

## Colorado Bar Association Ethics Committee

### Practice Area Ethics Advisory – Trusts & Estates

May 20, 2020

#### *Introduction*

As the reporters for The American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct (MRPC), 5<sup>th</sup> Ed. (2016) (ACTEC Commentaries) recognize, the “duties of trusts and estates lawyers are defined in many states by opinions rendered in malpractice actions, which provide incomplete and insufficient guidance regarding the ethical duties of lawyers.” (ACTEC Commentaries, Reporter’s Note, First Ed., p. 1). The late federal district judge Stanley Sporkin has noted that, “The existing ethics codes merely espouse certain general principles that apply to all lawyers, such as you don’t co-mingle a client’s funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties.” *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 Geo. J. Legal Ethics 149 (1993), quoted in ACTEC Commentaries, Reporter’s Note, Second Ed., p.4.

As a separate set of rules of professional conduct for practitioners in the trust & estates area has not emerged thus far and is unlikely to do so in the foreseeable future, this Practice Area Ethics Advisory provides guidance on a number of ethical issues that may be encountered by lawyers practicing in the areas of trusts and estates. The eight advisories in Section I (each an Advisory) were written by members of the Ethics Committee of the Colorado Bar Association (Committee). Section II, beginning on page 43, contains numbered summaries of opinions (Op. Summary) in this practice area issued by the ethics bodies of other states or the American Bar Association (ABA). As these are summaries only, readers are urged to read the full opinions related to summaries of interest. The full opinions are available as a resource to Colorado Bar Association (CBA)

members through the link shown by each summary. An index to the summary opinions, as well as to the eight advisories, begins on page 84.

The Committee encourages you to refer to the ACTEC Commentaries in reviewing ethical questions specifically related to trust and estates practice. The ACTEC Commentaries are available for download without charge at <https://www.actec.org/publications/commentaries/> . However, the Committee does not necessarily endorse all of positions taken in the ACTEC Commentaries.

The Committee has issued formal ethics opinions relevant to the trusts, estates and elder law practice, including the following:

CBA Formal Op. 135 “Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding” (2018)

CBA Formal Op. 132 “Duties of Confidentiality of Will Drafter Upon Death of Testator” (2017) [reproduced in Advisory 2]

CBA Formal Op. 131 “Representing Clients With Diminished Capacity Where the Subject of the Representation is the Client’s Diminished Capacity” (2017)

CBA Formal Op. 129 “Ethical Duties of Lawyer Paid by One Other than the Client” (2017)

CBA Formal Op. 113 “Ethical Duty of Attorney to Disclose Errors to Client” (2005, Rev. 2008)

CBA Formal Op. 87 “Collaboration with Non-lawyers in Preparation and Marketing of Estate Planning Documents” (1990, Rev. 1991, Addendum 1995)

Inclusion of summaries of ethics opinions from other states or the ABA does not imply that the Committee has adopted or approved the positions or reasoning in those opinions. This Practice Area Ethics Advisory should be used only as an ethics guide and should not be viewed as the formal opinion of the Committee on the matters treated.

The Committee encourages lawyers seeking further guidance on a particular ethical issue with which they are faced, involving their own conduct, to call the CBA Ethics Hotline at 303.860.1115 to obtain the name and phone number of a member of the Committee who has volunteered to provide informal ethics advice to Colorado lawyers.

## **I. Committee Advisories**

In these Advisories, Rule refers to the Colorado Rules of Professional Conduct.

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### **Advisory 1. Whom Are You Representing, the Estate or the Personal Representative; the Trust or the Trustee?**

One of the quickest ways to find yourself in ethical troubles as a lawyer practicing probate, trust and estates, and elder law, is to fail to identify who is your client from the very outset of the representation. Often this occurs because multiple persons come to you at the same time to request legal representation. But equally problematic is whether you are representing an individual or the entity (or presumed entity) for which that individual is a fiduciary. It can be further complicated if the fiduciary is also a beneficiary of the estate or trust for which the individual is acting in a fiduciary capacity (see Advisory 4, “Representing a Fiduciary Who also is a Beneficiary”, p. 22). Failure to identify from the beginning of the representation whom you represent can quickly result in inadvertent ethical problems.

It is not unusual for a lawyer to state, verbally or in writing, “I represent the estate of John Doe.” But is that really the case? Surprisingly, nowhere in the Rules is the term “client” defined to help us identify who is the client. In addition, the laws and ethics rulings concerning the lawyer’s duty to the client vary widely from state to state, often leaving the lawyer in a quandary. The majority view in the United States is that in a trust or estate setting the lawyer-client relationship is between the lawyer and the fiduciary in the fiduciary’s representative capacity and not between the lawyer and the estate or the beneficiaries. (ACTEC Commentaries, Reporter’s Note, First Ed. *Lawyer for Fiduciary*, p. 2). In Colorado, an estate is not considered to be a legal entity. “The ‘estate of Alta Blue’ is the property she owned at death; it is not a legal entity, though in common speech it seems such, and no judgment can be rendered for or against it. The statutes, in referring

to claims 'against the estate' (C. L. 1921, §§ 5330-5343), mean merely 'payable out of the estate.'" *Heuschel v. Wagner*, 73 Colo. 327, 215 P. 476, 477 (1923). The Colorado Probate Code defines the estate as "the property of the decedent." C.R.S. § 15-10-201(17). Thus, in Colorado, the probate lawyer is properly viewed as representing the personal representative of the estate, who has the responsibility to settle and distribute the estate in accordance with the terms of an effective will and the Probate Code. C.R.S. § 15-12-703(1).<sup>1</sup> The lawyer's duty is to advise the fiduciary on meanings and legal interpretation of the estate or trust documents, not to "stand in the shoes" of the estate. The purpose of the representation is to "assist the client (the fiduciary) in properly administering the fiduciary estate for the benefit of the beneficiaries." (ACTEC Commentaries on MRPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer, subheading "*Representation of Client in Fiduciary, Not Individual, Capacity*, p. 39)

Because the lawyer is representing the fiduciary in the role of fiduciary, this can be complicated if there is more than one fiduciary, such as co-personal representatives or co-trustees. If the lawyer is representing all the co-fiduciaries, the lawyer should seek a joint representation agreement and have the co-fiduciaries acknowledge in writing how conflicts of interest and confidentiality are to be handled as between the co-fiduciaries. (ACTEC Commentaries on MRCP 1.2, subheading *Multiple Fiduciaries*, p. 36; ACTEC Commentaries on MRCP 1.7: Conflict of Interest: Current Clients, p. 101; See also CBA Formal Op. 135 "Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding" (2018) and Advisory 3, "Representing Co-Personal Representatives or Co-Trustees", p. 19). Where the lawyer is representing only one of multiple co-fiduciaries, the lawyer maintains a normal lawyer-client relationship with that co-fiduciary but must ensure that any other co-fiduciary understands that the lawyer does not represent that other co-fiduciary and as such cannot provide legal advice to him or her. The same can be said for lawyer's discussions with beneficiaries. The lawyer must make clear that

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<sup>1</sup> The IRS requires the estate's personal representative to obtain a taxpayer identification number for the estate before filing a tax return on behalf of the estate or before filing an estate tax return. However, that does not make the estate a legal entity under Colorado law.

the lawyer does not represent the beneficiary and cannot provide legal advice to the beneficiary. This presumes the beneficiary is unrepresented, which is often the case. (See Rule 4.3. Communications with Unrepresented Persons) If the beneficiary is represented, the lawyer must comply with Rule 4.2. Communications with Persons Represented by Counsel.

Where the client is the fiduciary and also is a beneficiary of the estate or trust, the lawyer must make clear to the client in what capacity the lawyer is representing the client. See Rule 1.7. Conflicts of Interest: Current Clients. The ACTEC Commentaries acknowledge that in many cases estates and trusts are non-adversarial, and that representation of more than one client, or the same client in multiple capacities, is not only not uncommon, but may actually lead to legal efficiencies. That the client's multiple interests do not align completely does not eliminate the ability to represent the client in multiple capacities, so long as those interests do not become adversarial. There is no problem so long as the interests of the client as an individual do not compromise the actions of the client as fiduciary or vice versa. (ACTEC Commentaries on MRPC 1.7, pp. 101-102, and 107.) The lawyer should inform the client of the potential conflicts and difficulties which could develop in the dual representation of the client as fiduciary and as beneficiary. The ACTEC Commentaries also recommend the lawyer have the client sign an informed consent waiver concerning the lawyer's inability to advocate for the client as an individual in ways which would be inconsistent with the client's duties as fiduciary. (ACTEC Commentaries on MRPC 1.7, p. 107) See also Advisory 4.

As to other, non-client, beneficiaries of the estate or trust, see Advisory 7, "Responsibilities of a Lawyer for a Fiduciary Client to an Unrepresented Beneficiary", p. 36.

**Advisory 2. When Your Client is the Fiduciary for an Estate or Trust: Attorney-Client Privilege Compared to Duty of Confidentiality Under Rule 1.6 and Duty of Disclosure to the Tribunal Under Rule 3.3**

The attorney-client privilege is defined by statute in Colorado. Colorado Revised Statutes §13-90-107(1)(b) states:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

\* \* \*

(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

You should not confuse attorney-client privilege with confidentiality of your communications with clients. Compare the attorney-client privilege statutory language with Rule 1.6, Confidentiality of Information:

**Rule 1.6. Confidentiality of Information**

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

(b).

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

- (3) to prevent the client from committing a 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;
- (4) 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;
- (5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or
- (8) to comply with other law or a court order.

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

Section IV of CBA Formal Op. 123, "Candor to the Tribunal and Remedial Measures in Civil Proceedings" (2011) provides a thorough discussion of the distinctions between confidentiality and the attorney-client privilege and is printed in its entirety in the following paragraphs.



#### IV. Distinctions Between Confidentiality and the Attorney–Client Privilege

The ethical duty of confidentiality is set forth in Colo. RPC 1.6. The scope of the duty of confidentiality is extremely broad, encompassing “information relating to the representation of a client....” Colo. RPC 1.6(a). Included within this broad scope of confidentiality under Colo. RPC 1.6 is information that is subject to the attorney–client privilege. See Colo. RPC 1.6, cmt. [3]. The attorney–client privilege is a matter of the substantive law of evidence, not legal ethics. In Colorado, the attorney–client privilege is codified by statute.<sup>12</sup> Under federal law, the attorney–client privilege is governed by federal common law when the underlying dispute involves federal law and is governed by state law if jurisdiction is based on diversity of citizenship.<sup>13</sup>

Comment [3] to Colo. RPC 1.6 explains this distinction as follows:

The principle of client–lawyer confidentiality is given effect by related bodies of law: the attorney–client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney–client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client–lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See *also* Scope.

The duty of disclosure under Colo. RPC 3.3 is, on its face, unqualified. In particular, Colo. RPC 3.3 does not by its own terms exclude from the lawyer’s duty of disclosure information that is or may be protected by the attorney–client privilege.

Rather a lawyer's disclosure to the tribunal under Colo. RPC 3.3 is a matter separate and apart from any determination about whether and how that information might be used as evidence in a proceeding. Comment [10] to Colo. RPC 3.3 states, in relevant part, that where the lawyer knows that evidence already offered or admitted is false and remonstrated with the client to correct the false evidence has failed,

the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosures to the tribunal as is [*sic*] reasonably necessary to remedy this situation even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. *It is for the tribunal to then determine what should be done*—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Colo. RPC 3.3, cmt. [10] (emphasis added). Because information protected by Colo. RPC 1.6 includes privileged information, a lawyer's duty to disclose under Colo. RPC 3.3 includes the duty, in some cases, to disclose privileged information.

The Colorado Supreme Court has not expressly addressed whether the duty of disclosure under Colo. RPC 3.3(a)(3) includes information that may be subject to the attorney–client privilege or whether that information is somehow exempt from disclosure. However, in *In re Petition for Disciplinary Action Against John E. Mack*,<sup>14</sup> the respondent lawyer was disciplined for violating Minnesota version of Colo. RPC 3.3 by failing to take reasonable remedial measures after the introduction of evidence he knew to be false. Mack defended the disciplinary charge on the ground that he could not make the disclosure contemplated under Minnesota Rule 3.3 because the information was privileged. The Minnesota Supreme Court rejected this defense without distinguishing between privileged and

other information relating to the representation that is protected under Minnesota Rule 1.6.<sup>15</sup>

The Colorado Supreme Court's decision in *People v. Casey*<sup>16</sup> supports the conclusion that the disclosure duty under Colo. RPC 3.3 extends to privileged information, even though *Casey* did not address this precise issue. In *Casey*, a disciplinary case, the Supreme Court addressed the interplay between a lawyer's duty to be truthful to the court and the lawyer's duty to competently represent the client. Casey represented a defendant in a criminal case who was an imposter; the actual defendant was another individual. Nevertheless, Casey appeared before the court and expressly and implicitly represented to the court that his client was the defendant when Casey knew that was not the case. According to the Court, Casey "portray[ed] his situation as involving a close question between the loyalty he owed his client and his duty to the court."<sup>17</sup> The Court emphatically rejected Casey's argument:

Colo. RPC 3.3 (b) clearly resolves the respondent's claimed dilemma in that it provides that the duty to be truthful to the court applies even if to do so requires disclosure of [otherwise confidential information]. It is not "arguable" that the respondent's duty to his client prevented him from fulfilling his duty to be truthful to the court.<sup>18</sup>

While the Supreme Court did not specifically refer to the attorney–client privilege in *Casey*, the case is noteworthy in that, like *Mack*, it placed no limit on the type of confidential information that must be disclosed to discharge the attorney's obligations under Colo. RPC 3.3. Similarly, in *In re Hill*,<sup>19</sup> a federal bankruptcy court stated:

Firm attorneys who had knowledge, in light of privileged e-mails of which they were aware, of misleading nature of testimony of member of firm in proceedings in bankruptcy court had duty to take some remedial action, even

though it could potentially require divulging attorney–client privileged material.<sup>20</sup>

Outside of Colorado, several authorities have attempted to reconcile the duty of disclosure under other states' version of Colo. RPC 3.3(a)(3) with the attorney–client privilege, by distinguishing between non-evidentiary disclosures on the one hand and evidentiary submissions on the other hand.

This reconciliation finds support in a recent Ethics Opinion of the New York State Bar Association.<sup>21</sup> The New York Committee determined that while New York's statutory attorney–client privilege limited the available remedial measures under New York's version of Colo. RPC 3.3, that limitation applied only to the *introduction* of protected information *into evidence* and did not prohibit non-evidentiary disclosures in compliance with New York Rule 3.3. Moreover, at least one commentator supports this approach:

When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney–client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary form, namely sharing the information with the appropriate person or authority. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.<sup>22</sup>

Two state appellate court decisions also support this approach; they address permissive disclosures under those states' versions of Colo. RPC 1.6(b), rather than mandatory disclosures under their versions of Colo. RPC 3.3. In *Purcell v. District Attorney*,<sup>23</sup> Purcell's client had received a court order requiring his eviction from his apartment, which was located in the same building where the client had recently been discharged as a maintenance man. The client made statements to Purcell

that Purcell believed constituted threats of criminal activity by the client. Purcell deemed the threats to be serious and, acting in reliance on Massachusetts's version of Colo. RPC 1.6(b), exercised his professional discretion to make disclosure to law enforcement authorities. Acting on that disclosure, constables (accompanied by the police) went to the apartment to evict the client, found incendiary devices, and arrested the client for attempted arson. At the client's trial, the district attorney subpoenaed Purcell to testify against his former client regarding the statements made by the client to Purcell. The trial court rejected the client's assertion of the attorney–client privilege and ordered Purcell to testify against his former client. The Massachusetts Supreme Judicial Court reversed, holding that “the fact that the disciplinary code permitted Purcell to make the disclosure tells us nothing about the admissibility of the information that Purcell disclosed....”<sup>24</sup>

A similar result was reached in *Kleinfeld v. State*<sup>25</sup> where the defendant in a murder case made inculpatory statements to his lawyer in connection with a separate civil case. At the murder trial, the statements were admitted over objection, and the client was convicted of murder. The Florida appellate court held that because the requirements of the attorney–client privilege had been met, it was error to admit the lawyer's testimony. The court went on to note that the existence of an ethical rule that permits a lawyer to reveal a confidence under certain circumstances does not modify the evidence code, which governs the admissibility of evidence at trial.<sup>26</sup>

For all of these reasons, the Committee concludes that, if reasonable remedial measures necessitate disclosure, Colo. RPC 3.3 requires a lawyer to make disclosure to the tribunal, even if such disclosure includes information that is or may be protected by the attorney–client privilege and even if the client does not consent to the disclosure. However, the Committee again emphasizes that disclosure of privileged information always must be limited to that information which is reasonably necessary to apprise the tribunal of the problem.<sup>27</sup> There are few, if any, circumstances in which the lawyer properly would be required or permitted to

expressly disclose the source of the privileged information or any other details of the privileged communication. Once the required disclosure is made to the tribunal, the lawyer should take appropriate efforts to resist further efforts by the tribunal to compel additional disclosures. In addition, the lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction or disclosure of privileged information, including information previously disclosed pursuant to Colo. RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of privileged communications.<sup>28 2</sup>

A lawyer's duty of confidentiality continues after the death of a client. CBA Formal Op. 132, "Duties of Confidentiality of Will Drafter Upon Death of Testator" (2017), succinctly discusses a lawyer's ongoing obligations to a deceased client. That Formal Opinion is reproduced in its entirety in the following paragraphs.

A lawyer's duty of confidentiality continues after the death of a client. Cf. Colo. RPC 1.6(b) (listing exceptions to requirement of confidentiality, and "death of client" not listed); Colo. RPC 1.6, cmt. [20] (duty of confidentiality continues after the client-lawyer relationship has terminated); Colo. RPC 1.9(c)(2) (lawyer may not

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<sup>2</sup> Footnotes corresponding to quoted portion of CBA Formal Opinion 123:

12. CRS § 13-90-107(1)(b) (2010).

13. Fed. R. Evid. 501.

14. *In re Petition for Disciplinary Action Against John E. Mack*, 519 N.W.2d 900 (Minn. 1994).

15. *Id.* at 902.

16. *People v. Casey*, 948 P.2d 1014 (Colo. 1997).

17. *Id.* at 1016.

18. *Id.*

19. *In re Hill*, 437 B.R. 503 (Bankr.W.D.Pa. 2010).

20. *Id.* at 545.

21. N.Y. State Bar Ass'n Committee on Professional Ethics Op. 837 (March 16, 2010).

22. Sisk, "Rule 3.3 Candor Toward the Tribunal," 16 *Iowa Prac., Lawyer and Judicial Ethics* § 5.6(d)(4)(c) (2009 ed.).

23. *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997).

24. *Id.* Although *Purcell* involved the permissive disclosure of information under Massachusetts Rule 1.6, as opposed to the mandatory disclosure under Massachusetts Rule 3.3, the court's discussion of the differences between the Rules of Professional Conduct and the attorney-client privilege is instructive.

25. *Kleinfeld v. State*, 568 So.2d 937, 939-40 (Fla.App. 1990).

26. *Id.* at 939-40.

27. See Arizona Ethics Op. 05-05, *supra* note 9.

reveal information related to representation of former client); see also *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001) (attorney-client privilege continues after death of client).

Accordingly, a lawyer ordinarily should not disclose client information following a client's death. For example, if a family member is disappointed with the gift provided under a will and asks the drafting lawyer questions about the testator's intentions, the lawyer usually may not respond without violating Rule 1.6. See also American College of Trust and Estate Counsel, ACTEC Commentaries on the Model Rules of Professional Conduct, R. 1.6, at p. 80 (5th ed. 2016) ("ACTEC Commentaries") (lawyer's duty of confidentiality continues after death of client).

If the decedent had authorized the drafting lawyer to make such disclosures or if the deceased client's Personal Representative (who holds the rights to the client information) gives consent, then the lawyer may provide an interested party, including a potential litigant, with client information regarding a deceased client's dispositive instruments and intent. See *id.* This could include prior instruments and communications relevant to those instruments. *Id.* The disclosure should be no broader than necessary to carry out the decedent's wishes. *Id.*

If neither the client nor the Personal Representative has authorized the disclosure, however, there is a split of authority as to whether the lawyer may disclose client information as a matter of ethics. Some authorities contend that such a disclosure would have been "impliedly authorized" by the testator's mere retention of counsel, under the rationale that the testator presumably wanted his or her wishes followed. *Id.* at 88-91 (collecting conflicting ethics opinions from around the country, including Iowa Op. 98-11 (1998), which concludes that questions related to the decedent's potential implied authorization turn on individual facts, and thus a lawyer should not make such disclosures without a court order). Other authorities reject this analysis. See ACTEC Commentaries at 88-91 (citing North

Carolina 2002 Op. 7 (2003), which concludes that the lawyer may make such disclosures if consistent with the attorney-client privilege).

There is no case authority in Colorado on this ethical point, as *Wesp* addresses only the privilege question, not the ethical issue. While some other states have held that the act of communicating with a drafting lawyer itself may constitute implied consent under Rule 1.6 to disclosure of client information (to enhance the chances of the testator's wishes being carried out), no Colorado decision so holds. The Colorado Bar Association Ethics Committee is of the opinion that simply retaining a lawyer to draft estate documents, without more, is not sufficient to constitute implied consent for the lawyer to voluntarily provide information protected by Rule 1.6.

Therefore, the safer course of action is for the drafter not to provide such information voluntarily without the consent of either the testator or the Personal Representative. If a court orders the drafting lawyer to disclose information, however, then the lawyer may reveal the information without violating Rule 1.6. See Colo. RPC 1.6(b)(8) (lawyer excused from requirement of confidentiality to comply with court order).

In conclusion, a drafting lawyer may ethically provide client information relating to a deceased client's testamentary wishes as necessary to carry out those wishes where: (a) the decedent authorized such disclosure; (b) the Personal Representative authorizes such disclosure; or (c) a court orders such disclosure. If none of those circumstances are present (and no other exception in Rule 1.6 applies), no Colorado authority would allow the drafting attorney to provide client information to third parties, including beneficiaries under the will and other documents.

The court in *Wesp*, *supra*, however, recognized a testamentary exception to the attorney-client privilege. "The testamentary exception permits an attorney to reveal certain



types of communications in special circumstances. Specifically, the attorney who drafted the will of a deceased client may disclose attorney-client communications concerning the will and transactions leading to its execution in a suit between the testator's heirs, devisees, or other parties who claim by succession from the testator. McCormick, *supra*, § 94; Wigmore, *supra*, § 2314; 81 Am.Jur.2d, Witnesses § 389 (2000). The rationale for this exception is that it furthers the client's testamentary intent. Swidler [*& Berlin v. U.S.*], 524 U.S. at 405, 118 S.Ct. 2081 (citing *Glover v. Patten*, 165 U.S. 394, 407-408, 17 S.Ct. 411, 41 L.Ed. 760 (1897)); Wigmore, *supra*, § 2314.

“Colorado recognizes the testamentary exception. See *Denver Nat'l Bank v. McLagan*, 133 Colo. 487, 491, 298 P.2d 386, 388 (1956); *In re Estate of Shapter*, 35 Colo. 578, 587, 85 P. 688, 691 (1905). In *Shapter*, we rejected an argument that an attorney could not testify about client communications relating to the deceased client's will, stating that “after [the client's] death, and when the will is presented for probate, we see no reason why ... the attorney should not be allowed to testify as to directions given to him by the testator so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator.” *Shapter*, 35 Colo. at 587, 85 P. at 691 (internal quotation omitted). In *Denver National Bank*, we stated that numerous decisions hold that the testamentary exception permits an attorney who writes a will to testify, after the testator's death, about attorney-client communications related to the execution and validity of the will. *Denver Nat'l Bank*, 133 Colo. at 491, 298 P.2d at 388.”

The court did not, however, address the application of Rule 1.6.

In a case involving a lawyer's refusal to deliver to a deceased client's personal representative files related to the lawyer's representation of the decedent, the Colorado Court of Appeals in *In Re Estate of Rabin*, 2018 COA 183 (December 27, 2018) confirmed that, “A personal representative ... ‘succeeds to the rights and obligations of the Estate's decedent, effectively ‘stepping into the shoes’ of the decedent. *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 163 (Colo. 1993). In other words, the right to claim the attorney-client privilege passes to the personal representative, who becomes the holder of the privilege. Thus, disclosing the privileged communications to the holder of the privilege

does not itself violate the privilege.” The court also seemed to apply the same reasoning to the lawyer’s duties of confidentiality under Rule 1.6 but did not specifically rule on the issue.

In *In re Perini’s Estate*, 526 P.2d 313 (Colo. App. 1974) the Colorado Court of Appeals held that a successor estate fiduciary is in privity with the fiduciary’s predecessor. Thus, it would seem that the successor fiduciary has the authority to waive both attorney-client privilege and confidentiality regarding representation of the decedent and regarding representation of the initial fiduciary in the fiduciary’s capacity as such.

The reasoning in CBA Formal Op. 132 would seem to apply equally to a lawyer whose client was the deceased grantor of a revocable or irrevocable trust, that is, that Rule 1.6 requires the lawyer to keep confidential information relating to the representation of the deceased grantor in preparing the trust absent advance waiver from the grantor. While it is clear that a Personal Representative steps into the shoes of the deceased for purposes of being able to consent to disclosure of confidential information, it is not at all clear whether the trustee of a trust the grantor of which is deceased has the same authority. Until settled law appears on the subject, a prudent lawyer would be well advised to consider the matter carefully before disclosing confidential information related to representation of the deceased grantor relating to preparation of the trust.

The Committee notes that the guidance in CBA Formal Op. 132 and this Advisory on the subject of Rule 1.6 confidentiality run contrary to the ACTEC Commentaries on MRPC 1.6: Confidentiality of Information, subheading *Obligation After Death of Client*, which states in part, “A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.” Lawyers faced with this situation should be aware that the Colorado Supreme Court has not, either in case law or the Rules, specifically addressed this

situation under Rule 1.6 and aware of the conflict between the guidance in CBA Formal Op. 132 and the ACTEC Commentaries on MRPC 1.6.

### **Advisory 3. Representing Co-Personal Representatives or Co-Trustees.**

It is not at all unusual for a lawyer to be asked to represent co-fiduciaries in an estate or trust situation in which no litigation is involved. The ACTEC Commentaries points out that not only is multiple representation of co-fiduciaries common, “(i)n some instances the clients may actually be better served by such representation, which can result in more economical and better coordinated estates plans....” (ACTEC Commentaries on MRPC 1.7: Conflict of Interest: Current Clients, subheading *General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients*, p. 101)

The lawyer must at the outset, in considering whether to take the co-representation, obtain sufficient information to determine whether an actual conflict of interest between or among the potential fiduciary clients exists and whether the facts and circumstances indicate more than a theoretical potential conflict. Where there is litigation between the co-fiduciaries, the general admonition that a lawyer cannot represent adverse parties in litigation applies. But even where there is no litigation and the co-fiduciaries at least present themselves as being of one mind, the lawyer has duties that must be complied with beyond the general duties that any lawyer has to his or her client.

The first question that arises in these types of situations is “whom do you represent?” Comment [27] to Rule 1.7. Conflict of Interest: Current Client seems to indicate that an estate can be the client. In Colorado the lawyer properly is viewed as representing the co-fiduciaries in their capacity as co-fiduciaries, and not the estate, which is not a legal entity but the property the decedent owned at death. See Advisory 1. “Whom are You Representing, the Estate or the Personal Representative, the Trust or the Trustee?”, p. 4. You are representing multiple clients in the form of each of the co-fiduciaries, in their capacity as co-fiduciaries. Your purpose is to “assist the client [the fiduciary] in properly administering the fiduciary estate for the benefit of the beneficiaries.”

(ACTEC Commentaries on MRPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer, subheading *Representation of Client in Fiduciary, Not Individual, Capacity*, p. 39) This is the majority position in the United States on this subject.

When entering into representation of multiple clients it is imperative that the lawyer explain the issues in joint representation of the fiduciaries. See CBA Formal Op. 135, “Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding,” for a detailed discussion of the ethical implications of such representation of co-fiduciaries. While CBA Formal Op. 135 is written from the perspective of joint representation in a litigated matter, the principles contained in the opinion apply to uncontested matters such as the probate of an estate or the administration of a trust, as well.

To undertake such joint representation the lawyer should explain in writing to the would-be clients the potential dangers of joint representation. While specifics of what issues the lawyer must explain to the clients will vary depending on the specifics of the matter, at a minimum it must include a discussion of the lack of confidentiality as between the co-fiduciaries, which requires the informed consent of the clients, and that if a conflict develops that cannot be resolved, the lawyer must withdraw from representation of each of the co-fiduciaries. (Comment [31] to Rule 1.7) See also ACTEC Commentaries on MRPC 1.2, subheading *Multiple Fiduciaries*, p. 36. While co-fiduciary clients may be able to waive certain prospective conflicts that are clearly explained to them and to which they give informed consent in writing, a purported waiver to other prospective conflicts will not be valid, as discussed below.

The interests of the co-fiduciaries do not have to completely align. (“...[I]f 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...” ACTEC Commentaries at p. 104) However, the lawyer undertaking the joint representation must

reasonably believe that any conflicts that exist between the co-fiduciaries are relatively minor and are capable of being resolved. (Restatement (3d) Law Governing Lawyers (Rest.), § 130, vol. 2, p. 359) If conflicts are discovered (that is, there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to the other client), the lawyer must determine whether the conflicts may be consented to by the clients and even if they are, whether it is prudent for the lawyer to proceed in the face of such conflicts. If the lawyer reasonably believes that she or he will be able to provide competent and diligent representation to each affected client and determines to proceed with the joint representation, Rule 1.7 requires that each affected client give informed consent, confirmed in writing (Rule 1.7(b)(4)).

Where there are multiple co-fiduciaries and the lawyer represents some, but not all, of the co-fiduciaries, not only must the lawyer proceed as stated above with respect to each of the co-fiduciaries he or she represents, but, with respect to any other co-fiduciary that is not represented by another lawyer, because the lawyer will likely be dealing with that other co-fiduciary, the lawyer must also inform that co-fiduciary that the lawyer does not represent that co-fiduciary and is only providing legal counsel for the represented co-fiduciaries and not for any co-fiduciary the lawyer does not represent. (Rule 4.3. Dealing With Unrepresented Person)

The question is still open as to the point at which prospective informed consent obtained by the lawyer no longer covers a situation that later arises between the co-fiduciaries where the co-fiduciaries find themselves in conflict. See CBA Formal Op. 135 on this subject and ABA Formal Op. 05-436 "Informed Consent to Future Conflicts of Interest." ABA Formal Op. 05-436 points out that the understanding of the client governs what is covered by the prospective waiver through informed consent.

"Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved."

ABA Formal Opinion 05-436 at p. 2

As a result, not only is the scope and effectiveness of the informed consent subject to the discussion and understanding of the client, but also the familiarity of the client with the subject matter at issue concerning the effectiveness of the prospective informed consent. Even if the client is a relatively sophisticated client, if the nature of the estate proceeding is one with which the client is unfamiliar, the lawyer likely will have to discuss the conflict as it later develops to obtain informed consent from the client to that conflict.

Where the co-fiduciaries develop conflicts after the beginning of representation, those conflicts may reach the level that the lawyer must withdraw from representation of both clients, such as when litigation ensues between co-fiduciaries. (Cmt [4], Rule 1.7(b)) If, however, the conflict is likely resolvable, the lawyer may serve as informal mediator, proposing a variety of solutions to the conflict, with the co-fiduciaries determining the final outcome of the conflict. The lawyer may not advance the interests of one client over the other, even if the lawyer believes this to be in the best interests of the parties. (Rest. § 130, vol. 2, p. 361) While it may be advisable, the lawyer is not required to “encourage each client to obtain independent advice....” (*Id.*)

#### **Advisory 4. Representing a Fiduciary Who also is a Beneficiary.**

As stated in Advisory 1, “Whom Are You Representing, the Estate or the Personal Representative; the Trust or the Trustee?”, in Colorado the lawyer represents the fiduciary, not the estate or the trust. Often a personal representative or trustee, a fiduciary, also is a beneficiary under the will or trust.

In summary you can and, in the interest of providing economic legal services in the trusts and estates practice area, it will be beneficial to the client to, represent in both capacities a person who is both a fiduciary and a sole beneficiary. However, you should prepare an engagement letter that adequately advises the client of the potential conflict issues and specifies, to the extent possible, what will happen regarding representation if

an actual conflict arises. You should also give careful attention to developments in the representation that could or do give rise to a conflict and address them appropriately.

Notwithstanding the possibility that a lawyer under certain circumstances may represent both a fiduciary and one or more multiple beneficiaries, doing so generally is not advisable. See K. Millard, "Estate Planning and Administration in Colorado after *Baker v. Wood, Ris & Hames, PC*," 45 *The Colorado Lawyer* 10, p. 43 (Oct. 2016) ("It is advisable not to take on the role of lawyer for the client both as fiduciary and individually as beneficiary, and the lawyer's engagement letter should be clear on that point."). If a beneficiary needs legal representation regarding administration of an estate or trust, the conflict of interest regarding representation of the fiduciary and representation of the beneficiary likely will not be waivable.

In any event, a well-drafted engagement letter which clarifies the scope of the lawyer's representation is important. See Advisory 5, "Engagement Letter Considerations in Representing a Fiduciary", p. 28.

*Fiduciary as Sole Beneficiary.*

If the fiduciary is the sole beneficiary, it is unlikely that you will encounter ethical issues in representing the fiduciary/beneficiary based on that dual status, unless the fiduciary/beneficiary decides to disregard or impermissibly deviate from the terms of the will or trust. In that event, if the instrument is a will only (not containing a trust), the lawyer should be alert to conduct by the fiduciary/beneficiary that could result in fraud on creditors of the estate or that may cause the lawyer to violate Rule 3.3. Candor to the Tribunal, in a probate proceeding. The lawyer also should take note of her or his responsibilities under paragraph (b) of Rule 4.1. Truthfulness in Statements to Others, which requires that a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. Confidentiality of Information.

Rule 1.6(b)(3) and (4) permit (but do not require) a lawyer to disclose confidential information to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, or to prevent, mitigate or rectify such injury, which has been or will be furthered by the client's use of the lawyer's services. See *also* Advisory 6, "Lawyer's Duties if the Fiduciary Client Fails to Properly Perform Fiduciary Duties", p. 32.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer, paragraph (d) provides that, "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Let us suppose the instrument is a trust and the client, Kylie, age 27, is the sole beneficiary. She is your client in another matter, and she has asked you to represent her with respect to the trust by explaining to her the terms of the trust and her rights under it. The prior trustee has resigned and under a power contained in the trust has named Kylie the successor trustee. Kylie now asks you to represent her as trustee, as well.

The trust contains restrictive terms, as most trusts do. These terms provide that assets in the trust may be used only for Kylie's education and health until she reaches 35 years of age or obtains a master's degree from an accredited university, whichever occurs first. There are no individuals left living who would benefit if Kylie died before receiving a final distribution under the trust. Kylie decides she wants to use the money to travel the world. She consults you as the lawyer for the trustee to be sure that if she does so, she won't get into trouble. What are your obligations?

There is a conflict of interest between Kylie/trustee who, if she were to properly perform her fiduciary duties, would not consent to the premature distribution, and Kylie/beneficiary, who requests it. You should advise Kylie/trustee that she would be



breaching the terms of the trust and failing to fulfill her fiduciary duties by disbursing the trust assets for that purpose, and you should review the provisions of C.R.S. §15-1-1401, “Restrictions on exercise of certain fiduciary powers,” and advise her accordingly.

Her response is, “so what; will I get into trouble?” You may advise her that it is unlikely she will get into trouble because of the absence of any other party in interest, but after doing so, the prudent course of action would be to withdraw as lawyer for Kylie/trustee. See Advisory 6. However, you may continue to represent Kylie/beneficiary, despite her alter ego breaching the terms of the trust and using the funds to travel the world.

In a situation like this, be sure your client truly is the only party in interest. If there are others who could benefit from the trust assets that are being distributed prematurely, for example, if the beneficiary died before the conditions of distribution of the assets were fulfilled, then the discussion of Rule 4.1(b) and Rule 1.2, above, would apply. Analysis of criminal aspects of the fiduciary’s conduct in that event are beyond the scope of this Advisory, but you should consider whether the fiduciary’s actions may result in a crime being committed.

### *Multiple Beneficiaries.*

If there are multiple beneficiaries of an estate or trust, one of whom is your client in her or his capacity as personal representative or trustee, you may also represent that client in her or his capacity as a beneficiary, subject to analysis under the conflict of interest rules, Rules 1.7 through 1.9, if one or more of the other beneficiaries is your client or former client. However, as stated in the *Millard* article, *supra*, such representation may be unwise. See Advisory 7, “Responsibilities of a Lawyer for a Fiduciary Client to an Unrepresented Beneficiary”, p. 36, if one or more beneficiaries are unrepresented.

As noted in Advisory 1, “Whom are You Representing, the Estate or the Fiduciary; the Trust or the Trustee?”, p. 4, where your client is both a fiduciary and a beneficiary of

the estate or trust, you must make clear to the client in what capacity or capacities you are representing the client. (See Rule 1.2(c) and [Cmt 7], which permit a lawyer to limit the scope or objectives, or both, of the representation if reasonable under the circumstances and the client gives informed consent, and Rule 1.7, Conflicts of Interest: Current Clients.) The ACTEC Commentaries acknowledge that in many cases estates and trusts are non-adversarial, and that representation of more than one client, or the same client in multiple capacities, is not only not uncommon but might actually lead to legal efficiencies. That the client's multiple interests do not align completely does not eliminate the ability to represent the client in multiple capacities, so long as those interests do not become adverse. There is no problem so long as the interests of the client as an individual do not compromise the actions of the client as fiduciary or vice versa. (ACTEC Commentaries to MRCP 1.7, pp. 101-102, and 107.)

You should inform the client of the potential conflicts and difficulties which could develop in your dual representation of the client as fiduciary and as beneficiary. The ACTEC Commentaries also recommend you have the client sign an informed consent waiver concerning your inability to advocate for the client as an individual in ways which would be inconsistent with the client's duties as fiduciary. (*Id.*, p. 107.)

If a dispute arises between the fiduciary/beneficiary and another beneficiary and the fiduciary is properly exercising her or his fiduciary duties, the dispute itself does not give rise to an ethical issue. See Advisory 6 for a discussion of the situation in which the fiduciary fails to properly perform her or his fiduciary duties.

However, in a trust situation, if a dispute arises involving a conflict between the interests of your beneficiary client and the interests of another beneficiary which requires or involves a discretionary action by your trustee client, you may be faced with a conflict of interest under Rule 1.7, unless your trustee client determines, with the consent of your alter ego beneficiary client, that the proper resolution of the dispute is in favor of the other beneficiary's interests. Absent such determination and consent, you must conduct a careful analysis of whether the client/trustee's proposed course of conduct under the trust

is proper and whether you would be required to withdraw from representation of your trustee client. Whether you could continue to represent your beneficiary client would depend on the facts of the dispute and the nature of your engagement letter with each client. See Advisory 5.

Maryland State Bar Assn. Ethics Op. 2000-44 (2000) (Op. Summary 40 in Part II of this Practice Area Ethics Advisory) presents an interesting set of facts in which Lawyer represented a trustee who was both trustee and lifetime beneficiary of a testamentary trust. Two of the contingent beneficiaries of the trust were the trustee's daughters X and Y. While administering the trust, trustee was involved in acrimonious litigation in which Lawyer represented trustee and X against Y.

During the litigation, the trustee resigned due to ill health, and X became the successor trustee, as well as a contingent beneficiary. Lawyer represented X in both capacities. The original trustee/lifetime beneficiary then died, and the contingent beneficiaries became vested beneficiaries. Under its terms, the trust terminated and the property in the trust was subject to distribution to the beneficiaries. Notwithstanding the terms of the trust, X as trustee took possession of the trust assets and continued to expend trust income, borrowed money, and renovated the trust property without consultation with or permission from any of the other beneficiaries, including Y.

Lawyer was asked by Y to discontinue representation of X due to a conflict of interest, particularly in light of the multiple adverse actions taken by Lawyer against Y in the litigation. Lawyer declined to terminate representation of X as trustee but did claim to have ceased to represent X individually. Y continued to press a conflict of interest claim, as well as claiming that X and Lawyer were not acting in the best interest of the trust.

Analyzing the facts under Maryland Attorneys' Rules of Professional Conduct 1.7, the Maryland ethics committee did not accept that Lawyer no longer represented X individually and cited a conflict between X as successor trustee and X as beneficiary, in that any advice Lawyer gives to X as successor trustee may materially limit Lawyer in his

representation of X as an individual and vice versa. The committee cited a comment to that rule, which states,

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.... The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The committee concluded that Lawyer has a conflict representing X in her dual capacities and should withdraw from the representation of X as trustee. It did not address continued representation of X as beneficiary, by implication condoned that continuing representation.

#### **Advisory 5. Engagement Letter Considerations in Representing a Fiduciary.**

The primary goal in drafting an engagement letter is to describe clearly the nature of the representation and the rights and obligations of the lawyer and the client. The engagement letter also can serve to minimize later misunderstandings by clarifying potential issues at the start of the representation. In addition to covering subjects typical to all engagement letters - such as fees, billing practices, and retention of files - the lawyer representing a fiduciary should consider including additional provisions to address issues which may arise in the fiduciary context.

When a lawyer is representing a fiduciary, the engagement letter should specifically identify the client whom the lawyer will be representing and the capacity in which the client will be represented. See Advisory 1, "Whom Are You Representing, the Estate or the Personal Representative; the Trust or the Trustee?", p. 4. The engagement letter in the trusts and estates setting should make it clear that the lawyer will be representing only the personal representative or trustee, if that is the case, and only in that person's fiduciary

capacity, not as an individual, unless a dual representation is intended by both the lawyer and the client, e.g., a personal representative who also is the sole beneficiary who the lawyer is to represent in both capacities. See *Boatright v. Derr*, 919 P.2d 221, 228-29 (Colo. 1996) (plaintiff permitted to recover noneconomic damages in legal malpractice action where the plaintiff argued that lawyers represented her individually as well as in her capacity as personal representative) for an illustration of the importance of clarifying the capacity in which a probate or trust client is being represented.

The engagement letter should also address the scope of the engagement. Paragraph (c) of Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer allows the lawyer to limit the scope of a representation if the limitation is reasonable under the circumstances and the client gives informed consent. There are numerous instances in which a lawyer representing a fiduciary may want to limit the scope of the representation. While Rule 1.2(c) does not require such informed consent to be in writing, the best and simplest way to document the client's informed consent to the limited scope of the representation is to include it in the engagement letter signed by the client. *Accord*, CBA Formal Op. 101 "Unbundling/Limited Scope Representation" (updated 2016), p. 4.

If the lawyer will be representing co-fiduciaries, a fiduciary who is also a beneficiary, or a combination of a fiduciary and one or more beneficiaries, it is particularly important to delineate the lawyer's role in the representation. See Rule 1.7. Conflict of Interest: Current Clients, cmt. [27] ("In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view [including Colorado], the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved."). See Advisory 3, "Representation of Co-Personal Representatives or Co-Trustees", p. 19, and Advisory 4, "Representing a Fiduciary Who also is a Beneficiary", p. 22.

In the case of a joint representation, the lawyer should also consider using the engagement letter to address the sharing of confidential information between or among the clients. Confidentiality of information relating to the representation is governed by Rule 1.6. Confidentiality of Information, which provides that a lawyer generally may not reveal information relating to the representation of a client unless the client gives informed consent. Thus, for example, while it would be expected in representing co-personal representatives that the lawyer will share all information with both of them, the lawyer would be well advised to explain to the clients that all information will be shared as among them and the risks and benefits of such sharing of information, document the explanation, and provide for the clients' informed consent to the practice in the engagement letter.

Additionally, the engagement letter can be used to document the lawyer's explanation to the clients of actual conflicts of interest between the clients, if any, and the potential conflicts that may arise between them in the course of the representation and, where possible and appropriate, documenting the informed consent of the clients to proceeding with the representation in the face of those waivable potential conflicts that are foreseeable at the outset of the representation. See C. Eyster, "Trust and Estate Law Engagement Letters and Common Conflict of Interest in Joint Representation," 38 *The Colorado Lawyer* 2, p. 43 (Feb. 2009). See also CBA Formal Op. 135 "Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding" (2018)

A thorny question that can arise in a lawyer's representation of a fiduciary is what the lawyer may or must do if the lawyer has reason to believe that the fiduciary is acting improperly. At the start of the representation, the lawyer can help prevent inadvertent misconduct by carefully informing the client in advance of his or her duties as fiduciary. For example, most individuals appointed as personal representatives are lay persons not experienced in serving as fiduciaries, so it is helpful practice to include with the fee agreement an explanation of the fiduciary relationship and a list of the fiduciary duties of a personal representative.

The engagement letter may also ask the client to commit to complying with these fiduciary duties and inform the client that if the client violates the fiduciary duties, the lawyer may be entitled or required to disclose information to the court or the beneficiaries and/or withdraw from the representation, subject to court approval where required. See Advisory 6, “Lawyer’s Duties if the Fiduciary Client Fails to Properly Perform Fiduciary Duties”, p. 32. The ACTEC Commentaries suggest that the letter could provide, for example, that the lawyer’s representation is conditioned upon the fiduciary’s agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries or to the court any actions of the fiduciary that might constitute a breach of fiduciary duty. See ACTEC Commentary on MRPC 1.2, subheading *Disclosure of Acts or Omissions by Fiduciary Client*, p. 38, and on MRPC 1.6, *supra*. In that case, the engagement letter should contain the client’s informed consent to such disclosure.

As noted above, Rule 1.6 provides that a lawyer generally may not reveal information relating to the representation of a client unless the client gives informed consent, subject to the exceptions in Rule 1.6(b). Rule 1.0. Terminology, paragraph (e), states, “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Therefore, the lawyer must ensure that she or he has complied with this requirement in order for the client’s consent in the engagement letter to such disclosure to be effective. In the absence of such informed consent, the lawyer must rely on the exceptions in Rule 1.6(b) or on Rule 3.3. Candor Toward the Tribunal to support disclosure.

### **Advisory 6. Lawyer's Duties if the Fiduciary Client Fails to Properly Perform Fiduciary Duties.**

While most fiduciary clients will try to perform their duties conscientiously, the lawyer may become aware that a fiduciary client is not performing the fiduciary's duties as required, whether through negligence, fraud, or even criminal conduct. In all cases, the lawyer's first duty is to advise the client candidly and straightforwardly regarding the fiduciary's responsibilities. See Rule 2.1. Advisor (lawyer's duty to exercise independent professional judgment and render candid advice).

Because of the high standards to which fiduciaries are held, the lawyer should not hesitate to offer advice even when the fiduciary has not sought it. See Rule 2.1, cmt. [5] ("a lawyer may initiate advice to a client when doing so appears to be in the client's interest"). Such advice may include reminding the client of the court's powers under C.R.S. §§ 15-10-501 through -505 to supervise estate administration and address fiduciary misconduct. See M. Mihm, ed., *Lawyers' Professional Liability in Colorado: Preventing Legal Malpractice and Disciplinary Actions*, Vol. 2, §37.21 (T. Conover, "Addressing Fiduciary Misconduct"). The lawyer may also discuss with the client the lawyer's potential ethical duties to disclose the misconduct to the beneficiaries and/or the court, as well as the lawyer's right or duty to withdraw from the representation. Philadelphia Bar Ass'n Ethics Op. 2008-9 [See Op. Summary 16]. See paragraph (d) of Rule 1.6. Confidentiality of Information, Rule 1.16. Declining or Terminating Representation, and Rule 3.3. Candor Toward the Tribunal. If the fiduciary client insists upon acting in a way with which the lawyer has a fundamental disagreement, the lawyer may withdraw from the representation, subject to court approval, if applicable. Rule 1.16(b)(4).

The lawyer must be particularly careful if the fiduciary has engaged in conduct that the lawyer reasonably believes is criminal or fraudulent. For example, assume that a lawyer learns that the client—the personal representative of an estate—has wrongfully and secretly taken possession of a valuable piece of jewelry that belongs to the estate. When the lawyer confronts the client, the client says that she will return it to the estate. In



determining the best course of action, the lawyer should consider the circumstances of the misappropriation, *e.g.*, whether it was intentional or inadvertent. If the lawyer is concerned that the misappropriation was intentional, the lawyer may not help hide the misconduct without risking a violation of paragraph (d) of Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer (prohibition against assisting client fraud or criminal activity). One commentator has suggested that the best course of action may be to try to persuade the fiduciary client to resign and return the item to the estate through a successor personal representative. See H. Sterling, "Some Problems Arising in the Representation of a Fiduciary," 32 *The Colorado Lawyer* 11 (June 2003), for an excellent discussion of the dishonest fiduciary scenario.

If the fiduciary's misconduct has caused material representations to be made to the court, such as false statements made in an estate inventory, the lawyer also has a duty under Rule 3.3 to take reasonable remedial measures, including, if necessary, disclosure to the tribunal. See CBA Formal Op. 123 "Candor to the Tribunal and Remedial Measures in Civil Proceedings" (2011). Depending upon the seriousness of the infraction, the required remedial measure may be as simple as having the fiduciary submit a corrected inventory, but remediation also may require the lawyer to seek court approval to withdraw from the representation, request that the court order an accounting of the estate, and even disclose the misconduct to the court. *Id.* Also see Alabama State Bar Formal Op. 2010-03, "Representation of an Estate and Client Identity."

The lawyer faces a serious predicament if she or he knows or suspects that the fiduciary's criminal or fraudulent course of conduct is continuing or that the known misappropriation is only the "tip of the iceberg." In some circumstances, the lawyer's withdrawal from the representation, subject to any required court approval, is mandatory. Rule 1.2(d) expressly prohibits a lawyer from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent, and Rule 1.16(a)(1) mandates withdrawal if the lawyer's representation of the client "will result in violation of the Rules of Professional Conduct or other law" as explained in Rule 1.2, cmt. [10]:

When the client's course of action has already begun and is continuing, the lawyer must carefully weigh her or his responsibility. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Even if withdrawal is not mandated under Rule 1.16(a), the lawyer is permitted to seek court permission to withdraw in these circumstances under Rule 1.16(b). See Rule 1.16(b)(2) (permitting withdrawal when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent) and 1.16(b)(4) (permitting withdrawal when the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement). Note that in the case of limited scope representation, court permission to withdraw will not be required if, pursuant to C.R.C.P. 121, § 1-1(5), the lawyer has filed a notice of completion of limited scope representation.

The lawyer may also face the dilemma of what the lawyer may or must disclose to the beneficiaries regarding the fiduciary's past or ongoing misconduct. Under Rule 1.6, a lawyer may generally not reveal information related to the representation to third parties (beneficiaries) without the informed consent of the client (the personal representative). However, under the exceptions provided by Rule 1.6(b), a lawyer may (but is not required to) reveal information to the extent the lawyer reasonably believes necessary:

- (2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

- (3) to prevent the client from committing a 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;
- (4) 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.

Note that Rule 1.6(b)(3) and (4) refer to the client's commission of a crime or fraud "in furtherance of which the client has used the lawyer's services". If the client has not used the lawyer's services in furtherance of the crime or fraud, these exceptions to the requirement of Rule 1.6 that the lawyer not disclose information relating to the representation are not applicable.

If the circumstances fall within the exceptions of Rule 1.6(b), Rule 4.1. Truthfulness in Statements to Others, paragraph (b) requires that the lawyer "must not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." See Rule 1.2, cmt. [10] ("In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.") Whether or not disclosure is required, the lawyer is well advised to withdraw from the representation, subject to any required court approval, and should notify all parties in interest that the lawyer will no longer represent the fiduciary. See H. Sterling, "Some Problems Arising in the Representation of a Fiduciary," 32 *The Colorado Lawyer* 11 (June 2003). See also ACTEC Commentaries to MRPC 1.6, subheading *Disclosure of a Fiduciary's Commission of, or Intent to Commit, A Fraud or Crime* and other topics, pp. 81-85.

In addition to the lawyer's ethical obligations, another reason the lawyer may want to disclose fiduciary misconduct to the beneficiaries is to dispel any inference that the lawyer was aware of or participated in the misconduct. While Colorado law is clear that

the lawyer representing a personal representative does not have an attorney-client relationship with the beneficiaries of the estate, the lawyer can still be held liable to the beneficiaries for the lawyer's own tortious or criminal conduct. See *Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011) (where non-clients are concerned, a lawyer's liability is generally limited to circumstances in which the lawyer has committed fraud or a malicious or tortious act, including negligent misrepresentation), citing *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995); accord *Baker v. Wood, Ris & Hames, Professional Corp.*, 364 P.3d 872, 879 (Colo. 2016) (reiterating *Allen* rule); see also *In re Estate of Brooks*, 596 P.2d 1220 (Colo. App. 1970) (trustee's lawyer not liable to alleged beneficiary for breach of trust absent fraud or malice). The Colorado Supreme Court has left open the question of whether a lawyer can be held liable to third parties for aiding and abetting a client's breach of fiduciary duty. See *Alexander v. Anstine*, 152 P.3d 497, 503 (Colo. 2007).

To address the question of whether the lawyer is acting properly in disclosing fiduciary misconduct to the beneficiaries or the court, the lawyer may want to include a provision in the engagement letter authorizing such disclosure. See Advisory 5, "Engagement Letter Considerations in Representing a Fiduciary", p. 28

Op. Summary 59- PA Opinion 2017-100 (2017) also contains a thorough discussion of a lawyer's ethical duties in representing a fiduciary client whose conduct may harm or has harmed beneficiaries.

### **Advisory 7. Responsibilities of a Lawyer for a Fiduciary Client to an Unrepresented Beneficiary.**

A lawyer representing a trustee or personal representative is likely to be in communication with one or more beneficiaries of the trust or estate who are not represented by counsel. A beneficiary may ask questions of the lawyer the answers to which may be simply factual or may involve actual or perceived legal advice. "As a general rule, the lawyer for the fiduciary should consider informing the beneficiaries that

the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests." ACTEC Commentaries to MRPC 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer, p.37

Colorado courts have held that the lawyer drafting the will or trust or the lawyer for the fiduciary does not owe a specific duty to the beneficiaries. (*Baker v. Wood Ris & Hames*, 364 P.3d 872 (Colo. 2016); *Glover v. Southard*, 804 P.2d, 21, (Colo. App. 1994); *Shriners Hosp. For Crippled Children, Inc. V. Southard*, 892 P.2d 417 (Colo. App. 1994)) "The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct." "Specifically, the lawyer's obligation to preserve the client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary." ABA Comm. on Ethics and Prof. Resp., Formal Op. 94-380 "Counselling a Fiduciary" (1994), p.1 [Op. Summary 30]

In communicating with unrepresented beneficiaries, the lawyer should be governed by Rule 4.3. Dealing with Unrepresented Person, which states:

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.

Comments 1 and 2 provide further guidance:

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

The last sentence of Rule 4.3 suggests that if the estate or trust is one in which there is no question about who is to get what, the lawyer might properly advise a beneficiary on general matters, such as whether the beneficiary will have taxable income from receipt of distributions. On the other hand, if the lawyer is representing the trustee of a trust that places discretion in the trustee to decide when distributions will be made and in what amounts to particular beneficiaries, the lawyer should limit his or her advice as the last sentence of Rule 4.3 requires.

See also Op. Summary 7, Prof. Ethics of the FL Bar, Op. 10-3 [untitled] (2011); Op. Summary 19, PA Bar Assn. Op. 2009-072 [untitled] (2009); Op. Summary 29, ABA Comm. on Ethics and Prof. Resp., Formal Op. 05-434 “Lawyer Retained by Testator to Disinherit Beneficiary that Lawyer Represents on Unrelated Matters” (2004); and Op. Summary 37, KY Bar Assn. Ethics Op. KBA E-401 [untitled] (1997).

**Advisory 8. Representing Spouses with His and Hers Children in Estate Planning:  
What Do You Do When the Agreement on Distribution Falls Apart?**

Lawyers often are asked to represent both parties of a couple for estate planning. Estate planning is fundamentally nonadversarial in nature and such representation is often appropriate and may better serve the client both economically and with better-coordinated estate plans. ACTEC Commentary on MRPC 1.7 Conflict of Interest: Current Clients, p. 101.

Prior to undertaking such joint representation, the lawyer should explain in writing to the would-be clients the potential issues in joint representation, and it is wise to include that explanation, as well as the clients’ informed consent to the joint representation, in the engagement letter (see C. Eyster, “Trust and Estate Law Engagement Letters and Common Conflict of Interest in Joint Representation,” 38 *The Colorado Lawyer* 2, p. 43 (Feb. 2009)).

While specifics of what issues the lawyer must explain to the clients will vary depending on the specifics of the matter, at a minimum it must include a discussion of what information is to be shared with both clients and that if a conflict develops that cannot be resolved, the lawyer may be required to withdraw from representation of each of the clients. (Comments [29] through [31] to Rule 1.7; ACTEC Commentaries on MRPC 1.7, subheadings *Disclosures to Multiple Clients*, and *Joint or Separate Representation*, p. 102. In addition, if the situation involves a second marriage for one or both clients, especially if there are one or more children from a prior marriage, at the outset of the engagement the

lawyer should provide the clients with a thorough explanation of estate planning tools for a second marriage situation.

Despite the best efforts of the lawyer, on occasion a spouse who has stated agreement to an estate plan will have a change of heart. Take, for example, the following situation:

Lawyer represents Spouse A, who has children of her or his own, and Spouse B, who also has children of her or his own. Spouse A has the bulk of the assets as between A and B. Both Spouses tell Lawyer they want the assets to be disposed of on death mostly to A's children (approximately in proportion to the assets held by A and B). Lawyer drafts the appropriate disposition documents. Later Spouse B tells Lawyer that B has changed her or his mind and insists on a 50-50 split of assets between their respective children. What should/must Lawyer do?

Under these facts, Lawyer has a concurrent conflict of interest. Rule 1.7. Conflict of Interest: Current Clients states:

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

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

or

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

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

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

(2) the representation is not prohibited by law;



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

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

It appears unlikely in this instance that the requirements of (b)(1) could be satisfied.

Lawyer should consider carefully whether she or he can give unbiased and effective advice or whether Lawyer might unconsciously try to steer the clients toward what Lawyer believes would be a good compromise.

These facts also raise the question of whether, without Spouse B's permission (given either specifically in this instance or at the beginning of the representation by agreement that all communications with one client can or will be disclosed to the other; see Advisory 5. "Engagement Letter Considerations in Representing a Fiduciary" p. 28), Lawyer may even request the consent of Spouse A to the change, as to do so may involve disclosing confidential information of B. See the discussion of joint representation of co-fiduciaries in Advisory 3. "Representing Co-Fiduciaries, e.g., Co-Personal Representatives or Co-Trustees", p. 19. See *also* CBA Formal Op. 135, "Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding" (2018).

The question, then, is may Lawyer continue representing either Spouse A or Spouse B? Technically, Lawyer could continue representing either A or B if Lawyer complies with Rule 1.7(b)(1), and the client that Lawyer will not be representing gives informed consent, confirmed in writing.<sup>3</sup> However, under the circumstances, it is unlikely

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<sup>3</sup> "Informed consent" and "confirmed in writing" are defined in Colo. RPC 1.0. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. The communication necessary will vary according to the circumstances. The lawyer ordinarily must

- 1) Disclose the facts and circumstances giving rise to the conflict;
- 2) Explain the advantages and disadvantages of the proposed course of conduct;
- 3) Discuss other options or alternatives; and

that informed consent could be obtained. Even if technical compliance is possible, Lawyer should consider carefully whether such representation is prudent and whether the wisest course of action would be to withdraw from representing either A or B. Here, A and B are unlikely to be able to do effective joint estate planning until they, independently or with the help of a third party other than Lawyer, reach agreement on common objectives.

Each party of a couple may adopt a separate estate plan, and that does not *per se* make their respective interests adversarial or constitute a conflict of interest for the lawyer. However, the lawyer must be careful in addressing at the outset the sharing of information and remain alert for a developing adversarial situation and resulting conflict of interest that may require the lawyer's withdrawal from representing one or both clients.

See *also* Op. Summary 43, NC State Bar RPC 229 "Joint Representation of Husband and Wife in Estate Planning" (1996); Op. Summary 45, Prof. Ethics of the FL Bar, Op. 95-4 [untitled] (1997); Op. Summary 46, State Bar of MT Ethics Op. 960731 [untitled] (1996); and Op. Summary 47, RI Sup. Ct. Ethics Advisory Panel Op. 96-07 [untitled] (1996).

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4) In some circumstances, advise the client to seek advice from independent counsel before commencing the representation.

## II. Summaries of Other State and ABA Ethics Opinions

*Reference to a “Rule” in each summary is to that Rule of Professional Conduct in effect in that state, or in the case of ABA Opinions the MRPC Rule in effect, at the date of the opinion summarized. We have attempted to note significant differences between the cited rule and the corresponding Rule currently in effect in Colorado, but we cannot guarantee that we have noted all such differences and so we recommend you compare cited rules with current Colorado Rules in summaries and opinions of interest.*

### 1-PA Opinion 2012-024 (2012) [FULL TEXT HERE](#)

**Facts**—Lawyer represented X as administrator of the estate of X’s spouse, who died intestate. Child A filed an action to compel accounting, and when an accounting was filed, Child A filed objections alleging that X, during the lifetime of X’s spouse, abandoned the spouse and was therefore not entitled to the family exemption and the spousal intestate share of the estate. X then died intestate, and A was appointed successor administrator of X’s spouse’s estate. Children B, C, and D have asked Lawyer to represent them as intestate heirs of X and X’s spouse in their dispute with sibling A. Counsel for A has threatened to file a complaint with the Disciplinary Board against Lawyer if Lawyer represents B, C, and D.

**Analysis and Conclusion**—The proposed representation is not prohibited and does not require informed consent. No concurrent conflict of interest exists under **Rule 1.7, Conflict of Interest: Current Clients**, because A is not a client and there is no indication that the representation of Children B, C, and D would be materially limited by Lawyer’s responsibility to either another client, a former client, a third person, or by a personal interest of Lawyer. Although X was a former client of Lawyer [see **Rule 1.9, Duties to Former Clients**, Lawyer’s proposed engagement would not violate Rule 1.9(a), as the interests of B, C and D would not be materially adverse to X. However, Lawyer must abide by Rule 1.9(c) (use of confidential information) if Lawyer decides to represent B, C, and D. Lawyer should also consider potentially divergent or inconsistent interests among the potential clients because the proposed engagement will involve a common representation.

**2-Phil Bar Association Opinion 2013-6 (2013) [FULL TEXT HERE](#)**

**Facts**—Lawyer represents an elderly woman (‘Client’). Lawyer prepared and Client signed a power of attorney and a new will, leaving a \$50,000 gift to a cousin of Client and the remainder of the estate to charitable institutions. The will names Lawyer as alternate executor. The executor has died, making Lawyer the acting executor of the will. At the same time testator made her will, she executed a power of attorney naming S, the daughter of a friend of Client, as attorney-in-fact. Client felt S would be helpful in managing her affairs. Client is now in hospice and in a coma. Lawyer recently learned that within three months of Client signing the will and power of attorney, Client, her financial advisor, and S met to sign papers placing Client’s individual accounts into joint survivorship accounts with S, which would make assets in such accounts the property of S upon Client’s death. S says that the purpose of the joint survivorship accounts was to allow S to more readily manage Client’s bills. Lawyer strongly suspects that even if Client consented to naming S as a co-owner on the accounts for convenience purposes only, that Client had no idea of the dispositive effect of doing so. Lawyer informed S that the power of attorney gave her the authority to readily manage Client’s bills and moving the assets into joint accounts was unnecessary. While S is willing to make some concessions, she apparently is unwilling to reconvey the accounts to Client’s name alone. Does Lawyer have a duty to notify the Lawyer General’s office about the transfer of the assets into joint accounts?

**Analysis and Conclusion**—Pursuant to **Rule 1.4, Communication**, Lawyer normally must first attempt to communicate with Client to determine whether she understands the consequences of the transfer of her accounts into joint tenancy with S. However, since Client is in a coma, such action would be futile. Pursuant to **Rule 1.2, Scope of Representation and Allocation of Authority between Client and Lawyer**, and **Rule 1.14, Client with Diminished Capacity**, Lawyer may act on Client’s behalf without Client’s consent to protect Client’s financial interests and to effect the intent manifested in Client’s will. Contacting the Lawyer General is one way to meet Lawyer’s obligations. If Lawyer decides to report to the Lawyer General, Lawyer must abide by **Rule 1.6, Confidentiality of Information**, and may only reveal information about Client to the extent reasonably

necessary to protect Client's interest. If Client dies before Lawyer makes the disclosures, pursuant to past opinion 2003-11, Lawyer, as executor of Client's estate may make decisions on behalf of the estate and is authorized to disclose confidential information relating to the representation of Client.

### **3-NY Ethics Opinion 865 (2011) [FULL TEXT HERE](#)**

**Facts**—Lawyer prepared an estate plan for his client and supervised the execution of a will in furtherance of the plan. The will named the client's nephew executor of the estate. The client died and the estate is ready for administration. The nephew has asked the Lawyer to represent him in connection with the estate's administration, but Lawyer is concerned because executors may sue estate planners for malpractice, and both the estate plan and the will were prepared within any period of limitations possibly applicable to Lawyer's conduct. [Note: NY Court of Appeals had recently overruled a longstanding line of cases under which an executor, lacking privity with the estate planning lawyer, could not sue the lawyer for malpractice.]

**Analysis and Conclusion**—Rule 1.7, Conflict of Interest: Current Clients, provides that a lawyer shall not represent a client if, among other things, there is a significant risk that the representation will be materially limited by a personal interest of the lawyer, unless one of the exceptions in Rule 1.7(b) is present. Three situations arise under these facts. Situation (a)- the lawyer who prepared the estate realizes at the outset, before commencing representation of the executor in the administration of the estate, that he may have committed legal malpractice and that the executor would have a prima facie malpractice case against him. Here a nonconsentable conflict of interest exists. Moreover, a lawyer in situation (a) has an affirmative duty to report to Client (formerly the decedent, but is now the executor) that the lawyer's preparation of the estate plan has given rise to a prima facie malpractice case. However, there is no duty to report insignificant errors or omissions. Situation (b)- the lawyer at the outset does not perceive any basis for claiming that he committed malpractice, and does not believe the executor would have a prima facie malpractice case against him. In situation (b) the lawyer may represent Client and does not need to obtain consent under Rule 1.7(b). Situation (c)- the lawyer did not initially perceive

any basis for a malpractice claim against him, but has realized during the course of representation of the executor that he may have committed malpractice and that the executor would have a prima facie malpractice claim against him. In situation (c) the conflict is nonconsentable and pursuant to **Rule 1.16(b)(1)**, the lawyer must withdraw to avoid a violation of the Rules, and after withdrawal must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client.

[CBA Ethics Committee Note: See CBA Formal Opinion 113, *Ethical Duty of Lawyer to Disclose Errors to Client* (2005; modified 2015), which differs from this opinion regarding the duty of the lawyer to advise the client of a potential malpractice claim.]

#### **4-PA Opinion 2011-22 (2011) [FULL TEXT HERE](#)**

**Facts**—Lawyer represented Client in connection with estate planning and long-term planning. Client requested assistance in making changes to the beneficiary designation forms for his life insurance policy, Lawyer obtained the necessary forms and helped Client revoke a prior designated beneficiary and nominated two other beneficiaries. Client signed the forms but died before the forms were mailed to the insurance company. The executor of the estate has contacted Lawyer and has asked for information about the life insurance policy. (1) does Lawyer have a duty to disclose the information about the life insurance policy; (2) if a duty to disclose exists, must Lawyer disclose this information to the executor; (3) does Lawyer have a duty to disclose this information to the either or both of the beneficiary of the life insurance policy or the new beneficiaries named by Client; and (4) does Lawyer have a duty to try to enforce deceased Client’s intent and place a claim against the life insurance proceeds to stop them from paying out to the beneficiary.

**Analysis and Conclusion**—Under **Rule 1.6, Confidentiality of Information**, Lawyer does not have a duty to disclose information surrounding deceased Client’s life insurance policy to anyone. However, Lawyer may under Rule 1.6(a), make the disclosure if Lawyer is given informed consent or if Lawyer is impliedly authorized to do so in order to carry out the representation. Informed consent can no longer be obtained because Client is deceased. However, a legal representative has been appointed for Client and Lawyer

should look to the representative for decisions on behalf of Client. As to implied authorization, Lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote Client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. If Lawyer determines that Client impliedly authorized Lawyer to disclose that he made changes to the beneficiary designation forms for his life insurance policy, and the disclosure would likely promote the estate plan, forestall litigation, preserve assets, and further third parties' understanding of the Lawyer's client's intentions, then disclosure would be permissible. Finally, Lawyer has no duty to try to enforce the decedent's intent and place a claim on the life insurance proceeds to stop them from paying out to the beneficiary. Lawyer does not have a client to authorize him to take action on Client's behalf. According to agency law, a lawyer's authority to act for a client automatically terminates when Client dies.

**5-SC Opinion 12-10 [FULL TEXT HERE](#)**

**Facts**—Lawyer represented Client in actions brought against her by her estranged spouse. After Client's death, her spouse was appointed executor of her estate and requested Client's file from Lawyer.

**Analysis and Conclusion**—Pursuant to **Rule 1.6, Confidentiality of Information**, Lawyer may not turn over any items from Client's file without an order from the probate court unless disclosure had been specifically authorized by Client.

**6-NH Opinion 2014-15/10 (2015) [FULL TEXT HERE](#)**

**Facts**—Lawyer i meets with Client A and Client B, a married couple, to discuss preparing estate planning documents. Clients want to create a joint revocable trust that benefits each other during life, followed by their mutual children after the second spouse's death. During the joint meeting, Client A discloses that she wants a financial asset owned by her individually to be made payable on her death to a charity. Nothing during the initial meeting with Clients raises a concern for Lawyer that the interests of either spouse may limit Lawyer's ability to prepare a joint estate plan for the couple. At the end of the meeting, Clients want to engage Lawyer to draft their documents.

**Analysis and Conclusion**—Given these facts, there is no direct adversity or significant risk of material limitation under **Rule 1.7, Conflict of Interest: Current Clients**. Pursuant to **Rule 1.16, Declining or Terminating Representation**, should Client A and Client B's interests significantly diverge at a later time in Lawyer's representation of Clients, Lawyer may need to terminate the representation of both Clients if effective informed consent is not feasible under **Rule 1.7(b)** (permissible representation of a current client despite a conflict of interest). However, informed consent regarding mutual disclosure of information should be obtained under **Rule 1.6, Confidentiality of Information**, before Lawyer proceeds because although Clients would be involved in a common representation, the mere fact of common representation does not mean that Clients impliedly relinquish their confidentiality protections under Rule 1.6. Under **Rule 1.4, Communications**, Lawyer must keep both Clients reasonably informed about the representation.

**7-FL Ethics Opinion 10-3 (2011) [FULL TEXT HERE](#)**

**Facts**—A personal representative, beneficiaries or heirs-at-law of a decedent Client's estate, or their counsel, asks Lawyer for confidential information relating to Lawyer's deceased Client.

**Analysis and Conclusion**—Whether and what information Lawyer may disclose is fact intensive and doubt should be resolved in favor of nondisclosure Pursuant to **Rule 1.6, Confidentiality of Information**, confidentiality continues after Client's death, but Lawyer may reveal confidential information to serve Client's interest unless it is information Client specifically requires not to be disclosed. Moreover, if Lawyer is asked to disclose information via subpoena, Lawyer must disclose all information sought that is not privileged and raise privilege as to any information for which there is a good faith basis to do so.

**8-Massachusetts Bar Association Opinion 11-04 (2011) [FULL TEXT HERE](#)**

**Facts**—Lawyer was contacted by the Son of Decedent, seeking her assistance in probating Decedent's will. Son is Decedent's next of kin and the residuary beneficiary



under a will that Lawyer had prepared a few years earlier for Decedent. Son stated that Financial Advisor, who had been named executor of the will, had declined to serve or to offer the will for probate due to the relatively small amount of assets in Decedent's estate. Son represented to Financial Advisor that Lawyer was the lawyer for Decedent's estate, and Financial Advisor therefore revealed to Lawyer confidential information that the value of Decedent's estate was less than the total of the specific bequests named to Legatees. After Son learned he would not benefit under Decedent's estate, he lost interest in pursuing further action. Lawyer inquires whether she has a right or duty to advise Legatees of information concerning Decedent's estate. Son has not responded to Lawyer's requests for permission to disclose this information to Legatees.

**Analysis and Conclusion**—The scenario above contains several facts that Lawyer possesses that would be of interest to Legatees: (1) Decedent died, (2) the Financial Advisor has declined to act, (3) no probate proceedings have been undertaken, and (4) Legatees are beneficiaries under Decedent's estate planning documents. Lawyer learned of fact (1) in connection with the representation of Son. Pursuant to **Rule 1.6, Confidentiality of Information**, Lawyer must protect even public information communicated in the course of representation unless that information is widely available or generally known. In this case, the Decedent's obituary appeared in the newspaper and is easily findable online, therefore Lawyer may disclose to Legatees fact (1) without Son's consent. Similarly, fact (3) is easily obtainable through public records and disclosure is permissible without Son's consent. However, fact (2) is confidential information that Lawyer learned solely in the course of representation of Son and cannot be disclosed to Legatees without Son's consent. With regards to fact (4), Lawyer presumably knew this fact prior to establishing an attorney client relationship with Son, as Lawyer drafted the documents for Decedent. Lawyer is impliedly authorized to reveal fact (4) to Legatees because Decedent asked Lawyer for assistance in connection with the preparation of his estate planning documents. Pursuant to **Rule 1.9, Duties to Former Clients**, absent Son's consent, Lawyer may not represent Legatees in connection with the probate of Decedent's will or the settlement of the estate because the representation of Legatees

would be in the same or substantially related matter to the one in which Son initially sought Lawyer's assistance.

**09-MO Opinion 2010-0052 (2010) FULL [TEXT HERE](#)**

**Facts**—Lawyer drafted a will for now deceased Client. The original, signed will cannot be located. Lawyer now represents an heir, and Lawyer is unsure whether he may disclose the contents of the now missing will.

**Analysis and Conclusion**—Lawyer may not disclose information, other than an actual will, that Lawyer considers still valid, without a court order. The court order must be issued after the issue of confidentiality, under **Rule 1.6, Confidentiality of Information**, has been fully presented.

**10-RI Opinion 2013-05 (2013) [FULL TEXT HERE](#)**

**Facts**—Client signed a revocable living trust and other estate planning documents. The trust has since been amended several times. The original trust provided that all assets in the trust be left to Daughter. Client bequeathed tangible personal property to Daughter in a pourover will. The trust named Daughter as successor trustee. Client divorced, and recently asked Lawyer to amend the trust to leave Client's home to a female friend. Lawyer determined at the time of execution of that trust amendment that Client was competent. Client died and Daughter has asked Lawyer for assistance in settling Client's estate. Daughter is disturbed that Client left Client's home to the female friend. Lawyer advised Daughter about the grounds for settling aside provisions of the trust, and Daughter has retained another lawyer to represent her and the trust. Lawyer wants to know his ethical obligations regarding communications with the successor counsel and with the Daughter/trustee, as well as regarding testimony at trial or at a deposition.

**Analysis and Conclusion**—Pursuant to **Rule 3.7, Lawyer as a Witness**, Lawyer may not serve as an advocate in a challenge to the trust because Lawyer will likely be a witness. Lawyer must assert both the obligation of confidentiality under **Rule 1.6, Confidentiality**

**of Information**, and the attorney-client privilege if he is called as a witness or if he is contacted by successor counsel or the trustee. If a court orders Lawyer to disclose information relating to the representation of Client, disclosure would be permissible, but Lawyer must seek to limit disclosure.

**11-PA Opinion 2015-023 (2015) [FULL TEXT HERE](#)**

**Facts**—Lawyer modified Husband and Wife’s wills, which provided for division of items of a sentimental nature between Wife’s children and Husband’s children. Husband died, and because Lawyer was on vacation, Wife called another lawyer to make changes to her will. Wife signed the new will, which provided that unless she provides a signed memorandum that is kept with the will, her tangible property goes to her children. The new will named one of Wife’s children as executor and her new lawyer as alternate executor. Wife subsequently scratched out the name of her new lawyer and substituted Lawyer’s name. Within two months, Wife died. Lawyer states that there is conflicting evidence as to whether there was a memorandum, what the memorandum may have said, and whether it was signed. Husband’s children have retained Lawyer to determine the existence of a memorandum. Their intent is to see that Wife’s wishes are followed. Lawyer does not plan to testify because Lawyer has no personal knowledge of whether there was a written memorandum prepared and/or signed by Wife prior to her death. Lawyer is unsure whether there is a conflict of interest if Lawyer continues to represent Husband’s children.

**Analysis and Conclusion**—There is no conflict of interest under **Rule 1.9, Duties to Former Clients**, because although this representation is substantially related to Lawyer’s representation of Wife, the interests of the current clients are not materially adverse to those of Wife. The interests of the current clients are to determine whether the memorandum referred to in Wife’s will exists and what effect, if any, that memorandum has on the will. The interests of the current clients are to promote Wife’s estate plan, therefore there is no conflict under **Rule 1.9** in continuing to represent them.

**12-PA Opinion 2014-009 (2014) [FULL TEXT HERE](#)**

**Facts**—Son asked Lawyer to prepare a will for Mother that would divide her estate equally among her three children. Lawyer sent a fee agreement to Son and prepared the requested draft documents for Mother’s review. Before Mother could review the draft documents, Son informed Lawyer that Mother was ill and in the hospital. Lawyer has not heard back from Son or Mother regarding rescheduling the appointment. One month after Lawyer’s communication with Son, Lawyer was contacted by Daughter A who informed Lawyer that Father had passed away and that she was named executrix of Father’s estate. During Lawyer’s initial consultation with Daughter A, Lawyer learned that Mother and Father divorced several years ago and that Mother and Father had three children, Daughter A, Daughter B, and Son. Daughter A produced a copy of Father’s will, which provided that the entire estate be distributed between Daughter A and Daughter B. Son was specifically excluded from the will. Father’s original will cannot be located. Lawyer advised Daughter A that when admitting a copy of a will for probate a hearing is necessary and any interested party may raise objections. Lawyer believes Son will likely file an objection to probating a copy of Father’s will. Lawyer is unsure whether there is a conflict in representing Daughter A in the administration of Father’s will given the contact Lawyer has had with Son in preparing estate planning documents for Mother.

**Analysis and Conclusion**—No conflict of interest exists under **Rule 1.7, Conflict of Interest: Current Clients**, because Lawyer does not have an attorney-client relationship with Son. Lawyer has an attorney-client relationship with Mother because Lawyer prepared estate planning documents for Mother. Lawyer has an attorney-client relationship with Daughter A in her capacity as executrix for Father’s estate. At this time, the interests between Mother and Daughter A are not directly adverse, and Lawyer’s representation of either client does not appear to be materially limited by the responsibilities to the other client.

**13-TN Opinion 2014-F-158 (2014) [FULL TEXT HERE](#)**

**Facts**—Lawyer represented Client in connection with preparing estate planning documents at a time Client was competent. Lawyer has been ordered by the court or

subpoena to disclose, prior to Client's death and when Client apparently is no longer competent, a will or other testamentary document executed when Client was competent.

**Analysis and Conclusion**—Lawyer must comply with the court's orders, but only after Lawyer raises all non-frivolous claims that the will or other testamentary document is protected against disclosure by the attorney-client privilege or is protected by client confidentiality, under **Rule 1.6, Confidentiality of Information**. However, if Lawyer has informed consent or if Lawyer believes the disclosure is impliedly authorized to carry out the representation, then Lawyer may produce the document under **Rule 1.6** or **Rule 1.9, Duties to Former Clients**.

**14-NE Opinion 12-08 (2012)** [FULL TEXT HERE](#)

**Facts**—Lawyer was employed by Husband and Wife to create trusts for each of them. The trusts name their children as beneficiaries upon their deaths. After Wife's death, Husband employed a different lawyer to amend his trust. The amendment reduced the shares of the trust estate that would go to two of the children named as beneficiaries. The other two children, whose shares were not reduced, were named as successor trustees upon the death of Husband. The trustees have employed Lawyer to provide legal services to them in their capacities as trustees. Daughter A, whose share was reduced by the trust amendment disputes the validity of the amendment. Daughter A asserts that Lawyer cannot represent the trustees in an adversary action regarding the validity of the trust amendment because of an asserted conflict of interest that the trustees have as both trustees and beneficiaries. Lawyer has never provided legal services to the trustees personally and has never provided legal services to Daughter A in any capacity.

**Analysis and Conclusion**—**Rule 1.9, Duties to Former Clients**, is not applicable because Daughter A has never been a client of Lawyer. There is no conflict of interest under **Rule 1.7, Conflict of Interest: Current Clients** because there is no suggestion of adversity between the trustees themselves or between them and any of Lawyer's clients, and nothing indicates that a material limitation would exist.

**15-Philadelphia Bar Opinion 2008-10 (2008) [FULL TEXT HERE](#)**

**Facts**—In 1996, Lawyer’s partner met with B and prepared a will, power of attorney, and living will for her. Lawyer and Lawyer’s secretary witnessed the will which was not notarized. In 2007, B’s stepdaughter, C, and C’s son, D, came to Lawyer’s office and advised that B wanted to change her will to include C’s two sons as beneficiaries. C and D made significant statements to Lawyer and his partner which would likely be relevant in a will contest. Lawyer and his partner, along with C and D, visited B in the nursing home. Lawyer and his partner determined that B no longer had testamentary capacity and advised C and D that they were free to seek a second opinion on the issue of B’s testamentary capacity. B died and her will was submitted for probate and is now the subject of a will contest. Allegations in the proceeding are that B’s signature was either a forgery or that the will was not otherwise properly witnessed and acknowledged. Lawyer and his former secretary have been contacted by counsel for the executrix about the procedures followed in executing the will, and Lawyer and Lawyer’s secretary and partner need to know what they may reveal to counsel about the execution of the will and the content of the Lawyer and his partner’s conversations with C and D.

**Analysis and Conclusion**—Neither an actual nor prospective attorney-client relationship ever existed between Lawyer, or his partner, and C and D. Thus, the discussions with C and D are not confidential and can be revealed to whomever the Lawyer and his partner wish. Generally, Lawyer’s duty not to disclose confidential information, pursuant to **Rule 1.6, Confidentiality of Information**, continues after death. However, **Rule 1.14, Client with Diminished Capacity**, would allow the executrix of the will, who stands in the place of deceased B, to give her consent waiving confidentiality and allow such disclosures. There is implied consent under **Rule 1.6(a)** giving Lawyer the authority to disclose whatever may further the testamentary intent of B’s original will. Moreover, because the petition challenging the validity of B’s will makes allegations regarding the execution of the will and the conduct of the Lawyer, his partner, and their secretary, disclosure would be permitted under **Rule 1.6(b)(5)**.

**16-Philadelphia Bar Opinion 2008-9 (2008) [FULL TEXT HERE](#)**

**Facts**—Lawyer represents Executrix of a decedent’s estate. The decedent’s assets were ultimately settled in Orphan’s Court. A few years later, Lawyer learned about the existence of bonds in the decedent’s name and accompanied Executrix to collect the bonds. Executrix left with the bonds saying she would contact Lawyer the next day. Lawyer has since called and written to Executrix urging her to administer the additional bond assets in accordance with the law and the settlement agreement. Executrix has not responded to Lawyer.

**Analysis and Conclusion**—Lawyer may disclose Executrix’s failure to administer the additional assets under **Rule 1.6, Confidentiality of Information. Rule 1.6(c)(2) and Rule 1.6(c)(3)** specifically allow disclosure, as Executrix’s ongoing failure to respond is sufficient for Lawyer to infer that Executrix intends to retain those assets illegally. **Rule 3.3, Candor toward the Tribunal**, requires Lawyer to take action if any of the following has occurred— (1) the filing of an Inventory with the Register of Wills; (2) the filing of a Status Report with the Register of Wills indicating that the estate administration is complete; or (3) the filing of accounting or any other document with the Orphan’s Court, wherein the executrix set forth the assets and value of the estate. Lawyer is required to disclose under **Rule 3.3** under any of the three scenarios because the listed actions involve substantive representations regarding the value and/or estate to either the Register of Wills or the Orphan’s Court. Prior to disclosure, Lawyer should urge Executrix to come forward with the bonds so they may be properly administered. If Executrix refuses to come forward, Lawyer will be required to withdraw as her counsel, pursuant to **Rule 1.16(a)(1)** (mandatory withdrawal when representation would violate the rules of professional conduct or other law).

**17-ME Opinion 192 (2007) [FULL TEXT HERE](#)**

**Facts**—Lawyer is asked to disclose confidential information of Client, now deceased, to Client’s court-appointed Personal Representative in circumstances where Personal Representative has requested the information, citing a rule of evidence as the authority for waiving the attorney-client privilege on behalf of Client.

**Analysis and Conclusion**—Pursuant to **Rule 1.6, Confidentiality of Information**, Lawyer may disclose the information if the request would further Client’s interests. However, if Lawyer believes the information sought would not further Client’s purpose or would be detrimental to Client, Lawyer may waive the privilege only as required by law or by court order.

**18-MD Opinion 2009-05 (2009) [FULL TEXT HERE](#)**

**Facts**—Law Firm provided *pro bono* will drafting services for elderly Client. Law Firm discovered Client had significant assets and Client directed Law Firm to locate 35 proposed beneficiaries. Client died before executing the final draft of the will. Law Firm sought advice from Bar Counsel, who advised them to seal their files, that attorney-client privilege survives Client’s death, and that Law Firm can no longer discuss their representation of Client with anyone. Personal Representatives possessing Letters of Administration for Client’s estate seek a copy of the unexecuted will.

**Analysis and Conclusion**—Personal Representatives have all the rights and privileges of Client. Thus, Personal Representatives are entitled to possess anything belonging to Client, including the unexecuted copy of the will. Because Personal Representatives are, for legal purposes, Client, giving the unexecuted will to Personal Representatives does not amount to a disclosure and does not trigger **Rule 1.6, Confidentiality of Information**. Even if giving the will to Personal Representatives amounted to a disclosure, **Rule 1.6(b)(6)** permits disclosure to comply with a court order. The Letters of Administration presented to Law Firm by Personal Representatives are a court order. Moreover, **Rule 1.15, Safekeeping Property**, requires a lawyer to promptly deliver to Personal Representatives Client’s property, including the unexecuted will.

**19-PA Opinion 2009-072 (2009) [FULL TEXT HERE](#)**

**Facts**—Lawyer represented Husband and Wife jointly for a number of years and prepared numerous revisions of their wills. Wife died and an issue was raised by Husband, claiming Wife closed a joint certificate of deposit and placed the proceeds in an account in her sole



name, contrary to their estate plan. Husband filed a claim for the funds against Wife's estate and wants Lawyer to disclose information relating to his representation of Wife.

**Analysis and Conclusion**—Given these facts, it is assumed that Husband and Wife waived confidentiality with respect to Lawyer's joint representation of them in their estate planning. Even if there was no express waiver of confidentiality, confidentiality in joint representation is generally presumed waived, unless contrary intention is shown. Because Wife waived confidentiality with respect to Husband in connection with their estate planning, Lawyer may not refuse to disclose information relating to the joint representation of Husband and Wife on the basis of **Rule 1.6, Confidentiality of Information**.

**20-NH Opinion 2008-09/1 (2008) [FULL TEXT HERE](#)**

**Facts**— (1) Lawyer is drafting a will or other estate planning documents for Client and at the request of Client identifies himself as the named executor or other fiduciary in the documents; (2) Lawyer identifies himself, by default, as executor or other fiduciary in Client's estate planning documents; and (3) Lawyer solicits and/or requires Client to identify Lawyer as fiduciary in estate planning documents being prepared by Lawyer.

**Analysis and Conclusion**—Situation (1): before Lawyer can begin drafting a document naming Lawyer as fiduciary, Lawyer must have the requisite knowledge and experience to satisfy the competence requirements of **Rule 1.1, Competence**, to perform the fiduciary role. Lawyer must make adequate disclosures to comply with **Rule 1.4(a)(2)** (consult with client regarding means of achieving client objectives) and **Rule 1.4(b)** (explain matters to allow client to make informed decisions), and in doing so should disclose Lawyer's availability to serve as the fiduciary, discuss whether Client's goals will be best served by Lawyer serving as fiduciary, discuss that the professional fiduciary is typically fully bonded and whether or not a lawyer who will act as a fiduciary will be covered by errors and omissions insurance, discuss specifically the relative costs of having Lawyer or others serve as fiduciary, discuss the option of appointing Lawyer as co-trustee along with a family member to assist with the complexities of trust administration, and discuss the fact

that if Client appoints someone else as fiduciary they may retain a lawyer to advise and assist them as needed.

Pursuant to **Rule 2.1, Advisor** Lawyer must not allow his potential self-interest in serving as a fiduciary interfere with his exercise of independent professional judgment in recommending to Client the best choices for fiduciary. Moreover, Lawyer must consider whether serving as a fiduciary for Client would violate **Rule 1.7, Conflict of Interest: Current Client**. Although being named fiduciary does not always trigger the **Rule 1.7(b)** (representation notwithstanding conflict) requirement of confirming Client's informed consent in writing, it would be the best practice for Lawyer to obtain Client's informed consent in writing. Finally, Lawyer should advise Client the effect that **Rule 1.6, Confidentiality of Communications**, may have on Lawyer while acting in a fiduciary capacity. Lawyer may be the primary witness in a will contest, which could complicate the fiduciary's role, and the fiduciary has the authority to waive attorney-client privilege, thereby giving Lawyer/fiduciary the power to waive the privilege with respect to Client's communications with Lawyer.

Situation (2) is ethically prohibited by the Rules and could not be properly cured by subsequent client discussions and disclosure. Situation (3) may create a business interest that would trigger disclosures under **Rule 1.8(a)** (business transactions with clients).

### **21-AL Opinion 2010-03 (2010) [FULL TEXT HERE](#)**

**Facts**—Lawyer is retained to assist in the administration or probate of an estate and discovers that Personal Representative has misappropriated the estate funds or property.

**Analysis and Conclusion**—The general rule is that Lawyer represents the individual who hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, Lawyer represents only that person, unless Lawyer and client agree otherwise. If the person who retained Lawyer is Personal Representative, then Lawyer represents Personal Representative individually, unless Personal Representative and Lawyer agree otherwise. Lawyer must be careful not to give the impression that he

also represents the beneficiaries of the estate. To avoid violating **Rule 4.3, Dealing with Unrepresented Persons**, Lawyer must advise the beneficiaries and other interested parties in the estate known to Lawyer that Lawyer's only client is Personal Representative. Pursuant to **Rule 1.6, Confidentiality of Information** and **Rule 3.3, Candor Toward the Tribunal**, if Lawyer has actual knowledge that Personal Representative misappropriated funds or property, Lawyer must attempt to convince Personal Representative to either replace the misappropriated funds or to inform the court of the misappropriation. If Personal Representative refuses to do so, Lawyer should withdrawal from the matter and upon withdrawal ask the court to order an accounting of the estate.

**22-WA Opinion 2107 (2006)** [FULL TEXT HERE](#)

**Facts**—Lawyer is guardian for Incapacitated and also serves as lawyer for the guardianship. In Lawyer's capacity as guardian, Lawyer has concluded that a special needs trust should be established for the benefit of Incapacitated. Lawyer is unsure whether Lawyer, as guardian, can appoint himself to be the trustee of the special needs trust.

**Analysis and Conclusion**—Lawyer's duties in his role as guardian and trustee do not necessarily coincide, and the establishment of the special needs trust does not necessarily result in termination of the guardianship. Thus, it would be a conflict for Lawyer to seek appointment as trustee under **Rule 1.7, Conflict of Interest: Current Clients**. Furthermore, appointment of the Lawyer/guardian as trustee would violate **Rule 1.8: Conflict of Interest: Current Clients: Specific Rules**.

**23-NC Opinion 2006-11 (2006)** [FULL TEXT HERE](#)

**Facts**—Lawyer is asked by Third Party to prepare estate planning documents for Client.

**Analysis and Conclusion**—Pursuant to **Rule 5.4(c)** (maintaining professional judgment) Lawyer may not allow Third Party to direct or regulate Lawyer's professional judgment in rendering legal services for Client. Similarly, **Rule 1.8(f)** (fee paid by party other than the client) provides that when Lawyer's services are paid for by someone other than Client,

Lawyer may not accept the compensation unless Client gives informed consent, there is no interference with Lawyer's independent professional judgment or with the client-lawyer relationship, and confidential information relating to representation of Client is protected. Thus, Lawyer may not at the request of Third Party prepare estate planning documents for Client that purport to speak solely for Client without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from Client.

**24-MA Opinion 06-01 (2006) [FULL TEXT HERE](#)**

**Facts**—Lawyer is unsure whether she may draft Client's will naming Lawyer as executrix and whether as executrix Lawyer can retain herself as counsel.

**Analysis and Conclusion**—Pursuant to **Rule 2.1, Advisor** Lawyer must exercise independent professional judgment and render candid advice. Lawyer's interest in being named and getting fees as an executrix and counsel to the executrix are personal interests of Lawyer that may, depending on the qualifications of Lawyer, not be in the best interest of Client. However, Lawyer may name herself as executrix and retain herself as counsel to the executrix if she reasonably believes the representation will not be adversely affected and she obtains Client's consent, pursuant to **Rule 1.7, Conflict of Interest: Current Clients**.

**25-VA Opinion 1811 (2005) [FULL TEXT HERE](#)**

**Facts**—A and B are co-executors of an estate. Lawyer represented A. B has separate counsel. Lawyer's representation of A has recently ended and A has new counsel. Lawyer has transferred A's file to the new lawyer but has retained a copy of the materials. During the course of Lawyer's representation of A, A and B entered into an agreement that each would fully disclose financial information for purposes of administering the estate. Counsel for B has now contacted Lawyer asking for financial information from A's file as tax filing is due at the end of the month. The requested documents come within the terms of the agreement. A will not consent to Lawyer's release of the documents. Lawyer declined to provide his copy of the documents and instead referred B's counsel to A's new counsel.

**Analysis and Conclusion**— Lawyer’s duty of confidentiality continues after the client-lawyer relationship has terminated. The contents of A’s file are protected by **Rule 1.6, Confidentiality of Information**, and Lawyer is prohibited from disclosing the contents of A’s file unless one of the exceptions to **Rule 1.6** applies. Given these facts, the disclosure requested by B’s counsel does not fall within any exception to **Rule 1.6**. The agreement between A and B is not “law,” which would permit disclosure under **Rule 1.6(b)(6)** [Note: in Colo. RPC, this is Rule 1.6(b)(7)] (disclosure to comply with other law or court order). Therefore, Lawyer must not disclose the information until he is required to do so by a court order. Although there is a tenuous argument that **Rule 1.15, Safekeeping Property**, as it requires prompt delivery of funds to client or third party, would require Lawyer to give the information to B’s counsel, **Rule 1.6** is the proper authority for resolving the present issue and should prevail over this uncertain extension of **Rule 1.15**.

**26-NC Opinion 2002-7 (2002)** [FULL TEXT HERE](#)

**Facts**—Lawyer for deceased Client is asked to testify in a will contest or other litigation about the distribution of Client’s estate. Such testimony will require Lawyer to disclose Client’s confidences.

**Analysis and Conclusion**—Lawyer may reveal confidential information of a deceased client if disclosure was impliedly authorized by the client during client’s lifetime as necessary to carry out the goals of the representation. See **Rule 1.6(d)(2)** [Note: the equivalent in Colo. RPC is Rule 1.6(a)]. It is assumed that a client impliedly authorized release of confidential information to the personal representative of client’s estate after client’s death in order that the estate might be properly and thoroughly administered. Lawyer may testify in the will contest or other litigation if the Personal Representative consents to the disclosure. Moreover, **Rule 1.6(b)(6)** [Note: the equivalent in Colo. RPC is Rule 1.6(b)(7)] permits Lawyer to disclose client confidences if required by law or court order. If someone other than the Personal Representative calls Lawyer as a witness, Lawyer may testify to relevant confidential information of Client if Lawyer determines that attorney-client privilege does not apply as a matter of law or the court orders Lawyer to testify on this basis.

**27-ABA Formal Opinion 02-426 (2002) [FULL TEXT HERE](#)**

**Facts**—(1) Client asks Lawyer to serve as a fiduciary under a will or trust that the lawyer is preparing for Client; (2) while serving as fiduciary of an estate or trust, Lawyer wishes to appoint himself or herself or a member of Lawyer’s firm to represent Lawyer in Lawyer’s capacity as fiduciary; or (3) while serving as fiduciary, Lawyer or Lawyer’s firm is asked to represent either a beneficiary of a creditor of the estate or trust.

**Analysis and Conclusion**—Situation (1), Lawyer, having satisfied Lawyer’s obligations arising under **Rule 1.4(b)** (informed decisions of the client) or **Rule 1.7(b)** (permissible representation of a current client despite a conflict of interest), if applicable, may serve as a fiduciary under a will or trust that Lawyer is preparing for Client. Situation (2), there is no inherent conflict of interest under **Rule 1.7** when Lawyer, serving as fiduciary, appoints Lawyer or Lawyer’s law firm to serve as legal counsel for Lawyer as fiduciary, absent special circumstances such as when, pursuant to law of the jurisdiction or by agreement, the lawyer for the fiduciary also represents the estate as an entity or the beneficiaries of the trust. When serving as fiduciary and as lawyer for the fiduciary, however, the amount of compensation paid Lawyer and Lawyer’s firm for services in each capacity must be reasonable. Situation (3), Rule 1.7 will ordinarily prohibit Lawyer or Lawyer’s law firm from representing a beneficiary or creditor in a matter directly adverse to an estate or trust for which Lawyer is serving as fiduciary. Lawyer and Lawyer’s firm may, however, represent a creditor or beneficiary in unrelated matters upon compliance with Rule 1.7(b), including obtaining the informed consent of each affected client, confirmed in writing.

**28-ABA Formal Opinion 02-428 (2002) [FULL TEXT HERE](#)**

**Facts**—Lawyer is already providing estate planning services for Client. Client asks if she may recommend Lawyer to Testator to help him plan his estate. Testator is a widower whom Lawyer has not met before. Testator’s nearest relatives are several nephews and nieces. One of the nieces is Client, a potential beneficiary under Testator’s will. Client says she will pay Lawyer any part of the fee Testator does not pay.

**Analysis and Conclusion**—Lawyer may represent Testator as long as Lawyer does not permit Client to direct or regulate Lawyer’s professional judgement pursuant to **Rule 5.4(c)** (maintaining professional judgement). If Client agrees to pay or assure Lawyer’s fee, Testator’s informed consent to the arrangement must be obtained, and the other requirements of **Rule 1.8(f)** (fee paid by party other than the client). must be satisfied. Pursuant to **Rule 1.6, Confidentiality of Information**, Lawyer must obtain clear guidance from Client as to the extent to which Lawyer may use or reveal Client’s protected information in representing the Testator. Lawyer should advise Testator that he is concurrently performing estate planning services for Client. No conflict of interest arises under **Rule 1.7, Conflict of Interest: Current Clients**, because in this situation there is ordinarily no significant risk that Lawyer’s representation of either client will be materially limited by Lawyer’s representation of the other client.

**29-ABA Opinion 05-434 (2005) [FULL TEXT HERE](#)**

**Facts**—Lawyer is retained by Testator to prepare instruments disinheriting Beneficiary, who Lawyer represents on unrelated matters.

**Analysis and Conclusion**—Ordinarily there is no conflict of interest under **Rule 1.7, Conflict of Interest: Current Clients**, when Lawyer undertakes an engagement by Testator to disinherit Beneficiary, who Lawyer represents on unrelated matters. However, if Testator is restricted by a contractual or quasi-contractual legal obligation from disinheriting Beneficiary or if there is a significant risk that Lawyer’s responsibilities to Testator will be materially limited by Lawyer’s responsibilities to Beneficiary, as may be the case if Lawyer finds herself advising Testator whether to proceed with the disinheritance, there will likely be a conflict of interest under **Rule 1.7**.

**30-ABA Formal Opinion 94-380 (1994) [FULL TEXT HERE](#)**

**Facts**—Lawyer represents Client who is the fiduciary in a trust or estate matter and is unsure how this affects his obligations under the Rules.

**Analysis and Conclusion**—All the Rules prescribing Lawyer’s duties to a client apply. The fact that Client is a fiduciary and has obligations toward the beneficiaries does not in itself either expand or limit Lawyer’s obligations to Client under the Rules, nor impose on Lawyer obligations toward the beneficiaries that Lawyer would not have toward other third parties. Specifically, Lawyer’s obligation to preserve Client’s confidences under **Rule 1.6, Confidentiality of Information**, is not altered by the circumstance that Client is a fiduciary.

**31-NY Opinion 775 (2004)** [FULL TEXT HERE](#)

**Facts**—Lawyer drafted a will for an elderly former Client and maintained the original will for safekeeping. Sometime later, Client signed a letter, evidently prepared by someone else, requesting the return of the original will. Lawyer has reason to believe that Client is not competent and may be acting under the influence of a family member who would benefit if the will is destroyed and Client’s estate passes through intestacy.

**Analysis and Conclusion**—Generally Lawyer must return the will to Client upon Client’s request. Nothing in the Rules bars Lawyer from contacting Client directly in order to ascertain his genuine wishes regarding the disposition of the original will or to make a judgment about competence. If, after conducting whatever inquiry Lawyer deems appropriate, Lawyer still believes Client is not or may not be competent, Lawyer may seek judicial guidance on how to proceed.

**32-PA Opinion 2005-107 (2005)** [FULL TEXT HERE](#)

**Facts**—Lawyer is unsure whether he may represent deceased Client’s children/beneficiaries with regard to the administration of Client’s estate where he provided estate planning advice, served as scrivener of Client’s will, and initially counseled Client with regard to an anticipated purchase of an interest in Client’s family’s business prior to Client’s hiring of another law firm to handle that matter. Client and Client’s Wife were divorced, and no lawyer at Lawyer’s firm represented either Client or Wife with regard to the divorce and property settlement agreement. Lawyer prepared to meet with the executor of Client’s estate, but the meeting never took place and Lawyer was informed by



Client's father that another law firm would be handling the administration of the estate. Lawyer does not anticipate any beneficiary or other interested person will challenge Client's will. Lawyer also does not anticipate the initiation of any litigation regarding his representation of Client. Moreover, it is assumed that the interests of Client's children are equal and not adverse.

**Analysis and Conclusion—Rule 3.7, Lawyer as a Witness** does not prohibit Lawyer's representation of Client's children/beneficiaries because Lawyer does not anticipate the initiation of any litigation which would require him to be called as a witness regarding his representation of Client. Should circumstances change and it becomes apparent that Lawyer will be called as a witness, it may be appropriate for Lawyer to withdraw from the representation unless one of the exceptions listed in **Rule 3.7(a)** (exceptions to lawyer as a witness) is present. It appears that the interests of Client's children/beneficiaries are not adverse to those of Client, therefore **Rule 1.9, Duties to Former Clients** does not prohibit the representation. Moreover, **Rule 1.7, Conflict of Interest: Current Clients** does not preclude Lawyer's representation of Client's children/beneficiaries because it does not appear that there is a significant risk that his representation of children/beneficiaries will be materially limited by his responsibilities to Client.

**33-KS Opinion 99-3 (1999) [FULL TEXT HERE](#)**

**Facts**—Lawyer represents Decedent's intestate estate in which Widow is the administrator. The two heirs are Widow and Decedent's Son from a prior marriage. There is no question of heirship, and each heir has the right to inherit one half of any property listed in the name of Decedent only. Widow lives on an improved quarter section and appears to have the right to have the section set aside as her homestead. Widow has the right to household goods set aside to her, as well as a statutory allowance. Substantial joint tenancy property is passing to Widow. The intestate estate in Decedent's name is also substantial. There is considerable grain in storage, some of which is passing through joint tenancy and some of which is in Decedent's name only. Lawyer is unsure whether he may represent Widow in her personal capacity as heir and in her capacity as administratrix of the estate.

**Analysis and Conclusion**—Pursuant to **Rule 1.7, Conflict of Interest: Current Clients** Lawyer may not represent Widow in her personal capacity as heir and in her capacity as administratrix of the estate. Widow has a personal conflict in roles she cannot personally reconcile, thus the conflict is nonconsentable. The only exception is if all the heirs in the estate agree to Widow's position, which is unlikely under these circumstances.

**34-VT Opinion 2000-12 (2000) [FULL TEXT HERE](#)**

**Facts**—Firm A in VT was retained by out of state Firm B to review deeds and other real estate documents drafted by Firm B to effect an estate tax planning transaction for Firm B's clients, Husband and Wife. Firm A's role was limited to the review and approval of the deeds and other transfer documents. No significant financial information was provided to Firm A. Firm A did not participate in meetings with Husband and Wife and Firm B. The transfer documents were completed and recorded. Husband died a year later. . Proceedings to open an ancillary administration of Husband's estate were commenced in VT. Firm B retained Firm A to represent Personal Representative and Husband's estate in the ancillary proceedings. Wife, through other counsel, is contesting the ancillary proceeding and the appointment of Personal Representative in the ancillary proceeding and asserts that Firm A has a conflict of interest.

**Analysis and Conclusion**—Husband and Wife were the clients of both Firm A and Firm B. Firm A and Firm B should be treated as co-counsel in a single matter with regard to the estate planning. It is assumed that Wife is no longer a present client of Firm A or firm B based on her having obtained other counsel. Pursuant to **Rule 1.9, Duties to Former Clients**, Firm A is prohibited from undertaking this representation because the interest of Husband's estate and Personal Representative are adverse to those of Wife and are of the same or substantially related matter. Moreover, the fact that Wife is contesting the representation is evidence that Firm A does not have consent and will not be able to obtain Wife's consent.

**35-MA Opinion 97-3 (1997) [FULL TEXT HERE](#)**

**Facts**—Lawyer assisted in drafting a will for Husband’s First Wife. First Wife’s will established a trust with life benefits to Husband, who was given a power of appointment over the corpus of the trust. If the power was not exercised, the corpus would go to the children of Husband’s first marriage. First Wife died and Husband married Second Wife. Before Husband’s death, he revised his will to exercise the power of appointment granted by First Wife in favor of Second Wife. After Husband’s death, Children (from Husband’s first marriage) sued the executor of Husband’s estate and Second Wife, contending their mother intended the corpus to go to Children and that Husband agreed with First Wife not to exercise the power of appointment. In the litigation to date, Children have presented some evidence supporting their contention, but other evidence has indicated that First Wife intended Husband should be free to exercise the power according to his responsibilities at the time. Lawyer is unsure whether he is barred from defending Husband’s estate in the suit because he assisted First Wife in preparing her will.

**Analysis and Conclusion**—Lawyer should not represent Husband’s estate in a lawsuit brought by Children, who would have received the corpus had Husband not revised his will to exercise the power of appointment. Such a representation would violate **Rule 1.9, Duties to Former Clients** because Lawyer’s participation in drafting First Wife’s will is substantially related to the matter of the lawsuit and Children’s allegations are sufficient to show representing Husband’s estate in this matter would be materially adverse to the interests of First Wife.

**36-NC Opinion 99-4 (1999) [FULL TEXT HERE](#)**

**Facts**—Mother loaned money to Son A. Subsequently, Mother signed a statement indicating the loan had been settled. Mother died testate, leaving a will devising the majority of her estate to her five children equally and naming her three Sons, A, B, and C, co-executors. Letters testamentary were granted to Sons A, B, and C. Son B hired Lawyer to assist with the administration of the estate. Sons B and C believe the money loaned to Son A by Mother during her lifetime should be collected by the estate as debt or treated as an advance to Son A. Lawyer filed a motion to have Son A’s letters testamentary revoked

and wrote a letter to Son A requesting repayment of the debt. Lawyer is unsure whether he may make a motion to remove Son A as a co-executor and pursue a claim against him.

**Analysis and Conclusion**—When Lawyer accepted employment in regard to the estate, Lawyer undertook to represent the personal representatives their official capacity and the estate as an entity. After undertaking to represent all the co-executors, Lawyer may not take action to have one co-executor removed.

**37-KY Opinion E-401 (1997) [FULL TEXT HERE](#)**

**Facts**—Lawyer represents Client, who is a fiduciary of a decedent’s estate or trust. [Note: this Opinion is not in response to a specific set of facts, but is an exposition of a lawyer’s obligations under the Rules when representing a fiduciary. The Opinion cites extensively from ABA Formal Op. 94-380 (1994) and the ACTEC Commentaries on the Model Rules of Professional Conduct.]

**Analysis and Conclusion**—Lawyer who represents a Client who is a fiduciary of an estate or trust does not represent the estate or trust. Lawyer’s obligation to Client is not expanded or limited by the Rules, and Lawyer does not have obligations to the beneficiaries of the decedent’s trust or estate that Lawyer would not have toward third parties. Lawyer’s obligations to preserve client confidences under **Rule 1.6,**

**Confidentiality of Information,** is not altered by the fact that Client is a fiduciary.

Pursuant to **Rule 1.7, Conflicts of Interest: Current Clients,** Lawyer may represent the beneficiaries of decedent’s estate or trust if Lawyer explains the limitations on Lawyer’s actions in the event a conflict arises and the consequences if a conflict occurs and obtains consent from the multiple clients.

**38-AZ Opinion 96-07 (1996) [FULL TEXT HERE](#)**

**Facts**—Lawyer represents Client who has requested that Lawyer draft a revocable living trust with a pour over will. Client has requested that Lawyer be named as the personal representative and as successor trustee. Lawyer has advised Client that Lawyer would prefer that Client name a family member, a trusted friend or a corporate fiduciary such as a

bank as personal representative and successor trustee. Client has rejected the option of a corporate fiduciary and the only family member Client trusts to serve in such a capacity has declined.

**Analysis and Conclusion**—Lawyer is not prohibited by the Rules from writing a will or trust that names Lawyer as personal representative or as successor trustee. Such a representation does not constitute a gift under **Rule 1.8(c)** (soliciting gifts from clients), but Lawyer may not recover trustee fees in addition to legal fees for the same work. Moreover, pursuant to **Rule 2.1, Advisor** Lawyer must exercise independent professional judgment when acting as both trustee and counsel to the estate.

**39-MT Opinion 951231 (1995)** [FULL TEXT HERE](#)

**Facts**—Lawyer is frequently asked by Clients to serve as either primary or successor trustee and/or as personal representative in his will.

**Analysis and Conclusion**— Neither **Rule 1.8(c)** (soliciting gifts from clients) nor any other Rule prohibits Lawyer from being named personal representative or trustee in Client’s will.

**40-MD Opinion 2000-44 (2000)** [FULL TEXT HERE](#)

**Facts**—Lawyer represented Trustee of a testamentary trust who was also a lifetime beneficiary of that trust. Trustee was mother and grandmother of the contingent beneficiaries of the trust. Two of the contingent beneficiaries were daughters X and Y. In litigation that concluded a year ago, Lawyer represented Trustee and X in litigation against Y. Information regarding the trust was withheld by Lawyer, Trustee, and X from Y. During the course of litigation, Trustee resigned her position of Trustee. X then became the successor trustee/contingent beneficiary. Lawyer continued to represent X as successor trustee and in an individual capacity. Trustee died after conclusion of the litigation. Under the terms of the trust, the trust was to be terminated and the property in the trust was subject to distribution to the beneficiaries upon Trustee’s death. Nevertheless, X, in her capacity as successor trustee, took control of the assets and income of the trust to complete renovations of the trust property. Following the advice of Lawyer, X expended

trust income, borrowed money, and performed renovations to trust property without consulting or getting permission from the other vested beneficiaries, including Y. Lawyer indicates that X was relying in part on an exculpatory clause in the trust that would appear to insulate her from a number of the categories of claims which might be brought against her. Y asked Lawyer to discontinue representation of X due to a conflict of interest arising out of the fact that Y is now a one-third owner of the trust property and does not want Lawyer who had previously been against her in litigation to represent her interests. Lawyer stated he was not at present representing X in her individual capacity, but rather only in her capacity as trustee. Lawyer has attempted to avoid problems relating to the claims of impermissible conflict by requesting that X's estate and trust related matters be addressed to him in separate capacity and billed separately from X in her individual capacity.

**Analysis and Conclusion**—There are potential conflicts between Lawyer's client X as an individual and client X as trustee. Pursuant to **Rule 1.7, Conflicts of Interest: Current Clients**, Lawyer should withdraw from representing X in her capacity as trustee. Given these facts, it is evident that there would be adverse effects resulting from representing X in her dual capacities, therefore consent will not resolve this issue under **Rule 1.7**.

**41-PA Opinion 96-036 (1996)** [FULL TEXT HERE](#)

**Facts**—Lawyer recommended Client establish a trust during Client's lifetime. Client has asked Lawyer to draft the trust document and serve as trustee.

**Analysis and Conclusion**—The Rules do not prohibit Lawyer from naming himself as trustee of Client's trust that Lawyer is drafting, when asked to do so by Client, provided that Lawyer complies with the relevant provisions of the Rules and has not unduly influenced or improperly solicited Client to name Lawyer as trustee. Moreover, to comply with **Rule 1.4, Communications**, Lawyer must advise Client of the duties of a trustee, Lawyer's abilities to perform those duties, the availability and ability of others to perform those duties, the compensation payable to a trustee, the potential conflicts of interest, as well as any other factors relevant to the particular circumstances of Client. Pursuant to **Rule 1.1, Competence**, Lawyer must also determine whether he is able to perform the

duties of trustee competently. Moreover, Lawyer should discuss possible material limitation on Lawyer's ability to give independent with respect to serving as trustee in light of his own interests to comply with **Rule 1.7, Conflicts of Interest: Current Clients**.

**42-PA Opinion 96-74 (1996)** [FULL TEXT HERE](#)

**Facts**—Client asks Lawyer to act as trustee under what had been an inter vivos revocable trust, the grantor of which has recently died. A principal asset of the trust is shares in a family-owned corporation, which are the subject of a buy-sell agreement with other family members, and a dispute is in the offing as to the price to be paid for those shares.

**Analysis and Conclusion**—Given these facts, if Lawyer acts as trustee, Lawyer would be in the position of seeking the highest price for the trust, while the family members would be seeking to acquire the shares at the lowest price. This would create a conflict of interest contrary to **Rule 1.7, Conflicts of Interest: Current Clients**, prohibiting Lawyer from acting on behalf of the trust, unless Lawyer obtains informed consent. [Note: this Opinion is unclear regarding in what capacity Client is requesting Lawyer to assume the duties of trustee.]

**43-NC Opinion RCP 229 (1996)** [FULL TEXT HERE](#)

**Facts**—(1) Husband and Wife asked Lawyer to assist them with estate planning. Husband and Wife agreed that all the property of the first to die would be left to the surviving spouse with the exception of a small trust that would be established at Husband's death for the benefit of the couple's minor children. The trust would be funded prior to the distribution of the residuary estate to Wife. Husband has a terminal interest and the couple anticipates that Husband will be the first to die. The wills were drafted and signed. Husband subsequently called Lawyer and expressed concern about Wife's ability to manage her funds and asked Lawyer to draft a codicil to his will increasing the amount put in trust for the minor children, thereby reducing the residuary bequest to Wife.

(2) In matter unrelated to Situation (1), different Husband X meets with Lawyer regarding his personal estate plan. Husband X wants to minimize Wife X's share of his estate

because he believes she suffers from dementia. It is Husband X's second marriage, there are no children, and Wife X has her own assets.

**Analysis and Conclusion**—Situation (1): Pursuant to **Rule 5.1(a)** [Note: this Rule, since superseded, is comparable to **Rule 1.7, Conflict of Interest: Current Clients** of Colo. RPC] Lawyer may only prepare the codicil without informing Wife if there was no clearly expressed intent by Husband and Wife, at the time of the preparation of the original estate planning documents, that neither spouse would change the estate plan without informing the other spouse and if the provisions of the codicil are consistent with the best interests of Wife.

Situation (2): **Rule 7.1(a)(1)** [Note: this Rule, since superseded, is comparable to **Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer**, of Colo. RPC] permits Lawyer to seek the lawful objectives of Husband X, which includes assisting Husband X in preparing an estate plan that will minimize Wife X's share of Husband X's estate, through reasonably available means permitted by the laws and the Rules.

**44-PA Opinion 98-44 (1998)** [FULL TEXT HERE](#)

**Facts**—Client asks Lawyer to prepare a new will. At the conference, Client was accompanied by Friend, whom Client specifically requested sit in with him during the conference. Certain changes from Client's previous will were made, including an increase in the bequest to Client's Daughter and a minor increase in a gift to Friend. Inquirer felt there was no aspect of improper influence on Client or other untoward conduct on the part of Friend. Lawyer set about preparation of the new will, but Client died before the will could be signed. Daughter has requested Lawyer disclose to her the proposed changes Client would have made to his will.

**Analysis and Conclusion**—Pursuant to **Rule 1.6(a)** (implied authorization to disclose information) Lawyer has implied authority to take appropriate action on Client's behalf, which would include disclosing Client's proposed changes to his will. Failure to take such



action in some circumstances would be a violation of **Rule 8.4(d)** (conduct prejudicial to the administration of justice).

**45-FL Opinion 95-4 (1995)** [FULL TEXT HERE](#)

**Facts**—Lawyer represents Husband and Wife in connection with estate planning services. Husband and Wife have substantial individual assets and they also own substantial jointly-held property. Lawyer prepared updated wills that Husband and Wife signed. Like their previous wills, the updated wills primarily benefit the survivor of them for his or her life, with beneficial disposition of the survivor being made equally to their children. Husband, Wife, and Lawyer have always shared all relevant asset and financial information. Several months after the execution of the updated wills, Husband confers separately with Lawyer and reveals he has just executed a codicil (prepared by another law firm) that makes a substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship. Husband tells Lawyer that Wife does not know about the extra-marital relationship or the new codicil, and Husband asks Lawyer to advise him regarding Wife’s rights of election in the event she survives Husband.

**Analysis and Conclusion**—Lawyer is not required to discuss issues regarding confidentiality at the outset of representation of Husband and Wife. Pursuant to **Rule 1.6, Confidentiality of Information**, Lawyer may not reveal confidential information of Husband to Wife. Given these facts, Lawyer must withdraw from the representation of both Husband and Wife because a conflict of interest in violation of **Rule 1.7, Conflicts of Interest: Current Clients**, arises when Lawyer must maintain Husband’s separate confidences regarding the joint representation, and Lawyer is unable to obtain consent from Wife without disclosing Husband’s confidential information protected by **Rule 1.6**.

**46-MT Opinion 960731 (1996)** [FULL TEXT HERE](#)

**Facts**—Husband and Wife jointly retain Lawyer for estate planning services.

**Analysis and Conclusion**—Unless there is evidence of conflict between Husband and Wife, **Rule 1.7, Conflicts of Interest: Current Clients**, does not require that Lawyer

communicate the potential for conflict. However, if a conflict becomes evident or if Lawyer's independent judgment is restricted, then the lawyer must obtain consent under **Rule 1.7(b)** (permissible representation of a current client despite a conflict of interest).

**47-RI Opinion 96-07 (1996)** [FULL TEXT HERE](#)

**Facts**—Lawyer prepared an estate plan including trusts and wills for Husband and Wife. Years later, Wife asked Lawyer to redesign her estate plan to exclude Husband because she is divorcing Husband. Both Husband and Wife have other counsel for the divorce.

**Analysis and Conclusion**—Pursuant to **Rule 1.9, Duties to Former Clients Lawyer**, if Wife's modification of her estate becomes materially adverse to Husband's interest, Lawyer may not redesign Wife's estate plan absent Husband's consent.

**48-MO Opinion 20030016 (2003)** [FULL TEXT HERE](#)

**Facts**—Client came to Lawyer with a rough draft of a trust. Client provided Lawyer with information Lawyer needed to complete the trust document and some other estate planning. Client died before Lawyer could prepare the documents. Lawyer has received a request to produce all documents related to estate planning for Client to Client's family.

**Analysis and Conclusion**—Lawyer may not disclose any documents or information unless Lawyer is ordered to do so by a court after the issue of confidentiality under **Rule 1.6, Confidentiality of Information**, has been fully presented. It is not necessary for Lawyer to appeal such an order. Lawyer, in the absence of prior express consent from the decedent, may only disclose information or documents clearly necessary to effectuate decedent's intent, such as an executed will or similar documents.

**49-VA Opinion 1778 (2003)** [FULL TEXT HERE](#)

**Facts**—Lawyer represents administrator of an estate. Administrator is Husband of deceased Wife. Husband presented to Lawyer that there was no will. However, other family members locate a will, which is then admitted to probate. The will did not specify an executor, and Husband remains administrator of the estate. The will leaves nothing to

Husband. Husband chooses to take his statutory elective share of the estate. Litigation ensues between Husband and the beneficiaries regarding whether certain real estate belongs in the augmented estate.

**Analysis and Conclusion**— Lawyer’s client is Husband, not the beneficiaries of the estate. There is no conflict under **Rule 1.7, Conflicts of Interest: Current Clients**, that would prohibit Lawyer from representing Husband individually in the litigation and in his capacity as administrator of the estate. Lawyer should be mindful of Husband’s fiduciary duty to the beneficiaries. If Lawyer advises or assists Husband in actions that breach Husband’s fiduciary duty, Lawyer could be in violation of **Rule 1.2(d)** (prohibition against assisting client fraud or criminal activity).

**50-NH Opinion 2014-15/5 (2014)** [FULL TEXT HERE](#)

**Facts**—Lawyer represents elderly Client who is threatened by ongoing elder abuse or other forms of substantial bodily injury. Lawyer wants to disclose confidential information relating to Client, over the objection of Client, to protect Client from the abuse.

**Analysis and Conclusion**—If Lawyer determines that Client has diminished capacity under **Rule 1.14, Client with Diminished Capacity**, then **Rule 1.14(c)** (implied authorization to reveal otherwise confidential information to protect client with diminished capacity) impliedly authorizes Lawyer under **Rule 1.6(a)** (implied authorization to disclose client information) to disclose confidential Client information, without Client’s consent, to the extent reasonably necessary to protect Client from elder abuse or other threatened substantial bodily injury. Even if Lawyer does not determine that Client has diminished capacity, Lawyer may disclose information pursuant to **Rule 1.6(b)(1)** (disclosure to prevent death or substantial bodily injury) if Lawyer determines that death or substantial bodily injury is reasonably certain to occur. Mere suspicion that elder abuse or other forms of harm might be occurring is not adequate to trigger **Rule 1.6(b)(1)**. There must be sufficient evidence to lead to an actual supposition that Client is being abused physically or psychologically or threatened with such abuse. Moreover, Lawyer should seek consent from Client directly before taking action.

**51-CO Opinion 132 (2017) [FULL TEXT HERE](#)**

**Facts** – What are the duties of confidentiality of a lawyer who drafted a will for Client following death of Client?

**Analysis and Conclusion** - Unless Client had authorized Lawyer to disclose information regarding Client's testamentary intentions or deceased Client's Personal Representative gives consent, Lawyer's duty of confidentiality under **Rule 1.6, Confidentiality of Information** continues after Client's death and prohibits Lawyer from disclosing confidential information regarding the representation, including information on Client's intentions. [The opinion rejects the concept of implied authorization of Lawyer to disclose confidential information to ensure Client's wishes are followed adopted in ethics opinions from certain other states. See, ACTEC Commentaries, pp. 88-91.]

**52-MA Opinion 2017-3 (2017) [FULL TEXT HERE](#)**

**Facts** - May Lawyer release file regarding execution of the will of deceased Client to the lawyer seeking to probate the will of deceased Client when there is a pending will contest. No personal representative or other fiduciary has been appointed.

**Analysis and Conclusion** - **Rule 1.6, Confidentiality of Information** prohibits Lawyer from disclosing confidential information regarding the representation, including information from Lawyer's file regarding execution of deceased Client's will, in the absence of consent of an appointed personal representative. However, Lawyer may have a limited ability to give information when called to testify regarding the circumstances surrounding the execution of the will.

**53- NY Opinion 1125 (2017) [FULL TEXT HERE](#)**

**Facts** - Lawyer drafted a will in which Client disinherited a son. Client died. Disinherited son, who has a copy of the will with Lawyer's signature on it, asks Lawyer to confirm Lawyer drafted the will.

**Analysis and Conclusion** - As son is neither a beneficiary nor executor, Lawyer has no obligation to communicate with him. **Rule 1.9, Duties to Former Clients** in paragraph (c) provides that Lawyer may not reveal information relating to the representation of a former client [by definition a deceased client is a former client] except as **Rule 1.6, Confidentiality of Information** would permit with respect to a current client, and Rule 1.6 protects the information sought. Although information that is generally known in the local community is not protected as confidential information, information is not generally known simply because it is in the public domain or available in a public file.

**54-NY Opinion 1126 (2017)** [FULL TEXT HERE](#)

**Facts** - Lawyer represented husband and wife in drafting a joint revocable trust. The engagement letter signed by both provides that Lawyer may not withhold information from either. Trust agreement provides that upon wife's death, her share of the trust estate would be distributed to a credit shelter trust for the benefit of husband during his lifetime and upon husband's death, be distributed to wife's children from a prior marriage. Wife died and husband met with Lawyer to inquire about administration of the trust but did not retain Lawyer to advise him. Husband died and husband's sister, named in trust instrument as husband's successor trustee, contacted Lawyer and advised that husband failed to fund the credit shelter trust upon wife's death, but put those assets in his own name for the benefit of the sister, effectively disinheriting wife's children. Lawyer declined to represent the sister in administering the trust estate. Lawyer asks if Lawyer must advise wife's children of the failure to administer the trust estate properly.

**Analysis and Conclusion** - Under **Rule 1.18, Duties to Prospective Client** the sister is presumed to be a prospective client to whom Lawyer owes duties of confidentiality as if the sister was a former client. **Rule 1.9, Duties to Former Clients** prohibits use or disclosure of confidential information protected by **Rule 1.6, Confidentiality of Information** to the disadvantage of the former client. The information regarding the improper administration of the trust is confidential information under Rule 1.6. Since the sister did not disclose how she intends to proceed with administration of the estate, the exception in Rule 1.6(b) regarding disclosure of confidential information to prevent commission of a crime does not

apply, and Lawyer does not have the sister's consent to disclosure. Thus, Lawyer may not disclose information regarding husband's improper administration of the trust to wife's children.

**55-NY Opinion 1133 (2017)** [FULL TEXT HERE](#)

**Facts** - Lawyer, by arrangement (not involving compensation) with another lawyer who is closing the lawyer's practice, received approximately 800 files containing executed wills and trust documents. The transferring lawyer notified all clients of the transfer and the name and contact information for Lawyer, that the files could be retrieved by the client or sent to another lawyer of the client's choice, and that failure to retrieve the files or request further transfer within approximately four months would be deemed consent to transfer of the file to Lawyer. Lawyer wants to send letters to all clients whose files Lawyer received, offering legal assistance in reviewing the files and recommending updates to the wills and trust documents if appropriate.

**Analysis and Conclusion** - Mere transfer and possession of the files does not create a lawyer-client relationship with the clients, and Lawyer may not ethically examine the confidential information in the files more than reasonably necessary to identify the clients' contact information. Lawyer may contact the clients to offer Lawyer's legal services with respect to the wills and trust documents in the files, provided Lawyer complies with **Rule 1.15(c) [CO Rule 1.15A], General Duties of Lawyers Regarding Property of Clients and Third Parties** in maintaining the files and **Rule 7.1, Communications Regarding a Lawyer's Services** and **Rule 7.3, Direct Contact with Prospective Clients**. The opinion also analyses whether this was the sale of law practice subject to **Rule 1.17, Sale of Law Practice** and concluded that it was not.

**56-OR Opinion 2018-194 (2018)** [FULL TEXT HERE](#)

**Facts** - A married couple approaches Lawyer and asks Lawyer to represent them in estate planning. They have been married for 15 years, both have children from prior marriages, and there are no children of their current marriage. They own their home as tenants by the entirety but have kept most of their assets separate. Spouse A has substantially more

assets than Spouse B. They want to have their separate assets go to their respective children and their joint assets pass to the surviving spouse by right of survivorship. Spouse B would be entitled to an elective share claim if Spouse A were to die first, which would defeat their joint intent for their estate plan. There is no prenuptial agreement.

**Analysis and Conclusion** - Under **Rule 1.7, Conflicts of Interest: Current Clients**,

(a) Lawyer may provide information to both spouses about the elective share and its potential waiver. Each spouse has a fiduciary obligation to the other requiring full disclosure and fairness. Providing that information is consistent with their duties to each other; (b) Lawyer may not advise Spouse B whether or not to waive the elective share due to the conflict of interest between the spouses in that issue and may not draft such a waiver, absent waiver of the conflict with informed consent of both spouses; such a waiver may be possible, but is likely to be non-consentable given the facts, and such a course would be perilous for Lawyer; (c) if both spouses take independent legal advice on the issue of the elective share waiver and execute an agreement to waive or not to waive the elective share, Lawyer may represent the spouses jointly in preparation of their estate planning absent other circumstances that would create a conflict of interest under Rule 1.7.

**57-PA Opinion 2017-025 (2017)** [FULL TEXT HERE](#)

**Facts** - Lawyer states that Lawyer represents estate of individual who died intestate, and Lawyer's firm has entered an appearance in Orphans' Court. The administrator of the estate has admitted improperly withdrawing money from the estate. Lawyer advised the administrator that he must immediately return the money and that the report to the court must accurately reflect the withdrawal and return of the money. Lawyer assumes the administrator will not return the money.

**Analysis and Conclusion** - Regarding who it's the client, the opinion does not determine whether a lawyer may represent an estate, citing conflicting PA cases on the subject. **Rule 1.6, Confidentiality of Information**, paragraph (b), requires Lawyer to disclose information regarding the administrator's improper actions in connection with complying with **Rule 3.3, Candor Toward the Tribunal** if the estate is subject to an adjudicative

proceeding. If the administrator is the client, paragraph (c) of Rule 1.6 permits, but does not require, Lawyer to disclose that information, including to the beneficiaries of the estate, if Lawyer reasonably believes it necessary to prevent the client from committing a criminal act (here, embezzlement) that Lawyer reasonably believes is likely to result in substantial injury to the financial interests or property of another. If the administrator does not return the money, Lawyer should withdraw from the representation, seeking court approval if required. In the motion to withdraw, Lawyer may disclose the administrator's conduct after advising the administrator of Lawyer's intent to do so.

**58-PA Opinion 2017-100 (2017) [FULL TEXT HERE](#)**

**Facts** - This opinion is an analysis of a lawyer's ethical duties in representing a fiduciary Client whose conduct may harm or has harmed beneficiaries.

**Analysis and Conclusion** - Lawyer must avoid assisting Client in conduct that Lawyer knows is criminal or fraudulent. (**Rule 1.0, Terminology**, defining "fraud" and "fraudulent"; **Rule 1.2, Scope of Representation and allocation of Authority Between Client and Lawyer**, paragraph (d) prohibiting Lawyer from assisting Client in conduct Lawyer knows is criminal or fraudulent). If Client refuses to cease engaging in such conduct, Lawyer must withdraw from the representation. (**Rule 1.16 Declining or Terminating Representation**) Lawyer may, but is not required, to inform the beneficiaries of the fiduciary's conduct to prevent the client from committing a criminal act that Lawyer believes is likely to result in substantial financial injury to the financial interests of the beneficiaries, or to prevent, mitigate or rectify the consequences of Client's criminal or fraudulent act in the commission of which the lawyer's service are being or have been used. (**Rule 1.6, Confidentiality of Information**) If the matter is before a tribunal, Lawyer must consider whether Lawyer has an affirmative duty to inform the tribunal of past, present, or future criminal or fraudulent conduct by the fiduciary Client. (**Rule 3.3, Candor Toward the Tribunal**)

**59-NC Opinion 2017-2 (2017) [FULL TEXT HERE](#)**

What are Lawyer's obligations under **Rule 1.15, Safekeeping Property** in the following circumstances? [The comparable CO Rule is 1.15, but there are many substantive



differences between the two rules. The reader is advised to refer to the language of NC Rule 1.15 at <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-115-3-records-and-accountings/> .]

(1) Lawyer is named executor in a will. Testator dies and Lawyer begins serving as personal representative of the estate. Lawyer intends to seek compensation for services. Lawyer opens a checking account for the estate, is a signatory on the account, and manages the account.

Opinion- Under Rule 1.15 the checking account must be established as a lawyer's fiduciary account, and the lawyer will be providing professional fiduciary services. In managing the account and providing fiduciary services, Lawyer must comply with the requirements of Rule 1.15.

(2) Lawyer represents the estate of B and the personal representative of the estate (PR). Lawyer opens a checking account and designates PR as signatory. PR will receive bank statements, but Lawyer intends to retain possession of the checkbook, prepare checks for PR's signature as needed, and deposit estate funds into the account as received.

Opinion- Rule 1.15 applies only to the extent Lawyer has control over the account. Here, Lawyer is not a signatory on the account and so is not responsible for, among other things, review and reconciliation of the account. However, Lawyer is responsible under Rule 1.15 for items in Lawyer's possession or control, such as properly safeguarding the checkbook, safeguarding and depositing (or promptly informing PR to deposit) checks received that are estate assets. Lawyer must provide competent and diligent representation under **Rule 1.1, Competence** and **Rule 1.3, Diligence**. These require Lawyer to properly advise PR of PR's duties with respect to the estate and the account. If Lawyer prepares checks for PR's signature, Lawyer must periodically review the balance of the account to ensure against preparation of a check in amount exceeding that balance.

(3) Lawyer represents the estate of C and the personal representative of the estate (PR). Lawyer opens a checking account and designates both Lawyer and PR as signatories. Lawyer has the checkbook and receives bank statements.

Opinion- Lawyer has control over the account and therefore must comply with Rule 1.15 regarding the account. The account must be opened as Lawyer's fiduciary account, and Lawyer must review it as required by the Rule. Lawyer must properly advise PR of PR's duties with respect to the estate and the account.

- (4) Lawyer represents the estate of D and the personal representative of the estate (PR). PR opens a checking account and manages the account. PR has the checkbook and prepares checks at lawyer's direction.

Opinion- Lawyer has no obligations with respect to the account under Rule 1.15. See (2), above.

- (5) The facts are the same as (4), with PR the sole signatory on the account, but PR asks Lawyer's paralegal to take possession of the checkbook. Monthly, PR goes to Lawyer's office, writes checks, and gives the bills and checks to the paralegal, who mails the checks.

Opinion- See (2), above. Lawyer must make reasonable efforts to ensure that the paralegal's conduct is compatible with the professional obligations of Lawyer, including safeguarding the checkbook.

- (6) [This question and opinion deal with 2016 amendments to NC Rule 1.15 and are not addressed in this summary.]

- (7) In (1) and (2), above, may Lawyer management of the fiduciary account to a nonlawyer assistant?

Opinion- Yes, but responsibility for periodic account reviews required by Rule 1.15 may not be delegated. Lawyer remains professionally responsible for compliance with Rule 1.15. Therefore, the assistant must be appropriately instructed, trained, and supervised concerning the requirements of Rule 1.15.

- (8) In the circumstances of (7), above, may the nonlawyer assistant be a signatory on the checking account?

Opinion- Yes, but it increases the risk of internal fraud. Lawyer should not permit this unless Lawyer's firm has established fraud prevention procedures that will protect the fiduciary funds from internal theft.

**60-TX Opinion 678 (2018)** [FULL TEXT HERE](#)

**Facts** - Parent of Lawyer died and the parent's will named Lawyer and executor of deceased's estate and Lawyer and Lawyer's siblings as beneficiaries. Lawyer did not draft the will. Lawyer intends to represent Lawyer as executor, and if Lawyer cannot, intends to retain another lawyer in Lawyer's firm to do so.

**Analysis and Conclusion** - The opinion discusses in detail the various duties of an executor. Lawyer must analyze the potential for conflict of interest both before and during the representation under **Rule 1.06, Conflict of Interest: General Rule** [the comparable CO Rule is 1.7, Conflict of Interest: Current Clients]. Lawyer may represent Lawyer as executor if Lawyer reasonably believes the representation will not be materially affected by Lawyer's or Lawyer's firm's own interests. If Lawyer may not represent Lawyer as executor, neither may another lawyer in Lawyer's firm. Lawyer should be aware of the additional limitations that may arise under **Rule 3.08, Lawyer as Witness** [the comparable CO Rule is 3.7, Lawyer as Witness].

[This Practice Area Ethics Advisory was prepared by Committee members Douglas Foote, Robbi Jackson, Michael Kirtland, Allen Sparkman, and Julie Williamson. The authors gratefully acknowledge the assistance of Laura Jacobi, then a 2L at SMU Dedman School of Law (who we happily note has now graduated, passed the Texas bar, and is in private practice), in preparing most of these summaries. The conciseness and accuracy of the summaries are hers; any errors are solely ours. We also are grateful to the CBA Trust & Estate Section for their input to initial topics for consideration as Advisories and for their review and very helpful comments on the draft that resulted in this Practice Area Advisory. We note that the Section's review and input does not necessarily constitute its endorsement of all of the positions taken in this Practice Area Advisory, in particular the position taken in CBA Formal Op. 132 regarding the duties of confidentiality of a lawyer for a deceased testator regarding disclosure of circumstances surrounding the drafting of the testator's will.]

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*["Op. Summary" refers to the number given in this Practice Area Ethics Advisory to each of the state and ABA opinion summaries in Section II.]*

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- Op. Summary 19 – PA Op. 2009-072 (2009)
- Op. Summary 31 – NY Op. 775 (2004)
- Op. Summary 55 – NY Op. 1133 (2017)

### **Communication with Client**

- Committee Advisory 3
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- Op. Summary 2 – Phila. Bar Op. 2013-6 (2013)
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Op. Summary 25 – VA Op. 1811 (2005)

Op. Summary 26 – NC Op. 2002-7 (2003)

Op. Summary 28 – ABA Formal Op. 02-428 (2002)

Op. Summary 30 – ABA Formal Op. 94-380 (1994)

Op. Summary 44 – PA Op. 98-44 (1998)

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## **Conflict of Interest**

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CBA Formal Op. 57 (1981; addendum 1995)

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Op. Summary 11 – PA Op. 2015-023 (2015)

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Op. Summary 27 – ABA Formal Op. 02-426 (2002)

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### **Deceased Client**

Op. Summary 1 – PA Op. 2012-024 (2012)

Op. Summary 4 – PA Op. 22011-22 (2011)



Op. Summary 5 – SC Op. 12-10 (2012)  
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Op. Summary 9 – MO Op. 2010-0052 (2010)  
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### **Decision-making Authority of Client**

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### **Disabled Client**

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## **Disclosure**

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## **Drafting Will to Disinherit Beneficiary Who is also a Client**

Op. Summary 29 – ABA Formal Op. 05-434 (2004)

## **Drafting Will on Recommendation of Potential Beneficiary Who is also a Client**

Op. Summary 28 – ABA Formal Op. 02-428 (2002)

## **Duties of Lawyer to Disclose Error to Client**

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## **Duties of Lawyer for a Fiduciary to an Unrepresented Beneficiary**

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## **Estates and Estate Planning**

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CBA Formal Op. 87 (1990; Rev. 1991; addendum 1995)

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Op. Summary 15 – Phila. Bar Op. 2008-10 (2008)

Op. Summary 16 - Phila. Bar Op. 2008-9 (2008)

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Op. Summary 37 – KY Op. E-401 (1997)  
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### **Executor**

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### **Financial Planning**

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### **Former Client**

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### **Fraud**

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### **Funds of Missing Client**

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### **Guardian**

CBA Formal Op. 23 (1962; addendum 1995)  
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### **Lawyer-Client Relationship**

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### **Lawyer as Fiduciary for Estate or Trust**

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Op. Summary 27 – ABA Formal Op. 02-426 (2002)  
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### **Lawyer as Witness**

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Op. Summary 60 – TX Op. 678 (2018)

### **Malpractice**

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### **Multiple Representation**

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CBA Formal Op. 68 (1985; addendum 1995)

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### **Payment of Fees by a Third Party, such as a Beneficiary**

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### **Prospective Client**

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### **Soliciting Clients**

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### **Transfer of Client Files**

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Op. Summary 38 – AZ Op. 96-07 (1996)  
Op. Summary 39 – MT Op. 951231 (1995)  
Op. Summary 40 – MD Op. 2000-44 (2000)  
Op. Summary 41 – PA Op. 96-36 (1996)  
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### **Waiver**

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### **Will**

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### **Withdrawal from Representation**

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