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ETHICS FOR ESTATE PLANNERS: THE LATEST ON THE ABA
MODEL RULES AND ETHICS 2000¹

Terrence M. Franklin
Sacks, Glazier, Franklin & Lodisc, LLP
350 S. Grand Avenue, Suite 3500
Los Angeles, California 90071
213/617-7266
tfranklin@trustlitigation.la

I. INTRODUCTION

The expression “Turn of the Century” conjures images in most of our minds of horse drawn carriages, men in high collars and women in long skirts, and a hopeful expectant era of new things just around the corner at the end of the nineteenth and the beginning of the twentieth century. Of course, the turn of the most recent century occurred only a few years ago as 1999 gave way to the year 2000. Around that time, we focused on the exciting “turn of the Millennium,” a term that has not crept into our collective consciousness, but may be exactly how our children or perhaps their children will describe our times.

In 1997, shortly before the “Turn of the Millennium” and just as technology gurus were beginning to wonder what would happen to all our clocks and computers on January 1, 2000, the leadership of the American Bar Association

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determined that it was a good time to undertake a careful reassessment of the ABA Model Rules of Professional Conduct. Although the Model Rules had been adopted by the ABA House of Delegates only fourteen years earlier in 1983, the timing seemed right for a reconsideration of the Model Rules for several reasons: there were significant variations among the majority of the states that had adopted some version of the Model Rules, as a result of amendments to the rules adopted between 1983 and 1997, and modifications made by individual states; a new version of the Restatement of the Law Governing Lawyers had been recently published; and changes in technology and changes in the nature of legal practice, including increased attorney mobility and multi-jurisdictional practices all suggested that it was an opportune moment to re-evaluate the ethical rules that govern our conduct as attorneys. The Commission on Evaluation of the Rules of Professional Conduct was established and given the informal name “Ethics 2000.” Hon. E. Norman Veasey, American Bar Association Model Rules of Professional Conduct, Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”), Chair's Introduction.

From the beginning, the goal of the Commission was not to undertake a full-scale overhaul of the Model Rules, but rather to undertake a “comprehensive but conservative” approach and to recommend change only where necessary. *Id.* The Ethics 2000 Commission held over 50 days of open meetings, and 10 public hearings at regular intervals over a four and one-half year period. *Id.* The

Commission invited comments and input from state and local bar groups, and an Advisory Council of 250-plus persons, including representatives from the ABA Real Property Probate and Trust Law Section.

In February 2002, the ABA House of Delegates completed its review of the Model Rules proposed by the Ethics 2000. Review and consideration of adoption of the rules is underway in jurisdictions across the United States. Reviews are being conducted, and reports are being issued by various state bar ethics committees, bar organizations and supreme courts.

According to the website of the ABA's Center for Professional Responsibilities (www.abanet.org/cpr/mrpc) the Indiana State Bar Ethics Committee and the Illinois Supreme Court Professional Responsibility Committee and State Bar Ethics 2000 Committee are all conducting reviews. The Iowa Rules of Professional Conduct Drafting Committee has issued its final report largely recommending the adoption of the Model Rules, including the Ethics 2000 amendments. (Its final report can be found at <http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesDrafting.html>.) The Michigan State Bar Ethics Committee has issued its report, which can be found at <http://www.michbar.org>, and Ohio's Supreme Court Task Force is also conducting its review. Forty-four states and the District of Columbia have previously adopted the Model Rules, and it is reasonable to expect that they will adopt the Ethics 2000 amendments, with or without some modifications.

II. ETHICS 2000 AND THE RULES FOR ESTATE PLANNERS

The Model Rules are rules of conduct that generally govern the professional behavior of lawyers and are drafted broadly to be applied to all lawyers regardless of practice area. Thus, regardless of whether an attorney is litigating a civil matter, drafting a business contract, or drafting an estate plan, the rules of professional conduct are the guiding principles for professional behavior. The rules apply, therefore, regardless of whether the attorney is doing international estate planning or handling a small estate with limited assets, in a solo practice or a large firm.

Perhaps to achieve the maximum level of protection for clients and maintain high standards of practice in those instances where conflicts are most likely to arise, the Model Rules tend to focus on adversarial-type relationships between parties who are represented by attorneys. In other words, in general the rules focus on circumstances involving litigation, or perhaps arms-length business transactions, where the goals of the parties involved may be similar but their motivations and interests are largely divergent. The potential buyer and seller may share the common goal of completing the transaction, but the terms that each of the parties want to apply to the transaction are completely divergent.

In practice, many estate planning transactions, at their inception at least, do not involve either litigants or even parties negotiating at arms-length. Instead, estate planning typically involves an attempt by one individual or more individuals to establish an arrangement for transfer of assets to another person or group of

persons. The estate planning process may also involve an attempt to reduce the amount of tax that may be imposed as a result of the transaction. In either case, there may be no adverse party involved at all (except perhaps the taxing authority). Even when there is more than one party involved in the estate planning process, the goals and interests of the parties involved may still not be divergent or adverse.

The particular ethical rules adopted in various jurisdictions, malpractice and breach of fiduciary duty cases and state ethics opinions are all sources of law that the practitioner should consider in evaluating the ethical implications of his or her actions. However the sources identified in this article are helpful starting points and guidelines geared especially to the point of view of the estate planning lawyer.

One significant effort to help the estate planning attorney to navigate a successful estate planning practice over the concerns addressed by the adversarial-based Model Rules, is the American College of Trust and Estate Counsel Foundation publication, "Commentaries on the Model Rules of Professional Conduct." The Third Edition of that guide, which was adopted by the ACTEC Board of Regents in March 1999, is published by and available from the ACTEC Foundation. A Fourth Edition, which will take account of the Ethics 2000 report, is being prepared at this time. The ACTEC Foundation also publishes "Engagement Letters: A Guide for Practitioners" which is designed for use with the ACTEC commentaries and gives examples of form engagement letters

including samples of conflicts and waivers for various circumstances.

(Information regarding the ACTEC Commentaries and Engagement Letters, and the text of both documents are available to the public on the ACTEC website, www.actec.org/public/showresourcespublic.asp.)

The Reporter's Note to the First Edition of the ACTEC Commentaries observes that the Commentaries are an attempt to express views that are "consistent with the spirit of the MRPC as evidenced in the following passage: 'The Rules of Professional Conduct are Rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.'" ACTEC Commentaries (Third Ed. 1999), Reporter's Note, 1. Against this backdrop of practical application, the Commentaries have four basic themes: 1) that lawyers in the trusts and estates field and their clients are relatively free to develop their own rules that will govern the clients' representation; 2) that trusts and estates practices are generally nonadversarial; 3) that can be significant benefits for establishing multiple representations of clients whose "interests may differ but are not necessarily adversarial; and 4) that, with full disclosure, many problems that might arise under the MRPC can be moderated or eliminated by the attorney and client, working together. *Id.*

III. PARTICULAR AREAS OF CONCERN

The estate planning lawyer should be particularly familiar with a web of rules relating to the Scope of Representation (Rule 1.2); Confidentiality of Information (Rule 1.6); Conflicts of Interest for and Duties to Current Clients and Former Clients (Rules 1.7, 1.8, 1.9); and Clients with Diminished Capacity (Rule 1.14). Ethics 2000 Developments and modifications in the Model Rules in these areas are especially important to consider and are the primary focus of this article.

A. Conflicts of Interest

The Conflict of Interest Rules (1.7, 1.8, 1.9 and 1.10) contemplate that under appropriate circumstances, and with appropriate conflicts waivers, a lawyer may represent multiple clients with related, but not identical, interests. “The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict that precludes the same lawyer from representing them.” ACTEC Commentary on MRPC 1.6. Indeed, the ACTEC Commentaries acknowledge that in many instances, joint representation is the most cost and time-effective means of achieving the clients’ shared goals.

Generally, a single lawyer may represent a husband and wife, or a parent and child in an estate planning context, without running afoul of the MRPC *if* the representation is undertaken properly and with sufficient disclosures of information to the clients.

The basic conflict of interest rule for current clients is Rule 1.7, which

prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. The Ethics 2000 version of the MRPC, departs slightly from the prior version of the Rule by creating the concept of a concurrent conflict of interest, a concept which did not exist under the previous formulation of Rule 1.7. The rule now provides that if: “(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

Among other things, the new version of the Rule is intended to avoid confusion about what constitutes directly adverse “conflicts.” It also specifically identifies “former clients” recognizing that the lawyer may owe duties to them that may conflict with current clients. These changes are pointed reminders to the estate planning lawyer to assess the status and relationship of clients or potential clients before rendering legal services. For example, a lawyer should not expect to be able to represent the interests of both parties to a pre-nuptial agreement, and adequately comply with her duties of loyalty and competence to both parties. And while it may be appropriate and advisable in many circumstances for the lawyer to represent co-fiduciaries of an estate or trust, the lawyer must be careful to discuss the implications of the joint representation, and under the current formulation of

the rule to confirm in writing that the clients have given their informed consent to the representation.

An example of a typical conflict of interest which falls within the ambit of Rule 1.7 is the situation where a lawyer has represented a husband and wife and prepared an estate plan on their behalf. The estate plan identifies a particular bank to act as the trustee of a QTIP trust and executor of the husband's estate. After the husband dies, the lawyer may represent both the wife and the bank as trustee and executor so long as the lawyer complies with the requirements of Rule 1.7. The lawyer's analysis will involve a multi-step process. First the lawyer will ask herself if the positions of the Bank and the wife are directly adverse. Even if not, she must nonetheless ask whether there is a significant risk that taking on the Bank as a client will materially limit the lawyer's responsibilities to another client - - the wife. If neither basis for a concurrent conflict exists, then the lawyer may proceed with the representation of both the Bank and the Wife.

But what if the Wife is not satisfied with her interest under the Trust? Suppose she wants to challenge the Trust or to assert a claim for an elective share or an independent community property interest adverse to the Trust? Here, there would appear to be a concurrent conflict of interest which, without more, would prohibit the lawyer from proceeding on behalf of the Bank, the Wife, or both.

Even where a concurrent conflict of interest exists, however, MRPC 1.7 nonetheless permits a lawyer to represent a client if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law and does not involve the assertion of a claim by one client against another client represented by the same lawyer in litigation or proceeding before a tribunal, and each affected client gives informed consent, *confirmed in writing*.

Perhaps the most significant change in the new formulation of Rule 1.7 is the requirement of a confirmation in writing of each client's informed consent to proceeding with the representation, notwithstanding the existence of a concurrent conflict of interest. Rule 1.0 (b) of the new MRPC defines informed consent in writing as consent that is given "in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."

Most disclosures and consents to conflicts under the prior MRPC could be entirely oral. The requirement for confirmation in writing might initially be seen as an additional burden for the lawyer. However, the requirement, if implemented

by lawyers consistently and as a matter of standard practice, might better be viewed as a means of protecting the lawyer, and avoiding evidentiary disputes as to what information was communicated and how well the implications of the waiver were made clear to the client.

Rule 1.0(e) of the new MRPC defines "Informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

(Although the Reporter's Explanation of Changes to this Rule says that the shift from the expression "consent after consultation" to "informed consent" was not intended to be a substantive change, it would appear that the concept of "informed consent" is nonetheless more easily understood by lawyers and the public because of its broad use outside of the legal profession, e.g. for medical treatment.)

Thus, a lawyer consulted by joint or multiple parties is required to consult with them, explaining the implications of joint or multiple representation.

Reconsidering the example of the lawyer deciding whether to represent the Bank and the surviving spouse, the lawyer must ask herself whether she can provide diligent and competent representation to both parties (as required by MRPC Rules

1.1 and 1.3). Presumably, the lawyer will recognize that the representation will involve the assertion of a claim by one client against another in the same litigation, and will never reach the question of whether she really can adequately communicate all the material risks to both clients of going forward with both clients and obtaining written confirmation of the clients' consent to the dual and conflicting representation.

B. Confidentiality of Information

One of the most important implications of any joint or multiple representation is the extent to which information provided by either client will be shared with the other client(s) requiring the lawyer to withdraw if a conflict develops that prevents the lawyer from effectively representing the interests of each of the clients in a competent and diligent manner.

Rule 1.7 and the other conflict of interest rules are closely related to, and impacted by Rule 1.6, *Confidentiality of Information*. The new Rule 1.6 reads as follows:

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

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

In general, a lawyer representing multiple clients is presumed to represent them jointly. The joint representation implies that information will be shared by the clients among themselves and the attorney as to all matters involved in the representation. *ACTEC Commentary on MRPC 1.6*, at 119.

In order to avoid any misunderstanding as to the joint nature of the representation and the presumption that information may be shared freely among the lawyer and the joint clients, the estate planning attorney should draft an engagement agreement that specifically acknowledges these factors. While most jurisdictions still do not require a formal written engagement letter in most instances, such an agreement, signed by both clients, will help to prevent any future claim by either client that the lawyer has violated the confidentiality rule, particularly when the relationship of the clients later changes, for example, if married clients, who initially are jointly represented, later divorce.

The presumption of shared information among joint clients can create

significant problems when one of the clients, whether intentionally or accidentally discloses information to the lawyer that the client wants to keep confidential from the other joint client. The ACTEC Commentary to MRPC 1.6 suggests that in such a situation the lawyer should first assess the relevance and significance of the information received before deciding what to do, recognizing that the lawyer's options are to: 1) take no action with respect to trivial matters; 2) encourage the client who disclosed the information to inform the other client or allow the lawyer to do so; or 3) withdraw from the representation if there is a significant adversity between the parties.

Consider a situation where one spouse discloses to the lawyer the fact that the other spouse is unaware of the existence of an adult child born outside of the marriage. If the parties both clearly desire to disinherit any heirs not specifically named in the instrument that the lawyer is drafting, and the parent of the child born outside the marriage has no desire or legal obligation to provide any benefit to the child, might it be appropriate for the lawyer to keep the secret since there might be no actual adversity implicated by keeping the secret?

C. Multiple Separate Clients - A Dubious Alternative

One issue discussed by the ACTEC Commentary on MRPC 1.6 is the question of whether a lawyer may represent multiple clients separately with respect to related legal matters. In other words, is it ever appropriate for the

lawyer to represent one client, for example a husband, and at the same time, represent the wife as a separate client? While the MRPC do not seem to expressly prohibit such a representation, at least where there is not a violation of the rule prohibiting representation of clients with a concurrent conflict of interest (Rule 1.7), the threat to a lawyer's ability to comply with his duties of loyalty and impartiality to each client, would seem to make such a representation either impossible, or at least fraught with peril in most instances.

As an aside, subdivision (b)(2) of the new Rule 1.6, which did not exist under the prior formulation, is not a controversial change and merely codifies a longstanding general consensus that lawyers may disclose confidential information to their own attorneys when seeking legal advice about their own ethical duties. In addition to other modifications, the new Rule 1.6 expressly continues the strict protection of a client's confidential information that was set forth in the prior rule. However, the former Rule 1.6(b) permitted a lawyer to reveal information to prevent the client from *committing a criminal act* that the lawyer believed was likely to result in imminent death or substantial bodily harm, whereas the new rule's relaxed standard eliminates the requirements of *imminence* of harm and the existence of a possible criminal act.

During the Ethics 2000 commission's consideration of this rule, there was substantial discussion of the concept of eliminating the requirement of bodily

injury, and the possibility that an attorney could make disclosures of confidential information to prevent economic injury. After substantial debate, such broader disclosures to prevent non-bodily injuries were rejected.

D. Representing Multiple Clients

In order to reduce the likelihood of representing clients having conflicts of interest, it is important for the attorney to ask the question, “Who is the Client?” or perhaps more likely, “Who are the Clients?” It is important for the attorney to ask that question not only early on in the engagement, but it may be necessary to revisit the question periodically throughout the engagement as circumstances develop that affect the parties, their relationships, and their interests in the achieving a joint outcome.

The “Family” lawyer

Again, there are situations in which it may be beneficial and cost-effective to retain a single lawyer to perform services for various members of a family. Consider the example of a closely held family business, where the lawyer prepares a complex estate plan establishing a network of sub-trusts, LLCs, and GRATS structured to provide income for family members active in the business and to reduce the size of the taxable estates of the matriarch and patriarch through a gifting program. During the joint lifetimes of the matriarch and patriarch, all is well, and the lawyer represents not only the parents, but also their adult children

who see the lawyer to establish their own estate plans, based on everyone's collective understanding of the parents' goals and anticipated gifts.

Now, suppose the matriarch dies. Six months later, the patriarch, a robust but elderly man of 90 decides to marry the forty-year-old caretaker who attended to the matriarch through her last illness, and who has recently been assisting the patriarch with transportation and errands. The patriarch wants to revoke any revocable portions of the original estate plan so that he can lavish expensive gifts and homes on his new wife. He tells his lawyer that his children and grandchildren don't really need any more of his money. They already have enough, and he'd like to enjoy his last days making his new wife happy. On the other hand, the patriarch's children are convinced that the young caretaker is preying on their father and they want to establish a conservatorship, challenge the marriage and set in stone the previously established gifting plan.

This example may seem extreme, but it is based on the facts of an actual case, and highlights the dilemma facing the lawyer. He represents clients with a concurrent conflict of interest. In addition, to the extent that either the patriarch or his children have informed the lawyer of their intentions, the lawyer has received confidential communications which he cannot divulge. Ideally, when the lawyer commenced his representation of the patriarch's children, he informed everyone

that conflicts could arise among them, and that there was no confidentiality among the group. But could the lawyer have anticipated the extent of the adversity between the clients? Could the material risks of the joint representation have been communicated to all the parties, and then waived in writing?

Less dramatically, what if a lawyer has prepared an estate plan for a client. The client then informs the lawyer that her mother is also in need of a will. The ACTEC Commentaries suggest that in such a situation, the lawyer should “exercise particular care . . . particularly if the client will pay the cost of providing the estate planning services to the other person.” *ACTEC Commentary on MRPC Rule 1.7*, at 151. This situation requires the lawyer to consult directly with the mother, alone, in order to ensure that the lawyer complies with MRPC Rule 1.8(f), which provides that

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

The lawyer proceeding with the engagement after ensuring compliance with Rule 1.8(f) must also ensure that there was no undue influence involved in the procurement of the document. But what happens if the lawyer meets with the mother, and the lawyer satisfies himself that the mother is not being unduly influenced by the original client? In fact, the mother informs the lawyer that she can't stand her daughter and wants to disinherit her in favor of a gift to the local zoo. The lawyer's duty under Rule 1.6 to maintain the confidentiality of the mother should trump any duty of loyalty to the original client, if the lawyer is certain that the mother's capacity is not diminished and she understands the effect of her decision.

E. Conflicts of Interest and Prohibited Transactions

A distinct though related issue that arises for the estate planning attorney deals with the attorney's own involvement with the client's affairs. That involvement may in some instances appear to the client to be helpful and cost effective, since the client has trust and confidence in the attorney already. However, it is precisely that trust and confidence that creates a presumption that dealings between the client and lawyer, which benefit the lawyer, are unfair to the client.

These issues, and the related, though distinct issue of whether the lawyer should agree to take on the role of trustee or executor are all addressed by MRPC

Rule 1.8 “Conflict of Issues: Current Clients: Specific Rules.” Rule 1.8 quoted in relevant part below provides a litany of express prohibitions on attorney conduct.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including

whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the

lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere

pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing

paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Especially important for the estate planner is paragraph (c) which expressly prohibits the lawyer's solicitation of gifts from clients. The ACTEC Commentary on MRPC 1.8 suggests that a lawyer may prepare a will or document benefitting the lawyer, the lawyer's spouse, children, etc, if the client is closely related to the lawyer or the lawyer's spouse. *However*, the commentary also states that the "lawyer should exercise special care if a relative of either the lawyer or the lawyer's spouse proposes to make a gift that is disproportionately large in relation to gifts that the relative proposes to make to others who are equally related." (Practically speaking, even if the lawyer concludes that an engagement may be undertaken without, strictly speaking, violating any ethical duty, the lawyer should nonetheless evaluate whether taking on the task will be worth the contest of the instrument that is likely to be filed once the client is deceased, and the warm family feelings evaporate.)

The ACTEC Commentaries to Rule 1.8 also allows that in some circumstances and at the client's fully informed request, the lawyer "may properly include an exculpatory provision in the document drafted by the lawyer for an unrelated client that appoints the lawyer to a fiduciary office." However, if such a clause is overly broad and attempts to exculpate the lawyer (or any other fiduciary for that matter) from fraudulent or willful conduct, the clause will be

subject to challenge in many jurisdictions as violative of public policy, or statutory or caselaw.

The ACTEC commentary to Rule 1.8 is less accommodating when it comes to drafting a document or testamentary instrument designating a particular lawyer or law firm to serve as counsel to the fiduciary or directing the fiduciary to retain a particular lawyer.

“Before drawing a document in which a fiduciary is directed to retain the scrivener as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction.” ACTEC Commentary on MRPC 1.8, at 190.

Notably, in this area, Ethics 2000 proposal modifies Rule 1.8 (a) (2) to require that clients be advised *in writing* of the desirability of seeking the advice of *independent legal counsel* before entering into business transactions with the lawyer, and that the client must give informed consent, in a writing signed by the

client, to the essential terms of the transaction and the lawyer's role. Previously the client only had to be given a reasonable opportunity to consult independent counsel. The new writing requirement provides an additional burden which should make both lawyer and client more sensitive to the importance of the decision to enter into a transaction. The requirement will also provide an evidentiary basis to raise or defend a claim of violation of the Rule.

F. Client with Diminished Capacity

Perhaps in the trusts and estate field more than any other area of the law, Practitioners are often faced with the dilemma of having a client whose ability to function has become severely limited by mental impairments, memory loss or other mental conditions. Many times, the client is susceptible to the undue influence of others and easily fall prey to unscrupulous caregivers or others who might take advantage of the client's diminished capacity. The lawyer is sometimes uniquely

qualified by the nature of the lawyer-client relationship to take steps to protect the client.

The version of Rule 1.14, *Client Under A Disability* which existed before Ethics 2000 gave the lawyer some limited ability to protect the client. The old version first charged the lawyer with the responsibility to "as far as reasonably

possible, maintain a normal client-lawyer relationship with the client” whose ability to “make adequately considered decisions in connection with the representation [was] impaired.” Former MRPC Rule 1.14 (a). A lawyer confronted with such circumstances was then authorized to “seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believe[d] that the client [could not] adequately act in the client’s own interest.” Former MRPC Rule 1.14 (b).

The new version of Rule 1.14 is more explicit in advising the lawyer representing a client with “diminished capacity.” The Rule now reads as follows:

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

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

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

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect

the client's interests.

The new rule departs from the former rule first by applying the concept of “diminished capacity” instead of “under a disability” recognizing that a client’s ability to function normally falls on a continuum. The situations are rare where the lawyer can perceive a bright line of a client who is “under a disability.”

Significantly, the new rule expressly allows the lawyer to take steps to protect the client short of seeking appointment of a guardian, and permits the lawyer to apply a rule of reason in appropriate circumstances to guide the lawyer in determining how far to go to assist the client. It may be appropriate for the lawyer to consult with family members, friends, adult protective agencies, or medical service providers to take “reasonably necessary protective actions.” In this context, however, it is important for the lawyer to bear in mind that the client’s interests come first. The desires of family members are secondary. MRPC Rule 1.14, Comment 5.

Finally, the lawyer is reminded of the obligation to maintain the client’s confidences as required by Rule 1.6, so that while the lawyer may disclose confidential client information, the disclosure must be limited to disclosures necessary to protect the client’s interests. For example, the lawyer must be careful in deciding whether to disclose the client’s diminished capacity to persons who might seek appointment of a guardian if the lawyer believes that less invasive