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Participant Guide

Ethics Issues in a Contemporary Estate Planning Practice

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Ethics Issues in a Contemporary Estate Planning Practice

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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 Conduct¹) (“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”) Commentaries² 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 1.6⁵ 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 defective²³ 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.”



CANNON
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Certificate of Attendance

(Participant Name)

Has successfully completed the Cannon Financial Institute, Inc. course:

Ethics Issues in a Contemporary Estate Planning Practice

June 18, 2024

Laurie Sebestyen
Professional Education Coordinator

- **Certified Public Accountant** **1.5 credit hours**
In accordance with the standards of the National Registry of CPE Sponsors, CPE credits have been granted based on a 50-minute hour.
Instructional delivery method: Group-Internet-Based
NASBA #103655; Field of Study-Behavioral Ethics
Knowledge Level-Intermediate
- **Enrolled Agent (IRS)** **1.0 credit hour**
Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
Course # VRUGV-E-00192-24-O
- **Certified Financial Planner (CFP™)** **1.5 credit hours**
Course #320655
- **Accredited Fiduciary Investment Manager (AFIM™)** **1.5 ethics hours**
- **Certified Wealth Strategists (CWS®)** **2.0 ethics hours**
- **Certified Investment Management Analyst (CIMA®)** **1.5 ethics hours**
Course # 23CFI018
If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your account at <https://investmentsandwealth.org/>.
- **Certified Trust and Fiduciary Advisor (CTFA™)** **2.0 credit hours**
- **Certified Retirement Plan Professional (CRPP™)** **2.0 ethics hours**
- **Certified Trust Operations Professional (CTOP™)** **2.0 ethics hours**
- **Certified Fiduciary and Investment Risk Specialist (CFIRS™)** **2.0 ethics hours**
- **Chartered Life Underwriter & Chartered Financial Consultant (**No Individual State Insurance Credit Available)** **1.5 credit hours**
- **Fiduciary Investment Risk Management Association (FIRMA®)** **2.0 credit hours**

Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 389-7645.
Fax (706) 353-3994, Email lsebestyen@CannonFinancial.com
355 Oneta St. Building D 500, Athens, GA 30601



CANNON
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Certificate of Attendance

(Participant Name)

(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Ethics Issues in a Contemporary Estate Planning Practice

June 18, 2024



Laurie Sebestyen
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

The following states have been approved for 1.5 hours of Ethics Credit: (Course number is indicated in parenthesis): Alabama, Arkansas (ETH94089), California, Delaware, Georgia, Idaho, Illinois, Iowa (402047), Kansas, Kentucky(259791), Louisiana, Maine (74872), Minnesota (494093), Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (174208582), Utah, Vermont, Virginia, Washington, Wisconsin, & Wyoming

These states have been approved for the following Ethics Credit: Colorado – 1.8 hours, Florida - 2 hours (2309922N), Missouri –1.8 hours (731346), Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Maryland, Massachusetts, Michigan & South Dakota

The following states have special circumstances:

Alaska-Attorneys can use this certificate to submit to Alaska State Bar

Arizona-On honor system

Connecticut-Attorneys can use this certificate to submit to Connecticut MCLE

Hawaii- Attorneys can use this certificate for Hawaii CLE for 1.5 Ethics credits (Reciprocity Rule)

Indiana-Site Coordinators must apply for credit as the sponsor for participants to receive credit

New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit and self-report their attendance.*

New Jersey-Attorneys can use this certificate for New Jersey CLE for 1.5 Ethics credits (Reciprocity Rule)

New York-Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, DE, GA, KY, LA, MS, NM, NC, ND, OK. Type of credit: Ethics & Professionalism 1.5 Credits

****As required by the following State Bars, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, and West Virginia. ****

Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 353-3346.

Fax (706) 353-3994, Email lsebestyen@CannonFinancial.com

355 Oneta St. Bldg D 500, Athens, Georgia 30601

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Ethics Issues in a Contemporary Estate Planning Practice

Date and Time of Activity: June 18, 2024, 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,
10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics: 1.5

Elimination of Bias in the Legal Profession:

Competence:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: _____

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics: _____

Elimination of Bias in the Legal Profession: _____

Competence: _____

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.



CANNON
FINANCIAL INSTITUTE

Certificate of Attendance

(Participant Name)

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

**Ethics Issues in a Contemporary Estate
Planning Practice
(834690)**

June 18, 2024



Laurie Sebestyen
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

Colorado – 2.0 General Credits; 1.8 Ethics Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Virginia MCLE Board

Certification of Attendance (Form 2)

Certify your attendance online at www.vsb.org

MCLE requirement pursuant to Paragraph 17, Section IV, Part Six, Rules of Virginia Supreme Court and MCLE Board Regulations

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A \$100 fee will be assessed for failure to comply with either deadline.

Member Name: _____ **VSF ID#:** _____

Address: _____ **Phone:** _____

City **State** **Zip** **Email:** _____

Course ID: NLL1253

Sponsor: Cannon Financial Institute

Title: Ethics Issues in a Contemporary Estate Planning Practice

Credits: 1.5 1.5 0.0
CLE **(Ethics)** **Well-being**

Date Completed: _____ **Location:** _____

By my signature below I certify:

____ I attended a total of _____ (hrs/mins) of approved CLE of which (_____) (hrs/mins) were approved Ethics and _____ (hrs/mins) were approved Well-being.

Credit is awarded for actual time in attendance (0.5 hr. min) rounded to the nearest half hour. (1hr 15 min = 1.5hr)

____ The sessions I am claiming had written instructional materials to cover the subject.

____ I participated in this program in a setting physically suitable to the course.

____ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

____ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

____ I understand that a materially false statement shall be subject to appropriate disciplinary action.

NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

Date

Signature

This form may be mailed to:
Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
(804) 775-0577 / MCLE@vsb.org

Course Type: Live **Delivery Method:** Webcast