The American College of Trust and Estate Counsel (ACTEC) has for many years offered Commentaries to the Model Rules of Professional Conduct that apply the rules to the estate planning, probate and guardianship practice. A Fifth Edition of the Commentaries has recently been completed and was approved by the ACTEC Board of Regents at its annual meeting in March, 2016. The author of these materials is one of the Reporters for the Fifth Edition, and Professor Thomas R. Andrews of the University of Washington School of Law is the other Reporter. Professor Andrews and the author of these materials have also been responsible for updating the case law and ethics opinion annotations to the Commentaries for the past several years. These materials review the history of the commentaries, note some of the issues that are newly addressed or revised in the new edition, and discuss briefly some of the recent case law and ethics opinions from around the country that are of interest in the trust and estate field.

I. History of the Commentaries.

The first edition of the Commentaries was issued in 1993 and was authored primarily by Professor John Price of the University of Washington Law School. The purpose of the Commentaries was to address the concern that the Rules of Professional Conduct did not sufficiently consider the professional responsibilities of trust and estate practitioners. The Commentaries aimed to give particularized guidance to ACTEC Fellows and other lawyers with respect to the types of ethical situations encountered in a trust and estate practice, including questions relating to representation of a fiduciary. A Second Edition of the Commentaries was issued in 1995, and in 1999 a Third Edition was published, together with a separate publication containing sample engagement letters. The Fourth Edition, published in 2006, is currently available on the public ACTEC website, under publications, at http://www.actec.org/public/CommentariesPublic.asp The Fifth edition should be posted soon on the website. The Sample Engagement Letters are also available at that website. The ACTEC Foundation funded preparation and dissemination of the Commentaries and the Engagement Letters.

Each edition of the Commentaries were annotated with illustrative case law and ethics opinions from various states. After the 4th edition of the ACTEC Commentaries was published, the ACTEC Foundation agreed to fund updates to the case law and ethics opinions annotations.

The Commentaries have been used by courts and state bar associations for both ethics opinions and disciplinary actions. The approach of the Commentaries, however, is to give general guidance in applying the RPCs to a trust and estates practice and recommend best practices rather than to create corollary rules or pronounce certain practices as violations of the RPCs. Where it is particularly relevant, the
Commentaries point out state variations, but generally, the Commentaries address primarily the text of the Model Rules.

The Commentaries only cover certain rules that the drafters have considered to be relevant to the trust and estate practice. The format of the Commentaries is to set forth the rule and its official comment in their entirety, with the ACTEC Commentary to follow. Case law, ethics opinions and other secondary source annotations for that particular rule then follow the ACTEC Commentaries.

The Fourth edition contained commentary on the following MRPC:

1.0 Terminology
1.1 Competence
1.2 Scope of Representation
1.3 Diligence
1.4 Communication
1.5 Fees
1.6 Confidentiality
1.7 Conflict of Interest: Current Clients
1.8 Conflict of Interest: Current Clients: Specific Rules
1.9 Duties to Former Clients
1.13 Organization as Client
1.14 Client with Diminished Capacity
1.16 Declining or Terminating Representation
1.18 Duties to Prospective Client
2.1 Advisor
2.2 Intermediary
2.3 Evaluation for Use by Third Persons
3.3 Candor Toward the Tribunal
3.7 Lawyer as Witness
4.1 Truthfulness in Statements to Others
4.3 Dealing with Unrepresented Person
5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

II. Revisions to the Fifth Edition

The Fifth Edition retains the general text and structure of the Fourth Edition and the changes primarily are additions to reflect changes in the practice.

Past revisions to the Commentaries have taken into account revisions to the MRPCs and have added commentary to additional rules as changes in the practice have created particular trust and estate issues. The Fifth Edition follows that approach.

Commentary to MRPC 2.2 has been deleted, since that rule has been removed from the Model Rules.
A. **New Rules Added**

Commentary for the following rules has been added:

1.10 Imputation of Conflicts of Interest: General Rule
1.12 Former Judge, Arbitrator, Mediator or other Third-Party Neutral
5.3 Responsibilities Regarding Nonlawyer Assistance
7.1 Communications Regarding a Lawyer’s Services
8.5 Disciplinary Authority; Choice of Law

- **Rule 1.10: Imputation of Conflicts of Interest: General Rule**

  o This rule is as important as the primary conflicts rules because it is the vehicle for disqualifying many firms, and the lawyers in them, from taking on new clients when one lawyer in the firm has a conflict. Many trust and estate lawyers do their work within a department of a larger firm, and they are just as much affected by the imputed conflict rule as any other practice area. It seemed useful that this critical part of modern law firm practice be addressed in the Commentaries with specific attention to trust and estate lawyers.

  ▪ If a trust and estate lawyer is doing work for a client and another lawyer in the firm wants to take on a client who is adverse to the estate planning client, even on an unrelated matter, this is precluded by the concurrent conflict rule (Rule 1.7), because that conflict is imputed to all other lawyers in the firm under Rule 1.10.

  ▪ If a trust and estate lawyer formerly did work for a client and another lawyer in the firm wants to take on a client who is adverse to the former estate planning client on a matter that is “the same or substantially related” to the estate planning, this is precluded by the successive conflict rule (Rule 1.9) because that conflict is imputed to all other lawyers in the law firm under Rule 1.10.

  ▪ If a trust and estate lawyer, while with another firm, worked for a client who is adverse to a client of a new firm that the estate planner wants to join or has joined, and the matter is the same or substantially related to the estate lawyer’s prior matter, that lawyer’s Rule 1.9 conflict will be imputed to the new firm unless the lawyer is properly screened as provided by Rule 1.10.

  o The new Commentary to Rule 1.10 points out that Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules) has its own imputation rule, and that this imputation rule prevents trust and estate lawyers from getting around the strictures of a variety of specific rules, even if one might have argued that these were “personal conflicts” which under MR 1.10 might not have been imputed. In particular, the rules governing business transactions with clients (1.8(a)) and
governing the drafting of instruments which make gifts to the drafter or his/her family (1.8(c)), cannot be avoided by sending the client to another lawyer in the firm.

- **Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral**
  - The relevance of this model rule to trust and estate lawyer may not be immediately obvious. While some trust and estate lawyers may have served as judges, the incidence of former judges taking up such a practice is perhaps not great. On the other hand, it is becoming more and more common for trust and estate lawyers to try their hand at mediating a dispute between beneficiaries as part of a more general trust and estate practice. In view of that, the need to avoid imputed conflicts arising from such work to the rest of the lawyer/mediator’s firm becomes significant. Rule 1.12 allows the mediator to be screened to avoid imputation. Commentary to this rule would seem useful to acquaint trust and estate lawyers to the conflicts that might ensue from such a practice and how to guard against the imputation.

- **Rule 1.15: Safekeeping Property**
  - Trust and estate lawyers are required to account properly for client and third party funds while representing clients, just as are other lawyers. But Rule 1.15 has a special significance for trust and estate lawyers who agree to store the originals of their client’s wills and related documents. Provided that they have adequately explained the alternatives and have allowed clients to make an informed decision about whether to do this, the practice is generally understood to be ethical. But such documents are property subject to the rule and the safekeeping and notice provisions of the rule apply to such documents. Previously this was explained in the ACTEC Commentary to Rule 1.8, but under the proposed 5th edition the commentary would be moved to Rule 1.15 where it belongs.
  - When lawyers serve as personal representatives or trustees or guardians, a question arises whether Rule 1.15 applies to the property in the lawyer’s custody. Rule 1.15(a) speaks of property of clients or third persons in the possession of the lawyer “in connection with a representation.” If the lawyer/fiduciary/guardian, or someone in his/her firm, is also providing the legal services required by the fiduciary role, then there is an argument that Rule 1.15 applies to the trust/estate property in the lawyer’s custody. There are a growing number of disciplinary cases in which lawyers serving as fiduciaries are being subjected to Rule 1.15 requirements.

- **Rule 5.3 Responsibilities Regarding Nonlawyer Assistance**
Trust and estate lawyers frequently delegate work to their paralegals and/or legal secretaries. Quite frequently, they also enlist the services of a variety of non-lawyer professionals such as outside accounting firms, investigators, appraisers, estate liquidators, business managers, real estate managers, doctors, copying services and data storage providers. It seems important to address the lawyer’s responsibilities for such work that is delegated to nonlawyers, both at the time the nonlawyer is hired, as to the instructions they are given, and during the course of their work.

The proposed Commentary to this rule also addresses supervisory responsibilities as to other lawyers in a firm (Rule 5.1).

Trust and estate lawyers utilize a wide variety of document, tax, and accounting systems that are created and/or distributed by nonlawyers. Lawyers have a responsibility for assessing the adequacy of such systems under the guidelines of Rule 5.3.

Special concerns arise when the nonlawyers with which an estate planner becomes associated take on more of the estate planning work than is appropriate for a nonlawyer, such that the nonlawyer is flirting with the unauthorized practice of law. This implicates not only Rule 5.5 (Unauthorized Practice of Law) but also Rule 5.3, because it is only by adequate supervision of the work of nonlawyer “service providers” that a lawyer avoids assisting unauthorized practice by these nonlawyers.

- Rule 7.1 Communications Concerning a Lawyer’s Services
  - Trust and estate lawyers have many of the same challenges as other lawyers in navigating the rules relating to communications about the services the lawyer is offering to provide. There is not really just one rule here, but a nest of rules: MR 7.1-7.6. The proposed new commentary would discuss not only representations about the scope of a lawyer’s practice, advertising and solicitation, but the modern manifestations of these with internet “networking” sites, lawyer “profiling” sites, and lead generation vendors. It also addresses reciprocal referral arrangements.

- Rule 8.5 Disciplinary Authority; Choice of Law
  - Rule 8.5 is a rule that is not well known by lawyers and needs to be considered carefully by trust and estate lawyers in the context of multistate practice. Lawyers who step outside the bounds of their licensing jurisdiction to engage in “non-temporary” estate planning are engaged in the unauthorized practice of law. (MR 5.5.) But Rule 8.5(a) gives the jurisdiction where they engage in such practice the right to discipline the non-licensed lawyer. This may seem unfair: how can a jurisdiction discipline a lawyer that is not licensed there. But it turns out that if the jurisdiction where the misconduct occurs “disciplines” the lawyer (and they
have found creative ways of doing this), then the licensing jurisdiction is likely to “reciprocally” discipline the lawyer based on the record developed out of state. This is a growing phenomenon which is grounded in the jurisdiction conferred by Rule 8.5(a).

- Rule 8.5(b) establishes a conflict of laws rule for multistate practice. If a lawyer is properly practicing in more than one jurisdiction, or if he/she practices in only one jurisdiction but the effect of the practice is likely to be elsewhere, the Rules establishes a default rule for determining whose ethics rules apply to the conduct. First, if the matter is before a tribunal, then the ethics rules of the forum state apply. Second, if there is no tribunal, then the rules of the jurisdiction where the conduct occurred apply, unless the predominant effect is going to be elsewhere, in which case the rules where the effect is expected will control. More and more, trust and estate practice is becoming multijurisdictional, and sometimes it is taking on a foreign dimension. The proposed new commentary would address these choice of laws rules.

B. Changes to the Model Rules already covered in the Commentaries

In addition to these new rules, the fifth edition of the Commentaries takes into account the changes introduced into the Model Rules by the Ethics 20/20 Commission which were approved by the ABA House of Delegates in 2012 and 2013. There were not many changes made to the black letter rules for which we have ACTEC Commentaries, but a new exception to the rule on confidentiality (Rule 1.6(b)(7) was introduced to allow for conflicts screening when lawyers are considering moving to a new firm, and a standard of care for protecting confidentiality:

MR 1.6(b)(7) [A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary]: to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

MR 5.5(d) & (e) have also been revised to make it clear that foreign lawyers can take advantage of the exceptions to the unauthorized practice rule for in house counsel and practice
authorized by other law, although these changes are not likely to have much impact on trust and estate lawyers.¹

In addition to these changes to the model rules, there were a variety of changes made to the comments to the Model Rules based on the Ethics 20/20 Commission’s work. Many of them address the increased use of technology in legal practice. Others attempt to clarify concepts previously introduced into the model rules, such as that of “prospective client” in MR 1.18. The 5th edition of ACTEC Commentaries is revised to take account of these changes, to the extent necessary. But none of the changes should have a major impact on trust and estate counsel.

3. Focus on FATF

ACTEC has taken an active role in trying to help shape the United States response to the recommendations of the Financial Action Task Force (FATF). The 5th edition of the Commentaries would be amplified to address the impact of FATF on trust and estate practice. A comment to Rule 1.2 was added as follows:

_Duty to Avoid Assisting in Criminal or Fraudulent Activity._ Whether assisting clients in probating estates, establishing trusts, or engaging in other transactions, lawyers need to be ever watchful that the client is not seeking to enlist the lawyer’s services in criminal or fraudulent activity. Lawyers who assist clients in asset protection planning must be particularly careful, and lawyers must also be watchful when following clients’ directions regarding disbursement of funds held in trust accounts. See _In re Harwell, 2012 WL 3612356 (M.D. Fla. 2012)_(discussed below in the annotations). Today, the need for diligence has taken on international dimensions. As international crime and terrorism have grown in extent and

¹ MR 5.5(d): A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice or

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

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly-constituted professional body or a public authority.
sophistication, the role that lawyers may play in such illegal activities has become a focus of the Financial Action Task Force on Money Laundering (FATF). FATF is an intergovernmental body of the major industrialized nations formed in 1989 to coordinate efforts to prevent money laundering in both the international financial system and the domestic financial systems of the member entities. Estate planners are a potential instrumentality of money laundering activities because of their expertise in setting up trusts. Trusts present a financial vehicle that might be utilized by criminals to launder illegally obtained funds and estate planners need to guard against their services being used for this purpose. FATF has issued “risk based guidance” for legal professionals to assist them in avoiding assisting such illegal activity. The ABA, in turn, has issued its own “VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING” and reinforced this with a Formal Ethics Opinion 463 in 2013. More information on these documents is provided in the annotations below. In summary, lawyers need to exercise diligence and make a determination whether their clients present a risk of such illegal activities. If clients pose such a risk, lawyers should either decline to represent, or cease representing, them as permitted under MR 1.16, or engage in further inquiry to rule out the risk that the client is using the lawyer’s services for illegal activity.

C. New position on “separate” simultaneous representation of spouses

Ever since the ACTEC Commentaries were first published, there has been active discussion about the ethical constraints on estate planners who take on husbands and wives as clients simultaneously for estate planning. The prevailing practice is and has been for the lawyer to represent the spouses jointly, with best practice being that all confidences should be shared between them. But despite the misgivings of many, the ACTEC Commentaries approved (with qualification) of a practice of representing spouses simultaneously and separately, with confidentiality between them. The Professional Responsibility Committee has decided that this qualified approval should now be discontinued. The Committee concluded that such separate representation creates too great and insurmountable a conflict of interest if one spouse wants to keep something secret from the other spouse. Consequently, the new edition of the Commentaries withdraws its support for the simultaneous, “separate” representation of spouses.

D. Miscellaneous other revisions

There are numerous other changes to existing text of the commentaries. In several places, existing commentary was moved to another rule’s commentary. This was done to consolidate discussion of some issues, and where appropriate cross-references were added. The following is a summary of some of the more notable changes.

1. Supervising execution of documents. The previous editions of the Commentaries stated that generally, the lawyer (rather than a staff member) should supervise
execution of estate planning documents. These comments are in the commentary to Rule 1.1, and are reinforced by the commentary added to Rule 5.3.

2. **Privity and Duties of Lawyer for Fiduciary owed to Beneficiaries.** The text of the Commentaries discussing the relationship between the lawyer for the fiduciary and the beneficiaries (found in the Rule 1.2 Commentary) has not substantially changed, but the issue of whether a fiduciary’s lawyer can be sued by beneficiaries has been covered in numerous recent cases summarized in the Annotations document. These cases can be found by searching Rule 1.1 (competence) or “malpractice” or “privity.”

3. **Fees.** The commentary to Rule 1.5 now specifically recognizes that flat fees for estate planning services or even estate administration are acceptable as long as the overall fee is reasonable. Also now included is a reminder that if a client pays with property other than money, the lawyer is required to comply with Rule 1.8(a) (business transactions with clients).

4. **Confidentiality and Multiple Clients and Clients’ Agents.** The commentary to Rule 1.6 has several revisions from previous versions. The situation where an estate planning client’s attorney-in-fact contacts the lawyer for information about the now incapacitated client’s estate plan is now addressed. Disclosure of the information to the client’s agent may be considered impliedly authorized, depending on the circumstances, but the commentary recommends that the issue can be avoided by having the client waive confidentiality for this situation in the power of attorney document or otherwise. Confidentiality when the lawyer has joint clients or multiple related clients (such as different generations of a family) is also addressed more fully than in previous editions.

5. **Reporting Elder Abuse.** Language was added to the commentary to Rule 1.14 to address the growing problem of elder abuse and the lawyer’s role in preventing and reporting such abuse.

*Reporting Elder Abuse.* Elder abuse has been labeled “the crime of the 21st century,” and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. See, e.g., Tex. Hum. Res. Code § 48.051(a)–(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana)(exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. See, e.g., Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), that allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer’s ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in
addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client’s living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. See NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer’s Authority to Disclose Confidential Client information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer’s obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and state elder abuse law) in any aspect of the client’s affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.

III. Recent Decisions

A. Attorney’s Duty to Non-clients


Client had indicated to lawyer that he wanted to revise his revocable trust to leave the residue to his nieces and nephews and instead of to the charitable beneficiaries. Lawyer received specific instructions in this regard and sent a draft. However, lawyer did not bring a copy of revision to his last meeting with client and it was not discussed. Client died a few months later. Court held that the disappointed nieces and nephews could sue the lawyer as third party beneficiaries of the contract between client and lawyer, even though they had not previously been mentioned in the trust. Trial court had held that being named in an otherwise valid document as a beneficiary was a prerequisite to standing to sue as third party beneficiary.

Baker v. Wood, Ris & Hames, PC, 364 P.3d 872 (Colo. 2016). Rule 1.1. Topics: Malpractice, privity. The children of the testator sued the firm that did the testator’s estate plan and represented the estate, and the attorney who prepared their stepmother’s estate plan, alleging that the attorneys had allowed the stepmother to divert their father’s assets to her own child. The opinion discussed the strict privity rule, followed in Colorado. It further discussed the California test for legal malpractice that allows nonclients to sue in some circumstances, and declined to accept that approach for this case where the testator’s intent as claimed by the plaintiffs was not clear on the face of the document. It then discussed the “Florida-Iowa rule” that allows third party beneficiary claims of breach of contract for certain disappointed estate beneficiaries. It declined to adopt that rule, in part because it
was inconsistent with the policies underlying the strict privity rule and specifically because
the rule would not give the plaintiffs relief in this case because the rule requires that the
testator’s intent be clear in the testamentary instrument. The court acknowledged that a
claim of fraud or “a malicious or tortious act, including negligent misrepresentation” can be
brought by a nonclient but the facts did not support such a claim in this case.

**Parks v. Fink, 293 P.3d 1275 (Wn. App.  2013).**

Client with terminal cancer had new will prepared but it was not validly executed by the
time of his death. Disappointed beneficiary of unexecuted will sued the lawyer for not
having the will properly executed before the client died, but court held that the lawyer did
not owe a duty to the nonclient plaintiff. The court stated, “To impose a duty in this case
would severely compromise the attorney’s duty of undivided loyalty to the client and
impose an untenable burden on the attorney-client relationship. We therefore hold that an
attorney owes no duty of care to a prospective beneficiary to have a will executed
promptly.”

**Hall v. Kalfayan, 190 Cal. App. 4th 927; 118 Cal. Rptr. 3d 629 (2010)**

Lawyer was appointed by the court to represent an incapacitated woman during
conservatorship appointment proceedings, and his appointment was later renewed to
assist in drafting an estate plan for the incapacitated woman. The estate plan was to
benefit the conservator among others, and would have required court approval. Lawyer
began work on the estate plan in 2004 but the plan had not been completed when the
incapacitated woman died in 2007. The delay was due in part to the incapacitated
woman’s difficulties in expressing her intentions and in part to involvement of other
family members. The conservator sued the lawyer for malpractice, alleging the delay
was negligent. The court, following **Chang v. Lederman, 172 Cal.App.4th 67 (2009)**,
held that a lawyer owed no duty to a prospective beneficiary unless the beneficiary was
named in executed estate planning documents. Here, the incapacitated woman had not
initiated the drafting of the plan and there was no guarantee that the court would have
approved the plan even if completed. The conservator failed to establish a duty owed to
him by the lawyer so the malpractice claim failed.

**Messner v. Boon, 2015 WL 407928 (Tx Ct. App.)**

The personal representative of an estate could bring a malpractice action that the
decedent could have brought against his attorneys representing him as personal
representative of his wife’s estate. However, the personal representative could not pursue
a malpractice action against the prior attorneys for the decedent’s estate that her
predecessor personal representative could have raised.

**Stine v. Dell’Osso, 230 Cal.App.4th 834 (2014).**

An incapacitated woman’s son was appointed her conservator and he misappropriated $1
million of her property. He was removed as conservator, and the professional fiduciary
appointed as successor conservator sued the lawyers for the son, alleging that they were
aware of significant assets of the incapacitated woman that the son had not reported to the
court. The court cited prior case law holding that as a matter of statute (which states a
successor personal representative has all powers and duties as the former executor), a
successor fiduciary has standing to sue the predecessor’s attorney. The court further
noted that such a malpractice action would not threaten attorney client privilege because
the privilege would be held by the successor fiduciary. The lawyers claimed that the
successor conservator would be attributed the former conservator’s unclean hands and
therefore barred from suing, but the court held otherwise, noting that unclean hands was
an equitable remedy that should not apply here. The successor conservator only stepped
into the son’s fiduciary shoes and did not step into the “morass created by his personal
malfeasance.”

**Brookman v. Davidson, 136 So.3d 1276 (Fla. App. 2014).**

In a case of first impression, the Florida court of appeals allowed a successor personal
representative of an estate to bring a malpractice action against the attorney for the
predecessor personal representative. The court relied on the state statute that gave a
successor personal representative the same power and duty as the original personal
representative.


**Soignier v. Fletcher, 151 Idaho 322, 256 P.3d 730 (Idaho 2011).**

The client—Cowan—had been a beneficiary of a trust that terminated when he was 50.
After the trust terminated, he had a lawyer—Fletcher-- prepare a will for him, leaving all
his “beneficial interests ..in any trusts” to Ms. Soignier, and the remainder of his estate to
the American Cancer Society. When Cowan died, however, he had no “beneficial
interests in trusts” because the trusts had been wound up (even before Fletcher drafted his
will). As a consequence, Ms. Soignier received nothing under the will. So she sued the
lawyer for malpractice, claiming that Cowan intended her to get the assets from the trust
that terminated before the will execution. The court acknowledged that under Idaho law,
a beneficiary may sue a drafting attorney for malpractice but noted that such a claim is
limited. The lawyer is only required to effectuate the testator’s intent as reflected in the
documents. Allowing her claim, it concluded, would create an ongoing duty on the part
of lawyers to monitor the status of property given under wills drafted by the lawyers.

**Spencer v. Barber, 2013 N.M. LEXIS 109 (N.M. 2013).**

Client was driving car when accident occurred, killing the client’s daughter and infant
granddaughter. Lawyer represented client in wrongful death suit for death of her
daughter and granddaughter. Surviving father/grandfather was another statutory
beneficiary for a wrongful death action but lawyer did not represent him, and
mother/grandmother’s position was that he was not entitled to recovery because he had
abandoned the child. Lawyer received settlement offer from defendants, and went to
father/grandfather to ask for release of his claims in exchange for certain sum. Lawyer
made clear he was not representing father/grandfather. After negotiation, they agreed on
a sum, and lawyer then accepted offer from defendants. Father/grandfather then reneged on agreement with lawyer, so lawyer sued him to enforce the agreement. Father/grandfather countersued, alleging lawyer owed him a duty as statutory beneficiary. Court held that the attorney for the personal representative in a wrongful death suit owed duties to the statutory beneficiaries of a wrongful death action. Court acknowledged that the attorney had a conflict between the personal representative’s interests as beneficiary and the father/grandfather as the other beneficiary. Once the conflict was known, the lawyer did not have to withdraw, but could not resolve the conflict by informing the father/grandfather that he only represented the mother/grandmother. The court suggested that instead of withdrawing, he could have represented mother/grandmother to conclusion of settlement of wrongful death action, and then treat the issue of who was entitled to the proceeds and in what percentage separately. Court also held that attorney had a conflict because there was evidence the mother/grandmother was also at fault in the accident, potentially giving rise to a separate action against her for wrongful death.


Lawyers were hired by widow to pursue wrongful death claim. The statutory beneficiaries included the widow and two children of the decedent, one of whom was incapacitated. The lawyers gave the disabled child’s share of the settlement to the mother instead of to his guardian, and mother misappropriated the funds. The guardian sued the lawyers and the court held that plaintiff attorneys in a wrongful death suit owe duties to all the statutory beneficiaries, not just the person who hired the attorney.

**Alabama Bar Association Opinion 2010-03**

After a valuable and extensive discussion of competing theories as to client identity, the committee concludes that when a personal representative hires a lawyer to assist in the probate of an estate, the personal representative is the lawyer’s client, not the estate. If the PR intends to misappropriate estate assets, a lawyer may not assist his client to commit a crime or fraud. “However, more often than not, the lawyer only learns of the misappropriation of estate assets after the fact. In such situations where the misconduct is not ongoing, the lawyer may not disclose the prior misconduct to the court pursuant to Rule 1.6. As a result, the lawyer’s only recourse is to seek to persuade the Personal Representative to either replace any misappropriated funds or to voluntarily disclose to the court the Personal Representative’s misconduct. If the Personal Representative refuses to do either, then the lawyer should withdraw from the representation and, upon withdrawal, request that the court order an accounting of the estate. By doing so, the lawyer avoids assisting the Personal Representative in any criminal or fraudulent acts. Further, by requesting that the court order an accounting upon the lawyer’s withdrawal, the lawyer helps to shield himself from any accusations or allegations that he assisted or allowed the Personal Representative to engage in the misconduct.”

B. **Conflicts of Interest**
New York Ethics Opinion 865 (2011)

Lawyer who drafted estate plan is asked by executor to represent estate of client. Lawyer asks whether, in light of *Estate of Schneider v. Finmann*, he can represent the estate of a client for whom he drafted the estate plan. *Estate of Schneider* held that an executor of an estate had privity to sue the drafter of the estate plan. The ethics opinion concludes that a lawyer who drafted the estate plan can represent the executor of the client’s estate as long as the lawyer does not perceive of any colorable claim for malpractice for the estate planning work. If the lawyer begins representing the estate and discovers a basis for a malpractice claim, the lawyer must withdraw.

North Dakota Ethics Opinion 14-01.

Lawyer did estate planning for husband and wife and represented husband in child support matter. Lawyer drafted a power of attorney appointing wife attorney in fact for wife’s aunt. Aunt revoked the power of attorney and appointed new agents. Lawyer could not represent aunt in an action to recover funds from husband and wife because the couple remained his clients (no termination letter sent), and the matter is substantially related to the lawyer’s prior representation of the couple, so there would be a former client conflict even if not current clients.

Dayton Bar Assn. v. Parisi, 131 Ohio St. 3d 345, 965 N.E.2d 268 (2012)

Disciplinary case

The lawyer had became concerned that the client --- in a nursing home --- was incompetent and began a guardianship proceeding for the client. Seven weeks later, while this was pending, lawyer had the client execute a durable power of attorney appointing the lawyer as attorney-in-fact. Then she withdrew the first guardianship petition and refilled on behalf of the client’s niece. Later, using the power of attorney, the lawyer paid her own fees without court authority. Court found the representation of the niece to be a RPC 1.7 conflict and the payment of fees to be prejudicial to the administration of justice under RPC 8.4(d). In another matter, the court concluded that many of the services for which the lawyer charged attorneys fees were not legal services, so her fee was excessive and in violation of RPC 1.5.


The co-trustees of a trust had paid large fees to attorney for advice and implementation of a tax shelter to shelter capital gains upon sale of trust assets. Co-trustees were later advised by other attorneys that the IRS considered this an abusive tax shelter and that they should pay the taxes and penalties. They settled with the IRS and then sued the first lawyer for fraud, consumer protection violation, common law breach of fiduciary duty and breach of fiduciary duty based on RPCs. The court held that the
attorney had violated RPC 1.7(b). While representing the trust and setting up the tax shelter, the lawyer had also been representing the vendor of the tax shelter, and had a financial interest in referring clients to the vendor, and did not fully disclose that relationship to the co-trustees and obtain written consent. The lawyer objected to imposing civil liability for a violation of the RPCs, but the court stated: “A trial court may properly consider the RPCs in an action by a client to recover attorney fees for the attorney's alleged breach of fiduciary duty.”


This case involved a complicated estate plan in which two law partners set up irrevocable trusts for the benefit of their children and then set up a company called LK Operating (“LKO”) to manage the trusts. Each trust was the sole shareholder of a corporation and the five corporations were the sole members of LKO. LKO contributed funds to a business started by a client of the attorneys. LKO and the clients went to court over a dispute as to exact percentage owned by LKO. The court held that the attorney who arranged for the LKO investment had violated both 1.7 and 1.8(a). The trial court had relied on the 1.7 violation to order rescission of the agreement. The appeals court found no Washington authority for granting rescission based on RPC 1.7 and refused to do so in this case, worrying that burden of the rescission remedy could easily fall on innocent clients who should not pay for “the sins of its lawyer.” The court of appeals, however, held that the 1.8(a) violation justified recission. Even though the lawyer had not personally been a party to the transaction, the lawyer’s family interest LKO was enough to trigger 1.8(a).


**MR 1.7**

In a patent infringement case, an estate planning lawyer represented the co-CEOs and owners of the plaintiffs, and then moved to the firm representing the defendant. She continued to represent the co-CEOs with respect to estate planning after the move. Plaintiffs moved to disqualify defendant’s firm, and the court upheld the disqualification. The court noted that this was a case of an after-acquired client causing the disqualification of representation of a prior client, but in this circumstance, a concurrent conflict, the applicable California rule required per se disqualification.

**C. Miscellaneous**

*Novak v. Fay, 236 Cal.App.4th 329 (2015). Rule 1.5. Topics: Charging lien, fees.* Lawyer had contingent fee agreement with client for claim in deceased wife’s probate and won a significant settlement that gave his client an interest in a trust. Before
receiving lawyer’s agreed fee, client died. The remaining beneficiary of the trust objected but the court upheld enforcement of the lien.

_Gallner v. Larson, 291 Neb. 205 (2015). Rules 1.1, 1.8. Topics: Gift to attorney, Existence of attorney-client relationship, Malpractice._ Deceased was a divorced lawyer who had a longtime lawyer friend who assisted her in miscellaneous legal matters, particularly dealing with her divorce. There was correspondence between them indicating that she asked the lawyer friend to serve as trustee but he declined. She engaged another lawyer to prepare a will for her, naming lawyer friend as executor/trustee and leaving her estate to her son and granddaughter. That will was not signed. Deceased named lawyer friend as beneficiary on life insurance policies and a retirement account. Deceased’s executor sued the lawyer friend for return of those funds. Among other claims, executor claimed that as deceased’s attorney and that he breached his fiduciary duty to her. The court found that there was an attorney-client relationship, even though informal. The court referenced Rule 1.8(c) and comments, and held that he had the burden to show that the gift to him of the insurance policies was fair, but that he had met that burden. The facts that she was a lawyer and that she had hired another lawyer to assist in estate planning were noted. The court also noted that breach of an ethical rule is not a basis for civil liability.

_Witte v. Witte, 126 So.3d 1076 (Fla. App. 2012)_

This is a marital dissolution case involving an elderly couple, which has relevance for communications with elderly clients. Husband asserted that wife could not claim attorney-client privilege for communications with her attorney because her daughter and son-in-law were present during those communications. The court remanded, finding that the wife was elderly, had several cognitive impairments and needed her daughter and son-in-law to help her communicate with the lawyer. She also needed the daughter and son-in-law’s help in translating several of her financial documents, which were written in Hebrew. The court remanded for a determination of whether the communications “were intended to remain confidential as to other third parties, and whether the disclosure to [them], within the factual circumstances presented by this case, was reasonably necessary for the transmission of the communications.”

_Estate of Zagaria, 997 NE 2d 913 (Ill. App. 2013)._

Attorneys were hired by sister to open estate of absentee for her missing brother. The estate was opened, and in the course of administration the attorneys discovered that the brother was in fact alive. While the estate was open, the sister, as administrator, withdrew significant funds from the estate, for such expenses as buying ponies for her grandchildren. The brother hired an attorney, the estate was closed and the funds were distributed to the brother. The attorneys for the sister had not requested fees before the estate was closed, and after funds were returned to the brother they sought fees from the brother. The court upheld the order requiring the brother to pay the attorneys’ fees. The court noted that under prior law (citing an 1883 case),
administration of a live person’s estate is “absolutely null and void,” but that the statutory scheme for estates of absentees superceded that rule. Because the requirements of the statute were followed, the attorneys were entitled to be compensated even though the absentee was later discovered alive. A dissenting judge faulted the attorneys for not making the fee application sooner, and for not seeking payment from their client, the sister, who had removed significant funds from the estate.


Lawyer for elderly client drafted a power of attorney for the client and included the following:

10. The holder of this Power-of-Attorney shall within thirty (30) days of appointment, or as soon thereafter as possible make an inventory of my estate assets and list any claims or obligations which I have or may have, giving me a copy, keeping a copy for herself, and leaving a copy with my attorney, Robert D. Holmes * * *

11. The holder shall also file an annual account by January 31st of each year and deliver it to Robert D. Holmes, attorney, or any attorney licensed in Ohio, designated by me or by the holder of this Power-of-Attorney for safe-keeping.

The attorneys-in-fact did not file the inventory or accountings and stole large sums of money from the client. The client sued the lawyer, and the court held that including those clauses created additional duties owed by the lawyer to the client, so he could be sued by the client.


The Connecticut supreme court was responding to certified questions from the Second Circuit Court of Appeals. One of the questions was: under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? The underlying facts were as follows: the plaintiff, a New York resident, was visiting his daughter in Connecticut and was hospitalized for a medical emergency. A hospital employee filed a petition for conservatorship and a lawyer was appointed to represent the father. When interviewed by the lawyer, he told the lawyer he opposed the guardianship. Connecticut law limits the court’s authority to impose a conservatorship on Connecticut residents only. Despite these and other issues, the lawyer told the court he saw no reason to oppose the conservatorship. It took months and a writ of habeas corpus for the conservatorship to be terminated and the plaintiff to be released from the locked ward of a Connecticut facility. The plaintiff filed suit against the lawyer, as well as the others involved with the conservatorship, and the lawyer argued that he was immune from suit. Because the role of the court-appointed lawyer for a respondent in a conservatorship is to
represent the wishes of the respondent rather than to aid the court in determining what is in the best interests of the respondent, the lawyer is not entitled to quasi-judicial immunity. The court discussed a lawyer’s duties under RPC 1.14, stating, “with respect to attorneys for respondents in conservatorship proceedings, the primary function of such attorneys under rule 1.14 of the Rules of Professional Conduct is to advocate for the client's express wishes. Although an attorney might be required in an exceptional case to act as the client's de facto guardian, that is not the attorney's primary role.”


Lawyer was asked by client to prepare estate plan for mother. Lawyer had phone conference with mother regarding her wishes but did not hear back until client called to say that mother was in hospital and requested lawyer to bring documents to hospital. Mother had existing will but lawyer recommended transferring property into a living trust to avoid probate fees. Distributive plan (equal shares to the four children) remained the same. Upon arrival at the hospital, lawyer discovered that mother was incapacitated and unlikely to regain capacity. The children pleaded with the lawyer to allow the oldest daughter (his client) to forge the mother’s signature on the documents. He initially refused but ultimately gave in after the children assured him they were all in agreement. He assisted in the forgery by notarizing the false signature on the documents (which included a deed) and requesting his employees to sign as witnesses to the will. After the mother died, a dispute about selling the mother’s residence arose among the children and the forgeries came to light. The lawyer argued that this was not a violation of 1.2(d) because the mother rather than the children was his client and therefore he did not advise a client to commit fraud, but the court held that under the circumstances, where he was advising the children on the effect of the documents in the mother’s hospital room, the children were also his clients. He was disbarred, even though he had no other disciplinary history and he cooperated fully with the disciplinary proceedings. The case is noteworthy in two respects, other than the identity of the clients. First, only probate costs were at stake. Second, the possibility of later strife among family members can never be ruled out.

**NH Op. 2014-15/5. (2015). Rules 1.6, 1.14.** A lawyer who believes his client is a victim of elder abuse must make inquires or otherwise gather evidence (such as observations of the client) and seek consent of the client, before invoking the Rule 1.6(b)(5) exception (to prevent reasonably certain death or substantial bodily harm) and revealing confidential information to stop the abuse. Mere suspicion is not enough. The opinion also noted that Rule 1.14 only allows limited intervention when the client’s diminished capacity prevents the client from protecting his or her own interests. Making inquiries about the client’s capacity to invoke Rule 1.14 could trigger adverse consequences, such as waiving privilege or, if information is revealed to a health care provider who is a mandatory reporter of elder abuse, the potential result of reporting could create consequences to the client that the client opposes, such as prosecution of a family member. The lawyer should therefore consider the potential consequences when making inquiries. Determination of diminished capacity, however, is not required to trigger the Rule 1.6(b)(6) exception, however, in cases of suspected physical abuse.
California Cases Cited in Comprehensive Annotations
to the ACTEC Commentaries (July, 2016)

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**MRPC 1.1: COMPETENCE**

*Butler v. State Bar*, 42 Cal.3d 323, 721 P.2d 585, 228 Cal .Rptr. 499 (1986). A lawyer was disciplined for failure to inquire adequately regarding the existence of assets standing in decedent’s name alone, failure to communicate with the person named as executor of decedent’s will and his attorney, knowingly misrepresenting that probate was proceeding satisfactorily and improperly prolonging the probate proceeding. “While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation…. The attorney’s duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney’s knowledge at least to the extent of advising them that they are not clients.” 42 Cal. 3d at 329.

Also relevant to MRPC 1.3, 1.4, 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

*Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). This landmark decision abolished the privity defense in California in malpractice cases involving estate planning, and the Supreme Court of California set forth a “balancing” test for use in a given case to determine liability with respect to a plaintiff not in privity with the attorney. As modified over the years in California, and applied in several other jurisdictions, the test involves balancing the following five factors: (i) The extent to which the transaction was intended to affect the complaining beneficiary; (ii) The foreseeability of harm to the beneficiary; (iii) Whether, in fact, the beneficiary suffered harm; (iv) The closeness of connection between the negligent act and the injury; and (v) The public policy in preventing future harm.

*Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685 (1961). In this case, the Court extended the rule from *Biakanja*, which had involved a notary who was engaged in the unauthorized practice of law while doing estate planning, to licensed attorneys. It held that extending liability to intended beneficiaries would not unduly burden the legal profession, despite lack of privity. It also upheld liability on a third-party beneficiary contract theory. But the court ultimately declined to find the lawyer liable for malpractice in estate planning in the specific case on the theory that failure adequately to avoid the rule against perpetuities did not fall below the standard of ordinary skill and capacity.
Heyer v. Flaig, 74 Cal. Rptr. 225 (1969). In this malpractice case the court held that a lawyer has a continuing duty to a client whose will the lawyer has drafted where the attorney-client relationship continues and the lawyer is aware of events reasonably foreseeable and subsequent to the client’s execution of the will making revisions thereto necessary. The court held that an attorney may be liable for failing to appreciate the consequences of a post-testamentary marriage of which the attorney was advised.

Also relevant to MRPC 1.4.

Bucquet v. Livingston, 129 Cal. Rptr. 514, 521 (Ct. App. 1976). In this malpractice case, in holding that, as with beneficiaries under a negligently drafted will, the beneficiaries of a trust have standing to sue the drafter, the court stated:

We are not aware of any cases or guidelines establishing in a civil case a standard for the reasonable, diligent and competent assistance of an attorney engaged in estate planning and preparing a trust with a marital deduction provision. We merely hold that the potential tax problems of general powers of appointment in inter vivos or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present. [Fn. omitted.] 129 Cal. Rptr. at 521.

Sindell v. Gibson, Dunn & Crutcher, 63 Cal. Rptr 2d 594 (Ct. App. 1997). In this case the court held that the intended beneficiaries of a law firm’s estate planning services rendered for the beneficiaries’ father suffered “actual injury” (attorneys’ fees and litigation expenses) in defending a lawsuit by the surviving spouse’s conservator that plaintiffs alleged would not have been filed but for the law firm’s failure to obtain a waiver of community property rights from the allegedly willing spouse when she was competent.

Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888 (Ct. App. 2003). Because an attorney generally has no professional duty to anyone who is not a client, an attorney preparing a will has no duty to the intended beneficiaries to investigate, evaluate, ascertain or maintain the client’s testamentary capacity. The duty of loyalty of the attorney to the client might be compromised by imposing such a duty to beneficiaries on the attorney. [Citing and quoting from the ACTEC Commentary on MRPC 1.14 (3rd Edition)].

Also relevant to MRPC 1.14.

Osornio v. Weingarten, 21 Cal. Rptr. 3d 246 (Cal. App. 2004). When preparing a will or other testamentary instrument giving property to a beneficiary who, under applicable state law, is presumptively disqualified from receiving such a gift (in this, case, the decedent’s caregiver), the testator’s lawyer owes a duty of care to the nonclient intended beneficiary to try to ensure that
the proposed transfer stands up (in this case meaning that the lawyer should have advised the client testator to obtain a “Certificate of Independent Review” from a totally disinterested and independent lawyer without which the gift would and in this case did fail), declaring that the gift in question was clearly what the client intended and that the client had not been unduly influenced to make the gift.

_Boranian v. Clark_, 20 Cal. Rptr. 3d 405 (Ct. App. 2004). An estate planning attorney, at the direction of a third party and without meeting or speaking to the client, prepared a will and a “confirmation of gift” for a terminally ill individual. The “gift” was to the third party. When the testator signed the documents, she was lethargic, hallucinating, and in great pain. She died three days later. The testator’s son and daughter contested the will and the gift, and the third party settled by receiving a token amount of cash, but the estate was left with a debt related to the gift. In the subsequent malpractice action, the trial court found in favor of the son and daughter against the attorney. The Court of Appeal reversed, stating:

> Although a lawyer retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the lawyer’s primary duty is owed to his client and his primary obligation is to serve and carry out the client’s intentions. Where, as here, there is a question about whether the third-party beneficiary was, in fact, the decedent’s intended beneficiary, and the beneficiary’s claim is that the lawyer failed to adequately ascertain the testator’s intent or capacity, the lawyer will not be held accountable to the beneficiary—because any other conclusion would place the lawyer in an untenable position of divided loyalty.

Also relevant to MRPC 1.4.

_Chang v. Lederman_, 172 Cal. App. 4th 67; 90 Cal. Rptr. 3d 758 (2009). Client, recently married and terminally ill, allegedly instructed his lawyer to revise his estate planning documents to leave the bulk of his estate to his wife. His lawyer refused, alerting him to the likelihood of a lawsuit if he did this, and insisting that the client get a psychiatric evaluation before making such a change. Client died without making the changes and his surviving spouse sued the lawyer for malpractice. But the court held that lawyer owed her no duty and granted judgment for the lawyer: “[T]estator's attorney owes no duty to a person in the position of [surviving spouse here], an expressly named beneficiary who attempts to assert a legal malpractice claim not on the ground her actual bequest… was improperly perfected but based on an allegation the testator intended to revise his or her estate plan to increase that bequest and would have done so but for the attorney's negligence. Expanding the attorney's duty of care to include actual beneficiaries who could have been, but were not, named in a revised estate plan, just like including third parties who could have been, but were not, named in a bequest, would expose attorneys to
impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict…. Moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has died.”

Also relevant to MRPC 1.2 and 1.14.

*Stine v. Dell’Osso*, 230 Cal.App.4th 834 (2014). An incapacitated woman’s son was appointed her conservator and he misappropriated $1 million of her property. He was removed as conservator, and the professional fiduciary appointed as successor conservator sued the lawyers for the son, alleging that they were aware of significant assets of the incapacitated woman that the son had not reported to the court. The court cited prior case law holding that as a matter of statute (which states a successor personal representative has all powers and duties as the former executor), a successor fiduciary has standing to sue the predecessor’s attorney. The court further noted that such a malpractice action would not threaten attorney client privilege because the privilege would be held by the successor fiduciary. The lawyers claimed that the successor conservator would be attributed the former conservator’s unclean hands and therefore barred from suing, but the court held otherwise, noting that unclean hands was an equitable remedy that should not apply here. The successor conservator only stepped into the son’s fiduciary shoes and did not step into the “morass created by his personal malfeasance.”

*Smith v. Lewis*, 118 Cal. Rptr. 621 (1975). This was a malpractice action involving the failure of the wife’s lawyer in a dissolution action to assert her possible community property interest in her husband’s military pension. The court stated that, “Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client.” 118 Cal. Rptr. at 628.

*Brandlin v. Belcher*, 134 Cal. Rptr. 1 (Ct. App. 1977). A client for whom the lawyer had previously drawn a will and trust discussed with a trust officer changing the trust to add other children as beneficiaries. The trust officer discussed the possibility with the lawyer, who said that he would have to hear from the client directly. The client died without having amended her trust. The Lawyer was granted a summary judgment in an action brought against him by the decedent’s children for negligence. “[Lawyer] fully discharged whatever duty his prior representation imposed by his request through the intermediary that the client communicate with him personally. [Lawyer’s] conduct satisfied rather than violated his duty as a lawyer. It was designed to assure that the personal nature of the attorney-client relationship was protected.” 134 Cal. Rptr. at 3.

Also relevant to MRPC 1.4.
Horne v. Peckham, 158 Cal. Rptr. 714 (Cal. App. 1979). This decision came in a malpractice case involving the creation of a Clifford trust with respect to which the lawyer failed to do the necessary research. The appellate opinion upholds a jury instruction that a general practitioner has a duty to refer the client to a specialist or recommend the assistance of a specialist if a reasonably careful and skillful general practitioner would do so.


In this malpractice action brought by a trust’s beneficiaries against the lawyer for the trustee, the court stated:

An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary. In contrast to the third-party asserting a claim in Goodman, appellant here was not someone with whom respondent’s client, the trustee Wells Fargo, was to negotiate at arms’ length. 160 Cal. Rptr. at 243.

Also relevant to MRPC 1.2.

Davis v. Damrell, 174 Cal. Rptr. 257 (Ct. App. 1981). A lawyer was absolved from liability for a mistaken opinion because it resulted from the lawyer’s reasoned exercise of informed judgment. “While we recognize that an attorney owes a basic obligation to provide sound advice in furtherance of a client’s best interests … such obligation does not include a duty to advise on all possible alternatives no matter how remote or tenuous.” 174 Cal. Rptr. at 260.

Ridge v. State Bar, 254 Cal. Rptr. 803 (1989). A lawyer-executor was suspended for a year in part for mismanaging the estate of his father, for which he was serving as executor, and failing to communicate with a client. On discipline for service as executor, court relied on Annotation, Conduct of Attorney in Capacity of Executor or Administrator of Decedent's Estate as Ground for Disciplinary Action (1979), 92 A.L.R.3d 655.

Also relevant to MRPC 1.3, 1.4 and 1.15 (Safekeeping Property).

Latten v. State Bar, 268 Cal. Rptr. 845 (1990). A lawyer was suspended from practice for his unreasonable delays in closing an estate administration while serving as executor and intentionally and recklessly failing to perform legal services competently. Lewis v. State Bar, 170 Cal. Rptr. 634 (1981). This was a disciplinary case in which the lawyer was disciplined for
undertaking to administer estate without sufficient skill and without associating another more experienced lawyer.

Also relevant to MRPC 1.3.

*Johnson v. Superior Court*, 45 Cal. Rptr. 2d 312, 317 (Ct. App. 1995). This case distinguishes the holding in *Morales v. Field*, discussed above, stating that California courts have not followed Morales and suggesting the decision should be limited to cases where the fiduciary’s attorneys have made affirmative representations of care to the beneficiaries.

Also relevant to MRPC 1.2.

*Borissoff v. Taylor & Faust*, 15 Cal. Rptr. 3d 735 (2004). California’s Probate Code confers on a successor fiduciary the same powers and duties possessed by the predecessor. A fiduciary’s powers include the power to commence actions and proceedings for the benefit of the estate, thus giving the fiduciary who hired an attorney with estate funds the power to sue the attorney for malpractice. Therefore, a successor fiduciary has standing to sue a predecessor fiduciary’s attorney for malpractice.

Also relevant to MRPC 1.2, 1.6 and 1.9.

*In re Elkins*, 2009 WL 3878295 (Cal.Bar Ct. 2009). A lawyer who sent 53 threatening and intimidating voicemail messages to the administrator of his deceased father's estate, the administrator's attorney, and the judge who was overseeing the estate, was suspended from practice for at least 90 days as part of a two-year probation for violating California rules not found in the Model Rules, but analogous to MR 3.5(a) and 8.4(d). Abusive threats and harassment such as this are not protected speech under the first amendment.

Also relevant to MRPC 3.5 (Impartiality and Decorum of the Tribunal) and 8.4 (Misconduct).

*Hall v. Kalfayan*, 190 Cal. App. 4th 927, 937, 118 Cal. Rptr. 3d 629, 636 (2010). Lawyer was appointed by the court to assist in drafting an estate plan for an incapacitated woman. The estate plan would have benefitted the conservator and would have required court approval. Lawyer began work on the estate plan in 2004 but the plan had not been completed when the incapacitated woman died in 2007. The delay was due in part to the incapacitated woman’s difficulties in expressing her intentions and in part to involvement of others. The conservator sued the lawyer for malpractice, alleging the delay was negligent but the court rejected the malpractice claim. The lawyer owed no duty to the conservator as prospective beneficiary unless the beneficiary was named in executed estate planning documents, and that was not the case here. Moreover, here the incapacitated woman had not initiated the drafting of the plan.
and there was no guarantee that the court would have approved the plan even if completed.

Also relevant to MRPC 1.3 and 1.14.

*Smith v. Cimmet*, 199 Cal. App. 4th 1381; 132 Cal. Rptr. 3d 276 (2011). H and W hired lawyers in California to pursue claims against former business partner. H and W moved to Oregon, H died, and W was appointed personal representative of H’s estate. W authorized California lawyers to file suit against partner on behalf of H’s estate. The suit against partner resulted in large judgment against estate. H’s children contested H’s will, had W removed as personal representative, and had H’s son appointed as successor personal representative. Son sued the California lawyers for malpractice. California attorneys argued that (1) son lacked capacity to sue because his authority as Oregon personal representative did not extend to California, and (2) son did not have attorney-client relationship with them, and therefore lacked privity so could not sue them for malpractice. Court held that while Oregon law may prevent the successor personal representative from suing the former personal representative’s lawyer, California would allow it, based on statutory language that gave a successor PR all rights and powers of predecessor, as well as on policy reasons. Court found that California had greater interest in applying its law because it involved conduct of California lawyers, applied California law and held that the son had standing to sue. However, the court agreed that son did not have capacity to sue as Oregon PR and gave him the opportunity to file for ancillary probate appointment in California.

*Paul v. Patton* 235 Cal. App. 4th 1088 (2015). Attorney drafted trust amendment that erroneously increased the gift to the spouse, to the detriment of the trustor’s children from a prior marriage. On appeal from dismissal, court reversed, holding that under alleged facts attorney owed a duty to the children as intended beneficiaries because there was sufficient evidence that the trustor intended them to benefit. It distinguished cases where the claim was made by a potential beneficiary, with the possibility that the testator could change his mind.


**MRPC 1.2: SCOPE OF REPRESENTATION**

*Lasky, Haas, Cohler & Munter v. Superior Court*, 218 Cal. Rptr. 205 (Ct. App. 1985). This is an evidentiary privilege case in which the court denied the beneficiaries access to the work product generated by the lawyers for the trustee but not communicated to the trustee. The court stated that the beneficiaries of a private trust are not clients of the trustee’s lawyers.

*Goldberg v. Frye*, 266 Cal. Rptr. 483 (Ct. App. 1990). In this malpractice action the court stressed the absence of an attorney-client relationship between the lawyer for the personal
representative and the beneficiaries: “Contrary to the allegations of the complaint, it is well established that the attorney for the administrator of an estate represents the administrator and not the estate… A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence…. By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate.” 266 Cal. Rptr. at 488.

Also relevant to MRPC 1.1.

_Sullivan v. Dorsa_, 27 Cal. Rptr. 3d 547 (Ct. App. 2005). This case follows Wells Fargo Bank v. Superior Court (Boltwood), 990 P.2d 591(Cal. 2000), discussed in the Annotations following the ACTEC Commentary on MRPC 1.6, in holding that the trustee’s attorney owes no duty to the trust beneficiaries.

_Pierce v. Lyman_, 3 Cal. Rptr. 2d 236 (Ct. App. 1991). This case holds that the beneficiaries of a trust state a cause of action against the trustee’s lawyer when the lawyer is alleged to have actively participated in the trustee’s breach of fiduciary duty. “Active concealment, misrepresentations to court, and self-dealing for personal financial gain are described. We find this is sufficient to state a cause of action for breach of fiduciary duty [against lawyer for trustees].”

_Saks v. Damon, Raike & Co._, 8 Cal. Rptr. 2d 869 (Ct. App. 1992). In this case the court rejected claims by a trust’s beneficiary directly against the attorney for the trustee sounding in negligence, breach of contract and breach of fiduciary duty. Goldberg v. Frye, supra, is cited with approval.

Also relevant to MRPC 1.1.

See also, above, _Chang v. Lederman, Morales v. Field, DeGoff, Huppert & MacGowan, Johnson v. Superior Court, and Borissoff v. Taylor & Faust._

**MRPC 1.3: DILIGENCE**

_Radovich v. Locke-Paddon_, 41 Cal. Rptr. 2d 573 (Ct. App. 1995). The court held that the beneficiary of an un-executed will must prove facts that “manifest a commitment by the decedent to benefit” the beneficiary in order for the decedent’s lawyer to owe any duty to that beneficiary. The appellate court upheld summary judgment for the lawyer in a suit brought by the deceased client’s husband. The lawyer had met with the client in June to discuss the preparation of a new
will that would increase the provisions to be made for her husband. Although the lawyer knew the client was terminally ill, the lawyer did not send a draft of the new will to the client until October and did not otherwise follow-up on the matter. The client died in December without having executed a new will. The court found that the lawyer did not have a duty, after sending the draft will to the client, to inquire whether she had any questions or wanted further assistance.

Also relevant to MRPC 1.1.


MRPC 1.4: COMMUNICATION

*In re Respondent G.*, 1992 WL 204655 (Cal. Bar Ct. 1992). In this proceeding a lawyer was privately reprimanded for repeated failure to advise a client of the state inheritance tax owed by her with respect to an estate administration handled by the lawyer.

*Worthington v. Rusconi*, 35 Cal. Rptr. 2d 169 (Ct. App. 1994). The court here held that, for purposes of applying the statute of limitations, the continuation of a representation should be determined by examining the facts from “an objective point of view.” 35 Cal. Rptr. 2d at 175.


MRPC 1.5: FEES

*Estate of Trynin*, 264 Cal. Rptr. 93 (1989). The Supreme Court of California, construing California’s statute governing extraordinary compensation for attorneys, here held that in an appropriate case attorneys may be compensated for legal services rendered in preparing and prosecuting a claim for prior extraordinary legal services (so-called “fees on fees”). The Court observed that the trial court retains the discretion to reduce or deny additional compensation for fee-related services if the court finds that the fees otherwise awarded the attorneys for both ordinary and extraordinary services are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorneys for all services rendered.

*Estate of Wong*, 207 Cal.App.4th 366 (2012). The estate executor replaced the estate attorney with another. The first attorney sought fees, and the executor resisted his petition. The attorney requested, in addition to statutory fees, extraordinary fees for having to respond to the executor’s objections. The court thoroughly reviewed the statutory scheme for probate fees and awarded the attorney his fees, but denied the request for extraordinary fees.
Novak v. Fay, 236 Cal.App.4th 329 (2015). Lawyer had contingent fee agreement with client for claim in deceased wife’s probate and won a significant settlement that gave his client an interest in a trust. Before receiving lawyer’s agreed fee, client died. The remaining beneficiary of the trust objected but the court upheld enforcement of the lien.

See also, below, Birbrower, Montalbano, Condon & Frank, P.C., et al., v. Superior Court, and Estate of Condon.

MRPC 1.6: CONFIDENTIALITY

Cases (Obligation Continues After Death)

HLC Properties Ltd. v. Superior Court (MCA Records Inc.), 24 Cal. Rptr. 3d 1999 (2005). Construing California’s Evidence Code, the state’s Supreme Court held that, “the attorney-client privilege of a natural person transfers to the personal representative after the client’s death, and the privilege thereafter terminates when there is no personal representative to claim it.” Therefore, the company taking over responsibility for running the business ventures of the deceased entertainer Bing Crosby did not succeed to the entertainer’s attorney-client privilege.

Ethics Opinion (Client with Diminished Capacity)

Op. 1989-112. This opinion states that a lawyer may not take steps to protect a client that might involve disclosure of the client’s condition if the client objects.

Also referenced under MRPC 1.14.

Cases (Disclosure by Lawyer for Fiduciary)

Moeller v. Superior Court (Sanwa Bank), 69 Cal. Rptr. 2d 317 (Ca. 1997). This case holds that, since the powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee, when a successor trustee (who in this case also happened to be a beneficiary of the trust) takes office, the successor assumes all powers of the predecessor trustee, including the power to assert (or waive) the attorney-client communications privilege.

Also relevant to MRPC 1.9.

Wells Fargo Bank v. Superior Court (Boltwood), 91 Cal. Rptr. 2d 716 (Ca. 2000). This case holds that since the attorney for the trustee of a trust is not, by virtue of that relationship also the attorney for the beneficiaries of the trust, the beneficiaries are not entitled to discover the
confidential communications of the trustee with the trustee’s counsel, regardless of whether or not the communications dealt with trust administration or allegations of trustee misconduct. In addition, the work product of trustee’s counsel is not discoverable. These results obtain regardless of the fact that the fees for the attorney’s services are paid from the trust.

See also, above, *Borissoff v. Taylor & Faust*, and below, *Fiduciary Trust Int’l of CA v. Superior Court*.

**MRPC 1.7: CONFLICTS OF INTEREST: CURRENT CLIENTS**

Cases

*Estate of Buoni*, 2006 Cal. App. Unpub. LEXIS 9368, 2006 WL 2988737 (2006). A personal representative of the estate who was also a creditor was represented by one lawyer in both capacities. An estate beneficiary sought to disqualify the lawyer based on the conflict, but the court refused the disqualification. The conflict here is the PR’s, not that of his attorney, but even if there is a conflict for the attorney, it is cured by California law which contemplates that when the PR is a creditor, the creditor’s claim is submitted to the court for approval or rejection. If it is rejected, PR may sue to enforce the creditor’s claim and the court is empowered to appoint a separate lawyer to defend against the claim. Given this procedure, representation of one person in both capacities is not a disqualifying conflict.

*Baker Manock & Jensen v. Superior Court (Salwasser)*, 175 Cal.App.4th 1414 (2009). Law firm represented one son (George) of the decedent both as executor and in his own right as beneficiary. When the firm, on behalf of George personally, opposed a brother’s petition that would have reduced the probate estate assets and also reduced the son’s share personally, the brother sought to disqualify the firm for its conflict. The trial court granted the motion to disqualify but the court of appeals reversed reasoning that the positions taken by George personally and those he took as executor were the same: to avoid loss of probate assets. Even if the firm were viewed as representing two Georges (one personally, the other as executor) who could theoretically have adverse interests, that was not the case here so there was no conflict.

*Estate of Rohde*, 323 P.2d 490 (Ca. App. 1958). This case upheld the revocation of the probate of a will benefiting the scrivener and appointing him executor because of a presumption of undue influence.

Also relevant to MRPC 1.8.
Potter v. Moran, 49 Cal. Rptr. 229 (Ct. App. 1966). A decree settling the accounts of a trustee was not binding on the beneficiaries because the lawyers had failed to inform the court that they represented both the trustee and the guardian for the beneficiaries.

Adams v. Small, 2009 Cal. App. Unpub. LEXIS 9029, 2009 WL 3808295 (Cal. App. Nov. 16, 2009). Court reverses summary judgment that was entered against plaintiffs on their malpractice claim and remands for trial where lawyer concurrently represented estate planning clients and the promoters of a Ponzi scheme in which the estate planning clients were investing. There was a triable issue on actual conflict of interest because of evidence that lawyer knew that cease and desist orders had been entered against the promoter clients and he had failed to inform estate planning clients of this.

Ethics Opinions

San Diego Op. 1990-3. This opinion discusses the position of a lawyer who is asked by a son or daughter to prepare a new will for the child’s parent. The opinion concludes that the person who is to sign the instrument is the client of the lawyer: “As stated above, in our view the person who will be signing the document is clearly a client of the attorney, and must be treated as such. However, unless it is agreed upon in advance the Son or Daughter may also be considered clients of the attorney. If so, the provisions of Rule 3-310 apply. The attorney must disclose the potential conflicts of interest to the clients in writing, and obtain their informed written consent to the representation in order to proceed. Depending upon the specific facts, the conflicts of interest may be so great that the attorney would be well advised not to represent both even if the clients were willing to give their consent.”

See also, below, Transperfect Global, Inc. v. Motionpoint Corp.

MRPC 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

Cases (Gifts to Lawyer)

Estate of Auen, 35 Cal. Rptr. 2d 557 (Ca. App. 1994). This decision upholds the invalidation of certain inter vivos gifts and a will that made gifts to testator’s lawyer and her family because of the presumption that the lawyer exercised undue influence over the client. “The relation between attorney and client is a fiduciary relation of the very highest character…. Transactions between attorneys and their clients are subject to the strictest scrutiny…. These general principles applicable to the attorney-client relationship support the trial court’s reasoning that, when an attorney is acting as an attorney, any benefit other than compensation for legal services performed would be ‘undue.’” 35 Cal. Rptr. 2d at 562-563.
Cases (Transactions with Client or Beneficiary)

Sodikoff v. State Bar, 121 Cal. Rptr. 467 (1975). In this disciplinary action the court imposed a six month suspension on a lawyer who represented the administrator of an estate who violated a position of trust and confidence that he voluntarily assumed vis-a-vis an elderly beneficiary, who lived in England. The lawyer, who had encouraged the beneficiary to sell real property, falsely advised the beneficiary that “one of our clients by the name of Acquistate, a California corporation” had made an offer to buy the property for $20,000. The lawyer failed to disclose to the beneficiary that Acquistate was not a client of the law firm but was the lawyer’s alter ego. The lawyer also failed to disclose that the property had been appraised at $46,500.

See also, above, Estate of Rohde.

MRPC 1.9: DUTIES TO FORMER CLIENTS

Fiduciary Trust Int’l of CA v. Superior Court, 218 Cal.App.4th 465 (App. 2d Dist. 2013). This case is a cautionary tale about conflicts of interest when an attorney prepares an estate plan for a couple (sometimes a longterm client and the spouse) and then has an impermissible conflict in later disputes because of the representation of the spouse. Attorney drafted wills in 1992 for H and W that provided upon H’s death, his significant separate property was to be put into a credit trust and QTIP trust for the life of W, remainder to his 3 children from prior marriage and their joint child. W’s will provided that upon her death her estate would be distributed to the trusts set up under H’s Will. H died, and W revised her will to give her entire estate ($80M accumulated from distributions from the QTIP) to her daughter, thus cutting off the 3 stepchildren. Her executor claimed that the QTIP was required to pay the estate taxes on W’s 80M estate (based on language in H’s will) but the trustee of the QTIP (represented by firm where original attorney practiced) objected. W’s executor moved to disqualify the trustee’s firm because of the prior representation of W. Trial court denied, but on appeal court disqualified, holding that disqualification was required because prior representation of W was direct and substantially related to the current dispute. Court rejected arguments that disqualification not necessary because unlikely the lawyer had obtained confidential information when doing the estate plan (“The California Supreme Court has also repeatedly held that the disqualification rules are not merely intended to protect client confidences or other ‘interests of the parties’; rather, ‘[t]he paramount concern …[is] to preserve public trust in the scrupulous administration of justice and the integrity of the bar.’”), and arguments that joint representation with client consent allows later representation of one of the parties.

Also relevant to MRPC 1.6.
See also, above, *Borissoff v. Taylor & Faust*, and *Moeller v. Superior Court (Sanwa Bank)*.

**MRPC 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

*Transperfect Global, Inc. v. Motionpoint Corp.,* 2012 WL 2343908, 2012 U.S. Dist. LEXIS 129402 (N.D. Ca. 2012), relief from disqualification denied at 2012 WL 3999869 (N.D. Cal. 2012). An estate planning lawyer represented the co-CEOs and 99% owners of a closely held corporation, Transperfect, and then moved to the law firm representing the defendant in a patent infringement case earlier brought by Transperfect. She continued to represent the co-CEOs with respect to estate planning and related matters after the move, without obtaining an adequate conflict waiver. Transperfect moved to disqualify defendant’s firm, and the federal magistrate upheld the disqualification. The court noted that although this was a case of an after-acquired client (the CEOs) causing the disqualification of representation of a prior client (Motionpoint), it was nonetheless a concurrent conflict because the affairs of the estate planning clients were inextricably intertwined with the business and financial matters of Transperfect, and the applicable California rule required per se disqualification. The district court denied the defendant’s motion for relief from the disqualification.

Also relevant to MRPC 1.7.

**MRPC 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL**

*Sukhov v. Sukhov,* 2015 WL 1942797 (Cal. Ct. App. Apr. 29, 2015), as modified (May 18, 2015), review denied (July 15, 2015). The parties to a dispute over a trust which disinherited two of them engage in mediation with a retired judge. After a settlement was reached and approved by the court, one of the parties sought to have it set aside & to disqualify counsel for the defendants because of their association with the mediator/retired judge. The alleged “association” was not a formal one; rather the allegation was that the defense lawyers had paid for the mediation and had offered the mediator’s declaration in opposition to the motion to set aside the settlement. The court held that while the mediator was personally disqualified, movant had failed to demonstrate an association with defense counsel that required imputed disqualification.

**MRPC 1.13: ORGANIZATION AS CLIENT**


Representation of a partnership does not necessarily entail representation of the individual members of the partnership for purposes of determining whether counsel for the partnership must be disqualified if there is a conflict of interest between the partners. “Considering the mutability
of circumstances surrounding an attorney’s representation of a partnership, and the attorney’s relationship with individual partners, we believe the rule’s approach is sensible. All partnerships are not shaped by the same mold. The relationship a partnership attorney has with the individual partners will vary from case to case. A rule which may seem appropriate for an attorney representing a two-person general partnership may be entirely inappropriate for an attorney representing a limited partnership with scores or even hundreds of partners.” 20 Cal. Rptr. 2d at 765.

MRPC 1.14: CLIENT WITH DIMINISHED CAPACITY

L.A. Op 450 (1988). Initiating a conservatorship proceeding for a present or former client without the client’s authorization involves an impermissible conflict of interest.

Op. 1982-112. Without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client’s behalf, even though the lawyer has concluded it is in the best interests of the client. Initiation of the proceeding would breach confidences of the client and constitute a conflict of interest.

San Diego Op. 1990-3. The portion of this opinion dealing with capacity of a client advised that, “a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence.” The opinion continues, suggesting that once an issue of capacity is raised in the attorney’s mind it must be resolved. “The attorney should schedule an extended interview with the client without any interested parties are present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend initiation of a conservatorship.”

S.F. Op. 99-2 (1999). Criticizing the result reached in California Formal Opinion 1989-112, this opinion concludes after a careful analysis: “An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client’s person or property. Such action may include recommending appoint of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client. [Citations omitted.]

MRPC 5.5: UNAUTHORIZED PRACTICE OF LAW

Birbrower, Montalbano, Condon & Frank, P.C., et al., v. Superior Court, 70 Cal. Rptr. 2d 304 (1998). The Supreme Court of California here held that New York law firm was engaged in the unauthorized practice of law in California and disallowed firm’s recovery of legal fees for all services rendered which constituted the practice of law in California. None of the attorneys in the New York law firm was a member of the California Bar.

Also relevant to MRPC 1.5.

Estate of Condon, 76 Cal. Rptr. 2d 922 (Ct. App. 1998). The court here held that an out-of-state (Colorado) co-executor reasonably chose Colorado counsel to handle the California-based estate of his decedent where firm chosen did business where out-of-state executor lived and had prepared the decedent’s estate plan; and held further that the California Probate Code did not proscribe compensation for such attorneys. Furthermore, the court ruled, California’s statutes proscribing the unauthorized practice of law in California did not proscribe an award of attorney fees to an out-of-state attorney for services rendered to an out-of-state client regardless of whether or not the attorney was either physically or virtually present within California.

Also relevant to MRPC 1.5.
ACTEC Commentaries: Appendix
Hypotheticals for discussion

Example A

You have represented clients H and W for many years with regard to their estate planning. They have three adult children, and now one of their children, along with her spouse, have come to you their estate planning. What, if anything, needs to be said about the nature of the representation and the confidentiality of the communications? What if, instead, the parents and child came in together for estate planning, including the preparation of documents where the adult child would be named as a fiduciary? What if you have established that the representation of H and W is separate from the representation of child, but subsequently the parents come back to you to revise their plan to disinherit the child? What if you were working with the parents on a revision of their estate plan and they want to simplify everything by leaving their estates outright to their children, but you know that the child has marital difficulties or substance abuse issues?

Example B

You have been retained by the executor to handle estate administration. The executor then consults with you to let you know that the decedent borrowed substantial funds from the executor, although the loan documentation is not complete. The executor, in his individual capacity, wants to file a claim against the estate. May you represent both the executor and the claimant? Is it enough if the other beneficiaries are informed? What if the executor is the surviving spouse and a QTIP trust is established for his benefit with the remainder passing to the decedent’s children from a prior marriage? May you advise the surviving spouse, executor and beneficiary with regard to the consequences of such things as the QTIP election or portability election? Once the QTIP trust is established, may you advise the surviving spouse, trustee and income beneficiary on such issues as the appropriate exercise of discretion over principal distributions?

Example C

You have represented a client for many years with regard to her estate planning. She has now reached 90 years of age and is showing signs of dementia. You have concerns about her decision-making abilities. She has named an attorney-in-fact. How much information may you share? If the attorney-in-fact assumes the responsibility for handling financial affairs, may you represent the attorney-in-fact? What if the attorney-in-fact begins to take actions that you do not think are in the best interest of your client? How much information can you reveal to other third parties such as family members, social workers, doctors? Suppose there is no durable power of
attorney in place: May you seek the appointment of a conservator / guardian? What if your client is aware enough to oppose such an appointment?

**Example D**

Your law firm has been hired to bring a lawsuit against the governing body of a neighborhood association over some governance issues. You prepared estate planning documents several years ago for one of the board members, although the relationship has not been active in the last couple of years. Does your law firm have a conflict of interest? What if your engagement letter with your estate planning clients indicated that your representation was terminated upon completion of estate plan documents?

**Example E**

Your long-time client has no immediate family and has asked you to be executor of her estate. What issues would be involved in preparing her estate plan to name yourself as executor? Upon her death, are there any issues with you as executor hiring your law firm as your counsel? Any difference if you have not had a long-standing relationship with the client?
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