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Who's Your Client When Everybody is Your Client?

Ethical Dilemmas for Estate and Business Planners in Representing Family Members

Chicago Estate Planning Council
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"I need someone well versed in the art of torture—do you know PowerPoint?"

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1. The 4 "C"s of professional responsibility effect estate planners in roughly this order:

a. Conflict of Interest Resolution;
b. Competence;
c. Confidentiality; and
d. Communications.

Conflicts receive special attention in the Rules of Professional Responsibility and you will notice it is first on the list.

2. Rules regarding Conflicts (and how to resolve conflicts) are found at Rules 1.7, 1.8 and 1.9. Those Rules are set out in full at the end of this outline, along with the ACTEC Commentaries to those Rules actec.org (under the tab ACTEC Resources - Publications).

3. How do you "solve" a conflict?

a. By obtaining an *informed consent* from the affected parties to your representation.

b. Send the Letter EARLY in the representation (or proto-representation)
It is always best if you can identify and send these letters with the initial estate planning representation letter. You should not even start work that you may not be able to finish or to bill for if someone does not agree to waive the conflict. If the waiver is not forthcoming then you can save the time you would have spent meeting with a potential client and spend it instead with an actual client.

c. **Note:** The conflict disclosure/engagement letter should be dated and counter-signed by the client in ALL INSTANCES (unlike other engagement letters, where the attorney may decide that under given circumstances a signed letter is not necessary).

4. Common Scenarios: While there are many possible scenarios, the following five are likely to be encountered frequently and should raise ethical concerns when drafting the engagement letter:

a. Married Clients (first marriage or subsequent marriage)
b. Multi-generational Clients
c. Business entity representation
d. Trust/estate administration & beneficiary representation
e. Attorney as fiduciary

Note: In all cases, the most important purposes of the engagement letter are to disclose conflicts or potential conflicts, obtain *informed consent* from all parties, and lay the groundwork for what will happen if a conflict that impairs representations of any party does develop.

5. *Married Clients*: A pre-engagement letter should be delivered before any confidential information is obtained, and should cover the following points:

a. Disclosure that the representation is of both spouses jointly;

b. A statement that communications are intended to be joint, and will not be kept confidential from the other spouse;

c. A statement that if the clients have differences of opinions on any planning options discussed, the attorney can discuss and explain the pros and cons of different courses of action, but cannot be an advocate for the position taken by one spouse or the other;

d. A description of what course of action will be taken if a conflict does develop which prevents the attorney from further representation of both parties (usually withdrawal of representation from both parties)

6. *Multi-Generational Representation:* In the typical situation, multi-generational representation will include the children (and spouses) and grandchildren (and spouses) of existing clients. Engagement letters for this situation should cover the following:

a. For the New Clients:

i. Disclosure of whom the existing clients are;

ii. A statement that you have discussed the new proposed representation with the existing clients, that they have orally consented, and that you will be obtaining their consent in writing;

iii. A statement that the new clients' consent is required for continued representation of the existing clients (or, if that consent is not forthcoming, you will not go forward with the new representation);

iv. A statement that you do not believe the additional representation will create a conflict of interest, and what course of action will be followed if a conflict develops or is discovered;

v. A statement that all information regarding the existing client will be kept confidential from the new client, unless written consent is obtained from the existing client; and

vi. A statement that the new client's approves of your continued representation of the existing client:

(1) And that you have advised the new client of, and the new client consents to, the fact that representation of the existing client may include services rendered now or

in the future that would have the effect of limiting or eliminating an interest the new client would otherwise take under the estate planning documents of the existing clients, but for the services you might render; and

(2) And that the new client authorizes you to render to the existing client such services which have the effect of limiting or eliminating an interest the new client might otherwise receive, with no obligation on your part to advise the new client of that fact.

b. For the Existing Client: the same facts and issues, as set forth above, should be raised in a letter to the client, with the following additional points:

i. An explanation that the existing client's documents may grant certain types of powers to the new client, which can be exercised only in the new client's plan documents, and only if the new client is informed of them;

ii. Confirmation as to whether the attorney has the authority to communicate to the new clients the existence of any such powers and related information reasonably necessary to competently advise the new client regarding her estate plan; and

iii. Confirmation as to whether the attorney has the authority to communicate to the new clients information regarding the nature and extent of property subject to such powers.

7. *Multi-Party & Business Entity Representation:* This situation commonly arises where estate planning services are requested for a member of an existing closely-held business entity, and the attorney has represented and continues to represent the business entity. Disclosure and consents from the entity should be made and obtained, and further disclosures and consents may be necessary if it is not clear whether or not other entity owners consider themselves clients. If in doubt, communicate with everyone who might reasonably assume an attorney-client relationship exists. If in doubt, communicate with everyone who might possibly reasonably or unreasonably assume an attorney-client relationship exists.

It can never hurt to send a letter saying: Nice to know you, you are not my client. The worst that can happen is that someone will call wanting to be your client, and then you have to decide if there is more than a potential future conflict and if it can be waived.

a. Conflict Concern: Ordinarily, disposition of ownership interests in the entity should not cause conflict problems in the estate planning process. But buy-sell agreements, and other planning courses of action which may cause a dissolution or other early termination or restructuring of the entity may quickly put the attorney between parties with very different interests. Clearly provide in the engagement/conflict letter for your course of action if and when such a conflict develops.

b. This is probably an area where written advice, but not necessarily a written waiver, of the conflict is acceptable. Generally, you are simply advising a group of shareholders that you represent only one of them (or perhaps a particular family group) or that you represent the corporation rather than the shareholder to whom the advisory letter is addressed.

8. *Trust/Estate Administration - Concurrent Beneficiary Representation:* Representation of the fiduciary for the estate or trust may come first in time, before there is potential for representing a beneficiary. An engagement letter with the fiduciary should make it clear that:

a. The fiduciary understands that the fiduciary as such is the client (not the fiduciary individually);

b. The beneficiaries will be notified that the fiduciary and the estate/trust is the client, that the beneficiaries are not the client and are not represented by the attorney, and that beneficiaries may wish to obtain their own counsel to represent their interests;

c. The fiduciary as beneficiary can be represented by the attorney ONLY IF there is no conflict arising because of the dual representation (example: a dispute regarding valuation, where the results of the value will affect how other assets are distributed), and that if such a conflict develops, separate counsel will be required to represent the fiduciary "as beneficiary"; and

d. In the event co-fiduciaries are involved, conflicts may arise regarding how duties should be discharged, and what the attorney's course of action will be if such conflicts develop.

9. *Attorney as Fiduciary:* Unless you have decided to be a trust company, the best advice and best practice is: Do not act as a fiduciary.

If the client requests the attorney to act as a fiduciary and the attorney wishes to do so, then the issues listed below should be covered (1) in the engagement letter (or modified pre-engagement letter), (2) in the transmittal letter accompanying drafts of documents; and (3) in a "conclusion of representation" letter:

a. The client initiated the suggestion of naming the attorney;

b. The client has been advised and understands that there are others who could serve the position equally well, if not better;

c. The attorney's law firm will probably be retained to represent the attorney as fiduciary;

d. The law firm will bill for its services in the usual fashion, and the attorney/fiduciary will be the one reviewing and approving those statements (thus, normal checks and balances may not be present);

e. The attorney may take a commission for services rendered as a fiduciary;

f. Estate planning instruments normally include provisions waiving surety on bonds, and exculpating the fiduciary for a broad range of actions, and there may be a conflict for the attorney who is asked to serve as fiduciary in incorporating those provisions in the plan documents; and

g. The client is encouraged to seek independent counsel regarding the decision (1) to name the attorney, and (2) for the documents to be drafted with waiver of surety and exculpation provisions included.

10. Hypotheticals

Husband and Wife Engagement
Harry and Wilma come to see you to do their estate plan. This is the first marriage for both of them. They have no children. Are there any ethical problems in representing them both?
Yes, but these are handled with the engagement letter where you tell them you will represent them both, point out that their estate planning goals may differ, and that they will need candidly to discuss any differences with one another. You will not keep secrets from one spouse that are disclosed by another.

> ***Conflict Disclosure***
>
> *An additional purpose of this engagement letter is to confirm to you the dual representation of this law firm in connection with your estate planning because of our joint representation of you both. The ethical rules governing lawyers prohibits an attorney, except with consent of his client after full disclosure by the attorney, from accepting or continuing employment if the lawyer is asked to represent two clients having potentially differing interests. In that case the lawyer must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. For example, in any matter where we represent a husband and wife in their estate planning, issues may arise about the ownership of certain property, or what its appropriate disposition at death should be.*
>
> *My representation of both of you together is desirable to develop a coordinated plan. However, I must point out that having separate lawyers would ensure that each of you has your own advocate providing independent advice. You would also be assured that all communications to your separate lawyers would remain privileged and confidential, even from each other.*
>
> *In a joint representation I cannot serve as an advocate for one of you against the other. I cannot negotiate on behalf of one with the other. Instead, I will assist both of you in jointly developing a coordinated, overall estate plan that is beneficial and acceptable to both of you. In order to develop such a plan it is necessary that each of you be completely candid in advising me of all relevant information that may affect your estate plan. As a consequence of my advising both of you jointly, any information I receive from either of you that may affect the estate plan of the other will not be confidential between the two of you. I am required to disclose this information to the other. In all other respects our communications are privileged and confidential.*
>
> *While we do not believe that our firm's joint representation of you both in this matter constitutes a conflict of interest based on the information and facts available to this firm at this time, we believe it is proper to disclose again the fact of this dual representation to both of you, and to request your written approval for us to continue with this representation.*
>
> *This request is made with our assurances to you that should additional or changed facts and circumstances in this matter lead any attorney in this firm to believe that a conflict of interest exists such that the judgment of any attorney in the firm will or reasonably may be affected by the continued representation of both of you, we will immediately*

disclose such fact, offer to withdraw our representation of both parties, and will not represent either party without the written consent of the other.

Husband and (Different) Wife Engagement

Harry and Wendy come to see you to do their estate plan. Harry has 2 children by a prior marriage. This is Wendy's first marriage and Harry's third. Are there any ethical problems in representing them both?

Yes, the same issues as in the first example, but the issues are compounded by Harry's children. Are they close in age to Wendy? Are more children likely to be born to this marriage? Is Harry going to prefer his children over Wendy? Same basic letter is sent but attorney must be alert to problems the existing children represent. And perhaps even add this issue as an example of the types of conflicts that may develop.

Representing the Children

Harry now comes to see you and asks you to do estate plans for his children Ava and Tyler. Ava is a doctor. Tyler works in Harry's business as VP of marketing. What ethical problems are present?

Need to advise both existing client and possible future clients that there is a possible conflict of interest because, while Harry and Ava are currently beneficiaries under Harry's estate plan, Harry may change his plan in the future.

Letter to existing client Harry
(A more complete version of this letter is set out at page 35 of this outline.)

Of course you know that you suggested Tyler use our firm to do his estate plan, and we appreciate that referral. Any referral is welcome, but particularly when a close family member is referred, we appreciate the confidence in our abilities and expertise that you have shown.

We are writing to disclose to you our possible representation of your son, Tyler, in connection with his estate planning matters, and to request that you waive any possible conflict regarding that representation.

The ethical rules governing lawyers prohibits an attorney, except with consent of his client after full disclosure by the attorney, from accepting or continuing employment if the lawyer is asked to represent two clients having potentially differing interests. In that case the lawyer must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment

While we do not believe that our firm's dual representation of both you and your son in these matters constitutes a conflict of interest based on the information and facts available to this firm at this time, we believe it is proper to disclose the fact of this dual representation to you, and to request your written approval for us to engage in this new representation of your son.

This letter confirms that we will not disclose any information about you or your estate planning file to your son without your advance consent, nor will we disclose to you any

information about your son or his estate planning matters without his consent. We have reviewed the conflict issue with your son in a similar letter sent to him.

NOTE THAT *your planning documents may contain, now or in the future, provisions which give your son certain rights and powers over trust shares that may be created for him under your documents. This would ordinarily occur only after your death.*

Commonly, this type of power – called a power of appointment – requires the power holder to make specific reference to the power in his or her own estate planning documents if the power is to be exercised. .

The authorization below requests you to allow us to disclose the existence and nature of any such powers in your documents, in connection with any drafting we do for your son. Disclosure of the existence of any such power itself DOES NOT call for disclosure of any description (including values) of the property subject to the power.

We would appreciate it if you would confirm receipt and review of this disclosure, and your consent to our representation of Tyler as set out above, by signing, dating and returning to us the copy of this letter which we have provided.

The letter to Tyler (set out at page 37) is similar but contains the following additional warning:

Your approval of our representation of you while simultaneously continuing to represent your father includes the following advise and consent: Our representation of your father may include services rendered now or in the future that would have the effect of limiting or eliminating an interest you would otherwise take under his estate planning documents, but for the services we rendered. If we are requested to render such services which have the effect of limiting or eliminating your interest in your father's estate, we are authorized by you to engage in such representation without advising you of that fact.

If Harry proposes to pay any fees for services the attorney may render to Tyler, Tyler must consent to that payment.

Ordinarily an attorney looks to the client for payment of his fees, however, in this matter, your father has offered to pay our fees for estate planning services. Please know that, first, you must agree to us accepting his payment for your fees, and second, that any such acceptance of his payment does not mean he has to right to review your file or be informed of any matters you and I discuss.

Representing Harry and Tyler in connection with the business

Now, a few years down the road, Harry and Tyler are both your estate planning clients, and Harry and Wendy (who is 2 years older than Tyler) are still married. Harry wants to start to retire from the business but still wants to tap the cash flow and suggests that he be given an deferred compensation plan and a consulting agreement. Tyler feels he has been responsible for much of the growth and success of the company, but does still feel Dad is entitled to something. Also, both Tyler and Harry have agreed

that Harry will remain as a director and take a director's fee. He needs these 3 sources of cashflow to maintain the lifestyle to which he and Wendy have become accustomed.

They come to you to draft the deferred compensation plan and consulting agreement, and also to do the corporate work to give Harry voting control over the Company. You helped form the Company and have always been its lawyer.

Do you have a conflict (and, if so, how many)? What can you do?

I think you have to pick a side. There are three sides here. Harry, Tyler and the Company. Each of them has competing and in some situations incompatible interests going forward.

What happens if you don't pick a side?

Actual real life example (where my firm got involved after Tyler fired the company attorney who was also his own estate planning attorney):

Tyler got tired of Dad's greediness (which he viewed as Wendy's greediness) after a couple of years. The deferred compensation agreement was left alone. However, Tyler stopped using Dad as a consultant and – because there was no guaranteed minimum – Dad lost all income from that part of the arrangement. In addition, Tyler voted Dad off of the Board of Directors (thus involving the operation of the company in his decision to stop paying Dad to the extent that he could), and took away all of his perquisites (company car, country club membership, health care, etc.).

There was little Harry could do as he had trusted Tyler and gone along with all of the transfers of stock and power to him. The basic consulting agreement as drafted by the company's attorney had few teeth so Harry had little ability to force the company to keep paying him, or to keep his perqs intact. Guess who got sued?

Now, aren't you glad you were not trying to work all sides of that situation?

Becoming so entwined in the families and the business until real conflict(s) arise

Walter married Betty. Peter married Margaret. Walter and Peter were brothers who started a business together in the 1950s. Walter and Betty had two children, both girls. One of them (Susan) had no involvement in the business, the other (Linda) married a man who got a job with his father-in-law in the business, was successful and actively promoted over the years. Peter and Susan have two children, a boy and a girl. Their son is active in the business. Their daughter was not active but her husband was (until they got divorced and he got fired). Walter died and left his share of the company in trust to his wife. She already owned a share of the company.

Now, Betty has died. You suddenly realize: You did the estate plans for Walter and Betty. You did the estate plans for Peter and Susan. You did the estate plans for the children who were active in the business, but not for the children who were not active in the business. You do the income tax returns for the business and the personal income tax returns for its owners/officers (including the children who are active in the business). You helped to form the company (actually, your firm helped to form the

company and the partner who did that has retired so you have inherited the file). Your firm does the annual filings and minutes for the company and you are the "company attorney".

You review the files (some of which are quite old), and discover that no conflict letters have ever been sent to anybody.

The problem at this point is that Betty's daughters Susan and Linda are co-trustees of her trust which owns 25% of the business, and co-trustees of the QTIP marital trust which also owns 25% of the business. Linda has a right to buy from Susan the shares of the Company that are otherwise allocated to her share at their value as determined for federal estate tax purposes. The trust provides for a payout over 10 years of the amount due. This is a taxable estate. One of the trustees would like to value the Company high so as to get more money, the other would like to value it low so that she does not have to pay so much to her sister. You would like to see a low value used to minimize the estate taxes.

Your duty of loyalty to the point of view of any given client in this matter may clearly conflict with your duty to other clients who you already represent.

Can you represent the sisters as trustees? Should you represent the sisters as trustees?

What conflicts exist and how can they be resolved?

Please see the letter at page 40 that was sent in this situation.

In administering an estate, make sure the beneficiaries know you don't represent them.

1. *This law firm represents the trustee. WE DO NOT REPRESENT ANY BENEFICIARIES under the trust.*

2. *If you have any questions of a legal nature regarding the trust, you should seek advice from your own legal counsel.*

3. *If you have general questions of a non-legal nature regarding the administration of the Trust, you should contact the trustee directly.*

If the attorney is the fiduciary

The cover letter to the client with the documents appointing the attorney should include the following:

Designation Of Attorneys In This Firm As Successor Trustees

*Again at your request, at your sole initiative and without any suggestion or prompting from any one in this law firm, you have named * as successor trustees under your Declaration of Trust (after *). Please review and confirm these designations. Your Trust contains a provision allowing any attorney of this firm who is named and acting as a trustee, (I) to retain this firm for legal services to be rendered to the trust, and (ii) to be entitled to receive his or its fair, usual, and customary compensation for those legal services, and (iii) to receive that*

compensation or his distributive share of the compensation received by that firm, without diminution of the compensation to which he is entitled for services as trustee hereunder.

Further, your document contains standard exculpation provisions for any trustee acting in good faith, and those provisions would include any attorney in this firm acting as trustee.

The estate plan documents themselves should contain something like the following:

**. *, or any firm of which she is a member, may be engaged by my executor to render legal services on behalf of my estate, even though * shall then be acting as executor hereunder and shall make or participate in the decision so to engage herself or a firm of which she is a member. *, or any firm so engaged, shall be entitled to receive her or its fair, usual, and customary compensation for those legal services and * shall be entitled to receive that compensation or her distributive share of the compensation received by that firm, without diminution of the compensation to which she is entitled for services as executor under this will.*

11. Cases

Aoki v. Aoki, 243 N.Y.L.J. 93, at 18 (May 17, 2010) - children of prior marriages persuaded Dad to irrevocably release his right to exercise his broad non-general power of appointment in favor of anyone but descendants. This meant, effectively, Rocky could exercise the power only in favor of his children and omitted his newest wife as a beneficiary. A second irrevocable release limited the exercise even further. The attorneys who prepared Rocky's basic estate plan documents met with the children, prepared the irrevocable releases, and met with Rocky to sign them. Rocky (and later his widow) argued that the irrevocable nature of these documents was never adequately explained (and the court so found). The release of the power also cost some estate tax because the spouse was not allowed to be a beneficiary of the property. Rocky attempted to revise his exercise of the power but his revisions were rejected by the trustees (the children who had solicited the irrevocable release in the first place).

At trial, the spouse prevailed in her argument that the attorneys' impermissible conflict between representing Rocky and also representing the interests of the children had violated their fiduciary duty to Rocky making the releases fraudulent such that they should be ignored.

That finding by the trial court was reversed on appeal because the Court of Appeals decided the attorneys were not going to profit personally from the exercise of the power, there was insufficient evidence of fraud.

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

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

Haynes v. First National State Bank of New Jersey, 432 A.2d 890 (N.J.1981) concerns a lawyer who prepared a will for a new client where the lawyer had a preexisting professional relationship with the principal beneficiary of the will, the client's daughter. Here the grandchildren argues that the lawyer's conflict of interest invalidated the will arguing it was procured through undue influence. While the lawyer had met alone with the client, acted in good faith, and stated he understood the two clients to have an identity of interests. Facts also tended to show that the client was elderly and lived with the beneficiary, and that there was evidence of overreaching by the beneficiary. The court found the lawyer did have a conflict of interest sufficient to raise a presumption of undue influence. The court characterized the conflict as irreconcilable and expressed doubt whether disclosure and consent could have removed it.

Will of Mann, 490 N.Y.S.2d 213 (1985), a motion was filed to disqualify a lawyer in a will contest. In this contest, the lawyer represented a disinherited child, but had previously represented that child's

sibling in other matters involving the decedent. Here the sibling was accused of procuring the will by fraud, undue influence and coercion. The court found that these facts supported disqualification. Compare this result to *Chase v. Bowen,* 771 So.2nd 1181 (Fla. Ct. App. 2000) where the court ruled that no conflict of interest existed when a lawyer revised a will to disinherit a beneficiary whom the lawyer had represented on an unrelated matter.

Scanlon v. Eisenberg, 913 F. Supp. 2d 591 (N.D. Ill. 2012). Rules 1.7. Topics: Malpractice. Plaintiff was beneficiary of discretionary trusts set up by her father and uncle. The law firm that represented the trustee of the trusts also represented General Growth, the company whose stock was held by the trusts, and other family members. The lawyers also held General Growth stock and controlled the corporate trustee. The lawyers had represented plaintiff for all of her legal matters throughout her life. Plaintiff sued the lawyers for malpractice for several questionable transactions involving the trusts, and the lawyers responded that there was no attorney-client relationship with plaintiff with respect to her position as beneficiary of the trusts. In response to a Rule 12(b)(6) motion to dismiss by the lawyers, the court determined that the attorney-client relationship between the plaintiff and the lawyers was sufficiently broad to include her interest as beneficiary of the trust and so was sufficient to ground plaintiff's malpractice and breach of fiduciary duty claims.

Federal cases attempting to disqualify attorneys because of pre-existing conflicts
Artromick Intern., Inc. v. Drustar, Inc., 134 F.R.D. 226 (S.D. Ohio 1991). Rules 1.1, 1.4, 1.7, 1.16. Topics: Disqualification. In this disqualification case the court found that a pre-existing lawyer-client relationship had terminated. It is unreasonable to continue to demand an attorney's undivided loyalty for an indefinite period of time when the attorney's last bill is both disputed and unpaid, and when each of several new opportunities to use the attorney's services is directed to another firm. Even if, subjectively, plaintiff did consider Mr. Dunn to be their attorney in January, 1990, that belief became objectively unreasonable at some point prior to that date. The precise date need not be identified: it is enough to conclude, taking into account all the relevant facts, that the relationship ended before Schottstein [the law firm] accepted this litigated matter.

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

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

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

12. Bibliography

ACTEC Commentaries (5th Edition)

ACTEC Engagement Letters (3rd Edition)

[both of the foregoing are available on the public page of the ACTEC website actec.org under Resources, and then under Publications]

Clary Redd, Trying Too Hard To Do Too Much: Ethics Traps for the Good Samaritan Cannon December 5, 2017 Teleconference

Clary Redd, Ethics Issues Arising in Concurrent Representation of Spouses and Other Family Members Salvation Army presentation, October 3, 2017

"You seem to know something about law. I like that in an attorney."

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.

[No material change in Illinois Rules of Professional Conduct of 2010]

ACTEC COMMENTARY ON MRPC 1.7

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

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

it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises. Before accepting a representation involving multiple parties, a lawyer should consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest. Failure initially to meet with the prospective clients separately risks the possibility that information will be revealed by one of them in a joint meeting that would disqualify the lawyer from representing either of them because of the duties owed to a prospective client under MRPC 1.18 (Duties to Prospective Client).

Existing Client Asks Lawyer to Prepare Will or Trust for Another Person. A lawyer should exercise particular care if an existing client asks the lawyer to prepare for another person a will, trust, power of attorney or similar document that will benefit the existing client, particularly if the existing client will pay the cost of providing the estate planning services to the other person. The lawyer would, of course, need to communicate with the other person and decide whether to undertake representation of that person as a new client, along with all the duties such a representation involves, before agreeing to prepare such a document. If the representation of both the existing client and the new client would create a significant risk that the representation of one or both clients would be materially limited, the representation can only be undertaken as permitted by MRPC 1.7(b). In any case, the lawyer must comply with MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules) and should consider cautioning both clients of the possibility that the existing client may be presumed to have exerted undue influence on the other client because the existing client was involved in the procurement of the document. Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed). In other contexts, however, some experienced estate planners undertake to represent related clients separately with respect to related matters Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining informed consent) and MRPC 1.0(b) (Terminology) (defining confirmed in writing). The writing may be contained in an engagement letter that covers other subjects as well.

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

by one of them with the other. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

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

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

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

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

will or to assert an elective share. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining informed consent) and MRPC 1.0(b) (Terminology) (defining confirmed in writing).

Conflicts of Interest May Preclude Multiple Representation. Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a prenuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 (Conflict of Interest: Current Clients). A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 (Conflict of Interest: Current Clients) with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration. Nonetheless, the corporate fiduciary might be of a different view; and it would be useful to clarify this in advance. Where the lawyer is trying to keep open the possibility of such a future adverse representation on an unrelated matter, the lawyer should ask the corporate fiduciary for a prospective waiver as to such representations, as explored in the next section. Where a lawyer is already representing another party adverse to the corporate fiduciary on an unrelated matter, it will be necessary for the lawyer to comply with MRPC 1.7(b) as to both clients before undertaking to represent the corporate fiduciary.

Prospective Waivers. A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter. These conflicts are said to be "waivable." Thus, a surviving spouse who serves as the personal representative of her husband's estate may give her informed consent, confirmed in writing, to permit the lawyer who represents her as personal representative also to represent a child who is a beneficiary of the estate. The lawyer also would need an informed consent from the child that is confirmed in writing before undertaking such a dual representation. However, a conflict might arise between the personal representative and the beneficiary that would preclude the lawyer from continuing to represent both, or either, of them. Comment 22 to MRPC 1.7, as amended in 2002, states: [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b), provides: "A lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest" in a "wider range of future conflicts than would have been possible under the Model Rules prior to their amendment." Comment 22 to MRPC Rule 1.7 continues: The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those

representations, the greater the likelihood that the client will have the requisite understanding. ... [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. As used in Comment 22 and ABA Formal Ethics Opinion 05-436 (2005), the term "waiver" means "informed consent," as defined in MRPC 1.0 (Terminology). Several additional limitations and requirements apply to prospective waivers: 1) Some conflicts, of course, are not consentable [see MRPC 1.7(b)(2) and (3)]; 2) the client's informed consent must be confirmed in writing [see MRPC 1.7(b)(4)]; 3) a client's informed consent to a future conflict, "without more, does not constitute the client's informed consent to the disclosure or use of the client's confidential information against the client [see MRPC 1.6 (Confidentiality of Information)]"; and 4) in any event, the lawyer considering taking on a later matter arguably covered by an informed prospective consent must nevertheless determine whether accepting the later engagement is prohibited for any other reason under either MRPC 1.7(b) or MRPC 1.9 (Duties to Former Clients). ABA Formal Opinion 05-436 at 4-5. Finally, the lawyer in any event would need the consent of the other client whose interests are affected by the representation. MRPC 1.7(a). Lawyers should also note that neither Comment 22 nor ABA Formal Opinion 05-436 will be binding on the jurisdiction in which a lawyer practices. This is important because MRPC 1.7 limits the circumstances to which it applies under both paragraph (a) and (b) to situations where "a concurrent conflict of interest [exists] under paragraph (a)." Accordingly, a state disciplinary authority could argue that since Rule 1.7 applies only to a concurrent conflict of interest, neither Comment 22 nor ABA Formal Ethics Opinion 05- 436 (2005) accurately reflects the text of MRPC 1.7, so MRPC 1.7(b) would not control a future conflict of interest. In addition, the lawyer should consider the impact, if any, that MRPC 1.8 (h) could have on a state disciplinary authority. It provides: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." A claim that a lawyer asserted the interests of another party in conflict with a client's interest normally constitutes a breach of fiduciary duty, rather than malpractice. Even so, both as a matter of substantive law and pursuant to the Rules of Professional Conduct of a particular state, the disciplinary authority or court may believe that of the two types of misconduct, a client's right to bring a claim in the future for breach of the lawyer's fiduciary duty to the client deserves greater protection than a client's right to bring a future claim for malpractice. Thus, a state disciplinary authority or court could apply MRPC 1.8(h) to a future conflict of interest on the basis that "malpractice" includes a "breach of fiduciary duty" to the client. Selection of Fiduciaries. The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer's independent professional judgment in the selection of a fiduciary would be materially limited by the lawyer's self-interest or any other factor, the lawyer must obtain the client's informed consent, confirmed in writing. If the client is selecting a fiduciary that is affiliated with the lawyer, such as a trust company owned by the lawyer's firm, the lawyer must obtain the client's informed consent, confirmed in writing. Appointment of Scrivener as Fiduciary. An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). Comment [8] to MRPC 1.8 makes clear that Rule 1.8© "does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position" provided that doing so does not run afoul of MRPC 1.7. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer

should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer. The designation of the lawyer as fiduciary will implicate the conflict of interest provisions of MRPC 1.7 when there is a significant risk that the lawyer's interests in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. See ACTEC Commentary on MRPC 1.8. (Conflict of Interest: Current Clients: Specific Rules) (addressing transactions entered into by lawyers with clients). For the purposes of this Commentary, a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary. The client should also be informed of any significant lawyer-client relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary under consideration for appointment.

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

Representation of Fiduciary in Representative and Individual Capacities. Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be both an executor and a beneficiary of the estate, and may want the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client's personal interest, such a "dual capacity representation" poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities. In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer's clients. MRPC 1.7(a)(2) notes that if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to …a third person" then MRPC 1.7(b) must be complied with, including the duty to get informed consent found in MRPC 1.7(b)(4). Waivers from

beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MRPC 1.7(b)(4) only contemplates waivers from "affected client[s]." Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

> Example 1.7.4 X dies leaving a will in which X left his entire estate in trust to his spouse A for life, remainder to daughter B, and appointed A as executor. A asked L to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented, including an informed agreement to forego any right to have the L advocate for A's personal interest insofar as it conflicts with A's duties as executor. L may properly represent A in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).
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> Example 1.7.5 X dies, leaving a will giving X's estate equally to his three children. Child A was appointed executor. A engages L to represent her as executor. A dispute arises among the three children over distribution of X's tangible personal property, and A asks L to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, L may need to advise A to obtain independent counsel to represent her in the dispute. In addition, L may need to advise A to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties. Client with Diminished Capacity. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court's attention to the client's opposition and ask that separate counsel be provided to represent the client's stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

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

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

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

> Annotations (excerpt); Illinois: *Fetch v. McDermott, Will and Emery, LP,* 401 Ill.App.3d 1006, 929 N.E.2d 1167 (2010). Son of decedent alleged that law firm committed malpractice in failing to advise him of its conflict of interest in simultaneously representing both him and the co-trustees of the trust set up by his mother when he wished to buy a farm held in the trust. The court held that, because firm was representing him for purposes of prenuptial and estate planning matters, and was not advising him about purchase of the farm, it had no conflict. Ethics Opinions ABA: Op. 02-428 (2002). This opinion addresses the responsibilities of a lawyer whose estate planning services are recommended (and perhaps paid for) by a potential beneficiary of the relative. "A lawyer who is recommended by a potential beneficiary to draft a will for a relative may represent the testator as long as the lawyer does not permit the person who recommends him to direct or regulate the lawyer's professional judgment pursuant to Rule 5.4©. If the potential beneficiary agrees to pay or assure the lawyer's fee, the testator's informed consent to the arrangement must be obtained, and the other requirements of Rule 1.8(f) must be satisfied. If the person recommending the lawyer also is a client of the lawyer, the lawyer must obtain clear guidance from her as to the extent to which he may use or reveal that person's protected information in representing the testator. The lawyer should advise the testator that he also is concurrently performing estate planning services for the other person. Ordinarily, there is no significant risk that the lawyer's representation of either client will be materially limited by his representation of the other client; therefore, no conflict of interest arises under Rule 1.7."

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.

© 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.

[No material change in Illinois Rules of Professional Conduct of 2010]

ACTEC COMMENTARY ON MRPC 1.8

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

Prohibited Transactions. Unless the lawyer complies with the requirements of MRPC 1.8(a), a lawyer generally should not enter into purchase or sale transactions with a client or with the beneficiaries of a fiduciary estate if the lawyer is serving as fiduciary or as counsel to the fiduciary. Model Rule 1.8(a) "applies to lawyers purchasing property from estates they represent." MRPC 1.8, cmt [1]. Gifts to Lawyer. MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term "related person" is defined in MRPC 1.8© and may include a person who is not related by blood or marriage but has a close familial relationship. In principle, therefore, an unmarried person living with another person in a committed marriage-like relationship, should qualify as "related" under this definition. It should also encompass persons in a stepchild/stepparent relationship and persons who have been raised by "de facto" parents but who have never formally been adopted, provided there is, in fact, a "close familial relationship." However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person

associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. See MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules). For the purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts. As noted in comment [8], the rule "does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position." See also ABA Formal Opinion 02-426 (2002). The client's appointment of the lawyer as a fiduciary is not a gift to the lawyer and is not a business transaction that would subject the appointment to MRPC 1.8. Nevertheless, such an appointment is subject to the general conflict of interest provisions of MRPC 1.7 (Conflict of Interest: Current Clients).

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

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

> Example 1.8-1. Father (F), a client of Lawyer (L), has asked L to prepare an irrevocable trust for F's daughter (D), who will soon attain her majority. D will be the settlor, since F wants D to transfer property to the trust that D will be entitled to receive from a custodianship that was established for D under the Uniform Transfers to Minors Act. F has indicated that he would pay the cost of L's representation of D in connection with the preparation of the trust. Before undertaking to represent D, L should inform F regarding the requirements of MRPC 1.8—particularly that L must be free to exercise independent judgment in advising D in the matter. L must also obtain D's informed consent to L being compensated by F. Since F is a client, L must be satisfied that representing both F and D is permissible. If there is significant risk that the L's representation of D will be materially limited by the lawyer's own interests in the fee arrangement or by L's responsibilities to F, then L must be able to reasonably conclude that it will be possible to competently and diligently represent both clients and the consent of each must be confirmed in writing. See ACTEC Commentary to MRPC 1.7 (Conflict of Interest: Current Clients). If L cannot represent both F and D consistent with the provisions of MRPC 1.7 (Conflict of Interest: Current Clients), L should decline to represent D. L should not prepare the trust at F's request without meeting with D personally—just as L should not draw D's will without meeting with her personally.
>
> Example 1.8-2. After a review of various forms of fringe benefit programs, Employer (E) is introduced to Lawyer (L) for the purpose of having L provide estate planning services for those of E's employees who desire such services. E agrees to pay L for providing the contemplated professional services "that will benefit E's employees." Provided each employee gives an

informed consent to L's representation of the employee under the circumstances, and provided L exercises independent judgment on behalf of each employee-client, L may render the services requested by each employee.

Example 1.8-3. L represents Charity. Charity contacts L and tells her that a donor wishes to leave his estate entirely to Charity as long as Charity will cover the costs of drafting the Will. Charity asks L to meet with the client and draft his Will, with the understanding that the Charity will pay L's fees. L should inform Charity regarding the requirements of MRPC 1.8—particularly that L must be free to exercise independent judgment in advising donor in the matter, and that confidentiality of information regarding L's representation of donor will be maintained, even if donor's intentions regarding disposition of his estate vary from what Charity currently understands. L must also obtain donor's informed consent to L being compensated by charity. Since Charity is a client, L must be satisfied that representing both Charity and donor is permissible. If there is significant risk that the L's representation of donor will be materially limited by the lawyer's own interests in the fee arrangement or by L's responsibilities to Charity, then L must be able to reasonably conclude that it will be possible to competently and diligently represent both clients and the consent must be confirmed in writing.

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

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© that is material to the matter, unless the former client gives informed consent, confirmed in writing.

© 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.

[No material change in Illinois Rules of Professional Conduct of 2010]

ACTEC COMMENTARY ON MRPC 1.9

The completion of the specific representation undertaken by a lawyer often results in the termination of the lawyer-client relationship. See MRPC 1.16 (Declining or Terminating Representation). Thus, the completion of the administration of an estate normally results in the termination of the representation provided by the lawyer to the personal representative. The execution of estate planning documents and implementation of the client's estate plan may, or may not, terminate the lawyer's representation of the client with respect to estate planning matters. In such a case, unless otherwise indicated by the lawyer or client, the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive. However, following implementation of the client's estate plan, the lawyer or the client may terminate the representation by giving appropriate notice, one to the other. Even if the representation is terminated, the lawyer continues to owe some duties to the former client. As stated in the Comment to MRPC 1.9, "[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest." The lawyer who formerly represented a client in connection with an estate or trust matter may not, without the informed consent of the former client, confirmed in writing, represent another person in the same or a substantially related matter if that person's interests are materially adverse to those of the former client. For example, a lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's claims against the trust by invading the assets of the trust. Similarly, the lawyer may not, without the informed consent of a former client, confirmed in writing, use to the detriment of the former client any confidential information that was obtained during the course of the prior representation. See MRPC 1.7 (Conflict of Interest: Current Clients) (addressing the effectiveness of an advance waiver); MRPC 1.10 (Imputation of Conflicts of Interest: General Rule) (regarding disqualification of a firm

with which the lawyer is or was formerly associated). MRPC 1.9 may be implicated following the termination of a joint representation.

Example 1.9-1. Lawyer (L) represented Husband (H) and Wife (W) jointly in connection with estate planning matters. Subsequently H and W were divorced in an action in which each of them was separately represented by counsel other than L. L has continued to represent H in estate planning and other matters. Because W is a former client, MRPC 1.9 imposes limitations upon L's representation of H or others. Thus, unless W gives informed consent, confirmed in writing, MRPC 1.9(a) would prevent L from representing H in a matter substantially related to the prior representation in which H's interests are materially adverse to W's, such as an attempt to modify or terminate an irrevocable trust of which W was a beneficiary. However, after the marital dissolution is final, amending H's estate plan to remove W as a beneficiary, consistent with state law and the dissolution decree, should not be considered a conflict. Also, under MRPC 1.9©, L could not disclose or use to W's disadvantage information that L obtained during the former representation of H and W in estate planning matters without W's informed consent, confirmed in writing. For example, L could not use on behalf of one of W's creditors information that L obtained regarding W's financial condition or ownership of property. Subject to these limitations, it is possible that L could represent H and W concurrently with respect to their now separate estate plans. As noted in the Comments to MRPC 1.9, matters are "substantially related" for purposes of the Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. MRPC 1.9(c)(1) (use of confidential information to the disadvantage of a former client permissible when the information has become "generally known"). Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

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

Estate of Klehm, 363 Ill. App. 3d 373, 842 N.E.2d 1177 (2006). In a citation proceeding to recover estate assets from certain relatives, the relatives moved to disqualify counsel for the executor on the ground that the law firm had previously represented them. The trial court granted the motion, but the appeals court reversed. Insofar as the lawyers had represented the relatives, for a time, as co-executors, it did not represent them personally and so this did not

establish the requisite attorney-client relationship. Insofar as the firm did represent the relatives personally as to certain real estate transactions and estate planning, the relatives had failed to show that these services were substantially related to the current action. Finally, even if it were, the relatives had waived their right to complain of the potential conflict by waiting four years to bring the motion to disqualify.

Estate of Wright, 377 Ill. App. 3d 800, 881 N.E.2d 362 (2007). Law firm represented the decedent as to the transfer of $1.8 million to her son, including negotiating the terms of the transfer. After she died, same firm sought to represent the son, who took the position that the transfer was a gift rather than a loan. Here the court affirms the disqualification of the law firm for the son based on Rule 1.9: he was adverse to the firm's former client (decedent) on a substantially related matter. Ethics Opinions Illinois: Op. 98-01 (1998). This opinion advises that a lawyer may represent the beneficiary of a trust in a breach of fiduciary duty action against the trustee even though the lawyer had previously represented the trust, the beneficiary and the trustee in a condemnation suit involving trust real property. The opinion observes that the scope and nature of the lawyer's prior representation of the trustee were limited to the trust's real estate subject to the condemnation proceeding during which time the lawyer may have gained confidential information regarding the trust's property in general. However, since the beneficiary was not contesting the trustee's activities in connection with the condemnation, the information the lawyer may have received "does not appear to be relevant to the Beneficiary's claim against the Trustee." Thus, the proposed representation of the beneficiary was not substantially related to the subject matter of the prior joint representation.

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 electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. …

[No material change in Illinois Rules of Professional Conduct of 2010]

ACTEC COMMENTARY ON MRPC 1.0

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

Confirmed in Writing. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained informed oral consent, the lawyer may act in reliance on that consent, so long as it is confirmed in writing within a reasonable time thereafter. The confirmation must be "in writing," but this includes electronic records and thus encompasses communications such as email or a voicemail recording that can be preserved. The lawyer must make reasonable efforts to ensure that the client possesses information as to the law and the facts reasonably adequate to make an informed decision. Not all consents must be confirmed in writing to be binding, however. See, e.g., MRPC 1.2© (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.

... from the ACTEC Engagements Letters (3rd Edition - 2017)

GENERAL CHECKLIST

1. ISSUES A LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION

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

(b) If the lawyer (or the lawyer's firm) has represented any of the parties, their families or their business or domestic partners, in what capacity (e.g., individually, as an officer director or manager of an organization, or as a fiduciary or beneficiary of an estate or trust)? What connections do the parties have with each other (e.g., familial, business or personal relationships, fiduciaries or beneficiaries of an estate or trust)?

© How well does the lawyer know the parties?

(d) Are the parties U.S. citizens? Are the parties U.S. residents? What are the domiciles of the parties? If any entity is involved, is the entity duly organized and in good standing in all appropriate jurisdictions? In which jurisdiction or jurisdictions will the entity be organized or authorized to do business? If a trust or estate is involved, in what jurisdiction is it being or will it be administered? (e) Under guidelines issued by the Financial Action Task Force on Money Laundering, before agreeing to represent a person or entity, the best practice consists of:

1. Confirming the prospective client's identity by examining a government issued identification containing his or her photograph.
2. Identifying the persons managing and the persons having beneficial interests in business entities and trusts.
3. Making sure the client's circumstances and businesses are understood.
4. At a minimum, doing an internet search for suspicious circumstances or activities in which the prospective client is or may be involved. The Task Force also recommends checking the website for the Treasury Department's Office of Foreign Assets Control to see if the prospective client's name appears on its list of individuals with whom U.S. persons are prohibited from dealing.

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

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

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

2. DEFINE THE SCOPE OF THE REPRESENTATION.

(a) Describe with appropriate specificity the objectives of the representation and the means by which those objectives are to be pursued. Define the scope as narrowly as possible (to avoid having clients expect more than you can deliver or that it is cost effective to deliver).

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

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

(d) What do the parties expect the "style" of the representation to be (e.g., separate meetings with each party or some parties or are meetings to be attended by all interested parties)? Is one party to be placed in charge of making certain types of decisions?

(e) Consider describing the time frame within which the various phases of the engagement will be completed and mentioning any foreseeable delays or periods during which the lawyer may not be available during the engagement. Also consider identifying other attorneys, legal assistants, and support personnel in the lawyer's office who may or should be consulted in the event of the lawyer's absence or unavailability.

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

3. IDENTIFY THE CLIENT OR CLIENTS. (See also the Supplemental Checklist for each Chapter.)

(a) If a prospective client is married, will the lawyer (or firm) represent one spouse or both spouses?

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

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

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

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

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

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

(b) Describe how an actual conflict of interest will be resolved, the fact that the firm may have to withdraw from representing some or all parties if an actual conflict arises and the adverse consequences that may result from the firm's withdrawal. (If the lawyer plans to continue to represent some but not all parties if an actual conflict arises, presumably this is because the lawyer has a pre-existing, long-standing relationship with the party or parties whom the lawyer will continue to represent.)

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

(d) If appropriate, describe how a prior representation may give rise to a conflict of interest. (See Model Rule of Professional Conduct 1.8 concerning conflicts of interest among current clients and Model Rule 1.9 concerning duties to former clients.)

(e) Consider requesting authorization from all of the clients to disclose to all interested parties the actions of any one of the clients constituting fraud, a breach of trust, a violation of the governing documents of any entity involved, or in contravention of a mutual estate plan (if permitted in the jurisdiction in which you practice).

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

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

Letter to the new client

Dear New Client [Son]:

The purpose of this letter is to confirm to you the possible dual representation of this law firm in connection with the matter captioned above, as a result of (I) our proposed representation of you in connection with your estate plan, and (ii) our ongoing representation of your mother in connection with her estate planning matters.

The Code of Professional Responsibility for Attorneys prohibits an attorney, except with consent of his client after full disclosure by the attorney, from accepting or continuing employment if the lawyer is asked to represent two clients having potentially differing interests. In that case, the lawyer must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment.

While we do not believe that our firm's dual representation of both you and your mother in these matters constitutes a conflict of interest based on the information and facts available to this firm at this time, we believe it is proper to disclose again the fact of this dual representation to both of you, and to request your written approval for us to continue with this representation. Your approval includes our advising you that, and your consent to, the fact that our representation of your mother may include services rendered now or in the future that would have the effect of limiting or eliminating an interest you would otherwise take under the estate planning documents of your mother, but for the services we rendered, and that if we are requested to render such services which have the effect of limiting or eliminating an interest, we are authorized by you to engage in such representation without advising you of that fact.

This request is made with our assurances to you and your mother that should additional or changed facts and circumstances in this matter lead any attorney in this firm to believe that a conflict of interest exists such that the judgement of any attorney in the firm will or reasonably may be affected by the continued representation of both of you, we will immediately disclose such fact, offer to withdraw our representation of both parties, and will not represent either party without the written consent of the other.

Further, unless we receive specific written permission to do so, we will not disclose to your mother any matters relating to our representation of you in this matter, nor will we disclose to you any matters relating to our representation of your mother.

We have spoken to your mother regarding our possible representation of you, and we understand that she has consented to our representation of you in connection with your estate planning matters. We are nevertheless sending your mother a disclosure and consent letter similar to this one.

NOTE THAT your planning documents may contain, now or in the future, provisions which give your mother certain rights and powers over trust shares that may be created for them under your documents. This would ordinarily occur only after your death.

A certain type of this kind of power, technically referred to as a power of appointment, typically requires the power holder, if the power is to be exercised, to make specific reference to the power in his or her own estate planning documents.

The authorization below requests you to allow us to disclose the existence and nature of any such powers in your documents, in connection with any drafting we do for your mother. Disclosure of the existence of any such power itself DOES NOT call for disclosure of any description (including values) of the property subject to the power.

We would appreciate it if you would confirm receipt and review of this disclosure, and your consent to our representation as set out above, by signing, dating and returning to me the copy of this letter which I have provided. I have enclosed a stamped addressed envelope for your convenience.

If you have any questions, please call me.

VTY

*** [after signature block]
I have reviewed and understand the possible conflict of interest as disclosed above and in the letter referred to above, including those provisions dealing with conflict disclosure and confidentiality of communications. I consent to Daluga Boland & Montgomery LLC continuing its ongoing representation of my mother in connection with her estate planning matters, and generally.

_____ YOU ARE)
) please initial one
_____ YOU ARE NOT)

authorized to disclose to my mother the existence and nature of any powers of appointment contained in any of my estate plan documents. I understand that if I have given you authorization to make such disclosure, you will not disclose the nature, extent, or value of any property subject to such powers without my specific written consent.

Dated: _____

_____

Letter to the existing client

Dear Current Client [Mom]:

I am writing to disclose to you our possible representation of your son, *name, in connection with his estate planning matters, and to request that you waive any possible conflict regarding that representation.

The Code of Professional Responsibility for Attorneys prohibits an attorney, except with consent of his client after full disclosure by the attorney, from accepting or continuing employment if the lawyer is asked to represent two clients having potentially differing interests. In that case, the lawyer must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment.

While we do not believe that our firm's dual representation of both you and your son in these matters constitutes a conflict of interest based on the information and facts available to this firm at this time, we believe it is proper to disclose the fact of this dual representation to you, and to request your written approval for us to engage in this new representation of your son.

My letter to your son (and this letter to you) confirms that we will not disclose any information about you or your estate planning file to your son without your advance consent, nor will we disclose to you any information about your son or his estate planning matters without his consent.

Your approval includes our advising you that, and your consent to, the fact that our representation of your son may include services rendered now or in the future that would have the effect of limiting or eliminating an interest you would otherwise take under his estate planning documents, but for the services we rendered, and that if we are requested to render such services which have the effect of limiting or eliminating such an interest, we are authorized by you to engage in such representation without advising you of that fact.

I have reviewed the conflict issue with your son in a similar letter sent to him.

NOTE THAT your planning documents may contain, now or in the future, provisions which give your son certain rights and powers over trust shares that may be created for him under your documents. This would ordinarily occur only after your death.

A certain type of this kind of power, technically referred to as a power of appointment, typically requires the power holder, if the power is to be exercised, to make specific reference to the power in his or her own estate planning documents.

The authorization below requests you to allow us to disclose the existence and nature of any such powers in your documents, in connection with any drafting we do for your son. Disclosure of the existence of any such power itself DOES NOT call for disclosure of any description (including values) of the property subject to the power.

I would appreciate it if you would confirm receipt and review of this disclosure, and your consent to our representation as set out above, by signing, dating and returning to me the copy of this letter which I have provided. I have enclosed a stamped addressed envelope for your convenience.

If you have any questions, please call me.

VTY

*** [after signature block]
I have reviewed and understand the possible conflict of interest as disclosed above and in the letter referred to above, including those provisions dealing with conflict disclosure and confidentiality of communications. I consent to Daluga Boland & Montgomery, LLC representing my son *name in connection with his estate planning matters, and generally.

_____ YOU ARE)
) please initial one
_____ YOU ARE NOT)

authorized to disclose to my son the existence and nature of any powers of appointment contained in any of my estate plan documents. I understand that if I have given you authorization to make such disclosure, you will not disclose the nature, extent, or value of any property subject to such powers without my specific written consent.

Dated:_____

_____

Operating Agreement paragraph - Representation is of the LLC as a business entity (excerpt)

Legal Representation. The Company has engaged Daluga Boland and Montgomery, LLC, as legal counsel to the Company, with respect to the preparation of this Agreement. Daluga Boland and Montgomery has not been engaged by any of the Members to protect or otherwise represent the interests of the Members with respect to the preparation of this Agreement or with respect to the interests of such Member vis-à-vis the Company. Each Member: (a) approves Daluga Boland and Montgomery's representation of the Company in the preparation of this Agreement; (b) acknowledges that no legal counsel has been engaged by the Company to protect or otherwise represent the interests of such Members, as the case may be, vis-à-vis the Company or the preparation of this Agreement, and that actual or potential conflicts of interest may exist among the Members in connection with the preparation of this Agreement (with the consequence that a Member's interest may not be vigorously represented unless such Member engages its own legal counsel); and © acknowledges further that such Member has been afforded the opportunity to engage and seek the advice of its own legal counsel before entering into this Agreement. Nothing in this Section 15.18 shall preclude the Company from selecting different legal counsel to represent it at any time in the future.

Letter when you have left it almost too late

Mrs. Susan X, Trustee
Betty Trust

Mrs. Linda Y, Trustee
Betty Trust

Re: Betty A.: *Trust Administration*

Dear Mrs. X and Mrs. Y:

Confirming the substance of the conversation we had when we last met in our offices on February 23rd, we have determined that we need to advise you of *potential* conflicts that may exist in our representation of ABC Company (the "Company"), and some of its shareholders and officers, generally in various capacities that have evolved through the years of representation by this law firm of the Company and those individuals.

While these conflicts are not unusual whenever a law firm has represented various family Members in any family-owned business situation, we have ethical obligations to bring them to your attention, and to the attention of the Company and the other clients who are involved with the Company, so that you and they are aware of the various capacities in which we are now serving, and so that you can be fully informed of the risks and rewards of continuing to retain us to do the legal work for your mother's Trust.

This law firm either currently represents or has in the past represented the following parties in the following legal matters:

- ABC Company - general corporate representation, including acting as registered agent for the company.

- Aunt and Uncle - we are currently the income tax preparers for your Aunt and Uncle who are part owners of the Company. In addition, we have in the past provided estate planning services to them. Your Aunt and Uncle are also stockholders in the Company. Should they wish to make changes to their estate planning documents, we would expect to assist them in doing that.

- Dick and Linda Y - we are currently the income tax preparers for the Ys and their children. In addition, we have in the past provided estate planning services to the Ys. Should they wish to make changes to their estate planning documents, we would expect to assist them in doing that.

- Betty A. - we prepared Betty's Declaration of Trust (which will be the main document under which her estate will be administered). Dick Y was the first designated successor trustee and, having declined to act, the two of you have accepted the position of co-trustees of the Trust.

While the fact of representing so many parties connected in one way or another with your mother has the *potential* for conflict, we do not believe that any conflict currently exists or has existed at any time in the past. Nevertheless, each of you has the right to expect that any law firm that represents you will

do so with undivided loyalty and that nothing in that firm's representation of other persons will conflict with its duty to you.

As successor trustees, the two of you will be charged with the duty, among others, of determining the value of Betty's assets, including the value of her shares of stock in The Company. Linda Y has the right, individually, pursuant to the terms of the Trust, to purchase from Susan X's share of the Trust those shares of stock at their fair market value as determined for federal estate tax purposes.

It is in the best interests of the Trust to obtain a low value for the stock, since a low value will result in a lower estate tax. It is in the best interests of Linda for the estate to use a low value for the stock as that will determine the amount she will have to pay Susan's share of the estate. However, it may not be in Susan's interest to obtain a low value for the stock because, while it may reduce estate taxes, it will nevertheless mean that she will not be receiving the highest amount possible for the stock that her sister has the right to purchase from her.

The two of you, as acting co-trustees of your mother's trust, will have co-equal rights to make decisions and the resulting determination of value would have to be agreed upon between you and not imposed by any third party.

This tension between your possible competing interests can certainly be settled between you. We certainly feel capable of assisting you with that decision, and in counseling you regarding the pros and cons of each decision that will bear on the issue of value, and then leaving to you the task of making appropriate compromises or settlement of those issues. The risk of following the course of action we have suggested would be that you would not be able to agree on a mechanism for valuing the Company. In that case you would have to apply to a court to make the determination of value. In that case also we could not represent either of you in those court proceedings.

We believe the Trust would be best served if it continued to employ the services of this law firm because:

(I) of the knowledge this firm possesses of the Company, based on our years of association with it,

(ii) we drafted your mother's estate plan, and

(iii) we assisted your mother in administering the trusts created under your father's estate plan.

We concentrate our practice in estate planning and administration, and we have many years of experience in preparing federal estate tax returns, including federal estate tax returns where the valuation of interests in a family business are involved.

The risks of continuing to use our firm are that you may wish to discuss with an attorney options or objections that you want to keep <u>private</u> from each other in this matter. Our representation of both of you as co-trustees could only take place if you understand and agree from the outset that our representation will be of both of you jointly in administering your mother's Trust and advising you in connection therewith. We understand that all information regarding the Trust will be shared and discussed between you. If each of you had your own separate attorney, you would each have an

advocate for your own positions and would receive totally independent and confidential advice from your own attorney. This is not the case when one law firm represents and advises both of you jointly. Although we will encourage the resolution of any differences of opinion or conflicting interests, we cannot be an advocate for the positions or interests of just one of you, if we represent both of you. Once joint representation begins, either of you may retain separate counsel at any time. You should understand, however, that if that should occur, we will be able to continue to represent the other of you only with the consent of the party who has retained separate counsel.

If you believe at the outset of the administration of the Trust that it is unlikely that you can agree on the valuation methodology, or if either of you knows she will not be able to accept the results of a valuation expert without a court proceeding, then the conflict between you is not merely potential, it actually exists already. In that case, each of you should seek her own independent counsel. This separate representation would be for each of you as trustee and individually, as a beneficiary of the Trust. Your own independent attorneys can then advise you if that methodology or some other should be used.

Based on our conversations at our initial meeting, we understand that you do not believe a conflict exists at this time, either between the two of you, or with respect to any of the other parties identified in this letter. To memorialize this understanding, we would ask each of you to sign and date a copy of this letter, and return it to me.

We are similarly asking The Company, your Aunt and Uncle, and Mr. and Mrs. Y to acknowledge receipt of a copy of this letter, and by signing and returning a copy of letter, to indicate that they understand the potential for conflict among the parties, but that they do believe that a conflict exists at this time and accordingly have no objection to our representation of you as trustees of Betty's Trust.

Very truly yours,