SECTION G

Ethical Issues in Representation of Fiduciaries

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ETHICAL ISSUES IN REPRESENTATION OF FIDUCIARIES

A. Definition of "Fiduciary" for Purposes of this Outline

"Fiduciary" – Personal Representatives, Trustees, Guardians, and Conservators

Does not include trustees in bankruptcy, partners in partnership, or any other fiduciary in corporate setting.

B. Whom Does the Lawyer Represent?

a. Duties to Persons Other than the Fiduciary – General Issues

i. When a nominated Executor retains an attorney to assist him with the probate of his late mother's estate, to whom does the lawyer owe duties? Are the duties normally owed to clients expanded or limited as a result of the client's role as fiduciary to the decedent's estate?

ii. When the Trustee of an irrevocable trust retains an attorney to advise it with respect to the administration of the trust, to whom does the lawyer owe duties? Is there any distinction between this situation and that in which the Trustee retains the attorney for purposes of defending the Trustee in a lawsuit by the beneficiaries of the trust?

iii. Can an attorney represent both a fiduciary and a beneficiary of the estate or trust? Under what circumstances?

iv. Is the client the Executor or the Estate? The Trustee or the Trust?

b. Sources of Authority / Discussion

1. Restatement (Third) of Law Governing Lawyers §51 (2000) - Duty of Care to Certain Nonclients

For purposes of liability under § 48 [Professional
Negligence], a lawyer owes a duty to use care within the
meaning of § 52 [Standard of Care applicable in
Professional Negligence and Breach of Fiduciary Duty
cases] in each of the following circumstances:

(1) to a prospective client, as stated in § 15;

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

(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

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

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

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

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

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter

within the scope of the representation to prevent
or rectify the breach of a fiduciary duty owed by
the client to the nonclient, where (i) the breach is a
crime or fraud or (ii) the lawyer has assisted or is
assisting the breach;

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

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

ii. ACTEC Commentaries - See selected Commentary at Section D of this outline.

iii. Common Law – Generally

1. Majority– The majority of jurisdictions tend to follow the rule that the attorney for a personal representative or trustee does not owe any duties to the beneficiaries of the estate or trust; the duty to exercise reasonable care is owed only to the fiduciary client. Bruce S. Ross, *Ethical Issues in Practice: Important Fiduciary Litigation*, ALI-ABA Estate Planning Court Materials Journal, August 2010, p. 10.

a. *See, e.g., Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994). The beneficiaries filed a complaint asserting that the trustees' attorneys owed the beneficiaries of the trust a duty of care. The defendants claimed they owed a duty only to their clients, the trustees. The court held that the defendants owed a duty "only to the trustees. The trustees alone can pursue an action against them. It bears repeating that this result does not leave the beneficiaries without recourse; they can pursue an action directly against the trustees if they can show a breach of their fiduciary duties." *Spinner* at 547. The court notes that it is "clear that it is the potential for conflict that prevents the imposition of a duty on the defendants to the trust beneficiaries…the isolated instance of identity of interests between the trustees and the beneficiaries would not support the imposition of a duty on the defendants to the plaintiffs." *Id.* at 554.

i. The court distinguishes the situation from the cases in which courts have held attorneys liable to intended beneficiaries when will or trust drafting errors thwart the deceased client's intent. " '[I]n those cases, there is no conflict between the duty the attorney owes to this or her client and the duty the attorney owes to intended beneficiaries. The beneficiaries, like the testator, want the will allowed.'(citations omitted)" *Id.*

b. *Firestone v. Galbreath*, 747 F. Supp. 1556, 1571 (S.D. Ohio 1990), aff'd, 976 F.2d 279 (6th Cir. 1992), S.C., 67 Ohio St. 3d 87 (1993), quoting *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987) ("It is by now well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice").

c. *In re Estate of Brooks*, 42 Colo. App. 333, 336-337, 596 P.2d 1220 (Colo. Ct. App. 1979). The court held that an attorney for corporate and individual trustees owed no duty to a trust beneficiary who did not receive any income the trust, where the trust instrument provided income was to be paid in trustee's sole and absolute discretion, without having to observe rules of equality among beneficiaries. Without a duty to a beneficiary, there could be no breach of duty. The attorney was acting pursuant to the attorney-client relationship between himself and the trustees, and his actions did no establish any fraud or malice, without which no liability to a third party could arise.

d. *Kramer v. Belfi*, 106 A.D.2d 615 (N.Y. App. Div. 1984) "Defendants were retained by the executor only and are not liable to the beneficiaries of the decedents' estates in the absence of fraud, collusion, or malice, none of which is alleged here (citations omitted)." *Id.* at 615-616.

e. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621-622, 624 (Tex. App. 1993) (no fiduciary relationship exists between the beneficiary of trust and trustee's attorney).

f. *Neal v. Baker*, 194 Ill. App. 3d 485, 487, 141 Ill. Dec. 517, 551 N.E.2d 704 (Ill. App. Ct. 1990) (primary purpose of attorney-client relationship was to assist executor in the proper administration of its duties; no duty to beneficiaries).

g. *Rhone v. Bolden*, 608 S.E.2d 22 (Ga. Ct. App. 2004), reconsideration denied, (Dec. 2, 2004). "The existence of a duty by the administrator 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…Neither are the heirs of an estate third-party beneficiaries of the attorney-client relationship between an attorney hired by an administrator." *Id.* at 30.

h. *Ferguson v. Cramer*, 709 A.2d 1279 (Md. 1998) "[W]here a personal representative hires an attorney to assist him or her in handling the estate, as in the instant case, the direct purpose in hiring the attorney is not to benefit the beneficiaries. As the Court of Special Appeals noted, any benefit to the beneficiaries from the personal representative's attorney is merely incidental. (citations omitted). Such incidental benefit is not sufficient to impose a duty upon an attorney. (citations omitted) In cases such as the instant case, the attorney owes a duty solely to his or her client, the personal representative." *Id.* at 1284.

2. Minority – in some cases, courts have found that attorneys for fiduciaries do owe duties to the beneficiaries of the estate or trust.

   a. *Charleson v. Hardesty*, 839 P.2d 1303 (Nev. 1992) "We agree…that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law." *Id.* at 1306-1307.

3. Balancing Test / Third Party Beneficiary Test – some states apply a "balancing test" or "third party beneficiary" test to each scenario to determine if duties exist, which results in mixed outcomes in these jurisdictions based on factual circumstances.
   a. *Neal v. Baker*, 551 N.E.2d 704, *appeal denied*, 132 Ill. 2d 546 (Ill. App. Ct. 1990) summarizes the "third party beneficiary" test: "the supreme court [has] established the standard for pleading the liability of attorneys to nonclients in legal malpractice actions. The court[has] extended the traditional concept of attorney liability to include third parties who were 'intended beneficiaries of the relationship between the client and the attorney.' (citations omitted). A nonclient must prove that the primary purpose and intent of the attorney-client relationship is to benefit or influence the third party." *Id.* at 487.
      i. In *Neal*, the court applied the "third party beneficiary test" to determine whether a beneficiary had standing to sue an estate attorney for malpractice. The court dismissed the beneficiary's cause of action against the executor's attorney after the plaintiff failed to establish the primary

purpose and intent of the attorney-client relationship was to benefit the beneficiary. *Id.* at 487.

b. *Goldberg v. Frye*, 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990). In this case the court utilized a "balancing test" summarized as follows: "The determination of duty rests upon the assessment of six considerations: "(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession." *Id.* at 1268.

   i. "Particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants. [internal citations omitted] The fiduciary's attorney, as his legal adviser, is faced with the same task of disposition of conflicts. It is of course the purpose and obligation of both the fiduciary and his attorney to serve the estate. In such capacity they are obligated to communicate with, and to arbitrate conflicting claims among, those interested in the estate. While the fiduciary in the performance of this service may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney by definition represents only one party: the fiduciary. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney." *Id.* at 1269.

c. *Wisdom v. Neal*, 568 F. Supp. 4 (D. N.M. 1982 (applying New Mexico law)). "Without privity of contract, the State's courts have looked to other criteria for limitations on tort liability. In rejecting privity of contract, New Mexico's Supreme Court expressly referenced a California line of cases in which a multiple factor balancing test is used instead of privity of contract. The factors are, 'the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that he

suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, and the policy of preventing future harm.'" (Citations omitted).It is patently obvious that an evaluation of these factors dictates the conclusion that defendants here owed a duty to plaintiffs. This case is not materially distinguishable from those cases in which lawyers have been held liable to would-be beneficiaries for the negligent drafting of a will. (Citations omitted)." *Id.* at 7-8.

4. Statutory Authority
   a. At least two states have enacted statutes addressing the identity of those persons to whom the attorney owes duties when he or she represents a fiduciary.
      i. *See, e.g.,* OHIO REV. CODE ANN. §5815.16 (LexisNexis 2015):

         (A) Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.

         (B) As used in this section, "fiduciary" means a trustee under an express trust or an executor or administrator of a decedent's estate.

      ii. *See also* IND. CODE ANN. § 29-1-10-20 (LexisNexis 2015), (effective July 1, 2013):

         (a) As used in this section, "estate lawyer" refers to a lawyer performing services for an estate at the request of the estate's personal representative.

         (b) Except as otherwise provided in a written agreement between the estate lawyer and an interested person, an estate lawyer:

            (1) represents and owes a duty only to the personal representative;

            (2) does not have a duty to collect, possess, manage, maintain, monitor, or account for estate assets, unless otherwise required by a specific order of the court; and

            (3) is not liable for any loss suffered by the estate, except to the extent the loss was caused by the estate lawyer's breach of a duty owed to the personal representative.

(c) If a provision of a court's local probate rule conflicts with this section, this section controls.

c. Kentucky Authority

i. Rules of Professional Conduct – Most Often Cited

1. Scope of Representation SCR 3.130-1.2
2. Communication SCR 3.130-1.4
3. Conflict of Interest SCR 3.130-1.7

ii. Kentucky Bar Association Ethics Opinion E-401 (1997).

In September 1997 the Committee on Ethics and Unauthorized Practice of Law responded to requests from the Bar for guidance on the applicability of the Kentucky Rules of Professional Conduct to an attorney representing the fiduciary of an estate or trust, and the lawyer's responsibilities to the beneficiaries of the estate or trust. In issuing Ethics Opinion E-401 ("Opinion E-401"), the Committee relied in large part on the American College of Trust and Estate Counsel ("ACTEC") Commentaries to the Model Rules of Professional Conduct adopted in October 1993, and the Reporter's Notes on the ACTEC Commentaries. The full text of Opinion E-401 is reproduced below:

KENTUCKY
Opinions of the Committee on Ethics and Unauthorized Practice of Law
KBA E-401
September, 1997[1]

The Committee has been asked to address the applicability of the Kentucky Rules of Professional Conduct with respect to a lawyer's representation of the fiduciary of a decedent's estate or trust, and the lawyer's responsibilities to the beneficiaries of estates and trusts. In order to provide the requested advice, explain the Committee's position on these issues, and to give insight into the applicable Rules of Professional Conduct, the following questions are presented for response and discussion.

Question 1: Does a lawyer's representation of a fiduciary of a decedent's estate or trust expand or limit the lawyer's obligation to the fiduciary under the Rules of Professional Conduct?

Answer: No.

Question 2: Does a lawyer's representation of a fiduciary of a decedent's trust or estate impose on the lawyer obligations to the beneficiaries of the decedent's trust or estate that the lawyer would not have toward third parties?

[1] The Kentucky Supreme Court made substantial revisions to the Rules of Professional Conduct in 2009, and as a result some of the rules and comments referenced in Opinion E-401 may be renumbered, amended, or contained in a different section.

Answer: No.

Question 3: Is the lawyer's obligation to preserve client confidences under Rule 1.6 altered by the fact that the client is a fiduciary?

Answer: No.

Question 4: May the lawyer for the fiduciary also represent the beneficiaries of the decedent's trust or estate?

Answer: Qualified Yes.

References: ABA Formal Op. 94-380 (1994); Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Property, Probate and Trust Journal 541 (1996); ACTEC Commentaries on the Model Rules of Professional Conduct, 28 Real Property, Probate and Trust Journal 865 (1994); Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct, 26 Real Property, Probate and Trust Journal 1 (1991); When Loyalties Collide: Courts Resolve Conflicting Duties, 135 Trusts & Estates 22 (1996); Professional Responsibility Issues Keep Practitioners on Their Toes, 135 Trusts & Estates 22 (1996); and The Fiduciary, His Counsel And The Attorney - Client Privilege, 136 Trusts & Estates 29 (1997); § 73, Duty to Certain Non-Clients, Restatement, The Law Governing Lawyers.

CORE TERMS: fiduciary, beneficiary, trust estate, owe, confidence, Model Rules, Model Rule, fraudulent, accounting, wrongdoing, actively, breach of fiduciary duty, multiple representation, fiduciary duties, third parties, instructive, decedent's, tribunal, advice

OPINION:

From time to time Kentucky lawyers have requested advice from the Committee regarding a lawyer's responsibilities in the context of the administration of trusts and estates. The primary problem in answering such questions arises from the fundamental question: Whom does the lawyer represent? the lawyer represent the beneficiaries of the estate or trust; does the lawyer represent the estate or trust entity or does the lawyer represent the fiduciary? The complexity of this problem is acknowledged in Comment 12 to Rule 1.7, which states:

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

By issuing this Opinion it is the Committee's intent to clarify a Kentucky lawyer's obligations under the Rules of Professional Conduct.

The examination of these issues must focus on Rule 1.7, Conflict of Interest: General Rule, and the problems generated by a lawyer's multiple representation of clients. The American College of Trust and Estate Counsel, hereafter referred to as "ACTEC," adopted Commentaries to the Model Rules

of Professional Conduct in October 1993, and their Commentaries and the Reporter's Notes on the ACTEC Commentaries are helpful to this analysis. The Reporter's Notes contained the following statements:

Lawyer for Fiduciary. Under the majority view, a lawyer who represents a fiduciary ... stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries. ...

Duties to Beneficiaries. The lawyer who represents a fiduciary generally is not usually considered also to represent the beneficiaries. However, most courts have concluded that the lawyer owes some duties to them. Some courts subject the lawyer to the duties because the beneficiaries are characterized as the lawyer's "joint," "derivative" or "secondary" clients. Other courts do so because the lawyer stands in a fiduciary relationship with respect to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries. The duties, commonly called "fiduciary duties," arise largely because of the nature of the representation and the relative positions of the lawyer, fiduciary, and beneficiaries. However, note that the existence and nature of the duties may be affected by the nature and extent of the representation that a lawyer provides to a fiduciary. Thus, a lawyer who represents a fiduciary individually regarding a fiduciary estate may owe few, if any, duties to the beneficiaries apart from the duties that the lawyer owes to other nonclients.

In addition to the Reporter's Notes, this Committee finds the following comments from the ACTEC Commentaries on Model Rule 1.7 instructive for purposes of clarifying the lawyer's obligations to the fiduciary, to the beneficiaries of an estate or trust, and the problems of multiple representation.

General Nonadversary Character of Estates and Trusts Practice: Representation of Multiple Clients. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter... In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. ... Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. ...

Disclosures to Multiple Clients. Before, or within a reasonable time after, commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent both of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. 1

This Committee adopts the ACTEC Commentaries because the Commentaries properly set forth a lawyer's ethical obligations. Further, this Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view; that is, that a lawyer who represents a fiduciary does not also represent the beneficiaries. We reject the view that a lawyer who represents a fiduciary also owes fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality. We also reject the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but is the trust estate. We adopt the following comments made in the ABA's Formal Opinion:

When the fiduciary is the lawyer's client all of the Model Rules prescribing a lawyer's duties to a client apply. The scope of the lawyer's representation is defined by and limited by Model Rule 1.2. The lawyer must diligently represent the fiduciary, see Model Rule 1.3, preserve in confidence communications between the lawyer and the fiduciary, see Model Rule 4.1(a). The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct.

A lawyer's duty of confidentiality to a client is not lessened by the fact that the client is a fiduciary. Although the Model Rules prohibit the lawyer from actively participating in criminal or fraudulent activity or active concealment of a client's wrongdoing, they do not authorize the lawyer to breach confidences to prevent such wrongdoing.

The ABA's Opinion, in Footnote 6, included the following important caveats:

6. The Model Rules impose a number of limitations on a lawyer representing a fiduciary. For example, a lawyer may not participate in a breach of fiduciary duty by the fiduciary that involves fraud or criminal activity because the lawyer's conduct is limited by Model Rule 1.2(d), which provides that a lawyer may not actively participate in a client's criminal or fraudulent activity. This rule applies to all lawyers, not just those representing fiduciaries. Lawyers are also prohibited from actively concealing client breaches of fiduciary duty, or actively assisting in such concealment, by Model Rules 4.1(a) (a lawyer shall not lie to third parties) and 3.3(a)(1) and (2) (a lawyer shall not lie to or conceal information from a tribunal). If a lawyer knows that a breach of fiduciary duty has occurred, and that an accounting is misleading in that it hides wrongdoing committed by the fiduciary, the lawyer is expressly prohibited by Model Rule 3.3(a) from presenting the accounting to the court. Further, the lawyer is prohibited by Model Rule 4.1(a) from representing to the beneficiaries that a false accounting is accurate. These rules apply to a lawyer with a fiduciary client to the same extent as, but no farther than, they apply in any other lawyer/tribunal/third party scenario.

Continuing in the text of the Opinion, the ABA Ethics Committee then made the following comments:

Although a lawyer may not disclose confidences of the fiduciary, if the fiduciary insists on continuing a course of fraudulent or criminal conduct, the lawyer may be required to terminate the representation because the lawyer's services will be involved in that conduct, so as to invoke Rule 1.16(a)(1), or may have the option of a voluntary withdrawal under Rule 1.16(b)(1). If either of these

provisions of Rule 1.16 applies, this will be not because the client is a fiduciary, but because the client is acting in the manner described by the Rule. The client's status is irrelevant.

Based upon the instructive comments of the ACTEC Commentaries and the ABA Formal Opinion, this Committee concludes with the following advice for Kentucky lawyers.

1. 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.

2. 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 under the Rules of Professional Conduct, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

3. The lawyer's obligation to preserve client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.

4. 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.

5. 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. Further, a lawyer may obtain the consent of multiple clients only after appropriate consultation with the multiple clients at the time of the commencement of the representation. 2

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FOOTNOTES:

N1The Rules of Professional Conduct define "consult" or "consultation" as denoting "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." A lawyer is obligated to disclose to the client the existence of the conflict, that multiple representation is sought, and then disclose the implications thereof, including its risks and advantages. This Committee recommends that all communications between a lawyer and multiple clients regarding conflicts be in writing, and that the client's consent be evidenced in writing; however, the Committee is not imposing an additional ethical requirement that the lawyer commit the matter to writing.

N2 See footnote 1 above.

iii. Kentucky Common Law – Attorney Duties and Liability to Third Parties Generally

1. "An attorney is not ordinarily liable to third persons for his acts committed in representing a client. It is only where his acts are fraudulent or tortious and result in injury to third persons that he is liable." *Hill v. Wilmott*, 561 S.W.2d 331, 334-35 (Ky. Ct. App. 1978) citing *Rose v. Davis*, 157 S.W.2d 284 (Ky. 1941), overruled on other grounds by *Penrod v. Penrod*, 489 S.W.2d 524 (Ky. 1972).

2. Although "[a]n attorney may be liable for damage caused by his negligence to a person *intended to be benefited by* his performance irrespective of any lack of privity," *Hill*, 561 S.W.2d at 334, the representation must be "primarily and directly intended to benefit" the party who suffered the alleged injury. *See Baker v. Coombs*, 219 S.W.3d 204, 209 (Ky. Ct. App. 2007).

iv. Kentucky Common Law – Attorney Duties to Beneficiaries of Estates and Trusts

Although Opinion E-401 is only advisory for attorneys, it is in accordance with the rule in a majority of jurisdictions that an attorney for a fiduciary of an estate or trust does not owe duties to the beneficiaries of the estate or the trust. Since the Board of Governors of the Kentucky Bar Association adopted Opinion E-401, the Kentucky Supreme Court has addressed attorneys' duties in representing fiduciaries on several occasions. In two (2) of these cases the Court either relied on Opinion E-401 or discussed it and its generally understood application. In the other two (2) cases, the Supreme Court held that the facts of the case fell outside the scope of Opinion E-401 or were otherwise distinguishable based on the underlying action. However, in each of those cases, the dissent expresses concern with the majority opening the door to greater extensions of the attorney-client relationship in the future.

1. ***Kentucky Bar Association v. Fernandez*, 397 S.W.3d 383 (Ky. 2013).** In this case, the Office of Bar Counsel of the Kentucky Bar Association ("Bar Counsel") sought review of the Findings of Fact, Conclusions of Law, and Recommendations of the Board of Governors of the Kentucky Bar Association entered in a disciplinary proceeding involving ethical violations by Respondent. The underlying civil action, *Hale v. Moore*, 289 S.W.3d 567 (Ky. Ct. App. 2008). stemmed from the administration of the estate Claudia Sanders (the "Estate"), for which Respondent served as both Executrix and attorney for the Executrix. She had also prepared decedent's Will, which created (in part) a trust for the benefit of twelve (12) beneficiaries (the "Trust"). During the administration of the Estate, the bank serving as trustee of the Trust desired to release the trust funds to Respondent as substitute trustee and sent a release to all the Trust beneficiaries. Respondent did not provide any advice to the beneficiaries about the release or

explain to them that as a result of the releases Pennsylvania law would apply to the trust. The impact being, two (2) of the beneficiaries, which were colleges, would be exempt from paying any taxes on their share of the Trust. This resulted in the other beneficiaries paying an additional $98,000.00 in taxes. If, however, Kentucky law had applied to the Trust, all beneficiaries would have shared the tax liability equally. *Id.* at 387.

The Court of Appeals determined that 1) all of the trust beneficiaries should have shared equally in the tax burden, and 2) that Respondent's fee was excessive. The Court of Appeals remanded the case to the circuit court for the resolution of several issues, and the parties settled the dispute before a final judgment could be rendered there. *Id.* at 389. The Supreme Court, however, applied collateral estoppel to the Court of Appeals' findings as stated above, and upon its review of the record determined that Respondent violated 5 of the 7 counts charged by the KBA Inquiry Commission. *Id.* at 390.

Of the 7 counts charged by the Commission, the Trial Commissioner found Respondent guilty of 4 and the Board of Governors of the Kentucky Bar Association found her innocent of 5 charges but guilty of violating SCR 3.130-1.5(a) (charging an unreasonable fee) and SCR 3.130-8.4(c) (dishonesty, fraud, deceit, and misrepresentation) *Id.* at 385. Bar Counsel argued that the Supreme Court should find Respondent guilty of all 7 counts and that the proposed punishment be modified.

Count III involved Respondent's potential duties to the estate and Trust. This Count alleged a violation of SCR 3.130-1.4(b), which states, "[a] lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Commission alleged that Respondent "failed to properly inform the beneficiaries, before they signed a release that gave her the authority to serve as the trustee for the Sanders Trust, of the tax consequences of applying Pennsylvania law to the distribution of the Trust." *Id.* at 386.

HELD: Respondent did not violate SCR 3.130-1.4(b) by failing to advise the beneficiaries regarding the terms and effects of the release transferring trusteeship to Respondent. The Court stated that "[i]t is our view that Respondent did not have an attorney-client relationship with the beneficiaries, and therefore she did not owe the beneficiaries the same duties she owed to a client." (citing Opinion E-401). *Id.* at 392.

Although Respondent had affirmatively stated in her testimony in *Hale v. Moore* that she had represented the Estate and the beneficiaries, the Court held that those statements did "not create a lawyer-client relationship that did not otherwise exist. Her misconception on that point did not impose a duty that set her up for a violation, as if her misconception were true. The violation of this rule must be based up on an actual attorney-client relationship, not the attorney's misconception, or misstatement." *Id.*

2. ***Branham v. Stewart*, 307 S.W.3d 94 (Ky. 2010) (Scott, J., dissenting).** In *Branham*, a minor ("Stewart") suffered severe injuries in a car accident that killed his father and brother. Stewart's mother retained attorney Ira Branham ("Branham") to represent her in three capacities: (1) individually, (2) as Next Friend of Stewart, and (3) as administrator of the deceased brother's estate in filing tort claims in Pike Circuit Court for the injuries her sons suffered in the accident.

   Stewart's mother was later appointed Guardian for Stewart, and was also represented by Branham in that proceeding in which she posted a $5,000 bond and was not required to post any surety. As Guardian, she settled all tort claims for $1.3 million, which sum was allocated one-half (1/2) to Stewart and the other one-half (1/2) equally to the mother, individually, and the deceased brother's estate. Branham deducted expenses and paid Stewart's portion to his mother, in her capacity as Guardian. However, the mother never filed any accounting as Guardian and allegedly dissipated the funds otherwise intended to be used for Stewart's benefit.

   Some years later, when Stewart was an adult, he got married and started a family in Arkansas. He filed suit in Arkansas alleging that his mother and stepfather failed to transfer his money to him from the settlement. A few months later, his spouse petitioned the court to be appointed his Guardian due to the brain injury he suffered in the accident as a child, and as Guardian she filed a legal malpractice and breach of fiduciary duty claim in Pike Circuit Court against Branham. She alleged that Branham and Stewart had formed an attorney-client relationship by Branham's representation of Stewart's mother as his Next Friend and Guardian and that Branham had breached his duties to Stewart. Branham filed a motion for summary judgment on the grounds that he had no attorney-client relationship with Stewart and only owed duties to his mother, and also contending the statue of limitations had run. The Pike Circuit Court granted summary judgment in favor of Branham. In so holding, the Court stated orally that the lawsuit "seemed to assert a cause of action that had never before been recognized by Kentucky courts" and

indicated an intention to allow the appellate courts to decide whether this cause of action should be recognized before having a trial. *Branham*, 307 S.W.3d at 97.

The Court of Appeals reversed the trial court, holding that an attorney-client relationship existed between Branham and Stewart, as both infant (represented by next friend) and ward (represented by guardian), whom they identified as the "the real party in interest." *Stewart v. Branham*, 2007 Ky. App. LEXIS 80, *7-*9 (2007).

The Supreme Court, after accepting discretionary review, affirmed the opinion of the Court of Appeals. In so doing, the Court observed that it was a matter of first impression in Kentucky. Although Branham argued that Opinion E-401 applied to his situation because a guardian is a fiduciary. *Id.* at 101. The Court disagreed. It distinguished Opinion E-401 on the basis that it "specifically addresses 'the lawyer's responsibilities to the beneficiaries of estates and trusts' and does not specifically apply to a minor's guardian or next friend." *Branham*, 307 S.W.3d at 101. Branham also urged the Court to adopt the test in Restatement (Third) Governing Lawyers SEC 51 for determining if an attorney owes duties to minors in this situation. The Court declined to adopt the test, stating that it "expressly applies to determining if a lawyer owes a duty to a non-client, third party beneficiary. Because we have found that the attorney in these situations does have an attorney-client relationship with the minor ward, this test is not applicable." *Id.* at 101-102.

In addition, the Court stated that Stewart "raises a valid point that guardians are only obligated to work for the benefit of one person (the ward), rather than trustees or executors who may owe duties to beneficiaries with conflicting interests." *Id.*

HELD: that the attorney retained by a person in his or her capacity as a next friend or guardian for a minor "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." *Id.*

In so holding, the Court observed that in Kentucky the "next friend" of a minor is the minor's agent and may bring an action on behalf of the minor, but that "the minor is the real party in interest in any lawsuit filed on the minor's behalf by the minor's next friend…the minor 'himself is the plaintiff' in cases filed by the minor's next friend." *Id.* at 97-98. "The 'next friend' device is a procedural one by which a minor's claim is brought into court…" *Id.* at 98, n.13, citing *Jones By*

and Through Jones v. Cowan, 729 S.W.2d 188, 190 (Ky. Ct. App. 1987). The Court further observes that a minor's next friend is "regarded as an agent or officer of the court, of the nature of a guardian ad litem, to represent the interests of the infant in the litigation. The infant himself is the plaintiff." *Id.* at 98, n.16 (citing *Kash v. Kash's Guardian*, 85 S.W.2d 866, 867 (Ky. 1935)).

The Court also cites the case *Clements v. Ramsey*, 4 S.W. 311 (Ky. 1887), in which the court stated that the minor had been the plaintiff from the inception of the action. "He had instituted the action in his name by a next friend, who stood responsible for the costs; but, when he arrived at age, the next friend was no longer a necessary party, and the action abated in fact as to him, and proceeded to judgment in the name of the real plaintiff, and with whom the litigation had been had from the bringing of the action up to the rendering of the judgment." *Id.* at 312-313.

DISSENT: Justice Scott dissented from the majority's opinion extending the attorney-client relationship to the ward because "opening of this 'door' will invite greater extensions." *Branham*, 307 S.W.3d 94, 103-104 (dissent) (citing *Fickett v. Superior Court of Pima County*, 27 Ariz. App. 793, 558 P.2d 988 (Ariz. App. 1976) (conservator of incompetent's estate brought action against attorney for former guardian alleging that attorney was negligent in failing to discover that guardian had embarked upon scheme of misappropriation, conversion, and improper investment of ward's estate); *Pelham v. Griesheimer*, 92 Ill. 2d 13, 440 N.E.2d 96, 64 Ill. Dec. 544 (Ill. 1982) (children brought malpractice action against an attorney who represented mother in divorce case and allegedly failed to ensure that children remained beneficiaries on father's life insurance policy, as required by divorce decree); *Scholler v. Scholler*, 10 Ohio St. 3d 98, 10 Ohio B. 426, 462 N.E.2d 158 (Ohio 1984) (action on behalf of minor child against mother's attorney who allegedly negotiated and prepared the child support provisions in mother's separation agreement); *Metzker v. Slocum*, 272 Ore. 313, 537 P.2d 74 (Or. 1975) (action upon behalf of minor child against attorney retained by husband and wife to perfect adoption of minor, which attorney allegedly failed to perfect, leading to minor's loss of support upon divorce).

Justice Scott's second contention with the majority's opinion is that "introduces an expensive complexity into litigation for minors that is unjustified given its infrequency and the fact that matters related to guardianships are committed to the exclusive supervision of the courts." *Id.* at 104. "Moreover, such an extension will necessarily endanger the finality of a guardian's decisions even though approved by a court, as well as extend, by several multiples, the attorneys

necessary to represent a parent/guardian with multiple children/wards, not to mention the additional attorney necessary for the parent's personal claims. With such a 'cast of counsel' imposed on one lay parent -- each arguing for inconsistent results -- how can one realistically expect our current statutory scheme to function inexpensively and expeditiously?" *Id.*

Justice Scott also distinguishes the situation in Branham from the facts in the precedent from other states relied upon by the majority. Each of those cases "involved only one attorney, one guardian, and one ward. Here, we have multiple relationships and issues with Branham representing Backus in her individual capacity, as administratrix of her deceased son Adam's estate, and as next friend/guardian for Gary Ryan's injuries; guardianship began with the sale of Gary Ryan's interest in real estate, a proceeding recognized as adversarial by statute. See KRS 389A.010(4). Thus, a guardian ad litem was appointed to represent him individually. While a quasi-extension of the attorney-client relationship might work in single issue, single ward cases, it is not a practical solution in multi-party, multi-issue litigation for the reasons pointed out." *Id.* at 107-108.

Justice Scott states that, in relying on several of the non-Kentucky precedential cases, the majority seems to base its extension of the attorney-client relationship on agency law, rather than the multi-factor balancing test or intended third-party beneficiary test relied upon in the cases it cites. However, a guardian is no more a servant to the ward, than a regent is to a young king-to-be. Their power to act does not come from a master-servant relationship but, rather, from the state. 'The relationship of guardian to ward is not that of agent to principal. The guardian's authority is not derived from the ward, but from the appointing court for which the guardian acts as agent, exercising those powers conferred by statute or by the court.' *Mack v. Mack*, 329 Md. 188, 618 A.2d 744, 750 (Md.App. 1993) (citation omitted). 'In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.' The administration of guardianship affairs remains subject to judicial control by the equity court that appointed the guardian.' Id. (citations omitted). In *Southard v. Steele*, 3 T.B.Mon. 435, 19 Ky. 435, 1826 WL 1336 (1826), the court acknowledged that '[a] guardian represents the ward for whom he acts, and is his general agent; yet if he submits to a reference, as he may do, for the infant, he binds himself thereby and not the infant. . . . A court of chancery will not decree an award to bind the infant.' 19 Ky. 435, *Id.* at *6.

Branham, 307 S.W.3d 94, 108 n.5 (dissent).

Justice Scott suggests that instead of relying on distinguishable precedent from foreign jurisdictions, the better analysis is provided in the Restatement (Third) of the Law Governing Lawyers § 51 (2000). Specifically, Subsection 4(d) negates a lawyer's duty of care to a non-client unless "such a duty would not significantly impair the lawyer's performance of obligation to the client." *Id.* Moreover, the Restatement states, "[a] lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized *only* when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules." *Id.* at 363 (emphasis added). Justice Scott goes on to say,

"The RESTATEMENT specifically sets forth a similar analysis when it states in § 51:

> A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary's interests. Id. at 365.

This is consistent with KBA Ethics Opinion E-401, which states, "[a] lawyer who represents a fiduciary . . . stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary's estate." *Id.* at 108 (citing Kentucky Bar Association Ethics Opinion E-401).

Justice Scott points out that under Kentucky's previous legal precedents,

> although a legal malpractice claim may only to the attorney's client, 'an attorney still may be liable for damages to a third party because of events arising out of his representation of a client if the attorney's acts are fraudulent or tortious and result in injury to that third person.' (citations omitted). And certainly, '[s]uch liability may be

> found to exist where the attorney is responsible 'for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity[.]'' (citations omitted). Yet, the application of this doctrine demands that the representation be 'primarily and directly intended to benefit' the party claiming injury. (citation omitted). Any contrary rule creates a conundrum for attorneys under SCR 3.130, Rule 1.7 (July 15, 2009). Under this rule, of course, each affected client can give 'informed consent, confirmed in writing.' SCR 3.130, Rule 1.7(b)(4). Yet, a child cannot meet such a standard.
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> *Id.* at 106-107.

3. ***Pete v. Anderson*, 413 S.W.3d 291 (Ky. 2013) (Scott, J. and Noble, J., dissenting in part and concurring in part).** According to Justice Scott, who concurred in part and dissented in part, the holding in this case is the "first one" of the "greater extensions" he warned of in his dissent in *Branham*.

   In this case, a father of four (4) children was killed while driving a van owned by his employer. Attorney Pete was retained to pursue an action against the van maintenance company. Pete filed a wrongful death claim, naming the surviving spouse as personal representative of the decedent's estate. He also filed a loss of consortium claim on behalf of Anderson's children. The Jefferson Circuit Court dismissed the suit after the defendant excluded two expert witnesses leaving no evidence of a causal connection between defendant's conduct and Anderson's death. The decision was not appealed. *Id.* at 294.

   Two years later, one of the minor children, by and through his mother, and one brother filed a professional negligence action against Pete alleging negligence, gross negligence, and breach of fiduciary duty as well as negligent or fraudulent misrepresentations. *Id.* Pete moved for summary judgment on the grounds that no attorney-client relationship existed between Pete and the children, and any other claims were barred by statute of limitations. The trial court granted the motion, finding that the children "were not in privity with Pete" and therefore did not have standing to sue him for professional negligence. *Id.*

   The Court of Appeals unanimously reversed the trial court and found there was a material fact in dispute: whether the children were actually represented by Pete or were led to believe this was the case. In addition, and more importantly, the Court of Appeals held that "even if there was no privity, the children were owed

professional duties because they were the intended beneficiaries of the underlying wrongful death action." *Id.* at 295.

Pete argued to the Supreme Court that the underlying wrongful death action belonged to the Anderson estate, and not to the surviving family members. Thus, any malpractice action arising from the wrongful death claim could only be brought on behalf of the estate. *Id.* at 297. After undertaking a review of the wrongful death statute's creation, the Court states that "[u]nder the plain language of the statute, the cause of action 'belongs' to the beneficiaries of the wrongful death claim, as the amount recovered in a wrongful death action 'shall be for the benefit of and go to the kindred of the deceased[.]'" *Id.* at 299 citing KRS 411.130(2). "The personal representative is vested with the responsibility of bringing the action, but the representative is not a statutory beneficiary entitled to recovery." *Id.* (citing *Vaughn's Administrator v. Louisville N.R. Co.,* 179 S.W.2d 441 (Ky. 1944)). This, the Court concludes, was the result of confusion under the early wrongful death statutes regarding who the property was to bring the action – the widow, the heir, or the estate. The new statute directs the personal representative to prosecute the claim, but "[t]he statute does not accord any benefit of the recovery to the personal representative. With no interest in the recovery, the personal representative is a 'nominal' party, as the 'real parties in interest are the beneficiaries whom [the personal representative] represents.'" *Id.* (citing *Vaughn's Administrator*, 179 S.W.2d at 445).

The Court then compares the situation to that in its recent decision in *Branham v. Stewart*, stating that "the right to bring an action is not always tantamount to the right to benefit from that action." *Id.* Reiterating its holding in that case, the Court states that to hold that an attorney only represents the guardian's interest would "be to ignore the minor's 'direct interest' in the underlying action." *Id.* at 300 (citing *Branham*, 207 S.W.3d at 99). In this case, construing the language of KRS 411.130 which requires the personal representative to bring a wrongful death action as elevating that representative to the rank of statutory beneficiary would require this Court to disregard the plain language of KRS 411.130(2) specifically identifying those individuals to whom the action belongs." *Id.* (citing *County of Harlan v. Appalachian Regional Healthcare*, Inc., 85 S.W.3d 607, 611 (Ky. 2002)) ("General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy.").

Last, the Court looked to its decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) where it "concluded that while a survival action is

derivative of a personal injury claim which belongs to the estate, a wrongful death action is an independent claim belonging to the intended beneficiaries under KRS 411.130, a claim that 'accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss.'(citation omitted). *Id*. at 300. The Court rejected Pete's argument that the wrongful death action belongs to the estate, "[b]ased on the plain language of KRS 411.130 and our holding in *Ping*." *Id.* at 300.

HELD: The Court affirmed the Court of Appeals' Opinion reversing and remanding the summary judgment granted by the trial court. **"**The decedent's children were real parties in interest with regard to the wrongful death claim." (citation omitted) *Id.* at 300-301. As the intended beneficiaries of the claim, they were entitled to one-half of the proceeds of any recovery and thus, Pete's actions in litigating the claim must be construed as having been undertaken for the children's benefit. As a result, the children had standing to bring the malpractice claim (the one-year statute of limitations was tolled until they reached the age of majority). *Id.*

CONCURRENCE (in part) and DISSENT (in part): Justice Noble and Justice Scott both concurred in part and dissented in part in separate opinions, and Justice Cunningham joined in Justice Scott's opinion.

In her opinion, Justice Noble agreed with the majority's decision that when an attorney represents a party in a wrongful death action, he has a fiduciary duty to the statutory beneficiaries of the decedent even though the personal representative has retained him.[2] *Id.* at 301-302. Justice Noble goes on to state

> I recognize that this decision today places wrongful death attorneys in the difficult position of having to potentially face a malpractice claim many years in the future after young children have gained their majority. The statute requires that a wrongful death action be brought by the personal representative of the estate on behalf of the beneficiaries of the estate. That makes the personal representative the agent of the minor beneficiaries. The only viable argument that the minor children cannot be bound by the acts of their agent is that as minors, they retain their right to file a tort action within one year of reaching their majority without being time barred. It seems

[2] Justice Noble dissented from the majority's decision that the general allegation in the children's complaint was sufficient notice of professional negligence claims generally, not just those arising from statutory wrongful death claim, so as to also include loss of parental consortium claims. *See Pete*, 413 S.W.3d at 302.

> a much simpler solution to simply say that in this case the personal representative also has the duty to bring any ancillary claims on behalf of the children in a timely manner, and failure to do so can result in an action being time-barred. Perhaps the legislature could do so…But the majority has decided that the risk is better born by the attorney in a wrongful death action, who is held to professional standards and knowledge, than by the personal representative who often is not informed about the matter. I cannot fault the logic of that distribution of risk, although I do regret the potentially chilling effect this has on wrongful death representation.
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> *Id.* at 305.

In his dissent, Justice Scott states

> As I said in this opinion's predecessor, the 'opening of this 'door'' will invite greater extensions.' *Branham v. Stewart*, 307 S.W.3d 94, 104 (Ky. 2010) (Scott, J., dissenting). This, then, is the first one. Henceforth an attorney hired by a personal representative to represent an estate on its claims must not only satisfy the personal representative, but also all the estate's beneficiaries, including minors, such as the representative's children here. Either that, or wait the years it takes for minors to reach majority to see what they do about decisions that had to be made many years before; quite proverbially, the conflict is recognized by the biblical quote, "[n]o man can serve two masters . . . ." Matthew 6:24 (King James).
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> *Id.* at 306.

Justice Scott goes on to say that the majority's holding will be a "'disruptive bear' to apply efficiently in our practice of law. Plainly, bad facts [d]o make bad law.'" *Id.* (citations omitted). In light of this holding, Justice Scott argues,

> who is the trial attorney to look to in determining whether the suit may, or should, be settled or for how much—the mother/ personal representative or the underage children? Clearly, court approval of such settlements now provides an attorney no comfort or release [citations omitted]…Is there any one person left now to whom the

> attorney can turn and ask 'what do you want me to do?' With these new rules of representation, the answer is simply no. In this new age of theoretical litigation, an attorney must make an exceptionally risky choice of who to listen to and I cannot imagine a more inefficient means of arriving at litigation-ending decisions. As fair and nice a theory as the majority's position seems at first blush, it simply doesn't contribute to an efficient system of litigation; not to mention the conflicts it now raises with one counsel having duties to potentially antagonistic multiple parties. We just shouldn't be leaving one hundred years or more of good, workable precedent.
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> *Id.*

C. Representing a Fiduciary and Beneficiary

a. The Kentucky Supreme Court "has been hesitant to find ethical violations in most probate settings." *Ky. Bar. Ass'n v. Roberts*, 431 S.W.3d 400 at 412. This position is founded in KRPC 1.7 which authorizes multiple representations by an attorney when the representation is not adversely affected and the clients consent to the representation. *Id.*

b. However, in *Roberts*, the Court found that the attorney violated SCR 3.130-1.7(b) by representing the executor of the decedent's estate, the son on trial for killing him, and the decedent's other son. In so finding, the Court stated that the "interests of the Manning brothers were diametrically opposite because of Kentucky's slayer statute. Respondent could not have reasonably believed that the representation would not be adversely affected when one of the clients is on trial for killing the testator and a negative outcome in that case would bar that client from taking under the will. No waiver could make that conflict disappear." *Id.* at 412 (emphasis added).

c. ***Kentucky Bar Association v. Roberts*, 431 S.W.3d 400 (Ky. 2014) (Noble, J., concurring).** The civil action that gave rise to this case was *Manning v. Commonwealth*, 23 S.W.3d 610 (Ky. 2000). The disciplinary proceeding and the facts that led up to it cover a span of sixteen years, beginning with the murder of Earl Manning. In his Will he left a large farm to David Manning ("Manning"), his adopted son, and devised other real estate to another son and grandson. Manning was a suspect in the murder and hired Attorney Roberts as defense counsel.

Roberts and Manning entered into several employment agreements, the second of which was signed after Manning was indicted by the grand jury for

murder and being a persistent felony offender. The agreement set forth an hourly rate and specified the payment "would be 'pursuant to a promissory note and mortgage' for $25,000." *Roberts*, 431 S.W.3d at 403. Manning later signed a promissory note but no mortgage was ever executed. At the same time, Roberts appeared on Manning's behalf as his father's heir in probate court. None of the employment agreements ever addressed Roberts representing Manning in probate matters. *Id.* A month later, they entered into another agreement that included a handwritten note from Manning saying he agreed to pay Roberts from sale of timber as method of payment, after paying the retainer. The timber mentioned in the agreement was on land that was part of the estate Manning stood to inherit under his father's Will. *Id.* at 403-404.

On at least two occasions, Roberts paid for a ballistics expert witness for Manning's trial with funds from the estate's checking account. Although Manning's brother agreed to this, no waiver was ever signed. It was not until 1999, 2 years after Manning's father's murder, that Roberts had Manning and his brother sign documents in which they purportedly waived their right to object to her joint representation of the estate and Manning in his criminal case (or any other civil / criminal representation). Manning later testified that Roberts never explained the waiver to him. *Id.* at 405.

Manning was offered a plea bargain of a five-year sentence in exchange for a guilty please of second-degree manslaughter. Although Roberts later testified that Manning maintained his innocence and that she discussed the deal with him, she did not advise him to take it. *Id.* at 404. Manning was convicted on first degree manslaughter and being a persistent felony offender, which conviction was affirmed by the Supreme Court in 2000. *Id.* at 405. When Manning was asked why he did not take plea offer, he told the Commonwealth's Attorney that Roberts advised him not to take it and that Roberts "had a piece of the farm." *Id.*

In 2003, Manning filed a RCr 11.42 motion alleging ineffective assistance of counsel. This claim was based on an alleged conflict of interest because the fee arrangement with Roberts had essentially been a contingent fee contract. He claimed her actions were motivated by the fact that she would only get paid (from the timber on the father's farm that Manning stood to inherit) if Manning was acquitted. The Warren Circuit Court granted the motion and vacated Manning's conviction after finding that that a de facto contingent fee arrangement existed; Roberts was to be paid from the sale of property Manning would inherit from the murder victim's estate, which could only occur upon his acquittal. *Id.* at 406. This created a conflict of interest as it gave Roberts the incentive not to advise Manning to take a plea deal, pursue certain defenses, or offer mitigating proof that

might result in conviction of a lesser offense. *Id.* In 2006 the Inquiry Commission issued a complaint against Roberts alleging four (4) ethical violations related to the contingent fee arrangement. A year later, it issued a second complaint alleging (in part) a violation of SCR 3.130-1.7(b) for representing Manning, his brother, the executor, and the estate in the probate action when the joint representation was materially limited by her competing responsibilities to these clients.

The two disciplinary cases were consolidated and the trial commissioner found Roberts guilty of all nine counts. Roberts appealed and the Board of Governors found Roberts guilty of only two of the charges, including violation of SCR 3.130-1.7(b) for the joint representation of all the parties in the probate matter. *Id.* at 408. Bar Counsel and Roberts sought review by the Supreme Court.

HELD: Roberts violated SCR 3.130-1.7(b) by representing Manning, his brother, and the executor of their father's estate. The Court acknowledged that where the representation is not adversely affected and the clients consent, it is hesitant to find ethical violations in most probate settings. *Id.* at 412. However, in this case, despite Roberts having obtained waivers from the brothers, their interests "were diametrically opposite because of Kentucky's slayer statute." *Id.* Roberts "could not have reasonably believed that the representation would not be adversely affected" when she represented the alleged killer of the testator who would be barred from inheriting under the will if found guilty. *Id.* "No waiver could make that conflict disappear." *Id.* In addition, Roberts have convinced the executor (one of her clients) to use estate funds to pay for the expert witness fees in Manning's trial. The expenditure was an unallowable use of estate funds and had nothing to do with the administration of the estate, especially when the outcome of who was entitled to the estate property was at issue. *Id.*

CONCURRENCE: In her concurring opinion, Justice Noble cited Opinion E-401 and stated that ordinarily the attorney for the representative of an estate "owes duties only to the representative and does not have a fiduciary obligation to the beneficiaries. *Id.* at 417. Justice Noble agreed with the majority that Roberts created a conflict of interest by representing all of the parties under the circumstances and SCR 3.130-1.7 and believed she also violated additional ethical rules. *Id.* at 418.

D. Selected Kentucky Rules

a. SCR 3.130 - 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ACTEC COMMENTARY ON MRPC 1.2

General Principles. The client and the lawyer, working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client. If multiple clients are involved, the lawyer should discuss with them the scope of the representation and any actual or potential conflicts and determine the basis upon which the lawyer will undertake the representation. As stated in the Comment to MRPC 1.7 (Conflict of Interest: General Rule) with respect to estate administration, "the lawyer should make clear the lawyer's relationship to the parties involved." Also, as indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: General Rule) and former Rule 2.2 (Intermediary), it is often permissible for a lawyer to represent more than one client in a single matter or in related matters. A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.

In the estate planning context, the lawyer should discuss with the client the functions that a personal representative, trustee, or other fiduciary will perform in the client's estate plan. In addition, the lawyer should describe to the client the role that the lawyer for the

personal representative, trustee, or other fiduciary usually plays in the administration of the fiduciary estate, including the possibility that the lawyer for the fiduciary may owe duties to the beneficiaries of the fiduciary estate. By doing so the lawyer better equips the client to select and give directions to fiduciaries. The lawyer should be alert to the multiplicity of relationships and challenging ethical issues that may arise when the representation involves employee benefit plans, charitable trusts or foundations.

Multiple Fiduciaries. A lawyer may represent co-fiduciaries in connection with the administration of a fiduciary estate subject to the requirements of the MRPC, particularly Rules 1.7 (Conflict of Interest: General Rule). Before accepting the representation the lawyer should explain to the co-fiduciaries the implications of the representation, including the extent to which the lawyer will maintain confidences as between the co-fiduciaries. If the co-fiduciaries become adversaries with respect to matters related to the representation, the lawyer may be permitted to continue the representation of one co-fiduciary with the informed consent and waiver of the other co-fiduciary. If the lawyer has been engaged to act as an intermediary under former Rule 2.2 (Intermediary) the lawyer would be required to withdraw from the representation ("as intermediary") upon the request of one of the co-fiduciaries.

Communication With Beneficiaries of Fiduciary Estate. The lawyer engaged by a fiduciary to represent the fiduciary generally in connection with a fiduciary estate may communicate directly with the beneficiaries regarding the nature of the relationship between the lawyer and the beneficiaries. However, the fiduciary is primarily responsible for communicating with the beneficiaries regarding the fiduciary estate. An early meeting between the fiduciary, the lawyer, and the beneficiaries may provide all parties with a better understanding of the proceeding and lead to a more efficient administration. See ACTEC Commentaries on MRPCs 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time-to-time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests. As indicated in MRPC 2.3 (Evaluation for Use by Third Persons), the lawyer may, at the request of a client, evaluate a matter affecting a client for the use of others.

Representation of Fiduciary in Representative and Individual Capacities. The lawyer may represent the fiduciary in a representative capacity and as a beneficiary except as otherwise proscribed, as it may be in some cases by MRPC 1.7 (Conflict of Interest: General Rule).

> **Example 1.2-1.** Lawyer (L) drew a will for X in which X left her entire estate in equal shares to A and B and appointed A as executor. X died survived by A and B. A asked L to represent her both as executor and as beneficiary. L explained to

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

Facilitating Informed Judgment by Clients. In the course of the estate planning process the lawyer should assist the client in making informed judgments regarding the method by which the client's objectives will be fulfilled. The lawyer may properly exercise reasonable judgment in deciding upon the alternatives to describe to the client. For example, the lawyer may counsel a client that the client's charitable objectives could be achieved either by including an outright bequest in the client's will or by establishing a charitable remainder trust. The lawyer need not describe alternatives, such as the charitable lead trust, if the use of such a device does not appear suitable for the client. As indicated below, the lawyer should describe the tax and nontax advantages and disadvantages of the plans and assist the client in making a decision among them. The client might choose to ask the lawyer or another professional to prepare any tax returns that are required.

Express and Implied Authorization. A client may authorize a lawyer to pursue a particular course of action on the client’s behalf. By doing so the client may also impliedly authorize the lawyer to take additional, unspecified action to implement the particular course of action. Absent a material change in circumstances and subject to MRPC 1.4 (Communication), a lawyer may rely on a client’s express or implied authorization. In most circumstances, a client may revoke an express or implied authorization at any time.

Defining and Refining the Scope of Representation. As the lawyer obtains information from a client, the lawyer and the client are typically working together toward defining further the scope and objectives of the representation, which are often revised as the representation progresses. One of the lawyer's goals should be to educate the client sufficiently about the process and the options available to allow the client to make informed decisions regarding the representation. See ACTEC Commentary on MRPC

1.4 (Communication). In furtherance of that goal many lawyers review with an estate planning client the appropriate alternative methods by which the client's general estate planning objectives could be implemented. In the course of doing so the lawyer should express to the client the relative cost advantages of the alternatives, including the present and future tax, legal and other costs, such as trustee's fees. See ACTEC Commentary on MRPC 2.1 (Advisor).

Formal and Informal Agreements. Variations in the circumstances and needs of trusts and estates clients and in the approach and practice of individual lawyers naturally result in lawyers and clients adopting different methods of working together. The agreement between a lawyer and client regarding the scope and objectives of the representation is often best expressed in an engagement letter or other written communication. However, often their agreement is implicit-- reflected in the manner in which lawyer and client choose to work together. Their approach will reflect the client's needs (as perceived by the client and the lawyer) and the lawyer's judgment regarding the client's needs and objectives and the ways in which they may reasonably be fulfilled.

Limitation on the Representation Must Be Reasonable. This Rule recognizes that a lawyer and client may limit the scope of the representation in a manner that is reasonable under the circumstances. For example, a lawyer and client may agree that the lawyer will represent the client with respect to a single matter, such as the preparation of a durable power of attorney. See discussion of Adequate Information in the ACTEC Commentary on MRPC 1.0. Unless the scope of the representation is expanded by a subsequent agreement, the lawyer is not obligated to provide advice or services regarding other matters.

Disagreement Between Lawyer and Client as to Means for Accomplishing Client's Objectives. If an adequately informed client directs the lawyer to take action contrary to the lawyer's advice and the action is neither illegal nor unethical, the lawyer should generally follow the client's direction. See MRPCs 1.4 (a)(5), 1.4 (b) and 1.16 (b). A client might insist, for example, that a "simple" will alone is all that is needed to accomplish the client's estate planning objectives. The lawyer, however, might disagree. In the lawyer's professional opinion, a revocable inter vivos trust and a pour over will would better achieve those objectives. Provided the lawyer obtains the client's informed consent, the lawyer may proceed against the lawyer's better professional judgment to prepare the "simple" will. See ACTEC Commentary on MRPC 1.0(e) (Informed Consent).

Lawyer May Not Make False or Misleading Statements. In all cases the lawyer shall

not, in dealing with third persons, make a false statement of material fact or law or fail to disclose a material fact when disclosure is required in order to avoid assisting a criminal or fraudulent act by a client. See MRPC 4.1 (Truthfulness in Statements to Others). This requirement applies to accountings or other documents that the lawyer for a fiduciary may prepare on behalf of the fiduciary.

Disclosure of Acts or Omissions by Fiduciary Client. In some jurisdictions a lawyer who represents a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty. In deciding whether to make such a disclosure, the lawyer should consider MRPC 1.8 (b). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In jurisdictions that do not require or permit such disclosures, a lawyer engaged by a fiduciary may condition the representation upon the fiduciary's agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty. The lawyer may wish to propose that such an agreement be entered into in order better to assure that the intentions of the creator of the fiduciary estate to benefit the beneficiaries will be fulfilled. Whether or not such an agreement is made, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. The nature and extent of the duties of the lawyer for the fiduciary are shaped by the nature of the fiduciary estate and by the nature and extent of the lawyer's representation.

Representation of Fiduciary in Representative Not Individual Capacity. If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity--the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries--not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is appropriate for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: General Rule) and Example 1.7-2.

General and Individual Representation Distinguished. A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to

advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of mal-administration of the fiduciary estate. A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.

Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them. Without having first given written notice to the beneficiaries of the fiduciary estate, a lawyer who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer otherwise owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, a lawyer should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary that the lawyer would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, the lawyer generally should not give up the opportunity to make such disclosures when the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

Duties to Beneficiaries. The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely

because the lawyer represents the fiduciary generally with respect to the fiduciary estate.

The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. In resolving conflicts regarding the nature and extent of the lawyer's duties some courts have considered the source from which the lawyer is compensated. The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular, in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary. See MRPC 4.2 (Communications with Persons Represented by Counsel). However, even though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary. Additionally, the lawyer's communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them.

In this connection note the Comment to MRPC 4.3 (Dealing with Unrepresented Person) stating that a lawyer should "not give advice to an unrepresented person other than the advice to obtain counsel."

Lawyer Serving as Fiduciary and Counsel to Fiduciary. Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or is a primary beneficiary of the fiduciary estate. It may also be appropriate where there has been a long standing relationship between the lawyer and the client. Generally, a lawyer should serve in both capacities only if the client insists and is aware of the alternatives, and the lawyer is competent to do so. A lawyer who is asked to serve in both capacities should inform the client regarding the costs of such dual service and the alternatives to it. A lawyer undertaking to serve in both capacities should attempt to ameliorate any

disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa.

b. SCR 3.130 - 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

ACTEC COMMENTARY ON MRPC 1.4

Encouraging Communication; Discretion Regarding Content. Communication between the lawyer and client is one of the most important ingredients of an effective lawyer-client relationship. In addition to providing information and counsel to the client, the lawyer should encourage communications by the client. More complete disclosures by a client may be encouraged if the lawyer informs the client regarding the confidentiality of client information. See MRPC 1.6 (Confidentiality of Information). The nature and extent of the content of communications by the lawyer to the client will be affected by numerous factors, including the age, competence, and experience of the client, the amount involved, the complexity of the matter, cost controls and other relevant considerations. The lawyer may exercise informed discretion in communicating with

the client. It is generally neither necessary nor appropriate for the lawyer to provide the client with every bit of information regarding the representation.

In order to obtain sufficient information and direction from a client, and to explain a matter to a client sufficiently for the client to make informed decisions, a lawyer should meet personally with the client at the outset of a representation. If circumstances prevent a lawyer from meeting personally with the client, the lawyer should communicate as directly as possible with the client. In either case the elements of the engagement should be confirmed in an engagement letter.

Effective personal communication is necessary in order to ensure that any estate planning documents that are prepared by a lawyer are consistent with the client's intentions. Because of the necessity that estate planning documents reflect the intentions of the person who executes them, a lawyer should not provide estate planning documents to persons who may execute them without receiving legal advice. Accordingly, a lawyer should be hesitant to provide samples of estate planning documents that might be executed by lay persons without legal advice. A lawyer may, of course, prepare or assist in the preparation of, sample estate planning documents that are intended to be used by lawyers or by lay persons with personal legal advice.

Communications During Active Phase of Representation. The need for communication between the lawyer and client is reflected in Rules respecting the lawyer's duties of competence and diligence. See ACTEC Commentaries on MRPCs 1.1 (Competence) and 1.3 (Diligence). The lawyer's duty to communicate with a client during the active period of the representation includes the duty to inform the client reasonably regarding the law, developments that affect the client, any changes in the basis or rate of the lawyer’s compensation (See ACTEC Commentary on MRPC 1.5 (Fees), and the progress of the representation. The lawyer for an estate planning client should attempt to inform the client to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). In addition, the lawyer should inform the client of any recommendations that the lawyer might have with respect to changes in the scope and nature of the representation. The client should also be informed promptly of any substantial delays that will affect the representation. For example, the client should be informed if the submission of draft documents to the client will be delayed for a substantial period regardless of the reason for the delay.

Communications Needed For Informed Consent. Some of the rules require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under

certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of action. The nature of the communication that is generally required in connection with informed consent is described in MRPC 1.0 (e).

Advising Fiduciary Regarding Administration. Unless limited by agreement concerning the scope of the representation, the lawyer who represents a fiduciary generally with respect to a fiduciary estate should assist the fiduciary in making decisions regarding matters affecting the representation, such as the timing and composition of distributions and the making of available tax elections. The lawyer should make reasonable efforts to see that the beneficiaries of the fiduciary estate are informed of decisions regarding the fiduciary estate that may have a substantial effect on them. See ACTEC Commentaries on MRPCs 1.3 (Diligence), 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

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

Termination of Representation. A client whose representation by the lawyer is dormant becomes a former client if the lawyer or the client terminates the representation. See MRPC 1.16 (Declining or Terminating Representation) and MRPC 1.9 (Conflict of Interest: Former Client) and the ACTEC Commentaries thereon. The lawyer may terminate the relationship in most circumstances, although the disability of a client may limit the lawyer's ability to do so. Thus, the lawyer may terminate the representation of a competent client by a letter, sometimes called an “exit” letter, that informs the client that the relationship is terminated. The representation is also terminated if the client

informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

In general, a lawyer may communicate with a former client regarding the subject of the former representation and matters of potential interest to the former client. See MRPCs 7.3 (Direct Contact with Prospective Clients) and 7.4 (Communication of Fields of Practice).

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

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

c. SCR 3.130 - 1.5 FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

ACTEC COMMENTARY ON MRPC 1.5

Basis of Fees for Trusts and Estates Services. Fees for legal services in trusts and estates matters may be established in a variety of ways provided that the fee ultimately charged is a reasonable one taking into account the factors described in MRPC 1.5(a). Fees in such matters frequently are primarily based on the hourly rates charged by the attorneys and legal assistants rendering the legal services or upon a mutually agreed upon fee determined in advance. Based on the revisions to MRPC 1.5 in 2002, unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. As revised in 2002, the rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representation, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel. Any changes in the basis or rate of the fee or expenses shall be communicated to the client. Basing a fee for legal services solely on any single factor set forth in MRPC 1.5 is generally inappropriate unless required or allowed by the law of the applicable jurisdiction. In recent years courts in several states have, in effect, prohibited or seriously limited the use of fees based upon a percentage of the value of the estate.

Most states allow a lawyer who serves as a fiduciary and as the lawyer for the fiduciary to be compensated for work done in both capacities. However, it is inappropriate for the lawyer to receive double compensation for the same work.

Fee Paid by Person Other than Client. One person, perhaps an employer, insurer, relative, or friend, may pay the cost of providing legal services to another person. Notwithstanding the source of payment of the fee, the person for whom the services are performed is the client, whose confidences must be safeguarded and whose directions must prevail. Under MRPC 1.8(f) (Conflict of Interest: Prohibited Transactions) the lawyer may accept compensation from a person other than a client only if the client consents after consultation, there is no interference with the lawyer's independence of judgment or with the lawyer-client relationship, and the client's confidences are maintained. See ACTEC Commentary on MRPC 1.8 (Conflict of Interest: Prohibited Transactions).

No Rebates, Discounts, Commissions or Referral Fees. The lawyer should not accept any rebate, discount, commission or referral fee from a nonlawyer or a lawyer not acting in a legal capacity in connection with the representation of a client. Even with full disclosure to and consent by the client, such an arrangement involves too great a risk of overreaching by the lawyer and the potential for actual or apparent abuse. The client is generally entitled to the benefit of any economies that are achieved by the lawyer in connection with the representation. The acceptance by the lawyer of a referral fee from a

nonlawyer may involve an improper conflict of interest. See MRPC 1.7 (Conflict of Interest: General Rule) and MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). In those jurisdictions that permit referral fees between lawyers, the lawyer should comply with the requirements of local law governing such matters, including full disclosure to the client. A lawyer is generally prohibited from sharing legal fees with nonlawyers. See MRPC 5.4 (Professional Independence).

d. SCR 3.130 - 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 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 Page 25

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

ACTEC COMMENTARY ON MRPC 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.

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.”

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 7525, Treasury Department Circular 230, SEC disclosures rules under Sarbanes-Oxley, and MRPC 1.6(b)(6) (right to disclose when required by other law). See also MRPC Rule 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. 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 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 fiduciary estate.

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

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 may 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:

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

(2) 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 investment advice to T was proper. L was not obligated to determine whether or not T made investments contrary to L's advice. L may not give legal advice to the beneficiaries but may recommend that they obtain independent counsel. In jurisdictions that permit the lawyer for a fiduciary to make disclosures to the beneficiaries regarding the fiduciary's possible breaches of trust, L should consider whether to make such a disclosure.

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 fiduciary estate 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, and the actual or potential injury suffered by the fiduciary estate 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.

Client who Apparently has Diminished Capacity. As provided in MRPC 1.14, a lawyer for a client who has, or reasonably appears to have, diminished capacity is 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, ABA Inf. Op. 89-1530 (1989), and ALI, Restatement (Third), The Law Governing Lawyers, §24, §51 (2000). In such cases 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).

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 ALI, Restatement (Third) Law Governing Lawyers, § 15, §60 (2000). Under MRPC 1.18(b) 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.

Joint and Separate Clients. Subject to the requirements of MRPCs 1.6 (Confidentiality of Information) and 1.7 (Conflict of Interest: General Rule), 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: General Rule). Thus, the same lawyer may represent a husband and wife, 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. 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 with resulting full sharing of information between the clients. The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client. 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: General Rule). The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.

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 some experienced estate planners regularly undertake to represent husbands and wives as separate clients. Similarly, some estate planners also represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients should do so with great 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 spouse the lawyer may be unable adequately to represent the other spouse. However, within the limits of MRPC 1.7 (Conflict of Interest: General Rule), 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. It is unclear whether separate representation could be provided within the scope of former MRPC 2.2 (Intermediary). 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. 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 the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to

communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

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

e. SCR 3.130 - 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

ACTEC COMMENTARY ON MRPC 1.7

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

Disclosures to Multiple Clients. Before, or within a reasonable time after, commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). See ACTEC

Commentary on MRPC 1.6 (Confidentiality of Information). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

Before accepting a representation involving multiple parties a lawyer may wish to consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest.

Existing Client Asks Lawyer to Prepare Will or Trust for Another Person. A lawyer should exercise particular care if an existing client asks the lawyer to prepare for another person a will or trust that will benefit the existing client, particularly if the existing client will pay the cost of providing the estate planning services to the other person. If the representation of both the existing client and the new client would create a significant risk that the representation of one or both clients would be materially limited, the representation can only be undertaken as permitted by MRPC 1.7(b). In any case, the lawyer must comply with MRPC 1.8(f) and should consider cautioning both clients of the possibility that the existing client may be presumed to have exerted undue influence on the other client because the existing client was involved in the procurement of the document.

Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. However, some experienced estate planners regularly represent husbands and wives as separate clients. They also undertake to represent other related clients separately with respect to related matters. Such representations should only be undertaken with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0 (e)) (defining “informed consent”) and MRPC 1.0 (b) (defining “confirmed in writing”). The writing may be contained in an engagement letter that covers other subjects as well.

Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W. At the outset L should discuss with H and W the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation. The representation of a husband and wife as joint clients does not ordinarily require the informed consent of either or both of them. However, some experienced estate planners believe that a lawyer may represent a husband and wife as separate clients between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

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

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

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

connection with an attempt to set aside H's will or to assert an elective share. See ACTEC Commentaries on MRPC 1.0(e) (defining "informed consent") and MRPC 1.0(b) (defining "confirmed in writing").

Conflicts of Interest May Preclude Multiple Representation. Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a pre-nuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 (Conflict of Interest: General Rule) or act as an intermediary pursuant to former MRPC 2.2 (Intermediary).

A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration.

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

the personal representative and the beneficiary that would preclude the lawyer from continuing to represent both, or either, of them.

Overly broad waivers or waivers executed by an inadequately informed client are of little, if any, value. As noted in ABA Formal Op. 93-378 (1993):

> [I]t would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.

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

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

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

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

Designation of Scrivener as Attorney for Fiduciary. The ethical propriety of a lawyer drawing a document that directs a fiduciary to retain the lawyer as his or her counsel involves essentially the same issues as does the appointment of the scrivener as fiduciary. However, although the appointment of a named fiduciary is generally necessary and desirable, it is usually unnecessary to designate any particular lawyer to serve as counsel to the fiduciary or to direct the fiduciary to retain a particular lawyer. Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm (see MRPC 1.8(k)) as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction.

Client With Diminished Capacity. As provided by MRPC 1.14, a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. Doing so does not constitute an impermissible conflict of interest between the lawyer and the client. See ACTEC Commentary on MRPC 1.14 (Client With Diminished Capacity). A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

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

Confidentiality Agreements. A lawyer generally should not sign a confidentiality agreement that bars the lawyer from disclosing to the lawyer's other current and future clients the details of an estate planning strategy developed by a third party for the benefit

of the lawyer's client. As stated in Ill. Op. 00-01, a lawyer who signs such a confidentiality agreement creates an impermissible conflict with the other clients who might benefit from the information learned in the course of representing this client. "In the case at hand, the Lawyer's own interests in honoring the Confidentiality Agreement would 'materially limit' [the Lawyer's] responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D."

f. SCR 3.130 - 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the persons involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when

the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

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

ACTEC COMMENTARY ON MRPC 1.13

Subject to the requirements of other rules, including both MRPC 1.6 (Confidentiality of Information) and MRPC 1.7 (Conflict of Interest: Current Clients), the lawyer who represents a corporation or partnership may appropriately undertake to represent individuals who are interested in the business or are employed by it. The common interests of multiple clients with respect to matters concerning the business enterprise may predominate over any separate interests they may have. Multiple representation in such cases may be in the best interests of the clients and may provide them with better and more economical representation. The lawyer may, with full disclosure and the informed consent, confirmed in writing, of the business enterprise and an employee, represent both with respect to matters that affect both (e.g., an employment agreement) if their interests are not seriously adversarial. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients).

The lawyer may similarly represent both a fiduciary that owns an interest in a business enterprise and the business enterprise itself, unless to do so would violate MRPC 1.7.

A small minority of cases and ethics opinions have adopted the so-called entity approach under which the fiduciary estate is characterized as the lawyer's client. However, most cases and ethics opinions treat the fiduciary as the lawyer's client and the beneficiaries as persons to whom the lawyer owes some duties. See ACTEC Commentaries on MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication), 1.6 (Confidentiality of Information) and 1.7 (Conflict of Interest: Current Clients). The lawyer and the fiduciary, with the fiduciary's informed consent, confirmed in writing, may agree that the fiduciary estate and not the fiduciary shall be the lawyer's client. See MRPC 1.7(b)(when representation is permissible notwithstanding a concurrent conflict of interest); MRPC 1.0(e) (defining informed consent); and MRPC 1.0(b) (defining confirmed in writing). Such an agreement may significantly affect the extent of the lawyer's duties to the fiduciary, including the duty of confidentiality. However, such an agreement may not limit the duties that the lawyer or the fiduciary otherwise owe to the beneficiaries of the fiduciary estate.

g. SCR 3.130 - 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by MRPC 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ACTEC COMMENTARY ON MRPC 3.3

A lawyer may not mislead the court with regard to any matter before it, including ex parte applications. In particular, a lawyer may not assist a client by presenting to the court any petition, accounting, or other document or evidence that is false or fail to correct a false statement of material fact or law previous made to the court by the lawyer. If a lawyer knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to a matter shall take reasonable remedial measures, including,

if necessary disclosure to the court. See Pierce v. Lyman, summarized in the Annotation following the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). A lawyer should not construe too narrowly the scope of the term "criminal or fraudulent". In the context of the lawyer-client communications privilege, a client's fraudulent conveyance of property may be a fraudulent act that must be disclosed by the lawyer to a court. Similarly, frustrating an order of the court may involve a fraud, justifying disclosure of confidential information. This rule is consistent with MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer), which prohibits a lawyer from assisting a client in criminal or fraudulent conduct, and MRPC 4.1 (Truthfulness in Statements to Others), which prohibits the lawyer from making false statements to any third party. A lawyer for a court appointed fiduciary should consider the extent to which MRPC 3.3 may require the lawyer to disclose to the court any criminal or fraudulent conduct by the fiduciary.

Example 3.3-1. To remedy a breach of trust, the court appoints a special fiduciary (SF) to take possession of the trust property and administer the trust. See Uniform Trust Code §1001(b)(5). SF retains lawyer (L) to represent SF in matters pertaining to the trust. L prepares and files a pleading with the court seeking approval of SF's itemized invoice of its fees and includes the invoice with the pleading. Later, L discovers that a substantial portion of the invoice was for time that SF did not spend on trust matters. SF refuses to prepare a corrected invoice for submission to the court. L should take corrective action. Depending on the circumstances, L may be able to correct the false statement by informing the beneficiaries, or L may need to inform the Court of the false statement. Since the pleading seeks approval of the invoice, the false statements in the invoice are material false statements subject to MRPC 3.3(a)(1).

h. SCR 3.130 - 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in the trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

ACTEC COMMENTARY ON MRPC 3.7

MRPC 3.7 is intended to avoid or eliminate not only possible conflicts of interest between lawyer and client but also situations in trial that may prejudice the opposing party when the lawyer combines or intermingles his or her role as an advocate with that as a witness.

The first two exceptions to acting as an advocate at trial when the lawyer is "likely to be a necessary witness" are straightforward and uncontroversial. Exception two is commonly encountered in estate, trust and protective proceedings where the reasonableness of the attorney's compensation for legal services may be an issue and testimony by the lawyer(s) involved is required to resolve the dispute. The third or "substantial hardship" exception involves a balancing of the interests of the client in keeping his or her counsel (despite counsel's involvement as a witness) and the possible prejudice to the opposing party. In determining prejudice, the trier of fact will look to the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony may conflict with that of other witnesses. However, even if a risk of prejudice to the opposing party exists, the court will nevertheless consider the negative effects of disqualification on the lawyer's client. In applying this Rule, the principle of imputed disqualification (MRPC 1.10: Imputation of Conflicts of Interest; Disqualification: General Rule) does not apply.

MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients) often come into play:

> For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Comment, MRPC 3.7.

Problems implicating MRPC 3.7 typically arise in such estate and trust litigation matters as will contests, surcharge actions, will and trust interpretation cases involving extrinsic evidence, disputes among heirs and beneficiaries and, sometimes, tax litigation. The estates and trusts lawyer who is likely to be a "necessary witness" in a trial involving his or her client must carefully parse the decisions involving lawyer and law firm disqualification under MRPC 3.7 as well as the cases arising under MRPC 1.7 (Conflict of Interest: Current Clients); MRPC 1.9 (Conflict of Interest: Duties to Former Clients); and MRPC 1.10 (Imputations of Conflicts of Interest: General Rule).

i. SCR 3.130 - 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ACTEC COMMENTARY ON MRPC 4.1

MRPC 4.1 prohibits a lawyer from knowingly making false statements of fact or law to any third party or knowingly failing to disclose material facts to any third-party under the circumstances Page 55 described in paragraph (b). This rule must be considered in light of the lawyer's duties to the court, MRPC 3.3 (Candor toward the Tribunal). In addition, the lawyer for a fiduciary is obligated to deal fairly and honestly with the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

In representing a fiduciary the lawyer is bound by MRPC 3.3 (Candor toward the Tribunal) in all relations with the court. MRPC 4.1 operates the same way as MRPC 3.3 if the lawyer is representing the fiduciary in dealing with beneficiaries. Thus, if a fiduciary is not subject to court supervision and is therefore not required to render an accounting to the court but chooses to render an accounting to the beneficiaries, the lawyer for the fiduciary must exercise the same candor toward the beneficiaries that the lawyer would exercise toward any court having jurisdiction over the fiduciary accounting.

j. SCR 3.130 - 4.3 DEALING WITH UNREPRESENTED PERSON

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

ACTEC COMMENTARY ON MRPC 4.3

The lawyer for a fiduciary is required to comply with MRPC 4.3 in communicating with the beneficiaries of the fiduciary estate, or with the protected person in the case of guardianships and conservatorships, when such persons are not represented by counsel . In dealing with unrepresented beneficiaries or the protected person, the lawyer for the fiduciary may not suggest that he or she is disinterested. As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer should inform the beneficiaries of the fiduciary estate regarding various matters, including the fact that the lawyer does not represent them and that they may wish to obtain independent counsel. If the lawyer knows , or reasonably should know, that an unrepresented beneficiary, or another unrepresented person, misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding. The lawyer should not permit the beneficiaries to believe that the lawyer is the lawyer for the parties interested in the matter if the lawyer is serving only as lawyer for the fiduciary.

If the lawyer for the fiduciary believes that the interests of an unrepresented person are adverse to the interests of the fiduciary, the lawyer must refrain from giving the unrepresented person any advice. In such cases the lawyer should suggest that the unrepresented person consult with independent counsel. See Comment to MRPC 4.3.

E. Best Practices for Attorneys Representing Fiduciaries

a. Engagement Letters

i. Address Scope of Representation (SCR 3.130-1.2)

ii. Conflict Waivers (SCR 3.130-1.7(b))

b. Make Clear Whom You Represent

i. Attorney Represents Fiduciary NOT the Estate

1. Any time the attorney is asked whom they represent, they should be careful NOT to say they represent "the Estate". This is misleading and could result in third parties or beneficiaries believing the attorney has fiduciary duties to the beneficiaries of the Estate. *See e.g., Ky. Bar. Ass'n v. Roberts*, 431 S.W.3d 400, 417 (Concurring Opinion Noble) FN 13.

ii. Communications – SCR 3.130 (1.4) - confidentiality and ability to communicate with beneficiaries

1. "As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests." *ACTEC Commentaries*, p. 52.
2. Encourage all beneficiaries to obtain independent counsel at the close of each communication

iii. Attorney Representing Fiduciary and Beneficiary

1. "It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, or more than one of the investors in a closely held business. *See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).* In some instances the clients may actually be better served by such a representation…[r]recognition should be given to the fact that estate planning is fundamentally non-adversarial in nature and estate administration is usually non-adversarial." *ACTEC Commentaries* at p. 91.
2. All parties should be informed of the nature of the attorney's representation and appropriate waivers should be obtained from all parties

iv. Attorney Representing Fiduciary in Representative Capacity and as a Beneficiary

1. "The commentary to MRPC 1.2 notes that it may be permissible for the lawyer to represent the fiduciary both in a representative capacity and as a beneficiary provided that such representation is not otherwise proscribed by the dictates of MRPC 1.7 (Conflict of Interest: Current Clients)." Bruce S. Ross, *"Ethical Issues in Practice: Important Fiduciary Litigation"*, ALI-ABA Estate Planning Court Materials Journal, August 2010. The commentary p/rovides:

> Example 1.2-1. Lawyer (L) drew a will for X in which X left her entire estate in equal shares to A and B and appointed A as executor. X died survived by A and B. A asked L to represent her both as executor and as beneficiary. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented. L may properly represent A

in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in one or both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).