ACTEC COMMENTARIES ANNOTATIONS: RECENT CASE LAW AND ETHICS OPINIONS INVOLVING TRUST, ESTATE AND GUARDIANSHIP ISSUES

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The ACTEC Commentaries were annotated with illustrative case law and ethics opinions from various states. After the 4th edition of the ACTEC Commentaries was published, the ACTEC Foundation agreed to fund updates to the case law and ethics opinions annotations. These annotation updates are available on the ACTEC public website. Recent trends in these cases include the issue of privity and to whom an estate planning lawyer owes a duty, as well as conflicts when the lawyer represents several related parties. These materials include summaries of recent representative cases from the annotation updates.

I. Attorney’s Duty to Non-clients

**Parks v. Fink, 293 P.3d 1275 (Wn. App. 2013).**

Client with terminal cancer had new will prepared but it was not validly executed by the time of his death. Disappointed beneficiary of unexecuted will sued the lawyer for not having the will properly executed before the client died, but court held that the lawyer did not owe a duty to the nonclient plaintiff. The court stated, “To impose a duty in this case would severely compromise the attorney’s duty of undivided loyalty to the client and impose an untenable burden on the attorney-client relationship. We therefore hold that an attorney owes no duty of care to a prospective beneficiary to have a will executed promptly.”

**Hall v. Kalfayan, 190 Cal. App. 4th 927; 118 Cal. Rptr. 3d 629 (2010)**

Lawyer was appointed by the court to represent an incapacitated woman during conservatorship appointment proceedings, and his appointment was later renewed to assist in drafting an estate plan for the incapacitated woman. The estate plan was to benefit the conservator among others, and would have required court approval. Lawyer began work on the estate plan in 2004 but the plan had not been completed when the incapacitated woman died in 2007. The delay was due in part to the incapacitated woman’s difficulties in expressing her intentions and in part to involvement of other family members. The conservator sued the lawyer for malpractice, alleging the delay was negligent. The court, following Chang v. Lederman, 172 Cal.App.4th 67 (2009), held that a lawyer owed no duty to a prospective beneficiary unless the beneficiary was named in executed estate planning documents. Here, the incapacitated woman had not initiated the drafting of the plan and there was no guarantee that the court would have approved the plan even if completed. The conservator failed to establish a duty owed to him by the lawyer so the malpractice claim failed.

**Harrison v. Lovas, 234 P.3d 76 (MT 2010).**

Parents executed a revocable living trust leaving their property to their children. They later contacted lawyer to discuss giving larger shares to three of their children. The lawyer informed the clients she was waiting on additional information to complete the changes, but the parents did not follow up and died a few years later without making the changes. The children who would have received the larger shares sued the lawyer for malpractice, but the
court held that the lawyer owed no duty to the children. Whether a drafting attorney owes a duty to named beneficiaries is a factual issue, and here there was no clear indication that the parents intended to go through with the changes.

**Kennedy v. Ferguson 679 F.3d 998 (8th Cir. 2012)**

Lawyer prepared a 2000 will for client, which client signed, and a 2008 Will for same client, which was also signed. When client died, lawyer submitted the 2000 will for probate, apparently in error. Client’s son was a beneficiary under the 2008 will. Lawyer later gave a copy of the 2008 will to the son but the original will was lost. Son would receive more from the estate under the laws of intestacy than under either will, and under theory that 2008 will was proof that 2000 will was revoked but 2008 will could not be probated because lost, son settled with the other heirs and agreed not to challenge the 2000 will. Probate was still open and son filed this action suing lawyer for malpractice. The action was dismissed without prejudice, because the probate was still open, technically son could still challenge the 2000 will so the action was not ripe. Son’s litigation expenses were not enough of an injury at the time of the action to allow the suit.

**Vinton v. Virzi, 269 P.3d 1242 (Col. 2012)**

Trust beneficiary was suing the trustee (who was also a beneficiary) for breach of fiduciary duty and fraud, including changing title to trust real property into the name of the trustee individually. Plaintiff beneficiary amended her complaint to allege that the attorney had participated in the fraud. The basis of the claim against the attorney was that the attorney knew about the title, allowed the trustee to file accountings showing the property in the trust, and made representations to plaintiff beneficiary that the property was in the trust. Because of the fraud claim against the attorney, the attorney had to withdraw. The court dismissed the claim against the attorney. The court stated that before allowing a party to amend a complaint to add the opposing party’s lawyer, the trial court must first determine whether such a claim against the lawyer would survive a motion to dismiss. In this case, the plaintiff’s claim could not survive a motion to dismiss because (1) the plaintiff could not rely on attorney’s representation of title to the property, since that information was public record and available to plaintiff, and (2) title in the name of the trustee is not determinative of the trust’s claim to the property.

**Soignier v. Fletcher, 151 Idaho 322, 256 P.3d 730 (Idaho 2011).**

The client—Cowan—had been a beneficiary of a trust that terminated when he was 50. After the trust terminated, he had a lawyer—Fletcher-- prepare a will for him, leaving all his “beneficial interests ..in any trusts” to Ms. Soignier, and the remainder of his estate to the American Cancer Society. When Cowan died, however, he had no “beneficial interests in trusts” because the trusts had been wound up (even before Fletcher drafted his will). As a consequence, Ms. Soignier received nothing under the will. So she sued the lawyer for malpractice, claiming that Cowan intended her to get the assets from the trust that terminated before the will execution. The court acknowledged that under Idaho law, a beneficiary may sue a drafting attorney for malpractice but noted that such a claim is limited. The lawyer is
only required to effectuate the testator’s intent as reflected in the documents. Allowing her claim, it concluded, would create an ongoing duty on the part of lawyers to monitor the status of property given under wills drafted by the lawyers.


Wrongful death suit initially brought on behalf of parents of decedent. Woman made claim that decedent fathered her unborn child, and once child was born, DNA established paternity. Parents continued to claim portion of suit proceeds based on their dependency on the decedent. Court held: Illinois wrongful death statute identifies claimants based on intestacy, and the child was the sole intestate heir of decedent; and attorney for parents was not entitled to fees because once the child was confirmed as the heir, attorney continued to argue that the child was not entitled to recovery and the parents qualified as wrongful death claimants. These arguments breached his fiduciary duty to the statutory beneficiary of the wrongful death action, the child.

**Spencer v. Barber, 2013 N.M. LEXIS 109 (N.M. 2013).**

Client was driving car when accident occurred, killing the client’s daughter and infant granddaughter. Lawyer represented client in wrongful death suit for death of her daughter and granddaughter. Surviving father/grandfather was another statutory beneficiary for a wrongful death action but lawyer did not represent him, and mother/grandmother’s position was that he was not entitled to recovery because he had abandoned the child. Lawyer received settlement offer from defendants, and went to father/grandfather to ask for release of his claims in exchange for a certain sum. Lawyer made clear he was not representing father/grandfather. After negotiation, they agreed on a sum, and lawyer then accepted offer from defendants. Father/grandfather then reneged on agreement with lawyer, so lawyer sued him to enforce the agreement. Father/grandfather countersued, alleging lawyer owed him a duty as statutory beneficiary. Court held that the attorney for the personal representative in a wrongful death suit owed duties to the statutory beneficiaries of a wrongful death action. Court acknowledged that the attorney had a conflict between the personal representative’s interests as beneficiary and the father/grandfather as the other beneficiary. Once the conflict was known, the lawyer did not have to withdraw, but could not resolve the conflict by informing the father/grandfather that he only represented the mother/grandmother. The court suggested that instead of withdrawing, he could have represented mother/grandmother to conclusion of settlement of wrongful death action, and then treat the issue of who was entitled to the proceeds and in what percentage separately. Court also held that attorney had a conflict because there was evidence the mother/grandmother was also at fault in the accident, potentially giving rise to a separate action against her for wrongful death.


Lawyers were hired by widow to pursue wrongful death claim. The statutory beneficiaries included the widow and two children of the decedent, one of whom was incapacitated. The lawyers gave the disabled child’s share of the settlement to the mother instead of to his guardian, and mother misappropriated the funds. The guardian sued the lawyers and the
court held that plaintiff attorneys in a wrongful death suit owe duties to all the statutory beneficiaries, not just the person who hired the attorney.

**Alabama Bar Association Opinion 2010-03**

After a valuable and extensive discussion of competing theories as to client identity, the committee concludes that when a personal representative hires a lawyer to assist in the probate of an estate, the personal representative is the lawyer’s client, not the estate. If the PR intends to misappropriate estate assets, a lawyer may not assist his client to commit a crime or fraud. “However, more often than not, the lawyer only learns of the misappropriation of estate assets after the fact. In such situations where the misconduct is not ongoing, the lawyer may not disclose the prior misconduct to the court pursuant to Rule 1.6. As a result, the lawyer’s only recourse is to seek to persuade the Personal Representative to either replace any misappropriated funds or to voluntarily disclose to the court the Personal Representative’s misconduct. If the Personal Representative refuses to do either, then the lawyer should withdraw from the representation and, upon withdrawal, request that the court order an accounting of the estate. By doing so, the lawyer avoids assisting the Personal Representative in any criminal or fraudulent acts. Further, by requesting that the court order an accounting upon the lawyer's withdrawal, the lawyer helps to shield himself from any accusations or allegations that he assisted or allowed the Personal Representative to engage in the misconduct.”

**Young v. Van Buren, 2010 Haw. App. LEXIS 587**

Son of client sued two lawyers (the drafter and the witness) for malpractice alleging that the client, his mother, was not competent at the time she signed amendments to her living trust that left large gifts to a religious organization, and that the religious organization had unduly influenced her. The son was a residuary beneficiary of the original trust and the drafting lawyer being sued had been hired for the second and third amendments to the trust, which did not change son’s status as residuary beneficiary but which deleted other beneficiaries and added the religious organization. The court applied the Lucas v. Hamm, 56 Cal. 2d 583 (1961) factors and found that the lawyers owed no duty to the son, since the son was not the intended beneficiary of the work involving the 2d and 3d amendments to the trust, and because the son could challenge the validity of the trust directly. The court also held that the lawyer witness owed no duty to the son, finding no authority for holding a witness liable and noting that an amendment to a Revocable Living Trust did not require witnesses.

II. Conflicts of Interest

**Spence v. Wingate, 395 S.C. 148; 716 S.E.2d 920 (2011).**

Wife of hospitalized Congressman was told he would not recover from coma, so she hired lawyer to advise her of her rights in estate, in light of prenuptial agreement, estate planning documents and beneficiary designations. Lawyer negotiated an agreement between wife and
the Congressman’s children from another marriage. Congressman dies, and lawyer is hired to represent estate. He tells wife that she no longer needs a lawyer, and then tries to convince her to relinquish her rights in the Congressional life insurance policy. She asks him to “put his hat back on” as her lawyer, but he refuses. She retains her interest in the life insurance, and later sues him for breaching his duty to her as a former client. The court holds that S.C. Code 62-1-109, which states that a lawyer for a fiduciary does not owe a duty to the beneficiaries, did not apply in this case because the life insurance policy was not an asset of the estate. The court further held that whether a fiduciary relationship existed between lawyer and wife was a question of law for the court. Relying on Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991), a case holding that a lawyer breached his duty to a client when he misled her regarding her father’s estate plan, where the father was also a client, the court held that lawyer owed a duty to the wife as a former client under RPC 1.9(a).

Massachusetts Bar Association Opinion 11-04 (1/20/11)

Lawyer prepared a will for decedent which named specific legatees and then decedent’s son as residuary legatee and named a financial advisor (FA) as the executor. After decedent’s death, son initially sought lawyer’s assistance in probating the will but upon discovering (from FA) that there were not enough assets in the estate to leave a residue over and above the specific bequests, he lost interest in probating the will. The will had not been offered for probate. Lawyer asked whether he was entitled to disclose to the specific legatees that (a) decedent had died; (b) no probate had been opened; (c) that they were beneficiaries under the will; and (d) that the assets in the estate were insufficient to motivate the son to open a probate. The committee concluded that (a) lawyer had a former attorney/client relationship both with the decedent (because of the estate planning) and the son (because of the post-mortem consultations), so he owed a duty of confidentiality to both. As to the fact of decedent’s death and the lack of any probate, the committee concluded that this information was either generally known or so easily obtainable that it was not confidential, so the lawyer could disclose this. The information as to the size of the estate was learned only from the son and so the lawyer could not disclose this to the other beneficiaries without son’s consent (which was not forthcoming). But the fact that the specific beneficiaries were named was information learned while representing the decedent and the committee thought that disclosure of this information to them was impliedly authorized under MR 1.6(a) to carry out the representation. On the other hand, the lawyer would be precluded under MR 1.9 from representing the other legatees against the son, his former client.

New York Ethics Opinion 865 (2011)

Lawyer who drafted estate plan is asked by executor to represent estate of client. Lawyer asks whether, in light of Estate of Schneider v. Finmann (see discussion below), he can represent the estate of a client for whom he drafted the estate plan. Estate of Schneider held that an executor of an estate had privity to sue the drafter of the estate plan. The ethics opinion concludes that a lawyer who drafted the estate plan can represent the executor of the client’s estate as long as the lawyer does not perceive of any colorable claim for malpractice for the estate planning work. If the lawyer begins representing the estate and discovers a
basis for a malpractice claim, the lawyer must withdraw.

**New Hampshire Bar Association Opinion 2011-12/7 (4/11/12)**

An estate planning client wishes to leave (a) a gift in trust to his brother (who happens to be lawyer’s son-in-law) of a sports car; (b) a gift in trust to his sister-in-law (lawyer’s daughter) of a valuable painting; (c) a $50,000 endowment in trust to a hospital on whose endowment committee both client and lawyer (who is chair) sit; and (d) an unsolicited outright gift of theater tickets and the price of a nice dinner to lawyer. The committee concluded that: (a) the gift to client’s brother fits within the exception for gifts to those in a close familial relationship with the client (unless the client and the brother are estranged); (b) the gift to the lawyer’s daughter (client’s sister-in-law) is presumptively prohibited and would only fall within the exception if factual analysis were to show that client has a close familial relationship also with the sister-in-law comparable to other relationships clearly covered in MR 1.8(c); (c) the endowment gift is not precluded by MR 1.8(c) because it does not personally benefit lawyer, but must be analyzed under MR 1.7 given the potential conflict caused by lawyer’s interest in furthering the hospital’s goals. The lawyer should therefore not proceed here without reasonably concluding that he can draft such a gift competently and impartially and obtaining the client’s informed consent – relying on Maryland Bar Association Ethics Op. 2003-08 (2003). Finally, the unsolicited gift of theater and dinner tickets was permissible as an insubstantial gift given that the client’s estate was $3 million.

III. **Miscellaneous**

**Svaldi v. Holmes, 2012 Ohio 6161 (2012).**

Lawyer for elderly client drafted a power of attorney for the client and included the following:

10. The holder of this Power-of-Attorney shall within thirty (30) days of appointment, or as soon thereafter as possible make an inventory of my estate assets and list any claims or obligations which I have or may have, giving me a copy, keeping a copy for herself, and leaving a copy with my attorney, Robert D. Holmes **.**

11. The holder shall also file an annual account by January 31st of each year and deliver it to Robert D. Holmes, attorney, or any attorney licensed in Ohio, designated by me or by the holder of this Power-of-Attorney for safe-keeping.

The attorneys-in-fact did not file the inventory or accountings and stole large sums of money from the client. The client sued the lawyer, and the court held that including those clauses created additional duties owed by the lawyer to the client, so he could be sued by the client.

**Gross v. Rell, 40 A.3d 240 (Conn. 2012).**

The Connecticut supreme court was responding to certified questions from the Second Circuit Court of Appeals. One of the questions was: under Connecticut law, does absolute
quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? The underlying facts were as follows: the plaintiff, a New York resident, was visiting his daughter in Connecticut and was hospitalized for a medical emergency. A hospital employee filed a petition for conservatorship and a lawyer was appointed to represent the father. When interviewed by the lawyer, he told the lawyer he opposed the guardianship. Connecticut law limits the court’s authority to impose a conservatorship on Connecticut residents only. Despite these and other issues, the lawyer told the court he saw no reason to oppose the conservatorship. It took months and a writ of habeas corpus for the conservatorship to be terminated and the plaintiff to be released from the locked ward of a Connecticut facility. The plaintiff filed suit against the lawyer, as well as the others involved with the conservatorship, and the lawyer argued that he was immune from suit. Because the role of the court-appointed lawyer for a respondent in a conservatorship is to represent the wishes of the respondent rather than to aid the court in determining what is in the best interests of the respondent, the lawyer is not entitled to quasi-judicial immunity. The court discussed a lawyer’s duties under RPC 1.14, stating, “with respect to attorneys for respondents in conservatorship proceedings, the primary function of such attorneys under rule 1.14 of the Rules of Professional Conduct is to advocate for the client's express wishes. Although an attorney might be required in an exceptional case to act as the client's de facto guardian, that is not the attorney's primary role.”


Lawyer was asked by client to prepare estate plan for mother. Lawyer had phone conference with mother regarding her wishes but did not hear back until client called to say that mother was in hospital and requested lawyer to bring documents to hospital. Mother had existing will but lawyer recommended transferring property into a living trust to avoid probate fees. Distributive plan (equal shares to the four children) remained the same. Upon arrival at the hospital, lawyer discovered that mother was incapacitated and unlikely to regain capacity. The children pleaded with the lawyer to allow the oldest daughter (his client) to forge the mother’s signature on the documents. He initially refused but ultimately gave in after the children assured him they were all in agreement. He assisted in the forgery by notarizing the false signature on the documents (which included a deed) and requesting his employees to sign as witnesses to the will. After the mother died, a dispute about selling the mother’s residence arose among the children and the forgeries came to light. The lawyer argued that this was not a violation of 1.2(d) because the mother rather than the children was his client and therefore he did not advise a client to commit fraud, but the court held that under the circumstances, where he was advising the children on the effect of the documents in the mother’s hospital room, the children were also his clients. He was disbarred, even though he had no other disciplinary history and he cooperated fully with the disciplinary proceedings. The case is noteworthy in two respects, other than the identity of the clients. First, only probate costs were at stake. Second, the possibility of later strife among family members can never be ruled out.
# THE ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT:

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The *ACTEC Commentaries on the Model Rules of Professional Conduct:*

Bruce S. Ross

I. **INTRODUCTION**

A. **The ACTEC Commentaries on the Model Rules of Professional Conduct: A Chronology**

In October 1993, after four years of intensive study and debate, the Board of Regents of the American College of Trust and Estate Counsel (“ACTEC”) unanimously adopted the *ACTEC Commentaries on the Model Rules of Professional Conduct* (the “ACTEC Commentaries” or “Commentaries”). Originally authored by Professor John R. Price of the University of Washington School of Law pursuant to a grant from the nonprofit ACTEC Foundation, the Commentaries are designed to give “particularized guidance” to ACTEC Fellows, estates and trusts lawyers generally, and others regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. The Commentaries reflect a concerted and thoughtful effort on the part of experienced probate practitioners to harmonize the “black letter” restrictions of the Model Rules of Professional Conduct (“MRPC” or “MRPCs”) (and the Comments thereto) with the ethical dictates of a generally non-adversarial and family oriented trusts and estates practice.

In March 1995 the ACTEC Board of Regents adopted the Second Edition of the *ACTEC Commentaries* which among other things dramatically expanded the annotations to relevant case law and ethics opinions. In March 1999 the ACTEC Board of Regents approved the Third Edition of the Commentaries (published in October 1999). Unlike the Second Edition, which included numerous substantive additions and editorial changes from the First Edition, the Third Edition reflected far fewer departures from the prior Edition. The two main editorial additions in the 1999 edition were new Commentaries on Rule 1.16 (Declining or Terminating Representation) and Rule 3.7 (Lawyer as Witness). The Third Edition also included many new Annotations to recent cases and ethics opinions and some very modest editorial changes from the Second Edition. In addition to the foregoing, to make the Commentaries even more user-friendly, the Third Edition added a Table of Authorities, with citations, organized by state, to all relevant Rules of Professional Conduct, cases and ethics opinions cited in the *ACTEC Commentaries.* Simultaneously with the publication of the Third Edition of the *ACTEC Commentaries,* the ACTEC Foundation published *Engagement Letters: A Guide to Practitioners,* a practice guide filled with engagement letter forms designed to be used in conjunction with the *ACTEC Commentaries.*

The Fourth Edition of the *ACTEC Commentaries* was published in March 2006. This edition of the Commentaries reflects the changes made to the MRPC relevant to the trusts and estates practitioner (including the modifications implemented as a result of Ethics 2000,

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1 The author gratefully acknowledges the invaluable assistance of his colleague, Vivian Lee Thoreen, in the updating of this Article.
discussed below) through 2006, and includes many important cases, ethics opinions and other developments post-dating the Third Edition. The Fourth Edition includes Commentaries on MRPCs 1.0 (Terminology), 1.18 (Duties to Prospective Client) and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

B. Ethics 2000 and Beyond


According to Justice Veasey, the principal reasons driving the ABA’s decision to revisit the MRPC were the growing disparity in state ethics codes and concerns about “some substantive shortcomings and lack of clarity in particular Rules, both exemplified and aggravated by dissonance between Rule text and Comment.” The Commission nevertheless retained the basic architecture of the MRPC including “the primary disciplinary function of the Rules, resisting the temptation to preach aspirationally about ‘best practices’ or professionalism concepts.” (Chair’s Introduction and Executive Summary.)

Following additional public comment and discussion, the Ethics 2000 Commission’s Report was presented for debate to the American Bar Association House of Delegates at its Annual Meeting in Chicago, Illinois in August 2001. Following debate most of the Report was adopted as presented. However, the House of Delegates voted down two significant proposed changes to MRPC 1.6 (Confidentiality of Information), discussed later in this paper.

Since the House of Delegates was unable to conclude its work on the Report at the August 2001, Meeting, the Report came up for final discussion, debate and approval at the ABA’s Mid-Year Meeting in Philadelphia in February 2002. At this meeting the House of Delegates adopted the Ethics 2000 Commission Report, as revised. For the first time since the early 1980s the ABA adopted revised Model Rules of Professional Conduct. Later that year in August 2002, the House of Delegates adopted amendments to MRPC 5.5, based on recommendations by the Commission on Multijurisdictional Practice, created by the ABA to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law.

Since the historic year in which the MRPCs were amended, the following additional rules have been amended: in 2003, the House of Delegates adopted amendments to MRPCs 1.6 and 1.13; in 2007, Comment 14 to MRPC 5.5 was amended; in 2008, MRPC 3.8 was amended; and in 2009, MRPCs 1.0 and 1.10 were amended.

As of September 2011, the District of Columbia and every state except California have adopted the MRCP. The State Bar of California has approved a set of proposed Rules, adopting the ABA’s numbering convention but still varying materially from the MRPC. California’s proposed Rules will become effective upon their approval by the Supreme Court of California.
The following Article selectively discusses many of the MRPCs discussed by the ACTEC Commentaries. Following the discussion of each selected Rule and Commentary is appended a brief summary of any changes to the applicable Model Rule recommended by Ethics 2000 and beyond and adopted by the ABA that appear to be directly relevant to the estates and trusts lawyer.

It is worth noting here that one of the more recent rules adopted by the ABA, MRPC 1.0, entitled “Terminology,” elevates the definitions of certain key terms to the status of a formal Rule. MRPC 1.0 includes definitions of “[c]onfirmed in writing,” “[i]nformed consent,” and other important terms. The concept of “informed consent” replaces the current concept of “consent after consultation.” This change is further discussed infra.

II. OVERVIEW: THE ACTEC COMMENTARIES’ BASIC THEMES AND STRUCTURE

As stated in the Reporter’s Note preceding the ACTEC Commentaries (authored by Professor Price and this author as Chair of ACTEC’s Professional Standards (now Professional Responsibility) Committee):

“Basic Themes of Commentaries. The main themes of the Commentaries are: (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally non-adversarial nature of the trusts and estate practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC. . . .”

As the Preface to the ACTEC Commentaries notes, “While the Commentaries are intended to provide general guidance, ACTEC recognizes and respects the wide variation in the rules, decisions, and ethics opinions adopted by the several jurisdictions with respect to many of these subjects.”

The structure of the ACTEC Commentaries follows that of the Model Rules and the Comments thereto: Each Model Rule with respect to which ACTEC has offered a Commentary is quoted in full, followed by the Commentary thereon, extensive annotations to relevant case law and ethics opinions from many jurisdictions and other secondary authorities. “The Annotations that follow each Commentary include references to a broad sampling of the cases, ethics opinions and articles that deal with the professional responsibility of the trust and estates lawyers but are by no means exhaustive. Reflecting various approaches taken in different jurisdictions, the cases and ethics opinions are often inconsistent and cannot be harmonized. The summaries of the cases and ethics opinions are not part of the Commentaries. They are included

4 Commentaries, Preface.
for illustrative purposes only and do not necessarily reflect the judgment of the reporter or ACTEC regarding the issues involved.\textsuperscript{5}

III. \textbf{COMMENTARIES ON SELECTED MODEL RULES}

A. Commentary on MRPC 1.0: Terminology

The MRPC contains an entire rule, 1.0 (Terminology), devoted to key terms and terminology referenced throughout the MRPC. Definitions particularly helpful to the trusts and estates lawyer include “[c]onfirmed in writing,” “[f]raud” and “fraudulent,” “[i]nformed consent” and the terms “[w]riting” and “written.” Generally, where the MRPCs require a lawyer to obtain a client’s informed consent, in writing, that consent may be confirmed in a writing sent by the client to the lawyer or by the lawyer to the client. The \textit{ACTEC Commentary} on MRPC 1.0 observes, “[t]he lawyer must make reasonable efforts to ensure that the client possesses information as to the law and the facts reasonably adequate to make an informed decision.”\textsuperscript{6}

B. Commentary on MRPC 1.1: Competence

The most important contribution of the \textit{ACTEC Commentaries} on Model Rule 1.1, dealing with competence, is the principle that the estate planning lawyer “is generally entitled to rely upon information supplied by the client, unless the circumstances indicate that the information should be verified.”\textsuperscript{7} Furthermore, although the \textit{Commentaries} emphasize that the estate planning lawyer should generally supervise the execution of all estate planning documents, if such supervision is not practical, then the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which they should be executed. (Of course, this principle presupposes the client's ability to understand the instructions given.)

The Annotations to this Commentary include numerous decisions addressing lawyer discipline for failures to act competently and the issue of a disappointed beneficiary's standing to sue the decedent's lawyer for negligence in drafting the testamentary instrument. To date, at least 34 jurisdictions have ruled in one form or another that the lack of contractual privity between the attorney-drafter of a testamentary instrument and the instrument's intended beneficiaries is no bar to an action for legal malpractice by the beneficiary against the attorney.\textsuperscript{8}

\textsuperscript{5} \textit{Commentaries}, Reporter’s Note to First Edition, p. 3.
\textsuperscript{6} \textit{Commentaries}, p. 13.
\textsuperscript{7} \textit{Id.} at p. 15.
The principle has perhaps been best enunciated in an English case, *Ross v. Caunters* (1979) 3 Eng.Rep. 580. In holding that a will’s beneficiaries’ lack of privity of contract with the attorney-drafter of the will was no bar to an action for negligence, the English court observed:

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


Despite the compelling logic behind the principle stated in the cases holding that lack of privity is no bar to an action, at least eight states, primarily for historical reasons it would seem, have continued to deny standing to a disappointed beneficiary to sue the attorney-drafter of an allegedly defective instrument on the 19th century ground of privity.9

C. **Commentary on MRPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer**

In General

The *Commentaries* emphasize that the client and the lawyer, “working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client.”10

Representing Fiduciaries

While recognizing that the lawyer for the fiduciary retained to assist the fiduciary in the administration of an estate or trust generally represents only the fiduciary, the *Commentaries* permit direct communication between the lawyer and the beneficiaries while noting that the fiduciary is primarily responsible for such communication.

“As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer’s client; that while the fiduciary and the lawyer will, from time to time, provide

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9 Alabama, Colorado, Maryland, Nebraska, New York, Ohio (but see *Hosfelt v. Miller*, not reported in N.E.2d, 2000 WL 1741909 (2000), Texas (but see *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, (2006) 192 S.W.3d 780), and Virginia.

10 *Commentaries*, p. 32.
information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests. . . ."\(^1\)

The Commentary to MRPC 1.2 notes that it may be permissible for the lawyer to represent the fiduciary both in a representative capacity and as a beneficiary provided that such representation is not otherwise proscribed by the dictates of MRPC 1.7 (Conflict of Interest: Current Clients). (See discussion re MRPC 1.7, infra; see ABA Formal Ethics Opinion 2002-416.)

The Commentary notes:

"Example 1.2-1. Lawyer (L) drew a will for X in which X left her entire estate in equal shares to A and B and appointed A as executor. X died survived by A and B. A asked L to represent her both as executor and as beneficiary. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented. L may properly represent A in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in one or both capacities. See MRPC 1.7 (Conflict of Interest: General Rule) and MRPC 1.16 (Declining or Terminating Representation)."\(^2\)

The nature and extent of the duties, if any, owed by the lawyer for the fiduciary to the beneficiaries of an estate or trust is one of the most controversial topics touched upon by the Commentaries. The majority of the cases dealing with this issue have found that the attorney's duty to exercise reasonable care is owed only to the fiduciary client.\(^3\) As a California court has observed:

\(^1\) Id. at p. 33.
\(^2\) Commentaries, p. 33.
"Particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants. [Citation.] The fiduciary's attorney, as his legal adviser, is faced with the same task of disposition of conflicts. It is of course the purpose and obligation of both the fiduciary and his attorney to serve the estate. In such capacity they are obligated to communicate with, and to arbitrate conflicting claims among, those interested in the estate. While the fiduciary in the performance of this service may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney by definition represents only one party: the fiduciary. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney. [Citations.]

This principle is not accepted in all jurisdictions, however. For example, the Supreme Court of Nevada observed:

"[W]hen an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties towards the beneficiaries as a matter of law."


15 Charleson v. Hardesty (Nev. 1992) 108 Nev. 878, 882-883, 839 P.2d 1303, 1306-1307; see also, e.g., Fickett v. Superior Court (Ariz. App. 1976) 27 Ariz. App. 793, 558 P.2d 988 (held that the lawyer for a guardian owed fiduciary duties to the ward and that privity of contract between the lawyer and the ward was not required in order for the ward to pursue a claim for malpractice against the lawyer for the guardian). For a discussion of the Fickett decision and its implications, see Johns, "Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth", 32 Wake Forest L. Rev. 445 (Summer 1997). See also In re Guardianship of Karan (Wash.Ct.App. 2002) 110 Wash.App. 76, 38 P.3d 396 (Wash.Ct.App. 2002) (applying the multi-factor balancing test in Trask v. Butler (1994) 123 Wash.2d 835, 872 P.2d 1080) (see fn. 16, infra) and holding, as did Fickett, supra, that the lawyer for the guardian owes a duty of care directly to the ward, thus conferring standing in the ward to bring an action for legal malpractice. The court refused to establish a bright-line test but noted that in this case it was faced with a legally incompetent minor, a non-adversarial relationship and legal services solely consisting of setting up the guardianship; Estate of Treadwell ex rel. Neil v. Wright (Wash.Ct.App. 2003) 115 Wash.App. 238, 61 P.3d 1214.
The Supreme Court of Washington has reversed itself on this issue. In 1985, in passing upon the reasonableness of an estate lawyer's fee request, the Court overturned decisions of a court commissioner, the trial court and an appellate court affirming the award of fees and, in so doing, observed:

“The personal representative stands in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs. [Citation.] The personal representative employs an attorney to assist him in the proper administration of the estate. Thus, the fiduciary duties of the attorney run not only to the personal representative but also to the heirs.”16

Nine years later, in 1994, the Supreme Court of Washington held that a multi-factor balancing test (first applied by the Supreme Court of California in Biankanja v. Irving, 320 P.2d 16 (1958)) should be applied in deciding whether the beneficiary of a decedent's estate may bring an action against the lawyer who represented the executor in her fiduciary capacity. The court concluded:

“After analyzing our modified multi-factor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries.” 17

With respect to this troubling issue of the duties arguably owed to the beneficiaries of the fiduciary estate by an attorney retained to represent the fiduciary generally (i.e., in the fiduciary's representative capacity), the Commentaries conclude:

“The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to

16 Estate of Larson (Wash. 1985) 103 Wash.2d 517, 521, 694 P.2d 1051, 1054.
take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.\textsuperscript{18}

Although the duties undertaken by the lawyer for the fiduciary to the beneficiaries are constricted, it is clear that the lawyer may not make false and misleading statements to the beneficiaries and may, in some jurisdictions, be required to disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty.

The \textit{Commentaries} suggest that this problem may well be resolved in advance by the scrivener of the document including a provision in the will (obviously with the client's consent) that conditions the appointment of the fiduciary upon the fiduciary's agreement that the lawyer \textit{may} disclose to the beneficiaries or to an appropriate court actions of the fiduciary that might constitute a breach of fiduciary duty.

The \textit{Commentaries} include a helpful discussion of the distinction between representing a fiduciary generally and representing the fiduciary individually. Thus, in the latter case, the lawyer represents only the fiduciary when the lawyer is retained for the limited purposes of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or its beneficiaries. Common examples of this type of representation are the retention of an attorney to negotiate with the beneficiaries with respect to the fiduciary's compensation or to defend the fiduciary in litigation charging misadministration.

MRPC 1.2 expressly permits limitations to be placed on the scope of a lawyer's representation "if the limitation is reasonable under the circumstances and the client gives informed consent."\textsuperscript{19} Comment 4 to the revised Rule notes, "In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14\textsuperscript{20} (discussed infra).

\section*{D. Commentary on MRPC 1.3: Diligence}

The \textit{ACTEC Commentary} on MRPC 1.3 (Diligence) emphasizes the importance of establishing early on in the representation a timetable for completion of the various tasks undertaken. "The client or others may be seriously disadvantaged if the lawyer fails, within a


\textsuperscript{19} MRPC 1.2(c).

\textsuperscript{20} MRPC 1.2, Comment 4; see \textit{Dunn v. Patterson} (2009) 395 Ill.App.3d 914, 919 N.E.2d 404 (estate planning attorney who agreed to act as fiduciary for elderly clients to try to ensure that as they aged they would not unwittingly make detrimental changes to their estate plan did not violate MRPC 1.2 or any MRPCs) (noting absence of 'any case law holding that the MRPCs “require an attorney to follow self-destructive directions of an incompetent client”').
reasonable time, to provide the client with the agreed legal services. In such cases the client may be harmed, and intended beneficiaries may not receive the benefits the client intended them to have."21 This Commentary also emphasizes the importance of an appropriate engagement letter that will assist the client in understanding the scope and duration of a particular representation, whether it is estate planning or estate or trust administration. The Commentary also emphasizes the importance for a sole practitioner to plan in advance for the practitioner's death or disability to prevent neglect of client matters upon the occurrence of such an event.

E. Commentary on MRPC 1.4: Communication

Recognizing that "[c]ommunication between the lawyer and client is one of the most important ingredients of an effective lawyer-client relationship,"22 the Commentaries emphasize that the extent and nature of the communications by the lawyer are affected by numerous factors "including the age, competence and experience of the client, the amount involved[,] the complexity of the matter, cost controls and other relevant considerations."23

One of the many important contributions of the Commentaries to the practice of the estate planning lawyer is the notion of the “Dormant Representation.”

“The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, the lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs."24

21 Commentaries, p. 51.
22 Commentaries, p. 56.
23 Id.
24 Commentaries, p. 57; Pizel v. Zuspenn (Kan. 1990) 247 Kan. 54, 795 P.2d 42, opn. mod. and
The Commentary gives the following helpful examples:

“Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (C) [in 1992]. At C’s request, L retained the original documents executed by C. L performed no other legal work for C in the following two years [in 1993 or 1994] but has no reason to believe that C has engaged other estate planning counsel. L’s representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L’s representation remains dormant. C is properly characterized as a client and not a former client for purposes of MRPCs 1.7 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients).

Example 1.4-2. Assume the same facts as in Example 1.4-1 except that L’s partner (P) in the two years following the preparation of the estate plan [in 1993 and 1994] renders legal services to C in matters completely unrelated to estate planning, such as a criminal representation. L’s representation of C with respect to estate planning matters remains dormant, subject to activation by C.”

MRPC 1.4, as do the MRPCs generally, place great stress on the importance of clear communication between lawyer and client. As noted earlier, new MRPC 1.0 (Terminology) requires that client consent must be “informed” which is defined to mean a client’s agreement “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” In some cases the client’s informed consent must be confirmed in writing (principally in situations involving conflict waivers). MRPC 1.4 has been strengthened with language covering all aspects of a lawyer’s duty to communicate with the client (which includes moving language from some other Rules such as MRPC 1.2).

rehg. den. (1990) 247 Kan. 699, 803 P.2d 205, affidavit of note. Pizel v. Whalen (1993) 252 Kan. 384, 845 P.2d 37 (intended beneficiaries state cause of action for malpractice against attorney who drafted inter vivos trust agreement where the attorney allegedly failed to advise the trustees of their duties thereunder, failed to record a deed transferring property to trust and failed to advise the trustor to ensure that the trustees took control of the trust principal during the settlor’s lifetime even though new attorneys had taken over the representation of the settlor before the settlor’s opportunity to fund the trust had ended; as a result of the errors and omissions of both the earlier and later attorneys, the trust was found invalid and the trust property passed under the residuary clause of the testator’s will).

Commentaries, p. 58. See, e.g., Stangland v. Brock (Wash. 1987) 109 Wash.2d 675, 747 P.2d 464 (attorney has no continuing obligation to monitor testator’s management of his property to ensure that plan originally established in will is maintained).
F. Commentary on MRPC 1.5: Fees

This Commentary focuses on the importance of establishing a reasonable fee for the services to be rendered together with a clear communication of the basis for the fee to the client. The Commentary also emphasizes the prohibition against a lawyer accepting any rebate, discount, commission or referral fee from a non-lawyer or a lawyer not acting in a legal capacity in connection with the representation of the client. The Annotations to this Commentary cover such critical issues as percentage, excessive and reasonable fees; contingent fee agreements; rebates, discounts, commissions or referral fees; and other compensation-related matters.

G. Commentary on MRPC 1.6: Confidentiality of Information

The nature of an attorney's representation of husband and wife in estate planning and the scope of the attorney-client privilege governing confidential communications in this context were the subject of considerable debate in the years leading up to the adoption of the Commentaries. The majority view is that the most common representation of husband and wife in estate planning is "joint" in nature.

Generally, in a joint representation, all communications between either husband or wife to the attorney are confidential as to the outside world but not confidential (at least for evidentiary purposes) as between the husband and wife. Thus, the lawyer's receipt of information from one spouse that the communicating spouse clearly does not wish to share with the other spouse embroils the lawyer in a dilemma central to the lawyer's representation of both spouses. The Commentary to MRPC 1.6 recommends:

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

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer’s ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. . . . In doing so, the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer’s obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

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

26 Commentaries, pp. 76-77. Compare Advisory Opinion 95-4 (State Bar of Florida May 1997) ("In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a
The Commentary supports the suggestion of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility emphasizing the importance of having an express agreement between the husband and wife and the lawyer, preferably in writing, that sets out the ground rules of the representation.

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

The Commentary to MRPC 1.6 also suggests that with full disclosure and the consent of the clients it may be possible to represent husbands and wives as separate clients and thereby guarantee the confidentiality of unilateral communications to the lawyer by either spouse if the communicating spouse does not wish to impart them to the other spouse. Although this concept has met with a nearly unanimous negative reaction among academicians in the estate and trust field, ACTEC recognized that several sophisticated, experienced and ethical practitioners follow this practice and deemed it inappropriate to condemn the practice.

With respect to the lawyer's duty of confidentiality to a fiduciary client and the possible disclosure by the lawyer of a fiduciary's breach of duty, the Commentary to MRPC 1.6 emphasizes the importance of the agreement between the lawyer and the fiduciary recommended in the Commentary to MRPC 1.2 and, absent such an agreement, adherence to the applicable law (see text accompanying fns. 6-12, supra).

beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

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The Commentary continues:

"Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court any acts of misconduct committed by the fiduciary. See MRPC 3.3(c) (Candor Toward the Tribunal), which requires disclosure to the court 'even if compliance requires disclosure of information otherwise protected by MRPC 1.6.' In addition, the lawyer may not knowingly provide the beneficiaries or others with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communications with Person Represented by Counsel; Dealing with Unrepresented Person)."28

Example 1.6-1 is illustrative:

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

(1) L, in preparing the annual accounting for the trust, discovered T's investment in wheat futures, and the resulting loss. T asked L to prepare the accounting in a way that disguised the investment and the loss. L may not participate in a transaction that misleads the court or the beneficiaries with respect to the administration of the trust — which is the subject of the representation. L should

28 Commentaries, p. 73.
attempt to persuade T that the accounting must properly reflect the investment and otherwise be accurate. If T refuses to accept L's advice, L must not prepare an accounting that L knows to be false or misleading. If T does not properly disclose the investment to the beneficiaries, in some states L may be required to disclose the investment to them. In states that neither require nor permit such disclosures, the lawyer should resign from representing T. [See ACTEC Commentary on MRPC 1.6 (Confidentiality).]

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

The Restatement of the Law Third, The Law Governing Lawyers, section 51, in dealing with the duty of care owed by a lawyer to certain non-clients, observes:

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

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient,
where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

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

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.\textsuperscript{30}

The \textit{Restatement} elucidates the foregoing principles with three relevant illustrations:

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

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

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does

\textsuperscript{30} Rest.3d The Law Governing Lawyers, § 51 (2000) (hereinafter "\textit{Restatement}").
nothing to discourage the investment. Lawyer is not subject to
liability to Beneficiary under this Section.31

Comment re Ethics 2000 Revision: The changes to MRPC 1.6 recommended by Ethics
2000 generated the most extensive and heated debate at the 2001 ABA Annual Meeting in
Chicago. Although the ABA House of Delegates adopted the Commission's proposal to modify
MRPC 1.6(a) to permit disclosure by a lawyer of otherwise confidential information to prevent
"reasonably certain" death or substantial bodily harm (in lieu of the prior formulation of
"imminent" death or substantial bodily harm), the House rejected the Commission's proposed
revisions to MRPC 1.6(b) and (c) to permit (but not mandate) disclosure of confidential
information related to the representation to prevent the client from committing a crime or fraud
reasonably certain to result in "substantial injury to the financial interest or property of another in
furtherance of which the client has used or is using the lawyer's services" and to permit (but not
mandate) disclosure of information related to the representation to "prevent, mitigate or rectify
substantial injury to the financial interest 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." In rejecting the Ethics 2000 Commission's
recommendations, the ABA thus put itself squarely in conflict with the formulation of these
principles in the Restatement.32

Two years later, however, in 2003, following the public outcry over such corporate
accountability scandals as Enron and World.Com, the ABA House of Delegates reconsidered its
position with respect to Rule 1.6 and, after vigorous debate at the Summer 2003 Annual Meeting,
adopted the revisions to MRPC 1.6 originally proposed by Ethics 2000. Therefore, a lawyer may
(but is not required to) reveal information relating to the representation of a client to the extent
the lawyer reasonably believes necessary:

"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 . . . " MRPC 1.6 (b)(2)-(3) (as added in 2003).

H. Commentary on MRPC 1.7: Conflict of Interest: Current Clients

One of the Commentaries' most salutary contributions to the literature on the subject of
representing multiple client interests is the proposition on that, given the generally non-

31 Restatement at § 51, Illustrations 5-7.
32 Supra, pp. 16-18.
adversarial nature of an estates and trusts practice, in appropriate cases the representation of multiple clients should be positively encouraged.

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

Of course, the Commentaries emphasize the importance of making complete disclosure to all of the affected clients and obtaining the clients' fully informed consent to the representation and urge consideration by the lawyer of possible withdrawal whenever a potential conflict of interest ripens into an actual conflict or controversy.

Again, the examples given by the Commentaries are instructive:

First, in the estate planning context:

"Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W. At the outset L should discuss with H and W the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant

33 Commentaries, p. 91.
34 Commentaries, p. 92.
to the representation. . . . However, some experienced estate planners believe that a lawyer may represent a husband and wife between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc."

Two additional examples deal with the representation of multiple clients in a fiduciary administration:

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

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

The issue of whether or not an attorney may represent both parties to a prenuptial agreement or "other matter with respect to which [the parties'] interests directly conflict to a substantial degree" generated much controversy. In the end, the Commentary to MRPC 1.7 adopts a qualified view:

35 Commentaries, p. 92.
36 Commentaries, p. 93.
37 Commentaries, p. 93.
"A lawyer is almost always precluded from representing both parties to a pre-nuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. . . . On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 [Conflict of Interest: Current Clients] or act as an intermediary pursuant to former MRPC 2.2 (Intermediary)."38

The Commentaries also support the arguably controversial position that an individual should be free to select and appoint whomever he/she wishes to a fiduciary office and that "[a]s a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries."39

The Commentary to MRPC 1.7 appropriately cites the case of Estate of Koch (Kan.App. 1993) 18 Kan.App.2d 188, 849 P.2d 977, for the proposition that balance is required in determining conflict of interest questions. In Koch the court upheld a will that was drafted for the testator by a lawyer who also represented the testator and two of her sons in litigation involving a charitable foundation brought by her other two sons. Her will, which left the bulk of her estate to her four sons, included a no-contest clause and a provision that conditioned the gifts on the dismissal by a beneficiary of any litigation that was pending against her within 60 days following her death. The lawyer did not discuss the testator's will with her sons, including the two sons who were clients of the firm in the litigation. The sons were all unaware of the terms of their mother's will, which was prepared "without any evidence of extraneous considerations."

The Court observed:

"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

38 Commentaries, p. 93. Although the representation of both parties to a contract (such as a pre-nuptial agreement) may be ethical in limited cases, from a malpractice avoidance perspective such a representation should never be undertaken. See also Friedman v. Friedman (2002) 100 Cal.App.4th 65, 122 Cal.Rptr.2d 412 (upholding validity of postnuptial agreement against argument by lawyer-spouse, who had represented herself, challenging validity of agreement because husband's lawyer had previously prepared a joint estate plan for the husband and wife).
39 Commentaries, p. 95. But see Estate of Peterson (2002) 255 Ga.App. 202, 565 S.E.2d 524 (lawyer-executor disqualified for failing to disclose potential conflict of interest in writing to client whose will the lawyer was drafting and for failing to obtain the client's written consent to the lawyer's nomination as executor). See also ABA Formal Opinion 2002-426.
looking for conflicts where none exist is not of benefit to the public or the bar.\textsuperscript{40}

MRPC 1.7 is a useful resource to better understand conflict of interest subjects. Thus, a single paragraph now defines “concurrent conflict of interest” as a conflict existing 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.”\textsuperscript{41} As with virtually all of the revised MRPCs, the Comments to MRPC 1.7 are substantially revised to provide greater and more detailed guidance to lawyers with respect to application of the MRPC in particular conflict situations.

I. Commentary on MRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

This Commentary's most significant contribution to the literature is the principle that under some circumstances and at the client's\textit{ fully informed} request the lawyer “may properly include an exculpatory provision in the document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office. . . . An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary.”\textsuperscript{42}

However, the Commentary to MRPC 1.7, referencing MRPC 1.8(k), correctly takes a dim view of the drafting of a document or testamentary instrument designating any particular lawyer or law firm to serve as counsel to the fiduciary or directing the fiduciary to retain a particular lawyer.

“Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm [see MRPC 1.8(k)] (Conflict of Interest: Current Clients: Specific Rules) as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on the fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction.”\textsuperscript{43}

\textsuperscript{40} Estate of Koch, supra, 849 P.2d 977, at p. 998.
\textsuperscript{41} MRPC 1.7(a)(1) & (2).
\textsuperscript{42} Commentaries, pp. 112-113.
\textsuperscript{43} Id. at pp. 95-96. See also Fred Hutchinson Cancer Research Ctr. v. Holman (1987) 107 Wash.2d 693, 703, 732 P.2d 974, 980 (“[a]s the attorney engaged to write the testator’s will, [the defendant] is precluded from reliance on this clause to limit his liability when the testator did not receive independent advice as to its meaning and effect”); In the Matter of Eisenhauer (1998) 426 Mass. 448, 689 N.E.2d 783.

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The Commentary to MRPC 1.8 also supports the concept of a lawyer's retention of a client's executed originals if it is the client's desire, while noting that any lawyer retaining a client's documents should acknowledge that the documents are held subject to the client's direction. Further, the Commentary takes the position that the mere retention of the client's original estate planning documents "does not itself make the client an 'active' client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status. Similarly, sending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling a client's attention to subsequent legal developments does not increase the lawyer's obligations to the client."  

Under MRPC 1.8, clients will have to be advised in writing of the desirability of seeking the advice of independent counsel before entering into business transactions with a lawyer and the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role therein, including whether or not the lawyer is representing the client in the transaction. (As noted previously, throughout the MRPCs the concept of "informed consent" replaces the concept of "consent after consultation." ) MRPC 1.8(c) mandates that a lawyer "shall not solicit any substantial gift from a client, including a testamentary gift" in addition to continuing the prohibition on the lawyer's preparation on behalf of a client of an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph related persons include "a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship."  

J. Commentary on MRPC 1.9: Duties to Former Clients

This Commentary focuses on the termination of the lawyer's representation of a client, particularly with respect to estate planning matters. "In such a case, unless otherwise indicated by the lawyer or client, the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive."  This Commentary also elucidates the potential for conflict that exists when a lawyer, having formerly represented two spouses jointly, later undertakes to represent only one spouse. If the second matter is "substantially related" to the first representation, then the lawyer violates MRPC 1.9 by undertaking the representation of one spouse against the other spouse.

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44 Commentaries, at pp. 113-114; see the concept of "Dormant Representation" in the ACTEC Commentary on MRPC 1.4 (Communication), discussed, supra, at text accompanying fns. 23-24.  
45 MRPC 1.8(c). See also In re Disciplinary Action Against Bouger (N.D. 2001) 2001 N.D. 210, 637 N.W.2d 710 (lawyer reprimanded for drafting codicil and, later, a will under which, if certain contingencies occurred, he would receive a portion of client's estate; fact that gifts to lawyer were conditioned on unlikely contingencies did not affect the court's determination that the gifts were substantial and prohibited under MRPC 1.8).  
46 Commentaries, p. 123.
K. Commentary on MRPC 1.14: Client With Diminished Capacity

With respect to a lawyer's representation of the client whose competence is questionable, the Commentary on MRPC 1.14 adopts the majority view:

"Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action."^47

"For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client."^48

^47 Commentaries, p. 131.
^48 Commentaries, p. 132. The Comment to MRPC 1.14 includes recommendations with respect to a lawyer's disclosure of the client's condition and the rendering of emergency legal assistance. Specifically, Comment 9 provides: "In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-
In this regard, the Commentary criticizes the result reached in California Ethics Opinion 1989-112 (1989), which opined that, without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client's behalf even if the lawyer has concluded it is in the best interests of the client. The Commentary finds the preferable view expressed in ABA Informal Opinion 89-1530:

"... [T]he disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled [i.e., with diminished capacity] is impliedly authorized within the meaning of Model Rule 1.6 [Confidentiality of Information]. Thus, the inquirer may consult a physician concerning the suspected disability [diminished capacity]."49

This Commentary has been praised in a work on the legal and medical aspects of mental capacity:

"The approach taken by the Commentaries is pragmatic and reflects a real world approach to handling the disabled or incompetent client. After all, lawyers usually attempt to assist a client in implementing the client's wishes, as opposed to the wishes of others. It is important to remember, as the Commentaries point out, that it is not the decision that is made, but the rational and functional process by which the client makes the decision that is paramount. The Commentaries encourage the lawyer to implement the client's wishes as expressed by the client during the client's competency. Thus, knowing how to assess the client's competency becomes very important.

"If the lawyer cannot follow the client's wishes as expressed during a period of competency, perhaps because no legal authority has been granted to a surrogate decision-maker or agent and the client lacks sufficient capacity to undertake the contemplated act, the lawyer should act in such a way that the client's best interests are

lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf consulted with the lawyer. Even in such an emergency, however, the lawyer must act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. MRPC 1.14, Comment 9. In such cases the lawyer should act "only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm." In addition, the lawyer "should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action." MRPC 1.14, Comment 10.

being served. The best interest test is also a pragmatic real world approach to solving the needs of the client.”

The Commentary on MRPC 1.14 also emphasizes the importance of testamentary freedom and the lawyer's obligation to assist clients whose testamentary capacity, although extant, appears to be borderline. The Commentary suggests that in those cases involving a client's doubtful testamentary capacity the lawyer may wish to consider any available procedures for obtaining court supervision of the proposed estate plan (the “substituted judgment” proceedings).

As noted above, the title of MRPC 1.14 has been changed to “Client with Diminished Capacity,” a welcome revision. The Rule's terminology now also reflects a change of focus toward the continuum of a client's capacity. The Rule, as revised, now also provides:

“(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.”

The Comments to MRPC 1.14 have been significantly expanded to give greater guidance regarding those protective measures a lawyer may take, clarifying when it is appropriate to take such protective action and suggestions to the lawyer for dealing with the difficult issue of disclosure of the client's condition.

L. Commentary on MRPC 1.16: Declining or Terminating Representation

In addition to over viewing the rules governing a lawyer's mandatory or permissive withdrawal from a representation, this Commentary also focuses on other events of termination such as a client's death and the special considerations applying to a lawyer's representation of a client who has become or may be mentally impaired or incapacitated (see MRPC 1.14 (Client with Diminished Capacity)).

M. Commentary on MRPC 1.18: Duties to Prospective Client

This Commentary discusses the specific issues that arise when a lawyer initially interviews a prospective client for either estate planning or estate litigation matters and

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50 Walsh, Brown, Kaye & Grigsby, Mental Capacity: Legal and Medical Aspects of Assessment and Treatment, p. 1-15 (Shepard's 2d Ed. 1994); Restatement, § 24. For further discussion, see also House & Ross, eds. Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel, pp. 154-55 (State Bar of California, Trusts and Estates Section, 2d ed).
51 Commentaries, p. 132.
52 MRPC 1.14(b).
undertakes the appropriate conflicts check. Although the lawyer clearly owes some duties to a prospective client, those duties are implicated by MRPC 1.18 and not by MRPC 1.7 (Conflict of Interests: Current Clients). Most importantly, under MRPC 1.18(c) a lawyer receiving confidential information from a prospective client is prohibited from undertaking or continuing an adverse representation “in the same or a substantially related matter” only “if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.”

N. Commentary on MRPC 3.3: Candor toward the Tribunal

This Commentary reaches the not unsurprising conclusion that “[a] lawyer may not mislead the court with regard to any matter before it, including ex parte applications. In particular, a lawyer may not assist a client by presenting to the court any petition, accounting, or other document or evidence that is false, and the lawyer must correct a false statement of material fact or law previously made to the court by the lawyer. If a lawyer knows that a person intends to engage, is engaging or had engaged in criminal or fraudulent conduct related to a matter, the lawyer shall take reasonable remedial measures, including, if necessary disclosure to the court.”

The mere fact that most jurisdictions regard the lawyer who represents the fiduciary as owing no direct duty to the beneficiaries of fiduciary estates will not insulate the lawyer who intentionally aids and abets the fiduciary in the commission of fraud or other breach of trust.

MRPC 3.3 clarifies the lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses, amplifying the lawyer's duty not to make false statements to a tribunal, adding an obligation to correct false statements previously made and clarifying language in the Rule to reflect that the lawyer must take remedial measures when the lawyer comes to know that material evidence previously offered by the client or a witness called by the lawyer is false.

O. Commentary on MRPC 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

MRPC 5.5 dramatically broadens the opportunities for an attorney licensed in one state to advise clients in other states, provided that the limitations of the rule are observed. This rule reflects the increasing diversity and complexity of clients’ lives and legal affairs and the

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53 MRPC 1.18(c), italics added.
54 Commentaries, p. 151.
55 See, e.g., Pierce v. Lyman (1991) 1 Cal.App.4th 1093, 3 Cal.Rptr.2d 236 (beneficiary may state a direct cause of action against the trustee's lawyer when the lawyer is alleged to have actively participated in the trustee's breach of fiduciary duty) (“[a]ctive concealment, misrepresentations to the court, and self-dealing for personal financial gain are described. We find that this is sufficient to state a cause of action for breach of fiduciary duty [against the lawyer for the trustee]”; see also Wolf v. Mitchell, Silberberg & Knapp (1999) 76 Cal.App.4th 1030, 90 Cal.Rptr.2d 792 (trust beneficiary has standing to bring direct action against the previous trustee’s attorneys and other third parties where the beneficiary alleges that the attorneys and third parties actively participated in the previous trustee’s breaches of trust).
exponential increase in legal issues touching more than one jurisdiction. If a lawyer decides to practice law in a jurisdiction in which he is not admitted, MRPC 5.5(c) provides that the lawyer may “provide legal services on a temporary basis.” This term, although not defined in the rule, is very broad. As noted in Comment 6 to MRPC 5.5: “There is no single test to determine whether a lawyer’s services are provided on a single ‘temporary basis’ in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be ‘temporary’ even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation of litigation.”

The ACTEC Commentary on MRPC 5.5 observes:

“Thus, Comment 6 suggests a liberal interpretation of ‘temporary basis.’ This is particularly important for estate lawyers practicing in close proximity to another state. For example, a Chicago lawyer providing estate counseling for Illinois clients is likely to find multiple occasions to analyze and opine on the laws of Wisconsin, Iowa, Indiana and Michigan regarding titling, tax, and similar issues. In addition, the Chicago lawyer may need to prepare deeds and other documents according to the laws of one or more of these jurisdictions. Provided the Chicago lawyer otherwise complies with paragraph (c), the lawyer's legal services regarding the surrounding non-admitted jurisdictions would constitute practicing law in those jurisdictions on a ‘temporary basis.’”

IV. CONCLUSION

In the years leading up to the ACTEC Commentaries' initial adoption in 1993, a common concern voiced by many Fellows of the College was that the ACTEC Commentaries, if adopted, would become weapons in the hands of disgruntled clients and beneficiaries and other parties suing estates and trusts lawyers. The contrary view, to which ACTEC ultimately subscribed, was that, as “the best and brightest” members of the estates and trusts profession, the Fellows of ACTEC had a duty to their colleagues, their clients and the general public to promote competent and ethical representation in the estates and trusts arena by adopting ethical guidelines in harmony with the Model Rules but responsive to the unique requirements of an estates and trusts practice and the reasonable expectations of clients, beneficiaries and third-parties. A concomitant benefit of the ACTEC Commentaries' adoption has been raising the level of the debate and improving the quality of decisions made by triers of fact (whether judges or juries) in actions involving alleged legal malpractice or attorney misconduct.

The ACTEC Commentaries' emphasis on the generally non-adversarial nature of the trusts and estates practice, the encouragement of the representation of multiple clients, particularly in the family context, and an emphasis on informed communication between lawyer and client will ultimately improve the quality of legal representation in our field and increase the

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56 Commentaries, p. 162.
confidence of both clients and the general public in the legal profession. The ACTEC Commentaries are appropriately dedicated to that worthwhile goal.

The American College of Trust and Estate Counsel closely followed the deliberations of the Ethics 2000 Commission and the actions of the ABA House of Delegates and will continue to observe and comment upon the revised MRPC in the years ahead. As previously observed, the Fourth Edition of the ACTEC Commentaries covers all aspects of the recent changes in the MRPC that are relevant to the trusts and estates practitioner through 2006 and updates the Annotations to reflect many relevant cases and ethics opinions post-dating the 1999 Third Edition. Thus, the ACTEC Commentaries will continue to serve as an ethical beacon for all estates and trusts practitioners dedicated to competently and ethically representing their clients and following the highest dictates of our profession.