The Cannon Estate Planning Teleconference Series

Participant Guide

CFI
1961

Ethics Issues in a Contemporary Estate Planning Practice

Cannon Financial Institute, Inc.

Presents

The 2024 Estate Planning Webinar Series

Tuesday, June 18, 2024

By:

Charles A. Redd

CHARLES A. REDD, PARTNER
STINSON LLP
7700 FORSYTH BOULEVARD
SUITE 1100
ST. LOUIS, MISSOURI 63105-1821
(314) 259-4534 - TELEPHONE
(314) 259-3952 - FACSIMILE
charles.redd@stinson.com

www.stinson.com

The seminar materials and the seminar presentation are intended to stimulate thought and discussion, and to provide those attending the seminar with useful ideas and guidance in the areas of estate planning and administration. The materials and the comments made by the presenter during the seminar or otherwise do not constitute and should not be treated as legal advice regarding the use of any particular estate planning or other technique, device or suggestion or any of the tax or other consequences associated with them. Although we have made every effort to ensure the accuracy of these materials and the seminar presentation, neither STINSON LLP nor the lawyer, Charles A. Redd, assumes any responsibility for any individual's reliance on the written or oral information presented in association with the seminar. Each seminar attendee should verify independently all statements made in the materials and in association with the seminar before applying them to a particular fact pattern and should determine independently the tax and other consequences of using any particular device, technique or suggestion before recommending the same to a client or implementing the same on a client's or his or her own behalf.

CHARLES A. REDD

Charles A. Redd is a partner in the St. Louis, Missouri, office of the law firm of STINSON LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now Bank of America Private Bank).

Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar, the Illinois State Bar Association, The Bar Association of Metropolitan St. Louis and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Past Chair of Communications Committee; Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as a member of the Advisory Committee for the Heckerling Institute on Estate Planning and is Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. In 2018, he was inducted into the Estate Planning Hall of Fame® by the National Association of Estate Planners and Councils. In 2023, he was recognized by the Estate Planning Council of St. Louis as Distinguished Estate Planner of the Year. Mr. Redd is listed in The Best Lawyers in America and is "Band 1" ranked by Chambers and Partners in their High Net Worth guide. He frequently writes and lectures nationally on topics in the trusts and estates field.

Turney P. Berry

Turney P. Berry concentrates his practice in the areas of estate planning, fiduciary matters, and charitable planning. Mr. Berry is the leader of Wyatt, Tarrant & Combs' Trusts, Estates & Personal Planning Service Team and a past member of the firm's Executive Committee. Mr. Berry is active in the American College of Trust and Estate Counsel (ACTEC), and served as President of the ACTEC Foundation, Regent of the College, State Chair for Kentucky, Chair of the Estate & Gift Committee, and Chair of the Charitable and Tax-Exempt Committee. Currently he serves as Chair of the State Laws Committee, and a member of the Long Range Planning Committee.

As a Uniform Law Commissioner, Mr. Berry currently serves as Chair of the Study Committee on Transfers to Minors Act, Vice-Chair of the Drafting Committee on Conflicts of Laws in Trusts and Estates, Member of the Electronic Estate Planning Documents Committee, Member of the Joint Editorial Board for Uniform Trust and Estate Acts, and Member of the Drafting Committee on Uniform Determination of Death Act. He has served as chair of the Uniform Fiduciary Income and Principal Act (UFIPA), chair of the Uniform Power of Appointment Act, Vice Chair of the Drafting Committee on Electronic Wills Act, Co-Chair of the Drafting Committee on Uniform Cohabitants' Economic Remedies Act, and as a member of the drafting committees for the Directed Trust Act, the Revised Fiduciary Access to Digital Assets Act, the Trust Decanting Act, the Insurable Interests in Trusts Act, the Premarital and Marital Agreements Act, the Transfer on Death Deeds Act, the Revised Disposition of Community Property Rights at Death Act, and the Uniform Probate Code Artificial Reproductive Technology provisions, and an adjunct member of the Fundraising Through Public Appeals Act.

Mr. Berry is a Fellow of the American College of Tax Counsel, a member of the American Law Institute, a member of The International Academy of Estate and Trust Law, a member of the Advisory Council of the Heckerling Institute on Estate Planning, a Member of the Advisory Board of Trusts and Estates Monthly, and a member of the Bloomberg BNA Tax Advisory Board (Estates, Gifts, and Trusts). He serves as Adjunct Professor at the University of Miami Estate Planning LLM Program (teaching Business Succession Planning), and has served as Adjunct Professor at Vanderbilt University, the University of Missouri, and the University of Louisville, and regularly speaks at the nation's leading estate planning conferences. Since 1996, Mr. Berry has served as Co-Chair of the Midwest/Midsouth Estate Planning Institute at the University of Kentucky (the longest continuously run CLE event in Kentucky).

Mr. Berry has been certified as an Accredited Estate Planner® (AEP®) by the National Association of Estate Planners & Councils and is a member of its Estate Planning Hall of Fame [Kentucky does not recognize legal specialties]. He is listed in Woodward/White's The Best Lawyers in America® and in the Kentucky Super Lawyer Magazine in the area of Trusts and Estates.

A native of Tennessee, Mr. Berry received his B.A. and B.L.S. in 1983 from the University of Memphis and his J.D. in 1986 from Vanderbilt University.

* * * * * * * * *

TABLE OF CONTENTS

Ethics Issues in a Contemporary Estate Planning Practice

By: Charles A. Redd
STINSON LLP
St. Louis, Missouri

I. INTRODUCTION

Estate planners and those who administer estates and trusts must frequently adapt to changes in our profession, including evolving ethics-based concerns. We cannot be focused only on our traditional ethics obligations owed to clients and former clients. Many other ethics issues, some of which were never or seldom thought about by estate planning and estate and trust administration practitioners in earlier generations, now arise with increasing frequency.

II. ETHICS ISSUES RELATING TO MANAGING OFFICE TECHNOLOGY

A. Electronic Communications and Document Storage

Comment 8 under Model Rule 1.1 ("Competence") (part of the Model Rules of Professional Conduct[1]) ("Model Rules") includes a discussion of a lawyer's duties concerning technology and states that a lawyer should keep abreast of changes in the benefits and risks associated with relevant technology. The American College of Trust and Estate Counsel ("ACTEC") Commentaries[2] on the Model Rules, specifically, the Commentaries on Model Rule 1.1, provide that a lawyer who uses electronic communications or electronic document storage methods should be aware of the potential impact of such communications or methods on the lawyer's duty of confidentiality. Furthermore, a lawyer should keep abreast of technological developments in both communications and document storage.

Section (c) of Model Rule 1.6 ("Confidentiality of Information") provides that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Comment 18 under Model Rule 1.6 states that a lawyer must make "reasonable efforts" to prevent unauthorized disclosure by "other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment 18 goes on to say that the reasonableness of the lawyer's efforts is determined by looking at factors such as the sensitivity of the information, the likelihood of disclosure, the cost of additional security and whether the additional security is difficult to use and will adversely affect the representation. In addition, the client may require the lawyer to take greater security measures or may consent to lesser security measures than would be required by Model Rule 1.6.

The ACTEC Commentaries on Model Rule 1.6 add that "[p]articular care should be taken to ensure that electronic storage sites and transmission methods provide adequate protection for

[1] Model Rules of Professional Conduct ("Model Rules"), American Bar Association (1983).
[2] ACTEC Commentaries on the Model Rules of Professional Conduct prepared by the American College of Trust and Estate Counsel (6th ed. 2023).

the confidentiality of any client information entrusted to them." Duties regarding electronic storage sites extend to remote storage devices such as cloud storage.[3] Thus, lawyers have a duty continually to assess risks to their cybersecurity program, including the use of trained personnel to carry out this function.[4]

The American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "Standing Committee") issued Formal Opinion 477R on May 22, 2017, wherein it discussed a lawyer's ability to transmit client information over the internet without violating the Model Rules. Under certain circumstances, when the nature of the information requires a higher degree of security, strong protective measures, like encryption, may be warranted. The factors discussed in Comment 18 under Model Rule 1.6[5] should be utilized in determining whether encryption is necessary. The Opinion also recommended that lawyers discuss with their clients at the beginning of an engagement the level of security that's appropriate for client communications. Lawyers should also be responsible for ensuring that their nonlawyer assistants are properly trained in maintaining the appropriate security of information.

B. Exposure of Electronic Communications to Third Parties

A common issue, given the frequency with which lawyers communicate with clients through electronic mail and/or other electronic messaging methods, is the lawyer's duty to maintain confidentiality when such communications can be easily exposed, either intentionally or unintentionally, to third parties.

Comment 19 under Model Rule 1.6 provides that, when sending confidential information, the lawyer must take "reasonable precautions" to prevent such information from reaching unintended recipients. Reasonableness is determined by considering factors such as "the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."

The Standing Committee issued Formal Opinion 11-459 on August 4, 2011. It addressed a lawyer's duties when sending electronic mail messages to an electronic mail account that is maintained by the client's employer or when the client reviews such emails through a computer or other device owned by the employer. When the lawyer knows or reasonably should know that the client will be receiving or sending electronic mail messages in this manner, the lawyer has a duty to warn the client (*e.g.*, in the lawyer's engagement letter) that such communications may not be considered confidential when there is a significant risk that such communications will be read by the employer or other third party. The Opinion recommended that lawyers should typically instruct clients to avoid reviewing or sending electronic mail messages in or through accounts or devices

[3] *See also* N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 842 (2010) (allowing a lawyer to use cloud storage "provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained").
[4] *See* Lieberman, "Legal Ethics and Evolving Information Technologies," ACTEC PROFESSIONAL RESPONSIBILITY COMMITTEE (October 23, 2016).
[5] *See* part II.A., page 1, of these materials.

that the client's employer may access. The Opinion noted that the attorney-client privilege for such communications may be inapplicable depending on the circumstances and jurisdiction.[6]

The duty to safeguard the confidentiality of communications may extend to the transmission of metadata, information embedded in electronic files that may disclose past edits to the document, the authors, when the document was created and edited and other information that, especially in the trusts and estates litigation context, could be highly sensitive. Depending on the jurisdiction, the lawyer may have a duty to utilize software that will remove metadata before transmitting a document. If a lawyer receives a document and notices that it contains metadata, the lawyer may have a duty to notify the sender pursuant to Model Rule 4.4(b) ("Respect for Rights of Third Persons").[7]

C. Generative AI

1. *What is It?*

Generative AI ("artificial intelligence") ("GenAI") is a term that describes a computer-based system that uses algorithms to "learn" from very large amounts of data that's been embedded from one or more sources and then to create new, or original, content (text, images, video) in response to user prompts. Examples include ChatGPT, Copilot, Gemini and GPT-4. GenAI has proliferated in recent years in many fields, including the practice of law. GenAI has proven so far to be remarkably innovative and accurate in some areas but, in others, has performed very poorly. Its use by lawyers raises serious ethics issues.

2. *What Can It Do?*

GenAI can provide valuable and time-saving assistance to lawyers by automating performance of certain tasks, such as document review, assembling legal documents (including estate planning documents), conducting legal research and drafting legal memoranda and pleadings. GenAI is most reliable in carrying out relatively low-level, routine or redundant tasks but, when challenged to engage in even moderately serious deductive reasoning, has proven deficient – in some cases, shockingly so. Because of the apparent sophistication of GenAI (even though its development is still, by all accounts, in its infancy), the temptation unquestioningly to accept what GenAI produces may be irresistible. There is, however, enormous danger in blindly relying on GenAI-produced conclusions as to all but the most elementary legal questions and problems.

3. *What Can Go Wrong?*

The most notorious example of disastrous results for lawyers who relied on GenAI is the recent case of *Mata v. Avianca, Inc*.[8] In *Mata*, lawyers representing the Plaintiff filed an

[6] *See* Mignogna, "Ethics and Technology in Trusts and Estates," ACTEC PROFESSIONAL RESPONSIBILITY COMMITTEE (October 23, 2016).
[7] *See* Lieberman, *supra*.
[8] *Mata v. Avianca, Inc.*, No. 1:22-cv-1461-PKC - Document 54 (S.D.N.Y. June 22, 2023).

"Affirmation in Opposition," which cited and quoted from multiple judicial decisions allegedly published in the Federal Reporter, the Federal Supplement and Westlaw. The Affirmation in Opposition was created, in part, by ChatGPT. The decisions in question, the citations and the quotes, were completely made-up or, as characterized by the *Mata* court, "fake," "non-existent." To make matters worse, the lawyers "continued to stand by the fake opinions after judicial orders called their existence into question." When the court ordered the lawyers to produce and file copies of the opinions, the lawyers filed copies of opinions that were made up by ChatGPT and themselves contained citations to cases that didn't exist! One of the lawyers conceded at the sanctions hearing that, in conducting the legal research that formed the foundation of the Affirmation in Opposition, he had relied exclusively on ChatGPT. Unsurprisingly, the court found bad faith on the part of the individual lawyers and imposed sanctions on the lawyers and their firm.

4. *What Do We Do Now?*

GenAI shouldn't be ignored by the legal profession because it can locate and, sometimes, analyze information in an efficient and useful way. However, substantive legal work product rendered by GenAI should always, without exception, be verified by a capable, human legal technician.

III. MAINTAINING CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE WHEN WORKING WITH A CLIENT'S OTHER ADVISORS

A. Introduction

For many clients, a large part of the estate planning process will involve the collaboration of the client's team of advisors, such as investment advisors, life insurance specialists and accountants. Such advisors add value and efficiency to the planning process. In many cases, a client's advisory team will be involved in the planning meetings with the client and the estate planning lawyer, with each person contributing his or her own expertise. During that process, the lawyer must weigh the benefits of collaboration with other professionals against maintaining confidentiality and the attorney-client privilege.

B. Attorney-Client Privilege

The attorney-client privilege includes the following elements:

1. Information transmitted between a lawyer and a client;
2. In the course of the attorney-client relationship; and
3. In confidence.[9]

[9] Franklin, "Lawyers and Advisors Working Together – Are Your Communications Privileged?" ACTEC 2017 Fall Meeting (October 20, 2017).

Privilege is relevant when there is another party who might have a claim that would give him or her a reason to compel the release of information about what transpired during the planning meetings.

As to a given communication, consideration should be given to whether that communication is being made for the purpose of transmitting/obtaining legal advice and whether there is an intention that the communication be confidential. If it is determined that the privilege exists, one must also determine whether the privilege would extend beyond the lawyer – in this context, to the members of the third-party advisory team.

There are several ways to help ensure the privilege applies to the advisory team in these instances. If the non-lawyer advisor is included in the conversations with the client to assist the client in obtaining legal advice, for example, as a "translator" to understand the complexities of the issues being discussed, then a strong argument could be made for extending the privilege to the advisor.[10] This person can be a literal translator (for a foreign language-speaking client) or, perhaps, an accountant to assist in explaining a complex tax issue.[11] Additionally, under what is referred to as the "agency theory," a third-party advisor could claim that the privilege applies because he or she is an agent of the client. Yet another consideration is whether the advisor is a "facilitator," *i.e.*, a person helping the lawyer render legal advice or helping the client receive the advice. This could be a lawyer's assistant or perhaps a client's child who is helping his or her elderly parent. To ensure a client's privilege is protected, the lawyer should first consider whether the involved third parties can fit into one of these categories.

Illustrative of the protection afforded by the attorney-client privilege when the lawyer is working with a third-party advisor is *United States v. Kovel*.[12] This case began as a criminal case dealing with an investigation into alleged federal income tax violations by an individual, a client of the law firm of Kamerman & Kamerman. An accountant at the law firm, Mr. Kovel, had been employed by the firm for two decades and worked with the lawyers on their client's federal income tax matter and on occasion had direct communications with the client to discuss tax issues. When Mr. Kovel was called before a grand jury to testify about the firm's client, Mr. Kovel refused to answer various questions based on the attorney-client privilege (even though Mr. Kovel was not a lawyer). Mr. Kovel was brought before the federal district court for the Southern District of New York to determine the applicability of the attorney-client privilege. The district court ruled against Mr. Kovel and ordered him to testify before the grand jury. Mr. Kovel refused and was held in contempt of court and sentenced to one year in jail. On appeal, the Second Circuit reversed. In making its ruling, the court compared Mr. Kovel to a foreign language interpreter who was present to help translate for a client. Here, the court reasoned that the involvement of an accountant would be crucial in dealing with a complex tax situation and the fact that he was not a lawyer should not

[10] Wolven, "Living in a Statistical Universe: Embracing the Art and Ethics of the Engagement Letter," 53 HECKERLING INSTITUTE ON ESTATE PLANNING (2019).
[11] Kamin & Simon, "Privileged Communication in Estate Planning and Advising," (2018), https://actecfoundation.org/podcasts/privileged-communication-in-estate-planning-and-advising/
[12] *United States v. Kovel*, 296 F.2d. 918 (2nd Cir. 1961).

destroy the privilege; Mr. Kovel's presence was helpful in the communication of legal advice and related consultation between the client and the lawyer.

C. Confidentiality

The ACTEC Commentaries on Model Rule 1.6 offer guidance in dealing with consultants and associated counsel where a lawyer may not need to obtain client consent before disclosing confidential information. The ACTEC Commentaries note that a lawyer should obtain the client's consent prior to disclosing confidential information to other professionals. However, there are certain instances where the lawyer may be impliedly permitted to make disclosures to the extent appropriate for the representation. A lawyer is impliedly authorized to disclose certain confidential information to the courts, administrative agencies and other individuals and organizations whose participation in a case or project the lawyer believes is reasonably required by the representation. For example, a client could reasonably anticipate that a lawyer drafting an irrevocable life insurance trust instrument would need to discuss the client's situation with the client's insurance advisor. Moreover, a lawyer can arrange for another lawyer to review a client's files following the lawyer's death or disability and can make disclosures related to furthering the client's estate plan, avoiding litigation, preserving assets and promoting a family's understanding of the client's wishes. However, it should be noted that a lawyer's duty of confidentiality continues even after the death of a client unless consent to disclose is given by the client's Personal Representative or by the client before his or her death or becoming incapacitated.

IV. MULTIJURISDICTIONAL PRACTICE HAZARDS

A. Client Mobility

Estate planning professionals will more often than in the past need to consider the laws of multiple states in analyzing the nature and appropriate disposition of a client's property interests. Lawyers should consider drafting trust documents flexible enough to allow for changes in the governing law and situs of a trust due to changes in the domicile of the client or a beneficiary (and for other reasons). For example, clients may live in a separate property state but own real estate located in their former state of residence that is subject to community property laws. As another example, clients may live in a state with no estate or inheritance tax but own property in a state that is decoupled for estate tax purposes. In addition, due to their connections to multiple jurisdictions, clients may be able to establish trusts subject to the law of a jurisdiction with advantageous creditor protection or estate and income tax laws.

To avoid violating applicable disciplinary rules and potentially becoming subject to a malpractice claim, lawyers should consult with lawyers licensed in other jurisdictions that implicate the client's estate planning.

B. Model Rule 5.5

1. *Overview*

To address these and similar issues, the American Bar Association, on February 11, 2013, approved a revision of Model Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law"), allowing lawyers to practice across state lines in limited circumstances without being considered to engage in the unauthorized practice of law.

Under Model Rule 5.5, a lawyer may not establish an office in a state in which he or she is not licensed, nor may a lawyer lead the public to believe that he or she is licensed in a state in which he or she is not admitted. Model Rule 5.5(c) provides some exceptions, however, which permit lawyers to practice law in another jurisdiction "on a temporary basis." The most relevant of these exceptions for trusts and estates lawyers provides that the lawyer does not violate the temporary basis exception if:

- Representation is undertaken in association with a lawyer licensed to practice in the jurisdiction who actively participates in the matter; or
- The representation arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which he or she is admitted to practice.

Temporary basis is not defined, but Comment 6 under Model Rule 5.5 suggests that recurring representation is not automatically a violation of Model Rule 5.5. The ACTEC Commentaries on Model Rule 5.5 recommend a more conservative view than the liberally worded comments, especially for lawyers traveling to meet with clients in jurisdictions in which they are not admitted. With regard to working with lawyers licensed in the jurisdiction at issue, "active participation" has been defined differently. For example, a lawyer's merely allowing his or her name to be placed on the pleadings may not be sufficient participation to meet the requirements of Model Rule 5.5, while appearing in court and/or handling all court filings would be sufficient participation.

Regarding representation that arises out of existing client relationships, the ACTEC Commentaries state that a lawyer may continue to represent a client the lawyer originally served in an admitted jurisdiction who then moves to a non-admitted jurisdiction. The ACTEC Commentaries also state that a lawyer may represent a fiduciary in ancillary administration in non-admitted jurisdictions if the natural situs of the estate administration is an admitted jurisdiction. However, lawyers should seek an opinion from the non-admitted jurisdiction's bar association in these circumstances.

Model Rule 5.5(d)(2) permits lawyers licensed in a foreign jurisdiction or in another United States jurisdiction to provide legal services in a non-admitted jurisdiction that "the lawyer is authorized by federal or other law or rule to provide in this [the admitted] jurisdiction."

As the ACTEC Commentaries to Model Rule 5.5 point out, litigators frequently satisfy their ethics-based obligations by being admitted *pro hac vice* in a jurisdiction in which a

litigated matter arises but the lawyer is not admitted to practice. However, there was (and is) no equivalent for transactional lawyers. Despite the Model Rule's authorization, the ACTEC Commentaries caution estate planning lawyers that, even though temporary representation may be permitted, a lawyer must still adhere to the remaining Model Rules, including Model Rule 1.1 governing competence. Furthermore, the ACTEC Commentaries suggest that the lawyer consider obtaining the client's informed consent to "render services in or concerning a jurisdiction in which the lawyer is not admitted to practice law" because "a lawyer engaged in multijurisdiction[al] practice necessarily offers limited services in jurisdictions in which the lawyer is not admitted."

2. *"Practice of Law"*

A violation of Model Rule 5.5 requires that a lawyer be engaged in the "practice of law," which can vary greatly from state to state.[13] The ACTEC Commentaries suggest that the best approach, though also the most conservative approach, for avoiding discipline may be to assume that any services the lawyer intends to render in a non-admitted jurisdiction constitute the practice of law, and the lawyer should conduct him or herself accordingly.

The definition of "practice of law" was considered by the Supreme Court of Minnesota in *In re Charges of Unprofessional Conduct in Panel File No. 39302*.[14] In this case, a Colorado lawyer represented a Minnesota couple (who were the parents-in-law of the lawyer) to defend against the collection of a judgment obtained by a Minnesota creditor against the couple. The lawyer contacted the creditor's lawyer via email and informed him of the lawyer's representation of the couple. The two lawyers then exchanged approximately two dozen emails over the next several months. The Colorado lawyer disclosed that he was not licensed in Minnesota but that he would obtain local counsel if another court proceeding was necessary. The Colorado lawyer was unable to resolve the matter. He was never physically present in Minnesota and was not compensated for his services.

The court held that the email communications constituted the unauthorized practice of law in Minnesota, finding that the Colorado lawyer had "a clear, ongoing attorney-client relationship with his Minnesota clients." The court also found that Minnesota's version of Model Rule 5.5(c) did not apply to authorize the Colorado lawyer's practice of law in Minnesota. Specifically, the court found that this engagement did not arise out of nor was it reasonably related to the lawyer's practice in Colorado, given that the clients were not residents of Colorado and the lawyer had never represented them before.[15]

---

[13] *See* ACTEC Commentaries on Model Rule 5.5 for a more detailed discussion of various state approaches. *See*, *e.g.*, *In re Estate of Cooper*, 746 N.W.2d 653 (Neb. 2008) (filing a creditor's claim in a probate proceeding is not the practice of law; filing a demand for notice in a probate proceeding falls into the exception under Nebraska's version of Model Rule 5.5(c)(4)).

[14] *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016).

[15] *See*, *also*, *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 P.2d 1 (1998) (even telephonic communications could constitute practice of law in California).

V. MAINTAINING COMPETENCE AND DILIGENCE IN AN EVER-CHANGING AND EXPANDING FIELD

A. Model Rule 1.1 and *Discipline of Fett*

In a complex and rapidly-changing area of law such as estate planning, the duty of competence, and its related duty of diligence, should be of primary concern. Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Lack of skill or knowledge may be overcome through additional research and study or involving another lawyer who possesses the expertise to assist.[16]

One example of lack of competence leading to disciplinary action is *Discipline of Fett*.[17] In this case, the client was the attorney-in-fact for his brother. The client consulted with a lawyer regarding Medicaid planning. The lawyer advised the client in a letter to liquidate the brother's assets and to transfer the assets into the client's name, even though the power of attorney did not allow transfers to the client. The court held that the lawyer's advice in the letter was incompetent and did not adequately disclose to the client the risks of the recommended course of action (such as liability for breach of duty under the power of attorney and prosecution for the financial exploitation of a vulnerable adult) or the lack of any legal basis that would justify self-dealing. In sum, said the court, the client wasn't given sufficient information to participate intelligently in the decision of whether to transfer the assets into his name.

B. Supervising the Signing of Documents

The ACTEC Commentaries specifically address the signing of documents and state that a lawyer who drafts estate planning documents should oversee their signing. Furthermore, lawyers should develop a procedure for document signing and following it consistently.[18] If a lawyer sends documents to a client to be signed outside the lawyer's office, the lawyer should request that the original signed documents be returned for the lawyer's review and, if signed improperly, should send them back to the client for proper signatures.[19]

C. Promptness in Having Client Sign Estate Planning Documents

Surprisingly, notwithstanding that many jurisdictions have expressed a willingness to allow non-client beneficiaries to sue the drafting lawyer where the Will is negligently prepared, the reported cases regarding a lawyer's duty to have documents signed promptly before the client

---

[16] ACTEC Commentaries on Model Rule 1.1.

[17] *Discipline of Fett*, 790 N.W.2d 840 (Minn. 2010).

[18] *See Auric v. Continental Casualty Co.*, 331 N.W.2d 325 (Wis. 1983) (lawyer supervised signing in which the second witness failed to sign; beneficiaries permitted to sue lawyer for negligent supervision).

[19] ACTEC Commentaries on Model Rule 1.1. *See*, *also*, *Estate of Pavlinko*, 148 A.2d 528 (Pa. 1959) (spouses inadvertently signed each other's wills; court held decedent's Will was a nullity); *but see In re Snide*, 418 N.E.2d 656 (N.Y. 1981) (spouses inadvertently signed each other's wills; court upheld reformation of decedent's Will because decedent's Will and Wife's will nearly identical).

dies or becomes incapacitated have concluded that a lawyer does not have such a duty. Such was the holding in *Radovich v. Locke-Paddon*.[20]

In *Radovich*, the client signed a Will in 1985. In June 1991, the lawyer met with the client to discuss preparing a new Will. The lawyer learned at that time that the client was suffering from breast cancer for which she was receiving chemotherapy treatments. The lawyer sent the client "a rough draft" of a new Will in October 1991. The client died in December 1991 without having signed the new Will.

The proposed beneficiary under the "new" Will brought a malpractice claim against the lawyer for failing to cause the client to sign the new Will. The theory of the claim was that the lawyer owed a duty of care and reasonable diligence to the proposed beneficiary.

The court acknowledged the trend moving away from a strict privity rule to one holding lawyers potentially liable to third parties. However, the court refused to extend this trend to a situation where the decedent had not signed a Will naming the plaintiff as a beneficiary. The court reasoned that to hold a lawyer accountable for not having documents signed before a client's death may cause lawyers to rush clients into signing testamentary documents. This would clearly violate the lawyer's duty to the client by putting the interests of the beneficiaries ahead of the client's interests.[21]

A lawyer should not interpret cases like *Radovich* to give him or her license not to act diligently in getting documents prepared and signed. This is especially so if the client is in bad health and indicates a desire to sign the documents.[22]

Lawyers should take care to prepare promised documents with due diligence and to be vigilant in following up with their clients to complete the estate plan undertaken (*i.e.*, send follow-up letters and perhaps place phone calls). Also, the lawyer should be careful to document the steps taken to have the documents signed, especially if the client is in obviously poor health.

D. Missing or Defective Language

Depending on when the error is discovered, who is (or will be) damaged by it and whether courts in the applicable jurisdiction follow the strict privity rule for maintaining a malpractice action against a practitioner, a lawyer who has prepared an estate planning document that is

[20] *Radovich v. Locke-Paddon*, 35 Cal. App. 4th 946, 41 Cal. Rptr. 2d 573 (Cal. Ct. App. 1995).
[21] *See*, *also*, *Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002) (holding that lawyer did not owe a duty to intended estate beneficiary where client was in ill health and lawyer had concerns about client's capacity to sign because imposing such a duty "could compromise the attorney's duty of undivided loyalty to the client"); *Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009) (holding same relying, in part, on rationale in *Sisson*).
[22] *Cf. People v. James*, 502 P.2d 1105 (Colo. 1971) (lawyer disbarred for failing to prepare a Will for eight months after being employed to do so); *Discipline of Helder*, 396 N.W.2d 559 (Minn. 1986) (lawyer indefinitely suspended for, *inter alia*, failing to make requested changes to a client's Will).

internally defective[23] may be responsible for the consequences of his or her faulty drafting. The lawyer may be able to mitigate the damages (but not eliminate the liability) by having the document modified, construed or reformed or, if a trust is involved, orchestrating a decanting of the trust.

In *Blair v. Ing*,[24] the drafting lawyer failed to include a funding formula for the credit shelter trust ostensibly to be created under the trust instrument. The dispositive provisions of the credit shelter trust were intact. The non-client beneficiaries were entitled to maintain their malpractice actions under both tort and contract theories so long as the claim was not barred by the statute of limitations.

In *Bucquet v. Livingston*,[25] a surviving spouse was given a general power of appointment over a non-marital trust. The court held that the trust beneficiaries could bring a claim for legal malpractice.

VI. HOT OFF THE PRESS

Thus far in 2024, the Standing Committee has issued two formal opinions to which trusts and estates lawyers (as well as lawyers in other specialties, of course) should be attentive.

A. ABA Formal Opinion 510

Formal Opinion 510, released on March 20, 2024, addresses the application of Model Rule 1.18 ("Duties to Prospective Client") to a scenario in which a lawyer discusses a legal matter with a prospective client and the prospective client ends up not retaining the lawyer or the lawyer's firm.

Specifically, the issue addressed is what "reasonable measures" need to be taken to avoid imputing the lawyer's conflict of interest to the firm.

Model Rule 1.18 provides in pertinent part as follows:

> (c) A lawyer…shall not represent a client with interests materially adverse to those of [the] prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)

[23] Examples of internal defects include omission of or an erroneous residuary clause or omission of or erroneous other dispositive provisions, omission of or erroneous fiduciary appointment provisions, omission of or a defective tax clause or a general power of appointment that was intended to be a nongeneral power.
[24] *Blair v. Ing*, 21 P.3d 452 (Haw. 2001).
[25] *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976).

> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> …
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; …

The Opinion states that, if a lawyer receives "disqualifying information" and has failed to take the "reasonable measures" referenced in Model Rule 1.18(d) and no representation ensues, the lawyer's conflict of interest will be imputed to the lawyer's firm.

The Opinion suggests a lawyer could warn the prospective client that the prospective client should provide only the information requested by the lawyer and could condition a consultation with a prospective client on the prospective client's: (1) informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter; and (2) express consent to the lawyer's later use of information received from the prospective client.

B. ABA Formal Opinion 511

Formal Opinion 511, released on May 8, 2024, provides guidance for when a lawyer can seek advice on a listserv, noting that Model Rules in most cases forbid posting questions or comments relating to a representation — even in hypothetical or abstract form.

Invoking Model Rule 1.6, the Opinion seeks to draw a distinction between a lawyer's participation in a listserv to "keep abreast of changes in the law and its practice" and "seeking advice about a client matter." The latter, says the Opinion, would require a client's informed consent in most cases. The Opinion warns about those circumstances in which there's "a reasonable likelihood that the lawyer's questions or comments [on a listserv] will disclose information relating to [a] representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved."

The Opinion emphasizes that "the more unusual the situation…the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6."