SELECTED ETHICS ISSUES FOR THE ESTATE PLANNER
ACTEC COMMENTARIES AND VIRGINIA LAW

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INTRODUCTION

A. Sources of Information.

1. The American College of Trust and Estate Counsel ("ACTEC") Commentaries can be found on the ACTEC web site at http://www.actec.org/public/ShowResourcesPublic.asp. We would like to thank ACTEC for their permission to reprint text from the ACTEC Commentaries.

2. The American Bar Association (the "ABA") Model Rules can be found at the ABA's website at http://www.abanet.org/cpr/e2k/home.html.

3. The Virginia State Bar ("VSB") maintains a professional responsibility web page, http://www.vsb.org/profguides/index.html. A link on that page entitled "Ethics Opinions and Information" will take you to http://www.vsb.org/profguides/opinions.html, which contains a link to "Tom's LEO Summaries" and to "Virginia CLE Home Page." *Also see* the link to "Answering Your Questions about Legal Ethics" by Anne P. Michie, Assistant Ethics Counsel ["Anne Michie, FAQs"] at http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html.

4. "Tom's LEO Summaries" located on the McGuire Woods LLP's website at http://www.mcguirewoods.com/services/leo/ contains summaries of Virginia's and the ABA's Legal Ethics Opinions ("LEOs"), prepared by Thomas E. Spahn, Esquire, McGuireWoods LLP, Richmond, Virginia ("Spahn"). These summaries are arranged chronologically and by topic. Tom was a member of the VSB committee responsible for the promulgation of the Virginia Rules of Professional Conduct, and was a member of the VSB committee that revised the Consolidation of Part Six, Section IV, Paragraph 13, Rules of the Virginia Supreme Court, Disciplinary Board Rules of Procedure and Council Rules of Disciplinary Procedure. Tom's web site provided most of the information and many of the summaries of LEOs contained in this paper, for which the authors are extremely grateful.

5. The "Virginia CLE Home Page" contains a link, mentioned above, to http://www.vacle.org/leo.htm that as of the date of this paper contains LEOs 1360 through 1826. These opinions are available in electronic format as a result of the work of James M. McCauley, Virginia State Bar Ethics Counsel. For Mr. McCauley's other very useful web site, *see* http://members.aol.com/jmccauesq/ethics/.

B. History.

1. *Model Rules of Professional Conduct.* The ABA adopted the original Canons of Professional Ethics in 1908 to provide a professional standard to serve as a model of the regulatory law governing the legal profession. The original Canons of Professional Ethics have been revised, amended, and redrafted over the last century, and have evolved into the present day Model Rules of Professional Conduct (the "MRPC"). The MRPC was adopted by the ABA House of Delegates in 1983, and the MRPC and Comments have been amended on fourteen occasions since their adoption with the most recent revisions adopted in 2002.

2. *ACTEC Commentaries on the MRPC.*

   a. ACTEC is an association of lawyers that are skilled and experienced in the area of estate planning and collectively work toward the improvement of laws and procedures in the areas of estate planning and professional responsibility.

   b. ACTEC developed Commentaries on selected rules of the MRPC to provide particularized guidance regarding the professional responsibilities of lawyers engaged in trusts and estates practices. The current Fourth Edition of the Commentaries (2006), focuses on amendments to the MRPC promulgated by the Ethics 2000 Commission (ABA Commission on Evaluation of the MRPC).

3. *Va. Rules*. On January 1, 2000, the Virginia Code of Professional Responsibility (the "Code") was replaced by the Virginia Rules of Professional Conduct (the "Va. Rules") that set out the responsibilities of those practicing in the legal profession in the Commonwealth of Virginia. Although the Va. Rules are similar to the MRCP, amendments specific to Virginia make the Va. Rules different from the MRCP in many aspects. The Va. Rules can be found in Rules of the Supreme Court of Virginia, Part 6, § II, effective January 1, 2000.

4. *LEOs*. Legal Ethics Opinions ("LEOs") are written informal advisory opinions issued by the Standing Committee on Legal Ethics. *Caution:* LEOs cited in this paper that cite the former Code must be carefully analyzed by application of the Va. Rules.

5. *Interpretations*.

   a. The preamble to the Va. Rules provides that the word "should" "when used in reference to a lawyer's actions represents an aspirational rather than a mandatory standard."

   b. The preambles to the MRPC and the ACTEC Commentary both provide that: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. . . . Many of the Comments use the term 'should.' Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."

C. Scope of the Va. Rules. The preamble to the Va. Rules provides that:

1. [14] These Rules follow the same format as the current American Bar Association Model Rules of Professional Conduct ("ABA Model Rules"), rather than the former American Bar Association Model Code of Professional Responsibility ("ABA Model Code"), or the former Virginia Code of Professional Responsibility ("Virginia Code"). Although interpretation of similar language in the ABA Model Rules by other states' courts and bars might be helpful in understanding Virginia's Rules, those foreign interpretations should not be binding in Virginia.

2. [15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human

activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

I. COMPETENCE (HYPOTHETICAL #1)

Hypothetical #1A: How competent of an estate planner do I have to be?
Hypothetical #1B: May I hold myself out to be a specialist in estate planning?

A. ACTEC Commentary on MRPC 1.1: Competence.

1. A lawyer who initially lacks the skill or knowledge required to meet the needs of a particular client may overcome that lack through additional research and study. The needs of the client may also be met by involving another lawyer or other professional who possesses the requisite degree of skill or knowledge.

2. The lawyer should be candid with the client regarding the lawyer's level of competence and need for additional research and preparation, which should be taken into account in determining the amount of the lawyer's fee. *See* ACTEC Commentary on MRPC 1.5 (Fees).

3. A lawyer may, with the client's informed consent, limit the scope of the representation to those areas in which the lawyer is competent. *See* MRPC 1.2(c). [Note that Va. Rule 1.2(b) similarly allows a lawyer to limit the objectives of the representation if the client consents after consultation.]

4. Competence requires that a lawyer handle a matter with diligence and keep the client reasonably informed during the active phase of the representation. *See* MRPC 1.3 (Diligence) and MRPC 1.4 (Communication).

B. Va. Rules. Va. Rule 1.1 and MRPC 1.1 are identical.

C. Comment to Va. Rule 1.1.

1. *Legal Knowledge and Skill*. [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3. [4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. *See also* Va. Rule 6.2.

4. *Thoroughness and Preparation*. [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

5. *Maintaining Competence*. [6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

D. LEOs.

1. *LEO 1515* (1994). A lawyer should undertake representation only in matters in which the lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters. DR 6-l0l(A) under the Code (now Va. Rule 1.1). A lawyer may not limit his liability to his client for his personal malpractice. DR 6-l02(A), now Va. Rule 1.8(h).

2. *LEO 1412* (1991). Va. Rule 1.8(h) generally prohibits a lawyer from prospectively limiting his liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement. A lawyer may not contractually define services which constitute the practice of law as not amounting to legal services and thereby limit his professional liability. Under some circumstances and at the client's request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office. (An exculpatory provision is one that exonerates a fiduciary from liability for certain acts and omissions affecting the fiduciary estate.) The lawyer ordinarily should not include an exculpatory clause without the informed consent of an unrelated client. An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary. Va. Rule 1.8.

3. *LEO 1325* (1990). Standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law. However, when an attorney acts as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be disciplined under the Code (now the Va. Rules).

E. Virginia Cases.

1. *Copenhaver v. Rogers*, 238 Va. 361, 384 S.E.2d 593 (1989). In this action brought by a decedent's grandchildren against the decedent's estate planning attorney for alleged negligence, the court held that lack of privity barred any cause of action in tort and the plaintiffs' allegations based on a third-party beneficiary contract theory were insufficient to confer standing to sue since the plaintiffs failed to show that they were "clearly intended" beneficiaries of the testator's contract with the law firm.

2. *Rutter v. Jones, Blechman, Woltz & Kelly*, 264 Va. 310, 568 S.E.2d 693 (2002). Virginia is one of the very few "privity" jurisdictions left in the country whose courts hold that no intended beneficiary may sue the decedent's estate planning lawyer for alleged negligence when the testator's estate plan fails to achieve its intended purposes as a result of the estate planner's alleged negligence. Furthermore, Virginia retains its consistent approach to this issue by refusing to permit the personal representative of a decedent's estate (clearly "in privity" with the estate planning lawyer) to bring a negligence action for an estate planning lawyer's alleged failure to properly plan to avoid otherwise clearly avoidable estate taxes by holding that, since the action for malpractice did

not arise until after the client had died, the personal representative (limited under Virginia law to bringing only actions that arose before death) could present no viable claim for malpractice.

F. Advertising.

1. Under Va. Rule 7.4, lawyers may state, announce, or hold themselves out as limiting their practice in a particular area or field of law, but the communication is subject to the "false and misleading" standard in Va. Rules 7.1 and 7.2.

2. In addition, a lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in estate planning unless he has been certified as a specialist in a field of law by a named organization, ***provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.***

3. *See Spahn*, "Topic No. 86 - Descriptions of certification and specialization" for LEOs on this issue decided under the Code.

G. Conclusion to Hypothetical #1.

1. In regard to Hypothetical #1A, competency in the area of estate planning means more than the mere knowledge or skill to produce documents that meet the proper formalities for a valid will, etc.

   a. The lawyer must also either be able to understand, or gain an understanding of, a client's dispositive objectives and how such objectives can be met, including but not limited to tax implications.
   b. A competent lawyer must also ensure that he has obtained accurate information from the client regarding citizenship, asset ownership, asset values, as well as, beneficiary and survivorship designations.

2. In determining whether a lawyer possess the requisite competence in an estate planning matter, consideration of the client's particular objectives and situation is imperative. For example:

   a. Does the client desire a distribution other than the typical situation of everything passing to a spouse, and then to her children?
   b. Are there any beneficiaries with special needs?
   c. Will the client likely have a taxable estate that requires tax planning?

3. In regard to Hypothetical #1B, a lawyer may hold himself out as being a specialist in estate planning only if he has been certified as such by a named organization. *However*, any communication stating that the lawyer is an estate planning specialist certified by a certain organization must also clearly state that there is no procedure in Virginia for approving certifying organizations.

II. ENGAGEMENT LETTERS (HYPOTHETICAL #2)

Hypothetical #2: Do I need a written engagement letter?

A. ACTEC Commentary on MRPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer.

1. In general, the client and lawyer, working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client.

2. If multiple clients are involved, the lawyer should discuss with them the scope of the representation and any actual or potential conflicts and determine the basis upon which the lawyer will undertake the representation. As stated in the Comment to MRPC 1.7 (Conflict of Interest: Current Clients) with respect to estate administration, "the lawyer should make clear the lawyer's relationship to the parties involved."

3. In the estate planning context, the lawyer should discuss with the client the functions that a personal representative, trustee, or other fiduciary will perform in the client's estate plan. In addition, the lawyer should describe to the client the role that the lawyer for the personal representative, trustee, or other fiduciary usually plays in the administration of the fiduciary estate, including the possibility that the lawyer for the fiduciary may owe duties to the beneficiaries of the fiduciary estate. The lawyer should be alert to the multiplicity of relationships and challenging ethical issues that may arise when the representation involves employee benefit plans, charitable trusts or foundations.

B. Va. Rules.

1. Va. Rule 1.2(a) and MRPC 1.2(a), while worded somewhat differently, contain substantially the same requirements.

2. A comparison of Va. Rule 1.2(b) to MRPC 1.2(b) is as follows: (b) A lawyer may limit the ~~scope~~objectives of the representation if the ~~limitation is reasonable under the circumstances and the client gives informed consent. (d~~client consents after consultation. [underlined text represents Va. Rule 1.2(b) and strikeout text represents MRPC 1.2(b)]

3. Fees in Engagement Letters:

a. MRPC 1.5(b) provides: The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

b. Va. Rule 1.5(b) provides: The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

C. ACTEC Engagement Letters. Engagement letters for various situations, cross referenced to the ACTEC Commentaries, and checklists for their use, may be found at http://www.actec.org/pubInfoArk/comm/engltrtoc.htm.

D. Conclusion to Hypothetical #2.

1. It is always advisable to use a written engagement letter as a way to set the framework for the representation, avoid unrealistic expectations of the client and the lawyer, and avoid other potential problems.

2. Engagement letters should always address fees and other expenses, along with the timing of billing and expected payments.

3. Engagement letters should always address the scope of the anticipated engagement. If the lawyer is representing multiple clients, use of an engagement letter is particularly recommended so that the lawyer may disclose in writing the scope of representation and any actual or potential conflicts that may exist.

4. The engagement letter shall ***preferably*** be in writing; however, a written agreement is needed:

a. If there is a business transaction between the attorney and client. *See* Va. Rule 1.8(a).
b. If there is a waiver of conflicts between concurrent clients under Va. Rule 1.7. (Note that there is no requirement of a writing under

Va. Rule 1.9 for a conflict between a former client and a current client).

III. FEES AND RETAINERS (HYPOTHETICAL #3)

Hypothetical #3: My client has given me a $5,000 "retainer" and signed my standard engagement letter to pay me at my standard hourly rate. My client's bill to date is $400 at my standard rate, but most estate planning attorneys would have charged about $250. My client has now fired me and wants her $5,000 back. How much do I have to refund?

A. ACTEC Commentary on MRPC 1.5: Fees.

1. Fees for legal services in trusts and estates matters may be established in a variety of ways provided that the fee ultimately charged is a reasonable one taking into account the factors described in MRPC 1.5(a) (Fees).

2. Fees in such matters frequently are primarily based on the hourly rates charged by the attorneys and legal assistants rendering the legal services or upon a mutually agreed upon fee determined in advance. Based on the revisions to MRPC 1.5 (Fees) in 2002, unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. As revised in 2002, the rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representation, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel.

3. The ACTEC Commentaries are silent as to retainers.

B. Va. Rules.

1. Va. Rule 1.5(a) and MRPC 1.5(a), while worded slightly differently, are substantively similar.

2. Va. Rule 1.5(b) and (c) and MRPC 1.5(b) and (c), while worded differently, contain substantially the same requirements.

C. Comment to Va. Rule 1.5.

1. *Basis or Rate of Fee*. [1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its

computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding.

2. Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.

D. Fees in general and LEOs.

1. Retainers.

a. The labels of payment as "retainers" or "guaranteed minimum fees" are not dispositive, and any payment for fees not yet rendered must be placed in a trust account and not removed until the services are rendered. *LEO 510* (1983).

b. A retainer must be placed in a trust account and may be transferred to the lawyer's account only as the fees are earned, and money should remain in the trust account until any dispute is resolved by appropriate legal means. *LEO 1246* (1989).

c. A lawyer may charge a "retainer" to "insure the attorney's availability and as consideration for the lawyer's unavailability to potential adverse party" where the client seeks to secure the lawyer's employment "for representation of his interests in any matter which may arise in the future." On the other hand, a "specific sum paid at the time an employment agreement is entered into" to "secure the lawyer's legal services for a specific . . . matter" is "deemed to be an advanced legal fee which has been entrusted to the lawyer" but which still belongs to the client. *LEO 1322* (1990).

2. *LEO 1606* (1994). The principles governing an attorney’s fees are as follows:

a. Fee contracts "are not construed as are other commercial contracts."

b. "All fees must be reasonable."

c. Because the client "retains the absolute right to discharge the lawyer at any time for any reason or without reason," a discharged

lawyer may only recover in quantum meruit for services rendered which is valued by looking at the "reasonable value of the services rendered, not to the benefit received by the client."

d. A lawyer must return all unearned fees if the representation ends. A "retainer" is not a pre-payment for legal services, but rather a payment made to insure a lawyer's availability for future legal services.

e. There may be no non-refundable advanced legal fee.

f. Even if a lawyer and client agree to a fixed fee, the lawyer must return any unused portion if the representation prematurely ends (using a quantum meruit approach).

3. *LEO 1812* (2005). The arrangements between lawyers and clients are "unique and not governed solely by principles that govern ordinary commercial contracts." Although lawyers and clients may agree on an alternative fee that applies when a client discharges a lawyer without cause from a contingent fee arrangement, the alternative must meet the reasonableness standard:

a. when entered into;

b. when the client terminates the lawyer; and,

c. when the client obtains a recovery in the lawsuit. A lawyer discharged from a contingent fee arrangement without cause normally recovers under a quantum meruit standard if the retainer agreement is silent, or contains an alternative fee arrangement that would result in an unreasonable fee.

d. The following retainer agreement sentence was found to be improper and misleading because it "actually appears to attempt to set an hourly rate for a quantum meruit analysis," rather than indicating that the lawyer will seek quantum meruit compensation based on the referenced hourly rate: "In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered."

e. The following retainer agreement sentence was found to be improper and misleading because it does not fully explain "under what circumstances law may permit the attorney to elect

compensation based on the agreed contingent fee or any settlement offer made to client prior to termination": "In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination."

E. Conclusion to Hypothetical #3.

1. In Hypothetical #3, the attorney must return either $4,600 or $4,750 to the client.

2. First, the "retainer" is technically an "advanced legal fee" since it was a fee paid in advance for particular legal services not yet performed. By contrast, a "retainer" would be paid to ensure the attorney's availability and in consideration for the lawyer's unavailability to potential adverse parties.

3. Upon discharge of the lawyer, the lawyer must refund to the client any portion of an advanced legal fee not earned by the lawyer.

4. As an overriding principle regarding fees, the lawyer's fee must be reasonable.

   a. Assuming that the engagement letter advises the client of the basis upon which the fees will be charged, and the client has consented to the fee arrangement, the lawyer has an argument that $400 for his services is reasonable.
   b. However, the fact that a fee is stated in an engagement letter is not dispositive of whether it is reasonable. It is probable that $250 is a reasonable fee based on a *quantum meruit* basis since that is the amount that would be charged by other attorneys.

IV. USE OF PARALEGALS (HYPOTHETICAL #4)

Hypothetical #4: I am very busy and somewhat out of sorts. Client Jones is very difficult, and I just don't want to deal with him today. My paralegal is very experienced, and Mr. Jones likes him. May my paralegal supervise the execution of Mr. Jones' Will, Trust Agreement, Power of Attorney, and Advance Medical Directive *without me present at the signing*?

A. ACTEC Commentary on MRPC 1.1: Competence.

1. A lawyer should provide adequate training and supervision to the legal and nonlegal staff members for whom the lawyer is responsible. As indicated by the Comment to MRPC 5.5, . . . the MRPCs do not prohibit lawyers from employing paraprofessionals and delegating work to them. The requirement of supervision is described in the Comment to MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants): Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

2. A lawyer should provide adequate training, supervision and oversight of the lawyer's staff in order to protect the interests of the lawyer's clients.

3. Supervising Execution of Documents.

   a. Generally, the lawyer who prepares estate planning documents for a client should supervise their execution.

      (1) Of course, he or she may arrange for another lawyer to do so.

      (2) If it is not practical for a lawyer to supervise the execution or if the client so requests, the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which they should be executed. The lawyer should do so only if the lawyer

reasonably believes that the client is sufficiently sophisticated and reliable to follow the instructions.

(3) Note that in some jurisdictions the supervision of the execution of estate planning documents constitutes the practice of law, which a lawyer may not delegate to a non-lawyer member of the lawyer's staff.

B. Va. Rules.

1. Va. Rule 5.3 and MRPC 5.3 are substantively identical.

2. Va. Rule 1.1 and MRPC 1.1 are identical.

C. Comment to Va. Rule 5.3. [1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

D. ABA Model Guidelines for the Utilization of Paralegal Services. The Standing Committee on Paralegals of the ABA drafted, and the ABA House of Delegates adopted, the ABA Model Guidelines for the Utilization of Legal Assistant Services in 1991. The Model Guidelines were further revised in 2003. Under the Model Guidelines:

1. A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices.

2. The lawyer maintains responsibility for the work product. The Supreme Court of Virginia upheld a malpractice verdict against a lawyer based in part on negligent actions of a paralegal in performing tasks that evidently were properly delegable. *Musselman v. Willoughby Corp.*, 230 Va. 337, 337 S.E.2d 724 (1985).

3. A lawyer may not delegate to a paralegal responsibility for establishing an attorney-client relationship, establishing the amount of a fee, or for a legal opinion rendered to a client.

4. A lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

5. A lawyer may identify paralegals by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

6. A lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.

    a. *See* Va. Rule 1.6 and MRPC 1.6.

    b. *LEO 1258* (1989). A lawyer must be careful to prevent disclosure of confidential information when the lawyer's secretary is married to the head of a real estate agency and plans to become a real estate agent.

    c. *LEO 1800* (2004). A two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; screens the new secretary from the litigation matter (including the new firm's files on the matter). Although not mandating any specific steps, the Virginia Bar recommends that the new firm "develop a written policy statement" regarding such situations, and note the need for confidentiality "on the cover of the file in question."

7. A lawyer should take reasonable measures to prevent conflicts of interest resulting from a paralegal's other employment or interests.

8. A lawyer may include a charge for the work performed by a paralegal in setting a charge and/or billing for legal services.

9. A lawyer may not split legal fees with a paralegal nor pay a paralegal for the referral of legal business. A lawyer may compensate a paralegal based on the quantity and quality of the paralegal's work and the value of that

work to a law practice, but the paralegal's compensation may not be contingent, by advance agreement, upon the outcome of a particular case or class of cases.

a. *LEO 767* (1986). A law firm may pay legal assistants on a profit-sharing basis, and include legal assistants and other staff on the firm letterhead as long as they are properly identified.

b. According to VSB Standing Committee on Legal Ethics, Gp. 885 (1987), a nonlawyer may be paid based on the percentage of profits from all fees collected by the lawyer.

c. *LEO 1290* (1989). A law firm staff member may not solicit business for the firm even if the non-lawyer is to receive no additional compensation for the service (because the staff member would be compensated with a regular salary for recommending or securing employment for the law firm). A lawyer may never delegate in-person solicitation to a non-lawyer, even acting under the lawyer's supervision.

10. A lawyer who employs a paralegal should facilitate the paralegal's participation in appropriate continuing education and pro bono publico activities.

E. UPLs.

1. Under Va. Rule 5.5, a lawyer shall not assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law.

2. In UPL 147 (1991), the Virginia Committee on UPL addressed the use of paralegals and law office staff in real estate closings. The Committee ruled as follows:

a. It is not the unauthorized practice of law for a real estate paralegal company ["Company"] to provide assistance to an attorney in closing real estate loans which have been referred to the paralegal company by that attorney ["Closing Attorney"] using the following procedure:

(1) Closing Attorney receives sales contract from real estate agents; reviews contract; opens file; determines which items can be accomplished by Company (e.g. survey, title

insurance, private pay-off information); contracts real estate agent; and forwards file to Company for processing.

(2) Company receives Closing Attorney's file; requests title search; orders survey; notifies lending institution; and receives package from lending institution unless lending institution sends package directly to Closing Attorney who forwards package to Company.

(3) Company completes non-legal documents (e.g. tax information, name affidavit, W-9 forms, commitment letter, HUD-1 statement); contacts client to determine name of hazard insurance company.

(4) Company forwards note and deed of trust requests to Closing Attorney; if lending institution has completed documents, Company provides those to Closing Attorney for review prior to closing.

(5) Company receives survey and forwards to title insurance company. Upon receipt of title binder, same if forwarded by Company to seller's Attorney for completion of deed and seller's documents. Deed and seller's documents are reviewed by Closing Attorney and lender prior to closing.

(6) Completed approved package carried by Company to Closing Attorney for review prior to meeting with clients. Single charge for closing is made and shown on "title examination" line of HUD-1 statement. *See also LEO 1220*.

(7) ***Clients meet with Closing Attorney to sign all required documents***; package is returned to Company with any changes to be made noted by Closing Attorney; documents requiring recordation are recorded by Company with instructions from Closing Attorney; Company does not record until Closing Attorney determines procedure once any encumbrance is disclosed (emphasis added).

(8) Following recording, Company assembles various executed documents and certified copies of documents required by lender and delivers same to lender within required time.

(9) Company writes disbursement checks out of Closing Attorney's escrow account upon request (Company has no

signatory power over Closing Attorney's account); Closing Attorney reviews and signs checks to be disbursed.

(10) Upon receipt, Closing Attorney transmits recorded instruments to Company which prepares cover letter for Closing Attorney's review and signature before forwarding to appropriate individual/institution.

3. UPL 191 (approved by VSB Council June 18, 1998 and approved by the Va. SC September 29, 1998) addresses the use of paralegals and law office staff and certain activities in interaction with clients that are permissible.

a. An attorney may employ non-lawyer personnel to perform delegated functions but they must act under the direct supervision of a licensed attorney. The attorney must assure that any non-lawyer employee complies with the Code (now the Va. Rules). The initial and continuing relationship with the client is the responsibility of the attorney.

b. A non-lawyer employee may participate in the gathering of information from a client during an initial client interview as long as the non-lawyer renders no legal advice. A non-lawyer employee may not determine the validity of the client's legal claim since this is considered the practice of law.

c. A non-lawyer employee may answer factual questions regarding fee agreements but may not give any advice about legal ramifications of contract provisions. A non-lawyer may also be involved in a limited role in settlement negotiations, but he or she may not evaluate the offer or recommend to a client whether or not to accept an offer.

4. Proposed UPL 183 provided that the conduct of real estate closings by anyone other than an attorney would be the unauthorized practice of law, and as such, would prohibit lay settlement services from conducting closings for real estate sales and for any loans secured by real estate. In a letter from the United States Department of Justice and the Bureau of Competition of the Federal Trade Commission, those entities urged the Virginia Bar to reject the proposed opinion because it would deprive Virginia consumers of the choice to use a lay settlement service, which would end competition and increase the cost of real estate closings for consumers. Proposed UPL 183 was rescinded.

5. Allowing paralegals to supervise a will execution ceremony is questionable because the delegation of responsibility may be considered a violation of professional conduct rules proscribing the aiding of a non-lawyer in the practice of law. In Ethics Advisory Opinion 02-12, the South Carolina Bar Ethics Advisory Committee held that a paralegal may not execute estate planning documents without an attorney present. The Committee stated:

   a. It can be argued that since the form for a Health Care Power of Attorney is created by statute, assisting a person in completing and executing such a document is purely a matter of facilitating that person's wishes. The enabling statutes do not require the assistance of a lawyer, and indeed, hospital personnel, senior service centers, councils on aging, and the like, routinely advise persons on Health Care Powers of Attorney and assist in their execution.

   b. On the other hand, we believe that there comes a time in every transaction where a lawyer's advice and presence are essential. "We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again the protection of the public is of paramount concern." *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987).

   c. When a client retains a lawyer for what may be considered a routine transaction, that client clearly expects to receive more than the mere blank form with instructions on how to complete it. Furthermore, once retained, the lawyer must then provide consultation. Because a lawyer has a duty to supervise a nonlawyer who is working under his or her direction, this supervision should include the period during the execution of documents as well. While it may be permissible for the paralegal alone to gather information, ***we deem it not permissible for the paralegal alone to assist the client in the execution of the documents outside of the presence of the lawyer***.

   d. ***We further opine that once a client has consulted the lawyer or the paralegal, the lawyer's duty to supervise the paralegal (coupled with the lawyer's duty to advise and protect the client) invokes the lawyer's intervention.***

F. Conclusion to Hypothetical #4.

1. In Hypothetical #4, the paralegal should generally not supervise the execution of Mr. Jones' estate planning documents without the attorney present.

2. Although the situation has not been specifically addressed under Virginia law in the context of the execution of estate planning documents, specific guidelines have been set forth by UPL 147 for a real estate paralegal's assistance to an attorney closing on real estate loans. In particular, *the attorney* is required to meet with the clients to sign the required documents.

3. The response of the Department of Justice and the Bureau of Competition of the Federal Trade Commission to Proposed UPL 183 does not have an effect on UPL 147 or the question of whether a paralegal can oversee the execution of estate planning documents without the attorney present.

    a. The response to Proposed UPL 183 was based on its potentially anti-competitive results. Allowing only attorneys to conduct real estate closings had the potential to increase the costs to consumers by: 1) forcing consumers who would not otherwise hire an attorney for a real estate closing to do so; and, 2) causing the cost of the lawyers' settlement services to increase by eliminating competition from lay settlement services.
    b. The concerns present with Proposed UPL 183 are not present in the context of the execution of estate planning documents.

4. It is clear under South Carolina Ethics Advisory Opinion 02-12 that the paralegal may not execute Mr. Jones' estate planning documents with an attorney present.

V. CLIENT FILES (HYPOTHETICAL #5)

Hypothetical #5: My client won't pay me and wants her file, right now! (A) May I continue to withhold her file? (B) What do I have to give her, if anything? (C) May I charge her for the copying costs? (D) Do I have to take action "right now"?

A. ACTEC Commentary on MRPC 1.16: Declining or Terminating Representation. *Duties upon Withdrawal*. Subparagraph (d) of MRPC 1.16 requires the withdrawing lawyer to take "reasonably practicable" steps to protect the client's interests and includes requirements for giving reasonable notice of the impending withdrawal to the client, giving the client time to employ alternative counsel, refunding any advanced but unearned fees and returning any papers and property to which the client is entitled under applicable law.

B. Va. Rules. Va. Rule 1.16 is substantially different from and more detailed than MRPC 1.16. Va. Rule 1.16(e) is new and had no counterpart under the Code.

1. Anne Michie, FAQs, "What if a client wants his file? Does it matter whether he's paid his bill or whether the matter is concluded?"

a. Prior to January 1, 2000, a lawyer had to go searching through the legal ethics opinions for advice on these file questions.

b. However, on that date, Rule 1.16(e) went into effect; that provision directly addresses how to handle the client's file. Rule 1.16(e) breaks the contents into three categories.

(1) The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property, and the attorney must unconditionally return them to the client upon request.

(2) The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda and other attorney work product documents, research materials and copies of prior bills. For this second category, a lawyer may charge the client for the expense of making a copy of the items for his own retention.

(3) For both of these categories, an attorney must provide the requested items regardless of whether the client has paid his bill. The old common law lien on the client's file is, essentially, eviscerated by this rule. A lawyer can certainly pursue all normal collection options against a former client for unpaid fees; however, the retention of the file must never be held up in exchange for payment of the bill for fees, the copying cost, or other costs associated with the representation.

(4) A third category presented in Rule 1.16(e) includes copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations or difficulties arising with the attorney/client relationship. A lawyer is not required to provide those items to the client. It is important to note that attorney work product is not in this category. An attorney must provide copies of things like his research notes, drafts of documents and outlines of case strategies to the client upon request, as those items are within the second category discussed above.

c. This provision is a part of the general Rule 1.16, addressing an attorney's duties upon the end of the attorney/client relationship. The intent of this rule is that an attorney be required to provide the outlined items at the termination of the representation, upon request of the client, one time.

C. Comment to Va. Rule 1.16.

1. *Assisting the Client upon Withdrawal*. [9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

2. *Retention of Client Papers or File When Client Fails or Refuses to Pay Fees/Expenses Owed to Lawyer*.

a. [10] Paragraph (e) eschews a "prejudice" standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.

b. [11] The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

D. Conclusion to Hypothetical #5.

1. Va. Rule 1.16(d) provides that "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e)".

2. Under Hypothetical #5, the lawyer must return certain parts of the file to the client, and may not withhold the file for non-payment of fees and costs.

3. The following need to be returned:

a. All original, client-furnished documents and all originals of any legal instruments in the lawyer's possession are the property of the client and must be returned to the client upon request, irrespective of whether or not the lawyer's fees have been paid. The lawyer may make copies of these documents at the lawyer's own expense.

b. The lawyer must generally provide the client with copies of all other documents and may bill the client for the costs associated with copying these materials; however, the lawyer must still provide the copies even if the client refuses to pay such costs.

c. Note that Va. Rule 1.16(e) specifically provides that "The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation."

4. The lawyer is not required to provide the client with copies of billing records and documents intended for internal office use only.

5. A lawyer can certainly pursue all normal collection options against a former client for unpaid fees; however, the retention of the file must never be held up in exchange for payment of the bill for fees, the copying cost, or other costs associated with the representation.

6. Under Va. Rule 1.16(e), everything required to be returned to the client must be returned within a “reasonable time.” The facts and circumstances of each case determines what constitutes a reasonable time.

VI. INCAPACITATED OR DISABLED CLIENT (HYPOTHETICAL #6)

Hypothetical #6: My client appears to suffer from dementia and I fear that her funds are being purloined by an unscrupulous member of the opposite sex, who is not the client's spouse. May I implement proceedings adverse to my client to protect my client?

A. ACTEC Commentary on MRPC 1.14: Client with Diminished Capacity.

1. *Preventive Measures for Competent Clients*. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA.

2. *Implied Authority to Disclose and Act*. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends, and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. In determining whether to act and in determining what action

to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

3. *Risk and Substantiality of Harm*. For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.

4. *Disclosure of Information*. ABA Informal Opinion 89-1530 (1989) stated the authority of an attorney to disclose confidential and non-confidential information as follows:

   [T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is impliedly authorized within the meaning of Model Rule 1.6. Thus, the inquirer may consult a physician concerning the suspected disability.

   The 2002 amendments to MRPC 1.14 support this conclusion.

5. *Determining Extent of Diminished Capacity*. In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals, and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.

6. *Lawyer Representing Client with Diminished Capacity May Consult with Client's Family Members and Others as Appropriate*. If a legal

representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussion with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney client evidentiary privilege.

7. *Testamentary Capacity*. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity. In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

8. *Lawyer Retained by Fiduciary for Person with Diminished Capacity*. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator, or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the disabled person, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the disabled person. *See* ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may have an obligation to disclose, to prevent, or to rectify the fiduciary's misconduct. *See* MRPC 1.2(d) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).

As suggested in the Commentary to MRPC 1.2, a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons.

9. *Person With Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary*. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. Whether the person with diminished capacity is characterized as a client or a former client, the lawyer for the fiduciary owes some continuing duties to him or her. *See* Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information)). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent, or to rectify the fiduciary's misconduct.

10. *Wishes of Person With Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client*. A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of the person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

11. *May Lawyer Represent Guardian or Conservator of Current or Former Client?* The lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. *See* ACTEC Commentary on MRPC 1.7 and MRPC 1.9. Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. *See* MRPC 1.7(a)(2). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. *See* MRPC 1.0(e) (defining informed consent).

B. ACTEC Commentary on MRPC 1.6: Confidentiality of Information.

1. *Client who Apparently has Diminished Capacity*. The attorney for a client who has or reasonably appears to have diminished capacity is authorized to take reasonable steps to protect the interests of the client, including disclosure of otherwise confidential information where appropriate and not prohibited by state law or ethical rule.

2. The attorney may disclose only information necessary to protect the client's interests.

C. ACTEC Commentary on MRPC 1.14.

1. An attorney should always consider the wishes or directions that were clearly expressed by a client during his or her competency.

2. An attorney may represent the guardian or conservator of a current or former client, provided that representation of one will not be directly adverse to the other.

D. ABA Opinions.

1. Disclosure by a lawyer of information related to representation to the extent necessary to serve the best interests of the client who is reasonably believed to be disabled is impliedly authorized within the meaning of Model Rule 1.6 so that the inquirer may consult a physician concerning the disability. *See* ABA Informal Opinion 89-1530 (1989).

2. An attorney may consult with a client's family when the client becomes incompetent and may even petition the court for appointment of a guardian, but may not represent a third party petitioning for appointment; but the lawyer may support the appointment of a guardian who the lawyer expects to retain him as counsel. *See* ABA Formal Opinion 96-404 (1996).

E. Va. Rules.

1. Va. Rule 1.6 has more specific and broader requirements of confidentiality than MRPC 1.6.

a. A comparison of Va. Rule 1.6(a) and MRPC 1.6(a) follows [underlined text represents Va. Rule 1.6(a) and strikeout text represents MRPC 1.6(a)]: **(a) A lawyer shall not reveal information ~~relating to representation of a~~ protected by the attorney-client privilege under applicable law or other**

information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client ~~gives informed consent~~consents after consultation . . .

b. Additionally, Va. Rule 1.6 is different from MRPC 1.6 in its addition of subsection (c) dealing with an attorney's duty to reveal fraud.

2. Va. Rule 1.14 and MRPC 1.14, although worded slightly different, are substantively similar.

F. Comment to Va. Rule 1.14.

1. [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacities often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

2. [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

3. [3] If the client has a legal representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If there is no legal representative, the lawyer should seek such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal

representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

4. [4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Va. Rule 1.2(d).

5. [5] Court Rules generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

G. LEOs and VSB.

1. *LEO 908* (1987). A lawyer may withdraw from representing a client found mentally incompetent, even if the client wants to appeal the commitment order, as long as the lawyer believes that existing law supports the court's order, but the lawyer must prosecute the appeal if the court denies the withdrawal motion. [Va. Rule 1.14 provides guidance to lawyers representing clients under a disability.]

2. *LEO 1769* (2003). A lawyer has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is currently a client of the lawyer.

   a. Under Va. Rule 1.7, a lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless: the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation.

      (1) Applying Va. Rule 1.7(a) to the lawyer in the present hypothetical presents insurmountable problems. The committee found that the attorney could not fulfill either of the two requirements listed under Va. Rule 1.7.

         (a) As for the first requirement, that the representations not be adversely affected, it seems unlikely that the

representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence.

(b) Even were that hurdle cleared, the second requirement cannot be met since there is no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

(2) However, should the attorney actually consider his client to be incompetent, that attorney can look to Va. Rule 1.14 for guidance.

(a) The rule suggests that the lawyer should, as far as reasonably possible, maintain a normal client-lawyer relationship.

(b) However, should the lawyer reasonably believe that the client cannot adequately act in the client's own interest, then the lawyer may seek the appointment of a guardian or take other protective action. Va. Rule 1.14(a) and (b).

(c) Thus, should the attorney reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

(d) Va. Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as adverse to the client; however Va. Rule 1.14 does not otherwise derogate the lawyer's responsibilities to the mother, and certainly does not abrogate the lawyer-client relationship.

i) In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client.

ii) Such a representation would necessarily have to be regarded as adverse to the client and prohibited by Va. Rule 1.7(a).

3. Anne Michie, FAQs, “How should an attorney provide legal services to a client who appears to have less than full mental capacity?”

   a. Particularly in the practice area of elder law, attorneys frequently face difficult issues as the mental competency of some clients may be in decline. Rule 1.14, entitled "Client under a Disability," provides specific guidance to attorneys in that situation. Rule 1.14 discusses both the situation where a client’s abilities are merely limited and where that client just cannot act in his or her own best interest. The comments to Rule 1.14 provide helpful direction to an attorney making the difficult decision as to what, if any, protective action he needs to take on behalf of his client. Note that the rule does contemplate that such protective action may include, where appropriate, seeking the appointment of a guardian for the client. However, the attorney should not represent some third party in bringing that guardianship petition but instead should himself serve as petitioner. *See LEO 1769* (2003).

   b. An attorney dealing with his client’s possible incapacity should, throughout the course of the representation, be mindful of Rule 1.14’s directive that the attorney "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

H. Conclusion to Hypothetical #6.

1. Under Hypothetical #6, the lawyer may implement proceedings adverse to the client if the lawyer reasonably believes that the client cannot adequately act in her own interest.

2. If there is no legal representative for the client already in place, and if in the client's best interests, the lawyer should seek such an appointment.

3. When a client is under a disability or other impairment, the lawyer must maintain a normal client-lawyer relationship with the client to the fullest extent possible under Va. Rule 1.14(a).

4. Whether a client is under a disability is determined on a case by case basis and medical assistance may be necessary to make this determination.

5. Determining incapacity and then disclosing that incapacity will often conflict with a lawyer's duty of confidentiality under Va. Rule 1.6. However, disclosure is permissible to seek guidance from an "appropriate diagnostician." Care must be taken to ensure that the person consulted

will protect the confidentiality of the client's condition until disclosure is unavoidable.

6. The lawyer may not represent a family member or other individual seeking to have the lawyer’s client declared incompetent.

VII. ATTORNEY IN OTHER ROLES (HYPOTHETICAL #7)

Hypothetical #7: I am an attorney but I am also licensed to sell insurance and securities (or a certified public accountant). May I sell life insurance or accounting services or any other products to my client?

A. ACTEC Commentary on MRPC 1.8: Conflict of Interest: Current Clients: Specific Rules.

1. *Business Transactions with Client*. MRPC 1.8(a) provides mandatory procedural safeguards when a lawyer engages in business transactions with a client. As explained in this Commentary, lawyers often provide services for clients that could be considered business transactions but should not be so considered. Like any lawyer, an estate lawyer who desires to enter a business transaction with a client should follow the procedures set forth in MRPC 1.8(a).

2. *Prohibited Transactions*. Unless the lawyer complies with the requirements of MRPC 1.8(a), a lawyer generally should not enter into purchase or sale transactions with a client or with the beneficiaries of a fiduciary estate if the lawyer is serving as fiduciary or as counsel to the fiduciary.

B. ACTEC Commentary on MRPC 1.5: Fees.

1. *No Rebates, Discounts, Commissions or Referral Fees*. The lawyer should not accept any rebate, discount, commission or referral fee from a nonlawyer or a lawyer not acting in a legal capacity in connection with the representation of a client.

a. Even with full disclosure to and consent by the client, such an arrangement involves too great a risk of overreaching by the lawyer and the potential for actual or apparent abuse.

b. The client is generally entitled to the benefit of any economies that are achieved by the lawyer in connection with the representation.

c. The acceptance by the lawyer of a referral fee from a nonlawyer may involve an improper conflict of interest. *See* MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). In those jurisdictions that permit referral fees between lawyers, the lawyer should comply with the requirements of local law governing such matters,

including full disclosure to the client. A lawyer is generally prohibited from sharing legal fees with nonlawyers. *See* MRPC 5.4 (Professional Independence).

C. Va. Rules.

1. Va. Rule 1.8(a) and MRPC 1.8(a), while worded differently, contain substantially the same requirements. Va. Rule 1.8(a) provides that:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

2. Va. Rule 1.5(a) and MRPC 1.5(a) are substantively similar.

3. Va. Rule 1.7 and MRPC 1.7, although worded slightly different, are substantively identical.

D. Comment to Va. Rule 1.8. [1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable.

1. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services.

2. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

E. LEOs. *LEO 1754* (2001) addresses the situation of whether an attorney and life insurance agent may share a commission.

1. ***Facts***: Attorney's practice is principally in the area of estate planning. Attorney holds a life and health insurance license and is an agent for Insurance Company. Attorney recommends that Client establish an irrevocable life insurance trust. Attorney also discloses that he is a licensed insurance agent and recommends that Attorney, Client and Insurance Agent collaborate to design a comprehensive insurance plan for Client. Attorney advises Client that Attorney will receive one-half of the commission on the policy used to fund the trust. After disclosure, Client approves placement of the insurance policy with Attorney and Insurance Agent. Upon issuance of the policy, Insurance Company issues a check to Attorney and a check to Insurance Agent for their shares of the insurance commission.

2. ***Analysis:***

   a. The committee found that the appropriate and controlling disciplinary rules to be as follows:

      (1) Va. Rule 1.7 Conflict of Interest: General Rule.

         (a) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
            i) the lawyer reasonably believes the representation will not be adversely affected; and
            ii) the client consents after consultation.

      (2) Va. Rule 1.8. Conflict of Interest: Prohibited Transactions.

         (a) A lawyer shall not enter into a business transaction with a client . . . unless:
            i) the transaction and terms on which the lawyer acquires the interest
               a) are fair and reasonable to the client and
               b) are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

ii) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

iii) the client consents in writing thereto.

b. Previously, the committee held that an attorney may receive reasonable compensation from a title insurance agency in the form of legitimate fees based upon the attorney's having rendered services for the agency. *See LEO 1564* (1994, revised 1995).

c. The committee found that the situation in LEO 1564 was comparable to that of an attorney rendering a separate service to the client in the design of a comprehensive insurance plan.

(1) Since the basis of that payment is not related to legal services but based on premiums paid for specific insurance policies the committee found that the transaction was not *per se* improper.

(2) Va. Rule 1.7(b) seems to allow the lawyer to provide the representation to the client as long as it is not limited by the lawyer's own interests of promoting his insurance business.

(a) Comment [4] to Va. Rule 1.7(b) seems particularly helpful in outlining that the loyalty to a client is impaired when a lawyer fails to consider or recommend an appropriate course of action for a client because of the lawyer's own interests.

(b) That sort of conflict in effect forecloses other alternatives that would be available to the client.

(3) To avoid such a conflict in the present situation, the committee held that during the course of representing a party in estate planning where insurance related products are obtained from the attorney and insurance agent, it would be improper for the attorney to engage in the representation without full and adequate disclosure to the client.

(4) Comment [6] in Va. Rule 1.7 specifically addresses the issue that a lawyer may not allow his business interests to affect his representation of a client. The lawyer may not

refer clients to an enterprise in which the lawyer has an undisclosed interest.

(5) Furthermore, since the transaction will create a business relationship between the attorney and the client, Va. Rule 1.8(a) requires that:

(a) the transaction must be fair and reasonable, and

(b) the terms fully disclosed to the client, in writing.

(c) In addition, the client must be given a reasonable opportunity to seek advice of independent counsel and consent in writing to the transaction.

(d) The committee also held that the sufficiency of the disclosure must be resolved in favor of the client, and against the attorney, since it is the attorney who seeks to profit in advising his client to utilize the services of the business in which the attorney has a pecuniary interest. *See LEO 1564* (1994, revised 1995).

3. In conclusion, the committee held that the attorney may participate in the compensation arrangement so long as the dictates of Va. Rules 1.7 and 1.8 are followed.

F. Caveat. An attorney practicing in a dual capacity is subject to the Va. Rules even when practicing in his or her non-lawyer function. *See In the matter of Oliver Stuart Chalifoux*, VBS Docket No. 03-033-3680 (2003). In *Chalifoux*, the VSB Disciplinary Board of the Virginia State Bar found that a lawyer-accountant could not refuse to produce documents under a subpoena *duces tecum* issued by the VSB. Chalifoux asserted that the tax returns were prepared by him in his non-lawyer capacity as a tax accountant.

1. The Disciplinary Board found that: Chalifoux blurred the capacity in which he represented the clients and their business entity and the fact that Chalifoux was also their accountant did not displace his role as their lawyer. The Disciplinary Board then applied Va. Rule 1.16, which does not permit a lawyer to withhold a client's files until the client's bill has been paid to the lawyer (or until the client's bill has been paid to another creditor). The Disciplinary Board stated that if a lawyer, acting in a fiduciary capacity, violates his duty in a manner that would justify disciplinary action had the relationship been that of an attorney-client, the

lawyer is subject to discipline under the Va. Rules, relying on LEO 1617 (1995).

2. The Disciplinary Board found that even if Chalifoux could establish that he acted ***solely*** in his capacity as an accountant, he could not avoid the production of documents sought by the subpoena *duces tecum*, since he is a lawyer subject to the Va. Rules, even though he acted only in his capacity as an accountant.

G. Conclusion to Hypothetical #7.

1. In Hypothetical #7, the lawyer may sell life insurance (or another product) to a client, *provided that* the lawyer follows the provisions in Va. Rule 1.8 (business transactions) and Va. Rule 1.7 (conflicts of interest).

2. Va. Rule 1.8(a) generally requires that:

   (1) the transaction is fair and reasonable to the client, and fully disclosed and transmitted in writing in a manner which can be reasonably understood by the client;

   (2) the client is given a reasonable opportunity to seek the advice of independent counsel; and,

   (3) the client consents in writing.

3. Va. Rule 1.7(b) generally requires that:

   a. the lawyer reasonably believes that representation of the client will not be adversely affected by the lawyer's own interests; and,

   b. the client consents after consultation.

4. The overriding requirement in this situation is full and adequate disclosure by the lawyer to the client.

5. Even if the lawyer acts solely in his capacity as a non-lawyer, the Va. Rules will still apply to the lawyer.

VIII. ATTORNEY NAMED AS FIDUCIARY (HYPOTHETICAL #8)

Hypothetical #8: Mrs. Moneybags, an elderly, rich, fully lucid and sharp woman, is a new client. She has fallen in love with me, probably because of my good looks, confident attitude, and persuasiveness. I sense that she may be willing to appoint me as executor of her rather large estate and trustee of her trust. May I suggest to her that she name me as executor and trustee, and may I draft the documents naming me as fiduciary?

A. ACTEC Commentary. There is no commentary on this issue.

B. ABA Opinions. ABA Opinion 426 (2002) found that lawyers may act as personal representatives or trustees under documents the lawyer prepares, but: must obtain a written consent if the lawyer's judgment would be significantly impaired; must advise the client about how the lawyer's compensation will be calculated and whether it is subject to some limits or court approval. Lawyers may also hire their own firms to perform legal work in the administration of the trust or estate, in which case the lawyers generally represent themselves, and not the beneficiaries or the trust or estate as an entity. Even with consent, a lawyer serving as a fiduciary may not take positions adverse to the interests of a beneficiary or the entity. Lawyers acting as fiduciaries generally should not represent beneficiaries in unrelated matters.

C. LEOs.

1. *LEO 1358* (1990). Lawyers drafting a will or trust agreement must be very careful in naming themselves as executors or trustees. It is likely to be improper if the lawyer has not previously represented the client. At a minimum, the lawyer has a duty to advise the client of fees that would be charged by other executors or trustees. If the instrument requires that the estate or trust hire the lawyer's firm for legal services, the client must consent after full disclosure. If a lawyer acting as a fiduciary commits an act that could be disciplined had the relationship been that of an attorney and client, the lawyer-fiduciary may be disciplined by the Bar.

2. *LEO 1387* (1990). A lawyer acting as executor or trustee could hire the lawyer's own law firm to represent an estate as long as the co-fiduciaries consented. However, the firm would have to withdraw if the executor/trustee had to be a witness in any later proceedings (unless the testimony involved a matter of formality or an uncontested matter, and would not be rebutted by another party).

D. *LEO 1515* (1994) outlines the principles governing a lawyer acting as an executor or trustee. The opinion poses five specific questions that should be asked when a lawyer considers serving as a fiduciary for a client:

1. *Draftsman as Fiduciary*. Must there be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to provide legal services and, if so, what must be the nature and quality of that attorney/client relationship?

   a. Although a pre-existing attorney/client relationship is not required, a significant factor concerning the appropriateness of an attorney being named as executor or trustee in a document drafted by the attorney is whether the attorney draftsman took advantage of his role as draftsman to secure such a nomination for the attorney or another member of the attorney's firm. The naming of the executor or trustee must be an informed and fully volitional act of the client.

   b. Although the issue of whether or not undue influence was exerted requires a factual determination, on a case-by-case basis, the total lack of any pre-existing attorney/client relationship greatly enhances the potential for a finding of undue influence. The existence, duration, and nature of any earlier relationship would obviously mitigate such a finding because, clearly, an attorney with knowledge of the testator's/grantor's affairs, values, and estate would be in a position to best serve the client's needs. *See* DR 5-l0l(A) (now Va. Rule 1.7(b)).

   c. Furthermore, while the Virginia Code of Professional Responsibility (now the Va. Rules) does not generally preclude in-person solicitation, *see* DR 2-l03(A) (now Va. Rule 7.3), it prohibits it under certain circumstances and requires that the attorney take into consideration the "physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, whether or not a pre-existing attorney/client relationship is involved, in order to minimize the appearance of undue influence, the attorney must consider carefully the testator's/grantor's state of mind and health before recommending himself or a member of his firm, for future employment as executor or trustee.

2. *Disclosure of Fees*. What disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and, if disclosure is required, when must the disclosure be made?

   a. DR 2-l05(A) (now Va Rule 1.7(b)) requires, in pertinent part, that the attorney's fees be adequately explained to the client; DR 5-l0l(A) (now Va Rule 1.7(b)) requires a client's consent, after full and adequate disclosure, to the attorney's financial interest when that interest may affect the exercise of the attorney's professional judgment on behalf of his client; and DR 6-l0l(C) (now Va Rule 1.4(a) and 1.4(b)) requires an attorney to keep a client reasonably informed about matters in which the attorney's services are being rendered.

   b. Full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client prior to the execution of the instrument.

   c. It is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document. ***Note that Va. Rule 1.7(c)(4) requires the consent to be memorialized in writing and Va. Rule 1.8(a)(3) requires the client to consent in writing.***

   d. The attorney has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services.

   e. An attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

3. *Attorney/Fiduciary Retaining Own Law Firm as Attorney for Trust/Estate.* May an attorney/executor or trustee retain his law firm as attorney for a trust or estate for which he is serving as fiduciary? If it is proper to retain the executor's or trustee's own law firm, what limitations exist as to compensation for each? Should this matter be disclosed to the testator/grantor/client in the course of the preparation of the instrument?

   a. The attorney named as executor or trustee must disclose and obtain the consent of the testator/grantor prior to the execution of the trust/will when the attorney intends to or is considering retaining his law firm as attorney for the trust or estate.

b. The disclosure must include the general compensation to be paid to the law firm.

c. The role of the attorney who serves as fiduciary to a trust or estate and additionally engages his law firm as attorney for the same entity presents a personal conflict as described by DR 5-l0l(A) (now Va. Rule 1.7(b)). In such a situation, the attorney's own financial, business, or personal interest may potentially affect the exercise of his professional judgment on behalf of the trust or estate.

d. The committee has earlier opined that it is not per se improper for an executor or trustee to engage his own law firm to provide representation in legal matters relating to estate administration. *See LEO l387* (1990).

e. *LEO l353* (1990) found that it would not be improper for a lawyer who is employed both as Assistant General Counsel to a corporation and as "of counsel" to a law firm to retain the outside law firm to provide legal services to the same corporate client. The committee did opine, however, that full disclosure of the conflict must be made, consent from the corporate client must be received, the lawyer must not provide direct representation to the corporate client through the law firm, that any of the fees received by the firm from the corporate client, and communication between the outside law firm and the corporation must be maintained with other directors or employees of the corporation. *LEO 1353* dealt with a situation where the consent of the client could be readily obtained. Clearly, if at the time of the preparation of the document, the attorney/draftsman/executor/trustee makes a full and adequate disclosure of the possibility that the trustee/executor may retain his firm as legal counsel and of the general compensation that would be paid, and the testator/grantor/client consents, then the personal conflict is cured. However, if the trustee/executor did not obtain the consent of the now deceased testator/grantor/client, either because it was not disclosed at the time the document was drafted, or because the executor/trustee did not draft the document, then the committee is of the opinion that, after full and adequate disclosure, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all of the income beneficiaries and vested remainder beneficiaries of the trust.

4. *Fiduciary Competence*. As a matter of ethical consideration, do the Va. Rules impose a minimum standard of competence upon attorneys serving as fiduciaries?

   a. The standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law and . . . present a legal question beyond the purview of the committee. *LEO l325* adopted the conclusions reached in ABA Formal Opinion 336 and found that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the Code (now the Va. Rules).

   b. DR 6-l0l(A) (now Va. Rule 1.1), in pertinent part mandates that a lawyer should undertake representation only in matters in which the lawyer can act with competence.

   c. The committee cautions that DR 6-l02(A) (now Va. Rule 1.8(h)) precludes a lawyer from limiting his liability to his client for his personal malpractice.

5. *Suggestions for Fiduciaries*. May Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and, further, may the attorney suggest his willingness to serve as such? Are there limitations on an attorney's ability to solicit his designation as a fiduciary or future legal counsel to the estate?

   a. DR 2-l03(A) (now Va. Rule 7.3), regarding a lawyer's solicitation of professional employment, is applicable to the question. In addition, Ethical Consideration 5-6 provides further guidance in that it instructs that "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

   b. Although a conversation with the testator/grantor as to the suitability of specific persons or entities to serve as fiduciaries or legal counsel to the estate, and recommendations that a professional fiduciary (e.g., a bank, attorney, or accountant) would be preferable to or in addition to a lay person in certain instances, is clearly in the nature of appropriate legal advice to a client, the

attorney's suggestion of his own willingness to serve in those capacities would constitute solicitation for future employment.

c. Although the Va. Rules do not generally preclude in-person solicitation, DR 2-l03(A) (now Va Rule 7.3) does, however, prohibit it if the communication has a substantial potential for or involves the use of over persuasion or overreaching and requires that the attorney take into consideration the "sophistication regarding legal matters, [and] the physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, the attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate, in order to minimize the appearance of undue influence.

d. The same considerations apply:

(1) whether the document names the attorney as executor or trustee, on the one hand, or directs that the executor/trustee whom the client has designated engage the services of the attorney.

(2) to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as trustee. Advice about the suitability of specific persons or entities to serve as fiduciary should cover, in addition to competence and personal service, matters of financial stability both for the attorney and any agents with whom the attorney is expected to deal.

e. In addition, it is especially important to review with the client who wishes to avoid probate the availability of alternate fiduciary review procedures. Whether or not the client elects to remain within the probate system, the attorney in all cases should carefully review with the client the potential consequences of an elective waiver of security on the bond of the fiduciary.

6. Note that LEO 1515 was approved by the Virginia Supreme Court on February 1, 1994.

7. Observations:

a. While most LEOs are nonbinding, LEO 1515 is one of the few LEOs expressly approved by the Virginia Supreme Court and thus has acquired the status of a decision of the court. As a result, it is binding authority on Virginia lawyers.

b. Although the opinion was issued under the now superseded Code , the Va. Rules do not change the principles on which it is based.

E. *LEO 1590* (1994). A lawyer prepared a decedent's will creating two trusts -- for the decedent's son and daughter. The lawyer and the lawyer's wife (who is also a lawyer) serve as trustees for both trusts. After the decedent died, the son and daughter began to quarrel about the trusts. The lawyer represented the daughter in a suit against the son. Because the Code applies to the lawyers' conduct as trustees, the actual conflict between the son and the daughter precludes the lawyer and his wife from continuing to serve as trustees.

F. Application of Va. Rules. If a lawyer, acting in a fiduciary capacity, violates his duty in a manner that would justify disciplinary action had the relationship been that of an attorney-client, the attorney may be properly disciplined pursuant to the Code (now the Va. Rules). *See* LEO 1617 (1995); discussion of *Chalifoux*, *supra.*

G. Conclusion to Hypothetical #8.

1. The lawyer should exercise great caution in suggesting his willingness to serve as fiduciary under Mrs. Moneybag's estate planning documents. Although the lawyer is not prohibited from naming himself as fiduciary for Mrs. Moneybags' estate planning documents, he must be careful to avoid the potential for persuasion or overreaching. One factor in this regard is the absence of a pre-existing relationship, which could increase the likelihood of a finding of improper influence. However, considering that Mrs. Moneybags is fully lucid and sharp, even if elderly, it is probable that you can overcome the “undue influence” problem.

2. The lawyer must fully disclose the fees he will charge as fiduciary and the fact that his financial interest could affect his professional judgment. He should also advise Mrs. Moneybags to investigate the fees of others who might provide similar services. These disclosures should be made in a writing signed by Mrs. Moneybags as required by Va. Rule 1.8(a)(3) and Va. Rule 1.7(b)(4).

3. If the lawyer also intends to hire himself or his firm to provide separate legal services to the estate or trust, a separate conflict of interest arises

which also requires full disclosure of the fees to be charged for such services and a disclosure of the personal conflict which will arise from the lawyer's dual capacities and personal financial interests.

4. As in Hypothetical #7, above, the lawyer must comply with Va. Rules 1.8(a) and 1.7(b).

   a. Va. Rule 1.8(a) generally requires that:

      (1) the transaction is fair and reasonable to the client, and fully disclosed and transmitted in writing in a manner which can be reasonably understood by the client;
      (2) the client is given a reasonable opportunity to seek the advice of independent counsel; and,
      (3) the client consents in writing.

   b. Va. Rule 1.7(b) generally requires that:

      (1) the lawyer reasonably believes that representation of the client will not be adversely affected by the lawyer's own interests; and,
      (2) the client consents after consultation.

   c. The overriding requirement in this situation is full and adequate disclosure by the lawyer to the client.

5. Even if the lawyers acts solely in his capacity as a non-lawyer, the Va. Rules will still apply to the lawyer.

6. The lawyer must possess the competence required of a fiduciary. *See* LEO 1515 and Va. Rule 1.1.

7. The lawyer must also meet the requirements of in-person communications contained in Va. Rule 7.3(a)(2), which provides that:

   (a) A lawyer shall not, by in-person communication, solicit employment . . . from a non-lawyer who has not sought advice regarding employment of a lawyer if: . . . (2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

8. Again, however, considering that Mrs. Moneybags is fully lucid and sharp, even if elderly, it is probable that you can overcome the “undue influence” problem.

IX. ATTORNEY'S REPRESENTATION OF A FIDUCIARY (HYPOTHETICAL #9)

Hypothetical #9: If I represent a fiduciary, who is my client, what obligations do I owe to the fiduciary and beneficiaries?

A. ACTEC Commentary on MRPC 1.6: Confidentiality of Information.

1. *Disclosure of a Fiduciary's Commission of or Intent to Commit a Fraud or Crime*. When representing a fiduciary generally, the lawyer may discover that the lawyer's services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.

2. Whether a given financial loss to a beneficiary is a "substantial injury" will depend on the facts and circumstances. A relatively small loss could constitute a substantial injury to a needy beneficiary. Likewise, a relatively small loss to numerous beneficiaries could constitute a substantial injury. In determining whether a particular loss constitutes a "substantial injury," lawyers should consider the amount of the loss involved, the situation of the beneficiary, and the non-economic impact the fiduciary's misconduct had or could have on the beneficiary.

3. In the course of representing a fiduciary, the lawyer may be required to disclose the fiduciary's misconduct under the substantive law of the jurisdiction in which the misconduct is occurring. For example, the elder abuse laws of some states may require a lawyer who discovers the lawyer's conservator/client has embezzled money from an elderly, protected person to disclose that information to state agencies even though the lawyer's services were not used in conjunction with the embezzlement. Under such circumstances, MRPC 1.6(b)(6) ("to comply with other law") would authorize that disclosure.

B. ACTEC Commentary on MRPC 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer.

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

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

3. The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a

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

C. Va. Rules. Va. Rule 1.6 is different from MRPC 1.6 in its addition of a section dealing with an attorney's duty to reveal fraud. The following provisions of Va. Rule 1.6(c) do not appear in MRPC 1.6:

> (c) A lawyer shall promptly reveal:
>
> (1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;
>
> (2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the

fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

D. LEOs and VSB.

1. *LEO 1515* (1994). LEO 1515 outlines the principle governing a lawyer acting as executor or trustee and provides that a pre-existing attorney-client relationship is not necessary, but is one factor showing the propriety of the lawyer's selection. The lawyer must fully disclose the fees that will be charged (preferably in writing) and "has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services." A lawyer acting as executor or trustee may hire the lawyer's own law firm to represent him or her as long as there is full disclosure (including "the general compensation to be paid to the law firm") and consent (if the client is already dead, the beneficiaries can consent). A lawyer acting as a fiduciary is governed by the Code. A lawyer may solicit designation as a fiduciary as long as there is no overreaching or fraud.

2. *LEO 1452* (1992). A lawyer retained by a personal representative of an estate has an attorney-client relationship with the executor or other personal representative and not the beneficiaries.

3. *LEO 1599* (1994). A lawyer representing a person who is an executor and one of two beneficiaries: does not have a conflict unless the lawyer also represents the other beneficiary; must advise the client that communications with the client as beneficiary may not be entitled to attorney-client privilege protection, because communications with the client as fiduciary may similarly not be protected from disclosure to the beneficiaries; has "no attorney-client relationship with the beneficiaries of the estate other than the executor;" has no "derivative duty" to the other beneficiary by virtue of the client's fiduciary duty (as executor) to the other beneficiary, although the lawyer must "be alert to indications that [the other beneficiary] does not understand the attorney's role;" may not advise or represent the executor in actions that breach the executor's fiduciary duty; does "not take on the executor's duties to the beneficiaries simply by performing the executor's administrative tasks;" and, may not

charge for any services rendered to the client in the client's capacity as a beneficiary.

4. *LEO 1720* (1998). A lawyer who acted as co-administrator of an estate did not represent the estate or the beneficiaries, but rather "was his own client for practical purposes." After withdrawing as administrator, the lawyer could not represent a beneficiary's executrix in litigation involving estate assets (unless the successor administrator consented) because the representation would be adverse to the estate and was "substantially related" to the lawyer's previous representation of himself or herself as administrator ("substantial relatedness between the matters in a former representation and a current representation is a fact-specific inquiry from case to case . . . in previous opinions, substantial relatedness depended upon whether the same parties, the same subject matter, or the same issues were present. The committee referred to cases to find substantial relatedness in terms of the matters or the issues being essentially the same, arising from substantially the same facts, being by-products of the same transaction, or entailing a virtual congruence of issues of patently clear relationship in subject matter."). On the other hand, the lawyer could represent the beneficiary's executrix in litigation over real estate which was never part of the probate estate and therefore not within the scope of the lawyer's role as administrator. There may also be fiduciary duties or statutes that would apply.

5. *LEO 1473* (1992). Three co-executors each hired their own lawyer and a fourth lawyer to represent the estate. The fourth lawyer had an attorney-client relationship with all three executors. The executors later became trustees, and began to quarrel. The fourth lawyer may not continue to represent two of the executor/trustees unless the third one consented.

6. *LEO 1617* (1995). A lawyer acting as an executor, trustee, guardian, attorney-in-fact or other fiduciary is bound by the Va. Rules. In discussing a lawyer's duty to render accountings, the Bar concluded that the duty varies with the type of fiduciary relationship. However, the duty of accounting may not be waived.

7. *LEO 1335* (1990). Because a lawyer acting in a fiduciary capacity is governed by the Va. Rules, a lawyer acting as trustee may not undertake activity the lawyer knows is unjustified.

8. *LEO 340* (1979). A lawyer representing an estate may purchase an estate asset if all interested parties consent. [Under Va. Rule 1.8(a), a lawyer may not enter into a "business transaction" with a client unless: 1) the transaction is fair and reasonable to the client; 2) the client is given an

opportunity to seek independent advice; and, 3) there has been full disclosure and consent in writing.].

9. ABA Opinion 380 (1994). A lawyer representing a fiduciary owes a duty to the fiduciary and not to the beneficiaries.

10. Anne Michie, FAQs, "When a lawyer is hired by the executor of an estate, who is the client?"

    a. Attorneys hired by executors are not always clear to whom they owe duties of loyalty and confidentiality. Both the executor and beneficiaries may interact with the attorney as if he represents the interests of everyone involved. However, as outlined in LEOs 1452, 1599 and 1720, when an attorney is hired by the executor, he represents that person in that role. He does not represent the beneficiaries.

    b. Nonetheless, beneficiaries are not always knowledgeable on that point and may look to the attorney for advice and share personal information with the attorney. An attorney always has a duty to clarify his role whenever dealing with an unrepresented person when that person is confused on the point. Rule 4.2. Accordingly, where a beneficiary is under the impression that the attorney is protecting that beneficiary's individual interest, the lawyer has an affirmative duty to clarify the matter. Also, while the executor's attorney does not represent the beneficiary personally, he must, nonetheless, maintain awareness of the executor's fiduciary duty to the beneficiaries and never assist in a breach of that duty. LEO 1599.

E. Conclusion to Hypothetical #9.

1. An attorney hired by a fiduciary represents the fiduciary in that capacity, and does not represent the beneficiaries. The attorney has an affirmative duty to clarify to the beneficiaries that he does not represent their interests in the event that the beneficiaries are confused on this point.

2. Although the attorney for an executor or trustee does not represent any of the beneficiaries personally, he must nonetheless maintain awareness of the executor's or trustee's fiduciary duty to the beneficiaries and never assist the executor or trustee in a breach of that duty.

3. When an attorney serves in a fiduciary capacity, i.e., as an executor or trustee, the attorney represents neither the estate nor the beneficiaries, but is essentially his own client.

4. An attorney serving as a fiduciary is bound by the Va. Rules in such capacity, and as such, the lawyer may not undertake any activity the lawyer knows is unjustified.

X. REPRESENTATION OF SPOUSES (HYPOTHETICAL #10)

Hypothetical #10: Husband and Wife Jones are both new clients and have requested that you draft estate planning documents for them. Husband wants everything to go to Wife upon his death and to their children equally should Wife predecease him. Wife wants everything to go to Husband upon her death and to their children equally should Husband predecease her. Since they appear to be very much in love and in total agreement, you have not had them sign your ususal spousal conflicts letter providing that you will disclose everything that a communicating spouse tells you to the non-communicating spouse. Issues:

(1) May I prepare estate planning documents for Husband and Wife?

(2) What if Husband wants all of his assets to go to Son Jones if Wife does not survive him, and Wife wants all of her assets to go to Daughter Jones if Husband does not survive her?

(3) What if Husband wants to cut Wife out entirely from his estate and leave everything to his mistress? Believe it or not Wife admits that she is aware of the mistress!

A. ACTEC Commentary on MRPC 1.6: Confidentiality of Information.

1. *Joint and Separate Clients*. Subject to the requirements of MRPCs 1.6 (Confidentiality of Information) and 1.7 (Conflict of Interest: General Rule), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. *See* ACTEC Commentary on MRPC 1.7 (Conflict of Interest: General Rule).

2. Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them.

    a. In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients. The better practice in all cases is

to memorialize the clients' instructions in writing and give a copy of the writing to the client.

b. The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.

3. *Multiple Separate Clients*. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters.

a. However, with full disclosure and the informed consents of the clients some estate planners regularly undertake to represent husbands and wives as separate clients.

b. Similarly, some estate planners also represent a parent and child or other multiple clients as separate clients.

c. A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately.

d. For example, without disclosing a confidence of one spouse the lawyer may be unable adequately to represent the other spouse.

e. However, within the limits of MRPC 1.7 (Conflict of Interest: General Rule), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation.

f. The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law such a writing need not be signed by the clients.

B. ACTEC Commentary on MRPC 1.7: Conflict of Interest: Current Clients.

1. *General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients*.

a. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. *See* ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

b. In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations.

c. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them: Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family". Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

2. *Disclosures to Multiple Clients*.

a. Before, or within a reasonable time after, commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). *See* ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

b. In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.

c. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

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

3. *Joint or Separate Representation.*

a. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly.

b. However, some estate planners regularly represent husbands and wives as separate clients. They also undertake to represent other related clients separately with respect to related matters. Such representations should only be undertaken with the informed consent of each client, confirmed in writing. *See* ACTEC Commentaries on MRPC 1.0(e)) (defining "informed consent") and MRPC 1.0(b) (defining "confirmed in writing"). The writing may be contained in an engagement letter that covers other subjects as well.

C. Va. Rules.

1. Va. Rule 1.7 and MRPC 1.7, although worded slightly different, are substantively the same. Va. Rule 1.7 provides:

(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 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 each affected client consents after consultation, and:

(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) the consent from the client is memorialized in writing.

2. Va. Rule 1.6 and MRPC 1.6 are similar in many respects, but Va. Rule 1.6 is more specific. A comparison of Va. Rule 1.6(a) and MRPC 1.6(a) follows [underlined text represents Va. Rule 1.6(a) and strikeout text represents MRPC 1.6(a)]:

(a) A lawyer shall not reveal information ~~relating to representation of a~~ protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client ~~gives informed consent~~consents after consultation....

3. Va. Rule 1.4, entitled "Communication," provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

4. When representing a husband and wife, it is the interplay of these Va. Rules that may cause ethical dilemmas.

D. LEOs.

1. *LEO 708* (1985). A lawyer may draft wills for both a wife and husband although the provisions of the wills differ, as long as the lawyer may adequately represent both parties' interests.

2. *LEO 728* (1985). If both the husband and wife consent, a lawyer may represent both of them in preparing wills that preclude changing beneficiaries following the death of the first to die.

E. Conclusion to Hypothetical #10.

1. An attorney may prepare estate planning documents for Husband and Wife, but should take certain precautions in doing so.

a. At the outset, the lawyer should explain to Husband and Wife the terms of the lawyer's representation, including the extent of confidentiality that will be maintained with respect to communications made by each. In the absence of an agreement to the contrary, the default rule is that the lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients.

b. Additionally, the lawyer should explain that he would be required to withdraw from representation of both Husband and Wife if a conflict of interest develops between them to the degree that the lawyer cannot effectively represent the interests of both of them.

c. This information should be conveyed to Husband and Wife in written form, possibly in an engagement letter or agreement, and should preferably be signed by Husband and Wife acknowledging

their consent. ***But,*** if there is or is likely to be a concurrent conflict, Va. Rule 1.7(b)(4) *requires* the consent to be in writing.

2. In the situation where Husband wants all of his assets to go to Son Jones if Wife does not survive him, and Wife wants all of her assets to go to Daughter Jones if Husband does not survive her, the lawyer may draft the estate planning documents for both Husband and Wife since he may adequately represent the interests of both.

3. In the situation where Husband wants to cut Wife out of his estate and leave everything to his mistress, the lawyer ***probably*** cannot represent both Husband and Wife for the following reasons:

   a. A concurrent conflict exists. The interests of Husband and Wife in this situation are directly adverse to each other.

   b. However, suppose both clients are willing to consent to the representation? It may be possible (although not prudent) for the lawyer to continue representing both Husband and Wife. The lawyer may be able to meet the requirements of Va. Rule 1.7(b)(1) and (3), which provide:

      > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.
      >
      > This may be difficult, but possible in the case of the Jones.
      >
      > (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.
      >
      > There is no claim or proceeding at present, but what happens if the Husband dies immediately after signing his documents. Surely the Wife will make a claim for her elective share of his augmented estate.

      Assuming that the requirements of both 1.7(b)(1) and (3) can be met and both clients consent in writing, the lawyer may, but probably should not, continue to represent both Husband and Wife Jones.

XI. REPRESENTATION OF SPOUSES WITH ADVERSE INTERESTS (HYPOTHETICAL #11)

Hypothetical #11: Husband and Wife Jones are both new clients and have requested that you draft estate planning documents for them. Since they appear to be very much in love and in total agreement, you have not had them sign your usual spousal conflicts letter providing that you will disclose everything that a communicating spouse tells you to the non-communicating spouse. You have prepared "I love you" estate planning documents for Husband and Wife, but they have not yet signed the documents. Husband now tells you that he wants a divorce. (1) Do you have to communicate the Husband's wish for a divorce to Wife? (2) Do you have to withdraw from representation?

A. ACTEC Commentary on MRPC 1.6: Confidentiality of Information.

1. *Confidences Imparted by One Joint Client*. A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed.

   a. The potential courses of action include, inter alia,

      (1) taking no action with respect to communications regarding irrelevant (or trivial) matters;
      (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and,
      (3) withdrawing from the representation if the communication reflects serious adversity between the parties.

   b. For example,

      (1) A lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse.

      (2) On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that

threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement I intend to leave her"; or, "All of the insurance policies on my life that name her as beneficiary have lapsed").

(3) Without the informed consent of the other client the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

2. In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. *See* ACTEC Commentary on MRPC 2.1 (Advisor). In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

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

client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

B. Use of Waivers.

1. ACTEC Commentary on MRPC 1.7: Conflict of Interest: Current Clients.

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

b. Overly broad waivers or waivers executed by an inadequately informed client are of little, if any, value. As noted in ABA Formal Opinion 93-378 (1993): [I]t would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.

C. LEOs.

1. *LEO 1487* (1992). A lawyer representing the executor of an estate sought a general release from the widow. The Bar needed more facts before determining whether an attorney-client relationship existed between the lawyer and the widow. If it did, a general release would be per se improper. Because the lawyer was acting as a fiduciary even if not as a lawyer, "such a general release is not a good practice and does not follow the spirit of the Disciplinary Rule."

2. *LEO 1561* (1993). A wife was injured in a car accident in which her husband was killed. A lawyer represented her in suing the husband's estate for negligence, and the case was settled. One year later, the wife (now administratrix of her husband's estate) sued a third party, claiming that it

negligently caused the accident. The lawyer's current representation of the wife against the third party does not violate the Code (now the Va. Rules) because the wife "is in a position to waive any conflict both as administratrix of the estate and on her own behalf."

D. Conclusion to Hypothetical #11.

1. In the absence of an agreement to the contrary, the presumption is that the lawyer represents Husband and Wife jointly and therefore, fully shares information between the clients.

2. In regard to whether the lawyer must disclose Husband's desire for a divorce to Wife, the lawyer should first encourage Husband to disclose this information to Wife. If Husband is not willing to do so, and unless an agreement to the contrary exists between Husband and Wife, the lawyer has an obligation to share the information with Wife since it threatens her interests.

   a. As the lawyer represents the interests of both Husband and Wife, the lawyer is required to take some sort of action with respect to a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively. As such, the lawyer should not allow Husband and Wife to execute their documents until he is sure that the intended divorce is fully disclosed to Wife.

   b. If Husband refuses to disclose:

      (1) The lawyer has an obligation under Va. Rule 1.4 to keep Wife reasonably informed.

      (2) However, the lawyer also has a duty of confidentiality to Husband under Va. Rule 1.6.

      (3) If the lawyer's representation of Husband and Wife is joint, then the lawyer must disclose the information to Wife if Husband refuses to do so.

      (4) If the lawyer's representation of Husband and Wife is separate and they have signed an engagement letter or other agreement, then the terms of the engagement letter or agreement will control. If there is no engagement letter, then the lawyer is faced with a potential conflict of interest between concurrent clients.

3. Under Va. Rule 1.7, a lawyer may not represent a client if the representation involves a concurrent conflict of interest. Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if each affected client consents after consultation, and:

   a. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

   b. the representation is not prohibited by law;

   c. 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,

   d. the consent from the client is memorialized in writing.

4. In any situation where a lawyer is representing a married couple in estate planning, it is imperative that the lawyer always discuss the potential for conflicts and discuss how confidential information of the husband and wife will be disclosed to the other, absent an agreement to the contrary. The lawyer should always have the married couple acknowledge their understanding of the above in writing.

XII. TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP & DUTIES TO FORMER CLIENTS (HYPOTHETICAL #12)

Hypothetical #12: Husband and Wife have signed the documents, and Husband now tells me he wants a divorce. What do I need to do, if anything? May I represent Husband in the divorce proceedings? May I prepare new documents for Husband disinheriting Wife before the divorce? What about after the divorce?

A. ACTEC Commentary on MRPC 1.16: Declining or Terminating Representation. A representation may be terminated by the lawyer's completion of the legal services or tasks mutually contemplated by the lawyer and client, such as, e.g., the completion of an estate planning project for the client. Refer also to ACTEC Commentary on MRPC 1.4 (Communication) and the concept of the dormant representation.

B. ACTEC Commentary on MRPC 1.4: Communication.

1. *Termination of Representation*. A client whose representation by the lawyer is dormant becomes a former client if the lawyer or the client terminates the representation. *See* MRPC 1.16 (Declining or Terminating Representation) and MRPC 1.9 (Conflict of Interest: Former Client) and the ACTEC Commentaries thereon. The lawyer may terminate the relationship in most circumstances, although the disability of a client may limit the lawyer's ability to do so. Thus, the lawyer may terminate the representation of a competent client by a letter, sometimes called an "exit" letter, that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

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

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

characterized as a client and not a former client for purposes of MRPCs 1.7 and 1.9.

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

C. ACTEC Commentary on MRPC 1.9: Duties to Former Clients.

1. The completion of the specific representation undertaken by a lawyer often results in the termination of the lawyer-client relationship. *See* ACTEC Commentary on MRPC 1.16 (Declining or Terminating Representation). Thus, the completion of the administration of an estate normally results in the termination of the representation provided by the lawyer to the personal representative. The execution of estate planning documents and implementation of the client's estate plan may, or may not, terminate the lawyer's representation of the client with respect to estate planning matters. In such a case, unless otherwise indicated by the lawyer or client, the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive. However, following implementation of the client's estate plan, the lawyer or the client may terminate the representation by giving appropriate notice, one to the other. Even if the representation is terminated, the lawyer continues to owe some duties to the former client. As stated in the Comment to MRPC 1.9 (Duties to Former Clients), "[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest."

2. The lawyer who formerly represented a client in connection with an estate or trust matter may not, without the informed consent of the former client, confirmed in writing, represent another person in the same or a substantially related matter if that person's interests are materially adverse to those of the former client. For example, a lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's claims against the trust by invading the assets of the trust. Similarly, the lawyer may not, without the informed consent of a former client, confirmed in writing, use to the detriment of the former client any confidential information that was obtained during the course of the prior representation. *See* MRPC 1.7 (addressing the effectiveness of an advance waiver); MRPC 1.10 (regarding disqualification of a firm with which the

lawyer is or was formerly associated). MRPC 1.9 may be implicated following the termination of a joint representation.

3. *Example 1.9-1*. Lawyer (L) represented Husband (H) and Wife (W) jointly in connection with estate planning matters. Subsequently H and W were divorced in an action in which each of them was separately represented by counsel other than L. L has continued to represent H in estate planning and other matters. Because W is a former client, MRPC 1.9 imposes limitations upon L's representation of H or others. Thus, unless W gives informed consents, confirmed in writing, MRPC 1.9(a) would prevent L from representing H in a matter substantially related to the prior representation in which H's interests are materially adverse to W's, such as an attempt to modify or terminate an irrevocable trust of which W was a beneficiary. Also, under MRPC 1.9(c), L could not disclose or use to W's disadvantage information that L obtained during the former representation of H and W in estate planning matters without W's informed consent, confirmed in writing. For example, L could not use on behalf of one of W's creditors information that L obtained regarding W's financial condition or ownership of property. Some estate planners who represented both spouses in connection with estate planning matters prior to the commencement of a dissolution proceeding decline to represent either of them in estate planning matters during and after the proceeding.

4. As noted in the Comments to MRPC 1.9, matters are "substantially related" for purposes of the Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

D. Va. Rules.

1. Va. Rule 1.9 and MRPC 1.9 are worded differently, with the primary difference being that Va. Rule 1.9 requires consent of both the current and former client, while MRPC 1.9 requires consent of only the former client. A comparison of Va. Rule 1.9 and MRPC 1.9 follows [underlined text represents Va. Rule 1.9 and strikeout text represents MRPC 1.9]:

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

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

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

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless both the present and former client ~~gives informed~~ consent~~, confirmed in writing~~ after consultation.

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

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as ~~these Rules~~Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as ~~these Rules~~Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

2. Va. Rule 1.16(a) and MRPC 1.16(a) are substantively identical.

3. Va. Rule 1.16(b) and MRPC 1.16(b), while worded differently, contain substantially the same requirements, and a comparison of Va. Rule 1.16(b)

to MRPC 1.16(b) follows [underlined text represents Va. Rule 1.16(b) and strikeout text represents MRPC 1.16(b)]:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

~~(1)~~ withdrawal can be accomplished without material adverse effect on the interests of the client~~;~~, or if:

~~(2~~1) ~~—~~the client persists in a course of action involving the lawyer~~'~~'s services that the lawyer reasonably believes is ~~criminal~~illegal or ~~fraudulent~~unjust;

~~(3~~2) ~~—~~the client has used the lawyer~~'~~'s services to perpetrate a crime or fraud;

~~(4~~3) ~~—the~~a client insists upon ~~taking action~~pursuing an objective that the lawyer considers repugnant or ~~with which the lawyer has a fundamental disagreement~~imprudent;

4. Va. Rule 1.16(c) and (d) and MRPC 1.16(c) and (d) while worded differently, contain similar requirements.

5. Va. Rule 1.16(e) dealing with the return of records is not found in MRPC 1.16.

6. Va. Rule 1.4 and MRPC 1.4 have some similar provisions but are substantively different. Va. Rule 1.4 seeks to make a more complete statement of a lawyer's obligation to communicate.

7. A comparison of Va. Rule 1.4(a) to MRPC 1.4(a) follows [underlined text represents Va. Rule 1.4(a) and strikeout text represents MRPC 1.4(a)]:

(a) A lawyer shall:

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

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

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

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

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

8. The additional language of Va. Rule 1.4(c), which does not appear in MRPC 1.4 is as follows:

   (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

E. LEOs and VSB.

1. *LEO 1472* (1992). The lawyer for a divorced wife may not represent the estate of the former husband.

2. *LEO 1206* (1989). A lawyer serving as the executor of an estate and representing three children in an action filed by a fourth may represent all of the children in an unrelated real estate transaction if all consent.

3. Anne Michie, FAQs, "Can an attorney represent a spouse in a divorce where the attorney previously represented the couple jointly in some other legal matter?"

   a. Satisfied clients usually return to former counsel when new matters arise. This is generally a good thing. However, potential conflicts of interest must be considered where the prior representation was part of joint representation of spouses. Frequently, an attorney will have done estate planning, bankruptcy or real estate work for a couple only to be contacted by one of the spouses when the marriage is dissolving. Each of these new representations must be analyzed regarding two rules: 1.6 governing client confidentiality and 1.9 regarding former clients. Rule 1.9(a) prohibits an attorney from representing a party adverse to a former client in a matter substantially related to the prior representation. This prohibition is often not the hindrance to accepting these new representations, as while the divorce certainly is adverse to the former client, it is not usually "substantially related" to the prior matter. Nevertheless, Rule 1.9(b), together with Rule 1.6, may be the source of a conflict in many of these instances. Rule 1.9(b) prohibits a lawyer from

using confidential information obtained during a prior representation to the disadvantage of the former client.

b. Attorneys must consider whether any of the information obtained during the first matter would be pertinent in the divorce. If such information was received, then, under Rules 1.6 and 1.9(b), the attorney may only represent one spouse in the divorce if the other spouse consents to the use of that information against him or her. *See* LEOs 569, 677, 707, 774, 792, 1032 and 1181, reaching the same conclusions under the former Code of Professional Responsibility.

F. Conclusion to Hypothetical #12.

1. Once the lawyer completes the estate planning for the clients, the lawyer's representation is generally considered terminated. To be safe, the lawyer should send the client a "closed file letter" at the completion of the estate planning to inform the client that the relationship has terminated.

2. If representation of Husband and Wife was joint, then there are no issues with confidentiality between the two of them since information was to have been shared. However, the lawyer may not use one spouse's confidential information for the benefit of the other spouse.

3. Although the lawyer could possibly represent Husband in the divorce proceedings, it would be advisable not to, and the lawyer may not represent Husband without the informed consent of Wife to the use of any confidential information that the lawyer received from Wife during his representation of her for estate planning.

4. In regard to the preparation of new estate planning documents for Husband disinheriting Wife:

a. Prior to the divorce, the lawyer may represent the Husband only with the informed consent of Husband and Wife because such representation would be materially adverse to Wife’s interests. If Wife is not willing to consent, then the lawyer may not represent Husband in this regard.

b. After the divorce, the lawyer should still not represent Husband. Under Virginia law, upon divorce, all gifts to a divorced spouse under a will are extinguished and revocable beneficiary designations are revoked, and therefore the lawyer’s representation of Husband would not necessarily be materially adverse to Wife.

However, such revocation specifically does not apply to any trust or any death benefit payable to or under any trust. Any change to a trust of which the Husband's former Wife was a beneficiary would be materially adverse to Wife, and would therefore require the informed consent of Wife prior to lawyer's representation of Husband. The problem here, however, is that the lawyer may not know that Wife's interest are materially adverse until he has already begun representation of Husband.

XIII. UNAUTHORIZED PRACTICE OF LAW IN OTHER JURISDICTIONS. (HYPOTHETICAL #13)

Hypothetical #13: You have represented the Smiths and their businesses in Virginia for years. The Smiths have sold their businesses, their homes, and all their other Virginia real estate. They maintain no residence or office in Virginia, and they have retired and permanently moved to Florida. They just called and informed you of a terrible rift with one of their children who they wish to disinherit and remove him from all fiduciary positions under their estate planning documents. You also have several other retired clients who live in Florida whose circumstances are similar to the Smiths. May you redraft the Smiths' estate planning documents?

A. Va. Rule.

1. Rule 5.5 Unauthorized Practice Of Law.

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

2. Va. Comment: [1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

B. Va. UPLs.

1. UPL 93 (5/2/1986) allowed a non-Virginia attorney to prepare documents, conduct a settlement, and render advice on Virginia law in relation to real estate located in Virginia.

2. UPL 122 (6/9/1988) provided that it would not be improper for a non-Virginia lawyer to render advice in Pennsylvania to clients residing in Virginia on matters not concerning Virginia law.

3. UPL 99 (12/19/1986) presented a fact pattern where Virginia residents purchased a business located in Virginia. The buyer and seller both agreed that an attorney in the District of Columbia would conduct the closing. The attorney was licensed in the District of Columbia, but was

not admitted to practice in Virginia. The Committee found that the situation did not constitute the unauthorized practice of law in Virginia.

4. UPL 100 (12/9/1986) presented the question of whether an attorney licensed in the District of Columbia could move his practice to Virginia and continue to practice without a Virginia license. The attorney's practice was largely legislative, governmental, and advisory in nature, with little direct court practice. The attorney indicated that he would not be engaged in any court or judicial practice and that he would not hold himself out as being a member of the Virginia State Bar. The Committee determined that the attorney would be practicing law in Virginia, reasoning that one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

C. Florida Law.

1. Rule 4-5.5 Unlicensed Practice of Law; Multijurisdictional Practice of Law (based on MRPC 5.5).

(c) A lawyer admitted and authorized to practice law in another United States jurisdiction . . . may provide legal services ***on a temporary basis*** in Florida that:

(1) are undertaken ***in association with a lawyer*** who is admitted to practice in Florida and who actively participates in the matter . . . .

(4) are not within subdivisions (c)(2) or (c)(3), and

(A) are performed ***for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice***, ***or***

(B) ***arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.***

2. Note that the portion of Florida Rule 4-5.5 quoted above is identical to its counterpart in MRPC 5.5, except that 4-5.5(c)(4)(A) is added by Florida and is not found in the MRPC.

3. Florida Comment:

a. Other than as authorized by law, a lawyer who is not admitted to practice in Florida violates subdivision (b) if the lawyer establishes an office ***or other regular presence*** in Florida for the practice of law. ***Presence may be regular even if the lawyer is not physically present here.*** Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida.

b. There are occasions in which a lawyer admitted and authorized to practice in another United States jurisdiction or in a non-United States jurisdiction may provide legal services on a temporary basis in Florida under circumstances that do not create an unreasonable risk to the interests of his or her clients, the public, or the courts. Subdivisions (c) and (d) identify such circumstances.

c. There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in Florida and may therefore be permissible under subdivision (c). Services may be "temporary" even though the lawyer provides services in Florida on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

d. Subdivisions (c)(1) and (d)(1) recognize that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in Florida. For these subdivisions to apply, the lawyer admitted to practice in Florida could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation and actively participate in the representation.

e. Subdivision (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in Florida that are performed for a client who resides or has an office in the jurisdiction in which the lawyer is authorized to practice or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within subdivisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. When performing services which may be performed by nonlawyers, the lawyer remains subject to the Rules of Professional Conduct.

4. *Florida Ethics Opinion 24894* (2003). A Florida attorney sought an ethics opinion concerning the appropriate response he should give to out-of-state counsel who wrote demand letters and other correspondence to the Florida attorney's clients. The communications indicated that the out-of-state attorney was giving advice about Florida law. The Florida attorney refused to communicate with the non-Florida attorney and requested that a Florida attorney be retained to handle the issue. The opinion found that the Florida attorney acted appropriately in alerting the out-of-state practitioner to avoid the unlicensed practice of law. In subsequent correspondence, the Division Director clarified its position for the Florida Real Property, Probate and Trust Law Section and advised that a Florida attorney is not prohibited from reviewing documents, such as real estate or estate planning documents, drafted by out-of-state attorneys.

5. Gathering the necessary information for a living trust is not the practice of law and may be performed by nonlawyers. *Florida Bar re: Advisory Opinion - Nonlawyer Preparation of Living Trusts*, 613 So.2d 426, 427 (Fla. 1992). However, going beyond the mere gathering of information to answering specific legal questions, determining whether a client needs a living trust, assembling, drafting and executing the trust documents, and funding the living trust, is the practice of law and may not be performed by nonlawyers. *Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So.2d 255, 259 (Fla. 1997).

D. ACTEC Commentary on MRPC 5.5. A lawyer admitted to practice in one jurisdiction (an "admitted jurisdiction") who provides legal services in another jurisdiction in which the lawyer is not admitted (a "non-admitted jurisdiction") may violate the non-admitted jurisdiction's proscriptions against the unauthorized practice of law. ***If so, the lawyer is subject to discipline in both the admitted jurisdiction and the non-admitted jurisdiction***. MRPC 8.5 (Disciplinary Authority; Choice of Law).

1. A lawyer may also choose to associate counsel in the non-admitted jurisdiction. MRPC 5.5(c)(1).

   a. By doing so, the lawyer gains a similar, though not as expansive, safe harbor in which to practice. This safe harbor is only available when the legal services the lawyer provides in the non-admitted jurisdiction are provided on a "temporary basis."

   b. In addition, the associated counsel must "actively participate" in the matter. Active participation is not defined in the Rule or the comments.

c. Lawyers providing estate counseling services in a non-admitted jurisdiction would meet this second requirement by associating local counsel for such matters as deed preparation, will execution formalities, and similar services.

2. Threshold Requirement under MRPC 5.5(c): Temporary Basis.

a. If a lawyer desires to practice law in a non-admitted jurisdiction, MRPC 5.5(c) provides that the lawyer "may provide legal services on a temporary basis." ***The term "temporary basis" is not defined in the Rule.*** As noted in Comment 6 to Rule 5.5: "There is no single test to determine whether a lawyer's services are provided on a 'temporary basis' in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation." Thus, Comment 6 suggests a liberal interpretation of "temporary basis." This is particularly important for estate lawyers practicing in close proximity to another state. For example, a Chicago lawyer providing estate counseling for Illinois clients is likely to find multiple occasions to analyze and opine on the laws of Wisconsin, Iowa, Indiana, and Michigan regarding titling, tax, and similar issues. In addition, the Chicago lawyer may need to prepare deeds and other documents according to the laws of one or more of these jurisdictions. Provided the Chicago lawyer otherwise complies with paragraph (c), the lawyer's legal services regarding the surrounding non-admitted jurisdictions would constitute practicing law in those jurisdictions on a "temporary basis."

b. On the other hand, a lawyer who is engaged to provide estate planning services by clients in a non-admitted jurisdiction and makes personal visits to those clients on a recurring basis should be cautious in relying upon MPRC 5.5(c). While Comment 6 might lead the courts in the nonadmitted jurisdiction to interpret "temporary basis" broadly, the comments are not binding. Thus, a lawyer in such circumstances should consider the desirability of joining the non-admitted jurisdiction's bar.

3. *Other Legal Services on a Temporary Basis*. While the language of paragraph (c) appears to state all of the exceptions available to a lawyer seeking to practice law in a non-admitted jurisdiction on a "temporary basis," Comment 5 specifically provides: "The fact that conduct is not

[stated in (c)(1) through (4)] does not imply that the conduct is or is not authorized." Given the diversity of legal services that can be offered in estate planning and administration matters, there may be other situations in which a lawyer may provide legal services in a non-admitted jurisdiction or concerning the laws of a nonadmitted jurisdiction not expressly covered in paragraphs (c)(1) through (4). In analyzing whether the lawyer may act on a "temporary basis" with regard to the requested services, the lawyer should consider whether or not the "circumstances . . . create an unreasonable risk to the interests of their clients, the public or the courts." If the lawyer can demonstrate that there is no unreasonable risk, the lawyer may proceed with the requested representation on a "temporary basis." In any event, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.

E. Conclusion to Hypothetical #13.

1. There is no clear answer as to whether a Virginia lawyer may draft estate planning documents for a client in Florida.

2. In general, a lawyer may not practice law in a state in which he or she is not admitted, and doing so constitutes both a violation of Va. Rule 5.5 and any unauthorized law practice rule in the foreign state.

    a. The UPLs tend to focus on non-lawyers and foreign lawyers practicing law in Virginia, as opposed to a Virginia lawyer practicing law in a foreign state.
    b. The lawyer should probably consult UPL opinions in the state in which he or should would like to provide services.

3. Under Florida law, a Virginia lawyer may provide legal services in Florida on a ***temporary [problematic]*** basis if:

    a. ***Safest approach:*** the attorney is working in association with a Florida lawyer who actively participates in the matter; or
    b. ***Not applicable to the Smith facts:*** the client either resides or has an office in Virginia; or
    c. ***Potential, but risky:*** the services arise out of or are reasonably related to the Virginia lawyer's practice in Virginia.

4. "Temporary Basis"

    a. The Florida comments provide that there is no single test to determine whether a lawyer's services are provided on a "temporary basis" in Florida. Services may be "temporary" even

though the lawyer provides services in Florida on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

b. "Temporary" is not defined in the Florida Comments or in the ACTEC Commentaries.

c. The ACTEC Commentaries hint that:

(1) Like the Florida Comment, "services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation." Thus, Comment 6 suggests a liberal interpretation of "temporary basis."

(2) This is particularly important for estate planning lawyers practicing in close proximity to another state. For example, a Chicago lawyer providing estate counseling for Illinois clients is likely to find multiple occasions to analyze and opine on the laws of Wisconsin, Iowa, Indiana, and Michigan regarding titling, tax, and similar issues. In addition, the Chicago lawyer may need to prepare deeds and other documents according to the laws of one or more of these jurisdictions. Provided the Chicago lawyer otherwise complies with MRPC 5.5(c), the lawyer's legal services regarding the surrounding non-admitted jurisdictions would constitute practicing law in those jurisdictions on a "temporary basis."

5. "Arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

a. There is no Florida Comment nor does there appear to be any Florida law explaining this portion of Florida Rule 4-5.5(c)(4).

b. Here is where the ACTEC Commentaries may prove to be extremely helpful. Subject to the "***temporary basis***" threshold requirement:

(1) a lawyer may provide legal services in a non-admitted jurisdiction that arise out of or are reasonably related to the lawyer's practice in an admitted jurisdiction.

(a) A variety of factors may establish that the services performed are reasonably related to the lawyer's practice in the admitted jurisdiction.

(b) For example, a lawyer provides estate planning services for a client in the lawyer's admitted jurisdiction. The client then moves to a non-admitted jurisdiction. The lawyer may continue to provide estate planning services for the client. Similarly, where a client retains the lawyer to represent the client in a fiduciary administration and the admitted jurisdiction is the natural situs for administration, the lawyer could provide legal services for ancillary administrations in non-admitted jurisdictions.

(2) Where the lawyer has developed a recognized expertise in federal, nationally-uniform, foreign or international law, Comment 14 suggests that the lawyer's practice in non-admitted jurisdictions will be considered reasonably related to the lawyer's practice in the lawyer's admitted jurisdiction.

(a) For example, a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions.

(b) ***Caveat:*** Because the comments are not binding, a lawyer who intends to rely on this analysis should consider seeking an opinion of the non-admitted jurisdiction's bar association. In addition, since this exception is based on "recognized expertise," a lawyer who chooses to rely on this exception should take steps to insure that the lawyer is recognized as an expert. These steps could include:

i) obtaining certification as a specialist in those jurisdictions offering such programs (note that Virginia does not have such a recognition program);
ii) participating actively in bar sections related to the lawyer's expertise;

iii) participating in national associations of lawyers related to the lawyer's expertise;
iv) writing scholarly articles;
v) teaching; and,
vi) participating in seminars and panel discussions; or,
vii) any other activity that demonstrates the lawyer's expertise.

6. ***If*** you are not in violation of Florida law because you have met the requirements of Florida Rule 4-5.5, then you are not in violation of Va. Rule 5.5.

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