ACTEC®

THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

COMMENTARIES

Fifth Edition 2016

on the Model Rules of Professional Conduct

ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT

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Neither the Model Rules of Professional Conduct (MRPC) nor the Comments to them provide sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. Recognizing the need to fill this gap, ACTEC has developed the following Commentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others regarding their professional responsibilities. First published in 1993, the Commentaries continue to assist courts, ethics committees and others concerned with issues regarding the professional responsibility of trusts and estates lawyers. The Commentaries generally seek to identify various ways in which common problems can be dealt with, without expressly mandating or prohibiting particular conduct by trusts and estates lawyers. While the Commentaries are intended to provide general guidance, ACTEC recognizes and respects the wide variation in the rules, decisions, and ethics opinions adopted by the several jurisdictions with respect to many of these subjects.

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execution of the power, the lawyer consulted the client (again) about his wishes and he again instructed that no one should see his will. Based on the circumstances and the communications from the client, " the Niece is not a `client' for the `specific purpose' of reviewing Client's Will. First, absent a guardianship, conservatorship or other legal limitation, Client can revoke or modify the attorney-in-fact's authority. Second, if the general POA ever gave the Niece the authority to review the Will, the [subsequent] communication from Client to Attorney revoked it. Attorney believes that Client is slipping, but, until he is adjudicated unable to make such decisions, Rules 1.6, and 1.14(a) and (c) require that Attorney continue to protect Client's confidences."

Washington:

Op. 2188 (2008). A lawyer was hired by a wife to assist her in a legal action for separation and pays him fees in advance; but then dies before the work is done. The lawyer has a duty to take reasonable steps to identify who is entitled to these fees and to pay them to that person. If doing so requires communications with the husband, the lawyer is impliedly authorized to disclose that he holds funds in trust, but is not permitted to disclose the basis for the representation except to the extent determined by a court.

MRPC 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

ACTEC COMMENTARY ON MRPC 1.7

General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them. Advising related clients who

have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family." Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost-effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

Disclosures to Multiple Clients. Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

Before accepting a representation involving multiple parties, a lawyer should consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest. Failure initially to meet with the prospective clients separately risks the possibility that information will be revealed by one of them in a joint meeting that would disqualify the lawyer from representing either of them because of the duties owed to a prospective client under MRPC 1.18 (Duties to Prospective Client).

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

Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to

each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed). In other contexts, however, some experienced estate planners undertake to represent related clients separately with respect to related matters Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining *informed consent*) and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). The writing may be contained in an engagement letter that covers other subjects as well.

> Example 1.7-1. Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* their estate planning goals and the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Assuming that the lawyer reasonably concludes that there is no actual or potential conflict between the spouses, it is permissible to represent a husband and wife as joint clients. Before undertaking such a representation, the lawyer should elicit from the spouses an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

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

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

> Example 1.7-2. Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the

preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge *T* for any substantial personal services that *L* performs for *T*.

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

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

A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 (Conflict of Interest: Current Clients) with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration. Nonetheless, the corporate fiduciary might be of a different view; and it would be useful to clarify this in advance. Where the lawyer is trying to keep open the possibility of such a future adverse representation on an unrelated matter, the lawyer should ask the corporate fiduciary for a prospective waiver as to such representations, as explored in the next section. Where a lawyer is already representing another party adverse to the corporate fiduciary on an unrelated matter, it will be necessary for the lawyer to comply with MRPC 1.7(b) as to both clients before undertaking to represent the corporate fiduciary.

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

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

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

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

Comment 22 to MRPC Rule 1.7 continues:

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

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

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

Lawyers should also note that neither Comment 22 nor ABA Formal Opinion 05-436 will be binding on the jurisdiction in which a lawyer practices. This is important because MRPC 1.7 limits the circumstances to

which it applies under both paragraph (a) and (b) to situations where "a concurrent conflict of interest [exists] under paragraph (a)." Accordingly, a state disciplinary authority could argue that since Rule 1.7 applies only to a concurrent conflict of interest, neither Comment 22 nor ABA Formal Ethics Opinion 05-436 (2005) accurately reflects the text of MRPC 1.7, so MRPC 1.7(b) would not control a future conflict of interest.

In addition, the lawyer should consider the impact, if any, that MRPC 1.8 (h) could have on a state disciplinary authority. It provides: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." A claim that a lawyer asserted the interests of another party in conflict with a client's interest normally constitutes a breach of fiduciary duty, rather than malpractice. Even so, both as a matter of substantive law and pursuant to the Rules of Professional Conduct of a particular state, the disciplinary authority or court may believe that of the two types of misconduct, a client's right to bring a claim in the future for breach of the lawyer's fiduciary duty to the client deserves greater protection tham a client's right to bring a future claim for malpractice. Thus, a state disciplinary authority or court could apply MRPC 1.8(h) to a future conflict of interest on the basis that "malpractice" includes a "breach of fiduciary duty" to the client.

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

Appointment of Scrivener as Fiduciary. An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). Comment [8] to MRPC 1.8 makes clear that Rule 1.8(c) "does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position" provided that doing so does not run afoul of MRPC 1.7. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer.

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

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

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

Representation of Fiduciary in Representative and Individual Capacities. Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be both an executor and a beneficiary of the estate, and may want the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client's personal interest, such a "dual capacity representation" poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities.

In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer's clients. MRPC 1.7(a)(2) notes that if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to …a third person" then MRPC 1.7(b) must be complied with, including the duty to get informed consent found in MRPC 1.7(b)(4). Waivers from beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MRPC 1.7(b)(4) only contemplates waivers from "affected client[s]." Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the

requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

> Example 1.7.4 *X* dies leaving a will in which *X* left his entire estate in trust to his spouse *A* for life, remainder to daughter *B,* and appointed *A* as executor. *A* asked *L* to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. *L* explained to *A* the duties *A* would have as personal representative, including the duty of impartiality toward the beneficiaries. *L* also described to *A* the implications of the common representation, to which *A* consented, including an informed agreement to forego any right to have the L advocate for A's personal interest insofar as it conflicts with A's duties as executor. *L* may properly represent *A* in both capacities. However, *L* should inform *B* of the dual representation and indicate that *B* may, at his or her own expense, retain independent counsel. In addition, *L* should maintain separate records with respect to the individual representation of *A*, who should be charged a separate fee (payable by *A* individually) for that representation. *L* may properly counsel *A* with respect to her interests as beneficiary. However, *L* may not assert *A*'s individual rights on *A*'s behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits *L*'s ability to function as *A*'s lawyer in both capacities, *L* should withdraw from representing *A* in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

> Example 1.7.5 X dies, leaving a will giving X's estate equally to his three children. Child A was appointed executor. A engages L to represent her as executor. A dispute arises among the three children over distribution of X's tangible personal property, and A asks L to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, L may need to advise A to obtain independent counsel to represent her in the dispute. In addition, L may need to advise A to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties.

Client with Diminished Capacity. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court's attention to the client's opposition and ask that separate counsel be provided to represent the client's stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

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

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

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

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Concurrent Conflicts of Interest Generally

Cases

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

Federal:

Abbott v. U.S. I.R.S., 399 F.3d 1083 (9th Cir. 2005), *aff'g Estate of Sexton v. C.I.R.,* T.C. Memo. 2003-41 (2003). It was not an impermissible conflict under Rule 1.7 for lawyer simultaneously to represent an estate before the IRS while also serving as an expert consultant to the IRS on an unrelated matter. In his role as expert consultant, he did not represent the IRS, so there were no adverse clients. Nor was there any evidence that lawyer's representation of the estate was materially limited by the work he did for the IRS.

Transperfect Global, Inc. v. Motionpoint Corp., 2012 WL 2343908, 2012 U.S. Dist. LEXIS 129402 (N.D. Cal. 2012), *relief from disqualification denied* at 2012 WL 3999869 (N.D. Cal. 2012). An estate

planning lawyer represented the co-CEOs and 99% owners of a closely held corporation, Transperfect, and then moved to the law firm representing the defendant in a patent infringement case earlier brought by Transperfect. She continued to represent the co-CEOs with respect to estate planning and related matters after the move, without obtaining an adequate conflict waiver. Transperfect moved to disqualify defendant's firm, and the federal magistrate granted the motion. The court noted that, although this was a case of an after-acquired client (the CEOs) causing the disqualification of representation of a prior client (Motionpoint), it was nonetheless a concurrent conflict because the affairs of the estate planning clients were inextricably intertwined with the business and financial matters of Transperfect, and the applicable California rule required per se disqualification. The district court denied the defendant's motion for relief from the disqualification.

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

Arizona:

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

Arkansas:

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

California:

Estate of Buoni, 2006 Cal. App. Unpub. LEXIS 9368, 2006 WL 2988737 (2006). A personal representative of the estate who was also a creditor was represented by one lawyer in both capacities. An estate beneficiary sought to disqualify the lawyer based on the conflict, but the court refused the disqualification. The conflict here is the PR's, not that of his attorney, but even if there is a conflict for the attorney, it is cured by California law which contemplates that when the PR is a creditor, the creditor's claim is submitted to the court for approval or rejection. If it is rejected, PR may sue to enforce the creditor's claim and the court is empowered to appoint a separate lawyer to defend against the claim. Given this procedure, representation of one person in both capacities is not a disqualifying conflict.

Baker Manock & Jensen v. Superior Court (Salwasser), 175 Cal. App. 4th 1414 (2009). Law firm represented one son (George) of the decedent both as executor and in his own right as beneficiary. When the firm, on behalf of George personally, opposed a brother's petition that would have reduced the probate estate assets and also reduced George's own share, the brother sought to disqualify the firm for its conflict. The trial court granted the motion to disqualify but the court of appeals reversed, reasoning that the positions taken by George personally and those he took as executor were the same: to avoid loss of probate assets. Even if the firm were viewed as representing two Georges (one personally, the other as executor) who could theoretically have adverse interests, that was not the case here so there was no conflict.

Colorado:

Estate of Klarner, 98 P.3d 892 (Colo. App. 2003). Husband (Albert) had two daughters by a prior marriage and his wife (Marian) had two sons by a prior marriage. They had no children during the second marriage. After Albert died, Law firm became co-trustee of Albert's QTIP Trust whose remaindermen (at Marian's death) were his two daughters. Law firm was also a co-trustee of a trust set up by Marian after Albert died (Marian Trust). Marian's two sons were the beneficiaries; Albert's daughters were not. When Marian died, husband's QTIP trust was included in her estate for estate tax purposes. A decision had to be made whether she had waived her estate's right to reimbursement from Albert's QTIP trust in the amount of estate taxes incurred as a result of the inclusion of the QTIP in her estate. The court held that the law firm, as co-trustee of both trusts, had an insuperable conflict because claiming reimbursement was owed would benefit the beneficiaries of widow's estate (her sons) to the detriment of the beneficiaries of the QTIP trust (Albert's daughters). In fact, the Law firm claimed that the widow had not waived the right to reimbursement and did seek reimbursement, but this court found that this was error; she had waived. Noting that it was within the trial court's discretion whether to deny or reduce fees, it remanded for a determination of the appropriate remedy to be imposed as a result of the conflict.

District of Columbia:

In re Evans, 902 A.2d 56 (D.C. 2006). Attorney, as owner of a real estate title company, was contacted to close a real estate loan to be secured by a residential property. He discovered that the borrower did not own the residential property because it was still owned by the unprobated estate of her deceased mother. Thereupon he undertook, as lawyer, to represent the borrower and probate her mother's estate, without disclosing his conflict as owner of the title company with a financial interest in closing the loan, and he failed to obtain an informed waiver of the conflict. In probating the estate, he failed to act

competently in violation of Rule 1.1 and, further, engaged in actions prejudicial to the administration of justice in violation of Rule 8.4(d). He was suspended for six months.

Florida:

Chase v. Bowen, 771 So.2d 1181 (Fla. App. 2000). This case holds that no conflict of interest exists when a lawyer revises a will to disinherit a beneficiary whom the lawyer represents on an unrelated matter.

Harvey E. Morse P.A. v. Clark, 890 So.2d 496 (Fla. App. 2004). Court held that law firm representing Clark, the trustee of a revocable living trust, had an unwaived concurrent conflict of interest because it simultaneously represented Harvey E. Morse, PA, in an unrelated matter, and Morse was adverse to Clark in this case. Morse was the assignee of intestate heirs of the estate in this case and its interest was to maximize assets in the probate estate of which it was a partial assignee at the expense of the revocable trust of which Clark was trustee. Therefore the law firm must be disqualified from representing Clark.

Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So.2d 182 (Fla. App. 2007). Court affirms a $1 million malpractice judgment in case brought by personal representatives against lawyer for decedent based on lawyers' failure to disclose conflict which may have impacted their recommendation to decedent that he appoint JP Morgan to a fiduciary role, and their failure to fund a revocable living trust before decedent's death.

Georgia:

Estate of Peterson, 565 S.E.2d 524 (Ga. App. 2002). Attorney who drafted will under which he was named as executor was disqualified from acting because, although he had informed testator orally of potential conflict of interest, he failed to either obtain client's consent in writing or to give client written notice as required by applicable Georgia ethics opinion (GAO 91-1).

Illinois:

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

Indiana:

Matter of Taylor, 693 N.E.2d 526 (Ind. 1998). Knowing that he was a principal beneficiary of his father's will, lawyer advised his stepmother that she could execute a waiver of her right to claim a forced share of his father's estate in connection with a bankruptcy proceeding she was contemplating. The court held that in doing so, he violated Rule 1.7(a) because his ability to represent his stepmother was materially limited by his personal interest. He was suspended for four months.

Kansas:

In re Estate of Koch, 849 P.2d 977, 997-998 (Kan. App. 1993). In this action two respected commentators on ethics testified on behalf of opposing parties. The court upheld a will that was drafted

for the 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 continued that:

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

Kentucky:

Kentucky Bar Ass'n v. Roberts, 431 S.W.3d 400 (2014). "[I]t is clear that representing the estate, the executor of the estate, and two of the heirs (one of whom was accused and eventually found guilty of killing the testator) creates a conflict of interest…. Roberts could not have reasonably believed that the representation would not be adversely affected when one of the clients is on trial for killing the testator and a negative outcome in that case would bar that client from taking under the will. No amount of consent and consultation allows waiver of this limit."

Louisiana:

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

Maryland:

Attorney Grievance Com'n v. Ruddy, 411 Md. 30, 981 A.2d 637 (Md. 2009). Lawyer borrowed $95,000 interest free from his aunt and executed a promissory note. When she died, the note was in default, but lawyer was appointed personal representative of the estate and apparently did the legal work for himself. The court held that the mere fact that a lawyer is indebted to an estate for which he is serving as personal representative and lawyer does not create a conflict of interest. But here the lawyer failed to make arrangements for the payment of interest on the loan that was in default, and this violated Rule 1.7. The lawyer was reprimanded.

Atty Grievance Comm'n of Md v. Hodes, 441 Md. 136 (Md. 2014). The attorney represented an elderly woman. After she entered assisted living, he and staff at his firm took over management of her finances. He used his positions as her attorney-in-fact while she was alive to make self-interested distributions to himself; after she died, as trustee of a foundation set up under her Will, he transferred funds to his separate financial consulting business contrary to the terms of the trust. He argued that he was not subject to discipline because his actions were taken in a "personal or non-legal capacity." The court

rejected this argument, on the ground that some of the misconduct occurred while his client was alive and he was still representing her; but also because his roles as attorney-in-fact and trustee arose from the attorney-client relationship, and his intentionally dishonest conduct was a violation of Rule 8.4. He was disbarred.

Michigan:

Ervin v. Bank One Trust Co., 2005 Mich. App. LEXIS 528, 2005 WL 433573 (unpublished). Decision affirms a disqualification of a law firm from representing a beneficiary against a bank trustee when the same firm represents an affiliate of the bank trustee and had signed a retention agreement making clear that its representation of one bank affiliate would be deemed representation of all affiliates and subsidiaries and waivers would not be granted. Here the clients were directly adverse.

New Hampshire:

In re Wyatt's Case, 159 N.H. 285, 982 A.2d 396 (2009). Lawyer was suspended for two years for conflicting concurrent and successive representations. After persuading an adult client (the ward) to submit to a voluntary conservatorship, lawyer simultaneously represented the ward and the conservator, and later also the ward's wife, despite adversity between these clients, without a reasonable belief that these conflicts could be reconciled and without the informed consent of the clients. Later, after withdrawing from representation of the ward, he continued to represent the conservator and assisted him and the ward's wife in an attempt to establish a health care guardianship of the ward, and also defended conservator against charges by the ward that the conservator had mismanaged his estate, all without the ward's consent.

Williams v. L.A.E. Association, (N.H. Super. Ct. 1/6/2016). Lawyer had done estate planning work for two separate clients and after the estate planning work was complete, a partner of the estate planner undertook to represent property owners suing the estate planning clients in a dispute over elections to a property association board. Citing the ACTEC Commentaries and commentators relying on them, the court concludes that although the estate planning matters might be dormant, the estate planning clients remained current clients of the firm. Since they remained current clients of the estate planner, he would be disqualified from representing the plaintiffs in the adverse matter against his estate planning clients under Rule 1.7, and his conflict was imputed to his partner under Rule 1.10.

New Jersey:

Haynes v. First Nat'l State Bank, 432 A.2d 890 (N.J. 1981). At the behest of the testator's daughter, who had been a client for some time, the lawyer drew a will and trust for the testator, who was a new client, which drastically changed the disposition of the testator's estate in favor of the daughter who procured the will. "[I]t is clear that attorney [here] was in a position of irreconcilable conflict." 432 A.2d at 901. "[T]here must be imposed a significant burden of proof upon the advocates of a will where a presumption of undue influence has arisen because the testator's attorney has placed himself in a conflict of interest and professional loyalty between the testator and the beneficiary." 432 A.2d at 900.

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

Santacroce v. Neff, 134 F. Supp. 2d 366, 367 (D.N.J. 2001). This case involved a palimony action against the estate of a former lover. Here, the court applies the so-called "hot potato" doctrine to disqualify a firm that represented both the plaintiff and the estate at a time when they were adverse. In fact, the court found that while the firm was representing both the plaintiff and the Estate on ostensibly unrelated matters, it got wind that she was planning to file a palimony claim against the estate and so dropped her as a client "like a hot potato" to avoid a concurrent conflict with the estate, the more remunerative client. The court refused to let the firm convert her into a "former client" by such behavior and disqualified it under Rule 1.7.

New Mexico:

In re Stein, 143 N.M. 462, 177 P.3d 513 (2008). This is a disciplinary case in which a lawyer was disbarred for multiple conflicts of interest and misrepresentations to courts and a former client. At first, lawyer represented a husband (Bruce) who had set up trusts totaling more than $11 million and his wife (Ruth) who held a durable power of attorney for her husband. When a daughter sought to establish a guardianship for her father, lawyer ostensibly continued to represent both Bruce and Ruth. After a guardian ad litem was appointed for Bruce, and while the guardianship proceedings were pending, lawyer sought to have the trustee distribute the trust income to Ruth, even though Bruce was the income beneficiary. When that failed, without notifying Bruce's guardian ad litem, lawyer filed two federal actions to obtain control over the assets for Ruth. He was disqualified from continuing to represent Bruce because his interests were adverse to those of his wife Ruth, and he was later disqualified from representing Ruth, as well, since she was adverse to his former client Bruce from whom he had not obtained consent. The lawyer was disbarred for these conflicts and related misconduct.

Spencer v. Barber, 299 P.3d 388 (N.M. 2013). This is a case involving multiple claims against an attorney who represented the personal representative in two wrongful death claims. The PR (Sam) was the mother of one of the decedents and grandmother of the other; she was also the driver of the vehicle that was involved in the fatal accident. The lawyer (Barber) hired to represent Sam as PR on these claims knew that the father/grandfather (Spencer)—Sam's ex-husband—was also alive, but Sam told Barber that her position was that Spencer had no right to wrongful death shares because he had abandoned their daughter. Prior to settling the wrongful death claims, Barber met with Spencer and got him to agree to accept a specified amount in lieu of any claim as a statutory beneficiary of the wrongful death claim. When the claims settled for a much higher amount, Spencer sued Barber for malpractice and misrepresentation. In this case, the Supreme Court of New Mexico held that (a) Barber owed duties to Spencer as a statutory beneficiary which were complicated by the conflict of interest between his client Sam and Spencer; (b) Barber could have resolved that conflict in a number of ways, one of which would have been to notify Spencer that he, Barber, was not his lawyer, that Spencer could not rely on Barber to act for his benefit, and provide Spencer with sufficient information that he could understand why he needed independent representation; and (c) Spencer's right to sue Barber for misrepresentation did not depend on any fiduciary duties owed Spencer. When Barber learned that Sam may have been liable for the accident, he developed still another potential conflict of interest between his duties to her as PR and her individual interests. For all these reasons, the court found that summary judgment had been improperly granted in favor of Barber and remanded for trial.

New York:

Matter of Birnbaum, 460 N.Y.S.2d 706, 707 (N.Y. Sur. 1983). The court denied a motion to disqualify the firm that represented one of the co-executors in her representative and individual capacities. In the

opinion the court stated that, "It is well settled that the common practice of having one attorney or one law firm represent an executor as fiduciary as well as a beneficiary of an estate does not create a conflict of interest for the attorneys…. On the other hand, where the attorney represents his client in both capacities, he may not act to advance the *personal interests* of a fiduciary in such a way as to harm his other client, the estate."

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

Bishop v. Maurer, 823 N.Y.S.2d 366 (App. Div. 2006). Conflicts waivers in an engagement letter—and in a related estate planning document—which plaintiff signed were enough to avoid a malpractice claim brought by husband against firm that did estate planning for him and his wife, notwithstanding his allegation that more was expected of the firm in light of the "apparently hostile relationship with his wife." The engagement letter waiver stated: "Any relationship between a lawyer and a client is subject to Rules of Professional Conduct. In estate planning, ethical rules applicable to conflicts of interest and confidentiality are of primary concern. By countersigning a copy of this letter, you each acknowledge that you have had the opportunity to consult independent legal counsel with respect to your estate planning, and you each affirmatively waive with full understanding any conflict of interest inherent in your both relying on the advice of this firm and its attorneys." These waivers were sufficient to rebut he client's claim that defendants had failed to advise him of the conflict implicit in their simultaneous representation of him and his wife.

Estate of Tenenbaum, 2006 N.Y. Misc. LEXIS 9013, 235 N.Y.L.J. 2 (N.Y. Sur. 2006). This is a dispute between one of five co-executors (H), in her personal capacity, and several of the other co-executors. H argues that she is entitled to a particular piece of property based on a written note from the decedent. One of the respondent co-executors (M) seeks to disqualify the law firm which is representing H, claiming it is a conflict for the firm to represent H in both her personal capacity and as a co-executor where it must defend against her personal claim. Court denies M's motion to disqualify H's counsel, finding that while the law firm is representing her in both her personal and her fiduciary capacity, it is not representing her in her fiduciary capacity in defending against her personal petition here; indeed, she is not a respondent in this proceeding, even in her fiduciary capacity, but appears in the action only as the petitioner. Moreover, all the other co-executors have separate representation. Thus, the court found no conflict. Under the circumstances, the fact that her lawyer is representing her in her fiduciary capacity as to other estate administration matters does not require counsel's disqualification. Another motion to disqualify M's lawyer by another co-executor is described under MRPC 1.9.

Tischler v. Fahnestock & Co., Inc., 871 N.Y.S.2d 887 (2009). Mother (R) of a disabled adult child (E) hired lawyer (L) who had formerly represented R to prosecute an action against a securities broker on behalf of E for malfeasance. Defendant counterclaimed against R alleging that she was responsible for any losses to E. L had court appoint a guardian ad litem for E who then continued the retention of L. L advised mother R that he did not represent her, and R retained separate counsel. Amidst several changes

in the guardianship for E, L was dismissed and a replacement GAL also served as counsel for E. When L sought *quantum meruit* fees (roughly $80,000) for his work for E, R challenged the lawyer's fee petition on the ground that he had a conflict because he simultaneously represented both her (R) and E. Court, however, rejected the objection finding that the lawyer had never represented R but only E and therefore had no conflict. Indeed, L had avoided taking direction from R (who had contracted to pay his fees) once he discovered she did not have authority to act for E. The court granted the fee request to be paid from E's recovery, rather than by R.

Will of McElroy, 34 Misc.3d 689, 935 N.Y.S.2d 855 (N.Y. Sur. 2011). Decedent left a will that put 2/3 of her residuary estate into a special needs trust for her only daughter and gave the remaining estate to grandchildren. A Guardian ad litem was appointed for the daughter, and the GAL filed objections to the will on her behalf. The lawyer who drafted will was named as executor and he was being represented by his law firm, which had represented daughter in the past and currently provided her with financial management assistance. The GAL moved to disqualify law firm for conflict of interest. The court agreed that the law firm had a conflict of interest and disqualified the law firm.

North Dakota:

Disciplinary Action against McIntee, 833 N.W.2d 431 (N.D. 2013). Attorney prepared will for testatrix, and when she died, represented a son and a daughter who were appointed as co-executors (and who were also beneficiaries under the will). Attorney was aware that there were potential problems in interpreting the will but did not advise co-executors of potential conflicts in the joint representation and did not get their consent. During the administration of the estate, the daughter executor complained about lack of information but the attorney did not advise her that she could get independent representation for her role as co-executor. After the probate was closed, attorney began to represent the son co-executor individually and filed suit against the daughter and other siblings for interpretation of the will terms regarding use of farmland. Court held: attorney violated 1.7 by not getting consent for the common representation, and violated 1.9 by filing suit against the daughter, a former client, in a substantially related matter in which her interests were materially adverse.

Ohio:

Ivancic v. Enos, 2012-Ohio-3639, 978 N.E.2d 927 (Ohio App. 2012). Enos hired lawyer Davies—who had formerly represented her deceased father—to probate her father's estate. Davies did not tell client he was the estate's largest creditor ($50,000) or that shortly before decedent had died, Davies had filed a lien against the decedent's home to secure an alleged promissory note for services rendered to the decedent. Davies satisfied the lien from the estate assets without filing a creditor's claim with the estate—which was required by Ohio law. Finally, although Enos had told Davies that she had a half-sister who had been raised by someone other than their father, Davies failed to investigate whether the half-sister had been adopted by the person who raised her. The appeals court affirmed a trial court determination that Davies breached a fiduciary duty owed to Enos in (a) failing to disclose his creditor status and obtaining a conflicts waiver or withdraw (b) collecting the lien without adequate disclosure to his client and without properly using the creditors' claim process—a claim which he could not adequately document; and (c) failing to investigate the client's half-sister's adoption status. He was ordered to return fees paid to him and to pay the plaintiffs' fees.

Oregon:

In re Schenck, 345 Or. 350, 194 P.3d 804 (2008). Lawyer was suspended for a year for multiple violations in connection with estate planning for sisters. One of the violations was to draft wills for the sisters while knowing that they were feuding at the time and had adverse interests (had an "actual conflict") as to the disposition they intended relative to one another, in violation of Oregon's then version of MRPC 1.7.

South Carolina:

Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991). Lawyer Dobson had a long-standing attorney-client relation both with Hotz and her father Minyard. After Dobson had done some estate planning for Minyard relative to succession to his car business, Hotz met with Dobson to request a copy of her father's will. The will was favorable to Hotz and Dobson discussed the will with Hotz without telling her it had been revoked by a second will that he had also prepared. According to Dobson, Minyard had instructed him not to disclose the existence of the second will to his daughter. Hotz sued Dobson for malpractice. In reviewing summary judgment that had been granted in favor of Dobson, the court concluded that although Dobson represented Hotz's father, not Hotz, regarding the will, "Dobson did have an ongoing attorney/client relationship with [Hotz] and there is evidence she had 'a special confidence' in him." While Dobson had no duty to disclose the existence of a second will against the wishes of his client (Hotz's father), he owed Hotz a duty to deal with her in good faith and to not actively misrepresent the first will. Thus, the court concluded that summary judgment had been improperly granted to Dobson on this cause of action and remanded for a trial.

Smith v. Hastie, 367 S.C. 410, 626 S.E.2d 13 (S.C. App. 2005). In this malpractice case, appeals court reversed summary judgment that had been entered in favor of lawyer Hastie and remanded for trial on negligence and breach of fiduciary duty. Lawyer had represented husband and wife in setting up a family limited partnership and, in that role, had allegedly encouraged wife to transfer assets into the FLP without advising her of the potential conflict he had in representing both her and her husband, without inquiring into actual conflicts between them (there was substantial marital discord at the time), and without advising her of the implications of the FLP were the couple to divorce.

South Dakota:

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

Texas:

Baker Botts LLP v. Cailloux, 224 S.W.3d 723 (Tex. App. 2007). Court reverses an equitable trust in the amount of $65.5 million imposed on Baker Botts & Wells Fargo (as executor) to remedy fiduciary breaches in their representation of a widow who disclaimed this amount from the estate of her deceased husband. The law firm had concurrently represented the widow, her deceased husband's executor (Wells Fargo) and the charitable foundation that was the beneficiary of her disclaimer. Allegedly the widow's waiver of the conflict was not sufficiently informed, and the trial court held that this was a

fiduciary breach. But the court of appeals reversed for lack of evidence that the fiduciary breach caused the widow to execute the disclaimer and because establishment of the equitable trust was without basis in fact or law.

Hill v. Hunt, 2008 U.S. Dist. LEXIS 68925, 2008 WL 4108120 (N.D. Tex. 2008). This is an action brought by a great grandson of HL Hunt against a variety of persons involved with the management of trusts set up by HL Hunt. Among the defendants is plaintiff's father, a grandson of HL Hunt and this decision adjudicates the defendant father's motion to disqualify the law firm representing the plaintiff son. Finding that the law firm had established an attorney-client relationship with the defendant father in the context of unrelated trust litigation in New York, and that this attorney-client relationship was continuing, the court concluded that there was a concurrent conflict for the firm to also be representing the father's son as plaintiff in this suit against his father. The violation of Rule 1.7 and the surrounding circumstances convinced the court that the firm must be disqualified from representing the plaintiff son based on the appearance of impropriety and the likelihood of public suspicion.

Washington:

Behnke v. Ahrens, 172 Wn. App. 281, 294 P.3d 729 (2012). The co-trustees of a trust had paid large fees to attorney Ahrens for advice and implementation of a tax shelter to shelter capital gains upon sale of trust assets. Co-trustees were later advised by other attorneys that the IRS considered this an abusive tax shelter and that they should pay the taxes and penalties. They settled with the IRS and then sued the first lawyer—Ahrens—for fraud, consumer protection violation, common law breach of fiduciary duty, and breach of fiduciary duty based on RPCs. The court held that the attorney had violated RPC 1.7(b) and thus his fiduciary duty. While representing the trust and setting up the tax shelter, the lawyer had also been representing the vendor of the tax shelter, and had a financial interest in referring clients to the vendor, and did not fully disclose that relationship to the co-trustees and obtain written consent. Ahrens objected to imposing civil liability for a violation of the RPCs, but the court stated: " A trial court may properly consider the RPCs in an action by a client to recover attorney fees for the attorney's alleged breach of fiduciary duty."

Ethics Opinions

ABA:

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

Op. 05-434 (2005). This opinion is discussed in the text of the Commentary. It addresses the responsibilities of a lawyer who represents a client (testator) who asks the lawyer to draft a new will, the effect of which is to disinherit the testator's son whom the lawyer is representing on an unrelated matter. The Committee concluded that drafting the will is not directly adverse to the son, and the lawyer does not need the son's consent to do the will. The Committee also concludes that ordinarily this situation does NOT pose a significant risk of material limitation of the estate planning work unless (perhaps) the lawyer begins advising the testator about whether to disinherit the son. The Committee does point out scenarios under which the lawyer may not be able to do the will, on which we will not elaborate here.

California:

San Diego Op. 1990-3. This opinion discusses the position of a lawyer who is asked by a son or daughter to prepare a new will for the child's parent. The opinion concludes that the person who is to sign the instrument is the client of the lawyer:

> As stated above, in our view the person who will be signing the document is clearly a client of the attorney, and must be treated as such. However, unless it is agreed upon in advance the Son or Daughter may also be considered clients of the attorney. If so, the provisions of Rule 3-310 apply. The attorney must disclose the potential conflicts of interest to the clients in writing, and obtain their informed written consent to the representation in order to proceed. Depending upon the specific facts, the conflicts of interest may be so great that the attorney would be well advised not to represent both even if the clients were willing to give their consent.

Maryland:

Op. 2003-08. A lawyer who chairs his church's committee that promotes legacy giving from its parishioners may not prepare wills for parishioners who want to bequeath property to the church. The panel ruled that the lawyer's responsibility for furthering the church's financial interests would conflict with his representation of the parishioners and contravene MRPC 1.7(b). If the church is also the lawyer's client, then MRPC 1.7(a) may be violated.

Missouri:

Op. 2006-0073. A lawyer may offer a discount on estate planning to clients who leave a portion of their estates to a not-for-profit organization if the lawyer clearly and fully discloses his relationship with the organization and objectively advises and consults with the clients about their options and the effects of their choices.

Nebraska:

Op. No. 12-08. Lawyer's representation of co-trustees who were also beneficiaries of the trust was challenged on ground that the co-trustees/beneficiaries had conflicts. The validity of a trust amendment was being challenged by two other beneficiaries, and if successful their claim would reduce the share of the co-trustees/beneficiaries. The Advisory Committee concluded that there was no conflict since trustee clients were seeking to enforce the terms of the trust as written, and there was no conflict with another client or former client.

Nevada:

Op. 47 (2011). A lawyer who is on the board of directors of a company may not prepare the estate for a client who wishes to name the company as a beneficiary, at least not without a conflicts waiver. The lawyer is a fiduciary for the company and owes it duties of loyalty, impartiality, and confidentiality

which would preclude him from fully disclosing to the estate planning client company information that might be relevant. Further, the lawyer's information as to the company's financial situation and his interest in furthering the economic goals of the company would create a conflict of interest were he to do the estate planning in question. If the lawyer reasonably believes that the client will not be adversely affected, however, he is entitled to ask the client for consent after full disclosure of the conflicts. The committee relied, among other things, on Maryland Bar Association Ethics Opinion 2003-08, *supra*, to the same effect as to a lawyer who sits on a church's legacy committee.

New Hampshire:

Op. 2008-09/1. A lawyer may, at a client's request, draft an estate-planning document naming the lawyer as a fiduciary, but first must ensure that he is competent to perform the fiduciary role; discuss the client's options in choosing a fiduciary, including the relative costs of having the lawyer or someone else serve as fiduciary; and make a reasonable determination whether his personal interest in serving as fiduciary requires the client's informed consent. A lawyer may not nominate himself by default to serve as fiduciary in estate-planning documents he presents to a client. If a lawyer actively solicits clients to nominate the lawyer to serve as fiduciary, Rule 1.8(a) may apply.

New York:

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

Op. 836 (2010). Lawyer who previously represented an incapacitated client in guardianship proceeding inquired whether lawyer could now represent client and the guardian in proceeding to terminate the guardianship. The opinion concludes that this is a consentable conflict (assuming lawyer reasonably believes that lawyer will be able to competently represent both clients) that requires informed consent of both the client and the guardian. Obtaining informed consent of client must take into account any limits on client's capacity, but client's existing determination of incapacity does not bar obtaining client's consent. The requirement of the court's approval of the termination of the guardianship mitigated concerns about the client's ability to give informed consent.

North Carolina:

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

North Dakota:

Op. 14-01. The lawyer prepared an estate plan for a husband and wife and represented husband in a child support matter, and never sent them a termination letter. Lawyer also drafted a power of attorney for wife's aunt, appointing wife as agent. The aunt revoked the power of attorney and appointed new agents, and wanted the lawyer to represent her in suing the husband and wife to recover funds. The lawyer could not represent the aunt because the husband and wife were still the lawyer's clients (1.7) and the matter is substantially related to lawyer's prior representation of the couple (1.9).

Ohio:

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

Oregon:

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

Pennsylvania:

Op. 2013-005. The attorney represents an estate as plaintiff in litigation against a company for negligent damage to property. The estate's administrator was added as defendant under a contributory negligence theory. The estate and the administrator want the lawyer to represent both of them, but the lawyer cannot represent both because the estate has a directly adverse interest in establishing liability of the administrator. The lawyer cannot use or disclose any harmful information obtained from the administrator as a potential client.

South Carolina:

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

Washington:

Op. 2107 (2006). Insofar as the duties of a guardian for an incapacitated person diverge from those owed by the trustee of a special needs trust for the same person, for a lawyer who is guardian and counsel for the guardian to accept appointment as the trustee of a special needs trust would create an actual or a potential conflict. "[S]ince the incapacitated person probably lacks the mental capacity to understand a full disclosure and consent to the dual representation, the conflict cannot be waived pursuant to RPC 1.7(a) or 1.7(b)." Moreover, accepting the role of trustee for compensation would constitute a business transaction with a client, the "guardianship," which would be governed by Rule 1.8(a). Accordingly, some other person should be appointed to serve as trustee.

Joint Representation: Disclosures

Cases

Louisiana:

In re Hoffman, 883 So. 2d 425 (La. 2004). An attorney represented three siblings in a will contest. The court held that the attorney violated MRPC 1.7(b) by failing to obtain the informed consent of each client to the representation. The attorney relied upon the daughter of one of his clients to prepare an

affidavit of representation, which in turn the attorney's other clients signed without having the benefit of the advice of counsel. More importantly, according to the court, the attorney's failure to appreciate the potential conflict between his clients led directly to his violation of MRPC 1.8(g) in the course of settling their claims. Instead of giving all three clients the opportunity to exercise their absolute right to control the settlement decision, the attorney, after obtaining only one client's consent, accepted a settlement proposal on behalf of all of his clients. The attorney then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of only one client and over the objection of another client.

Ethics Opinions

Florida:

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

North Carolina:

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

Oregon:

Op. 2005-86. Ordinarily it is permissible for a lawyer to jointly represent and prepare wills for a married couple. "A lawyer is charged with all knowledge that a reasonable investigation of the facts would show. … Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when joint wills are contemplated, because the interests of spouses in such matters will generally be aligned. This will not always be the case, however. For example, … spouses with children by prior marriages may have very different opinions concerning how their estates should be divided. *See, e.g., In re Plinski*, 16 DB Rptr. 114 (2002) (husband and wife, who each had adult children from previous marriages, had interests that were adverse because value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband on financial issues)." Absent further facts, opinion "declined to state whether, or under what circumstances, the interests of the spouses would be directly adverse or that a significant risk of materially limited representation would result in such cases."

Joint Representation: Co-Fiduciaries

Cases

New York:

In re Flasterstein's Estate, 210 N.Y.S.2d 307, 308 (N.Y. Sur. 1960). In this case the surrogate court denied a motion to disqualify a law firm that represented the executors, who were also residuary beneficiaries, because of an alleged inherent conflict of interest. The court observed:

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

Ethics Opinions

Pennsylvania:

Op. 2006-20. It is permissible for a lawyer to represent a resigning trustee of a testamentary trust and also the successor trustee (who is a remainder beneficiary), notwithstanding the temporary overlap between the two representations and the potential for conflict, provided that the successor trustee will not oppose the accounting presented by the resigning trustee. Procedurally, the resigning trustee should prepare a preliminary verified accounting for the proposed successor and the successor should file a conditional waiver to the effect that "the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of successor trustee does not intend to object to the official account when filed; and the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of remainder beneficiary of the trust does not intend to object to the official account when filed."

Virginia:

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

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

Appointment of Scrivener as Fiduciary

Cases

Tennessee:

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

Washington:

Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 980 (Wash. 1987). In this case excessive compensation was recovered from the scrivener of a will who was subsequently appointed co-trustee of a large testamentary trust. The court held that an exoneration clause did not protect the scrivener against liability: "As the attorney engaged to write the decedent's will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect."

Wisconsin:

In re Disciplinary Proceedings Against Felli, 291 Wis. 2d 529, 718 N.W.2d 70 (2006). An attorney was suspended for three years for drafting estate planning documents naming the attorney as a fiduciary in violation of Rule 1.7 and 7.3. The court distinguished its earlier case, *State v. Gulbankian*, 196 N.W.2d 733 (Wis. 1972), in which it had warned against this practice but had declined to discipline the lawyers involved in that case.

Ethics Opinions

Georgia:

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

Illinois:

Op. 99-08, 2000 WL 1597066. Lawyer engaged to prepare a trust for a client may, at the client's direction, include a provision directing the trustee administering the trust to retain the lawyer for legal services, so long as (i) adequate disclosure (including disclosing that the trustee also would have the right to discharge the lawyer as its lawyer) is made, (ii) the client consents to the representation, and (iii) the lawyer concludes that his representation of the client will not be adversely affected by including such a provision.

Massachusetts:

Op. 06-01 (2006). There is no per se rule against a lawyer drafting an estate planning document that names the lawyer as a fiduciary and, as such, retaining themselves as counsel, but these are personal interests of the lawyer that require analysis under Rule 1.7. The possibility of material limitation requires the lawyer to satisfy himself that the role is in the best interests of the client and will typically

require discussion of alternatives and of the method for calculating fees as fiduciary and as counsel. There is no requirement that Rule 1.8(a) be followed, but comment 8 to Model Rule 1.8 provides relevant guidance.

Michigan:

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

New Jersey:

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

New York:

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

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

South Carolina:

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

Virginia:

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

Related Secondary Sources

Restatement (Third) of the Law Governing Lawyers (2000) §135 (A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient) addresses conflicts of interest that arise as a result of serving as a fiduciary, such as a personal representative or trustee. See, in particular, comment c and related illustrations.