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Don’t End Up as Road Kill: Surviving the Ethical Challenges Posed by Transfers Among Family Members

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Chapter 13

Don't End Up as Road Kill: Surviving the Ethical Challenges Posed by Transfers Among Family Members

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Synopsis

¶ 1300 Introduction[1]

¶ 1300.1 How Representation of Family Members Presents Ethical Challenges

Transfers of assets between family members, either during life or at death, are the most common types of estate planning transactions on which all estate planning professionals advise clients and which estate planning professionals help clients to implement. Sometimes the different family members involved in a particular estate technique are represented by separate counsel. In other situations, estate planning lawyers often represent several members of a family or even several generations of a family at the same time. Such representations can present ethical challenges to estate planning lawyers, particularly when representing family members in intra-family transfers. In this paper, attention will be paid to competence in often complex transactions, effective communications with clients and others, potential and real conflicts of interest, joint or separate representation, challenges in acting as a fiduciary, representing or working with family members with diminished capacity and representing clients in a jurisdiction other than the lawyer's home jurisdiction, as well as other issues.

¶ 1300.2 Model Rules of Professional Conduct and ACTEC Commentary on Model Rules

This paper will look at these issues through the prism of the ethical rules governing lawyers. The ethical conduct of almost all lawyers is governed by some version of the American Bar Association's *Model Rules of Professional Conduct* (Model Rules).[2] In examining ethical issues confronting estate planning lawyers, one place of inquiry for each issue will be the Model Rules and Comments to the Model Rules. A second basic and valuable reference for examining the ethical issues facing estate planning lawyers is the *ACTEC Commentaries on the Model Rules of Professional Responsibility* (ACTEC Commentaries).[3] As noted in the Preface to the ACTEC Commentaries, the Model Rules and Comments to the Model Rules often fail to provide sufficient guidance to lawyers engaged in an estate planning practice. The purpose of the

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[1] My colleague, Kurt Friesen, provided invaluable help in putting these materials together. These materials are also based in part on an update of "Is Crossing State Lines Ethically Challenging to Estate Planners" presented at the 1999 Institute and "The Top Ten Ethical Challenges For Estate Planners and Professionals Today and the Best Practices for Addressing Them" presented at the 2008 Institute by the author.

[2] To date, California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules.

[3] American College of Trust and Estate Counsel (Fourth edition 2006).

ACTEC Commentaries is to help provide the guidance estate planners need in understanding their professional responsibilities. This has also been noted in various articles and other publications. For example in 1993, Malcolm A. Moore and Anne K. Hilker wrote: "For some time, estate planners have been hampered by inadequate guidance from the ABA Model Rules of Professional Conduct and other available guidelines. Promulgated in 1983, the Model Rules recognized that the lawyer may not always be an adversary but rather may serve as counselor. However, the commentary to those Rules did not provide extensive guidance on the handling of day-to-day communications between parties and counsel in estate planning."[4]

¶ 1300.3 Consequences of Failure to Adhere to Ethical Rules

One preliminary consideration is the consequences of failing to take account of ethical issues in particular transactions. The failure of estate planners to address ethical issues adequately can result in disciplinary complaints by clients. While figures on disciplinary complaints against estate planners on a national basis are unavailable, the American Bar Association each year publishes a *Survey on Lawyer Discipline*, which covers complaints against all lawyers.

The Chart of the Lawyers Population and State Disciplinary Caseload for 2009 gives the following results:

Number of Lawyers with Active License	1,482,271
Number of Complaints Received by Disciplinary Agency	125,596
Number of Complaints Pending from Prior Year	28,684
Number Dismissed for Lack of Jurisdiction	66,160
Number of Complaints Investigated	77,832
Number of Complaints Dismissed After Investigation	35,067

[4] Malcolm A. Moore & Anne K. Hilker, "Representing Both Spouses: The New Section Recommendations", Prob. & Prof. July/Aug. 1993, at 26, 26.

Number of Lawyers Charged	6,904

The Chart on Sanctions Imposed for 2009 gives the following results:

Number of Lawyers Privately Sanctioned	1,760
Number of Lawyers Publicly Sanctioned	5,009
Number Involuntarily Disbarred	483
Number Disbarred on Consent	356
Number Suspended	2,824
Number Suspended on Interim Basis (for risk of harm or criminal conviction)	507
Number Publicly Reprimanded	828
Number on Probation	408

While the number of lawyers receiving sanctions in 2009 is low compared to the lawyer population, the number of complaints compared to the lawyer population is high. The ratio of complaints in 2009 is a little less than one complaint for every ten lawyers. Even though few complaints result in discipline, the cost and expense for a lawyer of dealing with a complaint that is eventually dismissed can be high both financially and emotionally.

¶ 1300.4 Relevance to Professionals Other than Lawyers

While this paper is focused on the ethical consequences to lawyers, the discussion is equally relevant to estate planning practitioners in other fields. Other fields have their own rules of professional responsibility. Even if an estate planning professional does not face disciplinary penalties, a dissatisfied client could bring a malpractice action for damages. One possible way of looking at this is that the ethical rules, possible disciplinary sanctions, and the possible awards of monetary damages to former clients for malpractice are intertwined. The ethical rules provide a goal to which lawyers and other estate planning professionals should aspire in order to meet the needs of their clients. The threat of a malpractice claim is the stick that encourages estate planning lawyers and

others to meet their professional responsibilities. Failure to do so may result not only in a disciplinary sanction but also in the need to compensate a client for that failure. By understanding the ethical rules and seeking to meet their requirements, estate planning lawyers and others should be able to mitigate or avoid the potential negative consequences.

¶ 1301 Competence

¶ 1301.1 Basic Considerations

Every lawyer, no matter what type of matter in which he or she is representing a client, must provide competent representation. Inadequate or incompetent representation of a client (or clients) potentially exposes a lawyer to more than simply a malpractice complaint. It can also result in sanctions imposed by the lawyer's state bar. Representation of multiple family members in an estate planning transaction increases the likelihood that a malpractice claim or complaint with a state bar will be made, if only because such representations are more likely to result in at least one dissatisfied client, especially when the transaction does play out as every family member thought that it would.

¶ 1301.2 Model Rule 1.1

Model Rule 1.1 relates to the competence of counsel and states as follows:

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

This rule is of particular importance to estate planning practitioners, whose practices often involve many different areas of the law, including trust and estate administration, tax law, corporate law, partnership law, insurance law, employee benefits, elder law, investment real estate law, and litigation. For example, one transaction, such as the formation of a limited liability company to hold marketable securities and commercial real estate with family members as the members of the limited liability company and then having the family members transfer their limited liability company interests to a revocable or irrevocable trust, can involve complex questions of partnership, trust, contract, real estate, and tax law. Importantly, Comment 1 to Model Rule 1.1 authorizes a lawyer to obtain the requisite knowledge and skill in a particular matter

through preparation and study if the lawyer lacks the necessary knowledge and skill. Of course, this does not address whether the lawyer may charge the client for the necessary study and preparation.

¶ 1301.3 ACTEC Commentary – Model Rule 1.1

The ACTEC Commentary notes and lists several areas with respect to a lawyer's competence to represent a client in a particular matter. Given the complexity of some estate planning with respect to intra-family transfers, competency is a critical consideration.

a. Meeting the needs of the client.

(1) One important question is whether the lawyer must have a thorough understanding of all the different rules that might affect a transaction in order to have the necessary competence to represent one or more clients in a particular transaction.

(2) The ACTEC Commentary also suggests that the needs of a particular client may be met through additional research and study when a lawyer represents the client and initially lacks the skill or knowledge required to meet those needs.

(3) The needs of the client may also be met by involving another lawyer or professional with the requisite skill or knowledge. In order to maintain confidentiality, another lawyer should only be consulted on an anonymous basis, or on a confidential basis with the consent of the client.

(4) The lawyer should be upfront with the client about his or her level of expertise.

A mistake in judgment does not necessarily indicate a lack of competence. According to the ACTEC Commentary, a mistake in judgment does not necessarily indicate a lack of competence. It notes that a lawyer might not precisely assess the tax or substantive law consequences for a particular transaction for a variety of reasons. These include unclear facts, disputed facts, or the unsettled state of the law. The complexity of a transaction or its unusual nature or its novelty may prevent a competent lawyer from accurately assessing the treatment of a particular transaction for tax or substantive law purposes. Of course, clients may disagree with this, especially with the advantage of hindsight.

Importance of facts. Clients need to provide their lawyers with accurate facts. A failure to do so can cause bad advice to be given. The ACTEC Commentary indicates that a lawyer may rely upon information provided by a client unless the circumstances indicate that the information should be verified.

¶ 1301.4 Cases on Competence

Case law regarding the competence of estate planning lawyers demonstrates that claims based on a lack of competence can be brought not only by the lawyer's client, but perhaps by beneficiaries of a client's estate plan as well. This ability of a beneficiary to sue a lawyer will often depend upon state law.

In Sindell v. Gibson, Dunn & Crutcher[5], the court held that the intended beneficiaries of an estate plan prepared for the beneficiaries' father suffered "actual injury" in defending a lawsuit by the surviving spouse's conservator that plaintiffs alleged would not have been filed but for the law firm's negligence. In Sindell, Harold Caballero retained Gibson, Dunn & Crutcher to prepare his estate plan so as to transfer wealth to his daughters and his daughters' children.[6] Knowing that all of Mr. Caballero's wealth was in a ranch he owned and controlled, his lawyers advised him to make gifts and sales of interests in the business to the children and the grandchildren.[7] Mr. Caballero's wife was not the mother of his children, and she had children of her own from a prior marriage. In addition to having substantial assets of her own and her own lawyers, under California law, the wife had a community property interest in Mr. Caballero's ranch. The court found that at the time that the testator implemented his estate plan, his wife would have been willing and able to execute a waiver of her community property rights in the ranchland, although none was obtained. The wife subsequently became incompetent and the wife's children sued Mr. Caballero for the amount of his wife's community property interest in the business. While this action was pending, Mr. Caballero's children and grandchildren sued Gibson, Dunn & Crutcher (1) to indemnify them for the amounts that they stood to lose in the action initiated by the wife's children, (2) for the $50,000 fee paid to the lawyers for the estate plan, and (3) for other expenditures associated with the plan. Although the decision turned on what event

[5] 63 Cal. Rptr. 2d 594 (Cal. Ct. App. 1997)
[6] 63 Cal. Rptr. 2d at 596.
[7] *Id.*

constitutes the actual injury in a legal malpractice action, the court held that the failure to obtain the written waiver from the wife clearly constituted negligence. In so finding, the court noted the failure of the defendants to obtain the readily available evidence of [the wife]'s consent to those transactions, or acknowledgement as to the separate nature of the property involved, was below the standard of care in the community and constituted negligence by the defendants. In short, the defendants breached their duty of care by failing to secure the [the wife]'s consent prior to the time that she fell ill and became mentally incompetent to give it.[8]

In Kinney v. Shinholser,[9] one lawyer drew a will for a married client which failed to preserve the tax benefit of the testator's unified credit. Instead, the will gave the entire estate to a trust for the benefit of the widow over which she was given a general power of appointment. As a result, the widow's estate at her subsequent death would be required to pay estate taxes that would have been avoidable if the widow had not been given a general power of appointment. The decedent's son sued the draftsperson who prepared the will and the lawyer and the accountant who administered the decedent's estate. The court did not hold the draftsperson liable for malpractice because the will did not indicate any intent to minimize taxes upon the death of the surviving spouse. However, the court went on to find that the complaint stated a cause of action by the decedent's son against the lawyer and the accountant who were retained by the surviving spouse to probate the will and prepare the federal estate tax return because they failed to advise her of the possible tax savings that would have resulted if the surviving spouse disclaimed the general power of appointment and a QTIP marital deduction election was not made.

In Copenhaver v. Rogers,[10] the grandchildren, as remaindermen of the decedent, brought tort and contract claims against the draftsperson, contending that his failure to supply trust terms in the grandmother's will resulted in their losing the remainder interest in a residuary share intended for their mother. In addition, they complained that the lawyer failed, in the course of drafting wills for their grandparents, to advise their grandparents on the creation of a marital trust and provided incorrect tax advice about possible estate and generation-skipping tax consequences of proposed transfers resulting

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[8] *Id.*
[9] 663 So.2d 643 (Fla. Dist. Ct App. 1995)
[10] 384 Se. 2d 593 (Va. 1989)

in additional monetary damages to them. The trial court held that the grandchildren had no claim against the lawyer for the negligent performance of legal services to the grandparents and they failed in their efforts to assert third party beneficiary contract claims against the lawyer. The Virginia Supreme Court affirmed. The court held that the grandchildren had no tort action against the lawyer in the absence of privity between them and the lawyer, and the grandchildren failed in the contract claim because they failed to allege and show that they were clearly intended as third party beneficiaries in the contract (the preparation of the wills) between the grandparents and the lawyer.

Virginia has continued to uphold the use of lack of privety as a defense. In Rutter v. Jones, Blechman, Woltz & Kelly,[11] the Virginia Supreme Court held that no intended beneficiary could sue the decedent's estate planning lawyer for alleged negligence when a testator's estate plan failed to achieve its intended purpose even when the action was brought by the personal representative of the decedent's estate, since the action for malpractice did not arise until after the client had died and the personal representative, who was limited under Virginia law in bringing only actions that arose before death, presented no viable claim for malpractice.

¶ 1302 Providing Effective and Timely Counsel to Clients

¶ 1302.1 Model Rule 1.3

Model Rule 1.3 relates to diligence and reads:

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

¶ 1302.2 Promptness in Handling Matters

One area in which clients often become frustrated is the failure of a lawyer to handle estate planning or estate administration matters promptly. Even in situations in which a lawyer is trying to act as promptly as possible, delays in completing work can arise. With the increased pressure to produce revenue, lawyers may take on more work than they can handle in a timely and effective manner. The possibility of this is recognized in Comment 2 to Model Rule 1.3, which states:

> "A lawyer's work load must be controlled so that each matter can be handled competently."

¶ 1302.3 Adverse Consequences of Failing to Handle Matters Promptly

[11] 568 S.E. 2d 693 (Va. 2002)

The adverse consequences of failing to act with promptness in representing a client are expressed in Comment 3 to Model Rule 1.3, which reads:

> "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's work."

¶ 1302.4 Transactions Involving Family Members

In certain transactions involving multiple family members, the need to consult with and coordinate among the family members may require more time than the lawyer might expect. The lawyer needs to take this into account to be able to handle the particular transaction in a timely manner.

¶ 1302.5 Cases on Providing Timely Counsel

The results have varied in cases in which a lawyer's diligence has been questioned, but each case shows that timely counsel may have helped to avoid problems.

In Rodovich v. Locke-Paddon,[12] Rafael Rodovich, when he married Mary Ann Borina in 1957, entered into a prenuptial agreement which stated that each party's property would remain his or her separate property. In 1973, Borina executed a will, which after making specific gifts to Rodovich and others, gave the residue of the estate to two charitable remainder trusts. Rodovich was one of the private beneficiaries of the two charitable remainder trusts. In 1991, the lawyer, Locke-Paddon, met with Borina to discuss drafting a new will. At that meeting, the lawyer learned that the decedent had been diagnosed with breast cancer and was receiving chemotherapy treatments. The purpose of the meeting was to discuss the preparation of a new will under which Rodovich was to receive all of the payments from a charitable remainder trust with which Borina intended to fund with most of her estate. The lawyer delivered a rough draft of the will more than three months after the meeting. His understanding was that the next move was Borina's since Borina had told the lawyer that she intended to confer with her sister before finalizing the provisions of the will. The lawyer never heard from the decedent prior to her death on December 19, 1991. Rodovich sued the lawyer on the

[12] 35 Cal.Rptr.2d 573 (Cal. App. Ct. 1995)

grounds that the lawyer owed a duty of due care and reasonable diligence to Rodovich as the proposed private beneficiary of the charitable remainder unitrust to make sure that the decedent's wishes would be effected with reasonable promptness and diligence. The trial court framed the issue as to whether the lawyer's duty to use professional skill, prudence, and diligence extended beyond Borina to Rodovich. The trial court concluded and the appellate court agreed that the duty did not extend to Rodovich. However, despite the favorable result for the lawyer, one must wonder whether the lawyer's position would have been further strengthened if the lawyer had regularly communicated with Borina to see how the review of the draft will was proceeding.

In People v. James,[13] a client employed a lawyer, Joseph C. James, to prepare a will. The client was seventy-five years old and attempted to contact the lawyer on several occasions concerning its completion with no success. The will was executed eight months after the client requested the preparation of the will and only after the filing of a complaint with the Colorado Bar Grievance Committee. The Grievance Committee found that the lawyer's failure to prepare a will for at least eight months after the initial contact by the client, especially where the client was elderly, was "grossly negligent and shows a total lack of responsibility." Apparently, private censures had been administered to the lawyer on two other occasions and the lawyer was suspended for one year as a result of other derelictions of duty. In this case, the Colorado Supreme Court determined that disbarment was the appropriate action. Most, if not all, readers of this case, should agree that the lawyer failed to act diligently in the representation.

In re Discipline of Helder.[14] In this case, the lawyer failed to communicate with a client for more than six months after a client repeatedly requested the lawyer to make changes in the client's will. Only after the client filed a complaint with the Lawyers Professional Responsibility Board, did the lawyer advise the client that the lawyer was not actively practicing law and return the client's file. As a result of this matter and an unrelated matter involving the defense of a contractual issue, the lawyer was indefinitely suspended from the practice of law.

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[13] 502 P.2d 1105 (Cal. 1972)
[14] 396 N.W.2d 559 (Minn. 1986)

Disciplinary Action Against MacGibbon.[15] In this case, a lawyer named MacGibbon first served as counsel for the personal representative and then as the successor personal representative of an intestate administration of an estate that required thirty years for administration. The decedent, Axel Anderson, died in 1964. At that time, Anderson owned approximately 280 acres of farm land with a value of $9,000 and bonds worth $5,000. From 1964 until 1980, according to MacGibbon, the estate's primary focus was on efforts to sell the real estate. One parcel was sold in 1972 and a second was sold in 1980. A third parcel had been listed for sale with a real estate broker since 1992. The originally appointed personal representative died in 1981. At that point MacGibbon became personal representative. He spent much of the 1980's attempting to locate the heirs. The court noted that neglect in probating estates had long been considered as serious professional misconduct. It determined that MacGibbon should be publicly reprimanded for his neglect and be removed as personal representative of the estate.

¶ 1303 Communication

¶ 1303.1 Model Rule 1.4

Representation of multiple members of a family also implicates Model Rule 1.4, which deals with communication with clients. Model Rule 1.4 reads:

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

[15] 535 N.W.2d 809 (Minn. 1995)

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

¶1303.2 Considerations in the Official Commentary on Model Rule 1.4

Regular communication. Comment four to Model Rule 1.4 states that regular communications with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, the lawyer must promptly comply with the request. If a prompt reply is not possible, the lawyer or member of the lawyer's staff should acknowledge receipt of the request and advise the client when a response may be expected. The basic rule is that a lawyer should promptly respond to or acknowledge client communications.

Explaining matters. Comment five to Model Rule 1.4 deals with explaining matters to a client. Pursuant to this, the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. The guiding principle is that a lawyer should fulfill a client's expectations for information consistent with the duty to act in the client's best interest.

Withholding information. The lawyer is rarely justified in withholding information from the client. Comment seven indicates that a lawyer may be justified in delaying transmission of information when the client might react imprudently to an immediate communication. The example given in the commentary is that of withholding a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. The commentary is clear that a lawyer may not withhold information to serve a lawyer's own interest or convenience or at the interest or convenience of another person.

¶ 1303.3 Representation of More Than One Family Member

The requirement of regular communication may cause tensions in a situation in which a lawyer is representing more than one member of a family in a transaction for estate planning or tax planning purposes. This would be especially true when one family member, who is a client, tells the lawyer not to mention or disclose certain information to other family members who are also clients with respect to the same transaction.

¶ 1303.4 Case on Communication

In Hotz v. Minyard[16], the lawyer Robert Dobson represented Mr. Minyard, his son, Tommy, daughter, Judy, and the family businesses, including multiple automobile dealerships. Tommy was in charge of his father's Greenville dealership, and Judy worked for her father at his Anderson dealership. With Dobson's assistance, Mr. Minyard executed a will on October 24, 1984 that left Tommy the Greenville dealership, gave other family members $250,000, and left the residuary estate in trust to his wife for life, with the remainder equally to Tommy and to a trust for Judy. The will was executed with Mr. Minyard's wife, his secretary, and Tommy in attendance. Later that day, Mr. Minyard executed a second will containing the same provisions as the first except that it gave the Greenville dealership real estate to Tommy outright. Mr. Minyard told Dobson that the existence of the second will was to remain a secret and specifically directed Dobson not to tell Judy of its existence.

Judy subsequently requested a copy of her father's will. Dobson showed Judy the first will and discussed it with her in detail. After this discussion, Judy believed that she would receive the Anderson dealership, and that she would share the estate equally with Tommy. Dobson never told Judy that the first will was revoked. The father subsequently suffered from serious health problems and became mentally incompetent. Tommy and Judy agreed that Judy would attend to their father's care while Tommy managed both dealerships. During this time, Judy questioned some of the business decisions Tommy was making with respect to the Anderson dealership. When Judy tried to return to the Anderson dealership, Tommy refused to relinquish control and eventually fired her. Shortly after Judy consulted with another lawyer about her concerns over Tommy's actions, Mr. Minyard executed a codicil, drafted by Dobson, removing Judy and her children as beneficiaries. Dobson subsequently convened a meeting with Judy, Tommy and her mother at his office. At that meeting, Judy was told if she dropped her plans for a lawsuit, she would be restored under her father's will and could work at the Greenville dealership. Believing that restoration under the will meant the will that Dobson disclosed to her, Judy dropped her planned lawsuit and moved to Greenville to work at the dealership.

[16] 403 S.E.2d 634 (S.C. 1991).

Eventually, Tommy fired Judy again. Judy sued Dobson for breach of fiduciary duty based on his misrepresentation of her father's will. The Supreme Court of South Carolina held that Dobson owed Judy a duty with regard to her father's will because of their previous lawyer-client relationship, including preparing Judy's will and offering advice to Judy directly regarding issues at the dealerships. The court reasoned that even though the lawyer represented the father regarding his will, he owed Judy, as a client, the duty to deal with her in good faith and not actively misrepresent the first will or its status.

¶ 1303.5 Extent of Continuing Duty to Client after Work is Completed

Model Rule 1.4(a)(2) requires that a lawyer shall reasonably consult with the client about the means by which the client objectives are to be accomplished. One issue with respect to representation of family members in estate planning is whether after the initial planning is done or the estate planning work for which the lawyer is hired has been completed, the lawyer has an obligation to keep the client informed of changes in the law. Clearly, if the representation continues, then there is likely a duty to keep the client informed of changes in the law. This can have consequences for the lawyer.

In Standish v. Stapleton an unreported decision out of the Connecticut Superior Court, the court found that a lawyer had no continuing duty to communicate with a former client where the lawyer represented various members of a family and was "drawn into what is in essence a family feud."[17] In Standish, lawyer Richard Stapleton drafted a trust agreement for Coral Moore, the mother of Gail Standish, Gary Moore and Wilbur Moore. Each of the children were beneficiaries of the Trust, and Stapleton was designated as a successor trustee. In her 1988 will, Coral bequeathed her one-half interest in a house to Gail, who owned the other one-half interest. In 1992, Stapleton represented both Coral and Gail in closing on an equity line of credit on Coral's one-half interest in the property. Coral subsequently executed a new will, drafted by Stapleton, in 1993. In the 1993 will, she still gifted her interest in the house to Gail, but the bequest was subject to any encumbrances on the property at the time of Coral's death, including any line of credit. Upon Coral's death in 1995, the interest in the house passing to Gail was subject to a $140,000 encumbrance. After the will was probated, Gail sued Stapleton, alleging, among other things, that Stapleton breached his fiduciary duty to Gail, both as

[17] Case No. 394608, 2000 Conn. Super. LEXIS 2970 (Nov. 8, 2000).

Trustee of Coral's trust and as Gail's lawyer, in his representation of Gail relating to the line of credit. The court found that Stapleton did not have a duty to Gail to inform her either of Coral's 1993 will or of Coral's use of the equity line of credit. In reaching its decision, the court specifically considered Rule 1.4 of the Rules of Professional Conduct and found that because Gail had made no "request" for information, Stapleton's duty was limited to keeping Gail "reasonably informed" about the status of the "matter." Since the "matter" was the creation of the line of credit, there was nothing to inform Gail of after its creation.

In Lama Holding Company v. Sherman & Sterling,[18] the Sherman & Sterling law firm created a holding company to facilitate the purchase of certain stock to take advantage of favorable treatment under the tax law. Bankers Trust was retained as the exclusive agent for the purchase of the stock. Without consulting either defendant, the holding company sold the stock. The holding company claimed that the failure of the law firm and the investment bankers to inform them of changes in the tax law caused them to incur an unduly burdensome tax liability. The court denied Sherman & Sterling's motion to dismiss while granting Bankers Trust's motion to dismiss. The court found that the question of whether Sherman & Sterling promised to inform plaintiffs of significant changes in the tax laws and whether its failure to due so caused injury to the plaintiffs were questions of facts for a jury. Changes in the tax laws would affect the investment. As a result, the complaint stated sufficient facts for claims of malpractice, negligent misrepresentation, and breach of fiduciary duty. The court dismissed the claim against Bankers Trust because the holding company's claim that the investment bankers failed to alert plaintiffs as to changes in tax law was too amorphous since the holding company independently negotiated the sale of the stock without consulting Bankers Trust.

Standish v. Stapleton and Lama Holding Company illustrate the issue of what steps lawyers should take to terminate the representation and thus avoid any issue of a continuing representation. Model Rule 1.16 deals with declining or terminating a representation. The rules under Model Rule 1.16 deal primarily with litigation and

[18] 758 F. Supp. 159 (S.D.N.Y. 1991)

corporate matters. Thus, Model Rule 1.16 deals more with the situation in which a lawyer believes that he or she can no longer represent a client.

Under Model Rule 1.16(b)(1), a lawyer may withdraw from representing a client if the withdrawal can be accomplished without a material adverse effect on the interests of a client.

The ACTEC Commentaries indicate that a lawyer may withdraw from representation if a client persists in criminal or fraudulent conduct; the lawyer discovers after the fact that his or her services have been used by client to perpetrate a fraud or crime; the client wishes to pursue objectives that the lawyer finds to be repugnant or with which the lawyer has a fundamental disagreement; the client fails to pay the lawyer's bill after receiving sufficient notice from the lawyer of the need to do so; the representation will place an unreasonable financial burden on the lawyer or the client has made the representation unreasonably difficult; or there is other good cause such as a mutual antagonism between the lawyer and the client or a breakdown of the lawyer-client relationship.

The rules and comments noted above offer little guidance with dormant representation. The ACTEC Commentaries on Model Rule 1.4 include a comment on dormant representation. The comment notes that the execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer, the representation becomes dormant awaiting activation by the client.

The ACTEC Commentaries go on to state that, although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by completion of the active phase of the representation. The ACTEC Commentaries state that a lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents and send the client individual letters or form letters, pamphlets, or brochures regarding changes in the law that might affect the client. They then state that, in the absence of an agreement to the contrary, the lawyer is not obligated to send a

reminder to the client whose representation is dormant or to advise the client of the impact that changes in the law or that client's circumstances might have.

While the position in the ACTEC commentaries may be correct, clients may believe that the lawyer does continue to have a duty to inform them when there is a change in the law or there are circumstances that arise which might affect their estate plans. To avoid any misunderstanding, the best practice is for lawyers to specifically terminate the relationship upon the completion of the actions to which they are engaged.

This can be especially important in a situation involving several family members who might believe that one lawyer is representing all of them with respect to a technique such as the creation or funding of a family limited partnership or the funding of a grantor retained annuity trust or a sale to defective grantor trust transactions.

Of course, if the lawyer continues to represent the partnership or continues to provide advice with respect to the grantor retained annuity trust or on the administration of the defective grantor trust, or another technique for example, the relationship will not be terminated and the lawyer does have a duty to inform the clients of changes in tax laws that might affect those techniques.

The basic choice is whether the lawyer wants to have a continuing obligation to keep clients informed of changes that might affect their estate planning or not. While this can be beneficial from a client relationship standpoint and continuing to receive work from the client, it does place a burden on the lawyer and the lawyer should consider that carefully.

One solution, of course, is to terminate the relationship, but continue to be in contact with the now former clients when there are changes in the tax law and to suggest to the former clients that there are changes in the tax law and that they might wish to re-engage the law firm to look at the possible impact of these changes upon the clients' estate plans. This practice will help insulate lawyers from possible liability.

¶ 1304 Confidentiality of Information

¶ 1304.1 Model Rule 1.6

Model Rule 1.6 reads that:

(a) "a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

Under Model Rule 1.6:

(b) "a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

(3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(3) To secure legal advice about the lawyer's compliance with these Rules:

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against he lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) To comply with other law or a court order."

¶ 1304.2 Impact of Model Rule 1.6 on Lawyers Representing Family Members

The ACTEC Commentary to Model Rule 1.6 includes significant discussion of the impact Rule 1.6 has on lawyers representing multiple family members. The Commentary notes that "[w]hen the lawyer is first consulted by multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them."

Issues arise when a lawyer receives information from one joint client that the disclosing client does not want shared with another joint client. In the event that the information received is both relevant and significant, the lawyer may urge the disclosing client to share the information directly with the other clients. If the communicating client refuses to do so, the lawyer faces a difficult situation for which there is often no clear course of action. The ACTEC Commentary advises that the lawyer consider "his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed."

¶ 1304.3 Case on Confidentiality

The Supreme Court of New Jersey held that a law firm jointly representing a husband and wife in estate planning matters was entitled to disclose to the wife the existence of the husband's child born out of wedlock in A v. B v. Hill Wallack.[19] In that case, the law firm learned of the child not from the husband but from the child's mother, who had retained the law firm to pursue a paternity action against the husband. Because of a clerical error, the firm's conflict of interest check did not reveal the conflict. The Hill Wallack court reasoned that the husband's deliberate failure to disclose the existence of the child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under Model Rule 1.6. The court also based its decision on the existence of an engagement letter waiving any potential conflicts of interest, suggesting that the letter reflected the couple's implied intent to share all material information with each other in the course of their estate planning.

Hill Wallack demonstrates the importance of setting forth the grounds of the representation in the engagement letter, including the extent to which information will be shared. The case also highlights the importance of conducting thorough conflicts checks when taking on new clients or new matters for existing clients.

¶ 1305 Fiduciary Exception

[19] 726 A.2d 924 (N.J. 1999).

¶ 1305.1 Importance of Fiduciary Exception

One important issue on which no clear guidance currently exists is the extent of duties, if any, the lawyer for estate or trust owes to the beneficiaries of an estate or trust. An important corollary to this is whether the beneficiaries of an estate or trust are clients of the lawyer representing the estate or trust. A minority of courts have found that when a trustee obtains legal advice from a lawyer, like all other information that relates to the affairs of a trust, that information must be shared with the beneficiaries. This is because the trust has paid the cost of lawyers' fees for obtaining the advice. This is the "fiduciary exception." While this fiduciary exception exists in some states, it has been rejected in others.

The ACTEC Commentary to Model Rule 1.2 notes that the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of a fiduciary estate. The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. The fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may implicitly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts and misconduct committed by the fiduciary.

The Uniform Trust Code punted on the issue of a fiduciary exception. The Commentary specifically explained:

> "The drafters of this code decided to leave open for further consideration by the courts the extent to which a trustee may claim lawyer-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustees lawyer. The courts are split because of the important values that are in contention on the question."

¶ 1305.2 Jicarilla Apache Nation

The case of United States v. Jicarilla Apache Nation,[20] considered whether the fiduciary exception applied to the United States as a trustee for certain Apache Indian lands. In 2002, the tribe sued the United States as trustee in the Court of Federal Claims alleging breach of trust and seeking monetary damages for alleged mismanagement of

[20] 131 S.Ct. 2313 (2011)

trust assets that were administered by the Department of the Interior. During alternative dispute resolution, the United States turned over thousands of documents but withheld 226 potentially relevant documents in part because of the assertion of the attorney-client privilege.

The Court of Federal Claims held that the communications related to management of the trust funds fell within the fiduciary exception to the attorney-client privilege and that the trust relationship between the United States and the Indian tribe was sufficiently analogous to a common law trust relationship that the exception should apply. The Circuit Court for the Federal Circuit upheld the Court of Claims and the Supreme Court agreed to hear the case. The United States actually conceded the existence of the fiduciary exception as part of the common law of trusts and instead argued that the exception did not apply to the unique role of the United States as a trustee for Indian trusts.

The Supreme Court held that the common law fiduciary exception to the attorney-client privilege did not apply to the trust relationship that existed between the United States and the Indian tribes. Partly, this is because the United States did not act as a private trustee.[21]

¶ 1306 Conflicts of Interest

¶ 1306.1 Preliminary Matters

Often lawyers are requested to represent two or more family members in a particular transaction, even though the interests of the family members may differ. There are two views on multiple representation in the estate planning and tax areas. One view is that common representation should be avoided. In the event of a genuine dispute, a lawyer's liability for representing clients with conflicting interests is likely to arise.[22] The other view is that multiple representations are often appropriate. Among the reasons given are the following:

1. Cost savings;

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[21] For more discussion of this case see "Gerard G. Brew and Dana G. Fitzsimons, Jr., " Jicarilla Apache Nation: U.S. Supreme Court Throws Heat, But Little Light On The Fiduciary Exception To The Attorney-Client Privilege." 26 Real Property and Probate No. 3, May-June 2012".

[22] Patricia A. Wilson. Avoiding Ethical Pitfalls for Estate Planning Lawyers. 331 PLI/EST 589 (Nov. 2004).

2. The impracticality of requiring independent representation of all who have potentially conflicting interests; and

3. The possibility of losing one or more clients, unless the representation is actually impermissible, could have negative economic consequences for the lawyer.[23]

¶ 1306.2 Ethical Rules on Conflicts of Interest

Model Rule 1.7 which governs whether a lawyer may represent multiple parties, reads as follows:

> (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."

While Model Rule 1.7(a) creates the presumption that the lawyer cannot provide common representation, this presumption can be overcome. Model Rule 1.7(b) permits a lawyer to represent multiple clients, despite the existence of a conflict of interest, in certain situations. Model Rule 1.7(b) reads:

> (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; t
>
> (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.

In representing a husband or wife or multiple generations in a tax or estate planning transaction, a lawyer needs to determine the following:

1. Whether there is a concurrent conflict of interest.

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[23] Wilson, supra, at p. 593.

2. If there is a concurrent conflict of interest, whether his or her representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.

3. If there is a concurrent conflict of interest and the representation of each client will not be materially limited, and the lawyer believes that he or she will be able to provide competent or diligent representation to each affected client provided each affected client gives informed written consent.

Among the factors to be used in determining whether representation of one client forecloses the lawyer's ability to recommend or carry out appropriate courses of actions on behalf of another client are:

1. The lawyer's relationship with the clients involved.
2. The functions the lawyer will perform.
3. The likelihood of consent.
4. The prejudice that will occur if a conflict arises.[24]

To obtain informed written consent, the lawyer must describe the risks of multiple representation and the possible effects of representation, including the possible effect on the lawyer's independent judgment. The lawyer should also consider whether information disclosed by one client might have to be disclosed in order to obtain consent or as part of the representation. The client whose confidences are to be disclosed will have to give consent to this disclosure.[25]

¶ 1306.3 Advice in ACTEC Commentaries

The ACTEC Commentary on Model Rule 1.7 gives states that ACTEC believes that it is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate planning or more than one of the investors in a closely held business. The reasons for this include:

1. The clients may actually be better served by such a representation.
2. Such a representation can result in an economical and better coordinated plan because the lawyer will have a better overall understanding of all the relevant family and property considerations.

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[24] Model Rules of Professional Conduct, Rule 1.7, comment 11.
[25] Wilson, supra, at p. 595.

3. In addition, estate and tax planning is, according to ACTEC, fundamentally nonadversarial in nature.

With respect to obtaining consent, ACTEC suggests that the lawyer consider meeting with the prospective clients separately. This may allow each of them to be more candid and perhaps reveal conflict or problems that might affect the relationship. Thus, ACTEC appears to favor multiple representations as much as possible.

¶ 1306.4 Representing Husband and Wife

The most common multiple representation situation encountered by estate planners and tax professionals is representing a husband and wife. Much has been written on this topic and the consensus seems to be that the best way to handle the potential conflicts inherent in representing spouses is to anticipate them by making clear to both spouses at the beginning of the representation that, as between the spouses, the lawyer will not preserve confidences revealed in the course of the representation.

Some lawyers do represent husbands and wives as separate clients. If a lawyer is going to represent a husband and a wife as separate clients and information communicated by one spouse will not be shared with the other spouse, then each spouse must give informed consent under Model Rule 1.7(b)(4). Such separate representation raises the same issues as those discussed below that arise with the representation of different generations of family members in the same estate planning matter.

A good summary of the issues involving the representation of spouses is found in Jeff Pennell's case book.[26] Some of the factors that may cause the interests of spouses to be different include:

1. Separate assets;
2. Children from a different marriage or relationship;
3. The risk of creditors of one spouse acquiring access to the assets of the other spouse; and
4. The potential use of gift splitting.

The ACTEC Commentary to Model Rule 1.7 also discusses the representation of a husband and wife. It indicates that the representation should only be taken with the informed consent of each of husband and wife confirmed in writing. The Commentary

[26] Jeffrey Pennell. Wealth Transfer Planning and Drafting (Thomson West 2005), ch. 3, p. 6.

suggests the writing be contained in an engagement letter that covers other subjects as well.

A 1994 report by an American Bar Association Real Property, Probate and Trust Section Task Force[27] also discussed the signs of potential conflict arising between multiple clients such as a husband and wife and which, in turn, could imperil a joint representation. These signs include:

1. Action related confidences that ask the lawyer to reduce or defeat the other spouse's rights or interests in the confiding spouse's property.

2. Prejudicial confidences that reveal adversity between the spouses (such as a plan to file for divorce following receipt of a transfer of property from the unknowing donor spouse).

3. Confidences indicating that one spouse's reliance on the plan of the other is misplaced.

Every joint representation carries the risk that one or more clients might feel betrayed or that the lawyer might be compelled to withdraw from representing all of the clients. These risks can be reduced by the lawyer properly creating and defining the joint representation.

The first issue to deal with is the issue of loyalty. As noted above, Model Rule 1.7 requires disclosure and written client consent only in the case of a "concurrent conflict of interest," which is a situation involving a direct adversity or a "significant risk" that a lawyer's representation of one client will be "materially limited" by the lawyer's responsibility to another client. This means that the Model Rules do not require full disclosure and consent until the conflict is nearly upon the lawyer.

Restatement (Third) of the Law Governing Lawyers, Sec. 130 Illustration 1, provides a good example of this dilemma:

> "Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interest, competent to make independent decisions if called for, and in accord with their common and individual objectives. Lawyer may represent both clients in the matter without

[27] Report of the Special Study Committee on Professional Responsibility. Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife.

obtaining consent. While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances."

Restatement (Third) of the Law Governing Lawyers, Sec. 130, Illustration 2, shows when the conflict would arise.

> "The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with the important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest and Lawyer may provide legal assistance only with the consent of both."

Restatement (Third) of the Law Governing Lawyers, Sec. 130, Illustration 3, shows the steps that a lawyer could take to determine whether the situation in Illustration 2 actually presents a conflict.

> "The same facts as in Illustration 1, except that Lawyer has previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent."

Even if consent is not required, as the above illustrations indicate may be the case in representing a husband and wife, the better practice is to obtain consent and describe the scope of the joint representation.

¶ 1306.5 Summary of Rules on Representing Husband and Wife

The default position under the Model Rules is that there can be no secrets among jointly represented clients. Instead, the lawyer must tell all clients any material fact that the lawyer learns with respect to any client.[28]

The other approach is for the clients to agree on separate representations in the same matter. The problem with this, obviously, is that the lawyer must exercise extreme vigilance and the lawyer may find himself or herself paralyzed by knowledge that the lawyer learns from one client, but is unable to share with others. The ACTEC

[28] Model Rule 1.7, comments 30 and 31.

Commentaries to Model Rule 1.6, using some understatement, indicate that "some experienced estate planners" might enter into such a relationship with spouses planning their estate, but must proceed with "great care."

A middle ground in establishing the representation might be for the lawyer to state that the lawyer will share all material information about the representation from any client, but will withdraw from the entire representation if any client balks at such sharing.[29] This, of course, puts the burden on the lawyer of determining what is and is not material information.

¶ 1306.6 Intergenerational Representation[30]

Just as in spousal representation, conflicts of interest in a family representation are swirling just below the surface and can snag the unwary lawyer at any time. Estate planning and tax lawyers are frequently involved in two other types of multiple representations that do not receive as much attention: Family or intergenerational representation; and representation of a partnership and individual partners.

One common scenario in which such conflicts arise involves a lawyer with a long term relationship with a client. As the client becomes successful, the lawyer prepares estate planning documents first for the parents and then for other family members. All seems peaceful until the original client dies and the survivors squabble over the division of assets. Eventually, some of the survivors may turn on the family lawyer for failing to represent their individual interests.

For example, in a case described by the malpractice carrier for the lawyer involved, a lawyer was sued 20 years after probating the will of a longtime client. The client had acquired substantial interests in real estate and oil prior to his final marriage. Under his estate plan, one-half of his community property was left to his wife, while the other half and all separate property was left to his descendants by a prior marriage. The client's grandchildren claimed that the lawyer had mischaracterized some assets as community property rather than separate property and that the widow had conspired with the lawyer in doing so. The widow filed a third-party complaint against the lawyer

[29] For further discussion of this, see Thomas Spahn, "Creating and Defining Joint Representations", ABA Experience, Spring 2007, p. 45.

[30] This portion of the outline is based, in part, upon materials prepared by Schiff Hardin LLP lawyers, including Charles D. Fox IV, during his tenure at that firm and are used with its permission.

alleging negligence in the drafting of the estate plan and administration of the property. The case was settled for $14 million.[31]

¶ 1306.7 Case Law on Conflict of Interest

Long before Charles and David Koch were making headlines for their funding of conservative policy and advocacy groups, they were involved in a will contest with two of their brothers, William and Frederick, over the will of their mother, Mary. In In re Estate of Koch, William and Frederick alleged that their mother's will was void as a product of undue influence and constructive fraud because of the drafting lawyer's conflict of interest.[32]

During the 1980s, numerous lawsuits were filed among members of the Koch family. The Wichita law firm of Foulston & Siefkin represented Koch Industries, Charles, David, Mary and the Fred C. Koch Foundation. In 1989, Mary called Robert Howard, a lawyer with the Foulston firm who was representing her in some of the family litigation and asked him to revise her will. Howard drafted and Mary executed a new will in 1989 which contained a no-contest clause and a provision that conditioned the gifts to each of her four sons on the dismissal by a beneficiary of any litigation that was pending against her within 60 days following her death.

After Mary's death, the will was offered for probate and the unrelated litigation previously initiated by Frederick and William had still not been dismissed. Under the terms of the will, Frederick and William would not receive gifts because of the pending litigation, resulting in the bulk of the estate passing to Charles and David. Frederick and William challenged the will, alleging among other things that the lawyer was acting on behalf of Charles and David when he prepared Mary's will, but the trial court rejected their challenges.

William and Frederick contended that Howard had a conflict of interest in violation of Model Rule 1.7 arising from his representation of Charles and David in intra-family litigation at the same time he undertook to represent Mary in revising her will. The trial court specifically found that Howard did not violate Model Rule 1.7 after

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[31] Attorneys' Liability Assurance Society, "Trusts and Estates Practice: Lawyers' Liability Issues," 1994, at 18-19.

[32] 849 P.2d 977 (Kan. Ct. App. 1993).

considering expert testimony from leading lawyers on the topic of conflicts of interest. The appellate court upheld the trial court's finding and held:

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

¶ 1307 Representing Families in Family Limited Partnerships

¶ 1307.1 Conflicts with respect to Family Limited Partnerships and Limited Liability Companies

One of the most popular estate planning tools in recent years and one that is used extensively in connection with transfers between family members is the family limited partnership and the related limited liability company. One of the best discussions of the ethical conflicts involved with one lawyer representing multiple family members in the formation and operation of a family limited partnership or limited liability company is found in a 2009 article by Mary F. Radford.[33] It is common for the formation of a family limited partnership to arise as part of the overall estate plan of one or more senior family members. The lawyer who represents senior family members may also be likely, as the "family lawyer," to also represent other members of the family in personal matters. This creates the potential for a conflict of interest and for difficulties in dealing with family information.[34] As Professor Radford notes, when family relationships start to disintegrate or go awry, the lawyer who represented different members of the family might find himself or herself in a difficult position. Simple withdrawal may not be sufficient, for example as a lawyer representing all the partners might have a duty to disclose partnership information to all of the partners even though one partner insists on keeping the information confidential.

Professor Radford suggests that in these situations the lawyer should help the multiple clients to understand the matrix of the relationships and agree to ground rules that cover the duties the lawyer has with respect to client information. The lawyer should memorialize all of the agreements of the different clients in writing. Professor Radford believes that the advance diligence, while it will not ward off all possible future

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[33] Mary F. Radford. "Ethical Challenges in Representing Families and Family Limited Partnerships", 35 ACTEC Journal 2 (2009). (Hereafter "Radford").

[34] Radford, at 28.

dissention, will promote deliberation by clients and the lawyer before the representation begins and will provide a framework in which to deal with future disagreements.[35]

One fundamental issue is whether the lawyer represents the entity or the partners or members of the entity. Model Rule 1.13(a) states that: "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Model Rule 1.13(e) states that:

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

The ACTEC Commentary on Model Rule 1.13 states that the lawyer who represents a corporation, partnership, or limited liability company may appropriately undertake to represent individuals who are interested in the business or who are employed by it, provided that they comply with the other ethical rules, especially Model Rule 1.6 on confidential information and Model Rule 1.7 on conflicts of interest between current clients.

The common interest in multiple clients with respect to matters concerning the business or family enterprise may predominate over any separate interests that they may have. Multiple representations in such cases may be in the best of interest of the clients and may provide them with better and more economical representation.

The ACTEC Commentary then goes on to say that the lawyer with informed consent confirmed in writing of the business enterprise and an employee may represent both with respect to matters that affect both. If their interests are not seriously adversarial.

One question that arises is whom the lawyer for a general partnership or a limited partnership represents. For example, Professor Radford in her article describes that the question of whom a lawyer represents when he or she represents a partnership has a number of possible answers:

1. The lawyer represents only the partnership which is a separate entity from its partners; and

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[35] Radford at 9.

2. The lawyer represents each of the individual partners because a partnership has no separate "entity" status; and

3. The lawyer represents the partnership as an entity and by extension each of the partners; and

4. The answer depends on the peculiar circumstances of each case.

Professor Radford notes that answering this question is required to determine to whom the lawyer owes the duty to communicate under Model Rule 1.4, the duty of confidentiality under Model Rule 1.6, and the duty to avoid conflicts of interest under Model Rule 1.7.

Professor Radford proposes that the answers may differ depending upon whether a general partnership or a limited partnership is formed. One approach is that the lawyer represents only the entity as a separate client of the lawyer. However, in Responsible Citizens vs. Superior Court,[36] a California court opted for a case by case analysis and examined four factors with respect to a general partner.

1. The type and size of the partnership;

2. The nature and scope of the lawyer's engagement by a partnership;

3. The kind and extent of contacts of any between the lawyer and a mutual partner;

4. The lawyer's access to information relating to the individual partner's interest.

In Responsible Citizens v. Superior Court,[37] the court found that a lawyer representing a partnership does not necessarily have a lawyer-client relationship with an individual partner for purposes of applying conflict of interest rules. ABA Formal Opinion 91-361 states that "An attorney-client relationship does not automatically come into existence between a partnership lawyer and one or more of its partners .... Whether such a relationship has been created almost always will depend on an analysis of the specific facts involved."

Limited Partnerships. Professor Radford notes that courts differ in their determinations of whether a lawyer who represents a limited partnership represents the

[36] 20 Cal Rptr 2d. 756 (1993)
[37] 20 Cal. Rptr. 2d 756 (Cal. App. 1993)

limited partnership alone; the partnership and the general partner concurrently; or the partnership and all of the partners, both general and limited, concurrently. The majority of the cases take the position that the lawyer for the limited partnership does not represent the limited partners. Other courts have held that the lawyer for a limited partnership has a duty of care to limited partners regardless of whether the lawyer was the lawyer for the partnership or general partner.

The increasing use of family limited partnerships as an estate planning tool carries with it the chance of ensnaring a lawyer in conflicts of interest. Griva v. Davison,[38] provides an example of a law firm caught up in a family dispute. Lawyer Davison and his law firm became involved with the Maiatico family in connection with some litigation over a commercial building owned by the patriarch of the family. During the litigation, questions of the father's capacity arose and the firm instituted a guardianship proceeding. The firm prepared an estate planning memorandum in connection with the guardianship recommending that the commercial real estate be placed in a family limited partnership. Two of the patriarch's three children, Ann and Michael Maiatico, looked solely to Davison and his firm for legal advice. The third child, Rose Griva, however, consulted with independent counsel. All three retained Davison to draft the partnership agreement and form the entity. The three children were general partners. At the insistence of Griva's separate counsel, a unanimous consent provision was included in the partnership agreement, such that any one general partner could deadlock the partnership.

After formation of Maiatico Family Limited Partnership (MFLP), Davison continued as general counsel to MFLP and represented all three siblings on family matters. Davison also advised the two Maiaticos as general partners, as well as on individual matters. Numerous disputes arose among the partners regarding the redevelopment of the partnership real estate and the partners were frequently deadlocked. The Maiaticos wished to grant the lessee of MFLP's building the right to sublet and manage the property. The effect of this transaction would have been to decrease the management power Griva was able to exercise due to the unanimous consent provision in the partnership agreement. The law firm's bills started to raise Griva's suspicions about Davison's advice to her siblings. Entries referenced a memorandum about "dissolution

[38] 637 A.2d 830 (D.C. App. 1994)

of [the] deadlocked MFLP" and conversations with the Maiaticos about "dissolving MFLP." These events led Griva to request access to all of the Davison's firm's files on MFLP. When the firm refused, Griva filed suit alleging that Davison and his firm had violated the conflict of interest provisions of the Code of Professional Responsibility.

On appeal, the court found that it did not need to resolve the question of whether Griva was a formal client of the firm after the formation of MFLP because the structure of MFLP made Griva "functionally" a client of the firm. Because Griva could deadlock MFLP when she disagreed with her siblings, she had the power to keep MFLP at odds with the wishes of her siblings. Therefore, rather than analyzing the situation as a potential conflict between Griva and the Maiaticos, the court addressed the ethical issue presented by the law firm's representation of MFLP and the Maiaticos as general partners. The court noted, "a lawyer for an entity cannot represent constituents of an entity when such representation may prejudice the interests of that entity, or when it is unclear what constituents represent the interests of the entity and thus a dispute between constituents makes it impossible to know what the entity's interests are."[39] The court determined that there were genuine issues of fact regarding whether Davison fully disclosed to Griva the conflict of interest involved in representing both her and MFLP and whether Griva consented to the joint representation.

Arpadi v. First MSP Corporation,[40] involved a limited partnership among investors rather than family members, but its holding may have profound implications for lawyers who represent family limited partnerships. Lawyer Richard Jankel served as counsel, president and director of the general partner in Lakeside Apartments, L.P. The partnership was formed for the purpose of acquiring and developing an apartment complex. Investments in the partnership were solicited by means of a private placement memorandum (PPM). The PPM provided that the partnership would purchase the complex and renovate some units. The liens on those units would be released to permit their sale as condominiums. The proceeds would then be used to renovate additional units. After the plaintiffs invested in the partnership as limited partners, the existing mortgage holders on the complex refused to agree to the release formula. Jankel

[39] (637 A.2d at 840.)
[40] 628 N.E.2d 1335 (Ohio 1994)

participated in the preparation of a purchase agreement that omitted any release formula. The limited partners were not informed of the omission. After the project ended in bankruptcy, the limited partners alleged that the lack of a mechanism for the release of liens on portions of the complex denied the project cash flow and caused its failure. The plaintiffs argued that Jankel, as lawyer for the partnership, owed a duty of care to the limited partners. The court agreed, noting that state law determines whether a partnership is treated as an entity, like a corporation, or as an aggregate of individuals.[41]

When representing multiple family members or partnerships and individual partners, the lawyer should assess each individual transaction and determine whether certain family members or partners should seek independent counsel because of the potential for conflicts arising.

¶ 1308 Designation of the Lawyer as Fiduciary or the Attorney for the Fiduciary

¶ 1308.1 Nature of Challenge When Lawyer is Named as Fiduciary

Lawyers face numerous conflicts in their representation. One of the most vexing, which is discussed below, is when a lawyer names himself or herself as a fiduciary for a client. One issue that challenges estate planners is whether the lawyer should be named in a client's documents as an executor or trustee and whether the lawyer or the lawyer's firm can also represent the lawyer in his or her fiduciary capacity.

This issue is discussed in ABA Formal Ethics Opinion 02-426 (May 31, 2002) which addresses the following issues:

1. May a lawyer serve as fiduciary under a will or trust that the lawyer is preparing for a client?

2. May a lawyer while serving as fiduciary of an estate or trust appoint himself or a member of his firm to represent him in his fiduciary capacity?

3. While serving as a fiduciary, may the lawyer or the lawyer's firm represent either a beneficiary or creditor of the estate or trust?

With respect to whether a lawyer may serve as a fiduciary, the ethics opinion finds that a lawyer may, provided that the lawyer satisfies his obligations under Model

[41] See also Pucci v. Santi, 711 F. Supp. 916 (N.D. Ill. 1989) (representation of partnership includes fiduciary duty to all partners on partnership matters).

Rules 1.4(b) and 1.7(b). Under Model Rule 1.4(b), the lawyer is required to discuss with the client the client's options in selecting an individual to serve as a fiduciary. The lawyer must provide reasonably adequate information to permit the client to understand the tasks to be performed by the fiduciaries, the desired skills in a fiduciary, the kinds of individuals or entities likely to serve effectively, and the benefits and detriments of using each, including costs. A lawyer may disclose his or her own ability to serve as fiduciary, but cannot allow the potential self-interest interfere with the exercise of independent professional judgment. Under Model Rule 1.7(b), a lawyer may serve as a fiduciary, even if there is a concurrent conflict of interest, if there is written consent from the parties involved and the lawyer believes that he or she can provide diligent and competent representation to all parties involved.

With respect to the issue of the lawyer acting as a fiduciary hiring either himself or his firm as counsel for him or her in his or her fiduciary capacity, the Model Rules according to Ethics Opinion 02-426 will not prohibit a fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of an estate or trust because the dual roles do not involve a conflict of interest. The ethics opinion states that the obligations of the lawyer and his firm as counsel do not differ from the obligations of the lawyer as fiduciary. It notes that the principal responsibility of the lawyer for a fiduciary is to advise the fiduciary in properly performing his or her fiduciary duties. The ethics opinion takes the position that the lawyer for a personal representative or trustee only owes a limited duty of care to the legatees and creditors of an estate or to the beneficiaries of a trust. In the opinion of the drafters of the ethics opinion, a key component of this dual representation is that the fees be reasonable.

If a lawyer serves a fiduciary and currently represents a beneficiary or creditor of the estate, any conflicts of interest must be resolved under Model Rule 1.7. The opinion gives the example of when a lawyer serving as fiduciary also attempts to represent a beneficiary or creditor in a claim against the estate. The lawyer would be obligated as fiduciary to oppose the beneficiary or creditor's claim. This would cause his representation to be materially limited under Model Rule 1.7(a). The representation of the beneficiary would not be permissible even with the consent of the trust or the estate because it would be unreasonable for the lawyer to conclude that he could provide

competent and diligent representation when opposing the interests of the estate or trust for which he or she is a fiduciary. The ethics opinion takes the position that the representation of the beneficiary or creditor in an unrelated matter is unclear. Representation of creditors of an estate or trust in unrelated matters would require informed consent under Rule 1.7(b), provided the lawyer believes that he will be able to provide competent and diligent representation of the beneficiary and the creditor.

The ethics opinion also gives another example. While it would be permissible for the fiduciary to represent one of several beneficiaries in unrelated matters with the consent of all clients, in some circumstances the lawyer never should do so. For example, it states that if the lawyer serves as sole trustee of a trust with discretionary power to distribute principal or income unequally among the beneficiaries, the trustee's decision to distribute principal to only one beneficiary, while excluding the others, might well be questioned, especially if the lawyer was representing that beneficiary.

¶ 1308.2 Position in ACTEC Commentary

The ACTEC Commentary to Model Rule 1.7 discusses the appointment of a scrivener as fiduciary.

The commentary to Model Rule 1.7 reads:

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

The designation of the lawyer as fiduciary will implicate the conflict of interest provisions of Model Rule 1.7 when there is a significant risk that the lawyer's interest 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.

For purposes of the ACTEC Commentary, a client is properly informed if the client is provided with information:

1. Regarding the role and duties of a fiduciary.

2. Regarding the ability of a layperson to serve as fiduciary with legal and other professional assistance.

3. 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 the appointment. For example, in the recent case, Gunster, Yoakley & Stewart v. McAdam, 965 So.2d 182 (Fl. Dist. Ct. of App. 2007), a law firm was held liable for $1,043,430 in damages for, among other complaints by the personal representatives of an estate, wrongfully procuring the appointment of a corporate fiduciary with which it had a referral relationship and thereby increasing the expenses of the estate administration.

The ACTEC Commentary to Model Rule 1.7 also discusses the designation of the scrivener as the lawyer for the fiduciary. The ethical propriety of a lawyer drawing a document that directs the fiduciary to retain the lawyer as his or her counsel will involve the same issues as the appointment of the lawyer drafting the document as fiduciary. The distinction drawn by the ACTEC Commentaries is that while the appointment of a named fiduciary is generally necessary and desirable, designating any particular lawyer to serve as counsel to a fiduciary or to direct the fiduciary to retain a particular lawyer is usually unnecessary. Before drafting the document in which the fiduciary is directed to retain a lawyer or a member of the lawyer's firm as counsel, the lawyer 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 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.

¶ 1308.3 Position in New York State

New York State, for example, has addressed the issue of naming the attorney as executor by statute.[42] This statute permits an attorney to prepare a will and be designated

[42] See McKinney's SCPA § 2307-A.

as executor provided that the testator is informed of the following prior to the execution of the will:

1. Any person, including an attorney, eligible to serve as an executor

2. Absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive the statutory commission.

3. If the attorney or an affiliated attorney renders legal services in connection with the executor's official duties, such attorney or the affiliated attorney is entitled to receive reasonable compensation in addition to the statutory commission.

The testator must give written acknowledgement of the disclosures required by the statute. In addition, the disclosure must be witnessed by someone other than the designated executor. The disclosure must be separate from the will, but may be annexed to the will. The statute also contains a model form of the acknowledgement of disclosure. If the statute is not complied with, the statutory commissions to which the attorney as executor would otherwise be entitled are reduced by fifty percent.

Two cases addressing this area are:

1. In re Estate of Weinstock.[43] This apparently is one of those cases which lead New York to enact SCPA § 2307-A, which is discussed above. A father-son team of attorneys met with an elderly man, eighty-two years of age, with physical infirmities and waning mental acuity. This was their first meeting with the decedent. The decedent indicated that he no longer wished to have a bank serve as executor because he wanted to avoid the fee which the bank would normally expect to receive. The decedent also discussed appointing his daughter and son-in-law. During the discussion, the attorneys never told the decedent that if there were to be two executors, each would be entitled to receive full commissions. A new will was prepared appointing the two attorneys and the decedent's accountant as executors. The decedent never saw a draft of the will prior to the date on which he executed the will.

[43] 351 N.E. 2d 647 (N.Y. 1976)

The surrogate determined that this was overreaching by the father-son combination of attorneys who before the first meeting with the decedent had been total strangers to him. The surrogate concluded that the father-son attorney team was guilty of practicing constructive fraud on the decedent which should preclude their serving as executors. The court went out of its way to state that it did not wish to be understood as implying that when a testator selects the attorney who draws his or her will as executor any presumption or inference would arise from the circumstance that the attorney is otherwise a stranger. It noted that the testator might want to insure that his estate would be administered by an outsider free from the competing interference of obsequious members of his family. In this case, the evidence warranted an affirmative finding of impropriety and overreaching.

2. Petty v. Privette.[44] The executor of an estate brought an action against the former executor and the attorney retained by the former executor alleging the failure to account to charitable beneficiaries, the failure to timely disperse funds, inappropriate investments, and excessive and unauthorized payments to the retained attorney. The trial court issued an opinion holding that the exculpatory clause in the testator's will was void against public policy. The Court of Appeals held that an attorney serving as executor of an estate, having been so designated in a document prepared by the attorney or member of his firm, can be protected by an exculpatory clause in a will limiting the executor's liability to acts of bad faith without violating public policy and the attorney may benefit from a clause limiting its liability for ordinary negligence in the course of his duties as an executor when the will was drafted by himself or another member of his firm if the attorney proves that there is no overreaching, undue influence, or abuse of fiduciary relationship. The case was sent back to the trial court to determine whether there was overreaching, undue influence, or abuse of fiduciary relationship.

¶ 1309 Miscellaneous Rules on Conflicts of Interest

¶ 1309.1 Payment of Lawyer's Fees by Others

[44] 818 S.W. 2d 743 (Tenn. Ct. App. 1989)

Model Rule 1.8 sets forth a number of specific rules related to conflicts of interest for current clients. Of particular interest to this discussion is Model Rule 1.8(f), which provides:

> (a) "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."

The ACTEC Commentary on this provision notes that "[i]t is relatively common for a person other than the client to pay for the client's estate planning services." The examples included in the ACTEC Commentary make clear that in such situations, the lawyer must inform the individual paying his or her fees of the requirements of Rule 1.8 and must also obtain the informed consent of their client. If the lawyer believes there is significant risk that their representation of the client will be materially limited by the fact that the fees are paid by someone else, then the consent must be confirmed in writing.

A common example of when someone other than the client might pay for estate planning services is when a parent pays for estate planning for a child or a child pays for the estate planning for a parent.

There are few reported cases dealing with the issue of an estate planning lawyer being paid by a party other than his client. Perhaps this is the case because such arrangements are relatively common. A case out of the Supreme Court of Louisiana addressed the issue under a unique set of facts. In Succession of Wallace[45], Charles Wallace's will appointed his wife, Ruth, as executor of his estate and appointed Jacqueline Goldberg to act as lawyer for the executor and estate. During the probate process, Ruth wanted to discharge Goldberg and employ a lawyer of her choice. Louisiana had a statute which provided that a lawyer designated by a testator in his will may be removed as such only for just cause. The Louisiana Supreme Court struck this law as being null and void as it was in irreconcilable conflict with rules requiring a lawyer to withdraw from a representation if he or she is discharged by a client. In

[45] 574 So.2d 348 (1991).

arguing that she should be retained as counsel to the executor, Goldberg argued that because the lawyer will be paid with succession funds from the estate, Rule 1.8(f) indicated that the testator is the client, not the executor. The court did not accept this argument, noting that "it is the executor's duty to pay the lawyer's fee with succession funds as a debt of the succession. . . . The only person or legal entity involved who can act as a client in paying the lawyer is the executor."

¶ 1309.2 Duties to Former Clients

Model Rule 1.9 provides:

> (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 about whom the lawyer had acquired information protected by Rules 1.6 and
> >
> > (2) 1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing."
>
> (c) "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

An example provided in the ACTEC Commentary to Model Rule 1.9 demonstrates how this Rule may be implicated by a joint representation. In the example, the lawyer represented husband and wife jointly in estate planning matters. Husband and wife subsequently divorce, at which point the lawyer continues to represent the husband in estate planning and other matters. Because wife is a former client, Model Rule 1.9 imposes limitations on the lawyer's representation of husband. Unless wife gives

informed consent, confirmed in writing, the lawyer would be unable to represent husband in a matter substantially related to the prior representation in which husband's interests are materially adverse to wife's, such as an attempt to terminate an irrevocable trust benefiting wife.

¶ 1309.3 Case on Duties to Former Clients

A lawyer's role representing individuals and estates may also result in precluding the lawyer from certain representations. In Galiardo v. Caffrey[46], an Illinois trial court granted a motion to disqualify a lawyer who formerly represented an estate from representing the executor individually in a beneficiary's action against her. In Gagliardo, Michael Gagliardo's sister, Paulette, became the sole trustee of his revocable trust and executor of his estate upon his death. Michael's wife, Margaret and their children were the sole beneficiaries of the trust. Unhappy with Paulette's service as trustee and executor, Margaret brought an action to remove Paulette as trustee and executor. Paulette was represented in her individual capacity by lawyer Christopher Matern. Margaret then filed a motion to disqualify Matern based on Matern's representation of Michael's estate. The trial court granted Margaret's motion to disqualify Matern for the representation under Rule 1.9, which prohibits a lawyer from representing one client whose interests are adverse to a former client. The appellate court affirmed the trial court's decision, concluding that for the time Matern represented the estate, he represented Margaret as its sole beneficiary thereby precluding him from representing Paulette in Margaret's action against her.

¶ 1310 Dealing with Unrepresented Persons

¶ 1310.1 Model Rule 4.3

Model Rule 4.3 provides:

> "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

[46] 800 N.E.2d 489 (Ill. App. 2003).

> The ACTEC Commentary on Rule 4.3 notes that a lawyer for fiduciary is required to comply with Rule 4.3 and that in doing so, the lawyer should inform the beneficiaries of the fiduciary estate regarding various matters, including the fact that the lawyer does not represent them and that they may wish to obtain independent counsel."

¶ 1310.2 Case on Dealing with Unrepresented Persons

Courts do not take kindly to counsel who do not take the appropriate steps in dealing with unrepresented persons. In fact, courts often raise the issue *sua sponte*, and in doing so, often direct the court's clerk to notify the state bar of the lawyer's conduct.[47] In Estate of Hydock[48], the court addressed the "tangential" issue of the conduct of a lawyer who prepared a disclaimer of interest in an estate to be executed by a beneficiary the lawyer knew was unrepresented and impaired. The court found it "clear that [the lawyer] had a duty under Rule 4.3 . . . to advise [the beneficiary], an unrepresented person, to retain counsel."

¶ 1311 Multi Jurisdictional Issues

¶ 1311.1 The Challenge in Multi Jurisdictional Practice

Estate planning transactions often involve family members who reside in more than one jurisdiction. In these situations, lawyers must be aware of the issues raised in representing clients who reside outside a jurisdiction in which the lawyer is not licensed.

ABA Model Rules of Professional Conduct. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983, and amended from time to time thereafter. The Model Rules (or variations thereof) are now in force in forty-four states. Rule 5.5 deals with the unauthorized practice of law. The original version of Rule 5.5 reads:

> "A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

In late 1997, the ABA established the Commission on the Evaluation of the Rules of Professional Conduct, popularly known as the "Ethics 2000 Commission," to examine the existing Model Rules of Professional Conduct and propose changes to them, giving

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[47] See, e.g., In re Jumper, 984 A.2d 1232 (D.C. App. 2009).
[48] 2004 Phila Ct. Com. Pl. LEXIS 144 (Feb. 22, 2004).

special attention to, among other topics, interstate practice and multistate law firms.[49] The Ethics 2000 Commission submitted a report to the ABA House of Delegates at the August 2001 meeting. The report was debated at both the August 2001 and February 2002 meetings and the recommendations were finalized at the February 2002 meeting.

In July 2000, the ABA appointed a Commission on Multi-Jurisdictional Practice which proposed substantial changes to Rule 5.5. These changes were adopted at the August 2002 meeting of the ABA. Since the adoption, these changes have been adopted in 34 states and the District of Columbia and were pending (as of September 25, 2007) in 6 states.

Amended Model Rule 5.5 reads:

> (a) "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."
>
> (c) A lawyer admitted to another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or

[49] See, e.g., Robert A. Stein, "Updating Our Ethics Rules", ABA Journal, Aug. 1998, at p. 106, Demetrios Dimitriou, "Legal Ethics in the Future: What Relevance?", Prof. Law., Spring 1998, at p. 2.

(4) are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac* vice admission; or are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction."

Amended Rule 5.5 greatly expands Rule 5.5 by providing several ways in which an out-of-state lawyer could practice in the state. The two important parts of Amended Rule 5.5 for tax practitioners are:

1. Amended Rule 5.5(c)(3) permitting an out-of-state lawyer to provide representation to clients in pending or anticipated arbitrations, mediations, or other alternative dispute resolution proceedings; and

2. Amended Rule 5.5(c)(4) which permits, on a temporary basis, transactional representation, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The reasons for Amended Rule 5.5(c)(4) are:

1. Drawn from § 3(3) of the Restatement (Third) of the Law Governing Lawyers.

2. Emphasizes need to have a single lawyer conduct all aspects of a transaction.

3. Respect preexisting and on-going client/lawyer relationships. According to the Report, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence.

4. Permits a client to engage a person with a recognized expertise in a particular body of law.[50]

One issue is when work outside a lawyer's home state is "reasonably related" to a lawyer's work in the home state. The MJP Report provides little guidance on this. Instead, it states that judgment must be exercised.[51]

Thirteen states have adopted a rule identical to Amended Model Rule 5.5:

Alaska	Nebraska
Arkansas	New Hampshire
Illinois	Rhode Island
Indiana	Utah
Iowa	Vermont
Maryland	Washington
Massachusetts	

Thirty states and the District of Columbia have adopted a rule similar to Amended Model Rule 5.5:

Alabama	Nevada
Arizona	New Jersey
California	New Mexico
Colorado	North Carolina
Connecticut	North Dakota
Delaware	Ohio
District of Columbia	
Florida	Oklahoma
Georgia	Oregon
Idaho	Pennsylvania
Kentucky	South Carolina
Louisiana	South Dakota
Maine	Tennessee
Michigan	Virginia
Minnesota	Wisconsin
Missouri	Wyoming

¶ 1311.2 Amended Rule 8.5

Also in 2002, upon the recommendation of the Commission on Multi-Jurisdictional Practice, the ABA adopted Amended Rule 8.5 to clarify the authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within

[50] American Bar Association Center for Professional Responsibility, Client Representation in the 21st Century. Report of the Committee on Multijurisdiction Practice. (2002) at 27-28 (hereafter "MJP Report")
[51] MJP Report, at 29.

their jurisdiction pursuant to the provisions of Rule 5.5 or other law. This was done to alleviate the perceived problems with lawyers only being subject to discipline in states in which they are licensed.

Amended Model Rule 8.5 reads as follows:

> (a) "Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted to this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."
>
> (b) "Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

Twenty-four states have adopted a rule identical to Amended Rule 8.5.

Alaska	Missouri
Arizona	Nebraska
Arkansas	Ohio
Connecticut	Oklahoma
Idaho	Oregon
Illinois	Pennsylvania
Iowa	Rhode Island
Kentucky	South Dakota
Louisiana	Utah
Maine	Vermont
Michigan	Washington
Minnesota	

Twenty-one states have adopted a rule similar to amended Model Rule 8.5.

California	New Mexico
Colorado	New York
District of Columbia	North Carolina
Florida	North Dakota
Georgia	South Carolina
Indiana	Tennessee
Maryland	Virginia
Massachusetts	Wisconsin
Montana	Wyoming
Nevada	
New Hampshire	
New Jersey	

¶ 1312 Clients with Diminished Capacity

¶ 1312.1 Model Rule 1.14 provides:

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

¶ 1312.2 Position in ACTEC Commentary

When dealing with a client with diminished capacity, the ACTEC Commentary notes that a lawyer: has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors."

In Moore v. Anderson Ziegler Disharoon Gallagher & Gray, PC[52], the adult children of a decedent brought a malpractice action against a lawyer alleging that the lawyer was negligent in failing to determine whether the decedent had testamentary capacity at the time the decedent executed a new will and amended his trusts. The trial court dismissed the children's complaint and the court of appeal affirmed. The adult children based their claim of negligence in part on Model Rule 1.14 and the ACTEC Commentary on Rule 1.14, arguing that the Rule and Commentary require an estate planning lawyer to determine that his or her client has testamentary capacity when executing a will or dispositive instrument and that when there is a doubt, a competent lawyer should take reasonable steps to confirm the client's capacity. The court dismissed this argument, noting that any such duty runs to the testator, not the beneficiaries.

¶ 1313 Lawyer as Witness

¶ 1313.1 Why a Lawyer May be a Witness

A lawyer may end up being a witness, often if an estate planning technique does not work as anticipated by one or more of the parties.

Model Rule 3.7 provides:

> (a) "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client."
>
> (b) "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."[53]

Problems implicating Model Rule 3.7 typically arise in estate and trust litigation matters such as will contests, surcharge actions and trust interpretation cases. These types of cases frequently involve the lawyer who drafted estate planning documents representing a party and also being asked to testify as to whether the testator had capacity to execute the document.

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[52] 100 Cal. App. 4th 1287 (2003).

[53] Model Rule 1.7 deals with conflicts of interest and Model Rule 1.9 deals with duties to former clients.

¶ 1313.2 Case on Lawyer as Witness

In In re Waters[54], Elizabeth Waters' granddaughter, Claire Trent, challenged the will prepared by Waters leaving a life estate to Waters' cousin, Lillian Young, before the remainder was to go to Trent. The lawyer who represented Young in the will contest, Brian Murphy, was the same lawyer who prepared Waters' will. As the lawyer who prepared Waters' will, Murphy was called to testify during the will contest regarding Waters' testamentary capacity. The Delaware Supreme Court found, relying on Rule 3.7, that "the centrality of Murphy's testimony to the contested issues of undue influence and testamentary capacity mandated his withdrawal as trial lawyer." The court found it was plain error for the Court of Chancery to permit Murphy to participate as a trial lawyer in a proceeding in which he was a central witness on the contested issue being adjudicated. The Delaware Supreme Court reversed the lower court and remanded the case for a new trial. The Supreme Court further directed the Clerk to send a copy of its opinion to the Office of Disciplinary Counsel.

¶ 1314 Conclusion

Complying with the ethical rules in a trusts and estates practice and especially when dealing with transfers between family members is almost always challenging. The key to avoiding the violation of the ethical rules as well as possible malpractice actions is for practitioners to be constantly vigilant and to ask questions any time that he or she believes that there might be a potential ethical problem. If the estate planner takes the time to ask questions if he or she perceives a possible ethical problem in a particular transaction or representation, the estate planner should be able to avoid those problems and the possibly serious consequences that could otherwise arise.

[54] 647 A.2d 1091 (Del. 1994).

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