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Ethical Issues in Advising Clients on Planning for, Creating, Operating, Transferring Control and Ownership of, and the Dissolution of Closely Held Businesses

I. INTRODUCTION[1]

A. Many ethical issues arise in the life cycle of a closely held business from inception to end. Some of the areas to be examined are competence, timeliness of work, keeping the client informed, and the conflicts that can arise in representing more than one party involved in the business, or representing the organization as a client.

B. This paper will look at these issues through the prism of the ethical rules governing lawyers. The ethical conduct of almost all lawyers is governed by some version of the American Bar Association's *Model Rules of Professional Conduct* (Model Rules).[2] In examining ethical issues confronting estate planning lawyers, one place of inquiry for each issue will be the Model Rules and Comments to the Model Rules. A second basic and valuable reference for examining the ethical issues facing estate planning lawyers is the *ACTEC Commentaries on the Model Rules of Professional Responsibility* (ACTEC Commentaries).[3] As noted in the Preface to the ACTEC Commentaries, the Model Rules and Comments to the Model Rules often fail to provide sufficient guidance to lawyers engaged in an estate planning or related practice. The purpose of the ACTEC Commentaries is to help provide the guidance estate planners need in understanding their professional responsibilities. This has also been noted in various articles and other publications. For example in 1993, Malcolm A. Moore and Anne K. Hilker wrote: "For some time, estate planners have been hampered by inadequate guidance from the ABA Model Rules of Professional Conduct and other available guidelines. Promulgated in 1983, the Model Rules recognized that the lawyer may not always be an adversary but rather may serve as counselor. However, the commentary to those Rules did not provide extensive guidance on the handling of day-to-day communications between parties and counsel in estate planning."[4]

C. While this paper is focused on the ethical consequences to lawyers, the discussion is equally relevant to practitioners in other fields. Other fields have their own rules of professional responsibility. Even if an estate planning professional does not face disciplinary penalties, a dissatisfied client could bring a malpractice action for damages. One possible way of looking at this is that the ethical rules, possible disciplinary sanctions, and the possible awards of monetary damages to former clients for malpractice are intertwined. The ethical rules provide a goal to which lawyers and other estate planning professionals should aspire in order to meet the needs of their clients. The threat of a malpractice claim is the stick that encourages estate planning lawyers and others to meet their professional responsibilities. Failure to do so may result not only in a disciplinary sanction but in the need to compensate a client for that failure. By understanding the ethical rules and seeking to meet their requirements, estate planning lawyers and others should be able to mitigate or avoid the potential negative consequences that could otherwise arise.

II. COMPETENCE

A. Basic Considerations.

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[1] Skip Fox's former colleague, Kurt Friesen, provided invaluable help in putting an earlier version of these materials together. These materials are also based in part on an update of "Is Crossing State Lines Ethically Challenging to Estate Planners" presented at the 1999 Institute and "The Top Ten Ethical Challenges For Estate Planners and Professionals Today and the Best Practices for Addressing Them" presented at the 2008 Heckerling Institute by Skip Fox. Finally, portions of these materials are derived from materials prepared by Skip Fox's colleague Thomas E. Spahn, a true expert on ethical issues facing lawyers.

[2] To date, California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules.

[3] American College of Trust and Estate Counsel (Fifth edition 2016).

[4] Malcolm A. Moore & Anne K. Hilker, "Representing Both Spouses: The New Section Recommendations", Prob. & Prof. July/Aug. 1993, at 26, 26.

1. Every lawyer, no matter what type of matter in which he or she is representing a client, must provide competent representation.

2. Inadequate or incompetent representation of a client (or clients) potentially exposes a lawyer to more than simply a malpractice complaint. It can also result in sanctions imposed by the lawyer's state bar. Representation of multiple family members in an estate planning transaction increases the likelihood that a malpractice claim or complaint with a state bar will be made, if only because such representations are more likely to result in at least one dissatisfied client, especially when the transaction does play out as every family member thought that it would.

B. Model Rule 1.1

1. Model Rule 1.1 relates to the competence of counsel and states as follows:

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

2. This rule is of particular importance to estate planning practitioners, whose practices often involve many different areas of the law, including trust and estate administration, tax law, corporate law, partnership law, insurance law, employee benefits, elder law, investment real estate law, and litigation. For example, one transaction, such as the formation of a limited liability company to hold marketable securities and commercial real estate with family members as the members of the limited liability company and then having the family members transfer their limited liability company interests to a revocable or irrevocable trust, can involve complex questions of partnership, trust, contract, real estate, and tax law. Importantly, Comment 1 to Model Rule 1.1 authorizes a lawyer to obtain the requisite knowledge and skill in a particular matter through preparation and study if the lawyer lacks the necessary knowledge and skill. Of course, this does not address whether the lawyer may charge the client for the necessary study and preparation.

C. ACTEC Commentary – Model Rule 1.1.

1. The ACTEC Commentary notes and lists several areas with respect to a lawyer's competence to represent a client in a particular matter. Given the complexity of some estate planning with respect to intra-family transfers, competency is a critical consideration.

   a. Meeting the needs of the client.

      (1) One important question is whether the lawyer must have a thorough understanding of all the different rules that might affect a transaction in order to have the necessary competence to represent one or more clients in a particular transaction.

      (2) The ACTEC Commentary also suggests that the needs of a particular client may be met through additional research and study when a lawyer represents the client and initially lacks the skill or knowledge required to meet those needs.

      (3) The needs of the client may also be met by involving another lawyer or professional with the requisite skill or knowledge. In order to maintain confidentiality, another lawyer should only be consulted on an anonymous basis, or on a confidential basis with the consent of the client.

      (4) The lawyer should be upfront with the client about his or her level of expertise.

   b. A mistake in judgment does not necessarily indicate a lack of competence. According to the ACTEC Commentary, a mistake in judgment does not necessarily indicate a lack of competence. It notes that a lawyer might not precisely assess the tax or substantive law consequences for a particular transaction for a variety of reasons. These include unclear

facts, disputed facts, or the unsettled state of the law. The complexity of a transaction or its unusual nature or its novelty may prevent a competent lawyer from accurately assessing the treatment of a particular transaction for tax or substantive law purposes. Of course, clients may disagree with this, especially with the advantage of hindsight.

c. Importance of facts. Clients need to provide their lawyers with accurate facts. A failure to do so can cause bad advice to be given. The ACTEC Commentary indicates that a lawyer may rely upon information provided by a client unless the circumstances indicate that the information should be verified.

d. Supervising execution of documents. The ACTEC Commentary to Model Rule 1.1 states that a lawyer who prepares estate planning documents for a client should supervise their execution. If it is not practical for the lawyer to supervise the execution, the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which the documents should be executed. The lawyer should do so only if the lawyer reasonable believes that the client is sufficiently sophisticated and reliable to follow the instructions and there are no concerns about potential challenges.

e. Competence requires diligence in communications with the client. Competence requires that a lawyer handle a matter with diligence and keep the client reasonable informed during the active phase of a representation. This is discussed in Model Rules 1.3 (Diligence) and 1.4 (Communications).

f. Competence with technology. The ACTEC Commentary notes that a lawyer who uses technology to transmit or store client documents or who communications electronically with a client regarding the drafting of documents must be aware of the potential effects of such use of technology on client confidentiality and the preservation of client information. The lawyer must stay reasonably informed about developments in technology used in client communications and document storage, including improvements, discoveries of risks and best practices.

D. Cases on Competence

1. Case law regarding the competence of estate planning lawyers demonstrates that claims based on a lack of competence can be brought not only by the lawyer's client, but perhaps by beneficiaries of a client's estate plan as well. This ability of a beneficiary to sue a lawyer will often depend upon state law.

2. In Sindell v. Gibson, Dunn & Crutcher[5], the court held that the intended beneficiaries of an estate plan prepared for the beneficiaries' father suffered "actual injury" in defending a lawsuit by the surviving spouse's conservator that plaintiffs alleged would not have been filed but for the law firm's negligence.

a. In Sindell, Harold Caballero retained Gibson, Dunn & Crutcher to prepare his estate plan so as to transfer wealth to his daughters and his daughters' children.[6] Knowing that all of Mr. Caballero's wealth was in a ranch he owned and controlled, his lawyers advised him to make gifts and sales of interests in the business to the children and the grandchildren.[7] Mr. Caballero's wife was not the mother of his children, and she had children of her own from a prior marriage. In addition to having substantial assets of her own and her own lawyers, under California law, the wife had a community property interest in Mr. Caballero's ranch. The court found that at the time that the testator implemented his estate plan, his wife would have been willing and able to execute a waiver of her community property rights in the ranchland, although none was obtained.

[5] 63 Cal. Rptr. 2d 594 (Cal. Ct. App. 1997)
[6] 63 Cal. Rptr. 2d at 596.
[7] *Id.*

b. The wife subsequently became incompetent and the wife's children sued Mr. Caballero for the amount of his wife's community property interest in the business. While this action was pending, Mr. Caballero's children and grandchildren sued Gibson, Dunn & Crutcher (1) to indemnify them for the amounts that they stood to lose in the action initiated by the wife's children, (2) for the $50,000 fee paid to the lawyers for the estate plan, and (3) for other expenditures associated with the plan. Although the decision turned on what event constitutes the actual injury in a legal malpractice action, the court held that the failure to obtain the written waiver from the wife clearly constituted negligence. In so finding, the court noted:

> The failure of the defendants to obtain the readily available evidence of [the wife]'s consent to those transactions, or acknowledgement as to the separate nature of the property involved, was below the standard of care in the community and constituted negligence by the defendants. In short, the defendants breached their duty of care by failing to secure the [the wife]'s consent prior to the time that she fell ill and became mentally incompetent to give it.[8]

3. In Kinney v. Shinholser,[9] one lawyer drew a will for a married client which failed to preserve the tax benefit of the testator's unified credit. Instead, the will gave the entire estate to a trust for the benefit of the widow over which she was given a general power of appointment. As a result, the widow's estate at her subsequent death would be required to pay estate taxes that would have been avoidable if the widow had not been given a general power of appointment. The decedent's son sued the draftsperson who prepared the will and the lawyer and the accountant who administered the decedent's estate. The court did not hold the draftsperson liable for malpractice because the will did not indicate any intent to minimize taxes upon the death of the surviving spouse. However, the court went on to find that the complaint stated a cause of action by the decedent's son against the lawyer and the accountant who were retained by the surviving spouse to probate the will and prepare the federal estate tax return because they failed to advise her of the possible tax savings that would have resulted if the surviving spouse disclaimed the general power of appointment and a QTIP marital deduction election was not made.

4. In Copenhaver v. Rogers,[10] the grandchildren, as remaindermen of the decedent, brought tort and contract claims against the draftsperson, contending that his failure to supply trust terms in the grandmother's will resulted in their losing the remainder interest in a residuary share intended for their mother. In addition, they complained that the lawyer failed, in the course of drafting wills for their grandparents, to advise their grandparents on the creation of a marital trust and provided incorrect tax advice about possible estate and generation-skipping tax consequences of proposed transfers resulting in additional monetary damages to them. The trial court held that the grandchildren had no claim against the lawyer for the negligent performance of legal services to the grandparents and they failed in their efforts to assert third party beneficiary contract claims against the lawyer. The Virginia Supreme Court affirmed. The court held that the grandchildren had no tort action against the lawyer in the absence of privity between them and the lawyer, and the grandchildren failed in the contract claim because they failed to allege and show that they were clearly intended as third party beneficiaries in the contract (the preparation of the wills) between the grandparents and the lawyer.

5. Virginia has continued to uphold the use of lack of privety as a defense. In Rutter v. Jones, Blechman, Woltz & Kelly,[11] the Virginia Supreme Court held that no intended beneficiary could sue the decedent's estate planning lawyer for alleged negligence when a testator's estate plan failed to achieve its intended purpose even when the action was brought by the personal representative of the decedent's estate, since the action for malpractice did not arise until after the client had died and the personal representative, who was limited under Virginia law in bringing only actions that arose before death, presented no viable claim for malpractice.

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[8] *Id.*
[9] 663 So.2d 643 (Fla. Dist. Ct App. 1995)
[10] 384 Se. 2d 593 (Va. 1989)
[11] 568 S.E. 2d 693 (Va. 2002)

E. Metadata. On area of technology with which lawyers need to show competence is metadata.

1. "Metadata," is essentially data about data. This involves the same basic issue as the inadvertent transmission of documents, but is even more tricky because the person sending the document might not even know that the "metadata" is being transmitted and can be read. Model Rule 4.4(b) reads:

> (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

2. A chronological list of state ethics opinions dealing with metadata highlights the states' widely varying approaches. The following is a chronological list of state ethics opinions, and indication of whether receiving lawyers can examine an adversary's electronic document for metadata.

2001

New York LEO 749 (12/14/01) -- **NO**

2004

New York LEO 782 (12/18/04) -- **NO**

2006

ABA LEO 442 (8/5/06) -- **YES**

Florida LEO 06-2 (9/5/06) -- NO

2007

Maryland LEO 2007-9 (2007) -- **YES**

Alabama LEO 2007-02 (3/14/07) -- **NO**

District of Columbia LEO 341 (9/2007) -- **NO**

Arizona LEO 07-3 (11/2007) -- **NO**

Pennsylvania LEO 2007-500 (2007) -- **YES**

2008

N.Y. County Law. Ass'n LEO 738 (3/24/08)-- **NO**

Colorado LEO 119 (5/17/08) -- **YES**

Maine LEO 196 (10/21/08) -- **NO**

2009

Pennsylvania LEO 2009-100 (2009) -- **YES**

New Hampshire LEO 2008-2009/4 (4/16/09) -- **NO**

West Virginia LEO 2009-01 (6/10/09) -- **NO**

Vermont LEO 2009-1 (10/2009) – **YES**

2010

North Carolina LEO 2009-1 (1/15/10) -- **NO**

Minnesota LEO 22 (3/26/10) -- **MAYBE**

2011

Oregon LEO 2011-187 (11/2011) -- **YES** (using "standard word processing features") and **NO** (using "special software" designed to thwart metadata scrubbing).

2012

Washington LEO 2216 (2012) -- **YES** (using "standard word processing features") and **NO** (using "special forensic software" designed to thwart metadata scrubbing).

2016

New Jersey Rules change (4/14/16) – **YES** (if receiving lawyers reasonably believe the metadata was not inadvertently sent).

Texas LEO 665 (12/16) **– YES**

3. Thus, states take widely varying approaches to the ethical propriety of mining an adversary's electronic documents for metadata.

   a. Interestingly, neighboring states have taken totally different positions. For instance, in late 2008, the Maine Bar prohibited such mining -- finding it "dishonest" and prejudicial to the administration of justice -- because it "strikes at the foundational principles that protect attorney-client confidences." Maine LEO 196 (10/21/08).

   b. About six months later, New Hampshire took the same basic approach (relying on its version of Rule 4.4(b)), and even went further than Maine in condemning a receiving lawyer's mining of metadata -- analogizing it to a lawyer "peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client." New Hampshire LEO 2008-2009/4 (4/16/09).

   c. However, Vermont reached exactly the opposite conclusion in 2009. Pointing to its version of Rule 4.4(b), Vermont even declined to use the term "mine" in determining the search, because of its "pejorative characterization." Vermont LEO 2009-1 (9/2009).

4. Basis for States' Differing Positions

   a. In some situations, the bars' rulings obviously rest on the jurisdiction's ethics rules. For instance, the District of Columbia Bar pointed to its version of Rule 4.4(b), which the bar explained is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent."[12]

   b. On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata. [13]

[12] District of Columbia LEO 341 (9/2007).
[13] Florida LEO 06-2 (9/16/06).

c. Other jurisdictions have not adopted any version of Rule 4.4(b), and therefore were free to judge the metadata issue without reference to a specific rule.[14]

d. On the other hand, some states examining the issue of metadata focus on the basic nature of the receiving lawyer's conduct in attempting to "mine" metadata. Such conclusions obviously do not rest on a particular state's ethics rules. Instead, the different bars' characterization of the "mining" reflects a fascinating dichotomy resting on each state's view of the conduct.

(1) On March 24, 2008, the New York County Bar explained that mining an adversary's electronic documents for metadata amounted to unethical conduct that "is deceitful and prejudicial to the administration of justice."[15]

(2) Less than two months later, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata."[16]

(3) A little over five months after that, the Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice."[17]

Thus, in less than seven months, two states held that mining an adversary's electronic document for metadata was deceitful, and one state held that it was not.

III. PROVIDING EFFECTIVE AND TIMELY COUNSEL TO CLIENTS

A. Model Rule 1.3 relates to diligence and reads:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

B. One area in which clients often become frustrated is the failure of a lawyer to handle estate planning or estate administration matters promptly. Even in situations in which a lawyer is trying to act as promptly as possible, delays in completing work can arise. With the increased pressure to produce revenue, lawyers may take on more work than they can handle in a timely and effective manner. The possibility of this is recognized in Comment 2 to Model Rule 1.3, which states:

> A lawyer's work load must be controlled so that each matter can be handled competently.

C. The adverse consequences of failing to act with promptness in representing a client are expressed in Comment 3 to Model Rule 1.3, which reads:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's work…

D. In certain transactions involving multiple family members, the need to consult with and coordinate among the family members may require more time than the lawyer might expect. The lawyer needs to take this into account to be able to handle the particular transaction in a timely manner.

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[14] See, e.g., Alabama LEO 2007-02 (3/14/07).
[15] N.Y. County Law. Ass'n LEO 738 (3/24/08).
[16] Colorado LEO 119 (5/17/08).
[17] Maine LEO 196 (10/21/08).

E. The results have varied in cases in which a lawyer's diligence has been questioned, but each case shows that timely counsel may have helped to avoid problems.

1. In Rodovich v. Locke-Paddon,[18] Rafael Rodovich, when he married Mary Ann Borina in 1957, entered into a prenuptial agreement which stated that each party's property would remain his or her separate property. In 1973, Borina executed a will, which after making specific gifts to Rodovich and others, gave the residue of the estate to two charitable remainder trusts. Rodovich was one of the private beneficiaries of the two charitable remainder trusts.

   a. In 1991, the lawyer, Locke-Paddon, met with Borina to discuss drafting a new will. At that meeting, the lawyer learned that the decedent had been diagnosed with breast cancer and was receiving chemotherapy treatments. The purpose of the meeting was to discuss the preparation of a new will under which Rodovich was to receive all of the payments from a charitable remainder trust with which Borina intended to fund with most of her estate.

   b. The lawyer delivered a rough draft of the will more than three months after the meeting. His understanding was that the next move was Borina's since Borina had told the lawyer that she intended to confer with her sister before finalizing the provisions of the will. The lawyer never heard from the decedent prior to her death on December 19, 1991.

   c. Rodovich sued the lawyer on the grounds that the lawyer owed a duty of due care and reasonable diligence to Rodovich as the proposed private beneficiary of the charitable remainder unitrust to make sure that the decedent's wishes would be effected with reasonable promptness and diligence. The trial court framed the issue as to whether the lawyer's duty to use professional skill, prudence, and diligence extended beyond Borina to Rodovich. The trial court concluded and the appellate court agreed that the duty did not extend to Rodovich.

   d. However, despite the favorable result for the lawyer, one must wonder whether the lawyer's position would have been further strengthened if the lawyer had regularly communicated with Borina to see how the review of the draft will was proceeding.

2. In People v. James,[19] a client employed a lawyer, Joseph C. James, to prepare a will. The client was seventy-five years old and attempted to contact the lawyer on several occasions concerning its completion with no success. The will was executed eight months after the client requested the preparation of the will and only after the filing of a complaint with the Colorado Bar Grievance Committee. The Grievance Committee found that the lawyer's failure to prepare a will for at least eight months after the initial contact by the client, especially where the client was elderly, was "grossly negligent and shows a total lack of responsibility." Apparently, private censures had been administered to the lawyer on two other occasions and the lawyer was suspended for one year as a result of other derelictions of duty. In this case, the Colorado Supreme Court determined that disbarment was the appropriate action. Most, if not all, readers of this case, should agree that the lawyer failed to act diligently in the representation.

3. In re Discipline of Helder.[20] In this case, the lawyer failed to communicate with a client for more than six months after a client repeatedly requested the lawyer to make changes in the client's will. Only after the client filed a complaint with the Lawyers Professional Responsibility Board, did the lawyer advise the client that the lawyer was not actively practicing law and return the client's file. As a result of this matter and an unrelated matter involving the defense of a contractual issue, the lawyer was indefinitely suspended from the practice of law.

[18] 35 Cal.Rptr.2d 573 (Cal. App. Ct. 1995)
[19] 502 P.2d 1105 (Cal. 1972)
[20] 396 N.W.2d 559 (Minn. 1986)

4. Disciplinary Action Against MacGibbon. [21]

a. In this case, a lawyer named MacGibbon first served as counsel for the personal representative and then as the successor personal representative of an intestate administration of an estate that required thirty years for administration.

b. The decedent, Axel Anderson, died in 1964. At that time, Anderson owned approximately 280 acres of farm land with a value of $9,000 and bonds worth $5,000. From 1964 until 1980, according to MacGibbon, the estate's primary focus was on efforts to sell the real estate. One parcel was sold in 1972 and a second was sold in 1980. A third parcel had been listed for sale with a real estate broker since 1992.

c. The originally appointed personal representative died in 1981. At that point MacGibbon became personal representative. He spent much of the 1980's attempting to locate the heirs.

d. The court noted that neglect in probating estates had long been considered as serious professional misconduct. It determined that MacGibbon should be publicly reprimanded for his neglect and be removed as personal representative of the estate.

IV. COMMUNICATION

A. Representation of multiple members of a family also implicates Model Rule 1.4, which deals with communication with clients. Model Rule 1.4 reads:

(a) A lawyer shall:

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

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

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

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

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

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

B. Considerations in the Official Commentary on Model Rule 1.4.

1. Regular communication. Comment four to Model Rule 1.4 states that regular communications with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, the lawyer must promptly comply with the request. If a prompt reply is not possible, the lawyer or member of the lawyer's staff should acknowledge receipt of the request and advise the client when a response may be expected. The basic rule is that a lawyer should promptly respond to or acknowledge client communications.

[21] 535 N.W.2d 809 (Minn. 1995)

2. Explaining matters. Comment five to Model Rule 1.4 deals with explaining matters to a client. Pursuant to this, the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. The guiding principle is that a lawyer should fulfill a client's expectations for information consistent with the duty to act in the client's best interest.

3. Withholding information. The lawyer is rarely justified in withholding information from the client. Comment seven indicates that a lawyer may be justified in delaying transmission of information when the client might react imprudently to an immediate communication. The example given in the commentary is that of withholding a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. The commentary is clear that a lawyer may not withhold information to serve a lawyer's own interest or convenience or at the interest or convenience of another person.

C. The requirement of regular communication may cause tensions in a situation in which a lawyer is representing more than one member of a family in a transaction for estate planning or tax planning purposes. This would be especially true when one family member, who is a client, tells the lawyer not to mention or disclose certain information to other family members who are also clients with respect to the same transaction.

D. Case on Communication:

1. In Hotz v. Minyard[22], the lawyer Robert Dobson represented Mr. Minyard, his son, Tommy, daughter, Judy, and the family businesses, including multiple automobile dealerships. Tommy was in charge of his father's Greenville dealership, and Judy worked for her father at his Anderson dealership.

2. With Dobson's assistance, Mr. Minyard executed a will on October 24, 1984 that left Tommy the Greenville dealership, gave other family members $250,000, and left the residuary estate in trust to his wife for life, with the remainder equally to Tommy and to a trust for Judy. The will was executed with Mr. Minyard's wife, his secretary, and Tommy in attendance. Later that day, Mr. Minyard executed a second will containing the same provisions as the first except that it gave the Greenville dealership real estate to Tommy outright. Mr. Minyard told Dobson that the existence of the second will was to remain a secret and specifically directed Dobson not to tell Judy of its existence.

3. Judy subsequently requested a copy of her father's will. Dobson showed Judy the first will and discussed it with her in detail. After this discussion, Judy believed that she would receive the Anderson dealership, and that she would share the estate equally with Tommy. Dobson never told Judy that the first will was revoked.

4. The father subsequently suffered from serious health problems and became mentally incompetent. Tommy and Judy agreed that Judy would attend to their father's care while Tommy managed both dealerships. During this time, Judy questioned some of the business decisions Tommy was making with respect to the Anderson dealership. When Judy tried to return to the Anderson dealership, Tommy refused to relinquish control and eventually fired her.

5. Shortly after Judy consulted with another lawyer about her concerns over Tommy's actions, Mr. Minyard executed a codicil, drafted by Dobson, removing Judy and her children as beneficiaries. Dobson subsequently convened a meeting with Judy, Tommy and her mother at his office. At that meeting, Judy was told if she dropped her plans for a lawsuit, she would be restored under her father's will and could work at the Greenville dealership. Believing that restoration under the will meant the will that Dobson disclosed to her, Judy dropped her planned lawsuit and moved to Greenville to work at the dealership. Eventually, Tommy fired Judy again.

[22] 403 S.E.2d 634 (S.C. 1991).

6. Judy sued Dobson for breach of fiduciary duty based on his misrepresentation of her father's will. The Supreme Court of South Carolina held that Dobson owed Judy a duty with regard to her father's will because of their previous lawyer-client relationship, including preparing Judy's will and offering advice to Judy directly regarding issues at the dealerships. The court reasoned that even though the lawyer represented the father regarding his will, he owed Judy, as a client, the duty to deal with her in good faith and not actively misrepresent the first will or its status.

E. Extent of Continuing Duty to Client after Work is Completed.

1. Model Rule 1.4(a)(2) requires that a lawyer shall reasonably consult with the client about the means by which the client objectives are to be accomplished. One issue with respect to representation of family members in estate planning is whether after the initial planning is done or the estate planning work for which the lawyer is hired has been completed, the lawyer has an obligation to keep the client informed of changes in the law. Clearly, if the representation continues, then there is likely a duty to keep the client informed of changes in the law. This can have consequences for the lawyer.

2. In Standish v. Stapleton an unreported decision out of the Connecticut Superior Court, the court found that a lawyer had no continuing duty to communicate with a former client where the lawyer represented various members of a family and was "drawn into what is in essence a family feud."[23]

a. In Standish, lawyer Richard Stapleton drafted a trust agreement for Coral Moore, the mother of Gail Standish, Gary Moore and Wilbur Moore. Each of the children were beneficiaries of the Trust, and Stapleton was designated as a successor trustee. In her 1988 will, Coral bequeathed her one-half interest in a house to Gail, who owned the other one-half interest. In 1992, Stapleton represented both Coral and Gail in closing on an equity line of credit on Coral's one-half interest in the property. Coral subsequently executed a new will, drafted by Stapleton, in 1993. In the 1993 will, she still gifted her interest in the house to Gail, but the bequest was subject to any encumbrances on the property at the time of Coral's death, including any line of credit. Upon Coral's death in 1995, the interest in the house passing to Gail was subject to a $140,000 encumbrance.

b. After the will was probated, Gail sued Stapleton, alleging, among other things, that Stapleton breached his fiduciary duty to Gail, both as Trustee of Coral's trust and as Gail's lawyer, in his representation of Gail relating to the line of credit. The court found that Stapleton did not have a duty to Gail to inform her either of Coral's 1993 will or of Coral's use of the equity line of credit. In reaching its decision, the court specifically considered Rule 1.4 of the Rules of Professional Conduct and found that because Gail had made no "request" for information, Stapleton's duty was limited to keeping Gail "reasonably informed" about the status of the "matter." Since the "matter" was the creation of the line of credit, there was nothing to inform Gail of after its creation.

3. In Lama Holding Company v. Sherman & Sterling,[24] the Sherman & Sterling law firm created a holding company to facilitate the purchase of certain stock to take advantage of favorable treatment under the tax law. Bankers Trust was retained as the exclusive agent for the purchase of the stock. Without consulting either defendant, the holding company sold the stock. The holding company claimed that the failure of the law firm and the investment bankers to inform them of changes in the tax law caused them to incur an unduly burdensome tax liability. The court denied Sherman & Sterling's motion to dismiss while granting Bankers Trust's motion to dismiss. The court found that the question of whether Sherman & Sterling promised to inform plaintiffs of significant changes in the tax laws and whether its failure to do so caused injury to the plaintiffs were questions of facts for a jury. Changes in the tax laws would affect the investment. As a result, the complaint stated sufficient facts for claims of malpractice, negligent misrepresentation, and breach of fiduciary duty. The court dismissed the claim against Bankers Trust because the holding company's claim that the investment bankers failed to alert plaintiffs as to changes in tax

[23] Case No. 394608, 2000 Conn. Super. LEXIS 2970 (Nov. 8, 2000).
[24] 758 F. Supp. 159 (S.D.N.Y. 1991)

law was too amorphous since the holding company independently negotiated the sale of the stock without consulting Bankers Trust.

4. Standish v. Stapleton and Lama Holding Company illustrate the issue of what steps lawyers should take to terminate the representation and thus avoid any issue of a continuing representation.

   a. Model Rule 1.16 deals with declining or terminating a representation. The rules under Model Rule 1.16 deal primarily with litigation and corporate matters. Thus, Model Rule 1.16 deals more with the situation in which a lawyer believes that he or she can no longer represent a client.

   b. Under Model Rule 1.16(b)(1), a lawyer may withdraw from representing a client if the withdrawal can be accomplished without a material adverse effect on the interests of a client.

   c. The ACTEC Commentaries indicate that a lawyer may withdraw from representation if a client persists in criminal or fraudulent conduct; the lawyer discovers after the fact that his or her services have been used by client to perpetrate a fraud or crime; the client wishes to pursue objectives that the lawyer finds to be repugnant or with which the lawyer has a fundamental disagreement; the client fails to pay the lawyer's bill after receiving sufficient notice from the lawyer of the need to do so; the representation will place an unreasonable financial burden on the lawyer or the client has made the representation unreasonably difficult; or there is other good cause such as a mutual antagonism between the lawyer and the client or a breakdown of the lawyer-client relationship.

5. Dormant Representation.

   a. The rules and comments noted above offer little guidance with dormant representation. The ACTEC Commentaries on Model Rule 1.4 include a comment on dormant representation. The comment notes that the execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer, the representation becomes dormant awaiting activation by the client.

   b. The ACTEC Commentaries go on to state that, although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by completion of the active phase of the representation. The ACTEC Commentaries state that a lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents and send the client individual letters or form letters, pamphlets, or brochures regarding changes in the law that might affect the client. They then state that, in the absence of an agreement to the contrary, the lawyer is not obligated to send a reminder to the client whose representation is dormant or to advise the client of the impact that changes in the law or that client's circumstances might have.

   c. While the position in the ACTEC Commentaries may be correct, clients may believe that the lawyer does continue to have a duty to inform them when there is a change in the law or there are circumstances that arise which might affect their estate plans. To avoid any misunderstanding, the best practice is for lawyers to specifically terminate the relationship upon the completion of the actions to which they are engaged.

   d. This can be especially important in a situation involving several family members who might believe that one lawyer is representing all of them with respect to a technique such as the creation or funding of a family limited partnership or the funding of a grantor retained annuity trust or a sale to defective grantor trust transactions.

e. Of course, if the lawyer continues to represent the partnership or continues to provide advice with respect to the grantor retained annuity trust or on the administration of the defective grantor trust, or another technique for example, the relationship will not be terminated and the lawyer does have a duty to inform the clients of changes in tax laws that might affect those techniques.

f. The basic choice is whether the lawyer wants to have a continuing obligation to keep clients informed of changes that might affect their estate planning or not. While this can be beneficial from a client relationship standpoint and continuing to receive work from the client, it does place a burden on the lawyer and the lawyer should consider that carefully.

g. One solution, of course, is to terminate the relationship, but continue to be in contact with the now former clients when there are changes in the tax law and to suggest to the former clients that there are changes in the tax law and that they might wish to re-engage the law firm to look at the possible impact of these changes upon the clients' estate plans. This practice will help insulate lawyers from possible liability.

V. CONFIDENTIALITY OF INFORMATION

A. Model Rule 1.6 (a) reads:

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

B. Under Model Rule 1.6 (b) a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;

2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

4. to secure legal advice about the lawyer's compliance with these Rules:

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

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

C. The ACTEC Commentary to Model Rule 1.6 includes significant discussion of the impact Rule 1.6 has on lawyers representing multiple family members. The Commentary notes that "[w]hen the lawyer is first consulted by multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them."

D. Issues arise when a lawyer receives information from one joint client that the disclosing client does not want shared with another joint client. In the event that the information received is both relevant and significant, the lawyer may urge the disclosing client to share the information directly with the other clients. If the communicating client refuses to do so, the lawyer faces a difficult situation for which there is

often no clear course of action. The ACTEC Commentary advises that the lawyer consider "his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed."

E. Case on Confidentiality.

1. The Supreme Court of New Jersey held that a law firm jointly representing a husband and wife in estate planning matters was entitled to disclose to the wife the existence of the husband's child born out of wedlock in A v. B v. Hill Wallack.[25] In that case, the law firm learned of the child not from the husband but from the child's mother, who had retained the law firm to pursue a paternity action against the husband. Because of a clerical error, the firm's conflict of interest check did not reveal the conflict.

2. The Hill Wallack court reasoned that the husband's deliberate failure to disclose the existence of the child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under Model Rule 1.6. The court also based its decision on the existence of an engagement letter waiving any potential conflicts of interest, suggesting that the letter reflected the couple's implied intent to share all material information with each other in the course of their estate planning.

3. Lessons from Hill Wallack.

a. Hill Wallack demonstrates the importance of setting forth the grounds of the representation in the engagement letter, including the extent to which information will be shared.

b. The case also highlights the importance of conducting thorough conflicts checks when taking on new clients or new matters for existing clients.

VI. CONFLICTS OF INTEREST

A. Introduction. Often lawyers are requested to represent two or more family members in a particular transaction, even though the interests of the family members may differ. There are two views on multiple representation in the estate planning and tax areas.

1. One view is that common representation should be avoided. In the event of a genuine dispute, a lawyer's liability for representing clients with conflicting interests is likely to arise.[26]

2. The other view is that multiple representation is often appropriate. Among the reasons given are the following:

a. Cost savings;

b. The impracticality of requiring independent representation of all who have potentially conflicting interests; and

c. The possibility of losing one or more clients, unless the representation is actually impermissible, could have negative economic consequences for the lawyer.[27]

B. Ethical Rules.

[25] 726 A.2d 924 (N.J. 1999).
[26] Patricia A. Wilson. Avoiding Ethical Pitfalls for Estate Planning Lawyers. 331 PLI/EST 589 (Nov. 2004).
[27] Wilson, supra, at p. 593.

1. Model Rule 1.7(a), which governs whether a lawyer may represent multiple parties, reads as follows:

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

2. While Model Rule 1.7(a) creates the presumption that the lawyer cannot provide common representation, this presumption can be overcome. Model Rule 1.7(b) permits a lawyer to represent multiple clients, despite the existence of a conflict of interest, in certain situations. Model Rule 1.7(b) reads:

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

3. Thus, in representing a husband or wife or multiple generations in a tax or estate planning transaction, a lawyer needs to determine the following:

   a. Whether there is a concurrent conflict of interest.

   b. If there is a concurrent conflict of interest, whether his or her representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.

   c. If there is a concurrent conflict of interest and the representation of each client will not be materially limited, and the lawyer believes that he or she will be able to provide competent or diligent representation to each affected client and each affected client gives informed written consent.

4. Among the factors to be used in determining whether representation of one client forecloses the lawyer's ability to recommend or carry out appropriate courses of actions on behalf of another client are:

   a. The lawyer's relationship with the clients involved.

   b. The functions the lawyer will perform.

   c. The likelihood of consent.

d. The prejudice that will occur if a conflict arises.[28]

5. To obtain informed written consent, the lawyer must describe the risks of multiple representation and the possible effects of representation, including the possible effect on the lawyer's independent judgment.

6. The lawyer should also consider whether information disclosed by one client might have to be disclosed in order to obtain consent or as part of the representation. The client whose confidences are to be disclosed will have to give consent to this disclosure.[29]

C. Advice in ACTEC Commentaries. The ACTEC Commentary on Model Rule 1.7 gives the following advice.

1. ACTEC believes that it is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate planning or more than one of the investors in a closely held business. The reasons for this include:

a. The clients may actually be better served by such a representation.

b. Such a representation can result in an economical and better coordinated plan because the lawyer will have a better overall understanding of all the relevant family and property considerations.

c. In addition, estate and tax planning is, according to ACTEC, fundamentally nonadversarial in nature.

d. With respect to obtaining consent, ACTEC suggests that the lawyer consider meeting with the prospective clients separately. This may allow each of them to be more candid and perhaps reveal conflict or problems that might affect the relationship.

2. Thus, ACTEC appears to favor multiple representations as much as possible.

D. Representing Husband and Wife.

1. The most common multiple representation situation encountered by estate planners and tax professionals is representing a husband and wife. Much has been written on this topic and the consensus seems to be that the best way to handle the potential conflicts inherent in representing spouses is to anticipate them by making clear to both spouses at the beginning of the representation that, as between the spouses, the lawyer will not preserve confidences revealed in the course of the representation.

a. Some lawyers do represent husbands and wives as separate clients. If a lawyer is going to represent a husband and a wife as separate clients and information communicated by one spouse will not be shared with the other spouse, then each spouse must give informed consent under Model Rule 1.7(b)(4).

b. Such separate representation raises the same issues as those discussed below that arise with the representation of different generations of family members in the same estate planning matter.

2. A good summary of the issues involving the representation of spouses is found in Jeff Pennell's case book.[30] Some of the factors that may cause the interests of spouses to be different include:

a. Separate assets;

[28] Model Rules of Professional Conduct, Rule 1.7, comment 11.
[29] Wilson, supra, at p. 595.
[30] Jeffrey Pennell. Wealth Transfer Planning and Drafting (Thomson West 2005), ch. 3, p. 6.

b. Children from a different marriage or relationship;

c. The risk of creditors of one spouse acquiring access to the assets of the other spouse; and

d. The potential use of gift splitting.

3. The ACTEC Commentary to Model Rule 1.7 also discusses the representation of a husband and wife. It indicates that the representation should only be taken with the informed consent of each of husband and wife confirmed in writing. The Commentary suggests the writing be contained in an engagement letter that covers other subjects as well.

4. A 1994 report by an American Bar Association Real Property, Probate and Trust Section Task Force[31] also discussed the signs of potential conflict arising between multiple clients such as a husband and wife and which, in turn, could imperil a joint representation. These signs include:

a. Action related confidences that ask the lawyer to reduce or defeat the other spouse's rights or interests in the confiding spouse's property.

b. Prejudicial confidences that reveal adversity between the spouses (such as a plan to file for divorce following receipt of a transfer of property from the unknowing donor spouse).

c. Confidences indicating that one spouse's reliance on the plan of the other is misplaced.

5. Every joint representation carries the risk that one or more clients might feel betrayed or that the lawyer might be compelled to withdraw from representing all of the clients. These risks can be reduced by the lawyer properly creating and defining the joint representation.

a. The first issue to deal with is the issue of loyalty. As noted above, Model Rule 1.7 requires disclosure and written client consent only in the case of a "concurrent conflict of interest," which is a situation involving a direct adversity or a "significant risk" that a lawyer's representation of one client will be "materially limited" by the lawyer's responsibility to another client. This means that the Model Rules do not require full disclosure and consent until the conflict is nearly upon the lawyer.

b. Restatement (Third) of the Law Governing Lawyers, Sec. 130 Illustration 1, provides a good example of this dilemma:

> Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interest, competent to make independent decisions if called for, and in accord with their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent. While each spouse theoretically could make a distribution different from the others, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.

c. Restatement (Third) of the Law Governing Lawyers, Sec. 130, Illustration 2, shows when the conflict would arise.

> The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with the important positions of Spouse A but to be

[31] Report of the Special Study Committee on Professional Responsibility. Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife.

> uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest and Lawyer may provide legal assistance only with the consent of both.

d. Restatement (Third) of the Law Governing Lawyers, Sec. 130, Illustration 3, shows the steps that a lawyer could take to determine whether the situation in Illustration 2 actually presents a conflict.

> The same facts as in Illustration 1, except that Lawyer has previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent.

e. Even if consent is not required, as the above illustrations indicate may be the case in representing a husband and wife, the better practice is to obtain consent and describe the scope of the joint representation.

6. Summary of Rules on Representing Husband and Wife.

a. The default position under the Model Rules is that there can be no secrets among jointly represented clients. Instead, the lawyer must tell all clients any material fact that the lawyer learns with respect to any client.[32]

b. The other approach is for the clients to agree on separate representations in the same matter. The problem with this, obviously, is that the lawyer must exercise extreme vigilance and the lawyer may find himself or herself paralyzed by knowledge that the lawyer learns from one client, but is unable to share with others. The ACTEC Commentaries to Model Rule 1.6, using some understatement, indicate that "some experienced estate planners" might enter into such a relationship with spouses planning their estate, but must proceed with "great care."

c. A middle ground in establishing the representation might be for the lawyer to state that the lawyer will share all material information about the representation from any client, but will withdraw from the entire representation if any client balks at such sharing. [33] This, of course, puts the burden on the lawyer of determining what is and is not material information.

E. Intergenerational Representation.[34] Just as in spousal representation, conflicts of interest in a family representation are swirling just below the surface and can snag the unwary lawyer at any time. Estate planning and tax lawyers are frequently involved in two other types of multiple representations that do not receive as much attention: Family or intergenerational representation; and representation of a partnership and individual partners.

1. One common scenario in which such conflicts arise involves a lawyer with a long term relationship with a client. As the client becomes successful, the lawyer prepares estate planning documents first for the parents and then for other family members. All seems peaceful until the

[32] Model Rule 1.7, comments 30 and 31.
[33] For further discussion of this, see Thomas Spahn, "Creating and Defining Joint Representations", ABA Experience, Spring 2007, p. 45.
[34] This portion of the outline is based, in part, upon materials prepared by Schiff Hardin LLP lawyers, including Charles D. Fox IV, during his tenure at that firm and are used with its permission.

original client dies and the survivors squabble over the division of assets. Eventually, some of the survivors may turn on the family lawyer for failing to represent their individual interests.

2. For example, in a case described by the malpractice carrier for the lawyer involved, a lawyer was sued 20 years after probating the will of a longtime client. The client had acquired substantial interests in real estate and oil prior to his final marriage. Under his estate plan, one-half of his community property was left to his wife, while the other half and all separate property was left to his descendants by a prior marriage. The client's grandchildren claimed that the lawyer had mischaracterized some assets as community property rather than separate property and that the widow had conspired with the lawyer in doing so. The widow filed a third-party complaint against the lawyer alleging negligence in the drafting of the estate plan and administration of the property. The case was settled for $14 million.[35]

F. Case Law on Conflict of Interest. Long before Charles and David Koch were making headlines for their funding of conservative policy and advocacy groups, they were involved in a will contest with two of their brothers, William and Frederick, over the will of their mother, Mary. In In re Estate of Koch, William and Frederick alleged that their mother's will was void as a product of undue influence and constructive fraud because of the drafting lawyer's conflict of interest.[36]

1. During the 1980s, numerous lawsuits were filed among members of the Koch family. The Wichita law firm of Foulston & Siefkin represented Koch Industries, Charles, David, Mary and the Fred C. Koch Foundation. In 1989, Mary called Robert Howard, a lawyer with the Foulston firm who was representing her in some of the family litigation and asked him to revise her will. Howard drafted and Mary executed a new will in 1989 which contained a no-contest clause and a provision that conditioned the gifts to each of her four sons on the dismissal by a beneficiary of any litigation that was pending against her within 60 days following her death.

2. After Mary's death, the will was offered for probate and the unrelated litigation previously initiated by Frederick and William had still not been dismissed. Under the terms of the will, Frederick and William would not receive gifts because of the pending litigation, resulting in the bulk of the estate passing to Charles and David. Frederick and William challenged the will, alleging among other things that the lawyer was acting on behalf of Charles and David when he prepared Mary's will, but the trial court rejected their challenges.

3. William and Frederick contended that Howard had a conflict of interest in violation of Model Rule 1.7 arising from his representation of Charles and David in intra-family litigation at the same time he undertook to represent Mary in revising her will. The trial court specifically found that Howard did not violate Model Rule 1.7 after considering expert testimony from leading lawyers on the topic of conflicts of interest. The appellate court upheld the trial court's finding and held:

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

G. Loyalty Issues.

1. Lawyers can (1) separately represent clients on separate matters (which most lawyers generally do on a daily basis); (2) separately represent clients on the same matter; or (3) jointly represent clients on the same matter. Lawyers jointly representing clients on the same matter must be especially careful when undertaking and continuing such a joint representation.

2. The ABA Model Rules identify two issues that lawyers must address when jointly representing clients on the same matter.

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[35] Attorneys' Liability Assurance Society, "Trusts and Estates Practice: Lawyers' Liability Issues," 1994, at 18-19.
[36] 849 P.2d 977 (Kan. Ct. App. 1993).

a. First, lawyers must deal with the issue of loyalty. The loyalty issue itself involves two types of conflicts of interest -- one of which looks at whether the lawyer's representation is directly adverse to another client, and the other of which requires a far more subtle analysis -- because it examines the representation's effect on the lawyer's judgment.

b. Every lawyer is familiar with the first type of conflict of interest -- which exists if "the representation of one client will be directly adverse to another client." Model Rule 1.7(a)(1). At the extreme, this type of direct conflict involves a representation that the Model Rules flatly prohibit. Lawyers can never undertake a representation that involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Model Rule 1.7(b)(3). Even if representation does not violate this flat prohibition, adversity might nevertheless create a conflict of interest if a lawyer represents one client "directly adverse" to another client. For instance, a lawyer jointly representing two co-defendants in a lawsuit obviously cannot "point the finger" against one of the clients (without consent), even if such an argument does not amount to "the assertion of a claim." Some describe this first variety of conflict as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

c. The second type of conflict involves a much more subtle analysis. As the Model Rules explain it, this type of conflict exists if

> 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.
>
> Model Rule 1.7(a)(2) (emphasis added).

(1) This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

(2) As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." Model Rule 1.7(b).[37]

3. Second, lawyers must deal with the issue of information flow. Even if there is no conflict between jointly represented clients, lawyers must analyze whether they must, may or cannot share information learned from one jointly represented client with the other clients.

a. A comment to the Model Rules explains the factors that lawyers must consider when determining whether they can undertake a joint representation.

[37] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not. ABA Model Rule 1.7(b)(4).

> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.[38]
>
> Thus, lawyers should consider whether adversity already exists, and the likelihood that it will arise in the future.

b. Lawyers concluding that they can enter into a joint representation (because adversity is not inevitable) have three basic options.

(1) First, they can say nothing to their clients -- and deal with any adversity if it develops. Because there is no conflict until such adversity develops, there is no need for disclosure and consent. The advantage of this approach is that the lawyer is more likely to obtain the business. The disadvantage is that all of the clients will be disappointed if adversity develops -- and might feel that the lawyer has been deceitful by not advising them of that possibility.

(2) Second, the lawyer can salute the possibility of adversity, and advise the clients that they (and the lawyer) will have to deal with adversity if it ever develops. This has the advantage of warning the clients that they might have to address adversity, but of course leaves the outcome of any adversity uncertain.

(3) Third, a lawyer can very carefully describe in advance what will happen if adversity develops. In most situations, the lawyer will have to drop all of the clients. Model Rule 1.7 cmt. [29] ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."). In certain limited situations, the clients might agree in advance that the lawyer will continue representing one of the clients and drop the other clients -- although there is rarely absolute certainty about that strategy working. The advantage of this approach is that the clients and the lawyer will know in advance what is likely to happen if adversity develops. The disadvantage of this approach is that the lawyer must describe this "parade of horribles" to the clients in advance -- and therefore may frighten away the potential clients.

4. ACTEC Commentaries.

a. Given the frequent joint representation of spouses or other family members in trust and estate planning work, it should come as no surprise that the ACTEC Commentaries extensively deal with a lawyer's responsibility for analyzing the propriety of such a joint representation.

[38] Model Rule 1.7 comment 29.

b. Like the ABA Model Rules and the Restatement, the ACTEC Commentaries warn lawyers that they must assess the likelihood of adversity before undertaking a joint representation.

> A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer's own interests.[39]

c. For obvious reasons, a lawyer may not undertake a joint representation if serious adversity exists from the beginning.

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

d. The presence of some adversity does not automatically preclude a lawyer from at least beginning a joint representation.

> Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same.[40]

e. Not surprisingly, lawyers must monitor possible later adversity.

> The lawyer must also bear this concern [possible "impermissible conflicts"] in mind as the representation progresses: What was a tolerable conflict at the

[39] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7.

[40] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6.

> outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients.[41]

f. Thus, the ACTEC Commentaries recognize both a spectrum of adversity, and the possibility that the adversity might increase or decrease over time.

H. Lawyers Serving on Boards of Directors of Clients.

1. Although the frequency of lawyers serving on client boards of directors seems to be declining, lawyers continue to serve on their clients' boards of directors.

2. Comment 35, Model Rule 1.7 provides specific guidance on this issue.

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

3. In 1998, the ABA issued a legal ethics opinion providing more detail. In ABA LEO 410 (2/27/98), the ABA indicated that lawyers serving on a corporation's board of directors should warn the corporation that their discussions with the board might not be protected by the attorney-client privilege (because they involve business advice rather than legal advice). The lawyer should also warn the other directors about the dangers of waiving the attorney-client privilege. The ABA also indicated that lawyers serving on their client's boards should consider declining to represent the clients in lawsuits involving actions that they opposed as directors. If the board might require an "advice of counsel" defense, the lawyer-director might suggest that the company should hire another lawyer to give that advice.

4. Although the ABA did not completely prohibit outside lawyer-directors from voting on any actions involving retaining, paying or discharging the lawyer-director's law firm,[42] the ABA suggested that outside lawyer-directors consider abstaining from such decisions.

5. The Restatement takes the same basic approach.

> A lawyer's duties as counsel can conflict with the lawyer's duties arising from the lawyer's service as a director or officer of a corporate client. Simultaneous service as corporate lawyer and corporate director or officer is not forbidden by this Section. The requirement that a lawyer for an organization serve the interests of the entity . . . is generally consistent with the duties of a director or officer. However, when the obligations or personal interests as director are materially adverse to those of the lawyer as corporate counsel, the lawyer may not continue to serve as corporate

[41] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7.

[42] New York LEO 589 (3/18/88) (imposing a flat prohibition on such activity).

> counsel without the informed consent of the corporate client. The lawyer may not participate as director or officer in the decision to grant consent.[43]

6. Lawyers serving on a client's board of directors should keep a number of special considerations in mind.

   a. First, they must determine whether they are acting in a director's or a lawyer's role each time they act -- which will frequently govern the availability of the attorney-client privilege. Perhaps more importantly, the lawyer must advise fellow board members that conversations with the lawyer's director might not be privileged (lay directors naturally would assume that any conversations with a lawyer-director would deserve privilege protection).

   b. Second, lawyers serving as directors must remember that they are not acting as advocates for management, but rather as fiduciaries for all of the shareholders.

   c. Third, directors who are lawyers at outside law firms which represent the company must avoid favoring the law firm at the expense of the company or its shareholders. To be even more careful, the lawyer should not serve as the law firm's main liaison with the client.

   d. Fourth, lawyers should not assume that all possible conflicts problems can be cured by the lawyers recusing themselves in voting as directors on matters involving the lawyer or the lawyer's firm. This is because directors have a fiduciary duty to their shareholders, and at some point violate that fiduciary duty if they must avoid participating in important corporate decisions.

I. Lawyers Representing or Taking Positions Adverse to Corporations on Whose Board the Lawyer or the Lawyer's Partner Sits.

1. Lawyers serving on a corporate board of directors must remember that their fiduciary duty to the corporation might conflict with their representation of the corporation or another client in a legal capacity.

2. Under Model Rule 1.7(a)(2):

> [e]xcept as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . 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.

3. ABA Model Rule 1.7(a)(2). A comment specifically mentions a lawyer's capacity as a board member.

> In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

4. The ABA Model Rules implicitly acknowledge that a lawyer or the lawyer's firm can represent a corporation on whose board the lawyer serves -- although warning that conflicts of interest "might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter."[44]

[43] Restatement (Third) of Law Governing Lawyers § 135 cmt. d (2000).
[44] ABA Model Rule 1.7 cmt. [35].

a. The ABA also explained in a 1998 legal ethics opinion that the lawyer might have to decline a representation of the company in a matter involving actions that the lawyer/board member opposed as a director.[45]

b. Not surprisingly, states also permit lawyers to represent corporations on whose board they serve.

5. Adversity to the corporation by the lawyer's firm (or obviously the lawyer herself) clearly implicates possible conflicts with the lawyer/board member's fiduciary duties to the corporation.

a. The ABA Model Rules do not explicitly deal with this issue, but the Restatement indicates that such adversity requires consents -- presumably by the corporation and the corporation's adversary.

> A second type of conflict that can be occasioned by a lawyer's service as director or officer of an organization occurs when a client asks the lawyer for representation in a matter adverse to the organization. Because of the lawyer's duties to the organization, a conflict of interest is present, requiring the consent of the clients under the limitations and conditions provided [elsewhere in the Restatement].[46]

b. The Restatement also provides an illustration.

> Lawyer has been asked to file a medical-malpractice action against Doctor and Hospital on behalf of Client. Hospital is operated by University, on whose Board of Trustees Lawyer serves. While Lawyer would not personally be liable for the judgment if Client prevails . . . , the close relationship between Lawyer and University requires that Lawyer not undertake the representation unless Client's consent is obtained pursuant to [other Restatement provision].[47]

c. State bars disagree about this issue. Several states have prohibited law firms from representing clients suing corporations on whose board a firm lawyer serves -- finding an irreconcilable conflict that cannot be cured with consent.

(1) Ohio LEO 2008-2 (6/6/08) (holding that a law firm cannot represent a client adverse to a corporation on whose board one of the law firm's lawyers sits; explaining the ethics issues implicated by a lawyer serving on a corporate board; "Serving in a dual role as a corporate director and corporate counsel is cautioned because of the ethical challenges: conflicts of interest calling into question the lawyer's professional independence; confusion among other directors and management as to whether a lawyer's views are legal advice or business suggestions; and concerns regarding protection of the confidentiality of client information, especially the attorney-client privilege. See ABA Formal Opinion 98-410 (1998). A common example of a conflict of interest calling into question a lawyer's independent judgment would be if a lawyer director is called upon to advise the corporation in matters involving the actions of the directors."; holding that the lawyer sitting on the board could not personally represent a client adverse to the corporation; "The lawyer's duties as a corporate director would materially limit the lawyer's ability to represent the client against the corporation."; "The corporation is not technically a client of a lawyer director who is not corporate counsel, but a lawyer director cannot isolate the fiduciary duties owed to the corporation from his professional duties as a lawyer."; disagreeing with other authorities, and imputing the individual lawyer's disqualification to the entire law firm; "The material limitation conflict of

[45] ABA LEO 410 (2/27/98).
[46] Restatement (Third) of Law Governing Lawyers § 135 cmt. d (2000).
[47] Restatement (Third) of Law Governing Lawyers § 135 cmt. d, illus. 4 (2000).

interest of a lawyer who serves as a corporate director and whose client is suing the corporation arises from both the lawyer's fiduciary duties to the corporation and the lawyer's personal interest in serving on the board. Both of these material limitation conflicts of interest, the personal interest and the fiduciary duties owed, pose a significant risk of materially limiting the lawyer's loyalty and independence in representing a client against the corporation."; "Thus, the Board's view is that the conflict of interest of the lawyer who serves as corporate director and not as corporate counsel and whose client is suing the corporation is imputed to other lawyers in the firm under Rule 1.10(a). Because the prohibited lawyer's conflict is based upon a fiduciary duty to the corporation as well as a personal interest of the prohibited lawyer and presents a significant risk of materially limiting the representation of the client[,] the conflict is imputed to the law firm pursuant to Rule 1.10(a)."; finding that the law firm may not represent the other client adverse to the corporation even if the corporation consents; "Rule 1.10(e) does provide for waiver of the law firm's disqualification upon consent of the affected client under conditions stated in Rule 1.7. But, pursuant to Rule 1.7(c)(2), the conditions for waiving a conflict under Rule 1.7(b) cannot be met, because the corporation and the client are directly adverse to each other in the same proceeding. The corporation is not a client of the law firm but a lawyer director's fiduciary duties to the corporation cannot be isolated from the lawyer's professional duties.").

(2) North Carolina RPC 160 (7/21/94) (holding that a lawyer cannot file a lawsuit against a board on which one of the law firm's associates sits; "Under Rule 5.1(b) [now Rule 1.7], an irreconcilable conflict would exist if a lawyer who is a member of the board of trustees of a nonprofit hospital were to represent a client who is suing the board or the hospital which is managed and controlled by that board. Rule 5.1(b). While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct. Rule 5.11(a) and CPR 66.").

d. At least one state took a more liberal approach -- permitting such adversity if the adverse party consented (thus apparently not requiring the corporation's consent as well).

In Virginia LEO 1821 (1/11/06) (explaining that a lawyer may file a lawsuit against a trust company on whose board the lawyer's partner sits (but who does not represent the trust department) if (1) the "affected client" (the plaintiff suing the trust company) consents; and (2) the lawyer "reasonably believes" that he can "provide competent and diligent representation" to his clients; noting that although the board member's recusal is not mentioned as a cure in the rules, it is a factor in analyzing the second requirement, which could be met if the board (in consultation with its lawyer) allows such recusal, after considering "such matters as whether the litigation is 'routine' or 'non-routine' in the course of the board's business; whether the claim goes to matters that had been determined by the board, or lower level administrative staff; and whether the claim involves matters on which [the partner who is a member of the board] has voted or has been involved in."; acknowledging that the board member's resignation might cure the conflict, unless there is some contractual undertaking that would affect his post-withdrawal activities; warning that under Rule 4.2, the plaintiff's lawyer should not have dealt with the company through his partner who serves on the board, but rather through the lawyer representing the trust company).

6. As in other areas, lawyers must check the approach taken by the applicable bar before deciding whether they can become adverse to the corporation on whose board they or one of their partners serves. Given the high stakes involved, they probably should also check the pertinent bar's attitude before agreeing to serve on a corporate board.

VII. ORGANIZATION AS CLIENT

A. Model Rule 1.13 deals with a situation in which a lawyer is employed or retained by an organization. This Model Rule may impact the services that a lawyer representing a closely held business can handle for an organization and the shareholders or partners or other members of such an organization.

B. Model Rule 1.13(a) states that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Model Rule 1.13(f) deals with the potential conflict or actual conflict between organization and others. It states:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interest are adverse to those of the constituents with whom the lawyer is dealing.

C. Model Rule 1.13(g) states that a lawyer representing an organization may represent any of its directors, officers, employees, members, shareholders or other constituents subject to the provisions of Model Rule 1.7.

D. The Model Rules define an organization as a corporation, partnership, limited liability company or an unincorporated association. As noted above, a lawyer under Model Rule 1.7 may not undertake a representation that is directly adverse to a current client or may be materially limited by the lawyers responsibility to another client absent consent after representation.

E. Often times it may not be clear that an attorney client relationship has been formed by either express agreement or by implication. This issue will often arise when there is a falling out among the shareholders and a closely held corporation and the corporate counsel is aligned with one faction, which often maybe the controlling shareholders. Some factors that have led courts to decide that an attorney client relationship has been formed between the corporate counsel and a constituent include:

- Frequent contact between corporate counsel and the constituent during counsel's representation of the corporation;
- Past representation of constituent by corporate counsel, whether or not the matters are related;
- Particular interest of a constituent in the matter at issue;
- Failure of the constituent to retain his or her own lawyer;
- Advice provided by corporate counsel to the constituent;
- Disclosure of confidences by the constituent to corporate counsel;
- Payment by the constituent of some portion of a corporate counsel fee; and
- Absence of any statement by corporate counsel about which entities or constituents were his or her clients.

F. Paula Blagger discusses various important considerations representing closely held entities and their constituents in her article on this. [48]

1. No matter how small the non-controlling interests, a closely held corporation is a separate entity from its shareholders and is entitled to separate representation.

2. Every shareholder must understand that, unless a joint representation has been undertaken, corporate counsel's primary obligation is to the corporation.

3. Corporate counsel should confirm in a written engagement letter the identity of his or her client.

4. Particularly if there are any special circumstances, corporate counsel should confirm in writing who is not his or her client.

[48] "Ethical Issues Facing Corporate Counsel in Closely Held Business Disputes,", Commercial and Business Litigation, Winter 2015, Volume 16, Number 2 (February 23, 2015).

5. Whenever dealing with a constituent whose interests are potentially adverse, corporate counsel should explain that counsel represents the corporation and not the constituent.

6. Corporate counsel may represent constituents as well as the corporation if the conflict rules in Model Rule 1.7 are satisfied. Any conflict waiver must be given by an authorized representative of the corporation other than the one counsel is seeking to represent.

7. The possibility of conflict increases if corporate counsel has represented some or all of the constituents in creating the corporation or drafting agreements among the constituents. This also increases the possibility of winding up on one or more witness lists.

8. Corporate counsel must be aware of special circumstances creating a duty to non-client constituents.

9. Corporate counsel should observe corporate formalities and insist on compliance with corporate governance documents.

10. Corporate counsel should only take direction from duly authorized constituents and document their instructions.

VIII. REPRESENTING FAMILIES IN FAMILY LIMITED PARTNERSHIPS.

A. One of the most popular estate planning tools in recent years and one that is used extensively in connection with transfers between family members is the family limited partnership and the related limited liability company. One of the best discussions of the ethical conflicts involved with one lawyer representing multiple family members in the formation and operation of a family limited partnership or limited liability company is found in a 2009 article by Mary F. Radford.[49] It is common for the formation of a family limited partnership to arise as part of the overall estate plan of one or more senior family members. The lawyer who represents senior family members may also be likely, as the "family lawyer," to also represent other members of the family in personal matters. This creates the potential for a conflict of interest and for difficulties in dealing with family information.[50] As Professor Radford notes, when family relationships start to disintegrate or go awry, the lawyer who represented different members of the family might find himself or herself in a difficult position. Simple withdrawal may not be sufficient, for example as a lawyer representing all the partners might have a duty to disclose partnership information to all of the partners even though one partner insists on keeping the information confidential.

B. Professor Radford suggests that in these situations the lawyer should help the multiple clients to understand the matrix of the relationships and agree to ground rules that cover the duties the lawyer has with respect to client information. The lawyer should memorialize all of the agreements of the different clients in writing. Professor Radford believes that the advance diligence, while it will not ward off all possible future dissention, will promote deliberation by clients and the lawyer before the representation begins and will provide a framework in which to deal with future disagreements.[51]

C. One fundamental issue is whether the lawyer represents the entity or the partners or members of the entity. Model Rule 1.13(a) states that: "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Model Rule 1.13(e) states that:

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

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[49] Mary F. Radford. "Ethical Challenges in Representing Families and Family Limited Partnerships", 35 ACTEC Journal 2 (2009). (Hereafter "Radford").

[50] Radford, at 28.

[51] Radford at 9.

D. The ACTEC Commentary on Model Rule 1.13 states that the lawyer who represents a corporation, partnership, or limited liability company may appropriately undertake to represent individuals who are interested in the business or who are employed by it, provided that they comply with the other ethical rules, especially Model Rule 1.6 on confidential information and Model Rule 1.7 on conflicts of interest between current clients.

1. The common interest in multiple clients with respect to matters concerning the business or family enterprise may predominate over any separate interests that they may have. Multiple representations in such cases may be in the best of interest of the clients and may provide them with better and more economical representation.

2. The ACTEC Commentary then goes on to say that the lawyer with informed consent confirmed in writing of the business enterprise and an employee may represent both with respect to matters that affect both. If their interests are not seriously adversarial.

E. One question that arises is whom the lawyer for a general partnership or a limited partnership represents. For example, Professor Radford in her article describes that the question of whom a lawyer represents when he or she represents a partnership has a number of possible answers:

1. The lawyer represents only the partnership which is a separate entity from its partners; and

2. The lawyer represents each of the individual partners because a partnership has no separate "entity" status; and

3. The lawyer represents the partnership as an entity and by extension each of the partners; and

4. The answer depends on the peculiar circumstances of each case.

F. Professor Radford notes that answering this question is required to determine to whom the lawyer owes the duty to communicate under Model Rule 1.4, the duty of confidentiality under Model Rule 1.6, and the duty to avoid conflicts of interest under Model Rule 1.7.

G. Professor Radford proposes that the answers may differ depending upon whether a general partnership or a limited partnership is formed.

1. One approach is that the lawyer represents only the entity as a separate client of the lawyer.

2. However, in Responsible Citizens vs. Superior Court,[52] a California court opted for a case by case analysis and examined four factors with respect to a general partner.

a. The type and size of the partnership;

b. The nature and scope of the lawyer's engagement by a partnership;

c. The kind and extent of contacts of any between the lawyer and a mutual partner;

d. The lawyer's access to information relating to the individual partner's interest.

3. In Responsible Citizens v. Superior Court,[53] the court found that a lawyer representing a partnership does not necessarily have a lawyer-client relationship with an individual partner for purposes of applying conflict of interest rules. ABA Formal Opinion 91-361 states that "An attorney-client relationship does not automatically come into existence between a partnership lawyer and one or more of its partners .... Whether such a relationship has been created almost always will depend on an analysis of the specific facts involved."

[52] 20 Cal Rptr 2d. 756 (1993)
[53] 20 Cal. Rptr. 2d 756 (Cal. App. 1993)

H. Limited Partnerships. Professor Radford notes that courts differ in their determinations of whether a lawyer who represents a limited partnership represents the limited partnership alone; the partnership and the general partner concurrently; or the partnership and all of the partners, both general and limited, concurrently.

1. The majority of the cases take the position that the lawyer for the limited partnership does not represent the limited partners. Other courts have held that the lawyer for a limited partnership has a duty of care to limited partners regardless of whether the lawyer was the lawyer for the partnership or general partner. See Arpadi v. First MSP Corp.[54]

2. Representing a Partnership and Individual Partners - The increasing use of family limited partnerships as an estate planning tool carries with it the chance of ensnaring a lawyer in conflicts of interest.

a. Griva v. Davison,[55] provides an example of a law firm caught up in a family dispute. Lawyer Davison and his law firm became involved with the Maiatico family in connection with some litigation over a commercial building owned by the patriarch of the family. During the litigation, questions of the father's capacity arose and the firm instituted a guardianship proceeding. The firm prepared an estate planning memorandum in connection with the guardianship recommending that the commercial real estate be placed in a family limited partnership.

(1) Two of the patriarch's three children, Ann and Michael Maiatico, looked solely to Davison and his firm for legal advice. The third child, Rose Griva, however, consulted with independent counsel. All three retained Davison to draft the partnership agreement and form the entity. The three children were general partners. At the insistence of Griva's separate counsel, a unanimous consent provision was included in the partnership agreement, such that any one general partner could deadlock the partnership.

(2) After formation of Maiatico Family Limited Partnership (MFLP), Davison continued as general counsel to MFLP and represented all three siblings on family matters. Davison also advised the two Maiaticos as general partners, as well as on individual matters.

(A) Numerous disputes arose among the partners regarding the redevelopment of the partnership real estate and the partners were frequently deadlocked. The Maiaticos wished to grant the lessee of MFLP's building the right to sublet and manage the property. The effect of this transaction would have been to decrease the management power Griva was able to exercise due to the unanimous consent provision in the partnership agreement.

(B) The law firm's bills started to raise Griva's suspicions about Davison's advice to her siblings. Entries referenced a memorandum about "dissolution of [the] deadlocked MFLP" and conversations with the Maiaticos about "dissolving MFLP."

(3) These events led Griva to request access to all of the Davison's firm's files on MFLP. When the firm refused, Griva filed suit alleging that Davison and his firm had violated the conflict of interest provisions of the Code of Professional Responsibility. On appeal, the court found that it did not need to resolve the question of whether Griva was a formal client of the firm after the formation of MFLP because the structure of MFLP made Griva "functionally" a client of the firm. Because Griva could deadlock MFLP when she disagreed with her

[54] 628 N.E. 2d. 1335 (Ohio 1994)
[55] 637 A.2d 830 (D.C. App. 1994)

siblings, she had the power to keep MFLP at odds with the wishes of her siblings. Therefore, rather than analyzing the situation as a potential conflict between Griva and the Maiaticos, the court addressed the ethical issue presented by the law firm's representation of MFLP and the Maiaticos as general partners.

(4) The court noted, "a lawyer for an entity cannot represent constituents of an entity when such representation may prejudice the interests of that entity, or when it is unclear what constituents represent the interests of the entity and thus a dispute between constituents makes it impossible to know what the entity's interests are."[56] The court determined that there were genuine issues of fact regarding whether Davison fully disclosed to Griva the conflict of interest involved in representing both her and MFLP and whether Griva consented to the joint representation.

b. Arpadi v. First MSP Corporation,[57] involved a limited partnership among investors rather than family members, but its holding may have profound implications for lawyers who represent family limited partnerships.

(1) Lawyer Richard Jankel served as counsel, president and director of the general partner in Lakeside Apartments, L.P. The partnership was formed for the purpose of acquiring and developing an apartment complex. Investments in the partnership were solicited by means of a private placement memorandum (PPM). The PPM provided that the partnership would purchase the complex and renovate some units. The liens on those units would be released to permit their sale as condominiums. The proceeds would then be used to renovate additional units.

(2) After the plaintiffs invested in the partnership as limited partners, the existing mortgage holders on the complex refused to agree to the release formula. Jankel participated in the preparation of a purchase agreement that omitted any release formula. The limited partners were not informed of the omission. After the project ended in bankruptcy, the limited partners alleged that the lack of a mechanism for the release of liens on portions of the complex denied the project cash flow and caused its failure.

(3) The plaintiffs argued that Jankel, as lawyer for the partnership, owed a duty of care to the limited partners. The court agreed, noting that state law determines whether a partnership is treated as an entity, like a corporation, or as an aggregate of individuals.[58]

3. When representing multiple family members or partnerships and individual partners, the lawyer should assess each individual transaction and determine whether certain family members or partners should seek independent counsel because of the potential for conflicts arising.

IX. CURRENT CLIENTS: CONFLICT OF INTEREST

A. Lawyers doing business with their clients confront both fiduciary duty and ethics challenges.

B. As a matter of common law fiduciary duty, lawyers entering into business transactions with their clients normally are presumed to have defrauded them -- and must overcome that presumption with clear and convincing evidence.

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[56] 637 A.2d at 840.
[57] 628 N.E.2d 1335 (Ohio 1994)
[58] See also Pucci v. Santi, 711 F. Supp. 916 (N.D. Ill. 1989) (representation of partnership includes fiduciary duty to all partners on partnership matters).

1. Liggett v. Young[59] addressed the contract between a lawyer and client contractor for the construction of the lawyer's home and reversed the trial court's award of summary judgment to the lawyer in a breach of contract action brought by the contractor. The court noted that the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledged that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract. It held that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof."

2. In Tower Investors, LLC v. 111 E. Chestnut Consultants, Inc.[60] the court held that a partner of the Chicago law firm of Sonnenschein, Nath & Rosenthal (who had invested in a law firm client through an entity separate from the law firm) could enforce a promissory note; explaining that "attorney-client transactions are not void, but rather, presumptively fraudulent"; explaining that the sophisticated client had not been defrauded, because the law firm had fully explained the conflict.

C. Building on this common law fiduciary duty principle, Model Rule 1.8 (a) contains a remarkably stringent standard for business transactions between lawyers and their clients.

> (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.

D. Not surprisingly, this rule does not apply

> to standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has not advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

E. The Restatement of the Law Governing Lawyers takes the same basic approach as the ABA Model Rules, but without the mandatory written disclosures and consents.

> A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:
>
> (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;

[59] 877 N.E.2d 178, 184, 185 (Ind. 2007).
[60] 864 N.E.2d 927, 943 (Ill. App. Ct.).

(2) the terms and circumstances of the transaction are fair and reasonable to the client; and

(3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.[61]

F. Every state has a rule dealing with lawyers doing business with their clients. These usually fall somewhere between the ABA Model Rules and the Restatement.

1. States have severely punished lawyers who violate the applicable rules.

a. In re Conduct of Hostetter,[62] suspending for 150 days a lawyer who "represented the borrower in the underlying loan transaction" and then "subsequently represented the lender in collecting the loans from the borrower's estate"; "This case presents a matter of first impression in Oregon -- that is, whether a former client, now deceased, is protected by the former-client conflict-of-interest rules. Oregon is not alone, as no jurisdiction appears to have directly addressed the issue. At best, a few jurisdictions have addressed the related issue of whether dissolved corporations are 'clients' for purposes of the former-client conflict-of-interest rules. Those jurisdictions are split on the issue. Some jurisdictions hold that, upon a corporation's dissolution, a conflict of interest cannot exist, because the entity is 'dead,' no longer exists, and, accordingly, cannot have interests adverse to the current client. . . . Conversely, other jurisdictions hold that a bankruptcy trustee 'stands in the shoes' of the corporation as former client, and the accused in later litigation may not represent an interest adverse to the successors in interests of the failed corporation."; "[W]e conclude that, pursuant to DR 5-105(C) and RPC 1.9(a), an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and are adverse to the current client during the subsequent representation."; "The debt collection and loan transactions certainly involved the same transaction -- the underlying loan documents that the accused drafted on behalf of Ingle [deceased client]. The accused's representation of Hohn [lender to deceased client] involved his own work that he had completed on behalf of Ingle and, in that regard, the matters are substantially related. We therefore determine that the accused engaged in a matter-specific conflict in violation of RPC 1.9(a)."

b. Office of Lawyer Regulation v. Trewin,[63] suspending for five months a lawyer who engaged in a business transaction with a client without following the Wisconsin rule requiring lawyers to advise their clients in writing of the possible adverse effects of the relationship.

c. Fair v. Bakhtiari,[64] addressing a situation in which a lawyer and client entered into a successful real estate business venture; explaining that the lawyer could not recover under a quantum meruit theory when the client rescinded the business venture, because the lawyer had not complied with the ethics rules governing business with clients.

2. Some courts give the client even a better deal -- finding the arrangement voidable by the client.

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[61] Restatement (Third) of Law Governing Lawyers § 126 (2000).
[62] 238 P.3d 13, 15, 18, 20, 24 (Or. 2010
[63] 684 N.W.2d 121 (Wis. 2004).
[64] 125 Cal. Rptr. 3d 765 (Cal. Ct. App. 2011).

a. BGJ Assocs. LLC v. Wilson,[65] holding that a lawyer's transaction with a former client was voidable because the lawyer had not made the necessary disclosures in writing, and had not obtained the client's consent in writing.

b. Petit-Clair v. Nelson,[66] holding that clients could void a mortgage on their personal residence that they had given their lawyer to secure payment of legal fees; explaining that the lawyer had not advised the client of the advisability of seeking independent counsel in the transaction. This approach allows clients to enforce favorable arrangements, while voiding unfavorable deals.

G. Under Model Rule 1.8(k), the prohibition involving a lawyer doing business with a client applies to all lawyers in the same firm.

X. MISCELLANEOUS RULES ON CONFLICTS OF INTEREST

A. Payment of Lawyer's Fees by Others

1. Model Rule 1.8 sets forth a number of specific rules related to conflicts of interest for current clients. Of particular interest to this discussion is Model Rule 1.8(f), which provides:

a. 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.

2. The ACTEC Commentary on this provision notes that "[i]t is relatively common for a person other than the client to pay for the client's estate planning services." The examples included in the ACTEC Commentary make clear that in such situations, the lawyer must inform the individual paying his or her fees of the requirements of Rule 1.8 and must also obtain the informed consent of their client. If the lawyer believes there is significant risk that their representation of the client will be materially limited by the fact that the fees are paid by someone else, then the consent must be confirmed in writing.

3. A common example of when someone other than the client might pay for estate planning services is when a parent pays for estate planning for a child or a child pays for the estate planning for a parent.

B. Cases on Accepting Payment from Persons Other than Client

1. There are few reported cases dealing with the issue of an estate planning lawyer being paid by a party other than his client. Perhaps this is the case because such arrangements are relatively common.

2. A case out of the Supreme Court of Louisiana addressed the issue under a unique set of facts. In Succession of Wallace[67], Charles Wallace's will appointed his wife, Ruth, as executor of his estate and appointed Jacqueline Goldberg to act as lawyer for the executor and estate. During the probate process, Ruth wanted to discharge Goldberg and employ a lawyer of her choice.

[65] 7 Cal. Rptr. 3d 140 (Cal. Ct. App. 2003).
[66] 782 A.2d 960 (N.J. 2001).
[67] 574 So.2d 348 (1991).

Louisiana had a statute which provided that a lawyer designated by a testator in his will may be removed as such only for just cause.

3. The Louisiana Supreme Court struck this law as being null and void as it was in irreconcilable conflict with rules requiring a lawyer to withdraw from a representation if he or she is discharged by a client. In arguing that she should be retained as counsel to the executor, Goldberg argued that because the lawyer will be paid with succession funds from the estate, Rule 1.8(f) indicated that the testator is the client, not the executor. The court did not accept this argument, noting that "it is the executor's duty to pay the lawyer's fee with succession funds as a debt of the succession. . . . The only person or legal entity involved who can act as a client in paying the lawyer is the executor."

C. Duties to Former Clients

1. Model Rule 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

2. An example provided in the ACTEC Commentary to Model Rule 1.9 demonstrates how this Rule may be implicated by a joint representation. In the example, the lawyer represented husband and wife jointly in estate planning matters. Husband and wife subsequently divorce, at which point the lawyer continues to represent the husband in estate planning and other matters. Because wife is a former client, Model Rule 1.9 imposes limitations on the lawyer's representation of husband. Unless wife gives informed consent, confirmed in writing, the lawyer would be unable to represent husband in a matter substantially related to the prior representation in which husband's interests are materially adverse to wife's, such as an attempt to terminate an irrevocable trust benefiting wife.

D. Cases on Duties to Former Clients

1. A lawyer's role representing individuals and estates may also result in precluding the lawyer from certain representations. In Galiardo v. Caffrey[68], an Illinois trial court granted a motion to disqualify a lawyer who formerly represented an estate from representing the executor individually

[68] 800 N.E.2d 489 (Ill. App. 2003).

in a beneficiary's action against her. In Gagliardo, Michael Gagliardo's sister, Paulette, became the sole trustee of his revocable trust and executor of his estate upon his death. Michael's wife, Margaret and their children were the sole beneficiaries of the trust.

2. Unhappy with Paulette's service as trustee and executor, Margaret brought an action to remove Paulette as trustee and executor. Paulette was represented in her individual capacity by lawyer Christopher Matern. Margaret then filed a motion to disqualify Matern based on Matern's representation of Michael's estate. The trial court granted Margaret's motion to disqualify Matern for the representation under Rule 1.9, which prohibits a lawyer from representing one client whose interests are adverse to a former client. The appellate court affirmed the trial court's decision, concluding that for the time Matern represented the estate, he represented Margaret as its sole beneficiary thereby precluding him from representing Paulette in Margaret's action against her.

E. Duties to Prospective Clients.

1. Model Rule 1.18 ("Duties to Prospective Client") starts with the bedrock principle that a person will be considered a "prospective client" if the person discusses with a lawyer "the possibility of forming a client-lawyer relationship." Model Rule 1.18(a). The lawyer must treat such a person as a former client for conflicts purposes.[69]

2. In a comment, Model Rule 1.18 provides some guidance that could apply to unsolicited emails.

> Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).[70]

3. A lawyer may not represent the adversary in the same or substantially related matter -- if "the lawyer received information from the prospective client that could be significantly harmful to that person in the matter."[71]

4. This would allow more flexibility to the lawyer than the standard rule, which would have prevented the lawyer's representation of the adversary if the lawyer had received any confidential information from the prospective client -- not just information that "could be significantly harmful" to the prospective client.

5. Finally, any individual lawyer's disqualification even under that standard is not imputed to the entire law firm if the lawyer had taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," and if the individually disqualified lawyer is screened from the matter (including financially screened) and provides written notice to the prospective client.[72]

F. File Ownership.

1. Lawyers must sometimes determine what part of their files they must turn over to a client who has fully paid the lawyers' fees. The issue becomes more complicated, and certainly more acute, if lawyers want to assert a lien over clients' files because the lawyers have not been paid. This is frequently called a "retaining lien." It differs from what many call a "charging lien," which lawyers may sometimes assert over a judgment or other client property other than clients' files.

2. In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

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[69] Model Rule 1.18(b).
[70] Model Rule 1.18, Comment
[71] Model Rule 1.18(c).
[72] Model Rule 1.18(d)(2).

> Upon termination of representative, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.[73]

3. The Restatement also deals with this issue -- in much more detail than the ABA Model Rules.

   a. The Restatement requirement that the lawyer provides documents in the lawyer's possession is subject to the lawyer's right to

      > decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain documents until the lawyer is paid].[74]

   b. Another Restatement section discusses a lawyer's general right to obtain a security interest in any property that the client owns or might acquire (not just a file).

      > Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows: (a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter; (b) the lien becomes binding on a third party when the party has notice of the lien; (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and (d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.[75]

   c. Some courts and bars cling to the traditional approach -- essentially allowing lawyers to retain documents until the client fully pays the lawyers' bills.

      (1) Grimes v. Crockrom,[76] holding that a lawyer could assert a retaining lien even if the lawyer did not provide a detailed record of the lawyer's work to the client; "A common law retaining lien on records in the possession of an attorney arises on rendition of services by the attorney. . . . Crockrom does not direct us in any legal authority tying the validity of a retaining lien to the provision of an itemized bill to the client. Indeed, a retaining lien is complete and effective without notice to anyone. . . . And the reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established. . . . We hold that Grimes has a valid retaining lien over the medical records." (emphasis added).

      (2) SEC v. Ryan,[77] analyzing a situation in which a law firm represented an individual and an LLC; concluding that the LLC's receiver became a client when the LLC declared bankruptcy; concluding that the law firm jointly represented the individual and the LLC; "On the other hand, every attorney has a common-law retaining lien upon the books and records in his possession and such lien exists independently of the rights created by statute."; "As a general proposition, before a lawyer is required to surrender the files, which are subject to this lien, to either the client or a substituted attorney, the outstanding legal fees must be paid or adequate security for the payment must be posted." (emphasis added).

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[73] Model Rule 1.16(d)
[74] Restatement (Third) of Law Governing Lawyers § 46(4) (2000).
[75] Restatement (Third) of Law Governing Lawyers § 43(2) (2000).
[76] 947 N.E.2d 452, 454-55 (Ind. Ct. App. 2011).
[77] 747 F. Supp. 2d 355, 361, 369 (N.D.N.Y. 2010).

d. Those courts and bars which have moved away from the traditional "auto mechanic" approach to a retaining lien sometimes articulate standards under which the client can obtain the file without paying for it. These standards represent a spectrum of the type of prejudice the client must claim before the lawyer becomes ethically obligated to turn over the file even if the client has not paid his bills. Bars and courts have articulated the following standards:

(1) Substantial Prejudice

(2) Prejudice

(3) Harm

e. Some states have adopted specific proceedings for asserting such retaining liens. See Alaska LEO 2012-1 (1/27/12) (holding that Alaska law did not allow a lawyer's recording of a lien for attorney's fee; "Recording a lien for attorneys' fees pursuant to AS 34.35.430 violates Alaska Rules of Professional Conduct 1.5, 1.8 and 1.16."; "Alaska Statute 34.35.430 sets out the procedure for asserting an attorney lien for fees against client papers or money in possession of the lawyer or an adverse party. Unlike other lien statutes of Chapter 35, AS 34.35.430 does not reference recording. One court has specifically held that AS 34.35.430 does not authorize the recording of an attorney lien."; "If an attorney wishes the security of a recordable lien on real property, the attorney has the ability to do so notwithstanding this opinion. The attorney can reduce the fees claimed in the lien to judgment with the final judgment being recorded. Because this procedure requires that the client be advised of the fee arbitration procedure and accords the client a full opportunity to respond to the fee claim, this is the appropriate procedure to accomplish this goal.").

XI. DEALING WITH UNREPRESENTED PERSONS

A. Model Rule 4.3

1. Model Rule 4.3 provides:

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

2. The ACTEC Commentary on Rule 4.3 notes that a lawyer for a fiduciary is required to comply with Rule 4.3 and that in doing so, the lawyer should inform the beneficiaries of the fiduciary estate regarding various matters, including the fact that the lawyer does not represent them and that they may wish to obtain independent counsel.

B. Case on Dealing with Unrepresented Persons

1. Courts do not take kindly to counsel who do not take the appropriate steps in dealing with unrepresented persons. In fact, courts often raise the issue *sua sponte*, and in doing so, often direct the court's clerk to notify the state bar of the lawyer's conduct.[78]

2. In Estate of Hydock[79], the court addressed the "tangential" issue of the conduct of a lawyer who prepared a disclaimer of interest in an estate to be executed by a beneficiary the lawyer knew was

[78] See, e.g., In re Jumper, 984 A.2d 1232 (D.C. App. 2009).

unrepresented and impaired. The court found it "clear that [the lawyer] had a duty under Rule 4.3 . . . to advise [the beneficiary], an unrepresented person, to retain counsel."

XII. MULTI JURISDICTIONAL ISSUES

A. Estate planning transactions often involve family members who reside in more than one jurisdiction. In these situations, lawyers must be aware of the issues raised in representing clients who reside outside a jurisdiction in which the lawyer is licensed.

B. ABA Model Rules of Professional Conduct. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983, and amended from time to time thereafter. The Model Rules (or variations thereof) are now in force in forty-four states.

1. Rule 5.5 deals with the unauthorized practice of law. The original version of Rule 5.5 reads:

> A lawyer shall not
>
> (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
>
> (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
>
> ABA Model Rules, Rule 5.5.

2. The original version of Model Rule 5.5, as can be seen, is quite similar to DR 3-101 of the Model Code.

3. Ethics 2000 Commission. In late 1997, the ABA established the Commission on the Evaluation of the Rules of Professional Conduct, popularly known as the "Ethics 2000 Commission," to examine the existing Model Rules of Professional Conduct and propose changes to them, giving special attention to, among other topics, interstate practice and multistate law firms.[80] The Ethics 2000 Commission submitted a report to the ABA House of Delegates at the August 2001 meeting. The report was debated at both the August 2001 and February 2002 meetings and the recommendations were finalized at the February 2002 meeting.

4. Commission on Multi-Jurisdictional Practice. In July 2000, the ABA appointed a Commission on Multi-Jurisdictional Practice which proposed substantial changes to Rule 5.5. These changes were adopted at the August 2002 meeting of the ABA. Since the adoption, these changes have been adopted in 34 states and the District of Columbia and were pending (as of September 25, 2007) in 6 states.

C. Amended Model Rule 5.5 reads:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

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[79] 2004 Phila Ct. Com. Pl. LEXIS 144 (Feb. 22, 2004).

[80] See, e.g., Robert A. Stein, "Updating Our Ethics Rules", ABA Journal, Aug. 1998, at p. 106, Demetrios Dimitriou, "Legal Ethics in the Future: What Relevance?", Prof. Law., Spring 1998, at p. 2.

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac* vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

D. Amended Rule 5.5 greatly expands Rule 5.5 by providing several ways in which an out-of-state lawyer could practice in the state. The two important parts of Amended Rule 5.5 for tax practitioners are:

1. Amended Rule 5.5(c)(3) permitting an out-of-state lawyer to provide representation to clients in pending or anticipated arbitrations, mediations, or other alternative dispute resolution proceedings; and

2. Amended Rule 5.5(c)(4) which permits, on a temporary basis, transactional representation, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

E. Reasons behind Amended Rule 5.5(c)(4):

1. Drawn from § 3(3) of the Restatement (Third) of the Law Governing Lawyers.

2. Emphasizes need to have a single lawyer conduct all aspects of a transaction.

3. Respect preexisting and on-going client/lawyer relationships. According to the Report, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence.

4. Permits a client to engage a person with a recognized expertise in a particular body of law.[81]

F. One issue is when work outside a lawyer's home state is "reasonably related" to a lawyer's work in the home state. The MJP Report provides little guidance on this. Instead, it states that judgment must be exercised.[82]

G. Thirteen states have adopted a rule identical to Amended Model Rule 5.5:

Alaska	Nebraska
Arkansas	New Hampshire
Illinois	Rhode Island
Indiana	Utah
Iowa	Vermont
Maryland	Washington
Massachusetts	

H. Thirty states and the District of Columbia have adopted a rule similar to Amended Model Rule 5.5:

Alabama	Nevada
Arizona	New Jersey
California	New Mexico
Colorado	North Carolina
Connecticut	North Dakota
Delaware	Ohio
District of Columbia	
Florida	Oklahoma
Georgia	Oregon
Idaho	Pennsylvania
Kentucky	South Carolina
Louisiana	South Dakota
Maine	Tennessee
Michigan	Virginia
Minnesota	Wisconsin
Missouri	Wyoming

I. Also in 2002, upon the recommendation of the Commission on Multi-Jurisdictional Practice, the ABA adopted Amended Rule 8.5 to clarify the authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within their jurisdiction pursuant to the provisions of Rule 5.5 or other law. This was done to alleviate the perceived problems with lawyers only being subject to discipline in states in which they are licensed.

1. Amended Model Rule 8.5 reads as follows:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted to this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

[81] American Bar Association Center for Professional Responsibility, Client Representation in the 21st Century. Report of the Committee on Multijurisdiction Practice. (2002) at 27-28 (hereafter "MJP Report")
[82] MJP Report, at 29.

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

2. Twenty-four states have adopted a rule identical to Amended Rule 8.5.

Alaska
Arizona
Arkansas
Connecticut
Idaho
Illinois
Iowa
Kentucky
Louisiana
Maine
Michigan
Minnesota
Missouri
Nebraska
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Dakota
Utah
Vermont
Washington

3. Twenty-one states have adopted a rule similar to amended Model Rule 8.5.

California
Colorado
District of Columbia
Florida
Georgia
Indiana
Maryland
Massachusetts
Montana
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
South Carolina
Tennessee
Virginia
Wisconsin
Wyoming

4. Amended Model Rule 8.5 has been recommended in Mississippi and West Virginia.

XIII. CLIENTS WITH DIMINISHED CAPACITY

A. Model Rule 1.14 provides:

(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.

B. When dealing with a client with diminished capacity, the ACTEC Commentary notes that a lawyer:

> has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors."

C. In Moore v. Anderson Ziegler Disharoon Gallagher & Gray, PC[83], the adult children of a decedent brought a malpractice action against a lawyer alleging that the lawyer was negligent in failing to determine whether the decedent had testamentary capacity at the time the decedent executed a new will and amended his trusts. The trial court dismissed the children's complaint and the court of appeals affirmed. The adult children based their claim of negligence in part on Model Rule 1.14 and the ACTEC Commentary on Rule 1.14, arguing that the Rule and Commentary require an estate planning lawyer to determine that his or her client has testamentary capacity when executing a will or dispositive instrument and that when there is a doubt, a competent lawyer should take reasonable steps to confirm the client's capacity. The court dismissed this argument, noting that any such duty runs to the testator, not the beneficiaries.

XIV. LAWYER AS WITNESS

A. A lawyer may end up being a witness, often if an estate planning technique does not work as anticipated by one or more of the parties.

B. Model Rule 3.7 provides:

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

(1) the testimony relates to an uncontested issue;

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

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

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.[84]

C. Problems implicating Model Rule 3.7 typically arise in estate and trust litigation matters such as will contests, surcharge actions and trust interpretation cases. These types of cases frequently involve the lawyer who drafted estate planning documents representing a party and also being asked to testify as to whether the testator had capacity to execute the document. They could also impact lawyers who work on matters with respect to closely held businesses.

D. In In re Waters[85], Elizabeth Waters' granddaughter, Claire Trent, challenged the will prepared by Waters leaving a life estate to Waters' cousin, Lillian Young, before the remainder was to go to Trent. The lawyer who represented Young in the will contest, Brian Murphy, was the same lawyer who prepared Waters' will.

[83] 100 Cal. App. 4th 1287 (2003).
[84] Model Rule 1.7 deals with conflicts of interest and Model Rule 1.9 deals with duties to former clients.
[85] 647 A.2d 1091 (Del. 1994).

As the lawyer who prepared Waters' will, Murphy was called to testify during the will contest regarding Waters' testamentary capacity. The Delaware Supreme Court found, relying on Rule 3.7, that "the centrality of Murphy's testimony to the contested issues of undue influence and testamentary capacity mandated his withdrawal as trial lawyer." The court found it was plain error for the Court of Chancery to permit Murphy to participate as a trial lawyer in a proceeding in which he was a central witness on the contested issue being adjudicated. The Delaware Supreme Court reversed the lower court and remanded the case for a new trial. The Supreme Court further directed the Clerk to send a copy of its opinion to the Office of Disciplinary Counsel.

XV. CONCLUSION

Representing clients in all phases of the life cycle of a closely held or family owned business can present many ethical challenges to any estate planning professional. However, with care and an understanding of the ethical rules, an estate planning professional can successfully navigate these challenges.

Ethical Issues in Advising Clients on Planning for, Creating, Operating, Transferring Control and Ownership of, and the Dissolution of Closely Held Businesses

Hypotheticals

Hypothetical 1:

Karen Harris is advising a closely-held company on its conversion from a C corporation to an S corporation. The shareholders of the S corporation will be the two parents, their three children, and an irrevocable non-grantor trust which was created by mom's grandparents and which provides for discretionary distributions of income and principal to mom and her descendants. One of the three children is currently a citizen of Belize. Has Karen shown the requisite competence when she drafts the papers to make the S corporation election for the new company and lists the two parents, their three children, and the irrevocable non-grantor trust as shareholders? Will there be any adverse income tax consequences if the company qualifies for S corporation status? What steps may need to be taken to qualify the company for S corporation status?

Hypothetical 2:

Henry Barker is representing a closely-held corporation in a complicated transaction to purchase another closely-held corporation. Henry Barker is, as he would put it, somewhat of an amateur with respect to technology. One evening, Henry receives a copy of the latest response from the lawyers for the company that might be acquired. Henry, in order to broaden his knowledge, had recently read an article about the "metadata" that might accompany many electronic documents and which might allow the reader of a document to see what changes were made to the document, when those changes were made, and even what changes were made in an earlier version. What should Henry do with respect to the document that he has received if he discovers metadata on it? Should Henry check the document for metadata? May Henry check the document for any metadata, but not have to? Should Henry not check the document for metadata?

Hypothetical 3:

Lawyer Martha Snyder has been engaged by the three shareholders of a closely-held company to prepare a buy-sell agreement between the three shareholders to cover both departures during life and departures because of the death of one of the shareholders. The three shareholders believe that it is very important that the buy-sell agreement be completed as soon as possible in order to ensure that upon the departure of one of the shareholders, the other two shareholders have the opportunity to own all the stock in the company. One of the shareholders, Brian Rogers, is 67 years old. The other shareholders are younger.

While Martha works diligently on the buy-sell agreements, this is a new area to her, and it takes her some time to understand, for example, the difference between cross-purchase buy-sell agreements and entity purchase buy-sell agreements, as well as the rules that might apply if insurance on the lives of the shareholders is used to help fund the buy-sell agreement including how to avoid the "transfer for value" rules applicable to the taxability of insurance proceeds. Martha has been working to complete the buy-sell agreements for five months when she is informed, one morning that Brian Rogers, the 67 year old shareholder, has passed away while playing tennis. Since no buy-sell agreement is in place, it turns out that Brian's will leaves the stock in the company to his eldest son, who is a bit of a dissolute, but who has already informed the other two shareholders that he looks forward to working at the company and being a co-owner with them. Has Martha violated her duty to provide competent representation in the preparation of the buy-sell agreement? Has Martha violated her duty to provide timely service in the preparation of the buy-sell agreement?

Hypothetical 4:

Five years ago, Lawyer Eric Jensen completed a buy-sell agreement for the ten members of the family that owned a large regional grocery chain. The buy-sell agreement provides that when a family member passes away, the family member's stock will be purchased for set price of $20 per share. One member, Dennis Kroger, passed away three years ago with a substantial estate worth $50 million exclusive of the stock in the family's grocery chain. Dennis owned 1,000,000 shares in the company on the date of his death and the company pays Dennis' estate $20 million for the shares pursuant to the terms of the buy-sell agreement. Eric represents Dennis' estate in the administration and the estate values the shares of the closely held stock at $20 million for federal estate tax purposes based on the price set in the buy-sell agreement. On audit, the IRS applies Section 2703 and says that the stock should be valued at its fair market value on the date of death which, after a lengthy audit and a Tax Court decision, is determined to be $50 million. As a result, $20 million in federal estate tax ($50 million x 40 percent tax rate) is owed by the estate while the estate receives only $20 million for the stock pursuant to the buy-sell agreement. Has Eric provided competent advice to the company and Dennis' estate? If Eric previously represented Dennis in his estate planning, did Eric provide competent advice to Dennis in his estate planning? Does Eric have a conflict of interest in his representations of the company, Dennis in his estate planning, and Dennis' estate?

Hypothetical 5:

Lawyer Judy Keller represents Dorothy Bruce, her son Frank, her daughter Jan, and various family businesses. With Judy's assistance, Dorothy has executed a will that leaves the son her business interests when she passes away, and gives her daughter the remainder of her assets while stating that taxes, to the extent possible, should be apportioned against the non-business assets. Currently, the business interests are valued at $30 million and the remainder of Dorothy's assets are valued at about $5 million. The will was executed with Frank in attendance, but Jan was not.

Judy subsequently does estate planning for Jan and never informs Jan of the provisions that mom has made in her estate plan. Jan is aware of a will that was prepared earlier in which mom left all of her assets equally to Frank and herself. In having Judy do her estate planning, Jan assumes Dorothy still plans to leave her assets equally between her brother and herself. Jan, in the course of the planning for the new will, asks Judy whether mom's will leaves everything equally to her and her brother and Judy tells her that it does. Has Judy violated any ethical duties in this representation of multiple family members? Does it make a difference if Judy did not represent Jan in Jan's estate planning?

Hypothetical 6:

John Anderson has represented a holding company that is owned by members of the Kendrick family. This holding company was created to take advantage of favorable treatment under the tax laws with respect to the different subsidiaries owned by the holding company. Several years after creating the holding company to facilitate the favorable tax treatment, the tax laws change with respect to the possible favorable tax treatment provided to the holding company if it ever sells one of the subsidiaries. Two years after the changes in the tax laws, the holding company, without consulting John, decides to sell a subsidiary and uses another law firm for the sale of the subsidiary. As a result, the holding company incurs far greater taxes than anticipated because of the change in the laws two years ago. The holding company sues John for failure to inform it about the changes in the tax. Has John violated any ethical duty to keep the client informed with respect to changes in the tax law? Is John liable for a failure to inform the holding company about the changes in the tax law?

Hypothetical 7:

Henrietta Jackson is the outside counsel for a closely-held business owned by three siblings. She has been the general counsel for the business for many years and works very well with each of the three siblings. The siblings, who currently comprise the board of directors of the closely-held company, have asked Henrietta to join its board of directors because of the wise and seasoned counsel that she would bring to it. Should Henrietta accept the offer to serve on the board of directors of the client? If Henrietta accepts the offer to serve on the client's board of directors, what special ethical considerations should Henrietta keep in mind?

Hypothetical 8:

Richard Slattery is a partner in a 150 lawyer firm in a mid-sized city in the Midwest. Richard has been asked by the chair of the board of a locally-based closely-held company to join its board of directors. Richard has a specialty in tax issues affecting both closely-held and publicly traded businesses and the board feels that it needs Richard's expertise as it enters what will be some challenging years for the company. Richard is delighted to receive the offer, but would like to explore how his presence on the board of directors would affect the business opportunities of this law firm. May Richard's firm represent the company if Richard serves on the board? May Richard's firm represent a party litigating against the company on whose board Richard is serving, as long as Richard recuses himself from participating in the matter both at the board level and at the law firm? Would it make a difference if the company was publicly traded?

Hypothetical 9:

Joanne Sullivan has been asked by her long time estate planning client, Dudley Henry (age 70), to assist in his estate planning. Dudley owns a series of businesses through corporations (both C corporations and S Corporations), limited liability companies, and limited partnerships. The accounting firm that handles the taxes for Dudley and the business interests has referred to the business interests as a confusing and contradictory maze or hodge-podge. Dudley wants to see what he can do about consolidating those business interests. He also wants to engage in estate planning to reduce the exposure of his estate to estate tax. Dudley asked Joanne what sort of steps could be taken. After much review of possible estate planning strategies with Joanne, Dudley determines that he would like to set up a series of limited partnerships in which he, his wife, and his adult children will be members. Dudley and his wife will make gifts of limited partnership interests to the children.

Dudley wants Joanne to represent the entities in the formation of the limited partnerships and also to advise his children on their rights and responsibilities as partners in the limited partnerships. Dudley does not want the children to have separate counsel because he thinks that this would be too expensive, especially since this is a simple transaction and the relationships between his wife and him and his four children are quite good. Two of the children work in the business and two children do not. May Joanne represent Dudley, his wife, the new entities, and the children in the creation of the new entities without violating the rules with respect to conflicts of interest? Would it make a difference if Dudley is currently married to his third wife and two of his four children are from his marriage to his first wife and two of his four children are from his marriage to his second wife? Would it make a difference if his current wife is currently pregnant with what will be Dudley's fifth child, who will be, when born, 30 years younger than Dudley's current youngest child?

Joanne represents the current entities and the new limited partnerships in their creation as part of the planning for Dudley. When Joanne represents the limited partnerships, exactly who is Joanne representing? Does Joanne represent the partnerships which are separate entities from their partners? Does Joanne represent each of the individual partners because the partnerships have no separate entity status? Does Joanne represent the partnerships as entities and by extension each of the partners?

Hypothetical 10:

Morgan Markus' law firm became involved with a family in connection with litigation over a commercial building owned by the patriarch of the family. During the litigation, questions about the patriarch's capacity arose and because the patriarch's had not done any estate planning, the firm instituted a proceeding for the appointment of a guardian to represent the financial interests of the patriarch. The firm then prepared an estate planning memorandum recommending that the commercial building be placed in a family limited partnership.

Two of the patriarch's three children looked solely to Morgan and his firm for advice. The third child, however, consulted with independent counsel. All three children retained Morgan to draft the partnership agreement and form the entity. The three children were general partners. One child, Godiva hires separate counsel. At the insistence of Godiva's, separate counsel, a unanimous consent provision was included in the partnership agreement so that any one general partner could deadlock the partnership.

After the formation of the partnership, Morgan continued as general counsel to the partnership and represented all three siblings on family matters. Morgan also advised the two other siblings as general partners and on individual matters.

Disputes then arose among the sibling partners regarding the redevelopment of the commercial building and leasing of space in the commercial building and the partners became deadlocked. The other two siblings wished to grant one of the lessees of building the right to sublet and manage the property which would decrease the management power that Godiva was able to exercise due to the unanimous consent provisions in the partnership agreement. Questions arose about the work being done by Morgan when Godiva looked at the bills. Godiva requested access to all of Morgan's firm's files on the partnership. Should the firm provide Godiva with access to the files?

Hypothetical 11:

Law firm partner, John Mason, requested an associate to research what factors should be taken into account in determining whether a lawyer-client relationship had been formed between corporate counsel and its constituents. What factors should the associate discuss with respect to whether a relationship has been developed between a corporation and its constituents? The associate, in doing so, will take account of Model Rule 1.13(f) which deals with the potential conflict and states:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, the lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Hypothetical 12:

Rachel Sanderson represents a closely-held construction contractor in its various business dealings. In the course of the representation of the closely-held contractor, Rachel is impressed by the quality of the contractor's construction work. Rachel and her husband decide to hire the contractor to build their home. After entering into the contract, Rachel and her husband are subsequently dismayed by the quality of the work that was done and find numerous problems with the work. They institute litigation against the contractor alleging breach of contract with respect to the construction of their house.

In entering into the contract with the contractor and bringing the action against the contractor client, has Rachel violated the provisions of Model Rule 1.8 which contains a stringent standard for business transactions between lawyers and their clients?

Hypothetical 13:

Thomas Holson represents ABC Company, a manufacturer of imprinted t-shirts and other garments. The closely-held company is doing well, but the current owners are getting older and would like to sell the business. Thomas has advised the owners for many years and the owners trust Thomas' judgment as he has helped them through many difficult situations. Thomas also represents a small company in the area which is looking to acquire businesses as part of a plan of diversification. Thomas has been advising this other business on the diversification efforts. Thomas, with the permission of the owners of the t-shirt company, informs the other client, which is seeking to diversify, that the t-shirt company might be interested in being acquired. With the consent of all the parties, may Thomas represent both the t-shirt company and the other company in the sale of the t-shirt company to the other company? Suppose in this fact situation that Thomas' representation of the t-shirt company had ended five years ago and that he still represents the other company. May Thomas represent the other company in its acquisition of the t-shirt company or does this run afoul of Model Rule 1.9 with respect to duties owed to former clients?

Hypothetical 14:

Tina Zachary has been representing a closely-held business for many years. She had worked very well with the mother and father who owned the business. However the mother and father have both died, the administration of their estates is complete, and one of the children is running the business. The child became upset with Tina because he feels that Tina had improperly advised his parents on giving the liquid portion of their substantial estate to charity when they died rather than leaving the entire estate to the three children. As a result, the child terminated Tina's representation of the company a year and one-half ago. However, the company has not paid Tina's firm the fees owed for the work Tina did for the company for over one year prior to the termination of the representation. As part of terminating the relationship, the child who is now running the company, sends a standard letter to Tina's law firm requesting that all files be transferred. Can Tina's firm withhold the files until the firm's fees are paid or must Tina's firm transfer the files to the former client? Suppose Tina's firm says that it wants to assert a lien over the files because the firm has not been paid? This type of lien is sometimes called a "retaining lien".

Hypothetical 15:

Rosemary Baker is representing one of the three owners of a closely-held business in its liquidation which is occurring because that owner exercised a clause in the corporate documents that permits one of the three owners to terminate the business at any time and for any reason. The other two owners have yet to get counsel to represent them in the liquidation of the business. There will be several tricky issues that will need to be resolved in order to successfully liquidate the business. Rosemary did participate in a meeting at which her client presented her client's plan for the liquidation to the other two owners who did not have counsel at the meeting, What steps should Rosemary take in this situation under Model Rule 4.3 with respect to dealing with unrepresented persons?

Hypothetical 16:

Linus Brown owns a closely-held company and has a majority of the shares. Wright Morris has been Linus' counsel for many years both in representing the company and in advising Linus on his estate planning. Linus' children, who hold minority interests in the corporation, are coming of age and Linus would like Wright to do estate planning for each of the children partly to insure that ownership of the company stays within the family and does not pass to spouses of the children. May Wright do estate planning for each of the children? If Wright concludes that he can do the estate planning for each of the children, does it make a difference if the children live in states in which Wright does not reside and is not licensed to practice? Can Wright, if he decides that he can represent the children in their estate planning, meet the requirements of Model Rule 5.5 with respect to representing clients in a jurisdiction who reside outside a jurisdiction in which the lawyer is licensed? Would it make any difference if Wright believes that he will only be advising on matters of federal law? Does Wright face any conflicts issues under Model Rule 1.7?

Hypothetical 17:

Two years ago, Lawyer Lewis Wesson represented a closely held business in the reorganization of the business to divide the responsibility for running the company between the 70-year old matriarch, Judy, and her daughter, Sarah. Judy is a widow. At her husband's death, Judy became chair of the board while Sarah became the CEO. Judy owns 51 percent of the stock in

the company and Sarah and her two siblings own the remaining 49 percent of the stock. All of the stock is voting stock. Since the reorganization of the business, Lewis has heard rumors of disagreements between Judy and Sarah on the future course of the business. This morning, Judy called Lewis and told Lewis to prepare the necessary papers to terminate Sarah immediately. Judy said that Sarah had come under the influence of drugs and called her a "hippie reincarnate." Judy also said that Sarah was listening to her husband, Rick, on business decisions and Rick lacked the sense that God gave billy goats. Rick is an independent business consultant who started at McKinsey Consulting and has been quite successful since striking out on his own.

Immediately after hanging up the telephone from the call with Judy, Sarah calls Lewis and says that she thinks that her mother is losing her mind. Judy does not always recognize Sarah when Sarah calls or visits and confuses Sarah with her sister, Susan, who does not work for the company but instead teaches at a university on the West Coast. In addition, Judy has taken up with a 30-year old hairdresser whom she takes to parties and introduces as her fiancé. Recently, Judy and the hairdresser took a two week trip to a Sandals resort in Jamaica about which Sarah just recently learned. Two days ago, Judy brought the hairdresser to the quarterly board meeting and the hairdresser spoke up often during the meeting and criticized Sarah's management. During the call, Sarah seems somewhat frantic and disoriented to Lewis.

Immediately after hanging up with Sarah, Rick calls Lewis. Rick tells Lewis that he is calling because Lewis did the estate planning for Sarah and him last year and he does not know to whom else to turn. Rick says that Sarah has recently been quite depressed and has been drinking a lot. In fact, Rick wants to use the medical power of attorney that Lewis drafted for Sarah and which names Rick as agent to involuntarily send Sarah to the Hazelden Clinic for a month. Rick wants Lewis' advice on what he should do. He also asks Lewis about who will run the company in Sarah's absence.

What should Lewis do in this situation in responding to the three telephone calls?

Subsequently, litigation breaks out between Judy, Sarah, and Rick. Lewis is called as a witness by the lawyers for each of Judy, Sarah, and Rick. What ethical considerations should Lewis take into account in acting as a witness?

Hypothetical 18:

Bill Morris is a business lawyer at a mid-size firm who also does some estate planning. He represents a large number of closely held businesses and has developed a reputation statewide for dealing with ESOPs. His firm bases compensation to its partners on an "eat what you kill" approach. One day, Bill's friend, Jimmy Self, makes a business proposal to Bill. Bill is an agent for a large financial services company whose ratings for its insurance products are marginal. Jimmy proposes an arrangement in which Bill will introduce executive insurance, and deferred compensation, disability, and retirement products provided by Jimmy's financial services company to his business clients. For each client that signs up, Jimmy's company will pay a referral fee to Bill's firm based on the value of the products that each client signs up for. In addition, Bill will likely get the legal work to implement the new benefits from each client that signs up. Can Bill entered into this arrangement with Jimmy and his company? Should Bill enter into this arrangement with Jimmy and his company?

Hypothetical 19:

Carson Land is the lawyer for a highly successful closely held technology company that has put itself in play. Carson has been involved in all of the planning for this including setting the minimum price at which the owners will agree to sell the company. The company is negotiating with a potential purchaser at a price two times the minimum. The company wants to get the deal finalized by the end of the year. In fact, the parties are negotiating at Carson's firm on December 22 while the firm's Christmas party is being held in the conference room next door. Carson, one of the owners of his client, and the lawyers representing the purchaser take a break and go next door to the Christmas party. The lawyers for the purchaser have a fair amount of the senior partner's Holiday Punch which packs a lot of punch. Carson and the owner of his client know better and merely sip a small amount of the lethal punch. Carson, the owner of his client, and the lawyers for the purchaser reconvene after spending about an hour at the party at which point the lawyers for the purchaser open by offering a price three times the minimum price at which the owners would have agreed to sell the company and about double that amount that the parties had previously been discussing. What should Carson do in this situation? Does it make a difference that one of the owners is present and, without consulting Carson, immediately says yes to the new price?

Hypothetical 20:

Lawyer John Rake is a business lawyer with an entrepreneurial streak. He has been highly successful in investing in several distressed businesses when he has been able to secure enough control to make the changes that he believes are necessary to make the businesses a success. Recently, the owner of one of Rake's clients, which is facing a severe cash-flow problem, has

been discussing possible steps with Rake. Rake, sensing an opportunity and seeing the potential, says that he, through one of his personal entities, will provided sufficient funding to the distressed client to relieve the current cash-flow problem and provide breathing room. In return, the client must accept certain conditions and changes in the operations that Rake will require. Rake draws up the agreement with the client to implement the financing and the client signs without representation by another lawyer. Has Rake violated any ethical obligations to the client? What steps should Rake take to meet his ethical obligations?