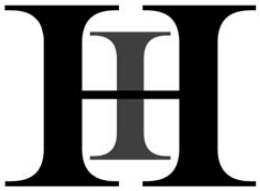

58TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING™ UNIVERSITY OF MIAMI SCHOOL OF LAW

Special Session IV-C
Ethical and Practical Challenges in Dealing with Diverse Clients

Steven K. Mignogna
Archer & Greiner, P.C.
Voorhees, New Jersey

Paula A. Kohut
Kohut, Adams & Randall, P.A.
Wilmington, North Carolina

Cynthia G. Lamar-Hart
Maynard Nexsen PC
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Akane R. Suzuki
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Seattle, Washington

Michael P. Vito
Lowenstein Sandler LLP
Washington, D.C.

Thursday, January 11, 2024
3:50 p.m. – 5:20 p.m.

Steven K. Mignogna
Archer & Greiner, P.C.
Voorhees, New Jersey

Steven K. Mignogna, Esquire is a partner with Archer & Greiner and serves as both the Co-Chair of the firm's Estates and Trusts Group and Chair of the Estate and Trust Litigation Group. Steve specializes in commercial litigation, including litigation involving probate matters, estates, trusts, gifts, fiduciaries, guardianships, and real estate, handling cases in the state and federal courts, at both the trial and appellate levels. Representing both institutions and individuals, Steve's clients include banks, corporate fiduciaries, investment companies, educational and charitable institutions, and real estate firms, as well as beneficiaries of estates and trusts, executors, trustees, guardians, incapacitated persons, surviving spouses, and persons having an interest in real estate.

Steve serves on the Advisory Committee of the Heckerling Institute on Estate Planning. He is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and holds several leadership roles in ACTEC, including: State Chair for New Jersey; Chair of ACTEC's Fiduciary Litigation Committee; and the ACTEC Board of Regents. He is active in ACTEC in several other areas, including the Professional Responsibility Committee, the Program Committee, the Joint Task Force of ACTEC and the National College of Probate Judges, and the Advisory Committee to ACTEC's Mid-Atlantic Fellows Institute.

Active in the American Bar Association (ABA), Steve has held leadership roles in the ABA's Real Property, Trust and Estate Law Section, including: Chair of the Litigation, Ethics and Malpractice Group, as well as Chair of that Group's Alternative Dispute Resolution Committee and Probate and Fiduciary Litigation Committee; Section Liaison to the ABA Dispute Resolution Advisory Committee; and several administrative Committees in the Section.

Steve is a national lecturer and author. He has lectured and published for ACTEC, the Heckerling Institute on Estate Planning, the National College of Probate Judges, the American Bar Association, the New Jersey Bar Association, the New Jersey Institute for Continuing Legal Education, the American Law Institute Continuing Legal Education Group, the Duke University Estate Planning Conference, the Delaware Trust Conference, and Estate Planning Councils and other professional groups around the country. He authors the treatise, Estate and Trust Litigation, and is the editor and contributing author of The New Jersey Estate Planning Manual and New Jersey Probate Procedures Manual. In 2017, the New Jersey Institute for Continuing Legal Education honored him with the Distinguished Service Award.

Steve is also a Senior Fellow of the Litigation Counsel of America, a national honorary society for trial lawyers, and has been named to various "top lawyer" lists, including The Best Lawyers in America.

An attorney since 1989, Steve has been with Archer & Greiner since 1988, when he joined the firm as a law clerk. Steve is admitted to the bars of the state and federal courts of New Jersey and Pennsylvania. He is also admitted to the Third Circuit Court of Appeals and the United States Supreme Court.

Steve earned his law degree from Rutgers University School of Law, and obtained his Bachelor's Degree from St. Joseph's University in Philadelphia. Along with his service to the legal profession, Steve remains active in various charitable and community organizations, including the Philly Pops Board, the Alicia Rose Victorious Foundation Board, the Chevaliers du Tastevin, and the Knights of Columbus. In 2021, he was honored by the Alicia Rose Victorious Foundation as a Community Champion. In 2020, he was recognized by the Camden County Bar Association as the Professional Lawyer of the Year, through the New Jersey Commission on Professionalism in the Law. In 2017, Steve received the Excalibur Award from the Bishop Eustace Preparatory School Alumni Association, recognizing his lifetime achievement in civic, religious, humanitarian, and professional endeavors.

Paula A. Kohut
Kohut, Adams & Randall, P.A.
Wilmington, North Carolina

Paula A. Kohut is a partner in Kohut, Adams & Randall, PA in Wilmington, North Carolina. Her principal practice areas are estate planning, trust and estate administration, business law and asset protection. Paula is a Fellow in the American College of Trust and Estate Counsel. She received her B.A. degree, from the University of California at Irvine and her J.D. degree, with honors, from Wake Forest University School of Law. She is the Chair of the Estate and Fiduciary Law Section of the North Carolina Bar Association, and a member of the North Carolina Commission on Inclusion. She also serves on the Board of St. Jude's Wilmington Foundation, Inc.

Cynthia G. Lamar-Hart
Maynard Nexsen PC
Birmingham, Alabama

Cynthia chairs the Estate Planning, Fiduciary Advisory Services and Fiduciary Litigation practice groups from the Birmingham, Alabama office of Maynard Nexsen PC. In addition to her representation of individuals and fiduciaries in planning, administration and litigation, Cynthia also serves as mediator for trust and estate disputes. She also chairs the firm's Women's Initiatives and formerly served on the firm's executive committee.

Cynthia is a Fellow of the American College of Trust and Estate Counsel ("ACTEC") who lectures frequently on estate-planning and fiduciary litigation topics at national ACTEC meetings, as well as the Heckerling Institute on Estate Planning, the American Institute on Federal Taxation, the Southern Federal Tax Institute, the University of Alabama CLE, the Southern Trust School and others. Cynthia chairs the ACTEC Diversity, Equity and Inclusivity Committee and serves as a Regent of the College. She is a past Director of the ACTEC Foundation.

Cynthia has been ranked as a Band 1, leading attorney in the area of "Private Wealth Law" by Chambers and Partners. Cynthia is a Past President of the Probate Section and a past member of the Executive Committee of the Birmingham Bar Association. She serves on an advisory board of the Community Foundation of Greater Birmingham and was a member of the Leadership Birmingham Class of 2022. She is a past President of the YWCA of Central Alabama Junior Board and past member of the YWCA of Central Alabama Board of Directors.

Cynthia was awarded a B.A., *summa cum laude*, Phi Beta Kappa, from Birmingham-Southern College, and was awarded a J.D. from Yale Law School.

Akane R. Suzuki
Perkins Coie LLP
Seattle, Washington

Akane R. Suzuki is a partner in the Seattle office of Perkins Coie LLP, a law firm with offices in the United States and Asia. She focuses her practice on sophisticated estate planning, wealth and business succession, and probate and trust administration matters. Akane also works with cross- border families who need assistance with U.S. inheritance, gifting, and related tax matters. She is particularly well-known for her expertise in U.S.-Japan estate planning. She is a fellow and the Washington State Chair of the American College of Trust and Estate Counsel and a member of the International Academy of Estate and Trust Law. Akane is ranked Band 1 in *Chambers High Net Worth Guide* and is listed in *Best Lawyers* and *Super Lawyers*.

Michael P. Vito
Lowenstein Sandler LLP
Washington, D.C.

A sophisticated planner to high net worth individuals, fiduciaries, family offices, and foundations, Mike has wide-ranging experience in tax law, high net worth estate planning, estate and trust administration, and philanthropy spanning more than two decades across multiple jurisdictions. He guides his clients through the administration and preservation of assets in ways that best protect their legacies through prudent business succession planning, multigenerational plans, and charitable giving.

With a keen focus on federal estate, gift, and generation-skipping transfer taxes and fiduciary income tax planning, Mike counsels clients on the most effective techniques for the protection, management, and transfer of wealth, including through such vehicles as irrevocable life insurance trusts, grantor retained annuity trusts, and spousal lifetime access trusts. He designs and implements planning structures to provide robust, multigenerational governance for families with growing trust networks. For philanthropically inclined clients, Mike provides advice on charitable gifts, private foundations, split-interest charitable trusts, excise taxes, grant-making procedures and agreements, and nonprofit governance.

Mike also advises fiduciaries on the fulfillment of their duties related to managing an estate or trust, including issues such as estate and inheritance tax returns, fiduciary accountings, concentrated position management, prudent investor act delegation, GST effective date trusts, fiduciary transitions, decanting, distribution, and wind-up strategies.

After working with Lowenstein for nearly 20 years, Mike moved to Washington, D.C., to join the high net worth family office practice group at an Am Law 50 firm. Beyond estate planning and trustee services, he provided innovative offerings such as living estate plan audits and financial benchmarking of advanced planning techniques. He later rejoined Lowenstein Sandler in Washington in 2021.

Mike is a Fellow of the American College of Trust and Estate Counsel, a member of the Washington, D.C. Estate Planning Council, and a past chair of Real Property, Trust & Estate Law Section of the New Jersey State Bar Association. He has been recognized in the Trusts & Estates Law section of *Best Lawyers* since 2015 and is admitted to practice in New York, New Jersey, District of Columbia, and Virginia.

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EXHIBIT “A”

ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT

The American College of Trust and Estate Counsel

Sixth Edition 2023

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, lawyers 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 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.

MRPC 1.1: COMPETENCE

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

ACTEC COMMENTARY ON MRPC 1.1

Meeting Needs of Client. A lawyer who initially lacks the skill or knowledge required to meet the needs of a particular client may overcome that inadequacy through additional research and study. The needs of the client may also be met by involving another lawyer or other professional who possesses the requisite degree of skill or knowledge. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), noting that confidentiality concerns must be addressed prior to involving another lawyer. Thus, the lawyer may choose to consult another lawyer while maintaining the client's confidential information or may obtain the client's informed consent to associate another lawyer to whom disclosures will be made if it is reasonable to do so. The lawyer should be candid with the client regarding the lawyer's level of competence and need for additional research and preparation, which should be taken into account in determining the amount of the lawyer's fee. See ACTEC Commentary on MRPC 1.5 (Fees). A lawyer may, with the client's informed consent, limit the scope of the representation to those areas in which the lawyer is competent. See MRPC 1.2(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer).

Mistaken Judgment Does Not Necessarily Indicate Lack of Competence. The fact that a lawyer does not precisely assess the tax or substantive law consequences of a particular transaction does not necessarily reflect a lack of competence. In some instances, the facts are unclear or disputed while in others the state of the law is unsettled. In addition, some applications of law and determinations of facts made by courts or administrative agencies are not reasonably foreseeable. In other instances, the complexity of a transaction or its unusual nature generates uncertainties regarding the manner in which it will be treated for tax or substantive law purposes and may prevent an otherwise thoroughly competent lawyer from accurately assessing how the transaction would be treated for tax or substantive law purposes.

Importance of Facts. A lawyer who is engaged by a client in an estate planning matter should inform the client of the importance of giving the lawyer complete and accurate information regarding relevant matters such as the ownership and value of assets and the state of beneficiary designations under life insurance policies and employee benefit plans. Having so cautioned a client, the lawyer is generally entitled to rely on information supplied by the client unless the circumstances indicate that the information should be verified. For a client who already has an estate plan, it is a good practice where appropriate to obtain the client's documents from his or her previous lawyer. If that is not possible, it is good practice to ask the client to supply originals or copies of signed originals of the most recent documents on which the client is seeking advice or work. These practices reduce the risk of the client inadvertently supplying incomplete or inaccurate information. The lawyer should verify the information provided by the client if the client appears to be uncertain about it or if other circumstances create doubts about its accuracy.

Supervising Execution of Documents. Generally, the lawyer who prepares estate planning documents for a client should supervise their execution. In doing so, it is advisable for the lawyer to develop a procedure for execution that is complete and adequate to meet the requirements of the jurisdiction where the document is to be executed and to follow that procedure consistently whenever a document of that sort is executed. Of course, he or she may arrange for another lawyer to do so. If it is not practical for a lawyer to supervise the execution or if the client so requests, the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which they should be executed. The lawyer should do so only if the lawyer reasonably believes that the client is sufficiently sophisticated and reliable to follow the instructions and that there are no present concerns about potential challenges. The lawyer who sends estate planning documents to the client for signing outside of the lawyer's office should request original signed documents be returned for the lawyer's review. If the lawyer determines the documents were signed improperly, the lawyer should resend the estate planning documents for the client to sign. Note that in some jurisdictions the supervision of the execution of estate planning documents constitutes the practice of law, which a lawyer may not delegate to a member of the lawyer's staff who is not a lawyer.

Competence Requires Diligence and Communication with Client. Competence requires that a lawyer handle a matter with diligence and keep the client reasonably informed during the active phase of the representation. See MRPCs 1.3 (Diligence) and 1.4 (Communication). See also the discussion of a dormant representation in the ACTEC Commentary on MRPC 1.4 (Communication).

Staff Training and Oversight. Consistent with the requirements of MRPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) and MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants), a lawyer should provide adequate training and supervision to the legal and nonlegal staff members for whom the lawyer is responsible. As indicated by the Comment to MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), the MRPCs do not prohibit lawyers from employing paraprofessionals and delegating work to them. The requirement of supervision is described in the Comment to MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants):

> Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in the rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

A lawyer should provide adequate training, supervision and oversight of the lawyer's staff in order to protect the interests of the lawyer's clients. See ACTEC Commentary on MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistance).

Competence with Technology. A lawyer who uses technology to transmit or store client documents or communicates electronic must be aware of the potential effects of such use of

technology on client confidentiality and preservation of client information. A lawyer must stay reasonably informed about developments in technology used in client communications and document storage, including improvements, discoveries of risks and best practices.

Cultural Competence. Estate planning, and in particular end-of-life and other health care decision planning, is extremely personal and the client's cultural traditions and religious beliefs can play an important role. The estate planning lawyer should be sensitive to the client's culture to be able to understand and document a client's wishes. Culture refers to a person's identity, language, thoughts, communications, experiences, actions, customs, beliefs, values, and institutions.

Disciplinary Cases

California:

Butler v. State Bar, 228 Cal. Rptr. 499, 502 (1986). A lawyer was disciplined for failure to inquire adequately regarding the existence of assets standing in decedent's name alone, failure to communicate with the person named as executor of decedent's will and his attorney, knowingly misrepresenting that probate was proceeding satisfactorily and improperly prolonging the probate proceeding. "While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation."

Colorado:

People v. Woodford, 81 P.3d 370 (Colo. 2003). Attorney was suspended after he created an invalid trust that did not accomplish the purpose he was paid to achieve and failed to advise client of additional legal options.

District of Columbia:

In re Long, 902 A.2d 1168 (D.C. 2007). Lawyer who had no experience in estate planning agreed to prepare a will for a client at the request of a mutual friend who was to be the principal beneficiary. "Sometime before [he] produced the final draft of the will, he spoke with [the client] at her home. [He elicited from her that she wanted to turn her farm over to the drafter's friend. [But he]… did not become knowledgeable about the existence or identity [of the client's] other relatives, he had no specific knowledge of her finances, and he did not discuss her intentions in anything more than this perfunctory manner. He took no special precautions in light of Mrs. Lowery's advanced age and medical condition in anticipation of a challenge to the will." The court concluded that he had not exercised the requisite competence and had an undisclosed and unwaived conflict (presumably his personal ties to her beneficiary). But his "foray into estate planning represented a one-shot event of a personal nature." Accordingly, he was suspended for one month, but the suspension was stayed on conditions.

Kansas:

In re Alig, 285 Kan. 117, 169 P.3d 690 (2007). Lawyer was publicly censured for taking on a contested probate matter in an estate worth $4 million that was beyond his competence: "Respondent's prior experience did not include significant experience in probate matters to take on this complicated, contested case. Respondent should have realized that he was not competent to handle a probate case of this complexity shortly after he undertook representing the

administrator." Evidence of his lack of competence was that he instructed the administrator to pay lawyer's fees from the estate without judicial approval as was required by Kansas law. Lawyer stipulated to violating these rules and Rule 1.5 for charging an unreasonable fee.

Maryland:

Attorney Grievance Comm'n of Maryland v. Myers, 490 A.2d 231 (Md. 1983). This decision came in a disciplinary case in which, in addition to other offenses, the lawyer prepared a will without an attestation clause and signature lines for the witnesses and failed to instruct the client properly regarding manner of execution. The court upheld a three-year suspension.

Minnesota:

Discipline of Fett, 790 N.W.2d 840 (Minn. 2010). Client was attorney-in-fact for his brother and consulted lawyer with regard to Medicaid planning. Lawyer advised client in letter to liquidate brother's assets and transfer the assets into the client's name, even though the power of attorney did not allow transfers to the attorney-in-fact. Court held that lawyer's advice in the letter was incompetent and did not adequately disclose to the client the risks of the recommended course of action or the legal basis which would justify the self-gifting and therefore the client was not given sufficient information to participate intelligently in the decision whether to transfer the assets into his name. Lawyer was publicly reprimanded and placed on one year's probation.

Ohio:

Toledo Bar Ass'n v. Wroblewski, 512 N.E.2d 978 (Ohio 1987). In this disciplinary case the lawyer made no attempt to determine whether or not the decedent was survived by next of kin; failed to include assets in estate inventory; and improperly prepared some tax returns. An indefinite suspension was imposed.

Oregon:

In re Greene, 557 P.2d 644 (Or. 1976). A lawyer was put on probation for selling estate property without properly ascertaining its value and for failing to discover other assets of the estate.

Malpractice Cases

England:

Ross v. Caunters, 3 All Eng. Rep. 580, 582-583 (1979). In holding that a will's beneficiaries' lack of privity of contract with the attorney-drafter of the will was no bar to an action for negligence, the English court observed:

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

California:

Biakanja v. Irving, 320 P.2d 16 (Cal. 1958). This landmark decision abolished the privity defense in California in malpractice cases involving estate planning, and the Supreme Court of California set forth a "balancing" test for use in a given case to determine liability with respect to a plaintiff not in privity with the attorney. As modified over the years in California, and applied in several other jurisdictions, the test involves balancing the following five factors:

The extent to which the transaction was intended to affect the complaining beneficiary;
The foreseeability of harm to the beneficiary; (iii) Whether, in fact, the beneficiary suffered harm;
(iii) The closeness of connection between the negligent act and the injury; and
(iv) The public policy in preventing future harm.

Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961). In this case, the Court extended the rule from *Biakanja*, which had involved a notary who was engaged in the unauthorized practice of law while doing estate planning, to licensed attorneys. It held that extending liability to intended beneficiaries would not unduly burden the legal profession, despite lack of privity. It also upheld liability on a third-party beneficiary contract theory. But the court ultimately declined to find the lawyer liable for malpractice in estate planning in the specific case on the theory that failure adequately to avoid the rule against perpetuities did not fall below the standard of ordinary skill and capacity.

Heyer v. Flaig, 74 Cal. Rptr. 225 (1969). In this malpractice case the court held that a lawyer has a continuing duty to a client whose will the lawyer has drafted where the attorney-client relationship continues and the lawyer is aware of events reasonably foreseeable and subsequent to the client's execution of the will, making revisions thereto necessary. The court held that an attorney may be liable for failing to appreciate the consequences of a post-testamentary marriage of which the attorney was advised.

Bucquet v. Livingston, 129 Cal. Rptr. 514, 521 (App. 1976). In this malpractice case, in holding that, as with beneficiaries under a negligently drafted will, the beneficiaries of a trust have standing to sue the drafter, the court stated:

> We are not aware of any cases or guidelines establishing in a civil case a standard for the reasonable, diligent and competent assistance of an attorney engaged in estate planning and preparing a trust with a marital deduction provision. We merely hold that the potential tax problems of general powers of appointment in *inter vivos* or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present. [Footnotes omitted.]

Sindell v. Gibson, Dunn & Crutcher, 63 Cal. Rptr. 2d 594 (Cal. App. 1997). In this case the court held that the intended beneficiaries of a law firm's estate planning services rendered for the beneficiaries' father suffered "actual injury" (attorneys' fees and litigation expenses) in defending a lawsuit by the surviving spouse's conservator that plaintiffs alleged would not have been filed but for the law firm's failure to obtain a waiver of community property rights from the allegedly willing spouse when she was competent.

Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888 (Cal. App. 2003). Because an attorney generally has no professional duty to anyone who is not a client, an attorney preparing a will has no duty to the intended beneficiaries to investigate, evaluate, ascertain or maintain the client's testamentary capacity. The duty of loyalty of the attorney to the client might be compromised by imposing such a duty to beneficiaries on the attorney. [Citing and quoting from the ACTEC Commentary on MRPC 1.14 (3rd Edition).]

Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Cal. App. 2004). When preparing a will or other testamentary instrument giving property to a beneficiary who, under applicable state law, is presumptively disqualified from receiving such a gift (in this, case, the decedent's caregiver), the testator's lawyer owes a duty of care to the nonclient intended beneficiary to try to ensure that the proposed transfer stands up (in this case meaning that the lawyer should have advised the client testator to obtain a "Certificate of Independent Review" from a totally disinterested and independent lawyer without which the gift would and in this case did fail), declaring that the gift in question was clearly what the client intended and that the client had not been unduly influenced to make the gift.

Boranian v. Clark, 20 Cal. Rptr. 3d 405 (Cal. App. 2004). An estate planning attorney, at the direction of a third party and without meeting or speaking to the client, prepared a will and a "confirmation of gift" for a terminally ill individual. The "gift" was to the third party. When the testator signed the documents, she was lethargic, hallucinating, and in great pain. She died three days later. The testator's son and daughter contested the will and the gift, and the third party settled by receiving a token amount of cash, but the estate was left with a debt related to the gift. In the subsequent malpractice action, the trial court found in favor of the son and daughter against the attorney. The Court of Appeal reversed, stating: Although a lawyer retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the lawyer's primary duty is owed to his client and his primary obligation is to serve and carry out the client's intentions. Where, as here, there is a question about whether the third-party beneficiary was, in fact, the decedent's intended beneficiary, and the beneficiary's claim is that the lawyer failed to adequately ascertain the testator's intent or capacity, the lawyer will not be held accountable to the beneficiary - because any other conclusion would place the lawyer in an untenable position of divided loyalty.

Chang v. Lederman, 172 Cal. App. 4th 67, 86, 90 Cal. Rptr. 3d 758, 773 (2009). Client, recently married and terminally ill, allegedly instructed his lawyer to revise his estate planning documents to leave the bulk of his estate to his wife. His lawyer refused, alerting the client to the likelihood of a lawsuit if he did this, and insisting that the client get a psychiatric evaluation before making such a change. Client died without making the changes and his surviving spouse sued the lawyer for malpractice. But the court held that lawyer owed her no duty and granted judgment for the lawyer:

> [T]estator's attorney owes no duty to a person in the position of [surviving spouse here], an expressly named beneficiary who attempts to assert a legal malpractice claim not on the ground her actual bequest… was improperly perfected but based on an allegation the testator intended to revise his or her estate plan to increase that bequest and would have done so but for the attorney's negligence. Expanding the attorney's duty of care to include actual beneficiaries who could have been, but were not, named in a revised estate plan, just

> like including third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict…. Moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has died.

Stine v. Dell'Osso, 230 Cal. App. 4th 834 (2014). An incapacitated woman's son was appointed her conservator and he misappropriated $1 million of her property. He was removed as conservator, and the professional fiduciary appointed as successor conservator sued the lawyers for the son, alleging that they were aware of significant assets of the incapacitated woman that the son had not reported to the court. The court cited prior case law holding that as a matter of statute (which states a successor personal representative has all powers and duties as the former executor), a successor fiduciary has standing to sue the predecessor's attorney. The court further noted that such a malpractice action would not threaten attorney-client privilege because the privilege would be held by the successor fiduciary. The lawyers claimed that the successor conservator would be attributed the former conservator's unclean hands and therefore barred from suing, but the court held otherwise, noting that unclean hands was an equitable remedy that should not apply here. The successor conservator only stepped into the son's fiduciary shoes and did not step into the "morass created by his personal malfeasance."

Colorado:

Glover v. Southard, 894 P.2d 21, 25 (Colo. App. 1994). This decision upholds dismissal of a malpractice claim brought by the intended beneficiaries against the scrivener of the decedent's will and trust agreement. "[I]n drafting testamentary instruments at the behest of a client, an attorney should not be burdened with potential liability to possible beneficiaries of such instruments."

Connecticut:

Licata v. Spector, 225 A.2d 28 (Conn. Com. Pl. 1966). The court here held that the named legatees under a will declared invalid and inoperative because the statutory requirements as to attesting witnesses were not met could maintain an action against the attorney-drafter of the will for the attorney's alleged negligence in failing to provide for the required number of witnesses.

Delaware:

Pinckney v. Tigani, 2004 WL 2827896 (Del. Super. 2004). Attorney drafted a trust to provide for the plaintiff. Pursuant to the scope of the engagement agreement, the attorney was not hired to investigate the client's finances to determine if funds were available to fund the bequest to the trust. In determining whether the beneficiary had standing, the court stated, "Where the drafting is correct [as in the instant case], yet the bequest fails for other reasons, the disappointed heir must allege facts that irrefutably lay the bequest's failure at the scrivener's door." The court held that the attorney did not owe a duty of care to the trust beneficiary to investigate the decedent's finances to ensure that the bequest would be funded because the scope of representation was limited to preparation of documents, and the engagement letter specifically excluded any investigation into the decedent's finances.

District of Columbia:

Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983). In a case of first impression, the court here held that the intended beneficiary of an allegedly negligently drafted will is not barred by the lack of privity from bringing a suit for malpractice against the attorney-drafter. (The attorney-drafter had admittedly failed to include a residuary clause in the will as executed.)

Florida:

Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1380 (Fla. 1993).

In this malpractice action the Supreme Court of Florida observed:

> In the area of will drafting, a limited exception to the strict privity requirement has been allowed where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party. [Citations omitted.]
>
> * * *[W]e adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's lawyer. [Emphasis added.]

Kinney v. Shinholser, 663 So. 2d 643 (Fla. Dist. App. 1995). Applying Florida malpractice standards, the court here upheld the dismissal of a complaint against the lawyer who drew a will for a married client which did not preserve the tax benefit of the testator's unified credit. The will gave the testator's entire residuary estate to a trust for the benefit of his widow, over which she was given a general power of appointment. In effect, the will caused the widow's estate to pay some estate tax that was avoidable had she not been given a general power of appointment. According to the court, there was no evidence of malpractice by the scrivener as the will did not indicate any intent to minimize taxes on the death of the surviving spouse. However, the court held that the complaint stated a cause of action by the decedent's son, the remainderman under the husband's will and the sole beneficiary of the wife's will, against the lawyer and the accountant who were retained by the surviving spouse to probate the will and prepare the federal estate tax return, for failing to advise her of the tax savings that would be achieved if she disclaimed the general power of appointment.

Dingle v. Dellinger, 134 So.3d 484 (Fla. App. 2014). Grantees of quitclaim deed that was later invalidated could sue the attorney who prepared the deed. The court noted that attorneys who represent a client in a property transfer are generally not liable to nonclients, because the transactions are typically two-sided, with different interests held by the parties. However, in this case the transaction was one-sided and the parties' interests did not conflict.

Brookman v. Davidson, 136 So.3d 1276 (Fla. App. 2014). In a case of first impression, the Florida court of appeals allowed a successor personal representative of an estate to bring a malpractice action against the attorney for the predecessor personal representative. The court relied on the state statute that gave a successor personal representative the same power and duty as the original personal representative.

Georgia:

Rhone v. Bolden, 608 S.E.2d 22 (Ga. App. 2004). Attorneys representing decedent's estate and attorneys who represented decedent's heirs in prosecuting wrongful death action have no fiduciary duty to an heir not included in the wrongful death action and, therefore, are not liable for legal malpractice in an action brought by the decedent's father who was not included in the settlement of the wrongful death claim. The decedent's father was clearly not the client of the attorneys prosecuting the wrongful death action. With respect to the duty of the lawyers for the administrator of the estate, the court observed:

> [T]he existence of a duty by the administrator to the heirs [to marshal and manage the estate assets and then distribute them properly to the heirs] does not translate into a duty by the administrator's lawyers to the heirs. While the estate may or may not ultimately pay the lawyer's fee, the lawyer's client is the administrator, not the estate.

Hawaii:

Blair v. Ing, 21 P.3d 452 (Haw. 2001). The beneficiaries of a trust brought legal malpractice action against the attorney who created the trust, alleging that attorney's negligence in drafting the trust caused adverse tax consequences that diminished their inheritance. In a case of first impression for that state, the Supreme Court of Hawaii held: Non-client beneficiaries have standing in legal malpractice action under both contract and negligence theories. In a testator-attorney relationship, the attorney is retained for the specific benefit of the named beneficiaries, thus the attorney owes the non- client beneficiaries a duty of care; 2) even where the testamentary instrument is valid on its face, extrinsic evidence will be allowed in a legal malpractice action to prove the testator's true intent; and 3) the statute of limitations for legal malpractice arising in the estate-planning context does not accrue at the time of drafting, but instead only begins to run when the plaintiff knew or reasonably should have known of the attorney's negligence.

Young v. Van Buren, 130 Haw. 349, 310 P.3d 1050 (Haw. App. 2010). Court rejected malpractice claims by son who claimed attorney who drafted trust amendments for his mother had negligently failed to ascertain that the client lacked competence to execute the documents and/or was being unduly influenced. Although the son was a residuary beneficiary of the trust, he remained so after the amendments; since he was not the intended beneficiary of the trust amendments, he was owed no duty by the lawyer for his mother.

Idaho:

Harrigfeld v. Hancock, 90 P.3d 884, 888 (Idaho 2004). The Supreme Court of Idaho adopted the rule set forth above in *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378 (Fla. 1993), holding that a testator owed limited duties to the testator's beneficiaries. The attorney owed a duty to include beneficiaries as requested by the testator and to have the instruments properly executed. The attorney did not owe any duty to individuals who believed they did not receive their fair share of the testator's estate.

Soignier v. Fletcher, 151 Idaho 322, 325, 256 P.3d 730, 733 (2011). The Supreme Court of Idaho reaffirmed the rule adopted in Harringfeld. Testator's will left a named beneficiary "[a]ll beneficial interests that I have in any trusts," even though testator's interest in his mother's trust had recently been distributed to him and he had no trust interests at the time his will was prepared

and executed. "Attorneys do not have to postulate whether a testator intended to do something other than what is expressed in the will….[and] attorneys have no ongoing duty to monitor the legal status of the property mentioned in a testamentary instrument."

Illinois:

Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984). The Supreme Court of Illinois here held that the beneficiaries under an allegedly negligently drafted will could sue the drafter directly in legal malpractice both under traditional negligence theory and third-party beneficiary/breach of contract theory given the plaintiffs' allegations that, among other things, the testators' purpose in employing the attorney was to draft the will not only for the benefit of the testators (plaintiffs' uncle and aunt) but for the benefit of the intended contingent beneficiaries.

Estate of Powell v. John C. Wunsch P.C., 989 N.E.2d 627 (Ill. App. 2013). Lawyer was hired by wife of decedent to pursue wrongful death claim. The statutory beneficiaries of the claim were the wife, and decedent's son and daughter. Lawyer was later sued by guardian of son, who was disabled, for not protecting the son's share of the settlement. Lawyer argued son was not a client but court held that lawyer owed a duty to all statutory beneficiaries in a wrongful death action.

Indiana:

Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988). The Supreme Court of Indiana here held that an action will lie by a beneficiary under an allegedly negligently drafted will against the attorney- drafter based on a known third-party beneficiary/breach of contract theory.

Ferguson v. O'Bryan, 996 N.E.2d 428 (Ind. App. 2013). Attorney was sued for malpractice by disappointed heirs. The testator had told the attorney she had a list of specific gifts for relatives, and that the residue would go to her alma mater. The attorney drafted the will referring to a separate list and leaving the residue to the school, and he gave her a form to use for the gifts. He told her it needed to be signed and dated but the form did not provide for a date and signature. After her death the form was found with a list of gifts but it was not signed. The court stated that drafting attorneys can be held liable to disappointed beneficiaries if they are known to the attorney, and held that even if attorney did not know who the intended beneficiaries were, he knew of their existence so he could be sued. A dissenting judge did not think knowledge of the testator's intent to prepare a list was enough to trigger liability.

Iowa:

Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987). The Supreme Court of Iowa here held that the lawyer drafting a will owes a duty of care to the direct, intended and specifically identifiable beneficiaries of the testator-client and that such a beneficiary has an action for legal malpractice against the attorney without regard to lack of privity.

New Hope Methodist Church v. Lawler & Swanson, P.L.C., 791 N.W.2d 710 (Iowa App. 2010). Beneficiaries of a trust who are owed notice by the personal representative are owed no duty of care by the lawyer for the personal representative and thus lack standing to sue the lawyer for negligently failing to provide notice.

Sabin v. Ackerman, 846 N.W.2d 835 (Iowa 2014). The lawyer represented a married couple and prepared for them a lease of their farm with option to purchase to their son. Couple died, leaving their estate to their 3 children and naming the daughter as executor. The lawyer represented the daughter as executor. Son exercised the option to purchase from the estate and the lawyer handled the transaction. The lawyer did not advise the daughter that the option might be invalid. The daughter and the other son later sued the son who purchased the farm, challenging the validity of the option, settled the claim and then sued the lawyer, claiming that he should have advised the daughter about the option or advised her to seek independent counsel. The court held the lawyer had no duty to advise daughter as to her claims as beneficiary.

Kansas:

Pizel v. Zuspann, 795 P.2d 42 (Kan. 1990), *modified on other grounds and reh'g denied*, 803 P.2d 205, *aff 'd sub nom. Pizel v. Whalen*, 845 P.2d 37 (Kan. 1993). The Supreme Court of Kansas here held that the lack of contractual privity between the potential beneficiaries under a testator's will and the attorney-drafter did not bar the beneficiaries' action for legal malpractice. The court applied the modified multifactor balancing test (first enunciated in California in *Biakanja v. Irving, supra*) in coming to this conclusion.

Kentucky:

Cave v. O'Bryan, 2004 WL 869364 (Ky. App. 2004). An intended beneficiary of a will may maintain a malpractice action against the testator's attorney alleging that the estate was not distributed according to the testator's intent. After acknowledging that the "clear trend" among courts in other jurisdictions is to hold that estate beneficiaries are intended to benefit from the services rendered by attorneys to their testator-clients, the court held that an attorney owes a "duty of care to the direct, intended, and specifically identifiable beneficiaries of the estate planning client, notwithstanding a lack of privity."

Branham v. Stewart, 307 S.W.3d 94, 101 (Ky. 2010). "[T]he attorney retained by an individual in the capacity as a minor's next friend or guardian establishes an attorney-client relationship with the minor and owes the same professional duties to the minor that the attorney would owe to any other client."

Pete v. Anderson, 413 S.W.3d 291 (Ky. 2013). Attorney was hired by surviving spouse to pursue a wrongful death action for death of husband. Husband was survived by spouse and two minor children. Case was dismissed and surviving spouse missed the deadline to sue for malpractice, so the two minor children filed the malpractice action. Attorney claimed that the children were not his clients because the proper party in a wrongful death action is the personal representative. Court discussed the history of the wrongful death statute and held, that because the real parties in interest were the beneficiaries and lawyer owed a duty to them, the minor children could maintain the suit. A dissent argued that allowing statutory beneficiaries to sue for malpractice could allow an estate beneficiary to sue the estate personal representative's attorney.

Louisiana:

Woodfork v. Sanders, 248 So.2d 419 (La. App. 1971), *cert denied*, 252 So.2d 455 (La. 1971). In this case the court rejected an attorney-drafter's privity defense in a legal malpractice action brought by a disappointed beneficiary and applied an intended third-party beneficiary/breach of contract theory.

Succession of Killingsworth, 270 So.2d 196 (La. App. 1972), *aff'd in part and rev'd in part*, 292 So.2d 536 (La. 1973). In this case the court permitted a legal malpractice action by a beneficiary not in privity with the attorney who acted as the officiating notary for execution of a will, basing its decision on a state statute permitting damages arising from "every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it."

Maryland:

Noble v. Bruce, 709 A.2d 1264 (Md. 1998). The Court of Appeals (Maryland's highest court) held that a testamentary beneficiary, who is not a client of the drafting lawyer, may not maintain a malpractice action against the lawyer for allegedly providing negligent estate planning advice to the testator or negligently drafting the testator's will in a manner which resulted in significant estate and inheritance taxes that could have been avoided, thus re-establishing the strict privity rule in Maryland.

Massachusetts:

Connecticut Junior Republic v. Doherty, 478 N.E.2d 735 (Mass. App. 1985), *review denied*, 482 N.E.2d 328 (Mass. 1985). In this case the court assumed that the attorney-drafter of a defective will could be held liable to the disappointed beneficiary but found no liability on the facts of this case since the testator had ratified the attorney's error.

Spinnato v. Goldman, 67 F. Supp. 3d 457 (D.Mass. 2014). The attorney represented an elderly woman who left her estate to Spinnato, a man she befriended, rather than her relatives in Texas with whom she had little contact. The attorney and Spinnato were co-executors of her estate. When she died, the attorney contacted the Texas relatives and told them a significant amount of assets were transferred to Spinnato by the deceased during her life and that the transfers were a result of Spinnato's undue influence. The attorney put them in touch with a Massachusetts lawyer and testified that the decedent lacked capacity and was subject to undue influence at the time the transfers were made. Spinnato settled with the relatives and sued the attorney. On a motion to dismiss, the court held that: (1) while decedent was alive, the attorney owed no duty to Spinnato and thus his failure to disclose concerns about undue influence to Spinnato during decedent's life was not actionable; (2) his testimony was protected by the absolute witness privilege and not actionable; (3) one co-executor does not owe duties to the other co-executor; (4) the attorney owed duties to Spinnato as heir, so those claims were not dismissed; (5) Spinnato's allegations that the attorney assured him during decedent's life that the estate plan and transfers were enforceable (thus keeping him from taking steps to ensure enforceability), and that those were false misrepresentations, were not dismissed; (6) Spinnato's allegations that the attorney's assurances after decedent's death that he would probate the will as written were false misrepresentations, were not dismissed; (7) Spinnato's claim of tortious interference with expectancy, based on alleged facts that attorney drafted the estate plan despite his concerns about undue influence, were not dismissed.

Michigan:

Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996). The Supreme Court of Michigan here held that, although a beneficiary named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by reason of the beneficiary's third-party beneficiary status, the attorney could not be held liable

to the testator's heirs for negligence inasmuch as the will in question fulfilled the intent of the testator *as expressed in the will*. (The will did not exercise the testator's power of appointment over her predeceased husband's marital trust, thereby permitting the testator's daughter, disinherited by the testator, to receive one- third of the assets held in the husband's trust.)

Sorkowitz v. Lakritz, *Wissbrun & Assoc., P.C.*, 683 N.W.2d 210 (Mich. App. 2004). Non-client estate beneficiaries may maintain a malpractice action against the attorneys who drafted estate planning documents on the ground that they rendered inadequate advice about tax consequences. The court departed from prior Michigan precedent (see *Mieras v. DeBona, supra*) and allowed the beneficiaries here to use extrinsic evidence to show that the attorney's negligence in omitting a common tax savings clause from the estate planning documents had thwarted the testator's intent.

Charfoos v. Schultz, 2009 Mich. App. LEXIS 2313, 2009 WL 3683314 (Mich. App. 2009). This is a malpractice case brought by the disinherited children of decedent who allege lawyer committed malpractice by drafting the offending will and trust amendment which bequeathed 70% of his estate to his surviving wife rather than to the children, even though lawyer knew their father was mentally incompetent. First, court held that in Michigan, the testator's intent to provide for the beneficiaries alleging malpractice must appear on the face of the will, which it did not. Second, Rule 1.14 does not provide a standard for civil liability. Summary judgment for the lawyer.

Minnesota:

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981). In this malpractice case the court applied the California *Biakanja, supra,* multifactor balancing test in a case involving the alleged negligent drafting of a joint tenancy deed but found no liability since plaintiff failed to prove he was the direct and intended beneficiary of the lawyer's services.

Missouri:

Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. 1995). In this malpractice case the Supreme Court of Missouri aligned Missouri's law with the majority rule in holding that lack of privity was not a defense to an action for alleged malpractice in the drafting of a testamentary instrument.

Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C., 958 S.W.2d 42 (Mo. App. 1997). Applying Missouri's recently adopted "modified balancing test" as enunciated in *Donahue, supra*, the court directed the trial court on remand to determine whether or not the decedent, in employing the defendant estate planning attorney, intended to benefit the non-client/beneficiary. The court noted that the lawyer, who had prepared a total amendment and restatement of an existing trust instrument, could be held responsible for the entire instrument's contents even though large portions of the instrument were simply copied, verbatim, from the original trust document.

Montana:

Stanley L. and Carolyn M. Watkins Trust v. Lacosta, 92 P.3d 620 (Mont. 2004). The court ruled that it was a factual question, precluding summary judgment, whether non-client will and trust beneficiaries had standing to bring a legal malpractice action against the attorney who drafted the decedent's estate planning documents. The court also ruled that the statute of limitations for

bringing the action did not begin to run until a claim was brought that jeopardized the validity of the documents.

Harrison v. Lovas, 356 Mont. 380, 383, 234 P.3d 76 (2010). Parents contacted lawyer to discuss giving larger trust shares to three of their children. The lawyer informed the clients she was waiting on additional information to complete the changes, but the parents did not follow up and died a few years later without making the changes. The children who would have received the larger shares sued the lawyer for malpractice, but the court held that the lawyer owed no duty to the children. Whether a drafting attorney owes a duty to named beneficiaries is a factual issue, and here there was no clear indication that the parents intended to go through with the changes.

Nebraska:

Lilyhorn v. Dier, 335 N.W.2d 554 (Neb. 1983). The court here held that the beneficiary's lack of privity with the attorney-drafter barred an action for negligence in the preparation of the will.

Perez v. Stern, 279 Neb. 187, 198, 777 N.W.2d 545, 554 (2010). Unlike *Lilyhorn*, where the estate planner owed no duty to a potential will beneficiary, a lawyer hired by the personal representative to prosecute a wrongful death claim on behalf of the decedent's children as statutory beneficiaries does owe them a duty "as direct and intended beneficiaries of her services, to competently represent their interests."

New Hampshire:

Simpson v. Calivas, 650 A.2d 318, 323-324 (N.H. 1994). This decision reverses the dismissal of a malpractice action against the scrivener of a will, who was charged with failing to draft a will that expressed the decedent's intent to leave all of his land to plaintiff. "We hold that where, as here, a client has contracted with an attorney to draft a will and the client has identified to whom he wishes his estate to pass, that identified beneficiary may enforce the terms of the contract as a third-party beneficiary."

Sisson v. Jankowski, 148 N.H. 503, 809 A.2d 1265 (2002). Lawyer had drafted estate planning documents for a client suffering from cancer and had taken them to him at a nursing home for execution. The client decided at that time, however, that he wanted a contingent beneficiary in his will. Rather than write in the addition, or make the change and return that day, the lawyer took the documents back to her office and returned with them 3 days later when she concluded client was incompetent to execute them. Client died intestate and the intended beneficiary sued the lawyer for negligence. The court held that the estate planner owed no duty to the intended beneficiary ensure the will was executed promptly.

New Jersey:

Rathblott v. Levin, 697 F. Supp. 817, 820 (D.N.J. 1988). Here a federal court, applying New Jersey law, held that an attorney, whose alleged negligence in drafting a will caused the will's beneficiary to deplete the estate's assets in successfully defending a will contest, could be liable to the beneficiary for malpractice despite the lack of privity. In answer to the defendant lawyer's argument that cases from the majority of jurisdictions finding liability for negligence in will drafting should not be extended to the facts of this case, where the beneficiary had successfully defended a contest to the will, the court observed:

> [W]e are unable to see a valid legal difference between a plaintiff who loses the right to one-half of an estate and a plaintiff who loses one-half of an estate in protecting her rights. If either was caused by an attorney's negligence in drafting, that attorney should be liable.

Lovett v. Estate of Lovett, 593 A.2d 382, 387 (N.J. Super. 1991). This case involved various charges of misconduct by a lawyer in connection with the preparation of a will, including a failure to meet with the husband-testator out of the presence of his second wife who would receive a share of his estate outright under the new will rather than in trust for her; a failure to counsel the client adequately with respect to tax matters; and a failure to obtain information regarding the husband's assets. Although the charges were rejected by the court, it stated that, "[i]n most circumstances, meeting with a client alone would be well advised." A failure to counsel the client in detail regarding the tax consequences was permissible because the client had indicated that he was not interested in them. In addition, the court observed that obtaining information regarding a client's assets "in most cases, is important to the formulation of an adequate testamentary disposition."

Estate of Albanese v. Lolio, 923 A.2d 325 (N.J. Super. 2007). Where retainer agreement between personal representative and law firm purported to be between the firm and the client "individually and as executrix," this was enough to defeat summary judgment entered by the trial court on the malpractice claim brought by the personal representative for damages she allegedly suffered as beneficiary. "[She] may have had a reasonable expectation of representation as an `individual' as well as executrix." Summary judgment against her co-beneficiary sisters, however, was affirmed as no duty was owed them.

New York:

Maneri v. Amodeo, 238 N.Y.S.2d 302 (1963). The court here upheld the privity defense in an action for legal malpractice and specifically rejected the California approach.

Viscardi v. Lerner, 510 N.Y.S.2d 183 (App. Div. 1986). The court here described the privity rule as "firmly established" in New York and to be applied to bar actions for legal malpractice by non- clients absent fraud, collusion, malice or other "special circumstances."

Leff v.Fulbright & Jaworski LLP, 78 A.D.3d 531, 911 N.Y.S.2d 320 (App. Div. 2010). Law firm represented a husband and wife (his third wife) for estate planning, but separately. When husband died, an agreement was found that required him to leave half his estate to a son from prior marriage. His wife sued the law firm, alleging law firm should have known about and discussed the agreement with husband, and that he would have devised a way to give her a larger share of the estate than she received had he known of the obligation to the son. The court held that the wife had no privity with law firm with respect to her husband's estate plan, and under New York's privity rule, she could not sue for malpractice. "Plaintiff's subjective belief that she had engaged in joint estate planning or was jointly represented with her late husband is insufficient to establish such privity…. There is no evidence that [law firm] knew and intended that their advice to plaintiff's late husband was aimed at affecting plaintiff's conduct or was made to induce her to act. Nor is there evidence that plaintiff relied upon defendants' advice to her detriment. Significantly, the standard is not satisfied when the third party was only `incidentally or collaterally' affected by the advice." (This case was decided after *Schneider*, noted below, and that case was distinguished). Note that these Commentaries caution that separate representation of H and W is "generally

inconsistent with the lawyer's duty of loyalty to each client." Commentaries, MRPC 1.7 "Joint or Separate Representation." Leff may present a requirement that clients be informed in advance of the separate representation of the effect of lack of privity in jurisdictions that restrict a beneficiary's right to sue a drafting attorney.

Estate of Schneider v. Finmann, 15 N.Y.3d 306 (2010). Lawyer allegedly gave client bad advice regarding titling of life insurance, causing life insurance to be included in client's taxable estate. The New York court relaxed its strict privity rule and held that the executor of the estate could sue for malpractice. See the New York Bar ethics opinion issued in response to *Schneider* case.

Steinbeck v. Steinbeck Heritage Foundation, 400 Fed. Appx. 572 (2d. Cir. 2010). In a longstanding dispute among the Steinbeck heirs over copyright interests in the author's works, the court held that deceased author's son could not claim an attorney-client relationship with lawyers who worked for the literary agency simply because they held themselves out as copyright experts, told him they had his best interests in mind, and expressed sympathy for him, particularly in light of the fact that son was represented by other counsel at the time. His claim for breach of fiduciary duty against the literary agency on this basis therefore failed.

North Carolina:

Babb v. Bynum & Murphrey, PLLC, 182 N.C. App. 750, 643 S.E.2d 55 (N.C. App. 2007). Beneficiary/co-trustee brought a malpractice claim against partner and law firm of another lawyer who served as a co-trustee for failure to monitor the trustee lawyer's conduct. The trustee lawyer was alleged to have engaged in fraud, conversion and embezzlement of trust funds. Court rejected the plaintiff's theories that defendants owed plaintiff a duty to monitor under either the state limited liability act or the law firm's operating agreement.

Ohio:

Shoemaker v. Gindlesberger, 118 Ohio St. 3d 226, 887 N.E.2d 1167 (2008). Under Ohio's strict privity rule, estate legatees have no standing to sue their mother's estate planner for malpractice. The estate planner assisted the decedent to transfer a life estate in a farm to one of her children allegedly without advising her of the tax consequences, thus shifting substantial tax liabilities to estate. Ohio is one of the minority of jurisdictions holding that lack of privity is a valid defense to a disappointed beneficiary's action against a lawyer for negligent drafting of a will. In this case, the court refused to relax the privity requirement announced in *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987). In general, the only exception is for "fraud, bad faith, collusion or other malicious conduct." However, see *Elam v. Hyatt Legal Services*, discussed in the Annotations following the ACTEC Commentary on MRPC 1.2.

Estate of Barney v. Manning, 2011 Ohio 480 (Ohio App. 2011). Lawyer who was serving as executor of estate and successor trustee misappropriated funds. The clients sued the law firm for malpractice, but the court affirmed dismissal of the case. The law firm did not know of the lawyer's misconduct, the lawyer's actions were beyond the scope of his employment and the lawyer's actions were not "calculated to promote the employer's business," so there was no liability under *respondeat superior* or agency law.

Oklahoma:

Hesser v. Central Nat'l Bank, 956 P.2d 864 (Okla. 1998). Joining the majority of jurisdictions that permit a lawsuit for alleged negligent will drafting by a disappointed beneficiary, the court here applied the third-party/intended beneficiary contract theory to permit a suit for malpractice by the intended beneficiary of a will that the testator's lawyer allegedly failed to have properly executed.

Oregon:

Hale v. Groce, 744 P.2d 1289 (Or. 1987). The court here held that a malpractice action for negligence in the drafting of a will sounds under both tort and contract theories.

Pennsylvania:

Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). Criticizing California's multifactor balancing test as too broad, the Supreme Court of Pennsylvania here applied a third-party beneficiary contract theory in permitting a suit by the intended beneficiaries of a negligently drafted will against the attorney- drafter. The court observed that the contract between the testator and attorney must be for the drafting of a will that clearly manifests the intent of the testator to benefit the legatees who are the intended beneficiaries of the contract and are named in the will.

Gregg v. Lindsay, 649 A.2d 935, 940 (Pa. Super. 1994), *appeal denied*, 661 A.2d 874 (1995). This decision reversed a judgment entered on a jury verdict that the lawyer's failure to see that a client's will was executed constituted a breach of a third-party beneficiary contract. The lawyer prepared a new will on the same day that a friend of the decedent told the lawyer of the client's wish to execute a new will that made the friend the principal beneficiary. When the lawyer took the will to the hospital for execution, the client said it was acceptable. However, as no witnesses were available, it was not signed. The lawyer agreed to change the name of a charitable beneficiary designated in the will and bring it back the following day for execution. The client was moved to another hospital, where he died the next day. The court stated:

> To hold otherwise, under the circumstances of this case, would open the doors to mischief of the worst type. To permit a third person to call a lawyer and dictate the terms of a will to be drafted for a hospitalized client of the lawyer and to find therein a contract intended to benefit the third person caller, even though the will was never executed, would severely undermine the duty of loyalty owed by a lawyer to the client and would encourage fraudulent claims.

Jones v. Wilt, 871 A.2d 210 (Pa. Super. 2005). Surviving spouse had standing as beneficiary to sue his deceased wife's estate planner for malpractice, but not as executor because he could not show harm to the estate. Nonetheless, his claim that estate planner was negligent for failing to advise the decedent of the value of using a QTIP trust and/or other means of saving estate and inheritance taxes failed because it lacked foundation: there was no evidence that testator wanted to minimize taxes or that she wanted her surviving husband to receive the use of the assets which she gave to her sister under an *inter vivos* trust.

South Carolina:

Argoe v. Three Rivers Behavioral Center, 697 S.E.2d 551 (S.C. 2010). An attorney-in-fact hired a lawyer to assist with the principal's (his mother's) incapacity. She had allowed a loan

against a condominium to go into default. The principal was unhappy with some of the things her attorney-in-fact son had the lawyer do for him and sued the lawyer on several claims, including malpractice. The court held that the principal was not the client of the lawyer and so lacked standing to sue the lawyer for her attorney-in-fact.

Fabian v. Lindsay, 410 S.C. 475 (2014). The Supreme Court of South Carolina held that an intended beneficiary named in a will or trust may sue the drafting attorney for faulty drafting. The court limited the action to beneficiaries named or otherwise identified by status in the document but held that extrinsic evidence was admissible to establish the decedent's intent.

South Dakota:

Persche v. Jones, 387 N.W.2d 32 (S.D. 1986). In this case a bank and its president who drafted and supervised the execution of wills and a codicil resulting in the documents' invalidity were held liable both in negligence and for the unauthorized practice of law.

Friske v. Hogan, 698 N.W.2d 526 (S.D. 2005). South Dakota here joins the vast majority of states rejecting the rule that the lack of contractual privity between a testator's lawyer and the beneficiaries bars an action for legal malpractice against the attorney. The court found that the privity rule does not apply where it can be shown that the nonclient was the direct, intended beneficiary of the lawyer's services to the testator. The court cites favorably to the Restatement (Third) of the Law Governing Lawyers §51(3) (2000).

Tennessee:

Akins v. Edmondson, 207 S.W.3d 300 (Tenn. App. 2006). This was an unsuccessful malpractice claim brought by a former attorney-in-fact (AIF) operating under a power of attorney against a law (and an accounting) firm which advised the principal. The AIF, who was also an attorney at law, was also the beneficiary of her principal's farm under the principal's will. Acting under the Power of Attorney, the AIF hired an accounting firm to provide tax and estate planning advice and the accountants recommended a limited partnership be established with the principal as the general partner and the AIF as the limited partner. The principal accepted this advice, and a law firm was hired to draft the limited partnership agreement, which it did. It provided the agreement to the principal who executed it on the advice and assistance of her personal attorney. The farm was transferred into the partnership, in which the AIF had only an 8.5% interest, thus rendering the testamentary gift of the farm to the AIF adeemed. After the principal died, and the AIF discovered the ademption, she brought this malpractice claim against the accounting firm and the law firm claiming to have been a co-client or at least an intended beneficiary of the services. The court rejected the AIF's standing to bring the malpractice claim because all services were provided to her principal, not to her personally; so she was not a client. It also rejected her claim that the firm had provided false information to the principal on which the AIF was expected to rely, finding the record devoid of any evidence of such false information supplied by the law firm. Finally, the court rejected a claim that the accounting firm had engaged in the unauthorized practice of law in providing the estate planning advice it did, and that the law firm had assisted this unauthorized practice. The unauthorized practice action was time barred, said the court, and breach of the Rules of Professional Conduct does not provide a private cause of action.

Texas:

Barcelo v. Elliott, 923 S.W.2d 575, 579-580 (Tex. 1996). The Supreme Court of Texas here reaffirms the application of the strict privity rule to bar an action for legal malpractice brought

by the beneficiaries under an allegedly negligently drafted trust against the attorney-drafter. One of the dissenting Justices in this 4-3 decision noted:

> With an obscure reference to "the greater good" [citation omitted], the Court unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing, and unjustly denies legal recourse to the grandchildren for whose benefit [Testator] hired a lawyer in the first place….
>
> By refusing to recognize a lawyer's duty to beneficiaries of a will, the Court embraces a rule recognized in only four states, [footnote omitted] while simultaneously rejecting the rule in an overwhelming majority of jurisdictions. [Footnote omitted] Notwithstanding the fact that in recent years the Court has sought to align itself with the mainstream of American jurisprudence, [footnote omitted] the Court inexplicably balks in this case.

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006). Having rejected in *Barcelo* (above) the rule followed in the "overwhelming majority of jurisdictions" that allows intended beneficiaries to sue a decedent's estate planners for legal malpractice, the Supreme Court of Texas decided here whether the decedent's executor had standing to do so. This was a malpractice case brought by the executors of the estate of their father against his estate planners, alleging that their negligence caused the estate to incur $1.5 million in taxes that could have been avoided by competent estate planning. The Court holds that the claim for legal malpractice accrued during the decedent's life and survived to his estate; therefore, the executors were entitled to pursue the survival claim against the decedent's lawyers. Thus, contrary to the concern of the dissenters in *Barcelo*, the estate planners are not insulated from the consequences of their malpractice.

Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009). This was a malpractice case brought by the executor of an estate (O'Donnell) against the law firm (Smith) that advised the executor's decedent (Corwin) in his role as executor of his deceased wife's estate. The Supreme Court of Texas holds here that the executor is in privity with his decedent and may bring this malpractice claim against the decedent's lawyer who advised him as executor for his wife's estate. The case thus extends the holding of *Belt* (above) by concluding that, not only do the decedent's claims for malpractice in estate planning survive to his executor, but so also do other legal malpractice claims that arise outside the estate planning context. At issue was the law firm's advice to Corwin, when he was executor for his deceased wife's estate, about the dangers of mischaracterizing community property as separate property and thus excluding it from his wife's estate. The law firm had assisted the decedent in filing tax returns which took the position (alleged to be a mischaracterization) that certain oil stock was the separate property of Corwin rather than the community property of Corwin and his wife. After both had died, their children as beneficiaries of their mother's estate sued Corwin's estate for this mischaracterization and Corwin's executor (O'Donnell) settled their claims for almost $13 million. The Court allowed his malpractice claim against Corwin's law firm to proceed.

Virginia:

Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989). In this action brought by a decedent's grandchildren against the decedent's estate planning attorney for alleged negligence, the court held that lack of privity barred any cause of action in tort and the plaintiffs' allegations based on a third-party beneficiary contract theory were insufficient to confer standing to sue since the plaintiffs

failed to show that they were "clearly intended" beneficiaries of testator's contract with the law firm.

Rutter v. Jones, Blechman, Woltz & Kelly, 568 S.E.2d 693 (Va. 2002). Virginia, one of the very few "privity" jurisdictions left in the country whose courts hold that no intended beneficiary may sue the decedent's estate planning lawyer for alleged negligence when the testator's estate plan fails to achieve its intended purposes as a result of the estate planner's alleged negligence, retains its consistent approach to this issue. Here it refused to permit the personal representative of a decedent's estate (clearly "in privity" with the estate planning lawyer) to bring a negligence action for an estate planning lawyer's alleged failure to properly plan to avoid otherwise clearly avoidable estate taxes by holding that, since the action for malpractice did not arise until after the client had died, the personal representative (limited under Virginia law to bringing only actions that arose before death) could present no viable claim for malpractice.

Washington:

Ward v. Arnold, 328 P.2d 164 (Wash. 1958). In this malpractice action the court found an attorney liable for breach of contract where the beneficiary had employed the defendant attorney to draw a will for her husband, and the will was defective.

Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994). In this decision the Supreme Court of Washington holds that the California *Biakanja v. Irving*, *supra*, multifactor balancing test should be applied in determining whether the beneficiary of a decedent's estate may bring an action against the lawyer who represented the executor in her fiduciary capacity. It modified that test, however, by making the "intent to benefit" factor a critical threshold inquiry. "After analyzing our modified multifactor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries."

Estate of Deigh v. Perkins, 2006 Wash. App. LEXIS 2160, 2006 WL 2895073 (Wash. App. 2006) (unpublished). This was a malpractice claim against the lawyer for a discharged, predecessor executor. The successor executor of Deigh's estate sued the lawyer retained by the predecessor executor (plaintiff's sister) for malpractice after predecessor executor/sister settled the claims her sister/successor executor had made against her for breach of fiduciary duty and, as part of the settlement, had assigned her malpractice claim against her lawyer to the estate. The court held that the successor executor had no standing to sue the predecessor executor's lawyer for malpractice because the lawyer hired by the executor owed duties to the executor not to the estate. Under Washington law, adversaries may not assign malpractice claims to one another. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 291, 67 P.3d 1068 (2003). The court conceptualized this assignment as one between adversaries since it was done by the predecessor executor to escape personal liability. The court dismissed the claims against the lawyer on summary judgment for lack of standing.

Linth v. Gay, —P.3d—, 2015 WL 5567050 (Wash. App. 2015). Relying on *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013), the court held that an estate planner does not owe a duty to an intended beneficiary to make sure a critical document was attached to a trust prepared for and executed by the decedent. Relying on *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), the court also held that the same attorney, while serving as attorney for the personal representative after trustor's death, did not owe a duty to the same beneficiary.

Wisconsin:

Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983). The court here applied the California *Biakanja v. Irving, supra*, multifactor balancing test) in permitting an action by disappointed beneficiaries against the drafter of an allegedly defective will.

Anderson v. McBurney, 467 N.W.2d 158 (Wis. App. 1991). In this case the decedent's only child was omitted from the will drafted by an attorney to whom the decedent gave his estate. The attorney's law firm represented the attorney as executor, and the lawyer filed an affidavit with the court incorrectly stating that the decedent had no heirs. The child's guardian sued the attorneys for negligence in failing to discover her status as a pretermitted heir. The court affirmed the dismissal of the child's claim holding that, under Wisconsin's intended third-party beneficiary/breach of contract test, the child lacked standing to sue.

Ethics Opinions

ABA:

ABA Op. 08-51 (2008). "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them. In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer 's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5."

Pennsylvania:

Philadelphia Bar Op. 2013-6 (1/13). Client is in a coma and near death. Lawyer had prepared a power of attorney naming friend as agent, and a will leaving the estate primarily to charity and naming lawyer as executor. Lawyer has just learned that the client placed her financial accounts into JTWROS with friend, with assistance from financial advisor. Friend states that the reason was to facilitate the friend paying bills. The lawyer: (a) must try to communicate with client to determine if client intended to give the accounts to friend at death, and if so, take no other action; (b) if unable to determine client's intent, may notify the state attorney general if the lawyer believes consistent either with competent representation of client while alive or with gathering estate assets as executor, provided that during client's life lawyer must limit disclosure to only information as is necessary to effectuate the client's intent, under 1.6(a) and 1.14.

Op. 2014-300. This opinion examines an attorney's ethical responsibilities as they relate to social media. On the issue of competence, it concludes that "a lawyer should (1) have a basic knowledge of how social-media websites work and (2) advise clients about the issues that may arise as a result of their use of these websites."

MRPC 1.6: CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  (1) to prevent reasonably certain death or substantial bodily harm;
  (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
  (4) to secure legal advice about the lawyer's compliance with these Rules;
  (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  (6) to comply with other law or a court order.
  (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ACTEC COMMENTARY ON MCRP 1.6

Legal Assistants, Secretaries and Office Staff. In the absence of express contrary instructions by a client, the lawyer may share confidential information with members of the lawyer's office staff to the extent reasonably necessary to the representation. As indicated in MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants), the lawyer is required to assure that staff members respect the confidentiality of clients' affairs. The lawyer should "give such assistants appropriate instructions concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product." Comment to MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Consultants and Associated Counsel. The lawyer should obtain the client's consent to the disclosure of confidential information to other professionals. However, the lawyer may be impliedly authorized to disclose confidential information to other professionals and business consultants to the extent appropriate to the representation. Thus, the client may reasonably anticipate that a lawyer who is preparing an irrevocable life insurance trust for the client will discuss the client's affairs with the client's insurance advisor. Additionally, in order to satisfy the lawyer's duty of competence, the lawyer may, without the express consent of the client, consult with another professional regarding draft documents or the tax consequences of particular actions, provided that the client's identity and other confidential information is not disclosed. In such a case the lawyer is responsible for payment of the consultant's fee. As indicated in the ACTEC

Commentary on MRPC 1.1 (Competence), with the client's consent, the lawyer may associate other professionals to assist in the representation.

Preserving Confidentiality. A lawyer must make reasonable efforts to prevent inadvertent or unauthorized disclosure of or unauthorized access to client confidences. If a lawyer has "outsourced" legal work to lawyers or non-lawyers who are independent contractors in this country or abroad, the same duty to make reasonable efforts to protect confidentiality applies. Particular care should be taken to ensure that electronic storage sites and transmission methods provide adequate protection for the confidentiality of any client information entrusted to them. Security measures should always be used when transmitting confidential information, and, depending on the specific needs and instructions of the client, greater security measures may be required in some cases. The duty to protect client confidences extends to protecting information stored electronically on storage devices such as computers, copy machines, smart phones and flash drives, as well as on remote storage devices provided by third-party vendors ("in the cloud").

The duty to preserve confidences also extends to the situation where a lawyer has received client confidences relating to another firm's client that the recipient lawyer believes were not intentionally transmitted to the recipient lawyer by the client or the firm retained by the client. In such a situation, the lawyer has a duty to notify the sender. See MRPC 4.4(b) (Respect for Rights of Third Persons). Whether the recipient lawyer may use the confidences thus transmitted is not addressed in the Model Rules, but may be addressed by the law of a particular jurisdiction.

Implied Authorization to Disclose. The lawyer is also impliedly authorized to disclose otherwise confidential information to the courts, administrative agencies, and other individuals and organizations as the lawyer believes is reasonably required by the representation. A lawyer is impliedly authorized to make arrangements, in case of the lawyer's death or disability, for another lawyer to review the files of his or her clients. As stated in ABA Formal Opinion 92-369 (1992), "[r]easonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded."

A lawyer has no implied authority to disclose client confidences in the context of electronic bulletin boards, social media, continuing legal education seminars or similar public forums where persons from outside the lawyer's firm may be participating. The prohibition on disclosure includes information that could reasonably lead to the discovery of confidential information. Thus, a lawyer may use a hypothetical to discuss issues relating to a representation only so long as there is no reasonable likelihood that others on the public forum will be able to ascertain the identity of the client or the situation involved.

Whether there is implied authority to disclose information related to a representation that is generally known is unclear. There is no such exception expressly stated in MRPC 1.6. As to former clients, MRPC 1.9(c) states that a lawyer may use information to the disadvantage of the former client if the information has become generally known. The Restatement of the Law Governing Lawyers defines "confidential client information" more narrowly than the model rules, excepting from the concept "information that is generally known." See Restatement section 59. But even the Restatement adds the caveat that "the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public… Information is not generally known when a person interested in knowing

the information could obtain it only by means of special knowledge or substantial difficulty or expense." Section 59, cmt. d.

Other Rules Affecting a Lawyer's Duty of Confidentiality. There are other rules that may impact the lawyer's duties regarding a client's confidential information. For example, see IRC Section 7525 (confidentiality privileges relating to taxpayer communications with federally authorized tax practitioners), Treasury Department Circular 230 (e.g., 31 C.F.R. 10.20 and 10.26(b)(4)), and MRPC 1.6(b)(6) (right to disclose when required by other law). See also MRPC 1.6(b)(2).

Obligation After Death of Client. In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. The personal representative or client may also authorize disclosure of other confidential information learned during the representation if there is a need for that information. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

Disclosures to Client's Agent. If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client's affairs, the attorney-in-fact often will ask the lawyer for copies of the client's estate planning documents in order to manage the client's assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney's duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client's preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request if, after considering the specific circumstances and the specific information being requested by the attorney-in-fact, the attorney reasonably concludes that disclosure is impliedly authorized to carry out the purpose of the representation of the client. Or, of course, the power of attorney could specifically authorize the disclosure.

Protection Against Reasonably Certain Death or Substantial Bodily Harm. A lawyer may reveal information insofar as the lawyer believes it reasonably necessary to prevent reasonably certain death or substantial bodily harm. Estate planning clients may disclose to their lawyer that they intend to do injury to themselves: they may be engaged in estate planning, for example, because they are planning suicide and they may disclose this. Such a client may be of diminished capacity. See MRPC 1.14 (Client with Diminished Capacity). But one need not be of diminished capacity to contemplate suicide, for example, if one has contracted a debilitating disease which has radically reduced one's quality of life. An estate planner who encounters this situation is not required to disclose the plan under the model rules, and may well conclude that it is the client's well-considered and rational decision. But a lawyer may nonetheless reasonably conclude, given

the specific facts of a client's situation, that the client should be prevented from carrying through on the plan. The model rule entrusts to the lawyer discretion to make this very difficult decision.

Disclosures by Lawyer for Fiduciary. The duties of the lawyer for a fiduciary are affected by the nature of the client and the objectives of the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Special care must be exercised by the lawyer if the lawyer represents the fiduciary generally and also represents one or more of the beneficiaries of the estate or trust.

As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the estate or trust. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the estate or trust may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. It should be noted that the evidentiary attorney-client privilege is in some jurisdictions subject to the so-called fiduciary exception, which provides generally that a trustee cannot withhold attorney-client communications from the beneficiaries of the trust if the communications related to exercise of fiduciary duties. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011); Restatement (Third) of the Law Governing Lawyers §84 (2000).

In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. See MRPC 3.3(c) (Candor Toward the Tribunal), which requires disclosure to the court "even if compliance requires disclosure of information otherwise protected by MRPC 1.6." In addition, the lawyer may not knowingly provide the beneficiaries or others with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communication with Person Represented by Counsel; and Dealing with Unrepresented Person).

Disclosure of a Fiduciary's Commission of, or Intent to, Commit a Fraud or Crime. When representing a fiduciary generally, the lawyer may discover that the lawyer's services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.

Whether a given financial loss to a beneficiary is a "substantial injury" will depend on the facts and circumstances. A relatively small loss could constitute a substantial injury to a needy beneficiary. Likewise, a relatively small loss to numerous beneficiaries could constitute a

substantial injury. In determining whether a particular loss constitutes a "substantial injury," lawyers should consider the amount of the loss involved, the situation of the beneficiary, and the non-economic impact the fiduciary's misconduct had or could have on the beneficiary.

In the course of representing a fiduciary, the lawyer may be required to disclose the fiduciary's misconduct under the substantive law of the jurisdiction in which the misconduct is occurring. For example, the elder abuse laws of some states require a lawyer who discovers the lawyer's conservator/client has embezzled money from an elderly, protected person to disclose that information to state agencies, even though the lawyer's services were not used in conjunction with the embezzlement. Under such circumstances, MRPC 1.6(b)(6) ("to comply with other law") would authorize that disclosure.

Example 1.6-1. Lawyer (L) was retained by Trustee (T) to advise T regarding administration of the trust. T consulted L regarding the consequences of investing trust funds in commodity futures. L advised T that neither the governing instrument nor local law allowed the trustee to invest in commodity futures. T invested trust funds in wheat futures contrary to L's advice. The trust suffered a substantial loss on the investments. Unless explicitly or implicitly required to do so by the terms of the representation, L was not required to monitor the investments made by T or otherwise to investigate the propriety of the investments. The following alternatives extend the subject of this example:

L, in preparing the annual accounting for the trust, discovered *T*'s investment in wheat futures and the resulting loss. *T* asked *L* to prepare the accounting in a way that disguised the investment and the loss. *L* may not participate in a transaction that misleads the court or the beneficiaries with respect to the administration of the trust—which is the subject of the representation. *L* should attempt to persuade *T* that the accounting must properly reflect the investment and otherwise be accurate. If *T* refuses to accept *L*'s advice, *L* must not prepare an accounting that *L* knows to be false or misleading. If *T* does not properly disclose the investment to the beneficiaries, in some states *L* may be required to disclose the investment to them. In others, it may be permitted under MRPC 1.6(b)(3) or other exceptions to the duty of confidentiality. In states that neither require nor permit such disclosures, the lawyer should resign from representing *T*.

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

Conditioning Appointment of Fiduciary on Permitting Disclosure. A lawyer may properly assist a client by preparing a will, trust or other document that conditions the appointment of a fiduciary upon the fiduciary's agreement that the lawyer retained by the fiduciary to represent the fiduciary with respect to the estate or trust may disclose to the beneficiaries or an appropriate court

any actions of the fiduciary that might constitute a breach of trust. Such a conditional appointment of a fiduciary should not increase the lawyer's duties other than the possible duty of disclosing misconduct to the beneficiaries. If the lawyer retained pursuant to such an appointment learns of acts or omissions by the fiduciary that may, or do, constitute a breach of trust, the lawyer should call them to the attention of the fiduciary and recommend that remedial action be taken. Depending upon the circumstances, including the nature of the actual or apparent breaches, their gravity, the potential that the acts or omissions might continue or be repeated, as well as the actual or potential injury suffered by the estate or trust or the beneficiaries, the lawyer for the fiduciary whose appointment has been so conditioned may properly disclose to the designated persons and to the court any actions of the fiduciary that may constitute breaches of trust even if such disclosure might not have been required or permitted absent the agreement.

Client Who Apparently Has Diminished Capacity. As provided in MRPC 1.14 (Client with Diminished Capacity),a lawyer for a client who has, or reasonably appears to have, diminished capacity is, in most jurisdictions, authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity), ABA Inf. Op. 89-1530 (1989), and *Restatement (Third) of the Law Governing Lawyers*, §§24, 51 (2000). In such cases, where permitted by the jurisdiction, the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client's condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client's interests [MRPC 1.14(c) (Client with Diminished Capacity)]. Note that California does not permit the lawyer to take action without the client's consent.

Prospective Clients. A lawyer owes some duties to prospective clients including a general obligation to protect the confidentiality of information obtained during an initial interview. See Restatement (Third) of the Law Governing Lawyers, §§15, 60 (2000). Under MRPC 1.18(b) (Duties to Prospective Clients), even though a lawyer-client relationship does not result from the initial consultation, the lawyer "shall not use or reveal information learned in the consultation, except as MRPC 1.9 would permit with respect to information of a former client." In addition, a lawyer who is not retained may be disqualified from representing a party whose interests are adverse to the prospective client in the same or a substantially related matter. See ACTEC Commentary on MRPC 1.18 (Duties to Prospective Client).

Joint and Separate Clients. Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent both spouses, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of any inherently adversarial contract (e.g., a marital property agreement) which is not subject to

rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly, but the law is unclear as to whether all information must be shared between them. As a result, an irreconcilable conflict may arise if one co-client shares information that he or she does not want shared with the other (see discussion below). Absent special circumstances, the co-clients should be asked at the outset of the representation to agree that all information can be shared. The better practice is to memorialize the clients' agreement and instructions in writing, and give a copy of the writing to the client.

Multiple Separate Clients. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, this may be permissible if the lawyer reasonably concludes he or she can competently and diligently represent each of the clients. Some estate planners represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients in related matters should do so with care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. For example, without disclosing a confidence of one estate planning client who is the parent of another estate planning client and whose estate plan differs from what the child is expecting, the lawyer may have difficulty adequately representing the child/client in his or her estate planning because of the conflict between the duty of confidentiality owed to the parent and the duty of communication owed to the child. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients), example 1.7.1a. Within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. Changed circumstances may, however, create a non-waivable conflict under MPRC 1.7 (Conflict of Interest: Current Clients) and require withdrawal even if the clients consented. See *Hotz v. Minyard*, 403 S.E.2d 634 (S.C. 1991) (discussed in annotations). The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

Confidences Imparted by One Joint Client. As noted earlier, except in special circumstances, joint clients should be advised at the outset of the representation that information from either client may be required to be shared with the other if the lawyer considers such sharing of information necessary or beneficial to the representation. This advice should be confirmed in writing, and the lawyer should consider asking the clients to acknowledge that understanding in writing. Absent an advance agreement that adequately addresses the handling of confidential information shared by only one joint client, a lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, *inter alia*, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the

lawyer to do so; and, (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement, I intend to leave her…" or "All of the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge said communicating client to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the existence of an agreement at the outset of the representation that all information will be shared is particularly helpful. The lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

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

Separate Representation of Related Clients in Unrelated Matters. The representation by one lawyer of related clients with regard to unrelated matters does not necessarily involve any problems of confidentiality or conflicts. Thus, a lawyer is generally free to represent a parent in connection with the purchase of a condominium and a child regarding an employment agreement or an adoption. Unless otherwise agreed, the lawyer must maintain the confidentiality of

information obtained from each separate client and be alert to conflicts of interest that may develop. The separate representation of multiple clients with respect to related matters, discussed above, involves different considerations.

Detection of Conflicts of Interest. Under MRPC 1.6(b)(7), a lawyer may disclose client confidences to detect and resolve conflicts of interest that might arise from a new lawyer joining a firm or from changes in the composition or ownership of the firm. But any such disclosures must be limited to what is reasonably necessary, and they may not be made to the prejudice of clients. Thus, disclosure should ordinarily be limited to the names of the persons and entities involved in a matter, a brief summary of the general issues involved, and information as to whether the matter has terminated or is ongoing. Sometimes even that amount of information might prejudice a client. Suppose that a firm is doing joint estate planning for a husband and wife and a lawyer from another firm who is defending the husband in a paternity action is considering joining the estate planning firm. The paternity lawyer may disclose to the estate planning firm that he is representing the husband, but disclosure of the nature of the representation to the estate planning firm might seriously harm the husband and compromise the ability of the estate planning firm to continue its work for the wife. The paternity lawyer, in such a situation, should disclose only enough to allow the paternity lawyer and the estate planning firm to know that there might be a conflict of interest.

Joint and Separate Clients

Cases

Florida:

Cone v. Culverhouse, 687 So.2d 888 (Fla. App. 1997). In this case the court discussed the "common interest" exception to the lawyer-client communications privilege. Under state statute there is no lawyer-client communication privilege where the communication is relevant to a matter of common interest between two or more clients, such as a husband and wife, with regard to their estate planning, if the communication was made by either of them to the lawyer whom they retained or consulted in common.

Witte v. Witte, 126 So.3d 1076 (Fla. App. 2012). This is a marital dissolution case involving an elderly couple, which has relevance for communications with elderly clients. Husband asserted that wife could not claim attorney-client privilege for communications with her attorney because her daughter and son-in-law were present during those communications. The court remanded, finding that the wife was elderly, had several cognitive impairments and needed her daughter and son-in-law to help her communicate with the lawyer. She also needed the daughter and son-in-law's help in translating several of her financial documents, which were written in Hebrew. The court remanded for a determination of whether the communications "were intended to remain confidential as to other third parties, and whether the disclosure to [them], within the factual circumstances presented by this case, was reasonably necessary for the transmission of the communications."

New Jersey:

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

Ethics Opinions

ABA:

Op. 08-450 (2008). This opinion concentrates on the insurance defense scenario, but has useful things to say for estate planners representing multiple clients on the same or related matters. With regard to the interplay between the duty of confidentiality and the duty to inform:

> Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise.
>
> The question generally will be whether withholding the information from the other client would violate the lawyer's duty under Rule 1.4(b) to `explain a matter to the extent reasonably necessary to permit the [other] client to make informed decisions regarding the representation.' If so, the interests of the two clients would be directly adverse, requiring the lawyer's withdrawal under Rule 1.16(a)(1) because the lawyer's continued representation of both would result in a violation of Rule 1.7. The answer depends on whether the scope of the lawyer's representation requires disclosure to the other client.

District of Columbia:

Op. 296 (2000). A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another. Without express consent in advance, the lawyer who receives relevant

information from one client should seek consent of that client to share the information with the other or ask the client to disclose the information to the other client directly. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.

Florida:

Op. 95-4 (1997). "In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." This opinion is also discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.

New York:

Op. 555 (1984). A lawyer retained by A and B to form a partnership, who received communication from B indicating that B was violating the partnership agreement, may not disclose the information to A although it would not be within the lawyer-client evidentiary privilege. The lawyer must withdraw from representing the partners with respect to partnership affairs. A minority of the Ethics Committee dissented on the ground that "the attorney must at least have the discretion, if not the duty in the circumstances presented, to disclose to one partner the facts imparted to him by the other partner, that gave rise to the conflict of interests necessitating the lawyer's withdrawal as attorney for the partnership."

Op. 1002 (2014). Lawyer who was a prosecutor was executor for his father, who was a solo practitioner and who held original wills of clients at his death. Lawyer as executor may examine the wills and may disclose information necessary to transfer or dispose of the wills. Because the lawyer did not acquire the wills incident to his law practice, MR 1.6 and 1.15 are not applicable.

Related Secondary Materials

ABA, Probate and Trust Division, Report of the Special Study Committee on Professional Responsibility, *Report*: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife; Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary; and Counseling the Fiduciary, 28 REAL PROPERTY, PROBATE & TRUST JOURNAL 765-863 (1994). The representation of a husband and wife is one of the subjects that has been studied by the ABA Probate and Trust Division Special Study Committee on Professional Responsibility ("the ABA Special Committee"). *Id*. at 765-802. The ABA Special Committee recommends the practice of having an agreement that sets out the ground rules of representation. *Id*. at 801. Absent such an agreement, a representation of husband and wife is a joint representation. *Id*. at 778. The ABA Committee takes the position that a lawyer may represent a husband and wife separately, agreeing to maintain the confidences of each, provided the mode of representation is clearly spelled out in an agreement. *Id*. at 794. Even where there is such an agreement to represent spouses separately, however, if a lawyer's independence of judgment and duty to one spouse are compromised by the disclosure of adverse confidences by the other, the lawyer must be prepared to withdraw. *Id*. at 800.

In the context of a joint representation, problems arise where one spouse tells the lawyer of a fact or goal that he or she desires to remain confidential from the other spouse. *Id*. at 783-93. If a confidence is communicated by one spouse, the Report suggests that the lawyer must inquire "into the nature of the confidence to permit the lawyer to determine whether the couple's difference that caused the information to be secret constitutes either a material potential for conflict or a true adversity." *Id*. at 784. The Report goes on to describe three broad types of confidences that may cause the lawyer to conclude that the differences between the spouses make the spouses' interests truly adverse: (1) Action-related confidences, in which the lawyer is asked to give advice or prepare documents without the knowledge of the other spouse, that would reduce or defeat the other spouse's interest in the confiding spouse's property or pass the confiding spouse's property to another person; (2) Prejudicial confidences, which seek no action by the lawyer, but nonetheless indicate a substantial potential of material harm to the interests of the other spouse; and (3) Factual confidences which indicate that the expectations of one spouse with respect to an estate plan, or the spouse's understanding of the plan, are not true. *Id*. at 785-86. Because an unexpected letter of withdrawal may not protect a confidence from disclosure, the ABA Committee concluded that "[t]he lawyer must balance the potential for material harm arising from an unexpected withdrawal against the potential for material harm arising from the failure to disclose the confidence" to the other spouse." *Id*. at 792.

Obligation Continues After Death

Cases

Federal:

Swidler & Berlin v. U.S., 524 U.S. 399 (1998). "[T]he general rule with respect to confidential communications … is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs. [Citation omitted.] The rationale for such disclosure is that it furthers the client's intent. [Citation omitted.] Indeed, in *Glover v. Patten*, 165 U.S. 394, 406-408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual's death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client's interest, could be impliedly waived in order to fulfill the client's testamentary intent. [Citations omitted.]"

United States v. Yielding, 657 F.3d 688 (8th Cir. 2011). Husband and Wife were charged with Medicare fraud. W died, and H subpoenaed files from W's attorneys, claiming that as Personal Representative of her estate, he was waiving attorney-client privilege. He wanted to use the files to shift blame to W. Eighth Circuit held that trial court judge properly quashed the subpoena. "A personal representative of a deceased client generally may waive the client's attorney-client privilege … only when the waiver is in the interest of the client's estate and would not damage the client's reputation." H argued that W's reputation was already damaged, but court held that waiving the privilege could cause further damage.

California:

HLC Properties Ltd. v. Superior Court (MCA Records Inc.), 24 Cal. Rptr. 3d 1999 (2005). Construing California's Evidence Code, the Supreme Court of California held that, "the attorney-client privilege of a natural person transfers to the personal representative after the client's death,

and the privilege thereafter terminates when there is no personal representative to claim it." Therefore, the company taking over responsibility for running the business ventures of the deceased entertainer Bing Crosby did not succeed to the entertainer's attorney-client privilege.

New York:

Mayorga v. Tate, 752 N.Y.S. 2d 353 (App. Div. 2002). A decedent's personal representative may waive the attorney-client privilege to obtain disclosure in a malpractice case against the decedent's former attorney.

Ethics Opinions

District of Columbia:

Op. 324 (2004). A decedent's former attorney may reveal confidences obtained during the course of the professional relationship between the decedent and the attorney only where the attorney reasonably believes that the disclosure is impliedly authorized to further the decedent's interest in settling her estate. In "rare situations" where the attorney is unsure what the client would have wanted the attorney to do, the attorney should seek an order from the court supervising disposition of the estate and present the materials at issue for an *in camera* review. For example, if the surviving spouse needed the information to fulfill the spouse's duties as executor to administer the estate, disclosure is clearly warranted. If on the other hand, the surviving spouse is or was engaged in litigation with the deceased spouse, disclosure, absent a court order, might be inappropriate.

Hawaii:

Op. 38 (1999). An estate planning attorney may disclose confidential information about a deceased client if the attorney reasonably and in good faith determines that doing so would carry out the deceased client's estate plan or if the attorney is authorized to do so by other law or court order. A waiver by the personal representative of the deceased client's estate is not a proper basis for disclosing confidential information.

Iowa:

Op. 98-11 (1998). The Board in this case was asked to provide an opinion on what types of matters involving his deceased clients an attorney could testify to in a deposition. The Board noted the existence of its earlier Opinions 88-11 and 91-24 and the recent decision of the U.S. Supreme Court in *Swidler & Berlin v. U.S.*, *supra*. Noting that the U.S. Supreme Court had held that the attorney-client communications privilege survives the death of the client and that a series of narrow tests must be met before an exception to the general rule that privileged communications survive the death of the testator may be applied, the Board stated, "these tests require findings of fact, which are legal questions which must be determined by a court of law and not by this Board. Upon the determination of these fact questions, it may well be that ethical questions may arise but in the meantime this Board does not have jurisdiction to issue an opinion in this kind of a question."

Missouri:

Op. 940013 (1994). Confidentiality restrictions apply in a situation where an attorney prepared a will for a decedent and the decedent's heirs and their attorneys wanted to discuss the matter with decedent's attorney with respect to a possible will contest action. This prohibition

against disclosing confidential information prohibits any disclosure of decedent's competency without a court order to do so.

Op. 990146 (1999). An attorney who prepared a will and filed the will in probate but never opened an estate for a deceased client may not voluntarily provide the estate planning file or information about the advice provided to the deceased to a personal representative, unless the deceased expressly consented to such a disclosure. The duty of confidentiality survives the death of a client. If the attorney, whose services are eventually terminated by the personal representative, is subpoenaed to provide such information, he may "only do so after the factual and legal issues related to confidentiality are fully presented to the court" and the court issues an order to disclose the information.

New York:

Nassau County Bar Op. 304 (2003). A lawyer who was representing a wife in secret planning for divorce may not after her death disclose confidences to her husband as personal representative. Husband had sought return of a retainer and then sought the lawyer's file. Acknowledging the general rule that a decedent's personal representative may waive the attorney-client privilege, the committee concluded that such a waiver was appropriate "if and when acting in the interest of the decedent-client and his or her estate." See also Nassau County Bar Op. 89-26 (1989).

North Carolina:

2002 Op. 7 (2003). A lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney-client privilege does not apply to the lawyer's testimony.

Pennsylvania:

Phila. Bar Op. 91-4 (1991). A lawyer may not disclose to a client's children the contents of a deceased client's prior will: "The earlier will constitutes confidential information relating to your representation of the testator, and your duty not to reveal its contents continues even after your client's death."

Op. 2003-11. The executor of the testator's estate does have the authority to consent to the disclosure of confidential information pertaining to the estate planning and other aspects of the representation of the testator.

Related Secondary Materials

Restatement (Third) of the Law Governing Lawyers (2000), §81A Dispute Concerning a Decedent's Disposition of Property, Comment b:

> ….
> The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an *inter vivos* transaction.

Cases

See MRPC 1.14(c) and cases collected under MRPC 1.14 in these Commentaries.

Ethics Opinions

Alabama:

Op. 89-77 (1987). The lawyer for a guardian who discovers embezzlement by the guardian may not disclose misconduct that is confidential information, must call on client to restore funds, and if client refuses to do so lawyer must withdraw. The lawyer may not represent a client who fails to account for the embezzled funds.

California:

Op. 1989-112. This opinion states that a lawyer may not take steps to protect a client that might involve disclosure of the client's condition if the client objects. This opinion is also discussed under MRPC 1.14.

Illinois:

Op. 00-02 (2000). A lawyer may not provide a copy of a psychiatric report relating to the lawyer's client with diminished capacity to the client's father. The father previously had retained the lawyer to represent the child (an adult). Lawyer should advise father to seek independent counsel.

Maine:

Op. 84 (1988). The lawyer for an elderly client believed to be incapable of making rational financial decisions may inform the client's son if the son has no adverse interest. Alternatively, the lawyer may seek help from the state adult guardianship service, etc.

Missouri:

Op. 20000208 (2000). Attorney prepared a will for a client in the past and had ceased contact with that client since that transaction. Second attorney contacted the first attorney as to the mental capacity of the client during the period of drafting the will, for the purpose of representing the client in another action. The first attorney may discuss the competency of the client without a court order if client is capable of giving consent. If the client is incapable of giving consent to the disclosure by the first attorney concerning his mental state at the time of the drafting, the attorney is prohibited from disclosing information related to his representation of client without a court order. Also, if no court order exists for the disclosure and the client is incapable of giving his consent, an attorney may discuss the client's competency with client's child if the client's child has been named as attorney-in-fact under a durable power of attorney, dependent upon the exact terms of that power of attorney.

Ohio:

Cleveland Bar Op. 86-5 (1986). A lawyer who represented a husband and wife may initiate a guardianship proceeding for the incompetent husband but may not take a position contrary to the

interests of the wife. However, if interests of the husband and wife conflict, the lawyer must withdraw from representing either.

Cleveland Bar Op. 89-3 (1989). The lawyer for a person with diminished capacity has a duty to choose a course of action in accordance with the best interests of the client, which may include moving for the appointment of a guardian for purposes of a tort action, but must avoid unnecessarily revealing confidential information. The lawyer should avoid the conflict involved in representing the client and petitioning for the appointment of a guardian.

Tennessee:

Op. 2014-F-158. The opinion addresses an "increasingly common" problem: whether to disclose estate planning documents of a now-incapacitated client to third parties such as guardians. The opinion distinguishes between judicial proceedings and requests outside of judicial proceedings. In a judicial proceeding, the lawyer must assert the attorney-client privilege but must disclose the documents if the privilege claim is overruled by the court. Outside of a court proceeding, "neither RPC 1.6(a)(1), RPC 1.9(c)(1), nor accompanying comments permit someone other than the client or former client to waive confidentiality on behalf of the client," so a guardian cannot waive confidentiality. However, Tenn. Code Ann. § 34-3-107(2)(F) allows a court to vest conservators with the power to receive or release confidential information of the incapacitated person, so in that circumstance the lawyer may be able to disclose under the "other law" exception to 1.6. The lawyer may determine that disclosure is impliedly authorized but the lawyer must exercise reasonable professional judgment and "consider the client's wishes or intent" in such determination, and "doubt should be resolved in favor of not disclosing."

Disclosures by Lawyer for Fiduciary

Rules Variations

Washington:

WRPC 1.6 allows a lawyer to inform the court of misconduct by a court-appointed fiduciary as follows:

> (b) A lawyer to the extent the lawyer reasonably believes necessary … (7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver.

Cases

Federal:

United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011). The litigation involved the federal government's management of funds held by the government in trust for the benefit of the Jicarilla Apache Nation. The tribe sought discovery of documents and communications between the government and its lawyers concerning management of the funds, and the government asserted attorney-client privilege. The lower courts nevertheless ordered disclosure because of the fiduciary exception to the attorney-client privilege. The Supreme Court held that the fiduciary exception did not apply in this case. The Court discussed the history and purpose of the exception,

and held that it did not apply here for two primary reasons: first, the advice given was for the benefit of the government in its governing role, as opposed to the circumstance of private trusts where the beneficiary is the "real" client. It was significant to the court that the government lawyers were not paid out of trust funds. Second, the Court distinguished between the common law duty of broad disclosure to beneficiaries of a private trust and the limited disclosure required by statute with respect to the tribe's funds held in trust by the government. Other federal cases considering the fiduciary exception in the ERISA context have held that it applies to ERISA trustees. *See Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011); *Harvey v. Standard Ins. Co.*, 275 F.R.D. 629 (N.D. Ala. 2011) (distinguishing *Jicarilla*); *Moore v. Metropolitan Life Ins. Co.*, 799 F. Supp. 2d 1290 (M.D. Ala. 2011).

Arkansas:

Estate of Torian v. Smith, 564 S.W.2d 521 (Ark. 1978). The Supreme Court of Arkansas here held that the attorney-client privilege did not bar testimony by the attorney for the executor of the decedent's will relating to a consultation which took place before the will was filed for probate in another state since the executor, in consulting with the attorney, was necessarily acting for both itself as executor and for the beneficiaries under the will, all of whom were therefore to be treated as joint clients.

California:

Moeller v. Superior Court (Sanwa Bank), 69 Cal. Rptr. 2d 317 (1997). This case holds that, since the powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee, when a successor trustee (who in this case also happened to be a beneficiary of the trust) takes office, the successor assumes all powers of the predecessor trustee, including the power to assert (or waive) the attorney-client communications privilege.

Wells Fargo Bank v. Superior Court (Boltwood), 91 Cal. Rptr. 2d 716 (2000). This case holds that since the attorney for the trustee of a trust is not, by virtue of that relationship also the attorney for the beneficiaries of the trust, the beneficiaries are not entitled to discover the confidential communications of the trustee with the trustee's counsel, regardless of whether or not the communications dealt with trust administration or allegations of trustee misconduct. In addition, the work product of trustee's counsel is not discoverable. These results obtain regardless of the fact that the fees for the attorney's services are paid from the trust.

Florida:

First Union Nat'l Bank of Florida v. Whitener, 715 So.2d 979 (Fla. App. 1998), *review denied*, 727 So.2d 915 (1999). In this discovery dispute, a trust beneficiary who had brought a breach of fiduciary duty action against the trustee bank sought information and documents exchanged between the trustee and its attorneys. The court held that the attorney's client was the trustee and not the beneficiary. The attorney had been hired by the trustee after the beneficiary had retained counsel and was questioning the trustee's conduct. The court also found that Florida's version of the fraud exception to the attorney-client communications privilege did not apply and that the trustee's earlier voluntary production of certain letters from its attorney to the trustee did not waive the attorney-client privilege as to undisclosed documents.

Jacob v. Barton, 877 So.2d 935 (Fla. App. 2004). A trust beneficiary sought discovery of the trustees' attorneys' billing records. In deciding whether the attorney-client privilege and work

product doctrine applied to the billing records, a court must decide whose interests the attorneys represent— the trustee's or the beneficiary's. According to the court, to the extent the attorneys' work concerns the trustee's dispute with the beneficiary, their client is the trustee. Since the record before the appellate court was limited, it could not determine whether the billing records contained privileged information. The appellate court therefore quashed the circuit court's order granting unlimited discovery of the billing records and directed it to determine whether any of the billing records would be protected.

Illinois:

In re Estate of Minsky, 376 N.E.2d 647, 650 (Ill. App. 1978) (no discussion of confidentiality). "As an attorney and officer of the court, the lawyer was under an obligation to inform the court of any suspicions of fraud or wrongdoing on the part of the executor."

New York:

Hoopes v. Carota, 531 N.Y.S.2d 407, 410 (App. Div. 1988), *aff 'd mem.,* 543 N.E.2d 73 (1989). In this case the court allowed the beneficiaries of a trust to discover communications between the defendant-trustee and the lawyer who advised the defendant generally with respect to administration of the trust. The opinion recognizes the distinction between a representation of the trustee *qua* trustee and a representation of the trustee "in an individual capacity." The Appellate Division opinion states that the lawyer-client evidentiary privilege:

> [D]oes not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure, on the ground that a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought to his own private interests under the guise of privilege.

Pennsylvania:

Follansbee v. Gerlach and Reed Smith, 2002 WL 31425995, 22 Fid.Rep.2d. 319 (Pa. Com. Pl. 2002). The beneficiaries of a trust have a right to see routine correspondence between the trustee and its counsel during the trust administration and that right may not be denied unless the correspondence was developed in the contemplation of litigation and has been appropriately cloaked with the attorney- client privilege.

South Carolina:

Floyd v. Floyd, 615 S.E.2d. 465 (S.C. App. 2005). Distinguishing *Barnett Nat'l Bank v. Compson*, *supra,* MRPC 1.2, from Delaware, and instead relying on *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, *supra* MRPC 1.2, from D.C., the court here found that the beneficiary of a trust was entitled to review the opinions of the trustees' counsel to ensure that the trustee was acting in accordance with the dictates of his fiduciary duties, particularly where, as here, the opinions in question were paid for with trust funds.

Ethics Opinions

Illinois:

Op. 91-24 (1991). The lawyer retained by a guardian represents both the guardianship estate and the guardian in a representative capacity. It was assumed that the guardian did not

reasonably believe that the lawyer represented her personally. "Accordingly, the communication by the guardian to the attorney, even if made in confidence, (and the other information acquired by the attorney in the course of his representation of the estate) would not be covered by the attorney-client privilege nor would it be considered a `secret' of the guardian….. The guardian is not represented personally by the attorney but is represented only in his capacity as guardian for closing out the guardianship estate." The lawyer's duty to the estate requires that "he take the steps necessary to protect the estate from the possibly fraudulent action of the guardian. If the attorney does not take steps to have the propriety of the taking of the money determined now, he runs the risk that both his and the guardian's actions will later be determined fraudulent."

Op. 98-07 (1998). A lawyer representing a guardian who has filed annual accountings, now known to have been false, must take appropriate remedial action to avoid assisting the guardian in concealing from the court the guardian's misappropriation of estate assets, even if the disclosure of client information otherwise protected by MRPC 1.6 may be required.

Kentucky:

Op. 401 (1997). In representing a fiduciary, the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. The lawyer's obligation to preserve client's confidences under MRPC 1.6 is not altered by the circumstance that the client is a fiduciary. A lawyer has a duty to advise multiple parties who are involved with a decedent's estate or trust regarding the identity of the lawyer's client and the lawyer's obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term "lawyer for the estate" or the term "lawyer for the trust" on documents or correspondence or in other dealings with the fiduciary or the beneficiaries. A lawyer may represent the fiduciary of a decedent's estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer's actions in the event a conflict arises and the consequences to the clients if a conflict occurs.

New York:

Op. 797 (2006). A lawyer hired by the named executor and decedent's only heir to probate the estate files a petition to have the heir appointed as executor and he is appointed. Thereafter lawyer learns that the client is a convicted felon who is not permitted to serve as executor under state law. Committee opines that under NY's confidentiality rules, lawyer is not permitted to disclose this secret to the tribunal, but is permitted to withdraw his own certification that the client is authorized to serve. He must, therefore, withdraw that certification and is permitted to disclose the secret only to the extent that disclosure is implicit in the withdrawal. Thereafter, lawyer may be required to withdraw from representation if continuing to represent the client would require the lawyer to violate another rule, such as that prohibiting him from assisting his client in an illegal act.

North Carolina:

2002 Op. 3. Lawyer for the personal representative may seek removal of his client if the personal representative has breached fiduciary duties and has refused to resign. Lawyer should first determine if actions of representative constitute grounds for removal under the law.

Oregon:

Op. 2005-119. A lawyer who represents widow as an individual and widow in her capacity as personal representative, has only one client. The fact that widow may have multiple interests as an individual and as a fiduciary does not mean that lawyer has more than one client, even if widow's personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7, do not apply to lawyer's situation. If the client confides in the lawyer that she has breached her duties as fiduciary in the past, he is not free to disclose this unless one of the exceptions to Rule 1.6 applies. Neither may he make affirmative misrepresentations about such conduct. The lawyer may be required to withdraw if not withdrawing would involve the lawyer in misconduct. If the client informs lawyer she plans to engage in criminal conduct in the future, he is permitted (but not required) to disclose this to prevent the crime under Oregon Rule 1.6(b)(1) (future crime exception).

Pennsylvania:

Philadelphia Bar Op. 2008-9. A lawyer was retained to represent a Personal Representative (PR) and helped her administer the estate, then thought to consist of $300,000. Thereafter U.S. Bonds in the name of the decedent worth $360,000 were discovered and the lawyer turned them over to the PR. Now the PR has dropped out of touch and will not communicate with lawyer. Opinion concludes that under PA's equivalent of MR 1.6(b)(2) and (3), lawyer is permitted to disclose PR's misconduct and, assuming representations have been made to the court sufficient to trigger Rule 3.3, the lawyer is required to disclose this information to the court. He will also be required to withdraw under Rule 1.16.

Disclosure to Third Party

Cases

Connecticut:

Gould, Larson, Bennet, Wells and McDonnell, P.C. v. Panico, 273 Conn. 315, 869 A.2d 653 (2005). "The principal issue on appeal is whether, in the context of a will contest, the exception to the attorney-client privilege, as recognized by this court in *Doyle v. Reeves*, 112 Conn. 521, 152 A. 882 (1931), that communications between a decedent and the attorney who drafted the executed will may be disclosed, applies when the communications do not result in an executed will. Specifically, we consider whether, in a probate proceeding in the course of a dispute among heirs, an attorney may be compelled to disclose testamentary communications that have not culminated in an executed will. We conclude that the exception to the privilege does not apply when the communications do not culminate in the execution of a will." "[O]ur research reveals that the overwhelming majority of courts to consider the issue have not broadened the [testamentary] exception under such circumstances."

New Hampshire:

In re Lane's Case, 153 N.H. 10, 889 A.2d 3 (2005). Lawyer who had represented the executor in a probate that had closed was charged with disclosing confidences of his former client to the client's disadvantage. By the time the confidences were disclosed, the lawyer had married the former client's sister and lawyer's wife (the sister) was in litigation with her brother, her husband's former client, over the brother's management of the estate. Without the consent of his former client, lawyer disclosed to his wife's lawyer the existence of a $100,000 life insurance policy that his former client denied existed. Although the court concluded that lawyer had used this information to the disadvantage of his former client, it credited the lawyer's argument that disclosure was permitted under an exception of NH's (then) version of Rule 1.6 which permitted disclosure to prevent a client from committing a crime the lawyer believes is "likely to result in …substantial injury to the financial interest or property of another." The court affirmed the dismissal of the disciplinary proceedings.

In re Stomper, 82 A.3d 1278 (N.H. 2013). Dispute between children of deceased parents. One child had assisted parents in preparing estate plan leaving everything to that child. Other children challenged the estate plan and asked for file of an attorney who had consulted with parents but had withdrawn before documents were executed. Attorney claimed they were privileged but court ordered disclosure of the documents based on the exception to the privilege for communications relating to an issue between parties claiming through the same deceased client. The child opposing disclosure claimed the exception only applied if the estate plan was executed, but that argument was rejected.

New York:

Estate of Walsh, 17 Misc.3d 407, 840 N.Y.S.2d 906 (N.Y. Sur. 2007). Lawyer who formerly represented the decedent and now is personal representative of an estate is representing himself as PR and petitions for discovery. Court holds he has waived the attorney-client privilege as to communications he had with another lawyer about the decedent's affairs insofar as he has attached those communications to his petition. As personal representative, he may waive decedent's attorney- client privilege.

Ethics Opinions

California:

Op. 2007-173. A lawyer may not deposit a will with a private will depository under California statutes without the client's express consent. A lawyer may not register identifying information about a client's testamentary documents with a private will registry unless the lawyer has a basis in the client file and/or in statements made by the client and all the other facts and circumstances that this would further the client's interest and be neither embarrassing nor likely to be detrimental to the client.

Maine:

Op, 192 (2007). A lawyer may not disclose confidential information of a deceased client to a court-appointed personal representative simply because the personal representative requests it and waives the attorney-client privilege. The lawyer is required to make an independent investigation as to the requested disclosure. "If… the attorney believes that the information sought to be disclosed would not further the client's purpose or would be detrimental to a material interest

of the client, the attorney may waive the privilege only as required by law or by court order. Thus, despite a PR's waiver of the attorney-client privilege, the attorney may still be ethically obligated to claim the privilege on behalf of his former client if, for example, the information had been specifically sought to be kept unqualifiedly confidential by the client or if disclosure of the information would embarrass or otherwise be detrimental to a material interest of the client."

Maryland:

Op. 2009-05 (2008). Where a firm drafts a will for a client who dies before executing it and the decedent's personal representative requests it, the firm must deliver the will to the PR. The PR is deemed the firm's client in the matter and the letters of administration constitute a court order entitling the PR to possession of the decedent's property, including the draft will. Delivery of the draft does not amount to an impermissible disclosure under the confidentiality rules.

Missouri:

Op. 930172 (1993). If an attorney accepts referrals for estate planning from insurance agent whereby the agent obtains all the information from the clients, compiles the information in a form, sends that information to the attorney, and the attorney then prepares the estate planning documents which are returned to the clients via the agent, then the attorney is in violation of MRPC 7.3(b). The agent in this situation is engaging in "in-person solicitation" on behalf of the attorney which is prohibited under the Model Rules. By assisting the agent and the client in filling out the estate planning documents, the attorney is participating in the unauthorized practice of law in violation of MRPC 5.5. Also, MRPC 1.6 is violated by the attorney-agent relationship because the agent is delivering confidential legal documents between the attorney and the clients.

Op. 2006-0004. A lawyer who prepared an agreement for the decedent has been subpoenaed in litigation between the heirs, various entities, and the decedent's estate to produce all files and documentation regarding the decedent. The lawyer may not divulge confidential information until ordered to do so after the issue of confidentiality has been fully presented. The lawyer should seek to ensure that any such order is as specific and limited as possible. It is not necessary for the inquiring lawyer to present the issue of confidentiality if he knows that another lawyer will fully present the issue.

New Jersey:

Op. 719 (2010). Lawyer representing personal representative with bad credit history asked whether it was ethical to comply with surety company's demands that in order to issue fiduciary bond for client, lawyer would have to, among other items, agree to be liable to the surety if the lawyer does not remain involved as promised; provide a retainer agreement indicating the client's agreement to the lawyer's continuing involvement; pay the bond premiums; "work to protect the interests of the administrator and surety"; provide legal services for the benefit of the surety in connection with the joint control agreement; provide the surety with full details about any disputes regarding estate matters; and notify the surety of any change in legal representation, any allegations of breach of fiduciary duty on the part of the administrator, and any objections to a request by the administrator for commissions or fees. The ethics committee found that the agreement would violate several ethics rules, including confidentiality, conflicts of interest, giving financial assistance to a client, independent judgment of lawyer, allowing third parties to affect lawyer's judgment, lawyer's right to practice, and requirements of withdrawal of representation. The opinion noted similarities with issues raised with respect to third-party financing of litigation.

Pennsylvania:

Philadelphia Bar Op. 2007-6. A lawyer who did estate planning for a decedent, and knew his wish that his daughter receive no share of his estate, is permitted to disclose contents of decedent's will to daughter, even though it was not probated and is not public, if disclosure was impliedly authorized. Relying on and quoting the *ACTEC Commentaries*, the committee notes that "If the inquirer feels that doing so would likely promote the husband's estate plan, forestall litigation, preserve assets, and further his daughter's understanding of his intentions then it would be permissible. However, if the inquirer does not feel that there is such implied authorization, then without being required by the Court to produce the will, he may not disclose its contents. The Committee notes that even if the inquirer concludes that he has implied authorization to reveal the contents of the will that he is not required to do so, only that he may choose to do so."

Philadelphia Bar Op. 2008-10. Eleven years after lawyer had prepared estate planning documents for a client (C), the client's stepdaughter (D) and her son (S) came to lawyer and said that C wanted lawyer to revise the will to provide bequests to D, S and a sibling of S. There were significant discussions about C's mental health and the reasons for the change. Lawyer went with D and S to visit C in the hospital, and lawyer concluded C lacked mental competency and refused to prepare the documents. C died a year later and a will contest was mounted in New Jersey which, among other things, called into question the work of lawyer in helping C execute the original documents. The executor of C's estate has asked about the procedures followed when C executed the documents and lawyer wants to know what he can disclose about this and about the conversations with D & S 11 years later. Committee, relying on and quoting *ACTEC Commentaries*, says that disclosures about advice and procedures followed when the will was executed may be impliedly authorized if they will promote former client's interests but even if they are not, the executor may waive the deceased client's right to confidentiality. Moreover, PA's equivalent of MR 1.6(b)(5) permits disclosure since lawyer's conduct has now been called into question. As for conversations with D & S, since they were not prospective clients but rather seeking to have lawyer provide additional legal work for C, "such discussions are not confidential and can be revealed to whomever the inquirer and his partner wish." Finally, committee cautions that under the conflict of laws provision of Rule 8.5, New Jersey ethics rules may apply to the NJ will contest, rather than Pennsylvania ethics rules.

Philadelphia Bar Op. 2013-6. Client is in a coma and near death. Lawyer had prepared a power of attorney naming friend as agent, and a will leaving the estate primarily to charity and naming lawyer as executor. Lawyer has just learned that the client placed her financial accounts into JTWROS with friend, with assistance from financial advisor. Friend states that the reason was to facilitate the friend paying bills. The lawyer: (a) must try to communicate with client to determine if client intended to give the accounts to friend at death, and if so, take no other action; (b) if unable to determine client's intent, may notify the state attorney general if the lawyer believes consistent either with competent representation of client while alive or with gathering estate assets as executor, provided that during client's life lawyer must limit disclosure to only information as is necessary to effectuate the client's intent, under 1.6(a) and 1.14.

Rhode Island:

Op. 2013-05. A lawyer who drafted and supervised execution of a trust amendment for a now deceased client must assert confidentiality and privilege when the trustee (client's daughter)

is questioning the amendment. If a court orders disclosures the lawyer must try to minimize the disclosure when complying.

South Carolina:

Op. 93-04 (1993). A lawyer drafted a trust agreement and pour-over will for a competent client who, at the same time, executed a durable general power of attorney appointing a friend and authorizing the friend "to do and perform all and every act, deed, matter and thing whatsoever in [sic] about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present..." When the friend asked the lawyer for a copy of the will and trust agreement, the lawyer should inform the client of the request and not provide the friend with the information without the client's consent. If the client becomes incompetent, the lawyer is authorized to open his file to the friend, absent prior instruction from the client to the contrary.

Op. 08-09 (2008). Lawyer is approached by A who is concerned about the wellbeing of his cousin (C) who is mentally incapacitated. C's mother and father are deceased although the estate of only the first to die has been probated. No guardianship has been established for C. Lawyer advises A about how to protect C. "Lawyer has reason to believe A was not receptive to such advice. Lawyer refused to participate since he has reason to believe that A [and others] are intending to transfer Cousin's property without consideration of Cousin's best interests." Lawyer inquires as to his right to disclose this information to agencies who can protect C. Committee analyzes who might be the client, or prospective client here and discusses the lawyer's duties under RPC 1.18 and 1.6 and concludes that SC RPC 1.6(b)(1) would permit the lawyer to disclose "regardless of the identity of the client." That SC Rule permits a lawyer to disclose confidences to prevent a client from committing a crime.

South Dakota:

Op. 2007-3. A lawyer who has prepared a will for an elderly client and who has been instructed by the client to reveal the contents to no one is bound by that instruction notwithstanding that the inquirer holds a durable power of attorney from the client. Here, the holder of the power demanded (through an attorney) to see the principal's will under the authority of the durable power. Subsequent to the 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 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ACTEC COMMENTARY ON MRPC 1.14

Declining and Diminished Capacity. MRPC 1.14 does not define "diminished capacity." In some cases, it is easily identifiable, as when a minor lacks contractual capacity due sheerly to the minor's age. In other cases, the determination is more difficult, as when an individual is exhibiting signs of dementia. The latter case rarely results in immediate "diminished capacity" but rather usually occurs gradually, with increased vulnerability as the decision-making capacity of the individual declines. For purposes of this Commentary, a person with "diminished capacity" refers to someone whose intellectual acuity is so substantially impaired, as a result of some illness, condition, or injury, that the person lacks the ability to make informed financial, medical, or personal decisions. A formal determination of diminished capacity need not have been made by a medical doctor or a court in order for a lawyer to believe that a client suffers from diminished capacity. A lawyer must be aware, however, that his or her determination of the client's diminished capacity is subjective and that the lawyer may lack the expertise to appraise the client's capacity accurately.

A person with "declining capacity," for purposes of this Commentary, refers to someone who is beginning to exhibit signs of reduced capacity but who possesses the ability to make informed decisions with respect to some or all financial, medical, or personal matters. Signs of declining capacity include, but are not limited to, occasional forgetfulness, confusion, or disorientation concerning persons or events that a fully competent person would understand clearly. A lawyer who believes that a client suffers from either diminished capacity or declining capacity should always act in a manner that is consistent with MRPC 1.14(a)'s direction to maintain a normal lawyer-client relationship to the extent reasonably possible.

Assisting Competent Clients in Planning for Possible Incapacity. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of declining capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, revocable trusts, and other support systems, including supported decision making agreements, if appropriate under state law. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. Such a document might also include authorization to the lawyer to take appropriate protective action, such as beginning a proceeding for the appointment of a guardian or conservator for the client or suggesting to the client's family members that they do so. In addition, a lawyer may properly suggest that a durable power of attorney for health care or other healthcare proxy document authorize the agent, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes any durable power of attorney to become effective at a date when the client is unable to act for himself or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA. The lawyer also should consider whether applicable state law permits execution of a power of attorney or other document creating an agency relationship that becomes effective at a date after the date of its execution.

The lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person. In addition, the client who suffers from declining capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. Before meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege and discuss any issues with the client.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client and the lawyer reasonably believes that the client is unable because of diminished capacity, either temporary or permanent, to protect himself or herself. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. If the client has given an express direction not to consult with an individual or group, the lawyer may not override that direction unless there has been a material change that would render the express direction no longer applicable. MRPC 1.14(c) makes it clear

that the lawyer is only authorized to disclose client confidences "to the extent reasonably necessary to protect the client's interests." The disclosures can be made to protect the client "even when the client directs the lawyer to the contrary." MRPC 1.14, cmt [8]. But before making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client's interests. Id. See also ABA Informal Opinion 89-1530 (1989).

In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. A lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client. However, under MRPC 1.14(b), when the lawyer reasonably believes the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take protective action, including, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. The issues associated with the lawyer's representing another person in seeking to be appointed to a fiduciary position for the client are discussed in more detail below in the section entitled *Lawyer Representing Guardian or Conservator of Current or Former Client*. The lawyer should also consider whether applicable state law includes mandatory reporting requirements for situations involving individuals with diminished or declining capacity where exploitation or exposure to unsafe situations is occurring, discussed in more depth below in the section entitled *Reporting Elder Abuse*.

Risk and Substantiality of Harm. For the purposes of determining whether to take protective action for a client whose capacity is diminished, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client had full capacity. During periods of declining capacity, a client may become susceptible to impaired decision-making due to an increasing inability to assess and understand risk. Additionally, the substantiality of the harm to the client may be exacerbated by the fact that the client whose capacity is diminished will not be in a position to recoup any losses suffered. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client when the client had full capacity and, to the extent feasible, pursue what would have been that client's wishes and interests. Absent this knowledge, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client but that result in the least extensive intrusion into the client's autonomy.

Determining Extent of Diminished Capacity. In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the legal standards and definitions of capacity for the transactions involved, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional to assess the client's capacity.

Testamentary Capacity and Undue Influence. A lawyer should attempt to remain reasonably alert to indications that a client may have declining capacity or be the subject of undue influence.

If the testamentary capacity of a client is uncertain or the lawyer suspects that another person may be unduly influencing the client, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan and make reasonable inquiry, under the circumstances, to assess whether the client has the necessary capacity and any document modifying the estate plan is consistent with the client's intentions. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity or is being unduly influenced to execute the document. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline or in circumstances which raise indicia of undue influence, recognizing that a trier of fact may be in the best position to make a final determination after full consideration of the facts and circumstances.

The lawyer may also take into account the ability of the client to make testamentary documents if the lawyer declines to act, erring on the side of creating what may constitute an invalid document when declining to do so would leave the client with no other options. *See*, *Vignes v. Weiskopf*, 42 So. 2d 84 (Fla. 1949) ("When he reached his client's bedside there was good reason to believe, from the atmosphere there, that the client had not long to live and that he was probably not mentally alert, but these circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and legal questions whether he was in fact capable of executing a valid codicil").

If a lawyer believes that another person may be unduly influencing the client, the lawyer should attempt to meet independently with the client to confirm the client's intentions, if the client is willing to do so, and it is possible to do so, under the circumstances.
In cases in which the lawyer believes that the client's testamentary capacity is borderline, or that the client may be the subject of undue influence, the lawyer should take steps to document and preserve evidence regarding the client's testamentary capacity and the facts and circumstances involved.

Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may, under applicable state law, have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

As suggested in the Commentary to MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested

persons. Furthermore, as is discussed below in the section entitled *Lawyer Representing Guardian or Conservator of Current or Former Client*, a lawyer who is asked to represent a person who wishes to be appointed a fiduciary for a client or former client with diminished capacity should exercise caution in undertaking such a representation and should thoroughly familiarize himself or herself with the interpretation of MRPC 1.14(b) under applicable state law.

Lawyer Representing Person with Diminished Capacity for Whom a Fiduciary Has Been Appointed by a Court. A lawyer who represented a client before the client suffered diminished capacity should ordinarily look to the court-appointed fiduciary to make decisions for the client. The lawyer is impliedly authorized to disclose to the fiduciary sufficient information to permit the fiduciary to properly protect the client's interest. The ongoing duties of a lawyer to a client with diminished capacity for whom a fiduciary has been appointed may differ from state to state.

In some situations, the scope of the fiduciary's duties and the limitations on the client's ongoing rights might be limited. For example, in some states, a court may appoint a fiduciary to exercise only limited rights of the client. In those instances, a lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity may appropriately continue to meet with and counsel him or her.

Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information)). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer should take the steps necessary to protect the interests of the client consistent with this rule.

Lawyer Appointed or Hired to Represent a Person with Diminished Capacity in a Guardianship Proceeding. In many states, when a proceeding is initiated to impose a guardianship or conservatorship or other protective arrangement, the person who will be the subject of that proceeding ("respondent") is entitled automatically to be represented by counsel. In other states, the respondent or a guardian ad litem may request that the respondent be represented by counsel. The respondent may retain his or her own lawyer or a lawyer may be appointed by the court. A lawyer who is representing a respondent should ascertain exactly what role the lawyer is to play in the guardianship proceeding under applicable state law. In those states that have an articulated rule, the majority approach is that the lawyer is to advocate for the respondent's expressed wishes rather than what the lawyer thinks may be in the client's best interests. In those states the court may also appoint a guardian ad litem whose role is to promote results that will be in the respondent's best interest rather than to advocate for the respondent's expressed preferences. In a few states, the lawyer who is appointed to represent the respondent is to act in the role of a guardian ad litem. (See, e.g., Idaho Code Ann. §15-5-303(b)).

Lawyer Representing Guardian or Conservator of Current or Former Client. Unless prohibited by applicable state law, the lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients). Joint representation would not be permissible if there is a significant risk that the

representation of one will be materially limited by the lawyer's responsibilities to the other. See MRPC 1.7(a)(2) (Conflict of Interest: Current Clients). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. See MRPC 1.0(e) (Terminology) (defining informed consent).

A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the currently or previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

A lawyer who is considering representing a person wishing to petition to have a conservator or guardian appointed for the lawyer's client or former client whether or not the petitioner seeks to be appointed the conservator or guardian, should exercise extreme caution. Although the ABA Comments to MRPC 1.14 state that seeking appointment of such a fiduciary for a client with diminished capacity is not only permissible but may be desirable, ABA Formal Ethics Opinion 96-404, summarized in the Annotations below, states that a lawyer should not represent the person seeking to be appointed guardian or conservator for a client or former client. ("In particular, [MRPC 1.14] does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client.") Although this opinion was written before the most recent changes to MRPC 1.14, it has not been amended or withdrawn as of the date of these Commentaries. Furthermore, as summarized in the Annotations below, several state courts have held that its prohibition is correct under the current version of MRPC 1.14. If a lawyer in this situation believes that it would be inappropriate for the lawyer to represent the person who wishes to be appointed fiduciary for the lawyer's client or former client, the lawyer should consider other actions, such as seeking the appointment of a guardian ad litem to determine the best interests of the person with diminished capacity, seeking the appointment of an attorney ad litem or similar officer of the court to represent the person with diminished capacity, or simply refusing the representation.

Reporting Elder Abuse. Elder abuse has been labeled "the crime of the 21st century," Kristen Lewis, The Crime of the 21st Century: Elder Financial Abuse, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014). Individuals who are the victims of elder abuse are often reluctant to disclose the abuse and seek assistance, particularly when the abuser is a family member or someone close to the victim. Thus, a lawyer who suspects his or her client is the victim of elder abuse may be faced with the dilemma of whether to seek protection for the client by reporting the abuse and disclosing confidential information if the client refuses to or cannot consent to the disclosure.

Every state has enacted elder abuse reporting laws. However, the role and obligations of lawyers with respect to the reporting of elder abuse vary significantly among the states. Some states have expressly made lawyers mandatory reporters of suspected elder abuse. See, e.g., Tex. Hum. Res. Code § 48.051(a)– (c) (2015); Miss. Code Ann. § 43-47-7(1)(a)(i) (2019); Ohio Rev. Code Ann. § 5101.63 (2019); Ariz.

Rev. Stat. § 46-454(B) (2019); Mont. Code Ann. § 52-3-811 (2003) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. See, e.g., Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure "to comply with other law," should apply in the states that require lawyers to report elder abuse. Disclosure in these states must be limited to what the lawyer reasonably believes is necessary to comply with the law.

In those states where a lawyer has no mandatory reporting duty, a lawyer's ability to report elder abuse where MRPC 1.6 would otherwise restrict disclosure of confidential information may be governed by MRPC 1.14(b). In addition, the lawyer's ability may be affected by any other exception to MRPC 1.6 (such as the exception for disclosing confidential information "to prevent reasonably certain death or other substantial bodily harm"). In order to rely on MRPC 1.14(b)'s permission to "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client," the lawyer must first determine that the client has diminished capacity.

Before the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professionals and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. See NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm).

In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and the applicable state's elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.

Cases

Arizona:

Fickett v. Superior Court, 558 P.2d 988 (Ariz. App. 1976). In this malpractice action the court held that the lawyer for a guardian owed fiduciary duties to the guardian's ward. Privity of contract between the lawyer and the ward was not required in order for the ward to pursue a claim for negligence against the lawyer for the guardian.

Connecticut:

Gross v. Rell, 304 Conn. 234, 263-64, 40 A.3d 240, 259-60 (Conn. 2012). Lawyer appointed by court to represent an elderly client who was the subject of a conservatorship proceeding was not entitled to quasi-judicial immunity from suit by the client. The Supreme Court of Connecticut was responding to certified questions from the Second Circuit Court of Appeals. One of the questions was: under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? After extensive discussion of the roles of guardians (conservators) and of lawyers under MRPC 1.14, the court concluded that: "Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts,…a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi- judicial immunity from claims arising from his or her representation." The discussion of the role of lawyers for conservators is also significant:

> [Where a conservator has retained an attorney,] if a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication") In addition, if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary. We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

Florida:

Vignes v. Weiskopf, 42 So.2d 84, 86 (Fla. 1949). The Supreme Court of Florida here held that it was proper for a lawyer to prepare and supervise the execution of a codicil for a client who was "incurably ill and was in such pain that a great deal of medication to relieve him of his suffering was being administered, such as phenobarbital, novatrine, demerol, cobra venom, and so forth." The court stated that:

> We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.
>
> Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.

Florida Bar v. Betts, 530 So.2d 928, 929 (Fla. 1988). In this case an attorney was publicly reprimanded for his actions in preparing two codicils to the will of his client at a time when the client was in a rapidly deteriorating physical and mental state. In the first codicil the testator removed his daughter and son-in-law as beneficiaries. The lawyer spoke with his client several times in an effort to persuade him to reinstate his daughter as a beneficiary. Subsequently, the lawyer prepared a second codicil to reach this result. However, when the codicil was presented to the testator, he was in a comatose state. The lawyer did not read the second codicil to the testator, the testator made no verbal response when the lawyer presented the codicil to him, and the lawyer had the codicil executed by an X that the lawyer marked on the document with a pen he had placed and guided in the testator's hand. The court observed:

> Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third-parties. It is undisputed that [Lawyer] did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own.

Michigan:

In re Makarewicz, 516 N.W.2d 90, 91-92 (Mich. App. 1994). A lawyer who was hired by a minor's conservator on a contingent fee basis to pursue the minor's claim does not, after discharge by conservator, have standing to petition the court to replace the conservator and require acceptance of settlement. The Presiding Judge directed the Clerk of the Court to forward a copy of the decision to Michigan's Attorney Grievance Committee. The opinion endorses the approach taken in the Comment to MRPC 1.14:

> Under MRPC 1.14(b), a lawyer may take protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interests. The Comment accompanying MRPC 1.14 suggests that where a legal representative has already been appointed for the client, the lawyer ordinarily should look to the representative for decisions on behalf of the client. However, if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

Taylor v. Shipley (In re Hughes Revocable Trust), 2005 Mich. App. LEXIS 2301, 2005 WL 2327095, *appeal denied*, 474 Mich. 1092, 711 N.W.2d 56 (2006). Court affirmed a probate court order invalidating a trust executed by the decedent, apparently on the ground that decedent was demonstrably incompetent at the time of execution. One issue in the case was whether the lawyer who had prepared the documents had adequately assessed decedent's competence and the court did not think so: An attorney is required to make "a reasonable inquiry into his client's ability to understand the nature and effect of the document she was signing." Here, the estate planner was "at least on notice that Gladys may not have been competent. He also stated that in both meetings with Eric and Gladys, Eric did all the talking while Gladys said nothing. By not talking to Gladys, Sheridan made no effort to determine whether she was competent, or even to determine that she approved of the proposed plan for her care."

Missouri:

Thiel v. Miller, 164 S.W.3d 76 (Mo. App. 2005). Court affirms malpractice judgment for defendants where heirs alleged that estate planner was (a) negligent in failing to make the power of attorney prepared for client durable, thus precluding her husband from executing trust provisions to avoid federal estate taxes after she became incompetent and (b) negligent in failing to recognize that attempted trust was invalid (because of inadequate power of attorney) and taking action to establish conservatorship for incompetent client so as to reduce taxes. Even assuming negligence had been shown, plaintiffs failed to prove that but for this negligence the damage would have been avoided.

New Jersey:

Lovett v. Estate of Lovett, 593 A.2d 382, 386 (N.J. Super. 1991). The court stated that, "[a]lthough I agree that a lawyer has an obligation not to permit a client to execute documents if

he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1982 [Client] was incompetent or that [Lawyer] should have concluded that he was."

New York:

Cheney v. Wells, 23 Misc. 3d 161, 877 N.Y.S.2d 605 (N.Y. Sur. 2008). Executors for Cheney continued an action previously commenced by the decedent against decedent's daughter alleging harassment, threats and mistreatment of the mother while she was alive. Here, the fifth lawyer for the defendant daughter moves to withdraw on the eve of trial arguing that withdrawal is mandated given a conflict of interest with the client. Noting from its own observations that the client was "incapable of managing the instant litigation, but also that she was unable to appreciate the consequences of that incapacity, "and after a detailed discussion of ethics authorities, the court here grants the motion to withdraw, but only on the condition that this lawyer file a petition for a limited guardianship of defendant's property. "[I]t appears that there is no ethical impediment to [the lawyer's] bringing a limited guardianship proceeding for her client, and to disclosing to the [court] whatever information may be necessary. Such a proceeding is the `least restrictive alternative' available, and [this lawyer] is the only available person with significant knowledge to bring it."

North Dakota:

In re Christensen, 2005 N.D. 87, 696 N.W.2d 495 (2005). Lawyer was reprimanded for misconduct in three matters, one of which involved estate planning. After preparing a trust and power of attorney for a client, the client married and the attorney-in-fact questioned his competence to do so. So he authorized the lawyer to commence annulment proceedings and a guardianship proceeding, which the lawyer did on behalf of the attorney-in-fact. The court held that, although the lawyer would have been authorized under Rule 1.14 to commence guardianship proceedings to protect his client, whose competency he questioned, he was not entitled to do so on behalf of a third person, the attorney- in-fact, and the lawyer stipulated that this was a violation of Rule 1.7. The court relied on ABA Op. 96-404.

Discipline of Kuhn, 785 N.W.2d 195 (N.D. 2010). Lawyer had prepared client's will and later represented client's 2 sons in having a guardian appointed for the client. Sometime after the guardian was appointed, lawyer's assistant took a call that client wanted to change his will. Without consulting with the guardian, lawyer prepared a new will for and assisted client in executing the new will which provided a larger bequest than previously to the 2 sons who were the lawyer's former clients. In doing so, lawyer violated Rule 1.14 and was suspended for 90 days.

Ohio:

Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009). Lawyer was charged with misconduct relative to one client who had originally hired him to help him with a dispute involving his mother's estate. Concerned about the client's mental health and financial affairs, the lawyer improperly loaned the client $5,000 and had him execute a power of attorney appointing the lawyer as his attorney-in-fact. After having his client admitted to a hospital for depression, lawyer proceeded to clean up the client's property without his consent, and to lie about his condition and the condition of the property, to his children. The lawyer was suspended for one year with this suspension stayed on conditions.

Washington:

Morgan v. Roller, 794 P.2d 1313 (Wash. App. 1990). In this malpractice action brought by the beneficiaries under a will to recover from the scrivener of the will the costs of successfully defending a will contest, the court held that the scrivener of the will was not required to inform intended beneficiaries under the will of his view, based on subsequent contacts with the testator, that she was incompetent at the time the will was executed.

In re Eugster, 166 Wn.2d 293 (2009). An 18-month suspension is the proper sanction for a lawyer who, when fired by his elderly client, asked a court to declare her incompetent without first investigating whether she was actually impaired. The court rejected the lawyer's claim that he justifiably feared his former client was suddenly unable to manage her affairs and was at risk of being taken advantage of. The court noted the lawyer had evidence that his client had recently had a mental health exam which determined she was competent; had been satisfied of her competence only months before when he had her execute documents he had prepared; and had failed to explain why his abrupt "epiphany" about his ex-client's mental state came on the same day he was fired. "[If a] lawyer reasonably believes that her client is suffering diminished capacity and is under undue influence, the lawyer may take protective action under RPC 1.14 without fear of provoking charges of ethical misconduct… [But a] lawyer's decision to have her client declared incompetent is a serious act that should be taken only after an appropriate investigation and careful, thoughtful deliberation." "Lawyers who act reasonably under RPC 1.14 are not subject to discipline. Eugster did not."

Wisconsin:

In re Guardianship of Jennifer M., 323 Wis.2d 126, 779 N.W.2d 436 (Wis. App. 2009). Where an attorney has been appointed as the guardian ad litem of a partially disabled person who is known to be represented by counsel and needs to meet with the ward, Rule 4.2 does not directly prohibit the GAL from meeting with the ward without the consent of her counsel because the GAL would be acting pursuant to court order. Nonetheless, the policies behind the no-contact rule and the ward's statutory right to counsel justify extending it to this situation and so the court holds that a GAL may not meet with ward without the ward's counsel being present.

Ethics Opinions

ABA:

Op. 96-404 (1996). "Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent … " The opinion goes on to observe that the lawyer in question may consult with the client's family, and may even petition the court for the appointment of a guardian, but may not represent a third party petitioning for appointment. It is not impermissible for the lawyer to support the appointment of a guardian who the lawyer expects will retain the lawyer as counsel.

Alabama:

Op. 87-137 (1987). A lawyer whose client has become incompetent may file a petition for appointment of a guardian. A lawyer is "required to do so" if the lawyer believes it is in the client's best interests.

Alaska:

Op. 87-2 (1987). The discharged lawyer for a conservator may ethically disclose to the ward's personal lawyer that the conservator was not acting in the ward's interests.

California:

L.A. Op. 450 (1988). Initiating a conservatorship proceeding for a present or former client without the client's authorization involves an impermissible conflict of interest.

Op. 1989-112. Without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client's behalf, even though the lawyer has concluded it is in the best interests of the client. Initiation of the proceeding would breach confidences of the client and constitute a conflict of interest.

San Diego Op. 1990-3. The portion of this opinion dealing with the capacity of a client advised that, "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." The opinion continues, suggesting that once an issue of capacity is raised in the attorney's mind it must be resolved. "The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship."

S.F. Op. 99-2 (1999). Criticizing the result reached in California Formal Opinion 1989-112, *supra,* this opinion concludes after a careful analysis:

> An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client. [Citations omitted.]

Connecticut:

CT Inf. Op. 15-07 (2015). Rules 1.14. Committee was asked (a) whether a Court-appointed attorney for a conservatee is required to "assist" the client in filing an appeal of a Probate Court Order when the attorney believes the appeal is "frivolous" and may be financially "detrimental" to the client (not only as a result of the fees and expenses incurred in the appeal itself but, especially, if the appeal were to cause a delay in liquidating assets needed for the individual's care); (b) whether the Court- appointed attorney risks grievance proceedings for filing the appeal or for refusing to "assist" the client; and (c) whether the Conservator, if an attorney, is obligated to report the attorney's behavior to the Grievance Committee. The Committee's short answers to the three questions were as follows:

1. No. The Court-appointed attorney has no duty to assist the client/conservatee in filing a frivolous or financially detrimental appeal.
2. Yes. All attorneys risk being the subject of a grievance proceeding.

3. No. The Conservator is not required to report the attorney's behavior to the Grievance Committee if he or she acts as we suggest.

The Committee reached its conclusions after relying on and quoting extensively from the Connecticut case *Gross v. Rell*, 304 Conn. 234 (2012), which is summarized in the case section above.

District of Columbia:

Op. 353 (2010). Lawyer had been hired by attorney-in-fact to represent disabled principal in challenging a mortgage. Defendant mortgage company responded with allegations of wrongdoing by attorney-in-fact. L-awyer asked attorney-in-fact to step down as fiduciary but she refused. Opinion states that ordinarily, lawyer should look to the client's chosen surrogate decision maker. If that surrogate is in conflict with the principal, however, or is endangering the success of the legal matter, the lawyer can seek a guardian to be appointed. The lawyer must evaluate the danger of allowing the surrogate to continue in that role. The lawyer could not, however, withdraw, because withdrawal could in this case harm the disabled client.

Florida:

Op. 96-94 (1996). Since a person adjudicated incapacitated is the intended beneficiary of the guardianship, an attorney who represents a guardian of such a person and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

Michigan:

RI 176 (1993). The adverse interests of a mother and daughter preclude the same lawyer from representing both of them in connection with the revocation of a durable power of attorney and petitioning for the appointment of a guardian for the mother.

New York:

Op. 746 (2001). A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that (i) the client is incapacitated, (ii) there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests and (iii) there is no one else available to serve as petitioner.

Op. 775 (2004). When a possibly incapacitated former client sends a lawyer a letter, evidently prepared by someone else, requesting the return of the client's original will, the lawyer may communicate with the former client and others to make a judgment about the client's competence and to ascertain his or her genuine wishes regarding the disposition of the original will. In this case, the lawyer had reason to believe that the client might be acting under the influence of a family member who would benefit by the destruction of the will.

Oregon:

Op. 1991-41. A lawyer who has represented Client for many years and has begun to observe extraordinary behavior by Client that is contrary to Client's best interests, may take action on behalf of Client. This opinion states that, "[a]s the language of [former] DR 7-101(C) makes clear, an attorney in such a situation must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate

conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

Pennsylvania:

Op. 89-90 (1989). A lawyer for a competent client who decided to refuse medical treatment for progressively disabling disease may serve both as her lawyer and as her guardian ad litem.

Virginia:

Op. 1769 (2003). A lawyer may not represent the daughter in gaining guardianship of incompetent mother, who is currently a client of the lawyer in another matter.

MODEL RULES OF PROFESSIONAL CONDUCT

RULE 8.4 MISCONDUCT[1]

Maintaining The Integrity of The Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

[1] *Rule 8.4: Misconduct - American Bar Association*. American Bar Association. (2023). https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/

MODEL RULES OF PROFESSIONAL CONDUCT

RULE 8.4 MISCONDUCT – COMMENT[2]

Maintaining The Integrity of the Profession

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social

[2] *Rule 8.4 Misconduct - Comment - American Bar Association*. RULE 8.4 Misconduct – Comment. (2023). https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/

activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

EXHIBIT “B”

I. ACTEC's Public Position on Fostering a Welcoming and Inclusive Environment.

ACTEC has a DEI landing page on the public side of its website, and ACTEC has made several public statements regarding DEI Issues.

ACTEC Policy Statement of Commitment to be Actively Welcoming and Inclusive of Diverse Communities, Including by Taking Active Steps to Combat Discrimination and Systemic Racism Against Minority and Marginalized Communities

ACTEC is a non-partisan, apolitical organization. However, the College considers the historical, continuing, and devastating impact of systemic discrimination against racial, ethnic, gender, LGBTQ and other minority and marginalized groups in our society to be a humanitarian, rather than a political, issue.

Individually and collectively, ACTEC condemns racism, sexism and discrimination in all its forms. ACTEC acknowledges that a failure to confront racist, sexist and discriminatory practices and policies will merely perpetuate the status quo, which continues to take the lives and dignity of our fellow human beings.

ACTEC strives to be, and publicly commits to be, actively anti-racist, anti-sexist, and anti-discrimination, and further commits to be actively welcoming and inclusive of minority and marginalized individuals and groups. Accordingly, ACTEC affirms its commitment to creating and maintaining a diverse and inclusive environment within the College. And, we commit ourselves to undertake concrete actions in our personal and professional lives to eliminate racism, sexism and discrimination.

II. ACTEC's Public Statements on DEI Incidents.

ACTEC has a DEI landing page on the public side of its website, and ACTEC has made several public statements regarding DEI Issues.

On July 13, 2020, ACTEC released a Press Release and Statement Condemning Racism following the shocking George Floyd murder.

ACTEC Statement Condemning Racism

ACTEC is a non-partisan, apolitical organization. However, the College considers the historical, continuing, and devastating impact of institutionalized racism against people of color in our society to be a humanitarian, rather than a political issue. Individually and collectively, we will never, and should never, forget the shocking video images of the brutal murder, now formally charged, of George Floyd. ACTEC will not be silent in the face of these events but will state here affirmatively: ACTEC condemns racism in all its forms. ACTEC will continue to strive to be, and publicly commits to be, anti-racist. ACTEC agrees that as we strive to be an anti-racist society, we cannot attain that goal without acknowledging that Black lives matter.

ACTEC acknowledges that, in a culture and society where white supremacy has been institutionalized, systemic racism exists; therefore, a failure to embrace strong anti-racist practices and policies will merely perpetuate racism. While we remain committed to maintaining a diverse and inclusive environment, we too must do more as a College. We pledge to take additional anti-racist actions, and we encourage all ACTEC Fellows to actively strive to eliminate all forms of racism in their personal and professional lives. ACTEC acknowledges and accepts that, in time, we all will be judged not only by our words, but also by our actions.

On April 9, 2021, ACTEC released a Statement condemning the spate of violent attacks against Asian-Americans and Pacific Islanders, which included reference to additional resources.

Statement Condemning Violence Against Asian American Pacific Islanders

ACTEC condemns the recent spate of violent attacks against Asian-Americans and Pacific Islanders, including the horrific shooting of eight individuals in Georgia, six of whom were Asian American women, and the beatings of elderly Asians in many cities across the nation. Asian Americans and Pacific Islanders have faced a double pandemic of COVID-19 and anti-AAPI racism. Whether it is at their workplace, on public transit, or on the street, the most vulnerable people are being targeted: elders in precarious living situations, workers in low-wage jobs, and women and children. Anti-Asian discrimination in the U.S. is not new. Almost 150 years ago, the U.S. government effectively barred Asian immigration to the U.S. and barred Asian Americans from owning land. Less than 80 years ago, that same government interned those of Japanese descent in camps during World War II.

ACTEC is committed to being both actively anti-racist and anti-discriminatory, and to providing a welcoming and inclusive environment. The recent assaults against AAPIs are a painful reminder that the elimination of systemic racism and discrimination is everyone's responsibility. ACTEC commends its Fellows to become and remain engaged, both personally and professionally. You may take a first step by taking Bystander Intervention Training today.

Additional Resources:

- *American Bar Association's Diversity and Inclusion Center*
- *Additional Resources and Action Items PDF*
  - *Stop AAPI Hate*
  - *MovementHub*
  - *NAPAWF*
  - *The Asian American Legal Defense and Education Fund*
  - *OCA National Center*
  - *Asian Americans Advancing Justice*
  - *JACL*
  - *Challenging Anti-Asian Bias and Acting as an Ally*
  - *Responding to Anti-Asian Violence and Georgia Shootings*
  - *#racialtraumaisreal*
  - *APISAA Therapist Directory*
  - *Protect All People: Social media campaign to raise awareness and take action against Anti-Asian Hate.*
  - *Crisisline - text "CONNECT" to 741741 or call 800-273-TALK for English or 877-990-8585 for Asian Languages*

III. ACTEC's Public Video Series in Support of Fostering a Welcoming and Inclusive Environment.

ACTEC has a DEI landing page on the public side of its website, and ACTEC has made several public statements regarding DEI Issues.

Planning for a Diverse and Equitable Future video series.

Planning for a Diverse and Equitable Future is a quarterly video series created by The American College of Trust and Estate Counsel's Diversity, Equity and Inclusivity Committee. ACTEC considers the historical, continuing, and devastating impact of systemic discrimination against racial, ethnic, gender, LGBTQ and other minority and marginalized groups in our society to be a humanitarian, rather than a political issue.

This series strives to educate by discussing issues surrounding racism, sexism and discrimination in all its forms and by offering recommendations to combat inequality.

The Planning for a Diverse and Equitable Future series is ACTEC's most outward facing DEI initiative, and was a recipient of the 2022 Communicator Award.

The videos released to date can be found here: Planning for a Diverse and Equitable Future

Links to each video are provided here:

- Blind Success: Hiring Visually Impaired Lawyers
- Native American Tribal Court
- Consejos Básicos en Planificación Paternal
- Protecting Civil Liberties in America
- Landmark Supreme Court Civil Rights Cases
- Chronic Illness and Long COVID
- Proposal to Repair Racial Wealth Disparity
- "Fair Housing" & Opportunity Hoarding
- Breaking the Glass Ceiling at ACTEC
- Fight for Justice, Reparations and Bruce's Beach
- Mentoring and Affinity Bars
- Recognizing Religious Diversity
- Legal Options for Individuals with Special Needs
- Heirs Property
- Black Farmers, Land Loss & Racial Economic Gap
- Reparations and the Estate Tax
- Systemic Racism in the Legal Profession
- Gender Inequality in the Legal Profession
- Cultural Competence in Estate Planning
- Increasing Diversity in Legal Profession
- Giving from the Heart
- Wills, Slavery and Probate
- Transgender? How to Change Your Legal Records
- Economic Inequality in America

Each video landing page provides on overview of the topic, a transcript and, when available, additional resources for consideration. Here is an example:

Overview

Transgender or "trans" people may decide to change their legal name and/or gender marker as part of their journey to live as their authentic self. Many wealth and estate planning professionals are not familiar with the steps necessary to accomplish these updates, or with issues specific to financial and estate planning for the LGBTQ community.

ACTEC Fellows Cynthia G. Lamar-Hart and Paula A. Kohut share introductory information for practitioners and for the general public about these processes, such as:

- Terminology and etiquette;
- What documents can be updated as to legal name and/or gender;
- Recent legal precedent;
- General guidance on the steps for changing state records (legal name, driver's license, birth certificate) and federal records (passport, social security);
- Where to obtain forms and instructions for the letter required for updating federal records, with a caution that states may require different documentation;
- Where to go for a state-by-state guide to updating name and/or gender marker;
- Recent legal precedent regarding federal anti-discrimination protection;
- What estate planning documents to consider (healthcare directive, will, power of attorney, legal guardian) and where to go for more information.

This video was a recipient of the 2022 Communicator Award.

Resources

For Estate Planning Professionals

- Estate Planning for Gay, Lesbian, Bisexual and Transgender Clients: Statutory Surrogates, Regulatory Changes, Health Care Powers of Attorney & Related Considerations - Article by Paula A. Kohut Published by the *Estate Planning & Fiduciary Law Section of the North Carolina Bar Association* (Section Vol. 31, No. 3, April 2012)
- Creating End-of-Life Documents for Trans Individuals: An Advocate's Guide - Produced by Whitman-Walker Health

For General Public

- National Center for Transgender Equality - The one-stop hub for how to update name and gender on vital state and federal records.
  - Transgender Legal Services Network
- GLAAD Media Reference Guide - an overview of LGBTQ rights, terminology, and information created for journalists but helpful to all interested parties.
- Lambda Legal - Changing birth certificate gender designations by state.
- Transgender Legal History in the United States - Information on trans legal history by Wikipedia.
- Gerald Lynn Bostock v. Clayton County, Georgia - June 15, 2020 Supreme Court of the US decision regarding employee legal rights for homosexual or transgender people.
- Changing Your Name, Not Your Credit Score: Helping Transgender and Non-binary People with Name Changes and Credit Reports
  - Equifax Knowledge Center

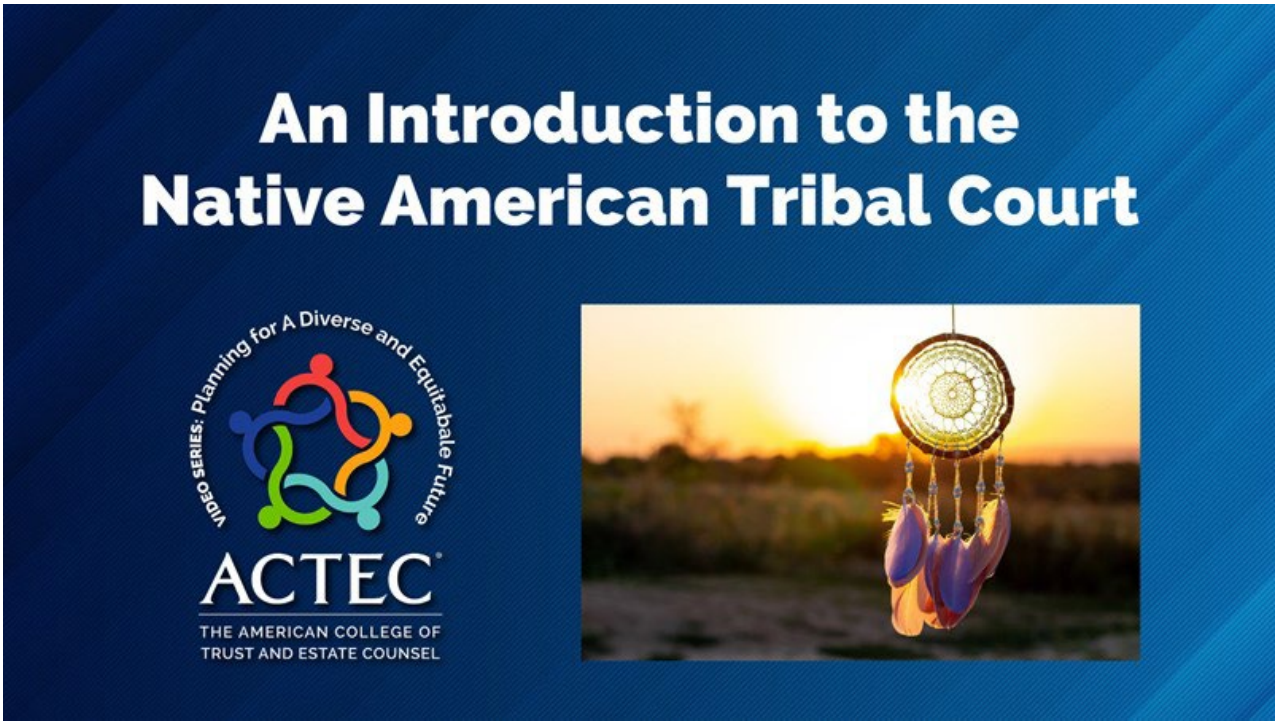
Here are the landing pages for all of the videos, which give a brief introduction to each topic:

a. Blind Success: Hiring Visually Impaired and Disabled Lawyers

An ACTEC Fellow describes his journey as a blind lawyer: lessons learned, job support, and recommendations for law firms hiring individuals with disabilities.

b. An Introduction to Native American Tribal Court

Judge Joseph Wiseman, a tribal court judge, explains the interworking of the court, its jurisdiction, and its importance to Native American law and culture.

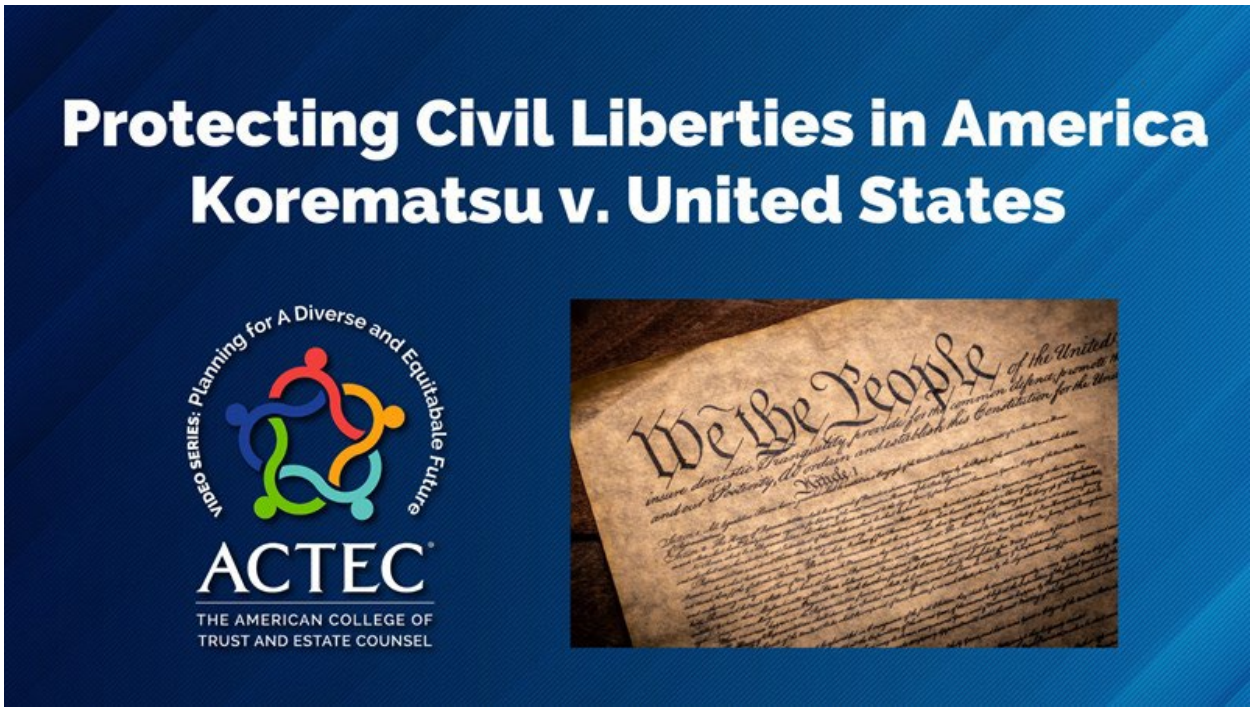


c. Consejos Básicos en Planificación Paternal

En este video, aprenda por qué es crucial crear documentos esenciales de planificación patrimonial, tales como un testamento y un poder notarial, para proteger, preservar y distribuir los activos al fallecer o durante la incapacidad; qué sucede si alguien muere sin testamento; y los pasos para empezar.

d. Protecting Civil Liberties in America: *Korematsu v. United States*

The 1944 Supreme Court case *Korematsu v. United States* retains significant relevance to present-day civil liberties and SCOTUS decisions. Dr. Karen Korematsu, daughter of plaintiff Fred Korematsu who refused to report to an internment camp during World War II, discusses the history of Japanese-American internment in the U.S., the case, and its relevance to social issues today.



e. Landmark Civil Rights Cases Decided by the Supreme Court

Author and Professor Christopher Schmidt reviews the history of critical Supreme Court civil rights and equality cases that everyone should know.

f. Chronic Illness and Long COVID in the Workplace

The Government Accountability Office estimates up to 23 million people in the US could develop “Long COVID,” potentially pushing an estimated 1 million people out of work. This video talks about the issues with a Long COVID sufferer and an employment law specialist to better understand the chronic illness and discuss the health and work impacts.

g. A Proposal to Repair Racial Wealth Disparity

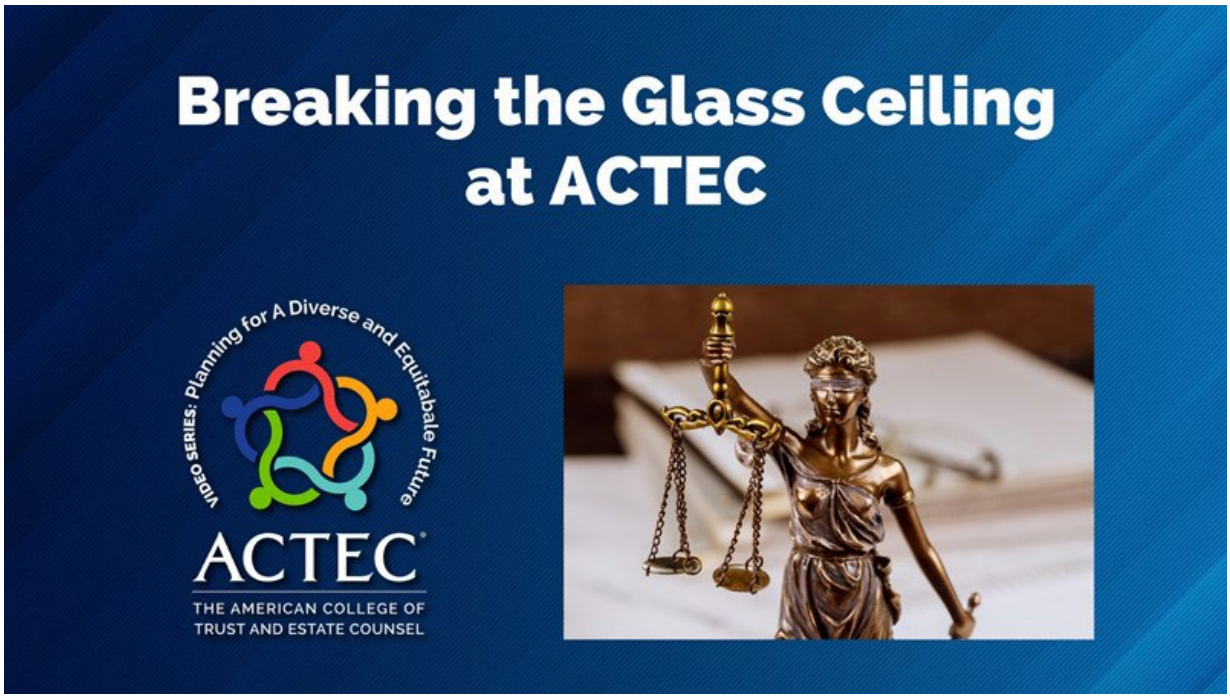
Repairing the wealth divide created by racism seems overwhelming, but with conversation and research come solutions. Experts in tax law present their research on racial wealth disparity as well as recommendations for funding and distributing reparations to descendants of U.S. enslaved people.

h. "Fair" Housing and Opportunity Hoarding

In a Fair Housing Month feature video, author and Georgetown University Law, Sherryl Cashin discusses how unfair housing has contributed significantly to the wealth gap between black and white Americans.

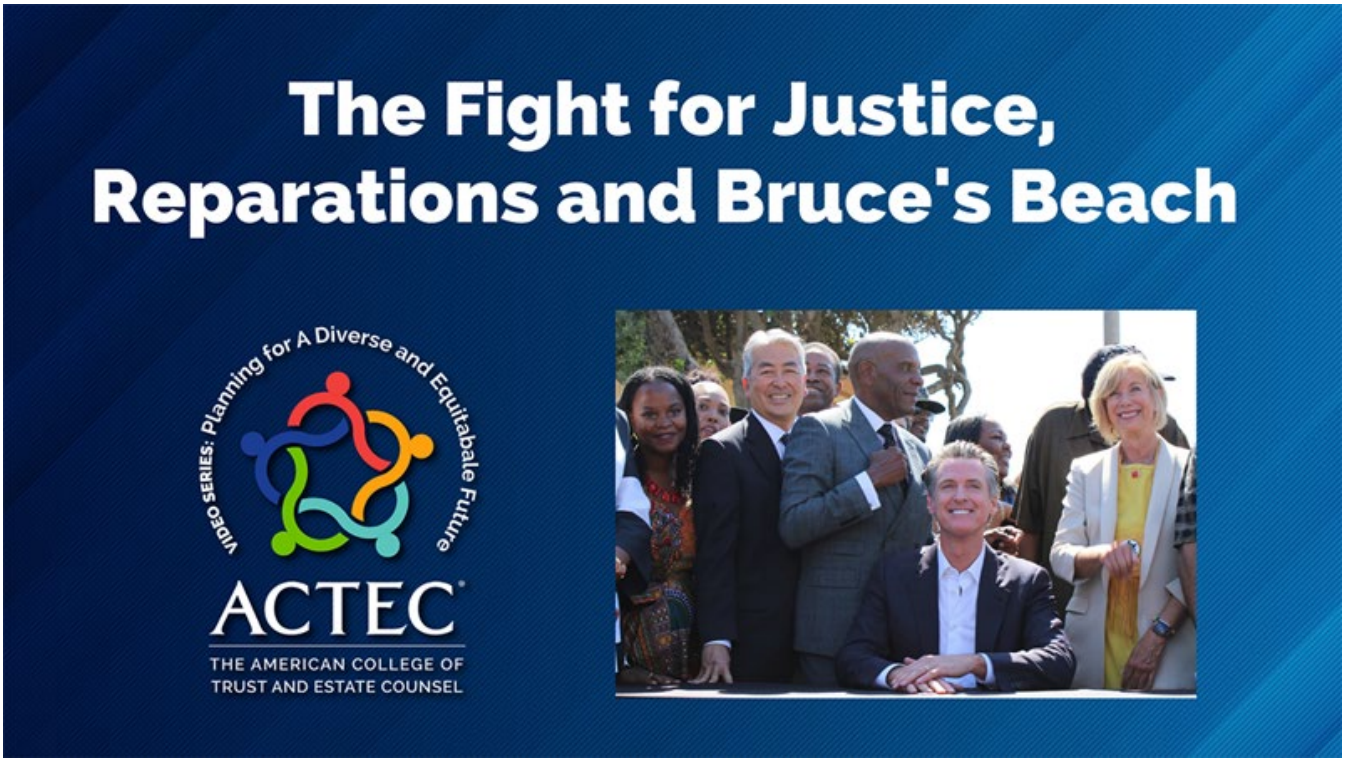
i. Breaking the Glass Ceiling at ACTEC

In honor of Women's History month, ACTEC looks at our history of inclusion and diversity by interviewing the first women to pave the way in the College. The video strives to understand better how an established organization like ACTEC has grown and changed to become more inclusive, diverse and aware.



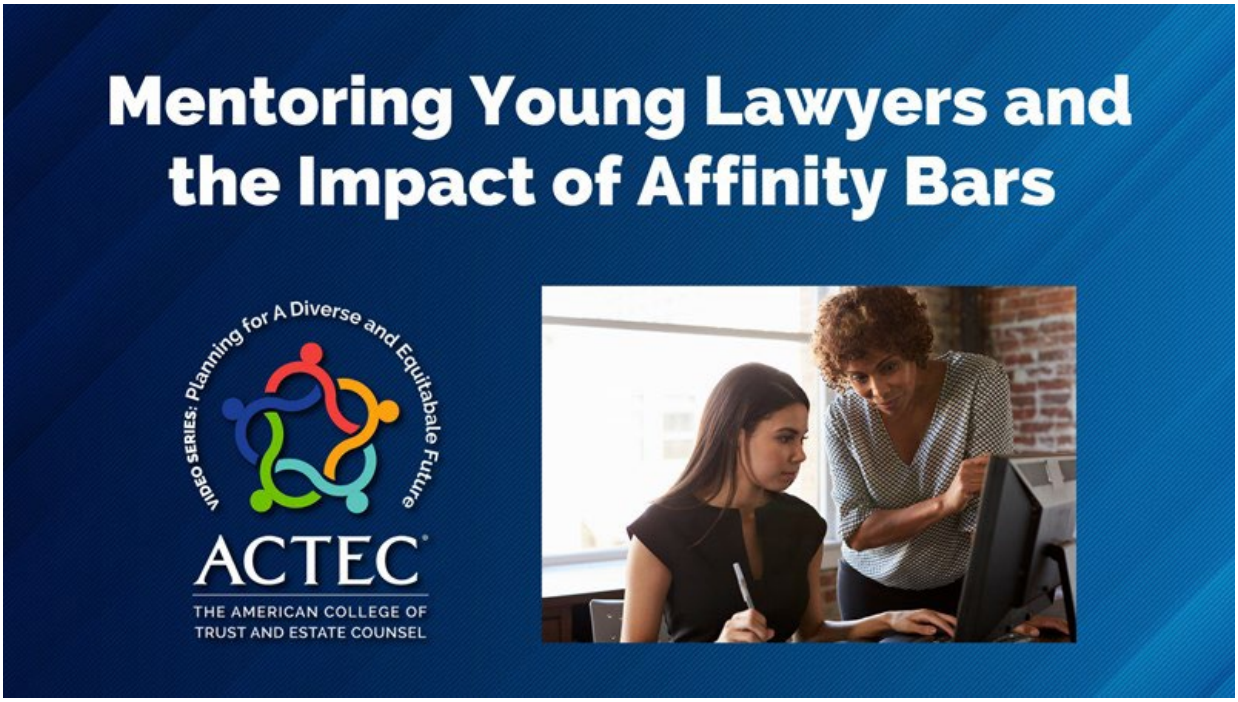
j. The Fight for Justice, Reparations and Bruce's Beach

Hear first-hand about the future of Bruce's Beach from the pro bono attorney who took the fight to court and the land-rights activist who took on the city and state to bring public awareness of the racially motivated eminent domain property issue.



k. Mentoring Young Lawyers and the Impact of Affinity Bars

Trust and estate lawyers discuss the importance of opportunities presented through mentoring and encourage participation in affinity bars.



1. Recognizing Religious Diversity While Advising End-of-Year Gifting

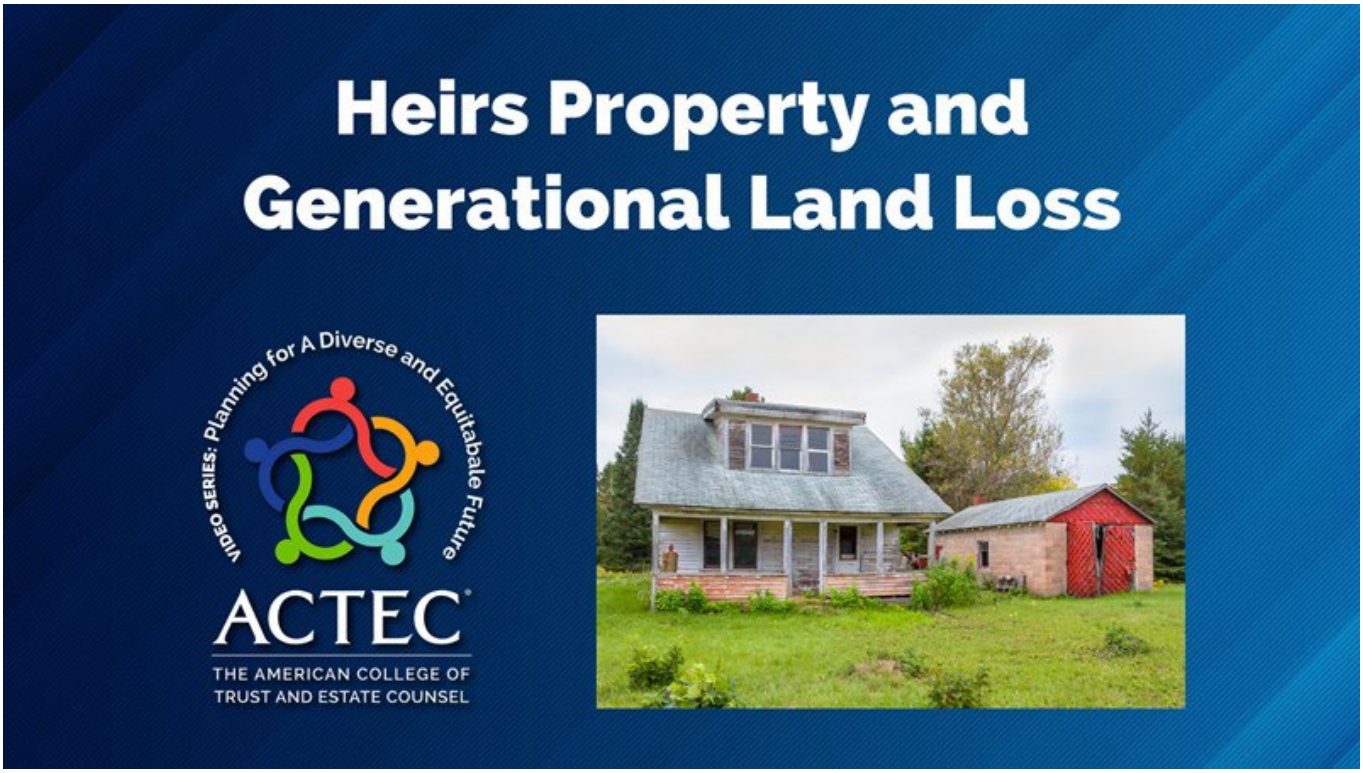
Religious-based giving is known by many names such as tithe, philanthropy, charity, Tzedakah, and Zakat. Trust and estate lawyers discuss the impact of faith on end-of-year giving and how to respect religious diversity when advising clients.

m. Legal Options for Individuals with Special Needs and Disabilities

Legal experts explain legal options for families and individuals with disabilities, including alternatives to guardianship, supported decision-making, legal documents and more.

n. Heirs Property and Generational Land Loss

An explanation of what is heirs property, discussion of how it has impacted families of color, and possible strategies to address the problem.

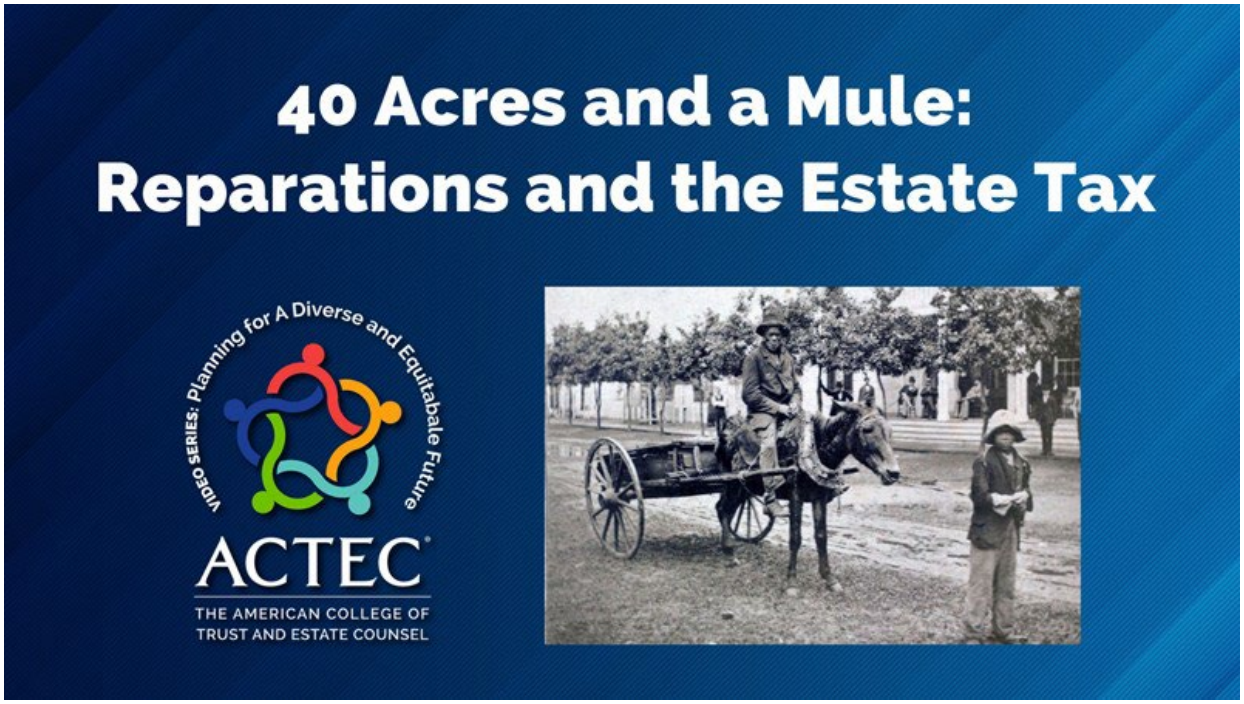


o. Black Farmers, Land Loss and the Racial Economic Gap

Author Natalie Baszile shares her research into the inequity of intergenerational wealth illustrated through the reality of Black American farmers and centuries of discrimination, government programs and practices.

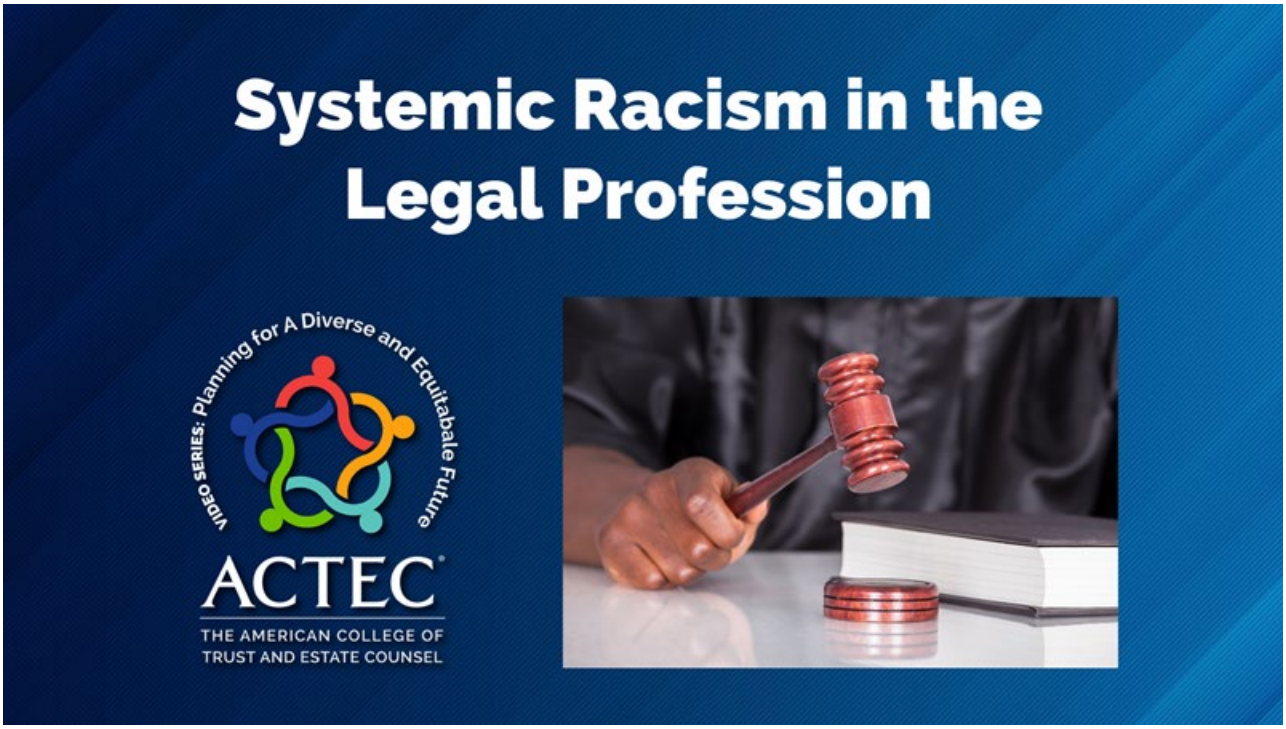
p. **40 Acres and a Mule: Reparations and the Estate Tax**

ACTEC Fellows offer an introduction to the wealth disparity resulting from slavery and Jim Crow law, the history of reparations, and the connection to wealth transfer and wealth taxation.



q. Systemic Racism in the Legal Profession

Judge Ashleigh Parker Dunston of North Carolina discusses her experiences with racism, implicit biases and offers recommendations for the legal profession.



r. Gender Inequality in the Legal Profession

How is the legal profession doing with gender equity, especially in trust and estate litigation? Is there still an income disparity between men and women? Four attorneys from The American College of Trust and Estate Counsel share their experiences and recommendations for improving equality in the trust and estate profession.

s. The Importance of Cultural Competence in Estate Planning

Two ACTEC Fellows discuss the differences between cultural sensitivity and cultural competence from the viewpoint of Asian American attorneys and explain why these skills are essential elements of effective estate planning. They also provide practical guidance as to how attorneys may best address sensitive cultural topics with their clients. Learn more in this important video.

t. How to Increase Diversity in the Legal Profession

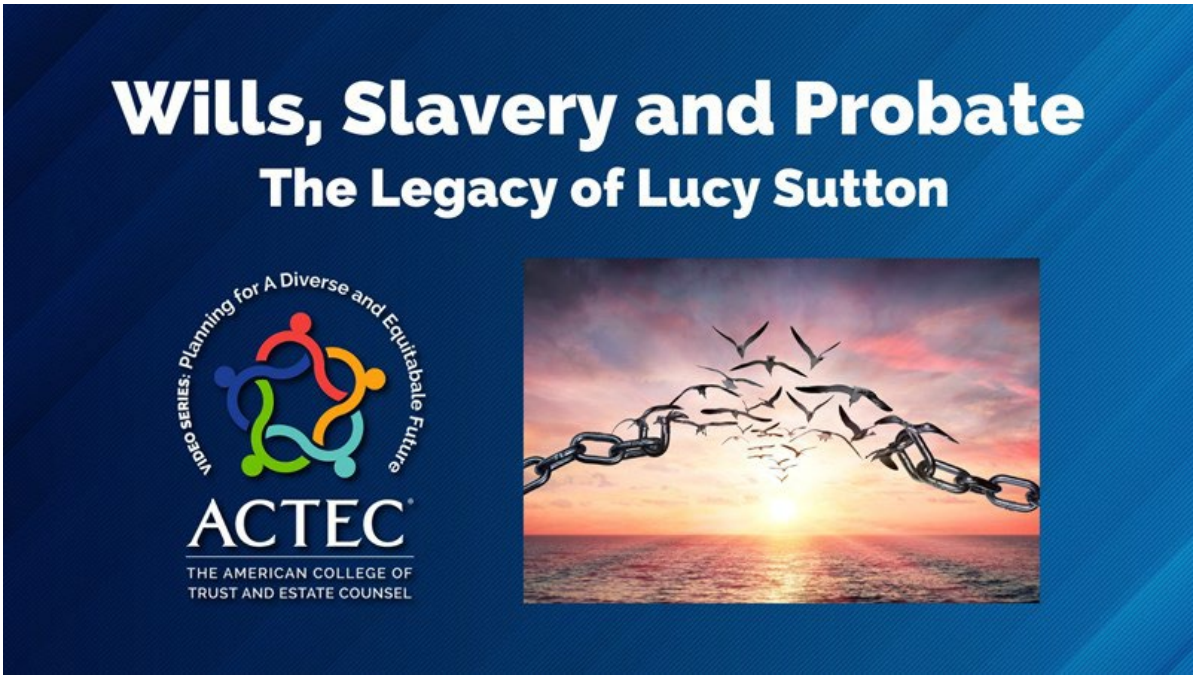
There is a diversity problem in the legal profession. How can we address it? Four impressive attorneys tackle the problem head-on and offer practical steps for mentoring, sponsoring, recruiting and retaining diverse people. The video offers recommendations and advice for law firms.

u. Giving from the Heart: Driving Diversity, Equity and Inclusion through Philanthropy

Guests from the American Heart Association, Carl Wayne and Nicolla Ross, are joined by Lorraine del Prado of del Prado Philanthropy, to dicuss how professionals can use an equity and diversity lens when working with clients, the philanthropic attributes clients might look for in nonprofits, and recommendations to combat inequality in this video.

v. Wills, Slavery and Probate: The Legacy of Lucy Sutton

In honor of Black History Month, ACTEC presents a mini-documentary about the family of one of our Fellow's journey to freedom from slavery in 1846. This emotional narrative offers insight into one family's journey to freedom and the critical role of a Last Will and Testament.



w. Transgender? How to Change Your Legal Name and Gender Marker on Vital Records.

ACTEC Fellows Cynthia Lamar-Hart and Paula A. Kohut share their legal and practical experience supporting transgender people who are changing their name and gender. Learn more about updating vital records and estate planning considerations in this video.

x. Economic Inequality in America

How do society and professionals promote generational wealth? Author Rochelle Riley and ACTEC Fellow Stephanie L. Perry discuss economic inequality for people of color, and actions estate planners and wealth management professionals can take to combat the wealth gap in America.

EXHIBIT “C”

A PERSONAL ESSAY
FROM
OUT AND ABOUT: THE LGBT EXPERIENCE IN THE LEGAL PROFESSION
(American Bar Association 2015)
https://www.americanbar.org/products/inv/book/224881618

Paula A. Kohut
A Transgender Lawyer

I love the practice of law (except for the days I hate it). I relish the moments when a client sends me a note of thanks or hugs me, and when I help improve someone's circumstances. Sometimes, I represent clients I do not like or whose beliefs disagree with mine. There are times I get angry or feel heartbroken when I cannot change the injustices some people must endure without a remedy. It pains me when I do not live up to my own expectations, an adversary "wins" a case I should have "won," or a jurist unjustly rules against my client or demeans my client or me. I regret it when I am rude or angry with my staff, colleagues, opposing counsel, court officials or adversaries. While the joy of practicing law outweighs the moments of frustration, sadness, anger and pain, I learned to cope with these feelings as a white male for the first twenty-seven years of my law practice.

So, it is with some trepidation that I tell you my story as a transgender lawyer since I was able to avoid bias and discrimination by living as a white male. I cannot tell you about many of the struggles a transgender lawyer faces because until recently (and then only infrequently) I have never had to overcome bias and discrimination while applying for a job, meeting with a prospective client or networking with a referral source. I admit moments when I shamefully stood in silence while derogatory comments were made by others about transgender people, as well as gays and lesbians, both in my personal life and the practice of law. My trepidation is not of what any reader may think about the fact that I am a transgender person (I am very comfortable with and proud of who I am), but of the fact that I have avoided much of the bias and discrimination transgender people encountered by living in my birth gender.

In 1983, I started my law career at the age of twenty-five having graduated from Wake Forest University School of Law with honors. The law firm I joined and continued to practice with for twenty-seven years had a uniquely positive culture of collegiality. I made partner in 1988 and was able to focus my practice in a number of different practice areas: litigation, corporate law, creditors' rights, health care, bankruptcy and for the last seventeen years, trust and estate planning, administration and litigation. I became and remain very involved in the estate planning bar, presenting, writing and serving on various committees with the North Carolina Bar Association, as well as volunteering with the Lawyers Assistance Committee of the North Carolina State Bar. In 2010, I was admitted to the American College of Trust and Estate Counsel.

In September, 2000, I was diagnosed with relapsing-remitting multiple sclerosis (MS). Having read three books on MS that weekend, I was certain the worst was right around the corner. I also pushed aside the commitment I had made to myself earlier that year to resolve a lifelong and secret personal struggle – accepting myself as transgender and beginning a gender transition. With MS, transitioning was out of the question. Once again, I did my best to forget my feelings

of being transgender and focused on practicing law and learning to cope with and manage my MS.

My law partners were incredibly supportive regarding my MS. Beginning in 2009, I had started to make accommodations in my practice with their support. By 2011, my health required that I leave what was a high paced and intense practice in trust and estate litigation, estate planning and estate administration. Effective June 30, 2011, I left my practice of twenty-seven (27) years to open a solo practice in Wilmington, North Carolina in which I could better manage the pace and flow of my practice.

These health and career changes also provided an opportunity to deal with being transgender. It had taken decades to summon the courage to steel myself for complete rejection by colleagues, friends and family members. I was certain I would be judged based upon negative stereotypes in books, movies and other media. Fortunately for me, my fears on the whole have proved unfounded. I attribute most of the ease with which I have transitioned genders in the legal profession to the many transgender people with professional careers who transitioned before me.

My beliefs about the certain judgment and rejection of my peers were so wrong. I was very active in the North Carolina bar throughout the state as Paul so my transition was hardly a secret. What surprised me most was the genuineness of the overwhelming majority of my colleagues throughout the state who welcomed me as Paula while at the same time the electorate in North Carolina passed a constitutional amendment banning same-sex marriage. While harboring a personal secret for over fifty (50) years, it was easy to wrongfully project my expectations of rejection upon my colleagues, friends, and family both in and outside of North Carolina.

My transition has not been without challenges. Early on in my transition, I was treated poorly by a lawyer in an established firm. Based upon my life experiences as a white male, I do not simply suspect (as many minorities are routinely forced to do in face of discreet bias) but knew that my opposing colleague was treating me poorly because I am transgender. Yet, like most professionals, I refused the bait and ignored the actions of opposing counsel.

When practicing law as Paul, I was frequently marketed by trust departments, insurance professionals and financial advisors. As Paula, very few have reached out and at least two have not followed up with an initial contact after learning I am transgender. I suspect the lack of marketing of my practice is due to the fact I am transgender and not the size of my practice. Of course, I will never know.

One prospective client, whom I could tell was initially thrown by my deep voice on the telephone, was too polite not to make an initial appointment only to call back and cancel professing to be called out of town on business. For the first time in my life, I questioned whether I was being treated differently because of my gender. The existence of bias and discrimination is real, but subtle.

A PERSONAL ESSAY
FROM
OUT AND ABOUT: THE LGBT EXPERIENCE IN THE LEGAL PROFESSION
(American Bar Association 2015)
https://www.americanbar.org/products/inv/book/224881618

One of the many joys of my transition has been the support of my colleagues. The colleagues I have known for years in Estate Planning Section of the North Carolina Bar Association have welcomed me. Another bright spot in my transition has been the American College of Trust and Estate Counsel which has embraced me from the date I called to change my name to this year when I was appointed to the Diversity Task Force.

I am in awe of those transgender lawyers throughout the United States who against all odds transitioned.

Finally, I hope that in the not too distant future, bias and discrimination against LGBT people, lawyers and non-lawyers alike, will be a thing of the past.

EXHIBIT “D”

Gaining Cultural Competency

By Celeste Fiore

Cultural competency and diversity seem to be hot topics for continuing legal education (CLE). Maybe this is because some jurisdictions have made separate diversity requirements within the ethics CLE component, or maybe it is just a sign of the times: People are different, but they all deserve the same respect. Or, it could be that the business case for diversity has gained more traction. Whatever your motivation for wanting to gain cultural competency, the goal of this article is to provide an accessible general outline and set of tools for how to gain cultural competency.

Each year, I give roughly 50 presentations about diversity and cultural competency primarily focusing on LGBTQ (lesbian, gay, bisexual, transgender, and queer) people to groups such as high school teachers, local registrars, members of the judiciary, lawyers, and community groups. What I have learned through these presentations, and through sharing panels with members of different linguistic, cultural, or religious groups, is that if we view cultural competency like learning another language that is foreign to us, we can follow similar steps to gain fluency in our communications and interactions with members of different groups of people. This fluency is cultural competency.

When polled, the majority of my audience members report they attempted to learn another language. However, most of these people never gained fluency. Of course, they do not lose their own native language in the process of attempting fluency, and chances are that their understanding of their own language is greatly increased just by attempting to learn another language. Because I am most familiar with the topic, this article will use LGBTQ cultural competency as an example to fill in the basic framework necessary to gain fluency about another group. This structure can be used for gaining cultural competency about other groups as well, much the same way as the framework holds to learn Spanish as well as English as additional languages. I posit that gaining cultural competency is not only possible, but much less difficult than one might imagine.

Even if you read no further, I hope you take away the first, most important principle: It is the responsibility of the *learner* who wants or needs to gain cultural competency to put in the work, not up to the teacher to impart their language to you. You would not walk up to a native speaker of another language and just expect them to teach you their language immediately or in a short period of time with no effort or independent learning on your part. However, it has been my experience that LGBTQ people are presumed to be able to quickly teach about the history of LGBTQ people throughout time and to give full vocabulary lessons about all current terms relating to our community. It is not the responsibility of native speakers to teach others fluency, nor is it possible.

The second principle: Most LGBTQ people are not experts on all things LGBTQ, much like most people, even those who have a particular heritage, are not professional linguists or language teachers. You would not expect that a native French speaker who happens to work with you will be able to teach you the French language, be current on politics and culture in another country, or be a scholar of that country's history. Similarly, when someone comes out as LGBTQ, there's no monthly newsletter they sign up for that contains relevant points of LGBTQ history or current vocabulary. There was no LGBTQ required K–12 curriculum in *any* state ten years ago: California was the first state to mandate LGBTQ inclusive curriculum in 2011, with New Jersey in 2019 being the next state (Jackie Botts, "ABCs of LGBTQ History Mandated for More U.S. Public Schools," tinyurl.com/y3xc8urp). It was not until 2017 that California approved history textbooks in accordance with the mandate. Chances are that none of you reading this article or any of the people you interact with on a daily basis learned about LGBTQ people or history because you didn't learn it in K–12 education. Therefore, we have all been left in the dark to figure it out on our own either in self-selected college classes or through personally motivated learning. To put this in perspective: The LGBTQ person you are looking to as a teacher may be trying both to learn their own history and to work through their own identity and labels in order to figure out where they fit in the community.

Yet, in my experience, LGBTQ people are expected to be completely up-to-date on current events impacting the community, details on the history of the community's oppression, and on all the labels or definitions folks use to describe themselves. While it is acceptable to ask an LGBTQ person about something that you might have read about LGBTQ history, it is not acceptable to assume that an individual will be able to teach you all you need to know. Too many people assume that LGBTQ people can explain and teach what it means to be LGBTQ, but justifying one's own identity is almost impossible (and exhausting). People assume that just because someone is LGBTQ they have specialized knowledge about how laws impact the LGBTQ community, such as whether Title VII of the Civil Rights Act covers sexual orientation and gender identity under sex discrimination. (I'll ruin the surprise: This will be heard by the Supreme Court this term, so this area of the law is not settled.)

Unfortunately, sometimes even LGBTQ people, in their zeal to believe that they are treated equally under the law, assume that practitioners don't need specialized knowledge about how LGBTQ people might be impacted in a particular area of the law. However, as long as the law does not validate or recognize LGBTQ people and their families as equal, advanced fluency in LGBTQ issues will be necessary to adequately represent LGBTQ clients. For example, New Jersey courts have recently determined that unmarried same-sex parents and their children can, as a matter of law, constitute a family. In *Moreland v. Parks,* 456 N.J. Super. 71 (App. Div. 2018), 191 A.3d.729 (2018), the Appellate Division overturned a trial court ruling that a non-marital co-parent could not bring a claim for bystander emotional distress when her same-sex partner's child was struck and killed by a car in front of her. At the time the accident occurred, the co-parents were not and could not have married each other in New Jersey; the trial court found that because the parents did not have a legal relationship to each other, the non-biological parent could not have a familial relationship with the biological parent's child. The Appellate Division disagreed and remanded for further proceedings. Cultural competency about how LGBTQ people create and organize their families, as well as an awareness that LGBTQ couples were not historically treated equally under the law, was vital to the appellate court's decision in *Moreland.*

You must make a commitment to put in the time and effort to gain competency.

Third, you have to make a commitment to put in the time and effort to gain fluency. Anecdotally, fluency in a language takes somewhere between 500 and 1,000 hours for less difficult languages. This means that it if you spend an hour a day on a language, it would take almost three years to gain fluency! The same principle holds true for LGBTQ cultural competency because it includes learning about culture, history, vocabulary, and current events — this kind of knowledge isn't gathered overnight. Practice is what makes perfect: Attending continuing legal education courses on LGBTQ issues, watching shows or movies with LGBTQ content, and making friends with LGBTQ people through community organizations (such as religious institutions or service/volunteer organizations) provide opportunities to practice.

Fourth, have a personal reason for wanting to gain fluency, whether it's to increase your client base or support a friend or relative. Motivation is key. Often a relative, friend, or job personally motivates a learner to push past mental blocks or fatigue in learning. It is thought that at least 10 percent of the population is LGBTQ, a statistic from the Kinsey reports of the 1950s and 1960s when fewer people were comfortable coming out and identifying as LGBTQ even confidentially to

researchers. Thus, it's likely that you know someone who is LGBTQ even if they have not come out to you. Sharing your LGBTQ cultural competency (or your efforts to obtain it) creates a safe space for LGBTQ people to come out to you and around you. Studies have shown that people are more productive and comfortable when they can be themselves.

Fifth, start with mastering the basics, like vocabulary words or cultural history, rather than jumping immediately into complex theories. When learning a language, it's best to start with children's stories containing limited vocabulary rather than trying to comprehend poetry. Find established LGBTQ advocacy or media organizations and review any definitions they may have on their websites to gain fundamental vocabulary. Try practicing the acronym "LGBTQ" until you can say it without stumbling or inadvertently adding or subtracting letters. Although it may seem silly at first, having "LGBTQ" roll off your tongue indicates that you have practiced making sure that you don't stumble when welcoming the LGBTQ community. This is similar to learning words in another language with the proper accent and sound of the words so that you can be understood by native speakers. Learn to ask simple questions politely and appropriately: Asking someone what pronouns they use also reflects cultural competency and does not take much effort to obtain significant returns.

Sixth, practice with a variety of native speakers, not just one. Much like a Spanish speaker in Mexico might have a different word than a Spanish speaker in Spain for the same object, different issues may impact lesbians more than gay men, such as gender-based income inequality or violence. There is not one monolithic LGBTQ culture/language nor is there only one way to speak Spanish. In particular, transgender people have issues that uniquely impact them based on their gender identity and may also be impacted as non-heterosexual (lesbian, gay, or bisexual). This is intersectionality within the LGBTQ label that may not be recognized without sufficient cultural competency.

Seventh, put up visual symbols to reflect that you're working toward cultural competency or fluency. In the context of language, a quote in that language shows native speakers, or other learners, that you're interested in that language. It could expand your network to more people with whom to continue learning. Hanging a rainbow flag or safe space sticker shows LGBTQ people that you will not be overtly discriminatory or hostile to us; this may seem like a very low bar, but LGBTQ people often face verbal and physical violence due to our identities, so having a welcoming space is vital to survival.

Eighth, start looking at the world in the second language, examining your own preconceived notions and comparing these to the lived experiences of native speakers. Start with the forms you use in the courthouse or in your practice. If your vocabulary contains words that may not apply or make sense to someone who speaks another language, find a better word, being mindful of false cognates (words that exist in two languages but that mean different things, like "gift," which means "poison" in German). You may think that "husband/wife" means the same thing for LGBTQ people, when, in fact, a gender-neutral term such as "spouse " may be more appropriate.

Compare your own preconceived notions to others' lived experiences.

Looking at the world through a new cultural lens is like learning new idioms, which is difficult if you have no cultural context. For example, American English contains an extraordinary number of idioms relating to horses: "don't put the cart before the horse," "don't beat a dead horse," "you can lead a horse to water, but you can't make it drink," etc. If you have no frame of reference for why people in the United States seem so focused on horses, you won't be able to learn these very common expressions. Likewise, you won't be able to understand why making sure to use the correct pronoun and name for a transgender person is vital to that person's health and safety unless you have learned that outcomes for transgender youth are exponentially more positive when that child is affirmed in their gender identity, so make sure you understand the basics.

Similarly, if you are unable to recognize that many LGBTQ people are used to being excluded from polling data or having to hide their identities, you will not be able to ask the right questions of them. For example, the only demographic question related to LGBTQ people on the 2020 U.S. Census will explicitly ask couples living together if they are "same-sex" or "opposite-sex" partners; there will be no questions about the sexual orientation or gender identity of anyone surveyed. Therefore, there will not be any count of non-coupled LGBTQ people (and bisexual people in an opposite-sex couple will be erased and effectively considered straight by the census). This framework also completely ignores the existence of partnered or unpartnered non-binary people (people who do not identify as either male or female). If it is relevant to your representation of an LGBTQ person, you can ask if they are in a relationship with anyone, how that person identifies, and what pronouns everyone uses. Make sure you have either a blank spot or drop-down menu that includes more than just "M" and "F" for gender markers (include at least "X") to include non-binary people.

Ninth, utilize multiple methods of learning, such as reading, writing, and speaking. There are movies, books, and television shows in other languages and also those that feature LGBTQ characters. Try to engage with media created by LGBTQ people or native speakers for a more authentic experience. Although the Internet can be a great research tool, be wary of social media postings posing as journalism.

Last, but not least, take an intersectional approach. For example, if it's Hispanic heritage month, read an article about current or historical Latinx LGBTQ people. No language or identity exists in a vacuum, and too often the experiences of white LGBTQ people are taken as the only experience. Therefore, as you begin your cultural competency fluency journey, be mindful that no one experience is *the* LGBTQ experience.

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EXHIBIT “E”

In Defense Of The Singular They

By Maria Mangano

A note from columnist Laura Graham: In the last issue, I wrote about the challenging issue of the use of the singular they in legal writing. While I advised using it with caution, I recognized that some writers would disagree with my advice. Shortly after the column was published, I received this very thoughtful and respectful response from Maria Mangano defending the use of the singular they, and I am grateful that she agreed to its publication in this issue.

Dear Professor Graham,

I am writing in response to your column in the November 2019 issue of the *North Carolina Lawyer*. I am a licensed attorney who has been practicing law in North Carolina since 1982, and I have served as the Director of the Career Development Office at the University of North Carolina School of Law since 2005.

I was deeply (deeply!) disappointed to read your column on the singular *they*. While you accept the use of the term for non-binary persons (tacitly acknowledging that language changes and the formerly incorrect and ungrammatical can become acceptable and correct), you resist its use when it refers to a singular non-binary person (refusing to accept that language changes and the formerly incorrect and ungrammatical can become acceptable and correct). It is, to my mind, and the mind of many others, a plainly outmoded and sexist construction, and defending its use is increasingly, well, indefensible. As quoted in the NPR piece below, "When you utter 'he,' you always bring a male to mind." It's that simple.

For starters, the use of the singular *they* in English is not new at all, but has been well-established in both spoken language, and yes, written language too, for centuries. Merriam-Webster, in declaring *they* the word of the year for 2019, noted that "English famously lacks a gender-neutral singular pronoun to correspond neatly with singular pronouns like *everyone* or *someone*, and as a consequence *they* has been used for this purpose for over 600 years"

Although the singular *they* has a long and venerable history both in spoken and written language, as noted by this NPR piece from 2016 – "It shows up in Shakespeare, Dickens and George Bernard Shaw. Jane Austen was always saying things like 'everybody has their failing;'" – "the Victorian grammarians made it a matter of schoolroom dogma that one could only say 'Everybody has his failing,' with the understanding that 'he' stood in for both sexes," the masculine embracing the feminine as it were. The NPR piece has a link to a blog posting which contains a detailed history of the use of the singular *they* and the resistance to its use, which resistance got seriously criticized during the second wave of feminism – happily in my lifetime! – noting that the prohibition against the generic *they* wasn't really discredited until the 1970s, when the second-wave feminists made the generic masculine the paradigm of sexism in language. Male critics ridiculed their complaints as a "libspeak tantrum" and accused them of suffering from "pronoun envy." But most writers now realize that the so-called gender-neutral "he" is anything

but. Nobody would ever say, "Every candidate thanked his spouse, including Hillary." When you utter "he," you always bring a male to mind.

My early-morning research on a busy day (would that I had even more time for this important subject) indicates that, as you say, a fair number of your colleagues have put it, "the train has left the station" when it comes to the use of the singular *they*, not only in speech, but in an increasing acceptance in formal writing and style guides. Yes, a phrase or sentence can sometimes be recast (generally by using the plural) to avoid the singular *they*, but the only reason to insist that every use of the singular *they* be recast or rewritten is based upon the belief that the singular *they* is "wrong" in some sort of immutable way. However, language is not immutable and unchanging, but rather, as the Linguistic Society of America put it in *Is English Changing?*, "Language is always changing, evolving, and adapting to the needs of its users."

Why is this so important? Language and words help form our beliefs and images and concepts of the world. To go back to where I started, "When you utter 'he,' you always bring a male to mind," reinforcing the patriarchal belief that men are more important than women. As a 16th century grammarian neatly put it, "the masculine gender is more worthy than the feminine..."[1] I am proud to say that I have done my small part to depict the world in a more egalitarian way and have consistently used the generic singular *they* not only in speech, but in my writing, both informal and formal – including all my legal writing – for as long as I can remember.

Change happens because we make it happen. I urge you to rethink your resistance to this issue and write in a way, and encourage your students to write in a way, that sends the message that the feminine gender is, always, as worthy as the masculine.

With kind regards,
Maria Mangano

Endnotes

[1] https://www.merriam-webster.com/words-at-play/word-of-the-year/they
[1] https://www.npr.org/2016/01/13/462906419/everyone-uses-singular-they-whether-they-realize-it-or-not
[1] https://blogs.illinois.edu/view/25/300287
[1] https://www.nprorg/2016/01/13/462906419/everyone-uses-singular-they-whether-they-realize-it-or-not
[1] https://www.linguisticsociety.org/content/english-changing
[1] https://blogs.illinois.edu/view/25/300287