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**AN OUNCE OF PREVENTION -
ETHICS ISSUES FOR ESTATE AND TRUST PRACTITIONERS**

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**AN OUNCE OF PREVENTION –
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PRACTITIONERS**

**ETHICAL GUIDELINES FOR THE ESTATES AND TRUSTS LAWYER:
THE *ACTEC COMMENTARIES ON THE MODEL RULES
OF PROFESSIONAL CONDUCT***

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I. INTRODUCTION

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

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 "*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 (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 reflects 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 includes 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 includes 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*.

B. Ethics 2000

In 1997 the American Bar Association impaneled the Commission on Evaluation of the Rules of Professional Conduct, popularly known as "Ethics 2000," under the chairmanship of Delaware Chief Justice E. Norman Veasey. Charged with making an intensive analysis and

reevaluation of *all* Model Rules of Professional Conduct, after three years of study and public debate the Commission issued its Final Report in November 2000.

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. Therefore, for the first time since the early 1980's the ABA has adopted revised Model Rules of Professional Conduct. It is now up to the individual states to consider whether or not to adopt the revised MRPC.¹

The following Article selectively discusses many of the MRPC 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 adopted by the ABA that appear to be directly relevant to the estates and trusts lawyer.

It is worth noting here that the ABA has adopted several new MRPC, including a new MRPC 1.0, entitled "Terminology", which will elevate the definitions of certain key terms to the status of a formal Rule. New MRPC 1.0 includes definitions of "confirmed in writing," "informed consent," and other important terms. The concept of "informed consent" replaces the current concept of "consent after consultation". This change is further discussed *infra*.

ACTEC will publish the Fourth Edition of the *Commentaries* in early 2006. This next edition of the *Commentaries* will reflect all of the recent changes made to the MRPC relevant to the trusts and estates practitioner and will include many important cases, ethics opinions and other developments post-dating the Third Edition. The Fourth Edition will include Commentaries on New MRPCs 1.0 (Terminology), 1.18 (Duties to Prospective Clients) and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

¹ Several have done so, including (as of late 2005) Iowa, Nebraska, Oregon, and Tennessee.

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."²

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 the subjects."³

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 range of the cases, ethics opinions and articles that deal with the professional responsibility of trusts and estates lawyers. Reflecting various approaches taken in different jurisdictions, the cases and ethics opinions are often inconsistent and cannot be harmonized. The summaries of the cases and ethics opinions are not part of the *ACTEC Commentaries*. They are included for illustrative purposes only and do not necessarily reflect the judgment of the Reporter or ACTEC regarding the issues involved."⁴

III. *COMMENTARIES* ON SELECTED MODEL RULES

A. Commentary on MRPC 1.0: Terminology

As revised, the MRPC now 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 "confirmed in writing", "fraud" and "fraudulent", "informed

² Reporter's Note, *ACTEC Commentaries on the Model Rules of Professional Conduct* (ACTEC Foundation 3d ed. 1999), p.1 (hereinafter "*Commentaries*". Except as otherwise noted, all page references to the *Commentaries* are to the Third Edition.)

³ Preface to *Commentaries*.

⁴ *Commentaries*, p. 6.

consent" and the terms "writing" and "written". Generally, where the MRPCs require a lawyer to obtain a client's informed consent, confirmed 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 *ACTEC Commentary on MRPC 1.0* observes, "the lawyer must make reasonable efforts to ensure that the client possesses information as to the law and the facts reasonably adequate to make an informed decision."⁵

B. Commentary on MRPC 1.1: Competence

The most important contribution of the *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."⁶ Furthermore, although the *ACTEC 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 32 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.⁷

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

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

⁵Pre-Publication Final Draft of Fourth Edition of *Commentaries*, p. 21.

⁶*Commentaries*, p. 22.

⁷Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia and Wisconsin.

If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim.

3 All Eng. Reports at 582-583.

Despite the compelling logic behind the principle stated in the cases holding that lack of privity is no bar to an action, at least seven 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.⁸

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."⁹

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 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."¹⁰

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 ABA Formal Ethics Opinion 2002-416.*)

⁸ Colorado, Maryland, Nebraska, New York, Ohio, Texas and Virginia.

⁹ *Commentaries*, p. 50.

¹⁰ *Id.*, p. 52.

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)."¹¹

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.¹² As a California court has observed:

"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 omitted.] 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

¹¹ *Commentaries*, pp. 52-53.

¹² See, e.g., *Goldberg v. Frye*, 217 Cal.App.3d 1258, 266 Cal.Rptr. 483 (1990); *Allen v. Stoker*, 138 Idaho 265, 61 P.3d 622 (Idaho Ct. App. 2002); compare *Borissoff v. Taylor & Faust*, 120 Cal.Rptr.2d 429 (2004) (Successor personal representative has standing to bring suit for malpractice against attorneys for predecessor personal representative).

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 even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney. [Citations omitted.]"¹³

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

"[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."¹⁴

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. . . . 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. [Citations omitted.]"¹⁵

¹³ *Goldberg v. Frye*, *supra*, 217 Cal.App.3d 1258, at 1269, 266 Cal.Rptr. 483 at 489-90. *See also*, e.g., *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex.Ct.App. 1993); *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542 (1994).

¹⁴ *Charleson v. Hardesty*, 839 P.2d 1303, at 1307 (Nev. 1992); *see also*, e.g., *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. App. 1976) (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* *Janssen v. Topliff*, 38 P.3d 396 (Wash.Ct.App. 2002) (applying the *Trask* multi-factor balancing test (*see fn.* 16) 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*, 61 P.3d 1214 (Wash. Ct.App. 2003).

¹⁵ *Estate of Larson*, 694 P.2d 1051, at 1054 (Wash. 1985).

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."¹⁶

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 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."¹⁷

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 *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)

¹⁶ *Trask v. Butler*, 872 P.2d 1080, at 1085 (Wash. 1994); *see also, e.g., Fitzgerald v. Linnus*, 765 A.2d 251 (N.J. App.Div. 2001); *compare, Murphy v. Fischer*, 618 So.2d 238 (Fla.Ct. App. 1993); *Sims v. Hall* 592 S.E. 2d 315 (S.C.Ct. App. 2003).

¹⁷ *Commentaries*, p. 57.

that conditions the appointment of the fiduciary upon the fiduciary's agreement that the lawyer *may* disclose to the beneficiaries or to an appropriate court actions of the fiduciary that might constitute a breach of fiduciary duty.

The *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.

Comment re Ethics 2000: As noted above, MRPC 1.2 has been retitled, "Scope of Representation and Allocation of Authority between Client and Lawyer." The new Rule 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."¹⁸ Comment 4 to the revised Rule notes, "in a case in which a 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"¹⁹ (discussed *infra*).

D. Commentary on MRPC 1.3: Diligence

The 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 reasonable time, to provide the client with the agreed legal services."²⁰ 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,"²¹ 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 control and other relevant considerations."²²

¹⁸ MRPC 1.2(c).

¹⁹ MRPC 1.2, Comment 4.

²⁰ *Commentaries*, p. 83.

²¹ *Commentaries*, p. 91.

²² *Id.*

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 (Conflicts). While the lawyer remains bound to the client by some obligation, 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."²³

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 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 and 1.9.

"Example 1.4-2. Assume the same facts as in Example 1.4-1 except that L's partner (P) in 1993 and 1994 renders legal services to C in matters completely unrelated to estate planning,

²³ *Commentaries*, p. 93; see, *Pizel v. Zuspahn*, 803 P.2d 205 (Kan. 1990), *modifying* 795 P.2d 42 (1990) (modification deleted language from earlier opinion indicating that lawyer had continuing duty to estate planning client to effectuate the client's plan), appeal after remand, 845 P.2d 37 (Kan. 1993).

such as a criminal representation. L's representation of C with respect to estate planning matters remains dormant, subject to activation by C."²⁴

Comment re Ethics 2000 Revision: The revised MRPC 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).

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 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

²⁴ *Id.*, pp. 94-95. See, e.g., *Stangland v. Brock*, 747 P.2d 464 (Wash. 1987).

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...

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 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."²⁵

²⁵ *Commentaries*, pp. 120-122. 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 beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both

The Commentary supports the suggestion of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility²⁶ 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*).

The Commentary continues:

husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.")

²⁶ See, Moore & Hilker, "Representing Both Spouses: The New Section Recommendations," 7 *Probate & Property* 26, 30 (July/Aug. 1993). The Committee produced three "Reports: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife; Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary;" and "Counseling the Fiduciary," 28 *Real Property Probate & Trust Journal* (No. 4, Winter 1994).

"Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties 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(b) (Candor toward the Tribunal), which requires disclosure to the court 'even if compliance requires disclosure of information otherwise protected by Rule 1.6.' In any event, the lawyer may not knowingly provide the beneficiaries or the court 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)."²⁷

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 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

²⁷ *Commentaries*, pp. 125-126.

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."²⁸

The *Restatement (Third) of the Law Governing Lawyers* (2000), 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 [Standard of Care]:

....

- (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."²⁹

The *Restatement* elucidates the foregoing principles with three relevant illustrations:

²⁸ *Commentaries*, pp. 126-127.

²⁹ *Restatement (Third) of the Law Governing Lawyers*, §51 (2000) (hereinafter "*Restatement*").

"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). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

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

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section."³⁰

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

³⁰ *Id.*, §51, Illustrations 5-7.

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*.³¹

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-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, 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

³¹ *Supra*, pp. 14-15.

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 non-adversarial in nature and estate administration is usually non-adversarial."³²

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.³³

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. Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation. However, some experienced estate planners believe that it is appropriate to represent a husband and wife as separate clients, each of whom is entitled to presume the confidentiality of information disclosed to the lawyer in connection with the representation. If permitted by the jurisdiction in which the lawyer practices, the lawyer may properly represent a husband and wife as separate clients. Whether the lawyer represents the husband and wife jointly or separately, the lawyer should do so only with their consent after disclosure of the implications of doing so. 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."³⁴

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

³² *Commentaries*, pp. 149-150.

³³ *Id.*, pp. 151-152.

³⁴ *Commentaries*, p. 152.

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.³⁵

"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 (Conflict of Interest: Former Client). However, without the informed consent of all affected parties L should not represent W in connection with an attempt to set aside H's will or to assert an elective share."³⁶

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:

"[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 pursuant to MRPC 1.7 (Conflict of Interest: Current Clients) or act as an intermediary pursuant to MRPC 2.2. See MRPC 2.2 (Intermediary). Note, however, that in some states unless each party to a pre-nuptial agreement is independently represented the agreement may be invalidated."³⁷

³⁵ *Id.*, p. 153.

³⁶ *Commentaries*, pp. 153-154.

³⁷ *Id.*, p. 154. 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*, 122 Cal. Rptr. 2d 412 (2002) (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).

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."³⁸ The Commentary to MRPC 1.7 finds this conclusion to be consistent with *ABA Ethical Consideration* 5-6, which states:

"A lawyer should not consciously influence a client to name him as an executor, trustee, or a lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid the appearance of impropriety."³⁹

The Commentary to MRPC 1.7 appropriately cites the case of *Estate of Koch*, 849 P.2d 977 (Kan. App. 1993), 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 looking for conflicts where none exist is not of benefit to the public or the bar."⁴⁰

Comment re Ethics 2000 Revision: MRPC 1.7 has been retitled as "Conflict of Interest: Current Clients" and reorganized to clarify its terms and to better educate lawyers regarding 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. ⁴¹ As with virtually all of the revised MRPCs, the

³⁸ *Id.*, p. 156. See, however, *Estate of Peterson*, 465 S.E.2d 524 (Ga. App. 2002) (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.

³⁹ *ABA Ethical Consideration* 5-6, cited at *Commentaries*, p. 157.

⁴⁰ *Estate of Koch*, *supra*, 849 P.2d 977, at 998.

⁴¹ MRPC 1.7(a)(1) and (2).

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 fully *informed* request the lawyer "may properly include an exculpatory provision in the document drafted by the lawyer for an unrelated client that appoints the lawyer to a fiduciary office. . . . An exculpatory clause is often desired by a client who wishes to appoint an individual non-professional or family member as fiduciary."⁴²

However, the Commentary to MRPC 1.8 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 as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction."⁴³

This Commentary 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 suggests 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 keep 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 do not increase the lawyer's obligations to the client."⁴⁴

⁴² *Commentaries*, p. 189.

⁴³ *Commentaries*, p. 190. See also *Fred Hutchinson Cancer Research Center v. Holman*, 732 P.2d 974 (Wash. 1987) ("As the attorney engaged to write the decedent's will [defendant] is precluded from reliance on the clause intended to limit his own liability when the testator did not receive independent advice as to its meaning and effect."); *In the Matter of Eisenhauer*, 689 N.E.2d. 783 (Mass. 1998).

⁴⁴ *Id.*, p. 191; see the concept of "Dormant Representation" in the ACTEC Commentary on MRPC 1.4 (Communication), discussed, *supra*, at text accompanying fn. 16.

Comment re Ethics 2000 Revision: The title of MRPC 1.8 has been changed to read, "Conflict of Interest: Current Clients: Specific Rules." Among other changes to this Rule, 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), as revised, has been broadened to mandate 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."⁴⁵

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."⁴⁶ 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.

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:

"The lawyer for a client who appears to be disabled may have implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an

⁴⁵ MRPC 1.8(c). *See also In re Boulger*, 637 N.W.2d 710 (N.D. 2001) (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. 204.

apparently disabled client that the lawyer reasonably believes are in the best interests of the client."⁴⁷

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 is *impliedly authorized* within the meaning of Model Rule 1.6. Thus, the inquirer may consult a physician concerning the suspected disability."⁴⁸ [Emphasis added by Commentary.]

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.

⁴⁷ *Id.*, pp. 217-218. In February 1997, the Comment to MRPC 1.14 was amended to include recommendations with respect to a lawyer's disclosure of the client's condition and the rendering of emergency legal assistance. Specifically, Comment 6 provides: "In an emergency where the health, safety or a financial interest of a person under a disability 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-lawyer relationship or to make or express considered judgments about the matter, when the disabled person or another acting in good faith on that person's behalf has consulted the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available." MRPC 1.14, Comment 6. In such cases the lawyer should only act "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 disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action." MRPC 1.14, Comment 7.

⁴⁸ *Commentaries*, p. 218; *see also*, San Francisco Ethics Opinion 1999-2 (1999) (Reasoning *contra* to *Cal.Op.* 1989-112, cited in text).

"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 being served. The best interest test is also a pragmatic real world approach to solving the needs of the client."⁴⁹

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 (so called "substituted judgment" proceedings).⁵⁰

Comment re Ethics 2000 Revision: 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:

"When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless other 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."⁵¹

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 overviewing 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)).

⁴⁹ Walsh, Brown, Kaye & Grigsby, *Mental Capacity: Legal and Medical Aspects of Assessment and Treatment*, p. 1-15 (Shepard's 2d Ed. 1994).

⁵⁰ *Commentaries*, pp. 218-19.

⁵¹ MRPC 1.14(b).

M. Commentary on MRPC 1.18: Duties to Prospective Client

This Commentary, new to the Fourth Edition (as MRPC 1.18 is to the MRPC generally), discusses the specific issues that arise when a lawyer initially interviews a prospective client for either estate planning or estate litigation matters and 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." (Emphasis added.)

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 or fails to disclose a material fact if disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."⁵²

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.⁵³

Comment re Ethics 2000 Revision: MRPC 3.3 has been modified to clarify 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.

⁵² *Commentaries*, p. 250.

⁵³ *See, e.g., Pierce v. Lyman*, 3 Cal.Rptr.2d 236 (1991): The 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. "Active concealment, misrepresentations to court, and self dealing for personal financial gain are described. We find this is sufficient to state a cause of action for breach of fiduciary duty [against the lawyer for the trustee]." *See also, Wolf v. Mitchell, Silberberg & Knupp* (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).

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 welcome new rule reflects the increasing diversity and complexity of clients' lives and legal affairs and the exponential increase in legal issues touching more than one jurisdiction. 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, over 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 will constitute practice in law in those jurisdictions on a 'temporary basis'." bb⁵⁴

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

⁵⁴ Pre-Publication Draft of Fourth Edition, p. 178.

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 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. The upcoming Fourth Edition of the *ACTEC Commentaries* will cover all aspects of the recent changes in the MRPC that are relevant to the trusts and estates practitioner and will update the citations 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.

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