representation [see MRPC 1.3 (Diligence) and ACTEC Commentary thereon].

Also, the representation must not result in the violation of any Rule of Professional Conduct applicable to the lawyer or any other law applicable to either the lawyer or the client. The most common problems facing the estates and trusts lawyer in this regard include conflicts of interest arising after the representation of joint clients (e.g., husband and wife) has commenced [see MRPC 1.6 (Confidentiality of Information) and ACTEC Commentary thereon, particularly *Confidences Imparted by One Joint Client*] and the misconduct of a fiduci-

ary client who either refuses to follow the lawyer's advice or, having breached a fiduciary obligation owed to others, refuses to correct the matter [see MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) and 1.6 (Confidentiality of Information) and ACTEC Commentaries thereon, particularly *Disclosure of Acts or Omissions by Fiduciary Client* and *Disclosures by Lawyer for Fiduciary*]. The lawyer's withdrawal is mandatory when the lawyer's own conduct may violate a Rule of Professional Conduct or a law. See, e.g., ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity).

Withdrawal is permissive in most (but not all) jurisdictions if it is the client's conduct that will violate the law, although a lawyer may never assist the client in violating the law or breaching any fiduciary obligation. When a lawyer withdraws from representation, the duty of confidentiality imposed by MRPC 1.6 (Confidentiality of Information) continues, although, if the representation involves judicial proceedings, the lawyer may be required to explain the withdrawal to the court. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). Applicable state law and ethics opinions should always be consulted to determine the nature and extent of the disclosures, if any, mandated or permitted to be made by the withdrawing lawyer to the court or other parties.

Finally, a lawyer must always withdraw from a representation if the lawyer is discharged by the client (whether with or without cause). If the client has diminished capacity, the lawyer should consider whether the client has the requisite capacity to terminate the representation and whether the lawyer can or should take actions authorized by MRPC 1.14 (Client with Diminished Capacity) to protect the client and the client's interests.

Permissive Withdrawal. A lawyer may withdraw from the representation of a client whenever withdrawal can be effected either without material adverse effects on the interests of the client or for one or more of the following reasons: 1) the client persists in conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; 2) the lawyer discovers after the fact that the client has used the lawyer's services to perpetrate a crime or fraud; 3) the client insists upon pursuing objectives that the lawyer finds repugnant or with which the lawyer has a fundamental disagreement; 4) the client fails "substantially" to fulfill an obligation to the lawyer regarding the lawyer's services (e.g., by failing to timely pay the lawyer's bills) and has been given reasonable warning in advance of the withdrawal that the lawyer will withdraw unless the obligation is fulfilled; 5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or 6) other "good cause" (often involving mutual antagonism between lawyer and client and the breakdown of the lawyer-client relationship). See ACTEC Commentary on MRPC 1.4 (Communication), particularly *Dormant Representation* and *Termination of Representation*.

Special Rules in Litigation and Other Court Proceedings. The right of a lawyer to withdraw from the representation of a client engaged in litigation or other court proceedings (e.g., a judicially supervised probate, trust or protective proceeding) is subject to the court's overriding authority to require the lawyer to continue in the representation, particularly when a hearing is pending. See 1.16(c). Generally, court permission for withdrawal is required whenever the client has refused to consent to the lawyer's withdrawal, when the client cannot be found and fails to communicate with the lawyer, or where the client may lack the capacity to give an informed consent to the lawyer's withdrawal (e.g., the mentally impaired or incapacitated client). Generally, courts retain broad discretion to deny withdrawal if the withdrawal would adversely affect parties to the proceeding or impede the administration of justice. See Comment to MRPC 1.16.

Duties upon Withdrawal. Subparagraph (d) of MRPC 1.16 requires the withdrawing lawyer to take "reasonably practicable" steps to protect the client's interests and includes requirements for giving reasonable notice of the impending withdrawal to the client, giving the client time to employ alternative counsel, refunding any

advanced but unearned fees and returning any papers and property to which the client is entitled under applicable law. For further discussion of the duty to communicate with the client, see ACTEC Commentary on MRPC 1.4 (Communication).

Other Events of Termination. Obviously, a client's death terminates a lawyer's representation, although the client's successor in interest, typically an executor or successor trustee, may revive or recommence the representation. Special considerations apply to a lawyer's representation of a client who has become or may be mentally impaired or incapacitated. See MRPC 1.14 (Client with Diminished Capacity) and ACTEC Commentary thereon. A representation may also be terminated by the lawyer's completion of the legal services or tasks mutually contemplated by the lawyer and client, such as, e.g., the completion of an estate planning project for the client. Refer also to ACTEC Commentary on MRPC 1.4 (Communication) and the concept of the dormant representation.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentary on MRPC 1.4.

Cases

District of Columbia:

Donnelly v. Parker, 486 F.2d 402 (D.C. Cir. 1973). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.14.

Louisiana:

In re Succession of Wallace, 574 So. 2d 348 (La. 1991). In this case, cited also in the Annotations following the ACTEC Commentaries on MRPCs 1.2 and 1.7, the court held that an executor may discharge the lawyer designated by the testator in the testator's will despite a statute purporting to make such a lawyer nondischargeable.

New York:

Lama Holding Co. v. Shearman & Sterling, 758 F. Supp. 159 (S.D.N.Y. 1991). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Ethics Opinions

ABA Formal Op. 96-404 (1996). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.14.

ABA Formal Op. 92-366 (1992). 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 Informal Op. 1397 (1977). "No lawyer can continue to represent a client who does not wish to be represented."

Connecticut:

Op. 03-06 (2003). Pursuant to MRPC 1.16(d) a law firm in possession of original will should furnish that will to new lawyer on written request of testator's attorney-in-fact, noting that testator through her attorney-in-fact could retain new counsel and authorize transfer of all papers to new counsel.

Delaware:

Board Case No. 52 (2001). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.4.

Indiana:

Op. 2-2003 (2003). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Rhode Island:

Op. No. 2000-6 (2000). Lawyer must turn over copy of joint file of clients A and B to client B as required under MRPC 1.16(d).

MRPC 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
    (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;
    (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
        (i) the disqualified lawyer is timely screened from an participation in the matter and is apportioned no part of the fee therefrom; and
        (ii) written notice is promptly given to the prospective client.

ACTEC COMMENTARY ON MRPC 1.18

Scope of MRPC 1.18. The lawyer's ability to enter into a lawyer-client relationship with a prospective client is governed primarily by MRPC 1.7 (Conflict of Interest: Current Clients), which may prohibit the lawyer from entering into the relationship if there is a non-waivable conflict of interest. On the other hand, MRPC 1.18 necessarily implies that it applies only if the client does not retain the lawyer or the lawyer does not accept the representation. If the client hires the lawyer and the lawyer accepts the representation, confidentiality and conflict of interest issues will thereafter be resolved under MRPCs 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients) and 1.9 (Duties to Former Clients).

When a lawyer discusses confidential information with a prospective client, MRPC 1.18(b) prohibits in all cases the disclosure or use of confidential information thereafter except as permitted in MRPC 1.9 (Duties to Former Clients) regarding a lawyer's disclosure or use of confidential information of a former client. However, as explained below, it may be possible for a lawyer to contract with a prospective client that the lawyer may disclose confidential information. See *Agreement with Prospective Client to Waive Possible Conflict* below.

MRPC 1.18(c) and (d) apply when a lawyer is contacted by a prospective client and the lawyer or the lawyer's firm either (i) currently represents a client adverse to the prospective client or (ii) in the future, accepts or considers accepting representation that is adverse to the prospective client.

Estate Planning Lawyers; Initial Interview and Conflicts Check. At the initial conference with a prospective estate planning client, the lawyer usually obtains confidential information regarding the prospective client's family, assets and estate planning goals. As soon as practical, the lawyer should run a conflicts check to determine whether the representation of the prospective client would result in a conflict of interest with an existing client. However, because of the generally non-adversarial nature of estate planning, gathering information from a prospective client at the initial conference will seldom disqualify the lawyer from representing a current or future client in a matter adverse to the prospective client. Under MRPC 1.18(c), a lawyer who receives confidential information from a prospective client is prohibited from continuing an adverse representation "in the same or a substantially related matter" only "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." In the estate planning context, it is very unlikely that the lawyer would already be involved in an adverse representation in the "same or a substantially related matter." Accordingly, lawyers who interview prospective clients regarding estate planning services are not ordinarily required to take the same precautions that would be appropriate if the lawyer were interviewing the prospective client about a dispute or pending or threatened litigation.

If the lawyer were to accept the representation of the prospective client for the estate planning matter, MRPC 1.7 (Conflict of Interest: Current Clients) would govern whether the lawyer or the lawyer's firm could continue a representation or undertake a future representation that is or would be adverse to the client.

Estate Litigation Lawyers and Prospective Clients. Lawyers also provide litigation and dispute resolution services to clients regarding wills, trusts, fiduciary administration and other estate matters. In interviewing prospective clients regarding these matters, the lawyer may wish to limit the amount of confidential information obtained from the prospective client so that the lawyer could represent another party in the same or a substantially related matter. In doing so, the lawyer would need to avoid obtaining confidential information that was "significantly harmful" to the prospective client.

Client Discloses Confidential Information Unilaterally. As noted in Comment 2 to MRPC 1.18, a prospective client who unilaterally provides confidential information to a lawyer without having a reasonable expectation that the lawyer is willing to discuss representation of the prospective client is not entitled to the protections of MRPC 1.18. Thus, in those circumstances, the lawyer would not be precluded from continuing a representation adverse to the prospective client nor from taking a new matter adverse to the prospective client.

Lawyers Contacted by Other Lawyers as a Consultant. Another lawyer (the "consulting lawyer") will occasionally contact the lawyer for advice concerning one of the consulting lawyer's cases. When the consulting lawyer seeks advice concerning estate planning issues, given the non-adversarial nature of estate planning services, there is little risk of MRPC 1.18 precluding the lawyer from later representing a party adverse to the consulting lawyer's client under the circumstances proscribed in MRPC 1.18. See *Estate Litigation Lawyers and Prospective Clients* above. When the consulting lawyer seeks advice considering estate disputes, litigation or administration matters, whether the consulting lawyer's client is a prospective client of the lawyer will depend on the facts and circumstances. Generally, if the consulting lawyer uses hypothetical questions and makes no promise to compensate the lawyer, the lawyer should not be precluded from representing a client adverse to the consulting lawyer's client. Under those circumstances, the consulting lawyer's client and the consulting lawyer do not have a reasonable expectation that the lawyer will consider that he or she is being asked to be a lawyer for the consulting lawyer's client. However, if the consulting lawyer discloses the name of the client and other relevant facts or offers to pay for the advice obtained, depending on the facts and circumstances, the consulting lawyer's client may be considered a prospective client of the lawyer. Thus, the

lawyer may decide to limit the amount of confidential information disclosed by the consulting lawyer to prevent the disclosure of confidential information "significantly harmful" to the consulting lawyer's client. This would protect the lawyer's ability to represent a client adverse to the consulting lawyer's client in the same or a substantially related matter.

Lawyers as Expert Witnesses. When a lawyer is contacted by another lawyer or a prospective client about being an expert witness, generally the client will be considered a prospective client. Under MRPC 1.18, in order to be able to represent the opposing party as an expert witness in the same or a substantially related matter, the lawyer would need to take steps to prevent the disclosure of confidential information significantly harmful to the prospective client.

Exception that Allows the Lawyer's Firm to Represent a Party Adverse to the Prospective Client. Even if the lawyer obtained confidential information that was significantly harmful to a prospective client, under MRPC 1.18(d), the lawyer's firm could undertake a representation adverse to the prospective client if the firm obtained the informed consent, confirmed in writing, of both the adverse client and the prospective client. Furthermore, in some jurisdictions the lawyer's firm could undertake the representation if the lawyer who consulted with the prospective client were properly screened from the new matter and the firm otherwise met the requirements of MRPC 1.18(d)(2). See also Comment 8 to MRPC 1.18.

Agreement with Prospective Client to Waive Possible Conflict. Comment 5 to MRPC 1.18 provides that a lawyer may, with the prospective client's informed consent, condition the initial consultation on the prospective client's agreement that the lawyer may represent a present or future client adverse to the prospective client in the same or a substantially related matter. Although not expressly required by the Comment, the lawyer should confirm any such agreement in writing.

MRPC 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

ACTEC COMMENTARY ON MRPC 2.1

As advisor, the lawyer may appropriately counsel the client with respect to all aspects of the representation, including nonlegal considerations. In doing so, the lawyer should recognize his or her own limitations and the risks inherent in attempting to assist a client with respect to matters beyond the lawyer's expertise. Although it may be appropriate for the lawyer to suggest that a client consider either diversifying the client's investments or investing in a particular class of assets (e.g., municipal bonds), the lawyer ordinarily should not recommend specific investments to the client. In contrast, the lawyer may properly suggest that the client consider whether or not a particular course of action might generate adverse legal or nonlegal consequences. For example, the lawyer may properly ask a client to consider the legal and nonlegal consequences that might result if the client were to make unequal gifts to children or other equally related relatives. The lawyer may also appropriately recommend that the client consult with an expert in a particular field, whether it be mental health, investments, insurance, employee benefits or any other matter that is not within the lawyer's expertise.

MRPC 2.2: INTERMEDIARY

This Rule was deleted by the ABA in 2002. Refer to ACTEC's Third Edition for Commentary and Annotations.

MRPC 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

ACTEC COMMENTARY ON MRPC 2.3

MRPC 2.3 describes the circumstances under which a lawyer may undertake to provide a legal evaluation of a matter for use by nonclients and when the lawyer should refrain from providing an evaluation to a third party. The latter point is made clear in Comment 3 to MRPC 2.3:

> When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client.

Comment 2 also notes that, "the general rules concerning loyalty to client and preservation of confidences apply," which makes it essential to identify the person by whom the lawyer is retained. MRPC 2.3 is of limited application to the representation of clients in the estate planning and estate administration context—by its terms it only applies if the lawyer undertakes to perform an evaluation of the type described in the Comment.

The Comment to MRPC 2.3 also indicates that it applies primarily to the preparation of evaluations, such as title reports or opinions required by governmental agencies that will be relied upon by nonclients. MRPC 2.3 logically applies to such evaluations regardless of the particular nature of the client or the type of representation involved.

Under MRPC 2.3(a) the lawyer may undertake an evaluation only if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client. Thus, as noted in the Comment to MRPC 2.3, "if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction."

Information relating to an evaluation is subject to MRPC 1.6 (Confidentiality of Information). Where it is reasonably likely that providing the evaluation will affect a client's interests materially and adversely, the lawyer must first obtain the client's informed consent. See MRPCs 1.6(a) (Confidentiality of Information) (providing in part that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent); 1.0(e) (Terminology) (defining *informed consent*).

Evaluations prepared for the use of nonclients are also subject to the requirements of MRPC 4.1 (Truthfulness in Statements to Others). In addition, MRPC 3.3 (Candor Toward the Tribunal) prohibits a lawyer from knowingly presenting to the court any petition, accounting, or other document or evidence that is false or fails to disclose a material fact.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Ethics Opinion

South Carolina:

Op. 93-34 (1993). An attorney for an estate in probate or an attorney acting as personal representative for an estate in probate has no ethical duty to inform a surviving spouse of the right to claim an elective share in the absence of a present or past attorney-client relationship with the surviving spouse. The attorney for the estate in probate should take care to see that the spouse does not rely on him for legal advice and is informed of the right to independent counsel. The attorney acting as personal representative for the estate in probate should take care that the beneficiaries not misunderstand the attorney's role by assuming that he represents them.

MRPC 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ACTEC COMMENTARY ON MRPC 3.3

A lawyer may not mislead the court with regard to any matter before it, including ex parte applications. In particular, a lawyer may not assist a client by presenting to the court any petition, accounting, or other document or evidence that is false, and the lawyer must correct a false statement of material fact or law previously made to the court by the lawyer. If a lawyer knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to a matter, the lawyer shall take reasonable remedial measures, including, if necessary disclosure to the court. See *Pierce v. Lyman*, summarized in the Annotation following the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). A lawyer should not construe too narrowly the scope of the term "criminal or fraudulent." In the context of the lawyer-client communications privilege, a client's fraudulent conveyance of property may be a fraudulent act that must be disclosed by the lawyer to a court. Similarly, frustrating an order of the court may involve a fraud, justifying disclosure of confidential information. This rule is consistent with MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer), which prohibits a lawyer from assisting a client in criminal or fraudulent conduct, and MRPC 4.1 (Truthfulness in Statements to Others), which prohibits the lawyer from making false statements to any third party. A lawyer for a court-appointed fiduciary should consider the extent to which MRPC 3.3 may require the lawyer to disclose to the court any criminal or fraudulent conduct by the fiduciary.

Example 3.3-1. To remedy a breach of trust, the court appoints a special fiduciary (*SF*) to take possession of the trust property and administer the trust. See Uniform Trust Code §1001(b)(5). *SF* retains lawyer (*L*) to represent *SF* in matters pertaining to the trust. *L* prepares and files a pleading with the court seeking approval of SF's itemized invoice of its fees and includes the invoice with the pleading. Later, *L* dis-

covers that a substantial portion of the invoice was for time that *SF* did not spend on trust matters. *SF* refuses to prepare a corrected invoice for submission to the court. *L* should take corrective action. Depending on the circumstances, *L* may be able to correct the false statement by informing the beneficiaries, or *L* may need to inform the Court of the false statement. Since the pleading seeks approval of the invoice, the false statements in the invoice are material false statements subject to MRPC 3.3(a)(1).

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Ethics Opinion

Illinois:

Op. 98-07 (1999). Lawyer who had represented a guardian and in the course of the representation had prepared accountings for the guardian and presented them to the court later discovered that the accountings were false. The lawyer no longer represented the guardian. The lawyer has a duty to take appropriate remedial action to avoid assisting the guardian in concealing the misappropriation of estate assets from the court even if the lawyer must disclose what would otherwise be confidential client information. Illinois version of MRPC 3.3(b), like the parallel Model Rule, provides that a lawyer's duty to take remedial action is a continuing duty, even though the fraud was committed by a former client.

MRPC 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.
(b) A lawyer may act as advocate in the trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

ACTEC COMMENTARY ON MRPC 3.7

MRPC 3.7 is intended to avoid or eliminate not only possible conflicts of interest between lawyer and client but also situations in trial that may prejudice the opposing party when the lawyer combines or intermingles his or her role as an advocate with that as a witness.

The first two exceptions to acting as an advocate at trial when the lawyer is "likely to be a necessary witness" are straightforward and uncontroversial. Exception two is commonly encountered in estate, trust and protective proceedings where the reasonableness of the attorney's compensation for legal services may be an issue and testimony by the lawyer(s) involved is required to resolve the dispute. The third or "substantial hardship" exception involves a balancing of the interests of the client in keeping his or her counsel (despite counsel's involvement as a witness) and the possible prejudice to the opposing party. In determining prejudice, the trier of fact will look to the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony may conflict with that of other witnesses. However, even if a risk of prejudice to the opposing party exists, the court will nevertheless consider the negative effects of disqualification on the lawyer's client. In applying this Rule, the principle of imputed disqualification does *not* apply [MRPC 1.10 (Imputation of Conflicts of Interest: General Rule)].

MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients) often come into play:

> For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with MRPC 1.7 (Conflict of Interest: Current Clients). This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by MRPC 1.9 (Duties to Former Clients). The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Comment, MRPC 3.7.

Problems implicating MRPC 3.7 typically arise in such estate and trust litigation matters as will contests, surcharge actions, will and trust interpretation cases involving extrinsic evidence, disputes among heirs and beneficiaries and, sometimes, tax litigation. The estates and trusts lawyer who is likely to be a "necessary witness" in a trial involving his or her client must carefully parse the decisions involving lawyer and law firm disqualification under MRPC 3.7 as well as the cases arising under MRPC 1.7 (Conflict of Interest:

Current Clients); MRPC 1.9 (Duties to Former Clients); and MRPC 1.10 (Imputation of Conflicts of Interest: General Rule).

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

See also the Annotations following the ACTEC Commentaries on MRPC 1.7 and MRPC 1.9.

Cases

Arkansas:

Smith v. Estate of Tola Wharton, 78 S.W.3d 79 (Ark. 2002) 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.

Delaware:

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

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

Florida:

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

Nebraska:

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

New York:

Bingham v. Zolt, 823 F. Supp. 1126 (S.D.N.Y. 1993). 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.

Pennsylvania:

Pew Trust (2), 16 Fid. Rep. 2d 80 [Montg. Cty (Pa.) 1995]. The Pennsylvania Orphans Court granted the petition of certain trust beneficiaries to disqualify the law firm representing the trustee in related actions challenging, among other things, the prudence of the trustee's reliance on certain tax and legal opinions previously rendered by the law firm to support a material corporate transaction entered into by the trustee. The court found that certain of the firm's lawyers were "likely to be called as necessary witnesses" and that the firm and its lawyers must be disqualified from trying the case. Although the court acknowledged that the law firm had never served as counsel for the trust's beneficiaries and, consequently, the firm's only client was the trustee, disqualification of the entire firm was warranted in light of the "derivative" duties owed by the law firm to the trust's beneficiaries. *Pew*, *supra*, citing 16 Fid. Rep. 2d at 84-85 (citing extensively to the ACTEC Commentary on MRPC 1.2).

Virginia:

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

West Virginia:

State ex rel. DeFrances v. Bedell, 446 S.E.2d 906 (W.Va. 1994). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Ethics Opinion

Texas:

Op. 439 (1987). An attorney prepared a will, signed by two witnesses, and acted as notary thereof. After filing the will for probate and acting as counsel for the petitioner, a contest of the will was filed claiming that the document was not executed in accordance with the applicable law and that the testator did not have testamentary capacity. Contestant filed a motion to disqualify the attorney who had prepared and notarized the will, and the issue presented was whether or not the attorney should be disqualified from continuing to act as attorney for the executor (who was also the sole beneficiary under the will). The Texas Committee on Professional Ethics held that the attorney could not continue to act under these circumstances (following Texas Opinion 234 (1961), holding that the law partner of a lawyer who had drafted a will, deed and contract for a client, the validity of which instruments were attacked after the client's death on grounds of fraud, undue influence and mental incapacity of the client, could not serve as counsel since the lawyer knew his partner would be a material witness).

MRPC 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ACTEC COMMENTARY ON MRPC 4.1

MRPC 4.1 prohibits a lawyer from knowingly making false statements of fact or law to any third-party or knowingly failing to disclose material facts to any third-party under the circumstances described in paragraph (b). This rule must be considered in light of the lawyer's duties to the court, MRPC 3.3 (Candor Toward the Tribunal). In addition, the lawyer for a fiduciary is obligated to deal fairly and honestly with the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

In representing a fiduciary, the lawyer is bound by MRPC 3.3 (Candor Toward the Tribunal) in all relations with the court. MRPC 4.1 analogously to MRPC 3.3 (Candor Toward the Tribunal) if the lawyer is representing the fiduciary in dealing with beneficiaries though MRPC 1.6 (Confidentiality of Information) applies in this context. Thus, if a fiduciary is not subject to court supervision and is therefore not required to render an accounting to the court but chooses to render an accounting to the beneficiaries, the lawyer for the fiduciary must exercise at least the same candor toward the beneficiaries that the lawyer would exercise toward any court having jurisdiction over the fiduciary accounting.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Cases

Colorado:

People v. Vigil, 929 P.2d 1311 (Colo. 1996). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

Texas:

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

Ethics Opinion

Illinois:

Op. 98-07 (1999). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 3.3.

MRPC 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ACTEC COMMENTARY ON MRPC 4.3

The lawyer for a fiduciary is required to comply with MRPC 4.3 in communicating with the beneficiaries of the fiduciary estate, or with the protected person in the case of guardianships and conservatorships, when such persons are not represented by counsel. In dealing with unrepresented beneficiaries or the protected person, the lawyer for the fiduciary may not suggest that he or she is disinterested. As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer should inform the beneficiaries of the fiduciary estate regarding various matters, including the fact that the lawyer does not represent them and that they may wish to obtain independent counsel. If the lawyer knows, or reasonably should know, that an unrepresented beneficiary, or another unrepresented person, misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding. The lawyer should not permit the beneficiaries to believe that the lawyer is the lawyer for the parties interested in the matter if the lawyer is serving only as lawyer for the fiduciary.

If the lawyer for the fiduciary believes that the interests of an unrepresented person are adverse to the interests of the fiduciary, the lawyer must refrain from giving the unrepresented person any advice. In such cases the lawyer should suggest that the unrepresented person consult with independent counsel. See Comment to MRPC 4.3.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

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

Case

California:

Butler v. State Bar, 721 P.2d 585 (Cal. 1986). The court here observed: "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." *Id.* at 589.

Ethics Opinion

South Carolina:

Op. 93-34 (1993). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 2.3.

MRPC 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
  (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
  (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
  (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
  (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

ACTEC COMMENTARY ON MRPC 5.5

The Unauthorized Practice of Law. A lawyer admitted to practice in one jurisdiction (an "admitted jurisdiction") who provides legal services in another jurisdiction in which the lawyer is not admitted (a "non-admitted jurisdiction") may violate the non-admitted jurisdiction's proscriptions against the unauthorized practice of law. If so, the lawyer is subject to discipline in both the admitted jurisdiction and the non-admitted jurisdiction. MRPC 8.5 (Disciplinary Authority; Choice of Law). Moreover, a lawyer guilty of the unauthorized practice of law in a non-admitted jurisdiction is subject to having the lawyer's legal services contract held void and unenforceable. Thus, a lawyer's adherence to a non-admitted jurisdiction's ethical rules will not only allow the lawyer to practice ethically, but it will also protect the lawyer's financial interest as well.

This Commentary provides ethical guidance to lawyers engaged in estate planning, estate administration, estate litigation, and collateral fields when their representation touches other jurisdictions in which the lawyer is not licensed to practice law.

Mandatory Conduct. Even though authorized by MRPC 5.5 to provide services in a non-admitted jurisdiction, the lawyer remains subject to all other ethical provisions of the MRPC. In particular, pursuant to MRPC 1.1 (Competence), the lawyer must provide competent representation regarding the laws and rules applicable in the non-admitted jurisdiction.

Although MRPC 5.5 and its Comments are silent regarding "informed consent," MRPC 1.2(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer) authorizes a lawyer to limit the scope of the lawyer's representation only with the client's "informed consent." MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Under MRPC 5.5, a lawyer engaged in a multijurisdiction practice necessarily offers limited services in jurisdictions in which the lawyer is not admitted to practice law. Thus, if a lawyer intends to render services in or concerning a jurisdiction in which the lawyer is not admitted to practice law, the lawyer should obtain the client's informed consent to do so. See Commentary to MRPC 1.1 (Competence); MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (limiting the scope of the lawyer's representation with client's informed consent).

Prohibited Conduct. Under paragraph (b)(2), "a lawyer who [has] not been admitted" to the practice of law in the jurisdiction "shall not … hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction." This prohibition would apply even though the lawyer may be authorized to practice federal or state law in the non-admitted jurisdiction pursuant to paragraph (d)(2).

Impact of MRPC 5.5(c) and (d). The addition of MRPC 5.5(c) and (d) benefits all lawyers engaged in providing legal services that span state lines. However, the amended Rule especially benefits lawyers who provide transactional services, such as estate planning counsel. Prior to the amendment, a trial lawyer who was retained to represent a client in litigation in a non-admitted jurisdiction could do so by being admitted *pro hac vice*. There was no similar exception available to transactional lawyers. With the adoption of paragraph (c)(4) of MRPC 5.5, a transactional lawyer, in the circumstances described in that paragraph, may provide legal services in a non-admitted jurisdiction, as well as providing legal counsel regarding the laws of a non-admitted jurisdiction.

In addition, MRPC 5.5 provides other means for a lawyer to provide legal services in a non-admitted jurisdiction. If federal or state law expressly authorizes a lawyer to represent a client in a matter, MRPC 5.5 authorizes that representation in a non-admitted jurisdiction. Similarly, if a lawyer is involved in an alternative dispute resolution proceeding, MRPC 5.5 authorizes the lawyer to participate in the preparation for and in the proceeding in a non-admitted jurisdiction without violating MRPC 5.5.

The Practice of Law. Before a lawyer can be found to have engaged in the unauthorized practice of law, the lawyer must be engaged in the "practice of law." Not only are there significant variations in how the various jurisdictions define the "practice of law," most definitions are circular or amorphous. For example, under Oregon law, "[T]he practice of law means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance." California courts define the "practice of law" as both "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure," and as "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." Arizona relies on traditional concepts and examples for its definition:

> [T]he practice of law [means] those acts, whether performed in court or in the law office, which lawyers customarily have carried out from day to day through the centuries.... Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect, alter, or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities; the preparation for another of matters for courts, administrative agencies and other judicial and quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer. They also include rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession, either with or without compensation.

On the other hand, Utah enacted a very narrow statutory definition of the "practice of law" as: "appearing as an advocate in any criminal proceeding or before any court of record in this state [for another person]," but it repealed the act before its effective date.

Given this diversity of definitions of the "practice of law," a lawyer engaged in a multijurisdictional practice could review the laws of each of the jurisdictions to determine whether the services the lawyer is providing constitute the "practice of law" in those jurisdictions. However, the lawyer can avoid this study by simply assuming that any services the lawyer intends to provide will be the practice of law in each non-admitted jurisdiction and proceed accordingly.

Safe Harbors. A lawyer practicing in a non-admitted jurisdiction can obtain complete protection from a claim of unauthorized practice of the law by being admitted to practice law in that jurisdiction. In recognition of this principle, in passing the 2002 amendments to MRPC 5.5, the ABA also adopted a proposed Rule regarding admission of a practicing lawyer in another jurisdiction by motion made to the courts of the local jurisdiction. See *ABA Report to the House of Delegates, No. 201F.* Subject to length of service, good character, and other qualifications, states were encouraged to allow active lawyers in other jurisdictions to be admitted to practice in the local jurisdiction by motion. Several states have entered into compacts allowing active lawyers in any of the states to be admitted to practice law in the others provided certain conditions are met. See *Idaho Bar Comm'n R. 204A; Or. R. Adm. Attys. 15; Wash. Adm. Prac. R. 18* (Idaho, Oregon, and Washington); see also *N.H. Sup. Ct. R. 42(11); Vt. Sup. Ct. R. Adm. Bar 7(e)* (New Hampshire and Vermont, with Maine agreeing to join the compact effective January 1, 2005).

A lawyer may also choose to associate counsel in the non-admitted jurisdiction [MRPC 5.5(c)(1)]. By doing so, the lawyer gains a similar, though not as expansive, safe harbor in which to practice. This safe harbor is only available when the legal services the lawyer provides in the non-admitted jurisdiction are provided on a "temporary basis." See *Threshold Requirement under MRPC 5.5(c): Temporary Basis* below. In addition, the associated counsel must "actively participate" in the matter. Active participation is not defined in the Rule or the comments. Lawyers providing estate counseling services in a non-admitted jurisdiction would meet this second requirement by associating local counsel for such matters as deed preparation, will execution formalities, and similar services.

Threshold Requirement Under MRPC 5.5(c): Temporary Basis. If a lawyer desires to practice law in a non-admitted jurisdiction, MRPC 5.5(c) provides that the lawyer "may provide legal services on a temporary basis." The term "temporary basis" is not defined in the Rule. As noted in Comment 6 to MRPC 5.5: "There is no single test to determine whether a lawyer's services are provided on a 'temporary basis' in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be 'temporary' even though the

lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation." Thus, Comment 6 suggests a liberal interpretation of "temporary basis." This is particularly important for estate lawyers practicing in close proximity to another state. For example, a Chicago lawyer providing estate counseling for Illinois clients is likely to find multiple occasions to analyze and opine on the laws of Wisconsin, Iowa, Indiana, and Michigan regarding titling, tax, and similar issues. In addition, the Chicago lawyer may need to prepare deeds and other documents according to the laws of one or more of these jurisdictions. Provided the Chicago lawyer otherwise complies with paragraph (c), the lawyer's legal services regarding the surrounding non-admitted jurisdictions would constitute practicing law in those jurisdictions on a "temporary basis."

On the other hand, a lawyer who is engaged to provide estate planning services by clients in a non-admitted jurisdiction and makes personal visits to those clients on a recurring basis should be cautious in relying upon MPRC 5.5(c). While Comment 6 might lead the courts in the non-admitted jurisdiction to interpret "temporary basis" broadly, the comments are not binding. Thus, a lawyer in such circumstances should consider the desirability of joining the non-admitted jurisdiction's bar.

Legal Services Reasonably Related to the Lawyer's Transactional Practice. Subject to the "temporary basis" threshold requirement, under paragraph (c)(4), a lawyer may provide legal services in a non-admitted jurisdiction that arise out of or are reasonably related to the lawyer's practice in an admitted jurisdiction. Comment 14 states that a variety of factors may establish that the services performed are reasonably related to the lawyer's practice in the admitted jurisdiction. For example, a lawyer provides estate planning services for a client in the lawyer's admitted jurisdiction. The client then moves to a non-admitted jurisdiction. The lawyer may continue to provide estate planning services for the client. Similarly, where a client retains the lawyer to represent the client in a fiduciary administration and the admitted jurisdiction is the natural situs for administration, the lawyer could provide legal services for ancillary administrations in non-admitted jurisdictions.

Where the lawyer has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the lawyer's practice in non-admitted jurisdictions will be considered reasonably related to the lawyer's practice in the lawyer's admitted jurisdiction. For example, a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions. Because the comments are not binding, a lawyer who intends to rely on this analysis should consider seeking an opinion of the non-admitted jurisdiction's bar association. In addition, since this exception is based on "recognized expertise," a lawyer who chooses to rely on this exception should take steps to insure that the lawyer is recognized as an expert. These steps could include: obtaining certification as a specialist in those jurisdictions offering such programs; participating actively in bar sections related to the lawyer's expertise; participating in national associations of lawyers related to the lawyer's expertise; writing scholarly articles; teaching; participating in seminars and panel discussions; or any other activity that demonstrates the lawyer's expertise.

Legal Services Regarding Litigation and ADR. Subject to the "temporary basis" threshold requirement, paragraphs (c)(2) and (3) expand the situations in which lawyers may render services in a non-admitted jurisdiction regarding litigation and alternative dispute resolution ("ADR"). Regarding trials, preliminary work in preparation for the trial is acceptable, provided the lawyer is either authorized to appear or reasonably expects to be so authorized. Thus, a lawyer asked to assist or handle estate litigation could investigate the underlying facts, meet with and counsel clients, and provide related services, provided the lawyer reasonably expected

to be admitted *pro hac vice.* While this exception is available to allow the lawyer to investigate the matter before seeking admission, the lawyer should not rely on the exception except where necessary. Instead, the lawyer should seek and obtain admission *pro hac vice* at the earliest opportunity.

On the other hand, the exception for ADR applies only when the non-admitted jurisdiction does not require admission *pro hac vice* to participate in the ADR and the lawyer's services "arise out of or are reasonably related to the lawyer's practice" in an admitted jurisdiction [MPRC 5.5(c)(3)]. If admission *pro hac vice* is required to participate in the ADR, then the lawyer must comply with MRPC 5.5(c)(2). Where admission *pro hac vice* is not required, the lawyer may provide legal services in the non-admitted jurisdiction regarding the client's ADR, provided those legal services are "reasonably related" to the lawyer's practice in an admitted jurisdiction. Like litigation, a lawyer engaged to assist a client's efforts to resolve estate litigation in a non-admitted jurisdiction through ADR may provide legal services both in preparation for ADR and during ADR.

While paragraph (c)(3) is silent regarding whether this exception would apply to settlement negotiations alone, logically a lawyer should be able to assist a client with settlement negotiations in a non-admitted jurisdiction, if the lawyer could assist the client with ADR. Although silent regarding this matter, paragraph (c)(3) does apply to both "pending" and "potential" ADR. Since every settlement negotiation could "potentially" lead to ADR, a lawyer may rely on (c)(3) to authorize participation in settlement discussions alone. If a lawyer is asked to represent a client in settlement negotiations regarding estate litigation in a non-admitted jurisdiction, the lawyer should consider specifically raising the possibility of "potential ADR" in written communications with the client.

Other Legal Services on a Temporary Basis. While the language of paragraph (c) appears to state all of the exceptions available to a lawyer seeking to practice law in a non-admitted jurisdiction on a "temporary basis," Comment 5 specifically provides: "The fact that conduct is not [stated in (c)(1) through (4)] does *not* imply that the conduct is or is not authorized" (Comment 5 to MRPC 5.5, emphasis added). Given the diversity of legal services that can be offered in estate planning and administration matters, there may be other situations in which a lawyer may provide legal services in a non-admitted jurisdiction or concerning the laws of a non-admitted jurisdiction not expressly covered in paragraphs (c)(1) through (4). In analyzing whether the lawyer may act on a "temporary basis" with regard to the requested services, the lawyer should consider whether or not the "circumstances . . . create an unreasonable risk to the interests of their clients, the public or the courts" (Comment 5 to MRPC 5.5). If the lawyer can demonstrate that there is no unreasonable risk, the lawyer may proceed with the requested representation on a "temporary basis." In any event, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.

Legal Services Authorized by Federal or State Law. A lawyer providing legal services regarding estate planning and administration often represents clients in disputes with the IRS. A lawyer "may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party or parties on whose behalf he or she acts." [31 CFR §10.3; see generally 31 CFR Part 10, §10.0 *et seq.* (published as a pamphlet as Treasury Department Circular No. 230)]. In addition, a lawyer may practice before the United States Tax Court by complying with its requirements for admission (Tax Court Rule 24). Pursuant to paragraph (d)(2) of MRPC 5.5, a lawyer who is authorized to practice before the IRS or the Tax Court would be able to practice in any non-admitted jurisdiction adopting MRPC 5.5(d)(2). Moreover, unlike MRPC 5.5(c), there is no requirement that the practice in the non-admitted jurisdiction be on a "temporary basis."

In addition, states adopting MRPC 5.5(d)(2) may have state rules regulating practice before a state administrative tribunal, such as a tax commission, or an administrative law judge, that would authorize a lawyer admitted in another jurisdiction to practice before the commission or administrative law tribunal in the non-admitted state.

While the text of MRPC 5.5(d)(2) appears expressly to permit multijurisdictional practice in these circumstances, given the ease with which a lawyer can qualify to practice before the Tax Court or the IRS, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.

When authorized by federal or state law, including authorizations by "statute, court rule, executive regulation or judicial precedent," the lawyer "may establish an office or other systematic and continuous presence in [the non-admitted] jurisdiction for the practice of law…" (MRPC 5.5, Comments 18 and 15). For example, a lawyer in South Carolina might be able to practice full-time in Georgia (Georgia having adopted MRPC 5.5(d)(2), if the practice were limited to handling tax appeals with the IRS and tax court litigation. However, the lawyer must take steps not to mislead potential clients about the lawyer's right to practice generally in Georgia [MRPC 5.5(b)(2); see also *Advertising and Websites* below].

Effect of Non-Admitted Jurisdiction's Disciplinary Rules. A lawyer who either offers to provide services or provides services in a non-admitted jurisdiction under either MRPC 5.5(c) or (d) will be subject to the non-admitted jurisdiction's rules of professional conduct and will be subject to discipline pursuant to the non-admitted jurisdiction's disciplinary rules. See MRPC 8.5(a) (Disciplinary Authority; Choice of Law).

Advertising and Websites. A lawyer engaged in a multijurisdictional practice should consider whether the lawyer advertises the lawyer's services in non-admitted jurisdictions. Continuous advertising in non-admitted jurisdictions regarding legal services (other than those services authorized to be provided by federal or state law in the non-admitted jurisdiction) would constitute the "unauthorized practice of law" based on paragraph (b)(2). Advertising on national radio and television stations, in national newspapers, in national magazines, and in other national publications, even if directed primarily at potential clients in the lawyer's admitted jurisdiction, will also reach potential clients in non-admitted jurisdictions. In addition, the majority of lawyers engaged in multijurisdictional practices have websites providing information about the lawyers, including representative clients, fields of expertise, and other relevant information. By their nature, websites offer opportunities for a lawyer to communicate with potential clients in non-admitted jurisdictions. Thus, pursuant to paragraph (b)(2), if a lawyer uses any advertising that has a potential audience beyond the lawyer's admitted jurisdictions, the lawyer's advertising should clearly state that the lawyer is admitted in only those jurisdictions in which the lawyer is a member of the state bar and not in any other jurisdictions.

Fundamentally, MRPC 5.5 is based on the premise that certain types of multijurisdictional practices are acceptable because there is no "unreasonable risk to the interests of [the lawyer's] clients, the public or the courts" (Comment 5 to MRPC 5.5). When it comes to advertising, however, Comment 21 expressly provides: "Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5" (Comment 21 to MRPC 5.5).

The provisions of MRPC 7.1 through MRPC 7.5 contain several provisions that affect a lawyer engaged in advertising concerning a lawyer's multijurisdictional practice. First, MRPC 7.1 (Communication Concerning a Lawyer's Services) directs the lawyer "not to make false or misleading" representations or "omit a fact" neces-

sary to prevent the communication from being "materially misleading." Second, MRPC 7.3(c) (Direct Contact with Prospective Clients) requires advertising to include the words "advertising material" on the outside of the envelope of any correspondence and at the beginning and the ending of any electronic material. It is unclear whether this requirement applies to a lawyer's or law firm's website. A website differs from traditional advertising since it requires the potential client to search for the website. On the other hand, a website can be a passive source of information about the lawyer and the lawyer's practice or a fully integrated document generation system, selling forms and services. Third, a lawyer may identify those areas in which the lawyer practices, such as estate planning, estate administration or estate litigation; however, unless certified by a state, state bar, the American Bar Association or an organization otherwise authorized to certify specialties under state or federal law, the lawyer may not imply that the lawyer is certified as a specialist in a practice area [Comment 3 to MRPC 7.4 (Communication of Fields of Practice and Specialization)].

If a lawyer providing estate legal services has a website, the lawyer should take steps to protect potential clients, the public and the courts from any unreasonable risk. At a minimum, the website should identify the lawyer or each lawyer in the law firm and each lawyer's admitted jurisdictions. While a passive website may not be considered advertising, a lawyer should consider identifying the website as "advertising materials." A lawyer should also consider including a disclaimer indicating that the lawyer is not offering any legal services or advice through the website.

Although an interactive website providing estate document preparation and related services may be financially attractive, the lawyer should recognize that the risk to the public is substantially greater, as is the likelihood a non-admitted state would begin disciplinary proceedings. In addition, unhappy "customers" might seek to recover payments by arguing that the contract for services rendered is void.

ANNOTATIONS

See Caveat to Annotations on page 12
(Limiting the Scope and Purpose of the Annotations)

Cases

California:

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

Estate of Condon, 76 Cal. Rptr. 2d 922 (Ct. App. 1998). The court here held that an out-of-state (Colorado) co-executor reasonably chose Colorado counsel to handle the California-based estate of his decedent where firm 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.

Colorado:

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

Kansas:

In Re Flack, 33 P.3d 1281 (Kan. 2001). An attorney was suspended for two years for assisting a company that marketed estate planning services. 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.

Maine:

Smith v. Brannan, 2002 WL 1974069 (Me. Super. 2002) An out-of-state estate planning attorney argued that Maine's courts had no jurisdiction over her in a case where the complainant claimed that the lawyer had tortiously interfered with a devisee's expectancy interest. The Maine Superior Judicial Court held that Maine courts did have jurisdiction under Maine's long arm statute since: (1) the testator's will had specifically provided that it be interpreted under Maine law; (2) the testator had both tangible personal property and intangible property in Maine when he died in Maine and was a Maine resident; (3) the complainant's welfare as a widow residing in Maine is of state interest; (4) a Maine lawyer participated in the drafting of the amendments to the testator's estate plan in conjunction with the defendant; and (5) if the tort occurred as alleged, it would have an effect on the welfare of a Maine resident and the administration of a Maine estate. Therefore, the court held, Maine has a legitimate interest in the subject matter, the defendant reasonably could have anticipated litigation in Maine, and the exercise of jurisdiction by Maine courts "comports with traditional notions of fair play and substantial justice."

South Carolina:

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

Wisconsin:

In re Strasburg, 577 N.W.2d 1 (Wis. 1998). While suspended from the practice of law, the suspended attorney continued to engage in the practice of law and misrepresented to clients that he was an attorney. He continued to operate a business, providing advice for qualification for Medicaid benefits and preparing legal documents including trusts, powers of attorney and living wills. The business did not employ a licensed attorney to review documents prepared by the suspended attorney or his staff. The fact that the attorney refused to cease the unauthorized activities after the suspension was determined to be contempt of the court. The attorney's license to practice law (previously suspended) was revoked.

Ethics Opinions

Florida:

Ethics Opinion 24894 (2003). Florida attorney sought an ethics opinion concerning the appropriate response he should give to out-of-state counsel who wrote demand letters and other correspondence to the Florida's attorney's clients. The communications indicated that the out-of-state attorney was giving advice about Florida law. The Florida attorney refused to communicate with the non-Florida attorney and requested that a Florida attorney be retained to handle the issue. Opinion found that the Florida attorney acted appropriately in alerting out-of-state practitioner to avoid the unlicensed practice of law. In subsequent correspondence, the Division Director clarified its position for the Florida Real Property, Probate and Trust Law Section and advised that a Florida attorney is not prohibited from reviewing documents, such as real estate or estate planning documents, drafted by out-of-state attorneys.

Missouri:

Informal Advisory Op. 930172 (1993). This opinion is discussed in the Annotations following the ACTEC Commentary on MRPC 1.6.

New Mexico:

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ACTEC COMMENTARIES

(Note: **Boldface** numbers indicate the primary Commentary for each MRPC.)

CASES

ETHICS OPINIONS

STATUTES

SECONDARY AUTHORITIES