

**ETHICS FOR ESTATE PLANNERS  
A CASE STUDY**

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**FACTS**

Sadie and Morris are bright, thoughtful, savvy, wonderful clients that you have represented for years beginning with the incorporation of their start-up business. You or your partners have helped them with numerous legal issues and problems including corporate, litigation, real estate, employment, immigration, retirement plans and planning, and estate planning. They have almost always appeared in your office together, and there is no question that you and your firm have always represented the two of them.

Their oldest child, Zena, is involved in the business and they have high hopes for her.

A second child, Godot, is the quintessential prodigal son who has yet to return.

A third child, Loveable, is a mentally challenged child, who can function and live by himself, but who will always need to have his inheritance managed for him.

Over the years you have become a trusted confidant of Sadie and Morris, and you and your wife frequently dine with them, and because of this very close relationship, you have never thought to have Sadie and Morris execute an engagement letter with you or your firm.

Of course, as they have prospered, their lives and their estate planning have become ever increasingly complicated, and they are a never ending source of ethical dilemmas and delightful conundrums for you and your firm.

**Question # I. ENGAGEMENT LETTERS.**

- A. You Don't Have a Written Engagement Letter—Is that Misconduct?
- B. Rule 1.5(b) of the Virginia Rules of Professional Conduct (“Va. Rules”) provides that “The lawyer’s fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
1. The only writings *required* by the Va. Rules are as follows:
    - a. Contingent fees under Va. Rule 1.5(c);
    - b. Division of fees between lawyers not of the same firm under Va. Rule 1.5(e);
    - c. Waiver of a concurrent conflict under Va. Rule 1.7(b); and,
    - d. Waiver of an attorney’s conflict in a prohibited transaction under Va. Rule 1.8(a).
  2. Even the waiver of a concurrent conflict under Va. Rule 1.7(b) only requires that client consent be *memorialized* in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgment; however, any writing will satisfy this requirement, including but not limited to, an attorney’s notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to, the client.
  3. The only writing required to be signed by the client is the waiver of an attorney’s conflict in a prohibited transaction under Va. Rule 1.8(a).
  4. Accordingly, the failure to have a written engagement letter is not misconduct.
- C. Although not necessary under the Va. Rules, engagement letters for estate planning clients are advisable for a number of reasons, including the following:
1. To define who is your client.
  2. If there are multiple clients:
    - a. to establish if they are joint versus separate clients,

- b. if you have to withdraw from representation, to establish whether you may do so in a noisy fashion or in a silent fashion, and
  - c. to establish the terms of your termination of representation.
- 3. If you represent a fiduciary, to establish that the fiduciary and not the beneficiaries are you clients.
- 4. To allow a violation of confidences if your client has diminished capacity.
- 5. To define the scope of your representation.
  - a. Va. Rule 1.2(b), Scope of Representation, provides that a lawyer may limit the objectives of the representation if the client consents after consultation. While no writing is required, common sense dictates that a writing evidencing any such limitations.
  - b. The American College of Trust and Estate Counsel (“ACTEC”) Commentaries strongly encourage the use of engagement letters to establish the scope and objectives of an engagement, to describe the basis upon which fees will be determined, and to explain how conflicts of interest and issues of confidentiality will be handled. As stated in the ACTEC Commentary on the American Bar Association Model Rules of Professional Conduct (“MRPC”), MRPC 1.3, “The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sends the client an engagement letter at the outset of the representation.”
  - c. Where the lawyer has served a client in a variety of matters, the client may reasonably assume that the representation is active or that the client may reactivate the representation at any time. A lawyer in these circumstances should clarify with the client the scope of the representation and the expectations of the client. *ACTEC Engagement Letters, A Guide for Practitioners*, Second Edition, 2007 (“ACTEC Engagement Letters”).
  - d. If the lawyer is representing multiple clients, use of an engagement letter is particularly recommended so that the lawyer may disclose in writing the scope of representation and any actual or potential conflicts that may exist. *ACTEC Engagement Letters*.

6. To set forth fees and avoid fee disputes.
  - a. Va. Rule 1.5(b), Fees: “the lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”
  - b. Comment [2] to Va. Rule 1.5, Fees: “When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.”
  - c. MRPC 1.5(b): “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.”
- D. Engagement letters for various situations, cross referenced to the ACTEC Commentaries, and checklists for their use, may be found at <http://www.actec.org/public/EngagementLettersPublic.asp>.
- E. **Conclusion: The failure to have a written engagement letter with Sadie and Morris is not misconduct, although it is always advisable to have an engagement letter with estate planning clients.**

**Question # II.           SEXUAL ACTIVITIES WITH CLIENT.**

- A. Your spouse is out of town, and Sadie invites you to dine with her and Morris. When you arrive at the restaurant, Morris is not there, and Sadie is dressed in a very alluring and provocative dress. Sadie gets drunk and during dinner propositions you. You find Sadie incredibly sexy and are intrigued by the possibilities. Reaching deep into your reserves, you hear the voice of your ethics professor questioning if this affair might be unethical.
- B. No specific provision in the Va. Rules specifically prohibits sexual relationships between a lawyer and client.
- C. Prior cases considering this issue lack uniformity.
  - 1. *Johnnie Eugene Mizelle*, VSB Docket Nos. 05-010-2813 and 05-010-3969, November 29, 2007.
    - a. Greene hired Mizelle for divorce representation, and before long she owed Mizelle several hundred dollars in legal fees. Greene claimed that Mizelle suggested Greene could reduce her bill by engaging in sex with him. Greene went to the Suffolk police, who suggested she return to Mizelle's office carrying hidden audio and video recording equipment provided by them. Greene referenced what she claimed was Mizelle's earlier offer, and Mizelle agreed he would reduce her bill if she engaged in sex with him.
    - b. In an Agreed Disposition, a Three-Judge panel found that the conduct of Mizelle violated Va. Rule 8.4(b), Misconduct, which provides that it is professional misconduct for a lawyer to commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law.
    - c. The panel suspended Mizelle's license to practice law for five (5) years.
  - 2. *Lee Robert Arzt*, VSB Docket No. 99-033-1567, February 27, 2003.
    - a. The facts are very convoluted being set out in sixty-two numbered paragraphs. The gist of the facts is that both the client and the attorney contributed to the sexual activities.
    - b. The Virginia State Bar Disciplinary Board (the "Disciplinary Board") concluded that the attorney was

guilty of professional misconduct under the (then applicable) Code of Professional Responsibility in that the attorney's conduct violated DR1-102 which provides in pertinent part that a lawyer shall not commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.

c. The Disciplinary Board noted that Respondent's lack of prior record; the likely impact of the finding of a violation, on these facts, on Respondent's personal and professional life; the fact that Respondent had cooperated with the Bar; that Respondent demonstrated remorse for his conduct and candor to the Board in his testimony; and, that he pursued counseling with regard to the conduct which contributed to this violation.

d. The Board admonished Artz.

D. Legal Ethics Opinion ("LEO") 1853 Sexual Relationship with a Client, the Virginia State Bar Standing Committee on Legal Ethics (the "Committee"), December, 2009.

1. The Committee recognized that no provision in the Va. Rules specifically prohibits sexual relationships between a lawyer and client; however, the lawyer must consider that such conduct could:

a. jeopardize the lawyer's ability to competently represent the client (Va. Rule 1.1),

b. wrongfully exploit the lawyer's fiduciary relationship with the client,

c. interfere with the lawyer's independent professional judgment (Va. Rule 2.1),

d. create a conflict of interest between the lawyer and the client (Va. Rule 1.7, Va. Rule 1.7 Comment [10], Va. Rule 1.8(b) and Va. Rule 1.10(a)),

e. jeopardize the duty of confidentiality owed to the client (Va. Rule 1.6(a)), or

f. potentially prejudice the client's matter (Va. Rule 1.3(c)).

2. Additionally, a lawyer who intentionally uses the fiduciary relationship of lawyer and client to coerce sexual favors from a

client may be found to have violated Va. Rule 8.4(b)'s prohibition against a “deliberately wrongful act that reflects adversely on the lawyer's . . . fitness to practice law.”

3. Also, when a lawyer solicits sexual favors in lieu of charging the client legal fees, the lawyer will have violated Va. Rule 8.4(b). (This is the *Mizelle* case, above).
4. The Committee rejected an unqualified ban on sexual activities, noting:

Critics of an unqualified ban acknowledge that a lawyer often holds a position of substantial power vis-à-vis a client, but both attorney and client have rights of privacy and freedom of association which should not lightly be restricted by the state. As one commentator notes, “any regulation by the bar of attorney-client sexual relations must account for the complex variety of relationships that can and do exist between attorneys and their clients.” William K. Shirley, “Dealing with the Profession’s Dirty Little Secret: A Proposal for Regulating Attorney-Client Sexual Relationships,” 13 *Geo.J. Legal Ethics* 131, 133 (1999).

5. After reviewing the factors set out in D(1) above in detail, the Committee concluded:

It is apparent that entering into a sexual relationship with a client during the course of representation can seriously harm the client's interests. *The numerous ethical obligations of a lawyer to a client are so fundamental to the attorney-client relationship that obtaining the client's purported consent to entering into a sexual relationship with the lawyer will rarely be sufficient to eliminate any potential ethical violation. . . . a lawyer should* refrain from entering into a sexual relationship with a client. In most situations, the client's ability to give the informed consent required by Va. Rule 1.7(b) is overwhelmed by the lawyer's position of power and influence in the relationship and the client's emotional vulnerability. [Emphasis added]

*Note:* The Preamble to the Va. Rules defines the term *should* when used in reference to a lawyer’s action as denoting an *aspirational* rather than a mandatory standard.

- E. **Conclusion: It is probable that by giving into Sadie’s overtures, you will have committed misconduct. It should be noted, however, that the**

**Committee rejected an outright ban on sexual relations between attorneys and clients, but the opening in the crack of the door is very narrow.**

**Question # III. REPRESENTATION OF ESTATE, FIDUCIARY, OR BENEFICIARY?**

- A. The phone rings at 7 a. m. and wakes you from a very bad dream in which you dreamed that Sadie had propositioned you. It is Morris who tells you that he has become the executor of his father's estate and wants you to represent the estate. You did not draft his father's estate planning documents. Later that afternoon, Morris' brother, Spendthrift Black Sheep, calls and wants to ask you many question and wants you to look out for his interests since he and Morris have never gotten along. You have never represented Spendthrift Black Sheep. Do you have any duties to Spendthrift Black Sheep?
- B. Answering Your Questions about Legal Ethics 14, Executor, available at [http://www.vsb.org/profguides/FAQ\\_leos/LegalEthicsFAQs.html](http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html) provides:
1. When a lawyer is hired by the executor of an estate, who is the client? Attorneys hired by executors are not always clear to whom they owe duties of loyalty and confidentiality.
  2. Both the executor and beneficiaries may interact with the attorney as if he represents the interests of everyone involved.
  3. However, as outlined in LEOs 1452, 1599 and 1720, when an attorney is hired by the executor, he represents that person in that role. He does not represent the beneficiaries.
  4. Nonetheless, beneficiaries are not always knowledgeable on that point and may look to the attorney for advice and share personal information with the attorney.
  5. An attorney always has a duty to clarify his role whenever dealing with an unrepresented person when that person is confused on the point. [Va] Va. Rule 4.2.
  6. Accordingly, where a beneficiary is under the impression that the attorney is protecting that beneficiary's individual interest, the lawyer has an affirmative duty to clarify the matter.
  7. Also, while the executor's attorney does not represent the beneficiary personally, he must, nonetheless, maintain awareness of the executor's fiduciary duty to the beneficiaries and never assist in a breach of that duty. LEO 1599.
- C. **Conclusion: Even though Black Sheep is not your client, you owe him the duties set out in III(B)(5), (6), and (7), above.**

**Question # IV. REPRESENTATION OF ESTATE, FIDUCIARY, OR BENEFICIARY - WITH A CONFLICT?**

- A. Same facts as in Question III, except that you have previously advised Spendthrift Black Sheep about his rights under his father's trust, which is a typical revocable trust with marital and family trust provisions. Since your review of the trust was merely a matter of interpretation of the trust, Black Sheep imparted no confidential information to you. Black Sheep's interests under the trust are materially adverse to Morris' interests in the trust. May you represent Morris as executor of his father's estate if Morris is willing to waive your conflict, but Spendthrift Black Sheep refuses to consent to that representation?
- B. Under Va. Rule 1.9, Conflict of Interest: Former Client, a lawyer who has formerly represented a client in a matter:
1. shall not thereafter represent another person in the same or a substantially related matter.
  2. in which that person's interests are materially adverse to the interests of the former client
  3. unless both the present and former client consent after consultation.
- C. The Comments to Va. Rule 1.9 provide:
1. Comment [1]. After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.
  2. Comment [2]. The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

3. The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters.

D. In LEO 1391 (1991), an Attorney prepared a will for Client A and also advised beneficiaries of the will, in regard to the will, after A's death. Prior to A's death, a deed of trust was placed on A's real property and the note securing the deed of trust was not paid. The Attorney has contracted with the note holder, B, to serve as substitute trustee in foreclosures on notes held by B and B now requests that the attorney foreclose on the deed of trust executed by A before his death. Attorney never represented A in regard to the deed of trust nor gave any advice as to the deed of trust or related matters. The Committee opined that:

1. DR 5-105(D) (now Va. Rule 1.9(a)) requires that a lawyer not represent a new client in a matter which is the same or which is *substantially related* to a matter in which he represented a former client, if the new client's interest is adverse in any material respect to the interest of the former client, unless the former client consents after disclosure.
2. In general, the mere fact that a lawyer has formerly represented a person, who is now the adverse party in a suit brought by the lawyer on behalf of another client, is not sufficient to create an incurable conflict unless the lawyer possesses confidential information which he obtained from the first client.
3. Even where a lawyer serves simultaneously as counsel for a borrower and as trustee on the underlying deed of trust, the lawyer may foreclose on the deed of trust without first obtaining consent of the borrower if two conditions are satisfied:
  - a. the attorney must not have counseled the borrower as to the terms or conditions contained in the note or deed of trust; and
  - b. following closing, the attorney must not have continued a relationship with the borrower which could be deemed to have been representation in the same or a *substantially related* matter.
4. Therefore, it was not improper for the Attorney to act as substitute trustee on the deed of trust executed by Client A before his death, since no representation had been provided to A by Attorney with regard to the real property which is the subject of the foreclosure.

5. The Committee noted that if the advice provided by Attorney to the beneficiaries under the will involved matters related to the property or to the note securing the deed of trust, it would be incumbent upon the Attorney to secure the consent of the beneficiaries, as required by DR 5-105(D), prior to foreclosing.
- E. In LEO 1452 (March 13, 1992), the Committee opined that an attorney represents the personal representative and not the estate.
1. While there were no disciplinary rules directly addressing the issue, the attorney engaged to render services in connection with the settlement of a decedent's estate enjoys a similar status to that of an attorney engaged to represent a corporation or similar entity. The corporate entity premise, however, requires the acceptance of the legal status of the corporation as a separate person, while, in reality and in order to carry on the legal business of the corporation, communication is required between the attorney and an individual who serves as agent for the corporate entity.
  2. Thus, since the personal representative assumes the legal status as the agent of the decedent and is the only available conduit of information between the entity and the attorney, the attorney/client relationship arises between the attorney and the personal representative, albeit for the ultimate benefit of the estate. *See* Alaska Bar Ass'n Ethics Comm. Op. 91-2 (Jan. 18, 1991), ABA/BNA Law. Man. on Prof. Conduct 7 Current Reports 66.
  3. The estate's personal representative assumes legal and fiduciary responsibilities to the estate which may include obtaining the services of an attorney. Although the attorney, in providing those services, may benefit the beneficiaries of the estate, there is no contractual privity with the beneficiaries which can give rise to an attorney-client relationship with those beneficiaries. *Goldberg v. Frye*, 266 Cal.Rptr. 483, 489 (Cal.App. 4 Dist. 1990).
  4. Given that the attorney enjoys an attorney/client relationship with the personal representative, the committee cautions that the prohibitions contained in the Code of Professional Responsibility as to multiple clients' conflicting interests and client confidentiality apply to that relationship irrespective of the potential benefit that the representation may hold for estate beneficiaries. *See* LEOs 260, 370, 811, 1206, 1358, and 1387.

F. LEO 1599 (1994).

1. A lawyer representing a person who is an executor and one of two beneficiaries:
  - a. does not have a conflict unless the lawyer also represents the other beneficiary;
  - b. must advise the client that communications with the client as beneficiary may not be entitled to attorney-client privilege protection, because communications with the client as fiduciary may similarly not be protected from disclosure to the beneficiaries;
  - c. has “no attorney-client relationship with the beneficiaries of the estate other than the executor;”
  - d. has no “derivative duty” to the other beneficiary by virtue of the client's fiduciary duty (as executor) to the other beneficiary, although the lawyer must “be alert to indications that [the other beneficiary] does not understand the attorney's role;”
  - e. may not advise or represent the executor in actions that breach the executor's fiduciary duty;
  - f. does “not take on the executor's duties to the beneficiaries simply by performing the executor's administrative tasks;” and,
  - g. may not charge for any services rendered to the client in the client's capacity as a beneficiary.
2. The attorney has an affirmative duty to clarify to the beneficiaries that he does not represent their interests in the event that the beneficiaries are confused on this point.
3. Although the attorney for an executor or trustee does not represent any of the beneficiaries personally, he must nonetheless maintain awareness of the executor's or trustee's fiduciary duty to the beneficiaries and never assist the executor or trustee in a breach of that duty.
4. When an attorney serves in a fiduciary capacity, i.e., as an executor or trustee, the attorney represents neither the estate nor the beneficiaries, but is essentially his own client. An attorney serving as a fiduciary is bound by the Va. Rules in such capacity, and as

such, the lawyer may not undertake any activity the lawyer knows is unjustified.

G. LEO 1473 (1992). Duty to Former Client.

1. Facts:
  - a. The decedent's three children were the three executors, and tension among the three executors developed quickly.
  - b. Each of the three executors were represented in their role as executor by separate counsel.
  - c. Attorney B was retained “to represent the interests of the estate.”
  - d. Attorney B was not aware of any information imparted to him in confidence by any of the executors.
  - e. The estate was about to end, and the assets were to be transferred to a marital trust and a bypass trust. One of the children refused to qualify as one of the three trustees and refused to consent to Attorney B representing the other two children in their role as trustees.
2. Attorney B is treated as having represented the co-executors (even though each executor had separate counsel) and Attorney B did not represent “the estate.”
3. DR 5-105(D)<sup>1</sup> mandated that “A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.”
4. The Committee opined that the issues involved in the establishment and administration of the trusts evolved from the same set of facts, i.e., from a single document of the same decedent, as does the estate administration. Therefore, the matters were found to be *substantially related*. Accordingly:

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<sup>1</sup> Va. Rule 1.9 is substantially similar and provides: “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.”

- a. Attorney B may represent two of the executors in their capacity as trustees *only with the consent* of the third co-executor, Attorney B's former client [and now with the consent of the other two executors under Va. Rule 1.9].
  - b. The fact that each executor has separate independent counsel does not alter the conclusion that the client is not the estate, but the three executors.
  - c. Where the earlier and present matters are substantially related, the attorney's non-receipt of secret or confidential information is irrelevant.
- H. LEO 1720 (December 2, 1998), Conflicts of Interest; Estates, Beneficiaries, Beneficiaries' Estates.
1. The facts are rather convoluted but may be simplified as follows:
    - a. Alice died intestate owning personal property and real estate. Alice was survived by her sister, Bernice, and her nephew, Carl, as her heirs and distributees.
    - b. Alice was a party to several joint bank accounts with survivorship at the time of her death. Alice had created a substantial number of those joint bank accounts in the name of herself and/or Bernice and in the name of herself and/or her niece, Dottie, who was Bernice's daughter.
    - c. Bernice retains Lawyer One.
    - d. Carl retains Lawyer Two.
    - e. Lawyer One and Lawyer Two qualify as co-administrators of Alice's estate.
    - f. Carl gives a notice to Lawyer One and Lawyer Two directing them to take legal action for a determination of whether Alice's joint bank accounts with Bernice and Dottie, respectively, were owned with survivorship.
    - g. Lawyer One and Lawyer Two both resign as co-administrators of Alice's estate.
    - h. Bernice then dies, and Dottie qualifies as executrix of her estate.

2. Issue 1: May Lawyer One represent Dottie as executrix of Bernice's estate and individually in litigation over Alice's joint bank accounts when Lawyer One had been a co-administrator of Alice's estate.
  - a. The appropriate and controlling Disciplinary Rule relative to the questions presented was DR 5-105(D)<sup>2</sup> as follows: “A lawyer who has represented a client in a matter shall not thereafter represent another person in the *same or substantially related matter* if the interest of that person is adverse in any material respect to the interest of the former client *unless the former client* consents after disclosure.”
  - b. Carl is not a former client of Lawyer One, since Carl had retained Lawyer Two to represent him and serve as co-administrator of Alice's estate with Lawyer One.
  - c. The client of a lawyer who represents an estate is the executor/administrator and not the beneficiaries. *See* LEO 1452.
  - d. However, a lawyer representing an estate must make appropriate disclosure of his role if he or she has reason to believe that the beneficiaries look at him as “their lawyer.”
  - e. Since Lawyer One was co-administrator of Alice's estate, he was his own client for practical purposes.
    - (1) Viewed in that posture, his representation of Dottie, as executrix of Bernice's estate and individually, in litigation over survivorship of Alice's joint bank accounts turns on whether the matter is, under DR 5-105(D), substantially related to his former representation as co-administrator of Alice's estate and is adverse to Alice's estate.
      - (a) Adversity seems to be apparent.
      - (b) If Lawyer One's representation of Dottie is successful, Alice's estate will not receive the

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<sup>2</sup> Va. Rule 1.9 is substantially similar and provides: “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless *both the present and former client* consent after consultation.”

funds on deposit in the joint bank accounts. Instead, they will pass by survivorship to Dottie, as executrix of Bernice's estate and to Dottie individually.

- (2) Substantial relatedness between the matters in a former representation and a current representation is a fact-specific inquiry from case to case. LEO 1652.
  - (a) In previous opinions, substantial relatedness depended upon whether the same parties, the same subject matter, or the same issues were present.
  - (b) The committee referred to cases defining substantial relatedness in terms of the matters or the issues being essentially the same, arising from substantially the same facts, being byproducts of the same transaction, or entailing a virtual congruence of issues or patently clear relationships in subject matter. *Id.*
- (3) Applying those principles of substantial relatedness, the Committee concluded that Lawyer One's representation of Dottie, individually and as executrix of Bernice's estate, in litigation over survivorship of Alice's joint bank accounts would be ***substantially related*** to Lawyer One's former representation as co-administrator of Alice's estate, since:
  - (a) Lawyer One as co-administrator of Alice's estate may have been required to report Alice's interest in multiple party accounts on the inventory of her estate. *See* Va. Code § 26-12.
  - (b) Lawyer One as co-administrator had a right and upon appropriate request, a duty, to assert a claim to the joint bank accounts. Va. Code §§ 64.1-140 and 6.1-125.8. In fact, Carl had given notice to Alice's co-administrators to take action establishing whether survivorship existed.

- (c) In short, the joint bank accounts, which are the subject of Lawyer One's representation of Dottie, as Bernice's executrix and individually, were implicated in his representation as co-administrator of Alice's estate in significant respects.
  - (4) The Committee opined that under DR 5-105(D) it was not ethically permissible for Lawyer One, without consent from Alice's successor administrator, to represent Dottie as Bernice's executrix and individually in litigation contesting the interest of Alice's estate in the joint bank accounts.
- f. Issue 2: May Lawyer One represent Bernice's executrix in litigation over partition of Alice's real estate as a distinct issue?
  - (1) Alice died intestate.
  - (2) If title to her intestate real estate vested in her heirs upon her death, and if her co-administrators did not obtain a court-awarded power of sale over the real estate, then the real estate was never an asset of her probate estate for administration by or subject to the control of Lawyer One and Lawyer Two as co-administrators. *See Yamada v. McLeod*, 243 Va. 426 (1992); *Stark v. City of Norfolk*, 183 Va. 282 (1944); *Epps v. Demoville*, 6 Va. (2 Call.) 22 (1799).
  - (3) Under those circumstances, Alice's intestate real estate was not implicated in Lawyer One's representation as co-administrator.
  - (4) It is ethically permissible for Lawyer One to represent Bernice's executrix in litigation over the partition of Alice's intestate real estate.

I. ACTEC Commentary on MRPC 1.2.

- 1. *Representation of Fiduciary in Representative and Individual Capacities.* The lawyer may represent the fiduciary in a representative capacity and as a beneficiary, except as otherwise proscribed, as it may be in some cases by MRPC 1.7 (Conflict of Interest: Current Clients).

2. Example 1.2-1. Lawyer (L) drew a will for X in which X left her entire estate in equal shares to A and B and appointed A as executor. X died, survived by A and B. A asked L to represent her both as executor and as beneficiary. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented.
  - a. L may properly represent A in both capacities.
  - b. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel.
  - c. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation.
  - d. L may properly counsel A with respect to her interests as beneficiary.
  - e. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal representative.
  - f. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in one or both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

J. *See also*, Jeffrey N. Pennell, *Wealth Transfer Planning and Drafting: Ethics Issues*, ALI-ABA Course of Study Estate Planning in Depth, June, 2008, p 50. Pennell's Advice:

The unfortunate reality is that this issue is as confusing and distressing as any to be found anywhere in the estate planning practice and the authorities and therefore the fundamental obligations are numerous and conflicting. The fortunate reality is that the attorney who anticipates the issue can dodge virtually all questions with a well drafted provision in an engagement letter, making it clear "who is the client" and avoiding in large part issues of spillover or ancillary duties. Doing so therefore necessarily is the first, last, and best advice on this topic.

- K. **Conclusions: There is material adversity between the interests of Morris and the interests of Black Sheep. Since Black Sheep refuses to consent, the consent of both your present and former client is absent. Therefore, the conclusion turns on the issue of whether the two matters are substantially related. In LEO 1473, the Committee opined that the issues involved in the establishment and administration of the trusts evolved from the same set of facts, i.e., from a single document of the same decedent, as does the estate administration. Therefore, it appears that the matters are substantially related, and as such, you cannot represent Morris as executor of his father's estate.**

**Question # V. CONFIDENTIALITY OF INFORMATION.**

- A. Same facts as in Question III, except that you previously represented Morris and Black Sheep's father, but not Black Sheep. In his call, Black Sheep demands that you disclose confidential information of the father that you possess. May you?
- B. Va. Rule 1.6(a), Confidentiality of Information, provides that "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, . . . ." with certain exceptions, none of which are applicable.
- C. Comment [18] to Va. Rule 1.6 provides that the duty of confidentiality continues after the client-lawyer relationship has terminated.
- D. The ethical duty of confidentiality continues after a client's death, and the lawyer may not turn over the client's files to an institution. Post-death, the wishes of the client are still a dominant consideration. [DR 4-101; EC:4-6; LEO 812]. LEO 928 (June 11, 1987).
- E. LEO 1207 (May 2, 1989). An attorney has represented a corporation owned by a sole shareholder and the sole shareholder has also consulted the attorney on a domestic relations matter. Following the death of the sole shareholder, his widow and sole heir to the stock is the defendant in a *nonrelated* suit. May the attorney represent the *plaintiff* in the nonrelated suit? While not actually answering the question presented, the Committee stated:
1. The appropriate and controlling disciplinary rule relative to your inquiry is DR:4-101(B), which provides that a lawyer shall not knowingly reveal a confidence or secret of this client or use the same to the disadvantage of the client or for his own advantage or the advantage of a third person, *unless the client consents after full disclosure*.
  2. Although the Virginia Code of Professional Responsibility as presently drafted is not explicit on this point, the Committee opined that the attorney's responsibility to protect a client's secrets and confidences survives the death of the client.
  3. Therefore, a lawyer may not reveal secrets and confidences of a deceased client unless the lawyer reasonably believes, in the

exercise of his own best judgment, that to do so would be in the best interest of the deceased client, who would have wanted the information revealed if he were alive.

- F. *Swidler & Berlin v. U.S.*, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998): “the general rule with respect to confidential communications . . . is that such communications are privileged during the testator’s lifetime and, also, after the testator’s death unless sought to be disclosed in litigation between the testator’s heirs. The rationale for such disclosure is that it furthers the client’s intent.” [Citations omitted.]
- G. *Testamentary Exception to Privilege, Confidentiality*, Kenneth L. Jorgensen, Minnesota Lawyer (May 14, 2001):
1. The general rule is that the attorney-client privilege does not cease upon the client’s death.
  2. The issues surrounding the confidentiality obligations to deceased clients can be more problematic. Like the attorney-client privilege, the confidentiality obligation continues after the client’s death.
  3. Unlike the attorney-client privilege, confidentiality issues are more apt to arise outside of the context of litigation—where there is no court to rule upon the applicability of disclosure exceptions. Moreover, the confidentiality exceptions authorizing permissive disclosure under the Rules of Professional Conduct do not address the confidentiality of deceased clients. *See* Rule 1.6(b).
  4. What happens when an heir, who has not commenced litigation, merely requests or inquires about confidential information (e.g., testamentary desires) of a deceased client?
    - a. The lawyer could wait until the heir commences litigation and compels disclosure of the information.
    - b. Yet, what if disclosure would prevent the heir from instituting litigation against the estate?
    - c. Would it not best serve the deceased client’s interests to disclose the information and avoid litigation?
  5. The Rules of Professional Conduct provide little guidance on this issue. The Comments to Rule 1.6 postulate that lawyers possess inherent authority to reveal confidential information when “necessary to perform professional employment.” Nevertheless, the applicability of this inherent authority to circumstances where the attorney-client relationship has ended and the client is dead appears somewhat dubious. What should a lawyer do when

disclosure of confidential information to descendants of a deceased client would further the interests of that client?

6. Many lawyers in the estate planning area look to ACTEC for assistance with this issue.
  - a. ACTEC Commentary to the confidentiality rule recognizes that in certain instances a lawyer is authorized to disclose deceased client information, including client communications, relating to a dispositive instrument or even a prior instrument.
  - b. ACTEC advises that confidential information may be disclosed to an interested party, including a potential litigant, after a client's death if the client's personal representative gives consent, or if the decedent had "expressly or impliedly authorized the disclosure." According to the commentary, "implied authority" exists if disclosure of confidential information would "promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention." Like other confidentiality exceptions, ACTEC cautions that the disclosure should be limited to information the lawyer would otherwise be required to disclose as a witness.
  - c. ACTEC's testamentary exception to confidentiality strikes the proper balance between maintaining client confidentiality and preventing unnecessary litigation or disputes where the client presumably would have authorized disclosure if he or she were alive. The exception also promotes the effective and efficient provision of legal services and advice in carrying out the testamentary desires of deceased clients.

H. **Conclusions: You generally may not disclose the father's confidential information to Black Sheep, although disclosure may be authorized in certain circumstances such as with Morris' consent (as the personal representative of the father's estate), or if disclosure would be in the best interests of the father, for example to avoid potential litigation.**

**Question # VI. ATTORNEY'S SERVICE AS FIDUCIARY.**

- A. Morris and Sadie ask you to become the executor of their estates and the trustee of their trusts. May you ethically do so?
- B. LEO 1358 (1990). A lawyer may draft a will naming the lawyer as personal representative or trustee or in which the fiduciary is directed to retain the lawyer as attorney if the client consents after being informed of alternate representatives, all fees involved, and of the lawyer's own financial interest. A lawyer's suggestion of himself as fiduciary may constitute improper solicitation.
- C. LEO 1387 (1990). A lawyer acting as executor or trustee could hire the lawyer's own law firm to represent an estate as long as the co-fiduciaries consented.
- D. LEO 1515 (1994)<sup>3</sup>. Virginia addressed several of the issues regarding lawyers serving as fiduciaries in LEO 1515, which answers five specific questions regarding the lawyer serving as a fiduciary for the client:
  - 1. Must there be a pre-existing client relationship for the lawyer to prepare an instrument in which he or she is named as a fiduciary for the client? A pre-existing attorney-client relationship is not necessary, but is one factor showing the propriety of the lawyer's selection.
  - 2. What disclosure is required of fees that the lawyer will receive as a fiduciary?
    - a. The lawyer must fully disclose the fees that will be charged (preferably in writing) and "has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services."
    - b. This disclosure is to be made before the client executes the instrument creating the fiduciary relationship.
    - c. The disclosure should be in writing and signed by the client. The writing may either be the will, trust, or other instrument creating the relationship, or it may be a separate writing.

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<sup>3</sup> Adapted from "Lawyers and Other People's Money," Fourth Edition, Frank A. Thomas, III and Kathleen M. Uston, Copyright © 2007 Virginia State Bar, [http://www.vsb.org/docs/Lawyers\\_OPM\\_electronic.pdf](http://www.vsb.org/docs/Lawyers_OPM_electronic.pdf).

- d. The disclosure must also address any tax, investment fees, or fees for other services that will be charged over and above the basic fees for service as a fiduciary.
3. May lawyers retain themselves or their firms as lawyers for the entities for which they are serving in a fiduciary capacity?
  - a. A lawyer acting as executor or trustee may hire the lawyer's own law firm to represent him or her as long as there is full disclosure (including "the general compensation to be paid to the law firm") and consent (if the client is already dead, the beneficiaries can consent).
4. Are there any minimum standards of professional competence imposed on lawyers serving as fiduciaries for their clients?
  - a. LEO 1515 notes that as a general matter, standards of fiduciary competence were subjects beyond its purview.
  - b. However, it reminds Virginia lawyers that the standards of the Va. Rules will apply to them in evaluating their conduct as fiduciaries.
5. LEO 1515 extends its requirements regarding disclosure and consent to instruments that name the lawyer as counsel in addition to those that name the lawyer as fiduciary. It also extends these standards to the issue of security or the lawyer-fiduciary's bond. Other issues to be discussed include the competence and personal service of the proposed fiduciary or lawyer and matters of financial stability. The decision should also focus on alternatives to the probate system and their implications.
6. While focusing on the questions answered by LEO 1515 is a necessary exercise for the prospective lawyer-fiduciary, the inquiry should not be limited to addressing only these issues. The opinion reminds lawyers that the act of becoming a fiduciary for a client is an act that is subject to the requirements of DR 5-101(A). Thus, the lawyer should discuss the matter with the client in a manner designed to fully satisfy the requirements of full and adequate disclosure discussed above. In addition to fees and other alternatives, the lawyer should address any actual or potential limitations on the lawyer's ability to act, the extent to which the lawyer intends to delegate work to third parties, and continuity should the lawyer become unavailable either on a temporary or a permanent basis. Issues of the financial stability of the lawyer and his or her firm may also be important. Even though LEO 1515 does not require a lawyer to specifically address fees charged by

other entities for similar services, a good-faith attempt to address the larger disclosure issue will almost inevitably involve some type of comparative analysis. In short, the lawyer should undertake to advise and counsel the client on the choice of the lawyer as a fiduciary in the same fashion as the lawyer would counsel the client regarding the choice of a third party.

7. Potential conflicts of interest and conflicts of loyalty between the lawyer's duties as a fiduciary should also be discussed. The client may be expecting the lawyer to take a position as a fiduciary that may be inconsistent with the lawyer's fiduciary duties to third parties. Even though the client may not have made his or her expectations clear, the lawyer's knowledge of family affairs or the lawyer's representation of other family members may indicate the potential for such a conflict.
- E. LEO1617 (1995). A lawyer acting as an executor, trustee, guardian, attorney-in-fact or other fiduciary is bound by the Code of Virginia. In discussing a lawyer's duty to render accountings, the LEO concludes that the duty varies with the type of fiduciary relationship. However, the duty of accounting may not be waived.
- F. ACTEC Commentaries. The ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) offers the following in regard to appointment of an attorney as the client's fiduciary:
1. *Selection of Fiduciaries.* The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer's independent professional judgment in the selection of a fiduciary would be materially limited by the lawyer's self interest or any other factor, the lawyer must obtain the client's informed consent, confirmed in writing.
  2. *Appointment of Scrivener as Fiduciary.* An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). None of the provisions of the MRPC deals explicitly with the propriety of a lawyer preparing for a client a will or other document that appoints the lawyer to a fiduciary office. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish

to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer.

G. ABA Opinions. ABA Opinion 426 (2002). Lawyers may act as personal representatives or trustees under documents the lawyer prepares, but:

1. The Lawyer must
  - a. obtain a written consent if the lawyer's judgment would be significantly impaired;
  - b. advise the client about how the lawyer's compensation will be calculated and whether it is subject to some limits or court approval.
2. Lawyers may also hire their own firms to perform legal work in the administration of the trust or estate, in which case the lawyers generally represent themselves, and not the beneficiaries or the trust or estate as an entity.
3. Even with consent, a lawyer serving as a fiduciary may not take positions adverse to the interests of a beneficiary or the entity.
4. Lawyers acting as fiduciaries generally should not represent beneficiaries in unrelated matters.

H. Conclusions:

1. **A lawyer may solicit designation as a fiduciary as long as there is no overreaching or fraud. A lawyer is obligated not to use his or her position as a lawyer to exert undue influence on the client's choice of a fiduciary. LEO 1515 takes the position that undue influence is a factual question to be resolved on a case-by-case basis. However, it notes that the absence of a pre-existing relationship greatly enhances the potential for a finding of undue influence, while the existence of a prior relationship mitigates a possible finding of undue influence.**
2. **You may ethically serve as executor and trustee for Morris and Sadie provided that you have not exerted any undue influence or overreaching and comply with the provisions of LEO 1515.**

**Question # VII. JOINT REPRESENTATIONS - CONFLICTS.**

- A. Sadie and Morris have fairly simple estate planning documents. Each has a revocable trust that provides for a residuary trust. All other assets pass to the survivor outright. At the death of the survivor, the assets pass in trust equally to their three children. The survivor is the sole executor and sole trustee for the first to die. Morris wants to change his documents to disinherit Godot (he is tired of waiting). While Sadie certainly understands Morris' disappointment and motivations, she adamantly opposes disinheriting her oldest son. Morris (ever the astute reader) tells you he wants a QTIP for Sadie to make sure that Godot does not inherit any of his assets and he wants Big Bank to be his sole executor and trustee. Sadie and Morris trust you and are willing to consent to your joint representation. May you continue to represent Morris and Sadie in their estate planning matter?
- B. Under Va. Rule 1.7, a lawyer **shall not** represent a client if the representation involves a concurrent conflict of interest.
1. A concurrent conflict of interest exists if:
    - a. the representation of one client will be directly adverse to another client; or
    - b. there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
  2. However, a lawyer may represent a client if:
    - a. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; and,
    - b. each affected client consents after consultation and the consent from the client is memorialized in writing.
- C. Comment [19] to Va. Rule 1.7 provides:
- A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be

circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

- D. LEO 708 (1985). A lawyer may draft wills for both a wife and husband although the provisions of the wills differ, as long as the lawyer may adequately represent both parties' interests.
- E. LEO 728 (1985). If both the husband and wife consent, a lawyer may represent both of them in preparing wills that preclude changing beneficiaries following the death of the first to die.
- F. In ABA Formal Opinion 05-434, The ABA held that there ordinarily is no conflict of interest when a lawyer is engaged by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters, unless doing so would violate a legal obligation of the testator to the beneficiary, or unless there is a significant risk that the lawyer's representation of the testator will be materially limited by the lawyer's responsibilities to the beneficiary. Note that the ABA noted that such representation may be problematic.
  - 1. There is a concurrent conflict of interest if either:
    - a. the representation of one client will be "directly adverse" to another client, or
    - b. there is a significant risk that the representation of one client will be "materially limited" by the lawyer's responsibilities to another client.
  - 2. Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests.
    - a. There may be direct adverseness even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter.

- b. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflict involves the legal rights and duties of the two clients vis-à-vis one another.
- 3. A testator is, unless limited by contractual or quasi-contractual obligations or by state law, free to dispose of his estate as he chooses, or to consume his entire estate during his lifetime or give it all away, leaving nothing to pass under his will. A potential beneficiary, even one who has been informed by the testator that he has been named in a testamentary instrument, has no legal right to that bequest but has, instead, merely an expectancy.
- 4. Even though there is no direct adverseness, a concurrent conflict of interest exists when there is a significant risk that the lawyer's representation of the testator (i.e., the lawyer's exercise of independent professional judgment in considering, recommending, and carrying out an appropriate course of action to implement the testator's directions), will be materially limited by the lawyer's responsibilities to the other client.
  - a. The preparation of an instrument disinheriting a beneficiary ordinarily is a simple, straightforward, almost ministerial task, without call for the lawyer to consider alternative courses of action, and it is difficult to imagine a circumstance in which a responsibility of the lawyer to her other client (even a client who is a presumptive beneficiary of the testator's bounty) would pose a significant risk of limiting the lawyer's ability to discharge her professional obligations to the testator.
  - b. The lawyer's representation of a testator does not, of itself, create responsibilities owed by the lawyer to prospective beneficiaries (even one who is the lawyer's client as to an unrelated matter), other than the duty to effect the testator's intent as expressed explicitly or implicitly in the instrument.
  - c. If, however, because of her relationship with the other client, the lawyer finds it repugnant or distasteful to carry out the assignment, or has good faith doubts as to whether there is a significant risk that she will be able to exercise independent professional judgment on behalf of the testator, then the lawyer may decline the engagement.

5. The issue becomes more complicated if the testator asks for the lawyer's advice as to whether the beneficiary should be disinherited, or if the lawyer initiates such advice, either as a matter of the lawyer's usual practice in dealing with such matters, or because the lawyer believes that such advice is, in the circumstances, in the testator's interest.
  - a. By advising the testator whether, rather than how, to disinherit the beneficiary, the lawyer has raised the level of the engagement from the purely ministerial to a situation in which the lawyer must exercise judgment and discretion on behalf of the testator.
  - b. In such circumstances, there is a heightened risk that the lawyer may, perhaps without consciously intending to do so, seek to influence the testator to change his objectives in favor of her other client, thus permitting her representation of the testator to be materially limited by her responsibilities to the beneficiary or by a personal interest arising out of her relationship with the beneficiary.
6. Problems also can arise in situations where the lawyer has represented both the testator and other family members in connection with family estate planning.
  - a. If proceeding as the testator has directed violates previously agreed-upon family estate planning objectives, the lawyer must consider her responsibilities to other family members who have been her clients for family estate planning.
  - b. If, for instance, a family has made its estate plans on the shared assumption (never reduced to an enforceable agreement) that the testator has provided for a disabled family member, thus relieving the others of that burden, then the lawyer may conclude that, in light of her responsibilities to her other clients, she cannot in good conscience implement the testator's intended disinheritance of that disabled family member, especially if the testator refuses to permit the lawyer to reveal the disinheritance.
7. In summary, ordinarily there is no conflict of interest when a lawyer undertakes an engagement by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters. However, this may not be the case if:

- a. the testator is restricted by a contractual or quasi-contractual legal obligation from disinheriting the beneficiary, or
    - b. if there is a significant risk that the lawyer's responsibilities to the testator will be materially limited by the lawyer's responsibilities to the beneficiary, as may be the case if the lawyer finds herself advising the testator whether to proceed with the disinheritance.
  - 8. There is a concurrent conflict under Rule 1.7(a)(2) if there is a significant risk that the lawyer's representation will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer. This opinion addresses only limitations arising out of the lawyer's responsibilities to another client in connection with the lawyer's representation of that other client on an unrelated matter.
- G. Professional Ethics of the Florida Bar, Opinion 95-4 (May 30, 1997). In a ruling that involved joint representation of a husband and wife, the Florida Committee recognized that some spouses do not share identical goals in common matters, including estate planning.
- 1. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not.
  - 2. Or, either or both of them may have children by a prior marriage for whom they may wish to make different beneficial provisions.
  - 3. Given the conflict of interest typically inherent in those types of situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses informed consent to the joint representation.
- H. ACTEC Commentaries
- 1. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer often represents multiple clients jointly.
    - a. Joint and Separate Clients.
      - (1) Subject to the requirements of MRPCs 1.6 (Confidentiality of Information) and 1.7 (Conflict of Interest: General Rule), a lawyer may represent more than one client with related, but not

necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: General Rule).

- (2) Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them.
  - (3) **In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients.** The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client.
  - (4) The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.
- b. Multiple Separate Clients. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients some estate planners regularly undertake to represent husbands and wives as separate clients.
2. As noted in the ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients), the nature of the estates and trusts practice is generally a nonadversary practice.
- a. General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients.

- (1) It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).
- (2) In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations.
- (3) The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them:
  - (a) Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family."
  - (b) Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests.
  - (c) Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

b. Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W.

- (1) At the outset L should discuss with H and W the terms upon which L would represent them, including the extent to which confidentiality would

be maintained with respect to communications made by each.

- (2) Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation.
- (3) The representation of a husband and wife as joint clients does not ordinarily require the informed consent of either or both of them.
- (4) However, some experienced estate planners believe that a lawyer may represent a husband and wife as separate clients between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

c. Example 1.7-3. Lawyer (L) represented Husband (H) and Wife (W) jointly with respect to estate planning matters. H died leaving a will that appointed Bank (B) as executor and as trustee of a trust for the benefit of W that meets the QTIP requirements under I.R.C. 2056(b)(7).

- (1) L has agreed to represent B and knows that W looks to him as her lawyer.
- (2) L may represent both B and W if the requirements of MRPC 1.7 are met.
- (3) If a serious conflict arises between B and W, L may be required to withdraw as counsel for B or W or both.
- (4) L may inform W of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients).
- (5) However, without the informed consent of all affected parties confirmed in writing, L should not

represent W in connection with an attempt to set aside H's will or to assert an elective share.

**I. Conclusions:**

1. **There is no doubt that a current conflict exists.**
  - a. **Morris wants to establish a QTIP trust that, along with his residuary trust, will protect his assets from passing to Godot. However none of his assets will pass outright to Sadie, raising issues of Sadie's elective share, her access to Morris assets, and the change of trustee. So it seems as if legal rights and duties of both Morris and Sadie are involved. (See ABA Formal Opinion 05-434).**
  - b. **It also appears that there is a significant risk that the representation of Sadie will be "materially limited" by your responsibilities to Morris.**
2. **The question is can this current conflict be waived?**
  - a. **Under Va. Rule 1.7 a lawyer *shall not* represent a client if the representation involves a concurrent conflict of interest unless:**
    - (1) **the lawyer *reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client; and,**
    - (2) **each affected client consents after consultation and the consent from the clients is memorialized in writing.**
3. **Since Morris and Sadie are both willing to consent, the only hurdle is your reasonable belief.**
4. **Accordingly, if you reasonably believe that you will be able to advise Sadie and Morris competently and diligently and if they both consent, you may continue to represent them. Of course the crucial issue is whether your belief is reasonable. The test is whether a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.**
  - a. **Can you competently and diligently explain to both:**
    - (1) **The effect of the QTIP;**

- (2) **Sadie's marital rights;**
  - (3) **The issues with Big Bank serving as executor and trustee;**
  - (4) **The ability of the survivor to change his or her documents after the death of the first to die; and,**
  - (5) **the possibility of a contract for will to ensure that each will have the appropriate documents in place at his or her death.**
5. **Given the longstanding relationship between Sadie, Morris, and you given the level of trust that it exists, and given the length of your representation, it is possible that your belief that you will be able to provide competent and diligent representation to Morris and Sadie may be reasonable.**
6. **On the other hand, you could not be criticized if you decided not to continue to represent the two of them in this matter.**

**Question # VIII. JOINT REPRESENTATION - DIVORCE.**

A. About ten years ago, at Morris and Sadie's request and expense, you drafted wills and trusts for Zena and her third husband. At that time they had few assets and you drafted very simple wills for them. Zena is now divorced from her third husband (your ex-client) and has come to you to revise her estate planning documents. Obtaining the ex-husband's consent is out of the question. May you represent Zena without her ex-husband's consent?

B. Va. Rule 1.9, Conflict of Interest: Former Client, provides in part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person

in the same or a substantially related matter

in which that person's interests are materially adverse to the interests of the former client

***unless both the present and former client consent after consultation.***

*Note:* Unlike MRPC Rule 1.9, Virginia's rule does not require the consent to be confirmed in writing. It is important to keep this in mind when reading the ACTEC Commentaries to MRPC Rule 1.9.

C. Answering Your Questions about Legal Ethics, 18, Representation of Former Client in Divorce,

[http://www.vsb.org/profguides/FAQ\\_leos/LegalEthicsFAQs.html](http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html):

1. Can an attorney represent a spouse in a divorce where the attorney previously represented the couple jointly in some other legal matter?
2. Satisfied clients usually return to former counsel when new matters arise. This is generally a good thing. However, potential conflicts of interest must be considered where the prior representation was part of joint representation of spouses.
3. Frequently, an attorney will have done estate planning, bankruptcy or real estate work for a couple only to be contacted by one of the spouses when the marriage is dissolving. Each of these new representations must be analyzed regarding two rules:
  - a. Va. Rule 1.6 governing client confidentiality and Va. Rule 1.9 regarding former clients.

- b. Va. Rule 1.9(a) prohibits an attorney from representing a party adverse to a former client in a matter substantially related to the prior representation. This prohibition is often not the hindrance to accepting these new representations, as while the divorce certainly is adverse to the former client, it is not usually "substantially related" to the prior matter.
- c. Nevertheless, Va. Rule 1.9(b), together with Va. Rule 1.6, may be the source of a conflict in many of these instances. Va. Rule 1.9(b) prohibits a lawyer from using confidential information obtained during a prior representation to the disadvantage of the former client.
- d. Attorneys must consider whether any of the information obtained during the first matter would be pertinent in the divorce.
- e. If such information was received, then, under Va. Rules 1.6 and 1.9(b), the attorney may only represent one spouse in the divorce if the other spouse consents to the use of that information against him or her. See, LEOs 569, 677, 707, 774, 792, 1032 and 1181, reaching the same conclusions under the former Code of Professional Responsibility.

D. ACTEC Commentary on MRPC 1.9: Duties to Former Clients provides:

- 1. The lawyer who formerly represented a client in connection with an estate or trust matter may not, without the informed consent of the former client, confirmed in writing, represent another person in the same or a substantially related matter if that person's interests are materially adverse to those of the former client.
  - a. For example, a lawyer who assisted a client in establishing a revocable trust for the benefit of the client's spouse and issue may not later represent another party in an attempt to satisfy the new client's claims against the trust by invading the assets of the trust.
  - b. Similarly, the lawyer may not, without the informed consent of a former client, confirmed in writing, use to the detriment of the former client any confidential information that was obtained during the course of the prior representation.
- 2. The ACTEC Commentaries provide in Example 1.9-1:

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

3. As noted in the ABA Comment 3 to MRPC 1.9:

- a. Matters are "substantially related" for purposes of this Rule
  - (1) if they involve the same transaction or legal dispute, or
  - (2) if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.
- b. For example, a lawyer who has represented a businessperson and learned extensive private financial

information about that person may not then represent that person's spouse in seeking a divorce.

- c. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.
- d. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.
- e. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services

**E. Conclusion: Assuming that any information that you obtained in the first estate planning matter is no longer pertinent and since Zena is not asking you to terminate or attach any trusts for her ex-husband, you should be able to represent Zena in her new estate planning matter without the ex-husband's consent. While the second estate planning matter is substantially related to the first estate planning matter, given the divorce there does not appear to exist any materially adverse interests between Zena and her ex-husband. However, you could not be faulted for refusing to represent Zena.**

**Question # IX. JOINT REPRESENTATION - DISCLOSURE OF CONFIDENTIAL INFORMATION.**

- A. Morris and Sadie have never asked you to keep any information secret from the other, and you have always disclosed everything of importance to both of them. You have never had any discussion about what you might do if either of them were to ask you to maintain a separate confidence. Several months after the execution of the new wills, Morris confers separately with you and reveals that he has just executed a codicil (prepared by another law firm) that makes substantial beneficial disposition to a woman with whom Morris has been having an extra-marital relationship. Morris tells you that Sadie does not know about the relationship or the new codicil. Morris asks you to advise him regarding Sadie's rights to his augmented estate.
- B. The "rub" in joint representation is the interplay of Va. Rules 1.7, 1.6, and 1.4, which may cause ethical dilemmas:
1. Under Va. Rule 1.7 a lawyer **shall not** represent a client if the representation involves a concurrent conflict of interest. However, a lawyer may represent a client if:
    - a. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; and,
    - b. each affected client consents after consultation and the consent from the clients is memorialized in writing.
  2. Under Va. Rule 1.6(a) a lawyer **shall not** reveal confidential information that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation.
  3. Under Va. Rule 1.4, a lawyer **shall** keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Under this rule, a lawyer shall inform the client of facts pertinent to the matter and of communication from another party that may significantly affect settlement or resolution of the matter.
- C. The Va. Rules and the Comments to the Va. Rules provide:
1. Comment [7] to Va. Rule 1.4 provides that in some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an

immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Other than this one comment, the Comments to the Va. Rules are silent concerning the disclosure of the information that is the subject of this Question.

2. Va. Rule 1.6(b) provides that to the extent a lawyer reasonably believes necessary, the lawyer may reveal: (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.
3. Comment [6b] to Va. Rule 1.6 provides that the confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.
4. Comment [31] to Va. Rule 1.7 provides that as to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.
5. Comment [33] to Va. Rule 1.6 provides that subject to the above limitations, each client in the common representation has the right to loyal and diligent representation.

D. ACTEC Commentary on MRPC 1.6, Confidentiality of Information.

1. A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients.
2. As soon as practicable after such a communication the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed.
3. The potential courses of action include, inter alia,
  - a. taking no action with respect to communications regarding irrelevant (or trivial) matters;
  - b. encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and,
  - c. withdrawing from the representation if the communication reflects *serious adversity* between the parties.
4. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse.
5. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement I intend to leave her"; or, "All of the insurance policies on my life that name her as beneficiary have lapsed").
6. Without the informed consent of the other client the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.
7. In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client

himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor).

- a. In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client.
  - b. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized.
  - c. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.
8. If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action.
- a. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case.
  - b. In fashioning a response the lawyer should consider
    - (1) his or her duties of impartiality and loyalty to the clients;
    - (2) any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client;
    - (3) the reasonable expectations of the clients;
    - (4) and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed.
  - c. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no

longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: General Rule).

- d. A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.
9. Note that the Comment not only does not specifically permit the disclosure of the communicating client's confidential information, but when discussing joint clients states:

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

10. Quandary: disclose or not.

E. Professional Ethics of the Florida Bar, Opinion 95-4 (May 30, 1997) provides a Road Map to Conflicts in Joint Representations. The facts of this Question were taken from Opinion 95-4. The Opinion addresses five separate issues arising out of the facts and is a road map for working through the issues.

- 1. Joint Representation.
  - a. The committee held that the Lawyer's representation of Husband and Wife was a "joint representation."
  - b. From the inception of the representation until Husband's communication: there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interests rules.
  - c. The committee recognized that some spouses do not share identical goals in common matters, including estate planning. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not. Or, either or both of them may have children by a prior marriage for whom they may

wish to make different beneficial provisions. Given the conflict of interest typically inherent in those types of situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses informed consent to the joint representation.

2. Confidentiality v. Duty to Disclose.

- a. The committee concluded that, under the facts presented, the Lawyer was not ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences, but pointed out that such a discussion is not ethically required, in some situations it may help prevent the type of occurrence that is the subject of this opinion.
- b. The central issue presented is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation.
  - (1) A lawyer is ethically obligated to maintain in confidence all information relating to the representation of a client. Rule 4-1.6.
  - (2) A lawyer, however, also has a duty to communicate to a client information that is relevant to the representation. Rule 4-1.4.
  - (3) These duties of communication and confidentiality harmoniously coexist in most situations.
- c. In the situation presented, however, Lawyer's duty of communication to Wife appears to conflict with Lawyer's duty of confidentiality to Husband.
- d. Thus, the key question for our decision is: Which duty must give way? The Committee concluded that, under the facts presented, **Lawyer's duty of confidentiality must take precedence.**

- e. Consequently, if Husband fails to disclose (or to give Lawyer permission to disclose) the subject information to Wife,
  - (1) the Lawyer is not ethically required to disclose the information to Wife and does not have discretion to reveal the information.
  - (2) **To the contrary, Lawyer's ethical obligation of confidentiality to Husband prohibits Lawyer from disclosing the information to Wife.**
  
- f. The committee noted that it has been suggested that, in a joint representation, a lawyer who receives information from the "communicating client" that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client.
  - (1) The committee is of the opinion that disclosure is not permissible and therefore rejects this "no-confidentiality" position.
  - (2) The ethical duty of confidentiality assures a client that, throughout the course of the representation and beyond, the lawyer ordinarily may not voluntarily reveal information relating to the representation to anyone else without the client's consent.
  
- g. The committee rejected the concept of discretion in this important area and opined that:
  - (1) Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature.
  - (2) Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly.
  - (3) Under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

3. Lawyer's Withdrawal Mandatory.
  - a. The committee further concluded that Lawyer must withdraw from the joint representation.
  - b. An adversity of interests concerning the joint representation has arisen. This creates a conflict of interest. Many conflicts can be cured by obtaining the fully informed consent of the affected clients. Rule 4-1.7. Some conflicts, however, are of such a nature that it is not reasonable for a lawyer to request consent to continue the representation.
  - c. The Comment to Rule 4-1.7 provides in pertinent part: A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.
  - d. In the situation presented, the conflict that has arisen is of a personal and, quite likely, emotionally-charged nature. Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable. Rule 4-1.16 thus requires Lawyer's withdrawal from representation of both Husband and Wife in this matter.
4. Withdrawal—Silent or Noisy?
  - a. In withdrawing from the representation:
    - (1) Lawyer should inform Wife and Husband that a conflict of interest has arisen that precludes Lawyer's continued representation of Wife and Husband in these matters.
    - (2) The Lawyer may also advise both Wife and Husband that each should retain separate counsel.
    - (3) The Lawyer may not disclose the separate confidence to Wife.

- b. The committee recognized that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife.
  - (1) This may even alert Wife to the substance of the separate confidence.
  - (2) Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband.

**F. Conclusions (remember that there is no agreement between Morris and Sadie):**

- 1. **In the absence of an agreement to the contrary:**
  - a. **the ACTEC presumption is that the you represent Morris and Sadie jointly and therefore, you must, most likely, disclose Morris' infidelity and his codicil to Sadie.**
  - b. **In Florida, you may not disclose that confidential information to Sadie. This is true even though the information threatens her interests.**
  - c. **In the author's opinion, Virginia will most likely prohibit disclosure.**
- 2. **It is clear that you may encourage Morris to disclose this information to Sadie. If Morris refuses to disclose, you probably have a duty to withdraw from representing both of them, and the withdrawal should probably be of the silent type.**
- 3. **Moral: In any situation where a lawyer is representing a married couple in estate planning, the lawyer should always discuss the potential for conflicts and discuss how confidential information of the husband and wife will be disclosed to the other and have the couple acknowledge their understanding in writing.**

**Question # X. WAIVER OF DUTY OF CONFIDENTIALITY.**

- A. Morris tells Sadie of his affair and after many tears and lots of counseling, Morris and Sadie reconcile; however Sadie's one condition for reconciliation is that she wants an engagement letter between Morris, Sadie, and you that you will disclose everything Morris tells you in the future, and she is willing to agree to the same. Is this prospective waiver of confidentiality effective?
- B. The ACTEC Engagement Letters provide in the sample letter for joint representation of spouses that:

Accordingly, matters that one of you might discuss with me may be disclosed to the other of you. **Ethical considerations prohibit me from agreeing with either of you to withhold information from the other.**

- C. Issue: notwithstanding the foregoing ACTEC language, can Morris and Sadie give a blanket consent for you to disclose all future confidences?
- D. Waiver of Future Conflicts.
1. The comments to Va. Rule 1.7 are silent as to waivers of future conflicts.
  2. Comment [9] to Va. Rule 1.9 provides that disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. *A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role on behalf of the new client.*
  3. Comment [22] to MRPC 1.7 expressly addresses the subject of a client's giving informed consent to future conflicts, and provides that:
    - a. Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [of MRPC 1.7].
    - b. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.
    - c. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those

representations, the greater the likelihood that the client will have the requisite understanding.

- (1) Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict.
  - (2) If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.
  - (3) On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).
4. Provided the following guidance:
- a. Under MRPC 1.7(b)(2) and (3), some conflicts are not consentable. An informed consent to a future conflict (like an informed consent to a current conflict) cannot alter that circumstance.
  - b. Under MRPC 1.7(b)(4), the client's informed consent must be confirmed in writing. Note under Va. Rule 1.7(b)(4), consent only has to be “memorialized.”
  - c. A client's informed consent to a future conflict, without more, ***does not constitute the client's informed consent to the disclosure or use of the client's confidential information against the client.***
5. Note that Virginia did not adopt Comment [22] to MRPC 1.7.
6. ABA Formal Opinion 05-436 (2005) provided that a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest; however, this

Opinion relies on Comment [22] to MRPC 1.7 to reach its conclusion.

7. Query: Since Virginia did not adopt Comment [22] to MRPC 1.7, what weight will ABA Formal Opinion 05-436 have in Virginia? No Virginia authority could be found concerning the weight of non-adopted ABA commentary and one Bar Counsel stated that there is no Virginia authority that non-adopted ABA comments are persuasive or aspirational.
8. DC Bar Opinion 309, Advance Waivers of Conflicts of Interest (2001).
  - a. Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct.
  - b. Such waivers, however, must comply with the overarching requirement of informed consent.
  - c. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid.
  - d. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character.
  - e. The DC Bar noted that most courts that have considered this issue have ruled along the lines set out by the ABA Opinion, the Restatement, and the proposal of the Ethics 2000 Commission.
    - (1) Advance conflict waivers have been sustained where the potential adverse party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client's in-house counsel.
    - (2) On the other hand, advance waivers have been struck down where they are unduly general and unsophisticated clients are involved.

E. ***Waivers permitting the future adverse use or future disclosure of confidential information.***

1. Va. Rule 1.6(a) provides that a lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client *unless the client consents after consultation* . . . The Preamble to the Va. Rule states that “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
2. Footnote 10 of DC Opinion 309 (2001) provides as follows:
  - a. Waivers permitting the adverse use or disclosure of confidential information, see D.C. Rule 1.6(c)-(d), may not be implied from waivers of conflicts of interest.
  - b. Because of their considerable potential for mischief, waivers of confidentiality require particular scrutiny and may be invalid even when granted by sophisticated clients with counsel (in-house or outside) independent of the lawyer seeking the waiver. *See Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (7th Cir. 1978) (expressing doubt as to the efficacy of “a vague, general” advance waiver of confidentiality); *In re Boone*, 83 F. 944 (prohibiting waiver of confidentiality requirement).
  - c. But see ABA Formal Op. 99-415 (1999) (suggesting that a more flexible standard may apply where the waiving client is sophisticated or has in-house counsel).
  - d. As with conflicts of interest . . . we view the waivers of confidentiality that commonly are found in joint . . . representation situations, see D.C. Rules 1.7 . . . as constituting *current*, rather than *advance* waivers.

**F. Conclusion:**

1. **Be careful.**
2. **The waiver of confidentiality for Sadie and Morris may be easy to draft and seems to be permitted by the flush language of Rule 1.6 and Comment [9] to Va. Rule 1.9, but when it is time to apply the waiver, application may be difficult as the issue will become whether the waiver is effective.**
3. **Morris or Sadie will surely be contesting the efficacy of the waiver if and when it becomes an issue.**