Ethical Issues in Illinois Estate Planning and Trust /Estate Administration

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INTRODUCTION

The sources of my presentation include the Comments to the Illinois Supreme Court rules, the ACTEC Commentaries, the 3rd Restatement of Law Governing Lawyers, ABA and Illinois Ethics Opinions, and case law.

American College of Trust and Estate Counsel (ACTEC) first adopted its Commentaries to the model rules in 1993. Specifically, various interpretations of the Supreme Court rules involving ethics issues for Estate Planning and Trust Administration are cited herein from the ACTEC Commentaries 5th Edition 2016 which was published by the American College of Trust and Estate Counsel Foundation.

Neither the Model Rules of Professional Conduct nor the Comments to them provide adequate guidance regarding professional responsibilities for lawyers engaged in Trust and Estate practice.

"The" Model Rules of Professional Conduct (MRPC) [are] composed largely of general, litigation-based rules that do not address many of the difficult problems that arise in specific areas of practice. Rather than recognize the need to consider ways in which the MRPC might be adapted to meet the needs of lawyers in specific areas, the American Bar Association appears to insist that one rule fits all [without regard to any difference in the nature of a client and the type of representation provided]. John R. Price, J. Michael Farley & Bruce S. Ross, Reporter's Note, ACTEC Commentaries, pg. 4 (5th ed. 2016).

"Model ethics rules do little to instruct the [estate] planner: they assume the existence of either an active transaction between two parties or litigation between two parties. They also assume the identity and interests of each client are clear. In most cases, they fail to serve the [estate] planner." Hilker, 37th Annual Seattle Estate Planning Seminar, Chapter 1A (1992)

The ACTEC Commentaries were developed to fill this gap. In large measure the duties of trusts and estates lawyers are defined in many states by opinions rendered in malpractice actions, which provide incomplete and insufficient guidance regarding the ethical duties of lawyers. ACTEC Commentaries, pg. 1 (5th ed. 2016).

The Illinois Practitioner must keep in mind that neither the ABA formal ethics opinions nor the ACTEC commentaries are binding upon the Illinois Supreme Court, but they do provide much needed guidance for rules which otherwise can be unclear.
In my view, the following model rules are the most important rules which govern Estate Planning and Trust and Estate Administration.

1.1 Competence
1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
1.3 Diligence
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5.3 Responsibilities Regarding Non-Lawyer Assistance
5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law

This article will follow the above Supreme Court Rules applicable in chronological order.

1.1 **COMPETENCE**

A lawyer who undertakes Estate Planning or Trust Administration (for the purposes of this article the reference to ‘Trust Administration’ shall include Probate Administration) must have the skill or knowledge required to meet the needs of the particular client. A lawyer’s deficiency may be overcome through additional research and study or by involving another lawyer or professional who does possess the requisite degree of skill or knowledge. When consulting with a fellow lawyer or other third-party professional such as an accountant, appraiser, etc., a conflict check must be performed, and the third party should sign a confidentiality commitment. Also, the client must consent to bringing in the third party and must consent to any fee splitting arrangement. Rules 1.6 involving confidentiality, 1.5 involving fees and 1.2 (c) involving scope of representation and allocation of authority between client and lawyer all come into play. Additionally, Rule 1.7 involving conflicts with current
clients comes into play. The lawyer’s mistaken judgment does not necessarily indicate a lack of competence. In other words, malpractice alone does not mean there is a violation of Rule 1.1. An example of a malpractice case that, per the ACTEC Commentaries, did not involve a breach of Rule 1.1 would be the important case of Ogle v. Fulten, 102 Ill.2d 356, 466 N.E.2d 224 (1984). Here the Supreme Court of Illinois held that the legatees under an allegedly negligently drafted will could sue the drafter for legal malpractice under both traditional negligence and third-party beneficiary breach of contract. The Ogle court applied the narrow exception carved out in Pelham v. Greisheimer, that an attorney owes a duty to a third-party beneficiary only where the attorney was hired by the client specifically for the purpose of benefitting the third party, extending the Pelham rule to non-adversarial representation. Id.; See Pelham, 92 Ill.2d 13, 440 N.E.2d 96 (1982). Thirty-four (34) states including Illinois no longer recognize lack of privity a defense for a negligence claim by legatees/beneficiaries against the drafter of a will or trust.

Lack of privity is no longer a defense in Estate Planning, but it is for the most part in Trust Administration. Generally, there is no privity of contract between the lawyer for a fiduciary and trust beneficiaries. However, in Estate of Powell v. John C. Wunsch P.C., 2013 IL App (1st) 121854, 989 N.E.2d 627 (1st Dist. 2013), the lawyer, hired by wife of decedent to pursue a wrongful death claim, was liable to the statutory beneficiaries. The guardian of the disabled son was successful in suing the lawyer for not protecting the son’s share of the settlement. While the lawyer argued that the son was not his client, the court held that the lawyer, in fact, held a duty to all statutory beneficiaries in a wrongful death action. Therefore, this appears to be an exception to the rule that in Illinois, the lawyer for the fiduciary does not represent the beneficiaries/legatees of an estate. There are certain duties, however, which the lawyer owes to estates and beneficiaries when representing a fiduciary, which are less than the
duty otherwise owed to a client. These duties will be discussed under other rules later in the presentation.

The lawyer’s intake form as to the client’s assets and heirs is critical, as the lawyer is generally protected and entitled to rely on the information supplied by the client unless circumstances indicate that the information should be verified. A lawyer should also read all existing estate planning documents and verify beneficiary designations.

Competence under Rule 1.1, also requires that a lawyer handle each matter with diligence and keep the client reasonably informed during the active phase of representation. This interplays with Rule 1.3 Diligence and Rule 1.4 Communication.

Another element of Rule 1.1 involves staff training and oversight, which overlaps with Rule 5.3. While the rules allow for delegation of trust administration and estate planning work to non-lawyers for assistance, the lawyer should give the assistants appropriate instruction concerning ethical aspects of each project, particularly the obligation not to disclose information. Furthermore, the measures employed in supervising the non-lawyer should take into account that they do not have legal training and that they are not subject to professional discipline. See ACTEC Commentaries, pg. 196 (5th ed. 2016).

As part of the discussion for Rule 1.1, the lawyer must supervise the execution of the documents. Id. I believe that the best practice is not to send estate planning documents to the client for execution, nor to delegate the supervising of execution to a paralegal or staff member who is not a lawyer.

Finally, a lawyer who uses technology to transmit or store client’s documents must be aware of the potential adverse effects of such technology on client confidentiality and preservation of client information. A lawyer must stay reasonably informed about
developments in technology used in client communications and document storage, including improvements, discoveries of risks, and best practices. \textit{Id.} at 7.

**Illinois Cases on Rule 1.1:**

\textit{In re. Estate of Halas}, 159 Ill.App.3d 818, 512 N.E.2d 1276 (1\textsuperscript{st} Dist. 1987). In an attorney's fee dispute, both parties conceded at argument that the attorney for the executor must act with due care and protect the interest of the beneficiaries.

\textit{McLane v. Russell}, 131 Ill.2d 509, 546 N.E.2d 499 (Ill. 1989). Beneficiaries under the decedent's will were intended beneficiaries of the decedent's attorney-client relationship with the will drafter and could therefore bring an action for legal malpractice.

\textit{Neal v. Baker}, 194 Ill.App.3d 485, 551 N.E.2d 704 (5\textsuperscript{th} Dist. 1990). An action was brought by the beneficiary of a decedent's estate against the lawyer for the personal representative for alleged negligence in advising the personal representative. The court held that the lawyer does not owe a duty to a non-client unless the non-client was an intended third-party beneficiary of the contractual relationship between the lawyer and the personal representative. General implicit intent in an executor hiring an attorney to assist in administering an estate is not enough to establish a sufficient cause of action – the intent must be to directly benefit the Plaintiff.

\textit{Estate of Lis v. Kwiatt & Rueben, LTD}, 365 Ill.App.3d 1, 847 N.E. 2d 879 (2006). This was an action to surcharge lawyers hired by an executor of an estate for failing to secure for the estate the proceeds of a profit-sharing plan the decedent had with his employer. The plan was governed by ERISA and the proceeds ultimately went to the person named under the plan documents. The court here affirmed summary judgment in favor of the lawyers on the ground that they owed no duty to the estate heirs.

**My concluding thoughts regarding Rule 1.1:**

A. Do not hold yourself out as being something you are not. Only represent your actual skill set and expertise. The lawyer must not accept representation of an estate planning project or Estate Administration that requires skill and knowledge which lawyer does not have.

B. Generally, the client's approval is required before the lawyer seeks outside assistance. However, ABA Formal Opinion 98-411 allows the lawyer to obtain hypothetical and anonymous consulting, but the lawyer must take steps to protect and not to disclose

C. Read your firm's malpractice policy—many carriers now require the lawyer to not only utilize engagement and conclusion of representation letters, but also require a second lawyer in the firm review all wills and trusts.

1.2 SCOPE OF REPRESENTATION: ALLOCATION OF AUTHORITY BETWEEN LAWYER AND CLIENT

When working with clients for Estate Planning and Trust Administration, the lawyer should work to define and then refine the scope of representation as the lawyer works with the client to identify the objectives. The lawyer should educate the client sufficiently about the process and the options available to make informed decisions. Illinois Rules of Prof Conduct, R 1.4 cmt 5 (2010). In furtherance of that goal, the lawyer should review alternative methods and relative costs with the client, including not only legal fees, but also trustee fees in the case of Trust Administration. See ACTEC, supra at 61.

The engagement letter is a critical document so as to give the client a reasonable expectation of the scope of representation and, for Trust Administration, protect the lawyer from potential future claims of beneficiaries. If the representation is to be limited, such as to prepare a property power of attorney, the lawyer should indicate this in the representation letter. With this limited scope of representation, the lawyer would not be bound by a duty to review or revise the other estate planning documents.

During the estate planning process, the lawyer should assist the client in making informed decisions regarding the method by which the client’s objectives will be fulfilled. The lawyer is permitted to exercise reasonable judgment in deciding upon the alternatives to propose to the client. The Commentaries use the following example: the lawyer may counsel a
client that charitable objectives can be achieved by an outright bequest or a charitable remainder trust. The lawyer need not describe all alternatives, such as a charitable lead trust, if such a device would not be suitable for the client. *Id.* at 37.

The Commentaries also distinguish between the client’s express and implied authorization. When a client authorizes a lawyer to pursue a particular course of action, the client is also impliedly authorizing the lawyer to take additional unspecified action necessary to implement the particular course of action. See *Id.*

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 follow the client’s directions or follow the rules in declining representation. See Illinois Rules of Prof’l Conduct R. 1.16(b) (2010). Sage advice from the ACTEC Commentaries is for the lawyer to put in writing that a provision insisted upon by the client may be unenforceable or ineffective. This will avoid a future claim of violating the duty of competence under Rule 1.1. An example of such an unenforceable clause would be a client who insists on doubling his daughter’s inheritance if she divorces her husband, as such a provision is void as a violation of public policy.

In Estate Administration, generally the lawyer and the client are free to define scope of representation, including the extent to which information will be shared amongst multiple clients. It is particularly important to define in writing with the fiduciary the extent to which administration activities are to be shared with the beneficiaries. The lawyer may communicate directly with the beneficiaries regarding the nature of the relationship between the lawyer and the beneficiaries, however, it is the fiduciary who is primarily responsible for communicating with the beneficiaries regarding the estate.
It is good practice early in administration for the fiduciary to inform the beneficiaries that the lawyer has been retained and that the fiduciary is the lawyer’s client. Furthermore, it is good practice to inform beneficiaries that the fiduciary and the lawyer will provide information to the beneficiaries regarding the estate, that the lawyer does not represent them, and that they may wish to retain independent counsel to represent their interests.

A lawyer may represent co-fiduciaries in Trust Administration subject to the Illinois Rules - particularly Rule 1.7 Conflict of Interest. Before accepting the representation, the lawyer should explain the implications of joint representation to the co-fiduciaries, including the extent the lawyer will maintain confidences as between the co-fiduciaries. If the co-fiduciaries become adversaries, the lawyer may be permitted to continue the representation of one fiduciary, but only with the informed consent and conflict waiver of the other fiduciary. Without such consent and waiver, or if the conflict cannot be waived (more in the discussion under 1.7), the lawyer must withdraw. See ACTEC, supra at 36.

While the lawyer for the fiduciary does not represent the beneficiaries, the lawyer may never make a false statement of material fact or failure to disclose a material fact when disclosure is required in order to avoid assisting a criminal or fraudulent act by the client. See Illinois Rules R. 4.1 (2010). This requirement particularly applies to trust accountings. This will be covered in further detail below.

One can represent a fiduciary with general or individual representation. General representation involves representing the fiduciary in Trust Administration. Individual representation would be to solely advance the interests of the fiduciary. Examples of representing a fiduciary individually would be to negotiate the fiduciary’s fees with the beneficiary or to defend the fiduciary against charges of mal-administration. While the lawyer can represent the fiduciary both generally and individually, the Commentaries advise that the
lawyer who previously represented the fiduciary generally should inform the beneficiaries that
the lawyer is now also representing the fiduciary individually. This is an important distinction
which goes toward the lawyer’s duties to the beneficiaries. For example, if the lawyer is only
representing the fiduciary individually, any duties to the beneficiaries would be minimal. See
ACTEC, supra at 39.

A lawyer should not attempt to diminish the lawyer’s duties to the beneficiaries without
notice. For example, a lawyer should not agree with the fiduciary not to disclose acts or
omissions by the fiduciary without disclosing this to the beneficiaries. Id. This issue will be
covered in further detail later.

The lawyer for a fiduciary owes some duties to the beneficiaries even if the lawyer does
not represent them. The lawyer is prohibited from taking advantage of the lawyer’s position to
the disadvantage of the beneficiaries. The lawyer and the fiduciary must take affirmative action
to protect the estate.

Illinois Cases for Rule 1.2 (and other rules):

against the decedent’s surviving spouse when, as executor under her husband’s will, sued the
attorney who represented her deceased husband as executor of a third-party estate of which
husband was also a beneficiary. Wife contended that husband, as beneficiary, had a claim
against the attorney for negligent tax advice in the administration of the estate. The court
found that the husband, as executor, had a claim against the lawyer but upheld the trial court’s
dismissal of wife’s action on behalf of her husband as beneficiary.

Jewish Hospital of St. Louis, MO v. Boatmen’s Nat’l Bank, 261 Ill.App.3d 750, 633 N.E.2d
1267 (5th Dist. 1994). The legatees of testator’s will sued the preparer of the will as well as the
same attorney who represented the executor and allegedly negligently prepared the Federal
Estate Tax Return. Applying a third-party beneficiary breach of contract theory, the Court held
that the attorney owed the legatees a duty in preparing the will but no duty in handling the
probate administration. The reasoning behind distinguishing the duties owed as an estate
planner versus representing a fiduciary seem to be that the third-party beneficiary status is
easier to establish when the attorney’s representation is non-adversarial such as drafting a will
versus estate representation which could be adversarial.
Dunn v. Patterson, 395 Ill.App.3d 914, 919 N.E.2d 404 (3rd Dist. 2009). The court held that it is not a violation of Rule 1.2 for a lawyer to draft trusts or healthcare powers of attorney which require the drafter’s consent (or that of a court) to any future amendments. Out of concern that others might take advantage of elderly clients, the drafter refused to consent until he could be satisfied that his clients were making competent decisions. The Court held that the lawyer was simply carrying out his clients’ instructions in the document that they knowingly executed.

ISBA Advisory Opinion on Professional Conduct, 96-05 (October 1996): Although under some circumstances it may be professionally improper for a lawyer to represent both a renouncing spouse and a creditor in the same proceeding, it is not improper for a lawyer to represent the same person in both a representative capacity as executor and in an individual capacity as debtor of the estate where an independent special administrator has been appointed to collect the debt.

Restatement (Third) of The Law Governing Lawyers § 51 Duty of Care to Certain Non-Clients (2000): The restatement finds a duty of care to a non-client where the lawyer’s client is a fiduciary and where the lawyer knows that action is necessary to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client where the breach is a crime or fraud or where the lawyer has assisted or is assisting in the breach. Also, this particularly applies where the non-client is not reasonably able to protect its rights and such a duty would not significantly impair the performance of the lawyer’s obligation to the client.

The restatement gives three examples:

(a) Executor tells lawyer that executor proposes to transfer funds to his own account. The lawyer informs the executor that the transfer would be criminal, but executor nevertheless makes the transfer as the lawyer then knows. If the lawyer does nothing and the legatees suffer loss, the lawyer is subject to liability to the legatees.

(b) Same facts as in (a) except that the executor asserts to lawyer that the account to which the client proposes to make the transfer is the estate’s account. Even though lawyer could have exercised diligence to discover this to be false, and assuming lawyer does not do so, the lawyer is not liable to the harmed legatee. The lawyer does not owe the legatee a duty of care because lawyer did not know that appropriate action was necessary to prevent a breach of fiduciary duty by the executor (although further investigation would have revealed this).

(c) Same facts as in (a) except that executor proposes to invest trust funds in a way that would be unlawful [e.g. violative of the local probate act] but not constitute a crime or fraud under applicable law. The lawyer’s services are not used in consummating the
investment. The lawyer does nothing to discourage the investment. Here the lawyer is not subject to liability to the beneficiary.

However, as reported below, the lawyer does have a duty to make an honest accounting to the beneficiaries and thus this would likely need to be disclosed in the accounting.

**My concluding remarks on Rule 1.2:**

**A.** When representing the fiduciary, only the fiduciary can permit the lawyer to communicate with beneficiaries. However, as stated above, the lawyer can describe to the beneficiary the relationship between the lawyer and the fiduciary. The fiduciary is primarily responsible for such communications per the Commentaries. The commentaries suggest that an early meeting with the fiduciary, the lawyer, and the beneficiaries and may provide all parties with a better understanding of the proceedings and may lead to a more efficient administration.

**B.** The lawyer for the fiduciary should inform beneficiaries in writing that (a) the lawyer has been retained by a fiduciary; (b) that the fiduciary is the sole client; (c) that the lawyer will from time to time provide information regarding the fiduciary estate; and that (d) they are free to retain independent legal counsel.

**C.** Can the lawyer for the fiduciary also represent a beneficiary?

Yes, according to the Commentaries, if the lawyer can comply with 1.7 Conflict of Interest with Current Clients, e.g. "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 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 towards 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 one or both capacities, lawyer should withdraw from representing A in one or both capacities. See Rule 1.7 (Conflict of Interest: General Rule) and Rule 1.16 Declining or Terminating Representation).”

D. Trust Administration Î when representing the fiduciary generally: While the lawyer does not represent the beneficiaries, the lawyer must serve with truthfulness and candor with the beneficiaries and must never be misleading. Also, the lawyer has a duty to the beneficiaries to preserve assets of the estate.

E. Include, with as much detail as possible, the scope of representation in the engagement letter and refine it, if applicable, as the representation continues.

F. When representing a fiduciary generally, know when the lawyer must notify the beneficiary of the fiduciary’s wrongful acts or omissions (further discussion to follow). Make certain that annual accountings are prepared and furnished annually. Know the ethical and legal rules when dealing with creditors. Cf. Illinois Rules R. 4.1 (the lawyer cannot make any false statements of fact); See also Tulsa Professional Collection Services, Inc. v Pope, 485 U.S. 478 (1988) (the fiduciary must serve notice of administration to all known or reasonable ascertainable creditors); In Re Estate of May Chetl, 394 So.2d 437 (Fla 5th Dist. 1981) (the lawyer cannot lull a creditor into a false sense of security).

1.2(d) AIDING AND ABETTING WRONGFUL CONDUCT

Illinois Rules 1.2(d) and 8.4(c) provide that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Is it zealous advocacy to fight valid estate claims or is the lawyer assisting the fiduciary as an active participant in a scheme to obstruct the execution of valid claims, which would violate Rule 1.2(d)?
In Trust Administration, the lawyer must be careful to prevent the unintentional defrauding of creditors by virtue of a false small estate affidavit or avoiding creditors by non-exempt, non-testamentary conveyances. We often tell our clients (in writing) to abandon registered assets where the estates are "under water" or, in the alternative, to probate the estate and apply the assets to the executor fee, widow award, minor award, or custodial claim. Illinois and Federal estate tax, income tax and Medicaid claims are enforceable against living trusts, joint tenancies and non-exempt assets that have beneficiary designations. See Illinois Public Aid Code 350 ILCS 5/5-13. In many other states, the law is clear as to what non-testamentary conveyances are subject to third-party claims. Illinois law is not entirely clear. The only clear exception whereby the non-testamentary transfers would be exempt from the claims of the estate would be life insurance, tenancy by the entirety, and spousal retirement account rollovers.

**Cases Involving Rule 1.2(d):**

**ILLINOIS**  
*Landheer v. Landheer*, 383 Ill.App.3d 317, 891 N.E.2d 975 (3rd Dist. 2008). A son of the settlor was the non-lawyer scrivener. The court set aside the trust amendment based upon the Illinois consumer fraud statute 815 ILCS 505/1, et. seq., specifically Sec. 2BB.

**OHIO**  
*Cincinnati Bar Ass’n v. Mid-South Estate Planning, LLC*, 903 N.E.2d 295 (2009). A lawyer was suspended for 6 months as a result of approving documents produced by a non-lawyer trust mill operation.

**My concluding thoughts on Rule 1.2(d):**

1. The lawyer should not:
   
   A. Condone the cashing of checks payable to the decedent.  
   B. Condone the client who does not advise a bank about the death of the account holder but writes checks on accounts which should be frozen due to the death.  
   C. Engage wrongful completion of a small estates affidavit to collect assets and avoid creditors.
D. Ignore the trust requirement to establish a credit shelter [B Trust] following the
death of the first spouse albeit for a non-taxable estate and albeit where the
beneficiaries of the credit trust and the surviving spouse's trust are identical. If the
widow[er] squanders the trust monies the remainder beneficiaries may have a cause
of action against the lawyer for the fiduciary.

E. Turn a blind eye after the client discloses prior unreported taxable gifts.

F. Ignore court ordered requirements for client to make a will/trust— The court in
_Tensfeldt v. Haberman_, 319 Wis.2d 329, 768 N.W.2d 641 (Wisc. 2009), held a
lawyer liable for intentionally aiding and abetting his client in drafting a will in
direct violation of a court-ordered property settlement agreement, incident to a
divorce.

2. Make sure that creditors are not being defrauded, e.g. when making spousal transfers
when funding and equalizing trusts for estate or federal or Illinois estate tax credit
shelter planning. For example, when transferring assets from a client who is a
physician to his or her spouse, make certain that the client-physician has no pending or
threatened malpractice claims which do not otherwise have adequate malpractice
insurance reserves.

1.3 DILIGENCE

The ACTEC commentary on Rule 1.3 recommends that a timetable be established early
in the representation of either Estate Planning or Trust Administration. _ACTEC, supra_ at 57.

The lawyer must always act within a reasonable time, whether the lawyer is drafting estate
planning documents, funding a trust, or administering a trust estate. Failure to act with
diligence in Trust Administration can cause harm to legatees and beneficiaries. To avoid ethics
complaints against the lawyer, realistic expectations for timing should be spelled out in both
the engagement letter and the initial letter to beneficiaries.
The measure of diligence required in Estate Planning will be enhanced where clients are elderly or are facing medical emergencies. In these situations, there is greater risk that the client might die or otherwise become incapable. In such cases the client may be harmed by the estate planner's lack of diligence, and the intended beneficiaries may not receive the benefits which the client intended them to have.

When administering a trust, the Commentaries indicate that lawyers frequently succumb to the temptation to delay. Ideally, the lawyer and fiduciary should forecast timetables based upon tax and non-tax impacts of sales, distributions and other administrative actions and perhaps, most importantly, to communicate the circumstances to the beneficiaries. On the other hand, the lawyer should not agree to unreasonable time constraints imposed by the client. The lawyer should caution the client regarding the risks that may arise if the matter is pursued on an abbreviated time schedule that deprives the lawyer of the opportunity to fulfill the lawyer's role. Id.

Comment (5) to Rule 1.3 states that, in order to prevent negligence in client matters in the event of a sole practitioner's death or disability, the duty of diligence may also require that each sole practitioner prepare a plan that designates another competent lawyer to review the files and to notify clients of the lawyer's death or disability and determine whether there is a need for immediate protective action. It is the lawyer's responsibility to assure that clients are represented on an uninterrupted basis. This should also extend to lawyers who practice in firms. See Illinois Rules R. 1.5 cmt. 5 (2010).

**Illinois Case involving Rule 1.3:**

*In re Cutright*, 233 Ill.2d 474, 910 N.E.2d 581 (Ill. 2009). In this disciplinary case, the attorney was suspended for two years in part for failing to act diligently in closing an estate (which took almost 20 years) and failed to adequately inform his client about the status of the matter in violation of Rules 1.3 and 1.4.
1.4 COMMUNICATION

Generally, the volume and comprehensiveness of communication should be tailored to the client depending upon their age, competence, and experience. The greatest number of ARDC complaints involve the lack of communication. The lawyer should keep the client informed of any decision to be made or change of circumstance and the lawyer should explain a matter to the extent that a client can thereafter make informed decisions. All communication must be clear, and this will again be determined by the likelihood the recipient will understand the lawyer. See Illinois Rules R. 1.9.

The lawyer should never agree to do Estate Planning for one person when the only communication has been with another who proports to be acting as an intermediary for the client. If circumstances prevent a lawyer from meeting personally with a 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.

The client must understand the documents which lawyer has prepared and what the effects of the documents will be moving forward. The lawyer should explain the documents in a clear statement, summarizing the most important features of the plan and whether the plan is irrevocable. Where the plan will require management by the client, the lawyer should provide appropriate instructions, and this should be done in writing. Also, the ACTEC Commentaries indicate that a lawyer should not provide samples of estate planning documents that might be executed by lay persons without legal advice. ACTEC, supra at 61.

For Trust Administration, the Commentaries on Rule 1.4 indicate that the lawyer should make reasonable efforts to see that beneficiaries of the fiduciary estate are informed of decisions regarding the fiduciary estate that may have a substantial effect on them. Id. An example might be for “stretch treatment” options for qualified retirement plans.
There is a difference in the communication requirements of "dormant" versus "active" representation and there are differing degrees of communication required during each phase. During the "active" phase, the duty to inform the client includes legal developments that might affect the client, the changes in the basis or rate of the lawyer's compensation, and the progress of the representation. The client should also be informed promptly of any delays that will affect the representation. If the lawyer determines that the client has some degree of diminished capacity, the lawyer should proceed carefully to assess the ability of the client to communicate his or her intentions and to understand lawyer's advice. See Illinois Rules R. 1.14 which will be discussed in detail below.

When estate planning tasks and "funding" are completed, the "active" representation will become "dormant," unless representation is terminated by the lawyer or the client. "Dormant" representation is awaiting activation by client. The duties of confidentiality and to avoid conflicts of interest stay with the lawyer during the "dormant" period. The lawyer should be very careful about any implied or express promise to keep client advised as to changes in the law during the "dormant" period. The lawyer is not obligated to advise the client on changes in the law or on how changes in the client's circumstances might affect the client's legal affairs. See Pizel v Zuspann, 247 Kan. 54, 795 P.2d 42 (Kansas 1990).

As a service, the lawyer may periodically communicate to the client the desirability of reviewing the client's estate plan. However, mere keeping of the client's documents or sending periodic newsletters does not elevate the representation from "dormant" to "active." ACTEC, supra at 63.

The client is not a "former client" under Rule 1.9 during "dormant" period, and thus there are slightly higher duties owed to the latter client. To terminate representation of a competent client, the lawyer should send a termination letter. *Id.*
1.5 FEES

Rule 1.5 provides that the fee a lawyer charges to a client for Estate Planning and/or Trust Administration must be reasonable and factored upon the time and labor required and the novelty and difficulty of the project. Illinois Rules R. 1.5(a). Generally, fixed or hourly rates are acceptable. Other factors to consider for Estate Planning and representing fiduciaries would include the fees customarily charged in the locality and the nature and length of the professional relationship of the client. *Id.* The fees can also be based upon the time constraints imposed by the client or other circumstances, as well as the experience, reputation and ability of the lawyer. *Id.* The scope of the representation and the basis or rate of the fee and expenses must nevertheless be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. See Illinois Rules R. 1.5(b).

Do not accept payment for fees with property other than money. This essentially converts the representation to have the essential qualities of a business transaction, which would subject the lawyer to additional regulation under Rule 1.8(a). Illinois Rules R. 1.5 cmt. 4.

Further caution should be exercised when fees are paid by a person other than the client. The Rules which come into play here include confidentiality and conflict of interest which are discussed below. Fees can be paid by a third party if the client consents, there is no interference with lawyer’s independence of judgment, and the client’s confidences are maintained. A lawyer should not permit a person who recommends or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment. See Illinois Rules R 5.4(c).

Also, a lawyer may not give anything to a referral source. See R 7.2(b). The lawyer cannot have a reciprocal exclusive referral arrangement. If the reciprocal referral arrangement is not exclusive the client nevertheless must be informed of the existence of the referral agreement and its nature. See R. 7.2 cmt. 8. Per Rule 1.5(e) a lawyer can fee split so long as the
split is done in proportion to the services performed by each lawyer. Even then, however, the client must agree to the arrangement and the share of the fee split in writing.

**Illinois Cases Involving Fees:**

*In re Estate of Pfoertner*, 298 Ill.App.3d 1134, 700 N.E.2d 438 (5th Dist. 1998). Lawyer filed a successful will contest on behalf of some, but not all, of the intestate heirs of decedent. Lawyer moved for an order assessing his fees and costs against each heir’s intestate share of the estate to the extent that such heir’s interest exceeded what they would have received under the challenged will. The Court applied the *common fund doctrine* which is an equitable exception to the *American Rule* that each party otherwise bears its own attorney’s fees. The court nevertheless remanded the case to the trial court to make a *quantum meruit* award.

*In re Estate of Zagaria*, 2013 IL App (1st) 122879, 997 N.E.2d 913 (1st Dist. 2013). In somewhat of a wild case, the sister opened the estate of her missing brother but during the course of administration the brother was found alive. While the estate was opened, the sister, as administrator, withdrew significant funds for expenses such as buying ponies for her grandchildren. The missing brother hired an attorney, the estate was closed, and the remaining funds were distributed to him. Thereafter, the attorneys for the sister sought fees from the brother. The Court cited an 1883 case that the administration of a live person’s estate is null and void but that the statutory scheme for estates for absentees superseded the rule and the Court allowed the attorneys to be paid! A dissenting judge faulted the attorneys for not making the fee application sooner and for not seeking payment from their wrongdoer client the sister.

*Cripe v. Leiter*, 184 Ill.2d 185, 703 N.E.2d 100 (1998). The court here concluded that the Illinois Consumer Fraud Act did not apply to regulate the conduct of lawyers in representing clients. The matter involved a fee dispute brought on behalf of a trust beneficiary challenging the fees of the lawyer for the trustee.


A lawyer cannot charge to recoup overhead expenses.

**My concluding thoughts on Rule 1.5:**

I would caution the Illinois lawyer that no referral fees are permitted, and a lawyer must charge fees and must not give discounts to referral sources. A lawyer can always do *pro bono* work for relatives or the needy but not to a referring source. Finally, all issues involving fees should be clearly outlined in an engagement letter.
1.6 CONFIDENTIALITY OF INFORMATION

Enormous potential ethical problems may present with joint representation, especially in the case of a married couple and most often in the second marriage scenario. How should a lawyer proceed if the wife-client in joint representation tells the lawyer on the day before the first scheduled consultation "do not tell my husband that I had a child out of wedlock," "I have been unfaithful, after he signs the trust I am leaving him," or "I let that life policy lapse do not tell him"?

The Commentaries are helpful in providing advice and the following guidelines:

1. The lawyer should first consider relevance and significance of the information and then decide upon appropriate manner in which to proceed.

2. Thereafter, the options for the lawyer would include:
   a. Take no action if information is trivial or irrelevant.
   b. Encourage the wife to tell husband or to allow the lawyer to tell husband.
   c. Withdraw if the communication reflects significant adversity between the parties. Without the informed consent of the other client, the lawyer cannot act such as to draft a will that might damage the other client's economic interests or otherwise violate duty of loyalty.
   d. The lawyer should point out possible legal consequences of not disclosing the communication when the lawyer tries to persuade wife to disclose or the possibility that the validity of the actions planned or taken previously may be jeopardized.
   e. The lawyer may caution wife that failure to communicate to husband may result in discipline and or malpractice action against the lawyer.

What if the wife won't budge? Then the lawyer is in extremely difficult position. Withdrawing may arouse husband's suspicions to the point that the lawyer must disclose the information. ACTEC, supra at 85. Here the lawyer should consider the nature of the confidence
and the harm that will result if the confidence is or is not disclosed. An interesting opinion involving this scenario is Florida Advisory Opinion 95-4, providing that a lawyer may not reveal to the wife that the husband told the lawyer that he wishes to provide for a beneficiary unknown to wife. The lawyer must withdraw because a conflict arises the moment representation of the husband attached and thus the lawyer must maintain the husband’s confidence. See Prof’l Ethics of the Florida Bar, Opinion 95-4 (1997).

The lesson to learn with this most difficult example is that with the lawyer’s first communication with the client, and before the client utters a single word, do a conflict check and admonish the client not to tell you anything that cannot be shared with the other spouse.

The lawyer must not reveal client confidences without client's informed consent unless:

1. THE LAWYER MUST REVEAL CONFIDENCES:
   a. When necessary to prevent the client from committing a crime; or
   b. To prevent death or bodily harm to another.

2. LAWYER MAY REVEAL CONFIDENCES:
   a. To serve the client's interest unless client specifically requires that it not be discussed.
   b. To establish a claim or to defend a controversy between the lawyer and the client.
   c. To establish defense to criminal charges or civil actions in which the client was involved.
   d. To respond to allegations in any proceeding regarding the lawyer's representation of the client.
   e. To respond to ARDC inquiries.
   f. Possibly under 1.14 ï Clients with Diminished Capacity.
   g. 1.6(b)(7) To detect and resolve conflicts of interest arising from the lawyer’s change of employment or ownership/composition changes within the firm.
Disclosure under Rule 1.6 (b)(7) is permitted only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Section (c) provides the lawyer shall make reasonable efforts to prevent inadvertent disclosure or authorized access to client information. Illinois Rules R. 1.6(c). Now that attorneys store data in the cloud and use other electronic means of communication, the risk of a data breach is greater than when all files were physical. The lawyers must make reasonable efforts to prevent unauthorized access to information.

The lawyer may share confidential information with lawyer’s staff to the extent reasonably necessary. However, the lawyer is required to direct staff members to respect confidentiality and to give their staff appropriate instructions regarding the ethical aspect of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client. Illinois Rules R. 5.3 cmt 2.

When consulting with third parties, such as accountants, insurance agents, financial advisors, or lawyers with higher skills, the lawyer should obtain the client’s written consent. However, the lawyer may be impliedly authorized to disclose confidential information to such third-party consultants without the express consent of the client so long as the client’s identity and other confidential information is not disclosed. This permission should be spelled out in the initial representation letter so that the lawyer is free to communicate with all necessary parties. Under these circumstances, however, the lawyer alone shall be responsible for payment of the consultant fee and may not pass that on to the client. See ACTEC, supra at 79.

The lawyer has no implied authority to disclose client confidences in the context of electronic bulletin boards, social media or continuing legal education seminars. However, a lawyer may use a hypothetical to discuss issues relating to a representation only so long as
there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. See Id.

A lawyer may always reveal information if the lawyer believes it reasonably necessary to prevent reasonably certain death or substantial bodily harm. Illinois Rules R. 1.6(b)(1). For example, an estate planning client might disclose to their lawyer that they intend to commit suicide and thus they want to engage in Estate Planning. According to the ACTEC Commentaries, the model rule entrusts the lawyer to make the difficult decision as to whether the suicidal client has diminished capacity under Rule 1.14, and therefore perhaps warn family members, or as to whether the client is of rational mind. ACTEC, supra at 81. The Commentaries cite an example where one is not in diminished capacity but has a debilitating disease that has radically reduced one’s quality of life. Id. Again, the client’s contemplated suicide is a very good example of where the rules are unclear but fortunately the lawyer seems to be given a reasonable degree of latitude when encountering such a situation.

Interestingly, according to the Commentaries, the mere fact that the incompetent client has executed a power of attorney, the appointment of the agent does not waive the duty of confidentiality unless the power of attorney so indicates. Therefore, it is critical to include this when drafting powers of attorney. See Id. at 83.

As discussed below in Rule 1.14, where a client apparently has diminished capacity the lawyer can disclose confidential information, but only to the extent reasonably necessary to protect the interest of the client. According to ABA Informal Opinion 89-1530 (1989), the lawyer may either initiate a guardianship or consult with diagnosticians regarding the client’s condition.

Regarding Estate Administration, the estate planner must always keep in mind that the duty of confidentiality continues after the death of a client. Swindler and Berlin v United
States, 524 U.S. 399, 118 S.Ct. 2081 (1998) held that confidential comments are privileged during testator's lifetime and also after the testator's death, when sought to be disclosed in litigation between the testator’s heirs. While the lawyer can disclose documents if directed by the estate fiduciary, it is best to obtain a court order to protect the lawyer. Trust documents are confidential and may not be shared unless already shared. Our practice is to only share redacted trusts when funding estate plans or disclosing the document to specific bequest beneficiaries during trust administration.

The ACTEC Commentaries provide that after the death of a client the lawyer may be implicitly authorized to disclose the client's information that would 1) promote the client's Estate Planning, 2) forestall litigation, 3) preserve assets, and 4) further the family's understanding of decedent's intention. Disclosure, however is limited to that which would be disclosed in a will contest. Id. at 80.

Query: Can you tell the inquiring daughter the reasons why she was disinherited by her mother? Were you authorized to? Does it violate the confidentiality of the deceased testator/settlor?

When representing the fiduciary generally in Trust Administration, the lawyer may disclose confidential information to the extent necessary to protect the interest of the beneficiaries. The lawyer has discretion as to how much and to whom that information is disclosed, but the lawyer is limited to the extent stated.

A very difficult area of the ethics rules involves when to disclose fiduciary misconduct to beneficiaries.

Example 1.6-1 includes where lawyer was retained by the trustee and was consulted regarding the consequences in investing trust funds in commodity futures. Lawyer advised trustee that neither the governing instrument nor local law allowed trustee to make such investment. Trustee invested despite lawyer’s advice to the contrary and suffered a substantial loss. The lawyer was not required to monitor the investments or to
investigate propriety unless the terms of the representation required these duties. *ACTEC, supra* at 82.

The following alternatives extend to this example:

The lawyer, in preparing the annual accounting, discovered trustee’s investment in wheat futures and the resulting loss. Trustee asks lawyer to prepare an accounting that will disguise the investment and loss. The lawyer may not participate in a transaction that would mislead the court or the beneficiaries. The example indicates that lawyer should attempt to persuade the trustee that the accounting must properly reflect the investment. If trustee refuses, the lawyer must not prepare the accounting and that the lawyer might be required to disclose the investment to the beneficiaries. The lawyer should, in any event, withdraw from representation. *Id.*

Depending on the nature of the actual apparent breaches, their gravity, and the potential that actions or omissions might be continued or repeated, the lawyer for the fiduciary may properly disclose to the beneficiaries. According to the Commentaries, the lawyer may prepare estate planning documents that condition the appointment of a fiduciary upon the fiduciary’s agreement that the lawyer retained by the fiduciary may disclose to the beneficiaries any actions of the fiduciary that would constitute a breach of trust. See *ACTEC, supra* at 80.

Additional ethical concerns arise with prospective clients: How should a lawyer protect confidentiality of information obtained during an initial interview? Furthermore, the lawyer who is not retained may be disqualified from representing a different party whose interests are adverse to the prospective client in the same or substantially related matter. These scenarios are to be addressed later in the discussion on Rule 1.18.

Extreme care must be taken when representing multiple separate clients such as parents and children, especially regarding confidentiality and conflicts of interest. Certain conflicts can be waived and certain cannot as will be discussed in Rule 1.7 below.
Illinois Cases for Rule 1.6:

*Matter of Minsky’s Estate*, 59 Ill.App.3d 974, 376 N.E.2d 647 (1st Dist. 1978). The court held that as an officer of the court, the lawyer was under an obligation to inform the court of any suspicions of fraud or wrongdoing on the part of the executor.

*In re Glenos’ Estate*, 50 Ill.App.2d 89, 200 N.E.2d 65 (1st Dist. 1964). The court held that it is the duty of the attorney to bring proceedings for removal when there exist reasonable grounds for suspicion as to the executor’s management of the estate.


The guardian assumed that the lawyer represented her personally and felt that all communications to the attorney would be covered by the attorney-client privilege. The opinion held that the guardian was not represented personally by the lawyer but only in the capacity as guardian for closing out the guardianship estate. The lawyer, thus, had a duty to take steps necessary to protect the estate from the possible fraudulent action of the guardian. Furthermore, if the attorney does not take steps to have the proprietary of the taking of money determined now, the lawyer runs the risk that both the guardian and the lawyer’s actions will later be determined to be fraudulent.

1.7 CONFLICT OF INTEREST - CURRENT CLIENT

Illinois Rule 1.7 provides that a conflict of interest exists between current clients if "the representation of one client will be adverse to the other client; or [italics added] there is significant risk that 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." (2010).

In Trust Administration, the ACTEC Commentaries favor representing the common interests for better coordination, for financial economy, and so that the lawyer has a better overall understanding of all relevant family and property considerations. According to the commentary on Rule 1.7, recognition should be given to the fact that Estate Planning is fundamentally not adversarial in nature and estate administration is usually non-adversarial.
ACTEC, supra at 102. However, the lawyer representing multiple parties should promptly disclose: (1) the implications of joint representation, (2) the extent to which material information imparted by a client would be shared with others, and (3) that the lawyer would withdraw if a conflict in the clients' interests developed to the degree that the lawyer could not effectively represent each of them. The Commentaries further recommend that the lawyer meet with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest. See Id.

As mentioned earlier, significant ethical concerns commonly arise with representation of a husband and wife, especially for second or third marriages. The Commentaries recommend that prior to representation that each spouse should give an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. See Id. at 103. The bottom line is that the lawyer cannot represent multiple parties if there is a significant risk that the representation of one might be materially limited by representation of the other.

Another area of significant potential ethics concern is where a lawyer represented husband and wife in Estate Planning and the husband thereafter dies appointing a bank as trustee and leaving benefits to wife in a QTIP trust. The Rule allows the lawyer to represent both the bank and the wife if the requirements of Rule 1.7 are met. If a serious conflict arises between bank and wife, the lawyer may be required to withdraw. Additionally, the Rule permits the lawyer to inform wife of her elective share, support, and other rights under local law. However, without the informed consent of all parties in writing, Rule 1.7 does not permit the lawyer to represent the wife in an attempt to set aside husband's will or to assert wife's elective share.
Example 1.73, *ACTEC Commentaries* at pg. 104:

A Lawyer (L) represented Husband and Wife jointly with respect to estate planning matters. Husband died leaving a will that appointed Bank as executor and as trustee of a trust for the benefit of Wife that meets the QTIP requirements under I.R.C. 2056(b)(7). L has agreed to represent Bank and knows that Wife looks to him as her lawyer. L may represent both Bank and Wife if the requirements of MRPC 1.7 are met. If a serious conflict arises between Bank and Wife, L may be required to withdraw as counsel for Bank or Wife or both. L may inform Wife 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 Wife in connection with an attempt to set aside Husband's Will or to assert an elective share.

Certain conflicts of interest are so serious that they are *not waivable*. These include:

1) as stated above, a lawyer may not represent clients whose interests conflict to such a degree that the lawyer cannot adequately represent their individual interests;
2) of course, a lawyer may never represent opposing parties in the same litigation; and
3) a lawyer cannot represent both parties to a prenuptial agreement.

*Query*: What about post-nuptial agreements? Contracts to make a will? Estate planning arrangements whereby the surviving spouse will be bound to some form of irrevocability?

Interestingly, the Commentaries feel that the lawyer can represent both the fiduciary and a party whose interest are adverse to the fiduciary in a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another trust administration. Example 1.7-2 allows the lawyer to represent the trustee in unrelated matters, such as preparing a will, but states that the lawyer should not charge the trust for any personal services performed for the trustee. *Id.* at 103. Of course, it is best to get the consent of the fiduciary in writing.

Waivable conflicts would include, by way of example, representing the wife as fiduciary of her husband’s estate and a child who is also a beneficiary of the estate. The waiver should be in writing from both parties and the lawyer should withdraw if a serious conflict does arise. Illinois Rule R. 1.7, comment 22 states that the effectiveness of a future-conflict waiver
is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. Therefore, much thought should be undertaken when preparing any current or future conflict waiver.

The Illinois Cases for Rule 1.7:

_Fitch v. McDermott, Will and Emery, LLP, 401 Ill.App.3d 1006, 929 N.E.2d 1167 (2nd Dist. 2010)._ The law firm represented both the son as beneficiary and the co-trustees established by his mother when he wished to buy a farm held in the trust. The court found no conflict because the firm was representing him for purposes of pre-nuptial and estate planning matters and was not advising him about the purchase of the farm.

_Baez v. Rosenberg, 409 Ill.App.3d 525, 949 N.E.2d 250 (1st Dist. 2011)._ An attorney was retained by a special administrator to prosecute a wrongful death claim on behalf of parents of decedent. Then, a woman claimed that she was pregnant with the decedent’s child and, after the child was born, a DNA test established paternity. Decedent’s parents continued to claim a portion of the lawsuit proceeds based on their dependence on the decedent. The Court held that the wrongful death statute identifies claimants based on intestacy and the child was the sole heir of decedent. Parent’s attorney was not entitled to fees because the attorney continued to argue the child was not entitled to recovery even after paternity was confirmed. The attorney retained to prosecute an action for the benefit of the next of kin owes a fiduciary duty to the statutory beneficiaries.

_Scanlon v. Eisenberg, 913 F.Supp.2d 591 (N.D. Ill. 2012)._ Plaintiff was beneficiary of discretionary trusts set up by her father and uncle. The law firm that represented the trustee also represented a company whose stock was held by the trusts, held the company’s stock, and controlled the company’s corporate trustee. The lawyers had also represented plaintiff for all her other legal matters throughout her life. Plaintiff sued for malpractice over questionable transactions involving the trusts and the lawyers claimed there was no attorney-client relationship since Plaintiff was a beneficiary only. The Court found that the attorney-client relationship between the plaintiff and the lawyers was sufficiently broad to include her beneficiary interest.

_In re W.R., 2012 IL App (3d) 110179, 966 N.E.2d 1139 (2012)._ An attorney mediated a custody dispute between a father and a mother. He was later appointed to represent the father in a neglect proceeding and petitioned for custody on behalf of the father. When the court discovered the attorney mediated the former dispute three years prior, it disqualified the attorney and ordered a new trial. The court looked to MRPC 1.11, cmt [10] for guidance on what is considered the same matter under MRPC 1.12 and held that the matters were sufficiently the same to be covered. That comment states: “a matter may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.”

Allows the lawyer engaged to prepare a trust to include a provision directing the trustee to retain the lawyer so long as the lawyer discloses to the trustee that the trustee has the right to discharge the lawyer, that the client consents to the representation, and the lawyer concludes that representation will not be adversely affected by including such as provision. I would not recommend including such provisions.


Addresses the lawyer's responsibility whose estate planning services are recommended, and perhaps paid for, by a potential beneficiary of the relative. Again, so long as the recommending party does not direct or regulate the lawyer's professional judgment, and so long as informed consent as to a payment arrangement is obtained from the client, the representation is permissible. The Rule goes on to state that if the recommending party is also a client of the lawyer, the lawyer should receive clear guidance as to the extent to which the lawyer may reveal that person's protected information. Furthermore, the lawyer should advise the client that that the lawyer is or has performed estate planning for the other person.

My final comments to Rule 1.7:

1. Avoid dual representation in situations which can easily result in conflict between clients such as a surviving spouse and decedent's child by a former marriage.

2. Do not name remaindermen as trustee of a credit shelter (B Trust) or QTIP Trust where the interest of the income beneficiary is adverse to the remaindermen, such as in a case where the son from the decedent's first marriage is the trustee. A recent decision held that such a trustee has his personal interest to preserve principal and the court can remove him from serving as trustee of the QTIP Trust. Faville v. Burns, 2011 IL App (1st) 110335, 960 N.E.2d 99 (1st Dist. 2011).
1.8 CONFLICT OF INTEREST CURRENT CLIENT: SPECIFIC RULES

There are four main issues under Rule 1.8 which impact the estate planner.

First, under Rule 1.8(c) A lawyer cannot solicit or suggest a gift from a client, including a testamentary gift, unless the lawyer is related to client. Holiday gifts and gifts of token appreciation are permitted. If the client offers a more substantial gift, it is allowable; however, undue influence may treat the gift as presumptively fraudulent. See Illinois Rules R. 1.8 cmt. 6. If the gift requires the drafting of a will, the client should have independent legal counsel unless client is a relative of the lawyer. See Id. cmt. 7.

Two Illinois cases addressing drafting lawyers as legatees:

1) *In re Vogel*, 92 Ill.2d 55, 440 N.E.2d 885 (1982): Drafting of wills and trust documents in which the lawyer is named as substantial beneficiary, without suggestion to client of problems involved and desirability of securing independent counsel, warrants censure in view of mitigating circumstances. When an attorney drafts a will naming himself as beneficiary, potential for abuse in clash of roles is serious enough that attorney must be deemed to suffer from conflict of interest.

2) But see *In re Barrick*, 87 Ill.2d 233, 429 N.E.2d 842 (1981): Though an attorney's conduct in writing himself into a will cannot be routinely condoned, it can be proper under special circumstances. The attorney acted properly in drafting will providing that he was to receive lifetime annuity of $12,000.00 per year which was the amount he received as annual retainer from testatrix and which had actuarial value of 4.5% of estate, as there was nothing unreasonable or improper in testatrix's insistence that such bequest be made to an attorney viewed by testatrix as a man who had done a great deal for testatrix, and her late husband, and as testatrix's insistence that such attorney draft the will, after attorney made full disclosure of ethical considerations involved and testatrix had received disinterested advice from another person, was reasonable.
The basic provisions of Rule 1.8 also forbid a lawyer from entering into a business transaction with a client unless the terms are reasonable, the client is advised of the desirability of obtaining independent legal counsel, and that there is informed consent. See Illinois Rules R. 1.8 (2010).

Rule 1.8(e) forbids the lawyer from providing financial assistance to a client, although the lawyer may advance the expenses of filing the probate estate, paying for publication and delaying the billing until assets are available. The lawyer may draft a will/trust that includes a gift to the lawyer if the client is related to the lawyer. The term Òrelated personÓ is defined in Rule 1.8(c) and may include a person not related by blood or marriage but has a close familial relationship, such as a couple living together or step-child or step-parent relationships. See Id. The Commentaries discourage disproportionately large gifts in relation to the estate. Common sense would be to send the relative to an independent lawyer.

Second, under Rule 1.8(f) and Rule 1.7 comment 13, the lawyer shall not accept compensation from a third party for representing a client unless:

a.) the client gives informed consent;

b.) there is no inference with the lawyer's independent judgment or with lawyer-client relationship; and

c.) information relating to the representation of a client is protected as required by Rule 1.6 Confidentiality.

Third, under Rule 1.8(k), the Commentaries take a dim view of drafting in the estate planning documents that the lawyer's firm to be legal counsel for fiduciary in the will/trust. See also ACTEC, supra at 103 (discussing selection of fiduciaries under Rule 1.7). The lawyer should advise a client in writing that such a direction is not binding on the fiduciary. For
example, Wisconsin bars the practice of naming the drafting attorney as the fiduciary unless lawyer is related to client. *State v Gulbankian*, 196 N.W.2d 733 (Wisc. 1972).

Fourth and finally, where the drafting lawyer is named as the fiduciary, the lawyer cannot charge both legal and fiduciary fees in Illinois. The lawyer should either serve as executor or lawyer for no charge or, in the alternative, calculate the billing in a meticulous manner. On the other hand, Florida allows dual representation and fees, but there are several disclosure requirements, a fidelity bond is required, and fees are set by statute. Fla. Probate Code § 733.6171 (6) (2017).

**Florida Code of Professional Responsibility R. 4-8.4, Comment**

The lawyer should not consciously influence a client to make himself as executor/trustee or lawyer in the instrument.

**Washington State Bar Association Committee on Prof'l Ethics, Informal Opinion 86-1**

Allows the lawyer to draft a document for an unrelated client appointing the lawyer as fiduciary only if lawyer fully informed client regarding alternatives and costs and that client is free to consult independent counsel.

Conflicts between parents and children can arise in three ways: parents may overreach when engaging in Estate Planning involving of young or youthful child of theirs, children may overreach when engaging in estate Planning involving an aged or infirm parent or conflicts can arise even where both parties are competent adults. See Randall W. Roth, *Current Ethical Problems in Estate Planning*, *ALI-ABA Estate Planning Course Materials Journal*, pg. 50 (Aug. 2000). A good example of this is a scenario where a father wants a daughter to have an irrevocable trust when she becomes entitled to previously established money in a uniform transfer to minors account. The father is a client of lawyer and the father will pay lawyer’s fees. The lawyer first provides that lawyer must be free to exercise independent judgment when
advising daughter. Also, lawyer must obtain the daughter's informed consent to lawyer being paid by the father. The lawyer must be satisfied that representing father and daughter is permissible. If the lawyer cannot represent the father and the daughter under the rules of Rule 1.7, the lawyer should decline to represent daughter. If lawyer does prepare the trust at the request of the father, the lawyer should meet with the daughter personally. See ACTEC, supra at 129. A similar example would be where a charity brings a donor to a lawyer and pays lawyer's fees. All of the rules relative to the father/daughter scenario described above would apply here. Id.

Another area of ethical concern is where a lawyer is appointed as fiduciary and attempts to include a customary exculpatory provision for certain acts or omissions. The Commentaries state that the inclusion of an exculpatory clause in a trust requires the informed consent of an unrelated client. See Id.

Illinois Cases on Rule 1.8:

In re Estate of DeMarzo, 2015 IL App (1st) 141766, 39 N.E.3d 255 (1st Dist. 2015). The testator left most of her estate to her tenant/boyfriend/occasional lawyer. Her brother, the sole intestate heir, sued the lawyer-beneficiary, claiming he drafted the will leaving him the bulk of the estate. The court held that there was no evidence the lawyer wrote the will or unduly influenced the testator.

In Re Karavidas, 2013 IL 115767, 999 N.E.2d 296 (Ill. 2013). The majority opinion did not discipline an attorney who had no experience in trust or estates as both executor and trustee under his father's will. In that role, he failed to fund trusts as directed, borrowed funds for his personal use (and alter reimbursed the estate), and made unauthorized distributions to his mother, sister, and himself all in violation of his fiduciary duties. The court seemed to rely on the fact that the attorney was the executor and trustee and was not the attorney for the executor or trustee. A dissenting judge disagreed and felt that Illinois Supreme Court 770 should apply. This Rule states that 'conduct of attorney that violate the rules of professional conduct or that tend to defeat the administration of justice or to bring the court or legal profession into disrepute shall be grounds for discipline of the court.'
1.9 DUTIES TO FORMER CLIENTS

As discussed above, at the conclusion of representation in Estate Planning, the representation either becomes “dormant” or “terminated.” A frequent scenario of an ethical concern is where a lawyer represented husband and wife in Estate Planning and they subsequently divorce and one or both want the lawyer to amend the estate plan. Rule 1.9 imposes limitations in this case. It is my view that the lawyer should obtain written consent from the spouse who is not retaining the lawyer to revise that spouse’s estate planning documents. The representation of one spouse might be benign to the other, but the lawyer might not know all of the facts and must be careful.

The Commentaries include the example of husband hiring lawyer to attempt to modify or terminate an irrevocable trust of which wife was the beneficiary. The Rule states that if the divorce judgment provided that the husband’s estate plan remove the wife as a beneficiary then this would not be a conflict. See ACTEC, supra at 139. The bottom line is that if the second matter is "substantially related" to the first representation, then the lawyer violates Rule 1.9 by representing one spouse where the lawyer represented the couple before the divorce. Written informed consent from the former client is always the best and safest course of action.

Illinois Cases Involving Rule 1.9:

Gagliardo v Caffrey, 344 Ill.App.3d 219, 800 N.E. 2d 489 (1st. Dist. 2003). There was a substantial relationship between attorney's former representation of estate of deceased and his representation of executor individually in action brought by widow against executor. Therefore, attorney was disqualified from representing executor, even though attorney represented the estate for only a brief period of time; confidential information could reasonably have been communicated in attorney's representation of estate, such as the valuations of various estate assets, which information was directly relevant to attorney's representation of executor individually in widow's action.

In re Estate of Wright, 377 Ill.App.3d 800, 881 N.E.2d 362 (2nd Dist. 2007). The law firm represented the decedent as to the transfer of $1.8 million to her son including the negotiation of the terms to the transfer. After she died, the same firm sought to represent the son who took the position that the transfer was a gift rather than a loan. The court affirmed the
disqualification of the law firm for the son based upon Rule 1.9, i.e. that the son was adverse to the firm’s former client (the defendant) on a substantially related matter.

But for the opposite result and for a good example of the "substantial relationship" test see In re Estate of Klehm 363 Ill.App.3d 373, 842 N.E.2d 1177 (1st Dist. 2006), appeal denied 219 Ill. 2d 564, 852 N.E. 2d 239. In this case, the court held that even if testator's sons named in the citation filed by the executor of testator's estate had not waived any right to disqualify, for conflict of interest, the law firm representing executor in the citation proceeding, earlier representation of sons by executor's law firm did not have a substantial relationship with firm's representation of executor such that firm's disqualification was justified. The law firm had represented sons in various real estate and loan transactions more than 20 years earlier. The executor's citation concerned allegations of conversion of estate assets and whether transfers of stock by testator constituted valid gifts or transfers and the law firm did not represent either testator or sons in connection with the purported transfers. The citation also alleged that sons breached fiduciary duties owed to the testator, and the law firm had not represented sons in any action that could result in a finding that sons breached their fiduciary duties. Under the substantial relationship test for disqualifying an attorney based on a prior representation, the court first makes a factual reconstruction of the scope of the prior legal representation; second, the court determines whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters; and third, the court determines whether the information is relevant to issues raised in the pending litigation against the former client. A lawyer's subsequent representation of a party with interests adverse to a former client is prohibited if the matters involved in the two representations are substantially related.


Allowed the lawyer to represent the beneficiary of a trust in a breach of fiduciary action against the trustee even though the lawyer had represented the trust beneficiary and trustee in a condemnation suit involving trust real property. The opinion accepts the fact that the lawyer may have gained confidential information regarding the trust's property generally, however since the beneficiary was not contesting the trustee's action in connection with the condemnation, the information that the lawyer may have received does not appear to be relevant to the beneficiaries’ claim against the trustee. Thus, the proposed representation of the beneficiary was not substantially related to the subject matter of the prior joint representation.
CLIENT WITH DIMINISHED CAPACITY
(Additional Rules encountered: 1.6 Confidentiality and 1.7 Conflict of Interest)

"When client's ability to communicate, to comprehend, and assess information and to make rational decisions is partially or completely diminished maintaining the ordinary relationship in all respects may be difficult or impossible."

Rule 1.14 came as a godsend because there was virtually no guidance prior to its inception as to the untenable position of the lawyer representing a client with diminished capacity. The classic example is what to do with a client with obvious diminished capacity who indicates that she wants to remain in her own home and refuses to have a guardianship appointed when the lawyer knows otherwise it is clearly in her best interests to be in a safe controlled environment and to have her finances handled in a professional manner by a third party.

I was personally so pleased to see the official permission given to the lawyer to take necessary protective action for the client with diminished capacity. See Illinois Rules R. 1.14(b) (2010). However, there remains in the diminished capacity scenario significant ethical concerns for which the rules must continue to evolve and guide us.

The lawyer must first, as far as reasonably possible, maintain a normal client/lawyer relationship with the client who has diminished capacity.

The lawyer then owes a duty to alter the relationship accordingly. Options for the lawyer include:

1. Seek help from family members. Nevertheless, the lawyer must keep the client's interests foremost and, to the extent possible, look to client, not family members to make decisions on client's behalf. Illinois Rules R. 1.14 cmt 3.

2. The lawyer may consult a diagnostician. Id. at cmt 6.

3. Substitute judgment. The lawyer can take reasonable protective action with a client with diminished capacity if client is at risk of substantial physical, financial, or other
harm unless action is taken and [the client] cannot adequately act in client's own interest." R. 1.14(b).

4. Appoint a GAL. R. 1.14(b). However, comment [7] adds the following caveat:
   “Appointment of legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of the circumstances is entrusted to professional judgement of the lawyer. Therefore, when dealing with a client with diminished capacity, the lawyer should take and retain copious notes. Consider having a witness present during the client interview and/or consider taking a video of the consultation.”

5. No matter which option is taken, the lawyer must avoid inappropriate disclosure. R. 1.14(c).

6. If the lawyer is taking protective action, then the lawyer may disclose client confidences, but only to the extent reasonably necessary to protect client's interest. See R. 1.6(a).

7. The lawyer should not disclose the client's condition of diminished capacity unless authorized to do so. Thus, not only the client's confidential matters but the client's capacity as well. R. 1.14 cmt 8.

8. Comment [8] also allows protective disclosures even if client directs the lawyer not to disclose.

What if the client directs the lawyer to draft an estate plan in which client leaves all assets to her church and to an animal rights' agency because of a recent spat she had with her daughter. Per ABA Op. 96-404, supra:"

The fact client makes a decision that is "ill considered" does not result in conclusion that protective action is required. It is not the lawyer's role to substitute his/her judgment for client's. But if lawyer believes client's mental capacity is so diminished that it lacks the ability to make informed decisions, lawyer can have family member participate or appoint a GAL."

The lawyer cannot substitute their own judgment for perceived errors in the client's judgment. The lawyer may offer a candid assessment of the client's conduct and possible consequences, but must always defer to the client's decision. Even though Rule 1.14 gives us some direction, this area of potential ethical violation is laden with landmines. If the lawyer
questions the client's capacity, then consider requiring a doctor's opinion of competency. When questioning the client's judgment, try to persuade the client and if unsuccessful, and if appropriate, then withdraw from representation. In the above example, where the mother had a spat with her daughter, the lawyer might suggest that the client go home and take her daughter to lunch and come back in a month to complete her estate plan. Time can solve many problems.

Remember that competency requirements for wills and TODs are different than that for executing deeds. The capacity requirement to execute a will is set forth at § 4-1 of the Probate Act 755 ILCS § 5 (2015). The testator must be 18 years of age and be of sound mind and memory. Id. at § 4-1(a). The Testator must know what he is doing, what property he has, who are the natural objects of his bounty, and what disposition he wants to make of his property. A testator is not required to understand the consequences or the probable result, which would follow the making of the will he executed. Anlicker v. Brethorst, 329 Ill. 11 (Ill. 1928). Illinois courts generally hold that the same capacity is necessary to execute a testamentary trust as a will. See Citizens Nat. Bank of Paris v. Pearson, 67 Ill.App.3d 457, 384 N.E.2d 548 (4th Dist. 1978).

However, a higher degree of mental capacity is required to make a valid deed than to execute a will. Here, a person must be capable of understanding, in a reasonable manner, the nature and character of the transaction in which he is engaged, and of transacting ordinary business affairs in which his interests are involved. See Id. Only then will he be deemed competent to dispose of his real property by deed. See generally Lucas v. Westray, 408 Ill. 243, 96 N.E.2d 623 (1951) (Testator suffered a stroke but evidence that he knew right from wrong and was able to speak clearly and know his own actions was enough for the Court to find he was reasonably capable of understanding the nature of the transaction). One would think that the same degree of competency for a deed would apply to the relatively new TODI (transfer on
death instrument for real property). However, see 755 ILCS 27/35, the capacity required to make or revoke a transfer on death instrument is the same as the capacity required to make a will. (2015).

According to the Commentaries, elder abuse has been labeled the crime of the 21st century. ACTEC, supra at 161. The exception to the duty of confidentiality Rule 1.6 (b)(6) allows disclosure to comply with other laws but the disclosure must be limited to what the lawyer reasonably believes necessary to comply. In order to rely on Rule 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. Id. If the lawyer consults with professionals on that issue, then the lawyer must be made aware of potential mandatory reporting duties. Id. In doing this, the lawyer must determine whether the consultation will result in reporting that the client actually opposes or that would create undesirable disruptions in the client’s living situation thus another catch 22 for the lawyer. Id.

Yet another situation in which ethical concerns arise is when the lawyer is retained by the fiduciary to represent the person with diminished capacity. If the lawyer did not previously represent the person with diminished capacity, then the lawyer actually represents only the fiduciary, but has some duties toward the person with diminished capacity including to report the fiduciary’s misconduct. Id. at 162. If the lawyer previously represented the person with diminished capacity and attempts to represent the fiduciary or guardian, in my opinion, the lawyer will run into conflict of interest issues and confidentiality issues. As provided for above, that the lawyer will continue to owe some duties to the diminished client as a former client.

If the lawyer does agree to represent the fiduciary, it is foreseeable that the fiduciary may take action which the lawyer knows is against the intention or best interests of the
diminished former client. Although the rules allow such representation so long as there is no significant risk that representation of one will be materially limited by the lawyer’s representation of the other, it is not recommended.

When there is any doubt of a client’s capacity, the lawyer should obtain a letter from client’s attending physician before the lawyer acts or decides not to represent the client.

1.15 SAFEKEEPING PROPERTY

I would not recommend the keeping of estate funds but if the firm does, it must be kept in a separate account and complete records must be maintained for a period of seven years after the termination of representation. Illinois Rule R. 1.15(a) (2015). Similar protections must be adhered to for estate property such as jewelry or bonds. See R. 1.15(d).

Other areas where this rule comes into play is the retention of original wills and other documents. The rule requires that the documents be properly identified and appropriately safeguarded. The good news is that the retention of the original estate planning documents does not make the representation “active” nor does it impose any obligation on the lawyer to take steps to remain informed regarding the client’s management of property and family status.

In my view, the best practice is to never maintain original estate planning documents for clients.

1.18 DUTIES TO PROSPECTIVE CLIENTS

According to the ACTEC Commentaries, not all communications with a prospective client constitute a consultation. Generally, if a lawyer requests submission of confidential information without a clear or understandable warning that limits the lawyer’s obligations, a consultation is likely to have resulted and the person becomes a “prospective client.” However, if a person communicates confidential information unilaterally without a reasonable expectation that the lawyer is willing to discuss the possibility of representation, the person is
not a “prospective client.” When a lawyer is contacted by another lawyer or prospective client about becoming an expert witness, generally the client will be considered a prospective client.

Comment 5 to Rule 1.18 provides that a lawyer may with the prospective client’s informed consent, condition the initial consultation on the prospective client’s agreement that the lawyer may represent a present or future client adverse to the prospective client in the same or substantially related matter. Of course, the lawyer should confirm any such agreement in writing.

For example, the lawyer takes a phone call or receives an e-mail inquiry perhaps from FindLaw or an equivalent provider. The lawyer should perform an immediate conflict check. The lawyer still has duties to the prospective client when the lawyer receives confidential information. Specifically, the lawyer has the 1) duty of confidentiality and 2) is prohibited from undertaking or continuing an adverse representation. It could be significantly harmful to either the current or prospective client. Comment 5 to 7.2 prohibits the lawyer for paying for internet-based client leads. See Illinois Rules R. 7.2.

3.3 CANDOR TOWARDS THE TRIBUNAL

A lawyer may never mislead a court or assist a client who misleads the Court. Illinois Rule R. 3.3(a)(1). (2010). The lawyer must take remedial action when lawyer knows material evidence offered by client or a witness is false. R. 3.3(a)(3). According to the Commentaries, a lawyer shall not construe too narrowly the scope of the term criminal or fraudulent. ACTEC, supra at 184. 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. Id. For example, to remedy a breach of trust, the court should appoint a special fiduciary to take possession of the trust property and administer the trust.

5.3 RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANCE
Also discussed under Rule 1.1, the Commentaries indicate that the hiring process should include conflicts checks and if necessary to set up a screen to prevent the transmission of protected information across conflict lines. *ACTEC, supra* at 195. The Rules do not impute conflicts of interests held by non-lawyers to the lawyers in the firm but the Rules nevertheless recommend that non-lawyers be screened if they have conflicts to avoid communication of protected information. *Id.*

Another kind of non-lawyer service that may be employed by trust and estate lawyers is cloud computing for remote storage of client information. The Commentaries and various ethics opinions from New York and Iowa discuss the importance of evaluating the vendor to be certain that there is a reasonable assurance that client information will be preserved from destruction and that client confidentiality will be protected.

### 5.5 UNAUTHORIZED PRACTICE OF LAW - MULTI-JURISDICTIONAL PRACTICE

The ACTEC Commentaries provides some ethical guidance to Estate and Trust lawyers when their representation touches other jurisdictions in which the lawyer is not licensed to practice. The lawyer must keep in mind that Rule 1.1 Competence comes into play when preparing estate planning documents and the need to understand local law is critical.

The adoption of (c)(4) to Rule 5.5 permits the transactional lawyer in certain circumstances that arise out of or are reasonably related to the lawyer’s practice to provide legal services in a non-admitted jurisdiction, as well as provide legal counsel regarding the laws of a non-admitted jurisdiction. See Illinois Rules R. 5.5(c)(4). Be certain to review a state’s definition of the practice of law because the states differ widely in the definition. *ACTEC, supra* at 201. The best practice is to develop co-counsel relationships in the states frequently involved with estate planning clients, such as vacation and retirement states.
Rule 5.5 also allows Estate Planning or Trust Administration work in other states if the representation is on a temporary basis. See Illinois Rule R. 5.5(c). "Temporary" includes limited representation on a recurring basis and even over a long period of time. The ACTEC Commentaries MRPC rule 5.5 observes:

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

ACTEC at p. 162.

Despite the Commentaries, the lawyer should not prepare deeds in other jurisdictions. The primary reason is the existence of nuances in certain sister state's laws regarding real property:

- e.g. Uncapping of the real estate tax freeze in Michigan.
- e.g. Unique deed drafting requirements of a sister state.
- e.g. Unlike Illinois tax law, tenancy in common between spouses in Florida presumes tenancy by the entirety, even if the property is not the marital residence. See Fla. § 689.115 (2017). Also, unlike Illinois most states do not allow tenants by entirety for real property owned by living trusts. Thus, when the lawyer is funding the respective trusts of the clients with out of state real property the lawyer should retain local legal counsel for advice and drafting.

CONCLUSION

In my view, the estate planners and lawyers for the fiduciary do not have the same degree of guidance as most other areas of practice under the Supreme Court rules and thus must fend for themselves to some degree. Estate planners and lawyers for fiduciaries do have a number of
ethical duties in common with all lawyers, generally. The main duties are the duties of competence, diligence, communication and confidentiality, all of which are discussed in detail above.

What complicates these duties for the estate planner, however, include scenarios such as dealing with clients with diminished capacity, commonly representing multiple clients such as husbands and wives, and inter-generational representation in areas such as estate planning, business succession, and trust administration.

However, do not become lured into doing the right thing if in doing so you might be in violation the rules of ethics. In other words, NEVER practice with your heart without your head and NEVER rule out the possibility of family strife.

A tragic example of practicing with one’s heart and not with one’s head is Attorney John Michael Coppala, who was disbarred by the State of Maryland in 2011. Mr. Coppala spoke with the elderly mother of four adult children and advised the adoption of living trusts to avoid probate. The lawyer never heard back until the children called and pleaded with him to come to the hospital. Upon arrival he discovered the mother to be incapacitated. The children nevertheless begged him to help. All children were adults and appeared to get along well. Mr. Coppala finally notarized the forged Living Trust and deed and had his office staff witness the documents. When a dispute arose later about selling the home the forgeries came to light. He argued that the mother and not the children was his client. The Court held that he advised the children at the hospital and thus per 1.2 (D) he advised them to commit fraud. The distribution plan he drafted was still divided equally amongst the four children. He only wanted to avoid probate and it cost him his profession. Attorney Grievance Comm’n v. John Michael Coppola, Misc. Docket AG No. 5 (Sep. 2010)

In conclusion, the lawyer must take all steps reasonably necessary to avoid an ethical dilemma from arising in the first place. The lawyer should have comprehensive in-take forms signed by the clients and have comprehensive engagement and termination letters. If the lawyer does encounter an ethical situation the Lawyer must swiftly investigate all the lawyers’ options as permitted by the Supreme Court Rules. If mitigating the ethical dilemma is not successful, or if, by way of example, a conflict is not waivable, then the lawyer must withdraw from representation.

Keep in mind to always follow the ethical rules strictly even when representing close friends or relatives. Finally, the use of common sense and fairness seems to be a common theme of the Rules and thus, when in doubt, a good course to follow.

— d. kuhn

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