MALPRACTICE MELEE: FENDING OFF THE DISGRUNTLED AND DISAPPOINTED, AN ESTATE PLANNER'S FIELD GUIDE

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I. INTRODUCTION

Estate planning is unique among the many different disciplines within the practice of law, in that a person the lawyer has never met and has never been the lawyer's client may nonetheless sue for malpractice in many states.[1] While some states tether to the age-old concept of privity of contract, many other states have long since abandoned it when applied to the field of estate planning.[2] State law governing when and under what circumstances a non-client beneficiary of an estate plan may sue the drafting attorney for malpractice generally breaks down into three categories: (1) states that adhere to the strict rule of privity of contract; (2) states that, at least ostensibly, apply a balancing of factors test; and (3) states that apply a (supposedly) narrower, third-party beneficiary rule.[3] Part II of this article will analyze the application of these rules and the truth, according to the author, behind the billing for these rules by the courts applying them.[4]

Estate planning may also be unique among legal disciplines for the bountiful conflicts which may arise for the following reasons: (1) the lawyer frequently represents persons with potentially conflicting interests, such as: (a) husbands and wives or gay and lesbian couples; (b) multiple generations such as parents and children; (c) a person such as a trustee who is both a fiduciary and a beneficiary; (d) testators and beneficiaries such as charities; (e) testators and, subsequently, the fiduciary or beneficiary; and (f) testators as well as the corporate fiduciary named in the testator's instrument; (2) the client may ask the lawyer to act as fiduciary at the client's death; (3) clients sometimes want to make a gift to the lawyer, a member of the lawyer's family,

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1. *See* Jonathan C. Reed, *Who Does A Probate Attorney Represent?* THE LAW FIRM OF REED & MANSFIELD, 2010, http://probatenevada.net/PorbateAttyClient.aspx (last visited Feb. 28, 2011).

2. Jeffrey A. Schoenblum, MULTISTATE AND MULTINATIONAL ESTATE PLANNING 2009 4–28 (CCH Incorporated 2008) (1982).

3. *See* Charity Delich, *What Is Privity of Contract*, WISE GEEK, Feb. 8, 2011, http://www.wisegeek.com/what-is-privity-of-contract.htm. *See* Christopher Armstrong, PRACTICE ERRORS IN TRUST PLANNING AND ADMINISTRATION—WHAT YOU DON'T KNOW AND WHO YOU MIGHT KNOW ARE WHAT COUNT 1–2, http://www.rmstrnglaw.com/publications/Practice%20Errors%20in%20Trust%20and%20Estate%20Planning%201.pdf (last visited Feb. 28, 2011). *See* MARYLAND LEGAL ETHICS 2.3:300.

4. *See infra* Part II.

or a charity with which the lawyer has some affiliation or affinity; and (4) in most states, it is permissible for a lawyer to represent a client and also provide non-legal, ancillary services such as accounting, tax preparation, fiduciary services, financial planning, investment advice and brokerage, real estate brokerage, and insurance brokerage.[5] These conflicts can create complicated problems for the attorney (and indigestion for her carrier). Part III will address the ethical rules on conflicts of interest in the context of estate planning.[6]

In Part IV, this article discusses problems that can arise for estate planning attorneys who represent clients in matters in states other than the state in which the lawyer is admitted to practice.[7] Problems arise when a client moves to a new state and asks her existing attorney to continue to provide estate planning advice or when the client has business, real estate, or other matters in another state.[8] The question for the attorney is whether they may be engaged in the unauthorized practice of law.[9]

Finally, Part V addresses another problem that arises frequently for estate planners; that is, a client who has diminished capacity or may potentially be subject to undue influence.[10] This article discusses what the lawyer can or cannot do when confronted with this problem.[11]

II. WHO IS MY REAL CLIENT? CAN "NON-CLIENTS" SUE ME?

A. Do I Have a Duty as an Estate Planner to Non-Client Beneficiaries? In California, a Theme Emerges

California has the most fully developed body of case law in states where the rule of privity has been abandoned.[12] The California courts describe a multi-factored balancing test to determine whether an attorney has a duty to a

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5. *See* Posting of David Goldman, *Conflicts of Interest between Husband and Wife*, FAMILY ESTATE PLANNING LAWYERS BLOG, http://www.floridaestateplanninglawyerblog.com/2007/06/conflict-of-interest-between-husband-and-wife.html (June 13, 2007, 4:46 PM EST); *see also* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 154 (1996); Posting of Joel A. Schoenmeyer, *Who's the Boss? The Fiduciary-Beneficiary Relationship*, DEATH AND TAXES, http://www.deathandtaxesblog.com/2010/08/whos_the_boss_the_fiduciaryben.html (Aug. 24, 2010); Karen Ruben, *American Bar Association (ABA) Ethics Committee Issues Journal Opinions on Conflicts In Probate and Insurance Areas*, LORMAN Sept. 2005, http://lorman.com/newsletter/article.php?article_id=106&newsletter_id=36&category_id=8; Peter C. Valente & Herbert Bockstein, Deference or Discretion: Assessing Fiduciary Eligibility, BLANK ROME, July 10, 2008, http://www.blankrome.com/index.cfm?contentID=37&itemID=1836; Shirley B. Whitenack, *Principles Governing the Removal of Fiduciaries for Hostility and Conflict of Interest*, SHENCK, PRICE, SMITH & KING, LLP, http://www.spock.com/articles/removalof.cfm (last visited Feb. 28, 2011); MODEL CODE OF PROF'L CONDUCT R. 1.8(c) (2008); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 08-451 (2008).

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part IV.

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See infra* Part V.

12. *See* Phillip Feldman, *How to Avoid Having Strangers for Clients*, EXPERT LAW, http://www.expertlaw.com/library/practice-management.thirdparties.html (last visited Feb. 28, 2011).

non-client beneficiary.[13] In application, however, a theme emerges that more aptly defines the circumstances in which a non-client beneficiary may or may not sue the drafting attorney for legal malpractice.[14] The theme from these cases can be stated accordingly: Where the testator has clearly expressed her testamentary intentions, but those intentions cannot be effectuated due to a drafting or execution error caused by the attorney's negligence, a duty to non-client beneficiaries exists.[15] However, when the instrument is otherwise valid, but the testator's intent is ambiguous or her intent is itself in issue, the courts conclude that it would impose too great a burden on the profession to extend the duty to beneficiaries.[16]

One particularly significant rationale in support of the distinction between these two types of cases can be stated as follows: In cases where the courts find that a legal duty exists to non-client beneficiaries, the beneficiaries typically have no effective remedy absent the ability to sue the attorney; the probate court cannot validate an instrument that is invalid due to an execution or drafting error, or read into an instrument a term that by statute must appear in the instrument, even if extrinsic evidence exists to indicate the testator intended to include such a provision.[17] In those cases in which no duty is found to exist, however, the beneficiaries appear to have an adequate remedy in the probate court.[18] The beneficiaries could contest the instrument or seek interpretation or reformation in the probate court to establish that the instrument failed to reflect the testator's true intent.[19]

1. Duty Exists when Intent Is Clear and Unambiguous

To begin, an attorney generally has no duty to a non-client beneficiary, and the existence of a duty is a question of law for the court:

> "'A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence.' (*Goldberg v. Frye* (1990) 217 Cal. App.3d 1258, 1267 [266 Cal. Rptr. 483].)" (*Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal. App.3d 692, 700-01 [282 Cal. Rptr. 627].) (4) "Duty, in the context of negligence analysis, has been said to be' "a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . . '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff

13. *See* Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958).
14. *See, e.g.*, *id.*
15. *See, e.g.*, *id.*
16. *See, e.g.*, *id.*
17. *See* Fraser Sherman, *Ohio Laws on Probating an Estate*, EHOW, May 7, 2010, http://www.ehow.com/list-6470799-ohio-law-probating-estate.html.
18. *See id.*
19. *See id.*

> is entitled to protection. '[Citations.]' "Courts . . . have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act . . . .'" '[Citations.]".) (*Radovich v. Locke-Paddon*, *supra* 35 Cal. App.4th 946, 954-55.).
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> (5) "As a general rule, an attorney has no professional obligation to nonclients and thus cannot be held liable to nonclients for the consequences of the attorney's professional negligence . . . ." (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2002) ¶ 6:240, italics omitted.). Consequently, " '[a]n attorney generally will not be held liable to a third person not in privity of contract with him since he owes no duty to anyone other than his client. The question of whether an attorney may, under certain circumstances, owe a duty to some third party is essentially one of law and, as such, involves "a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances. [Citation.] "(*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342 [134 Cal. Rptr. 375, 556 P.2d 737].)' (*Schick v. Lerner* (1987) 193 Cal. App.3d 1321, 1329 [238 Cal. Rptr. 902].)" (*Skarbrevik v. Cohen, England & Whitfield*, *supra* 231 Cal. App.3d 692, 701.)[20]

Biakanja v. Irving: For the first time in California, the California Supreme Court held that an attorney may have a duty to the intended, third-party beneficiaries of the client's estate plan.[21] Plaintiff, an heir, sued a notary who drafted a will that, on its face, expressed the testator's intent to leave the entire estate to the plaintiff.[22] The notary failed to have the will witnessed, and the plaintiff received only a one-eighth intestate share.[23] The court abrogated the existing rule that required privity of contract to sue an attorney and articulated six factors that a court should evaluate in determining whether a duty existed to non-client beneficiaries:

(1) The extent to which the transaction was intended to affect the plaintiff;
(2) The foreseeability of harm to him;
(3) The degree of certainty that the plaintiff suffered injury;
(4) The closeness of the connection between the defendant's conduct and the plaintiff's injury;
(5) The moral blame attached to the defendant's conduct; and
(6) The policy of preventing future harm.[24]

The court concluded that these factors militated in favor of finding a duty owed to the plaintiff in *Biakanja*.[25] The facts presented by this case implicated

20. Moore v. Anderson Ziegler Disharoon Gallagher & Gray, 135 Cal. Rptr. 2d 888, 892–93 (Cal. Ct. App. 2003).
21. Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958).
22. *Id.* at 16.
23. *Id.*
24. *Id.* at 19.

the fifth and sixth factors articulated by the court.[26] There was moral blame attached to the defendant's conduct, in that the notary was engaged in the unauthorized practice of law.[27] Finding in favor of a duty in this case also advanced the policy of preventing future harm by deterring future illegal activity.[28]

Biakanja fits within our theme because the instrument was invalid due to an execution error caused by the notary.[29] The beneficiary had no remedy in the probate court because the court could not validate an instrument that failed to satisfy the statutory requirements to constitute a valid will.[30] Failing to confer standing upon the beneficiary in such a case would, therefore, effectively deny him any remedy.[31]

Later cases have considered two additional factors to determine whether an attorney should have a duty to non-client beneficiaries:

(1) The likelihood that the imposition of liability might interfere with the attorney's ethical duties to the client; and
(2) Whether imposition of a duty would impose an undue burden on the profession.[32]

Lucas v. Hamm: The California Supreme Court remanded to determine whether, in drafting an instrument that violated the rule against perpetuities and restraints on alienation, the attorney's conduct fell below the standard of care.[33] In doing so, the court affirmed the duty of the attorney to the intended, third-party beneficiaries.[34] Here again, the testator's testamentary wishes were clearly and unambiguously set forth in the instrument, but it was invalid due to attorney negligence.[35] The court noted that if the intended beneficiary could not seek redress against the attorney, there would be no remedy.[36]

Heyer v. Flaig: Plaintiffs, the two daughters of the decedent, sued the decedent's estate planning attorney for failing to effectuate the decedent's orally stated intention.[37] Decedent told her attorney that she wanted her entire

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25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *Id.*
30. *See id.* at 16.
31. *See id.*
32. *See* Goodman v. Kennedy, 556 P.2d 737, 737 (Cal. 1976); *see also* St. Paul Title Co. v. Meier, 226 Cal. Rptr. 2d 538, 540 (Cal. Ct. App. 1986).
33. *See* Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961).
34. *See id.* at 685.
35. *See id.* (the result would be different today due to statutes now in existence in every state that would save an instrument from failing by imposing a term that is in accord with the rule against perpetuities).
36. *Lucas*, 364 P.2d at 688.
37. Heyer v. Flaig, 449 P.2d 161, 161 (Cal. 1969).

estate to pass to plaintiffs.[38] Decedent also stated that she intended to marry.[39] The will failed to make any provision for decedent's future husband or to express any intention to omit him.[40] The decedent executed her will and married him ten days later.[41] Seven months after, she died.[42] After the decedent passed away, her husband filed a petition to determine his right to an intestate share as an omitted spouse, which was granted.[43] The court held that the attorney had a duty to the plaintiffs that the attorney breached by failing to carry out the testator's testamentary direction.[44] Because the California Probate Code requires that the instrument state an intention to omit a person who becomes a spouse after the execution of all testamentary instruments, the court could not effectuate the testator's clear and undisputed intent, and the beneficiaries had no other remedy but to sue the attorney for negligence.[45]

Bucquet v. Livingston: Plaintiffs, the express beneficiaries of husband's and wife's trust, sued the attorney who drafted separate trusts for the husband and wife for failing to advise the couple of the adverse tax consequences that would arise by giving each other a general power of appointment over the non-marital portion of each other's trust.[46] Plaintiffs claimed that the attorney's negligence diminished their inheritance.[47] The court of appeal held that a duty existed to the intended beneficiaries and found that a reasonable person could assume that the trustors intended for the attorney to minimize the estate and gift taxes to the extent possible.[48] This may be viewed as a possible departure from our theme, in that the trustors' intent was not so clearly stated, but it was a point of such obvious importance to these, and most similarly situated, trustors to minimize taxes with a common planning device, that the court could not conceive of a reason the trustors would not have desired the common planning technique.[49]

Garcia v. Borelli: Decedent's son sued for malpractice after settling a dispute with the decedent's widow.[50] The decedent told the attorney of the existence of community property held in joint tenancy for the sake of convenience, and that the decedent wanted his share of the community property to pass to his son and grandchildren.[51] The attorney drafted a will that was

38. *Id.* at 162.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 162–63.
43. *Id.* at 163.
44. *Id.* at 167.
45. *See id.*
46. Bucquet v. Livingston, 129 Cal. Rptr. 514, 514 (Cal. Ct. App. 1976).
47. *Id.*
48. *See id.* at 518.
49. *See id.*
50. Garcia v. Borelli, 180 Cal. Rptr. 768, 768 (Cal. Ct. App. 1982).
51. *Id.* at 769.

ambiguous and failed to accomplish the decedent's stated direction.[52] The court of appeal held that the attorney had a duty to the plaintiff, which he breached.[53] The court also held that the plaintiff was not estopped from pursuing the claim as a consequence of the settlement of the dispute with the widow.[54] Instead, the settlement merely mitigated the damage claim against the attorney.[55] Again, the decedent's intent was undisputed, but this case is different in the sense that there was an alternative remedy, which the plaintiff pursued successfully.[56] The fact that there was a settlement, in this author's opinion, suggests that the decedent's intent was either not clear as to justify imposing a duty on the attorney, or a decision to compromise that indicates the plaintiff did have a direct remedy that should have militated against extending the attorney's duty to this non-client beneficiary.[57]

Osornio v. Weingarten: Plaintiff, the decedent's care custodian for purposes of section 21350 of the California Probate Code, sued the decedent's attorney for failing to advise the client of the need to obtain a certificate of independent review to effectuate the client's stated intention of leaving the entire estate to plaintiff.[58] At trial in the probate case, the plaintiff failed to prove by clear and convincing evidence that the gift was free from undue influence.[59] The court of appeal held a duty existed, and that most estate planning attorneys understand the need to obtain a certificate of independent review so that it does not impose an undue burden on the profession to hold that a duty existed.[60] The case is consistent with our theme in that the gift to the care custodian was presumptively invalid by statute due to an execution error (the failure to obtain a certificate of independent review).[61] On the other hand, it cannot be said there was no remedy in the probate court because the care custodian had a right to establish the validity of the gift if she could prove by clear and convincing evidence that the gift was free from undue influence.[62] The case may be said to be similar to the result in *Garcia* in the sense that absent a completely successful remedy, the courts may determine that a duty exists to non-client beneficiaries.[63] This author again believes the courts should not extend duties to non-client beneficiaries as a means of making attorneys the guarantors or insurers of results that may not be completely satisfactory to the beneficiary for a variety of reasons beyond the control of the attorney.

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52. *Id.*
53. *Id.* at 771.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. Osnoria v. Weingarten, 21 Cal. Rptr. 3d 246, 249 (Cal. Ct. App. 2004).
59. *Id.*
60. *Id.*
61. *Id.* at 263.
62. *Id.* at 252–53.
63. *Id.* at 263; *cf.* Garcia v. Borelli, 180 Cal. Rptr. 768, 768 (Cal. Ct. App. 1982).

There are a number of other problems with the court's decision. For example, previous case law found a duty when the intention of the testator was unambiguous, and as will be seen, no duty is found to exist when that intention is ambiguous.[64] The very purpose of section 21350 is to create a statutory presumption that can be overcome only by clear and convincing evidence that a gift to a disqualified person was free from undue influence and was the testator's true intent.[65] Thus, the court should not have held that a duty existed where the testator did not by law intend the gift to the plaintiff (absent clear and convincing evidence to the contrary).[66] It should not be the policy of the courts to provide disqualified persons with a remedy where the legislative policy is to disqualify them. It is an undue burden on the legal profession to be the protectors of persons who by law and by important public policies, are not to be recipients of gifts except in limited circumstances. While this means that some negligent attorneys will not be responsible for their acts and some testators' intentions will be frustrated, this seems to be the better policy choice if the disqualified person cannot prove by clear and convincing evidence that the gift was free from undue influence.

2. No Duty when Intent Is Ambiguous or at Issue

Ventura County Humane Society v. Holloway: Various societies for the humane treatment of animals sued the testator's attorney for ambiguously defining the intended beneficiaries of the will.[67] The will provided that 25% of the residue would be distributed to the "Society for the Prevention of Cruelty to Animals (Local or National)."[68] Various humane societies petitioned to determine their entitlement to a non-exclusive portion of the residuary gift.[69] The San Francisco Society for the Prevention of Cruelty to Animals, however, claimed it was exclusively entitled to the benefits of the residuary gift.[70] The probate court in San Francisco disagreed and an appeal was filed.[71] Before the appeal could be heard, the executors settled by paying the bulk of the gift to the San Francisco society.[72] The other humane societies sued the attorney for malpractice, but the court of appeal held that no duty existed to anyone other than the *unambiguously* stated beneficiaries.[73] Since it was ambiguous whether

64. *See, e.g.*, Ventura County Humane Soc'y v. Holloway, 115 Cal. Rptr. 464, 469 (Cal. Ct. App. 1944).
65. *See* CAL. PROB. CODE § 21350 (West 2004).
66. *See* Osnoria v. Weingarten, 21 Cal. Rptr. 3d 246, 250 (Cal. Ct. App. 2004).
67. *Ventura*, 115 Cal. Rptr. at 464.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

the testator intended to benefit these plaintiffs, the court of appeal refused to give them standing to sue for malpractice.[74]

Radovich v. Locke-Paddon: Plaintiff, the testator's husband, sued his wife's attorney for failing to obtain in a reasonable fashion the due execution by the wife of her draft will.[75] The wife was undergoing chemotherapy treatment for cancer when she instructed her attorney to prepare a new will.[76] At the wife's instructions, the attorney prepared a will that would have created a testamentary trust to benefit her husband during his lifetime.[77] The spouses had previously entered into an agreement that they had no community property, and the wife had provided substantially less to her husband in a prior will.[78] The attorney delivered the draft will to his client.[79] Two months later, the wife passed away without having executed her new will.[80] The husband sued for malpractice alleging that the attorney failed to carry out the wife's clear testamentary wishes in a reasonably prompt and diligent manner by failing to obtain his client's execution of the will before she passed away.[81] The court of appeal rejected the husband's argument that a duty existed.[82] Interestingly, the case is similar to those mentioned above where the testator made her intentions known orally, but the attorney failed to carry out those intentions.[83] In those cases, the courts imposed a duty.[84] The difference in this case is that the testator never executed her will.[85] The attorney provided the will to her, but she did not sign it.[86] Thus, one might reasonably question whether it really was her intent. Her testamentary intent was ambiguous. It is probably for this reason that the court declined to impose a duty on the attorney unlike the aforementioned cases.

Moore v. Anderson Zeigler Disharoon Gallagher & Gray: Plaintiffs, children of the trustor who were adversely affected by a trust amendment prepared by the defendant law firm, sued for malpractice alleging that the attorney should have refused to prepare the trust amendment because the trustor

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74. *Id.*

75. Radovich v. Lock-Paddon, 41 Cal. Rptr. 2d 573, 574 (Cal. Ct. App. 1995).

76. *Id.* at 575.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 575–76.

82. *Id.*; *see also Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002) (holding no duty when lawyer brought estate planning documents to client suffering from cancer to client in nursing home, client decided he wanted a contingent beneficiary in will, and rather than interlineating, lawyer took documents back to office and returned three days later when she concluded client lacked capacity; client died intestate and intended beneficiary sued for malpractice).

83. Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961); Heyer v. Flaig, 449 P.2d 161 (Cal. 1969).

84. *See Biakanja*, 320 P.2d at 19; *see also Lucas*, 364 P.2d at 689; *Heyer*, 449 P.2d at 167.

85. *Radovich*, 41 Cal. Rptr. 2d at 575.

86. *Id.*

allegedly lacked capacity.[87] In this case of first impression, the court of appeal held that the lawyer owes no duty to beneficiaries to refuse to prepare an estate plan based on the capacity of her client.[88] The court held that the lawyer owes that duty only to the client, and that it would impose too great a burden on the profession to require the estate planner to make determinations as to capacity, which are often extremely difficult and outside the expertise of attorneys.[89] The court explained that no duty should be extended to the beneficiaries because the very intent of the trustor is the question at issue, distinguishing it from the drafting and execution error cases:

> In the *Biakanja-Lucas-Heyer* line of cases, there is clearly no potential for conflict between the duty the attorney owes to the client and the duty the attorney owes to intended beneficiaries. The testator and the beneficiaries want what the will allowed. The intention of the testator is certain in the circumstance presented in those cases. Only the negligence of the attorney, resulting in the invalidity of the document or bequest, frustrates the intention of the testator.
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> In contrast, where the testamentary capacity of the testator is the basis for a will challenge, the true intent of the testator *is* the central question. That intent cannot be ascertained from the will or other challenged estate plan document itself. The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will.
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> The extension of the duty to intended beneficiaries recognized in *Biakanja*, *Lucas* and *Heyer* to this context would place an intolerable burden upon attorneys. Not only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries. The testator's attorney would be placed in the position of potential liability to either the beneficiaries disinherited if the attorney prepares the will or to the potential beneficiaries of the new will if the attorney refuses to prepare it in accordance with the testator's wishes . . . .
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> In the situation presented in *Biakanja*, *Lucas* and *Heyer*, intended beneficiaries of the invalid will or trust documents were left with no remedy and no way to secure the undisputed intention of the testator. Their only avenue for redress was via a malpractice action against the negligent attorney. In contrast, beneficiaries disinherited by a will executed by an incompetent testator have a remedy in the probate court. They may contest the probate and challenge the will on the ground that the testator lacked testamentary

87. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 135 Cal. Rptr. 2d 888, 889–90 (Cal. Ct. App. 2003).

88. *Id.* at 902.

89. *Id.*

> capacity at the time of executing the will. That is precisely what appellants did in this case.
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> In addition, the other factors relevant to the duty analysis are less compelling here than in the *Biakanja-Lucas-Heyer* situation. Although appellants allege that Clyde lacked testamentary capacity, it is far less clear in this case than in the drafting and execution error cases that the testator intended to benefit appellants to the exclusion of Michael. As drafted, the will here is effective to carry out the presumed intention of the testator. It does exactly what it purports to do. The question of Clyde's capacity or lack thereof is one that cannot be determined from the will itself, unlike those cases involving invalidly drafted or executed wills in which the document itself demonstrates the intention of the testator to benefit the beneficiary.
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> As did *Radovich,* this case presents both practical and policy reasons for refusing to extend the duty in these circumstances. We, too "must be sensitive to the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent—the only person who can say what he or she intended—has died." (*Radovich*, *supra*, 35 Call.App.4tyh at p. 964.). Similarly, the 'foreseeability of harm' to appellants, and the degree of certainty that they 'suffered injury' attributable to respondents' conduct, and the 'closeness of the connection' between their conduct and the injury the appellants assertedly suffered are less than in the *Biakanja*, *Lucas* and *Heyer* cases."[90]

As noted above, the court was also persuaded by the fact that the beneficiaries in the so-called "drafting error cases" had no remedy other than a malpractice case, whereas the beneficiaries in *Moore* could contest the instrument on the grounds of capacity.[91]

Boranian v. Clark: An attorney, acting at the direction of the decedent's boyfriend at a time when the decedent was terminally ill, quickly deteriorating, and near death, drew a will for decedent that left her business to the boyfriend and her house to her children.[92] The attorney verbally summarized the terms to decedent at her hospice and she signed the will.[93] She died a few days later.[94] The children sued the attorney for malpractice and breach of fiduciary duty claiming that the decedent had told the children only a few months earlier that she intended the business to pass to them.[95] The court held that the children had no standing to pursue a malpractice case against the attorney on the theory that the children should have received more of the estate than expressly provided for under the instrument.[96] The court explained:

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90. *Id.* at 896–97.
91. *See id.*; *Moore*, 135 Cal. Rptr. 2d at 889–90.
92. Boranian v. Clark, 20 Cal. Rptr. 3d 405, 406 (Cal. Ct. App. 2004).
93. *See id.*
94. *Id.*
95. *Id.*
96. *Id.*

> The primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the intention of the testator. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer's primary duty of undivided loyalty by creating an incentive for him to exert pressure on his client to complete her estate planning documents summarily, *or by making him the arbiter of a dying client's true intent*, the courts simply will not impose that insurmountable burden on the lawyer.[97]

Hiemstra v. Huston: Decedent's son sued the attorney who drafted decedent's new will at the behest of the decedent's second wife, claiming that the attorney was part of a scheme by the second wife to unduly influence the decedent and deprive the son of his interest in his father's estate.[98] The son alleged that his father had retained a lawyer to prepare a prior will to make certain that specifically identified gifts went to the wife and the residue to the son.[99] The son further alleged that the wife procured the defendant (a different attorney) to draft the new will that left the entire estate to the wife.[100] The son alleged that the attorney, procured by the second wife, went to the decedent's hospital and wrongfully induced him into signing the new will, which did not reflect decedent's true testamentary intent.[101] The trial court sustained the demurrer by the attorney, and the court of appeal affirmed, holding that the son had no standing to sue because the issue was not whether the instrument contained a drafting error or was executed improperly, but whether the will reflected the decedent's actual intent:

> In each of the foregoing cases [*Biakanja*, *Lucas* and *Heyer*], the alleged negligence of the draftsman resulted in some kind of legal defect in the will which ultimately frustrated in whole or in part the testator's expressed intent and the very objective of the document which but for the defect would have attained. The situation is far different from the one presented by plaintiff's pleading in which the will, admittedly validly executed by the testator possessed of testamentary capacity, contained no legal deficiency which prevented his wishes expressed therein from being carried out.[102]

Chang v. Lederman: Raphael Schumert, a physician, met Chang, a nurse, while working at a hospital in 1994.[103] They lived together for several years before marrying in 2004.[104] About six months before the marriage, Schumert

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97. *Id.* at 411 (emphasis added).
98. Hiemstra v. Huston, 91 Cal. Rptr. 269, 269 (Cal. Ct. App. 1970).
99. *Id.* at 269–70.
100. *Id.*
101. *Id.*
102. *Id.* at 272.
103. Chang v. Lederman, 90 Cal. Rptr. 3d 758, 762 (Cal. Ct. App. 2009).
104. *Id.*

retained Lederman to prepare a revocable trust.[105] Schumert had been diagnosed with terminal cancer.[106] The trust, executed a few months before the marriage, provided for gifts of $30,000 and certain personal property to Chang and $10,000 to Wenna Tancio, with the residue to Schumert's only child, Roy Schumert, to be held in trust.[107] Schumert named Roy's mother as trustee of Roy's trust.[108] The trust further provided that his residence was to be sold and that Chang must vacate the residence within thirty days of Schumert's death.[109] A month or so later, Schumert executed an amendment prepared by Lederman reducing the gift to Chang to $15,000 and eliminating the gift to Tancio.[110] Following the marriage, Schumert executed a will to dispose of his assets in Israel.[111] There was no provision for Chang or expression of any intent to revoke the trust.[112] According to Chang, five or six months after the marriage, Schumert, now seriously ill, instructed Lederman to revise the trust to leave the entire estate to Chang (with the understanding that Chang would give Roy $250,000 when he turned 25).[113] Lederman refused and told Schumert he would be sued by Roy's mother if he revised the trust.[114] Lederman also advised Schumert to have a psychiatric evaluation before making further amendments.[115]

After Schumert's death, Roy's mother, Etti Hadar, retained Lederman to assist in the administration of the estate.[116] Chang filed an action seeking to revoke the trust and to award her half of the estate as an omitted spouse.[117] The trial court ruled that the will executed in Israel following the marriage precluded the application of that doctrine and found that the trust was valid and had not been revoked by the will.[118] The court further ruled that Chang's action violated the no-contest provision in the trust.[119]

Chang then filed a lawsuit against Lederman for breach of fiduciary duty, professional negligence, and various other claims.[120] Chang alleged that Lederman owed her a duty as an express, intended beneficiary of the trust (she was to receive a $15,000 gift), and he breached that duty by failing to revise the trust to give the entirety to her.[121] Lederman's demurrer was sustained without

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 763.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 764.
121. *Id.*

leave to amend after two attempts to amend the original complaint failed to allege facts sufficient to give rise to a legal duty by Lederman to Chang.[122] The court of appeal affirmed.[123] The Second District Court of Appeal articulates the conclusion from the case law as follows:

> As discussed in the preceding section, California decisions recognize an enforceable duty of care in cases involving a negligently drafted or executed testamentary instrument when the plaintiff was an *expressly named* beneficiary of an *express bequest*—in the words of the *Lucas* Court, a duty of care "to the beneficiaries injured by a negligently drawn will." (*Lucas*, *supra* 56 Cal.2d at p. 589.). In each of those cases the wills or trusts did not fail because of any defect in the expression of the testator's intent, but because of some failure either in other language of the instrument or in the circumstances of its execution. (*See, e.g.*, *Biakanja*, *supra* 49 Cal.2d 647 [will failed because of improper attestation]; *Lucas*, at pp. 587, 592 [bequest arguably failed because it violated rule against perpetuities]; *Heyer v. Flaig*, *supra* 70 Cal.2d 223 [bequest failed because attorney did not provide for effect of testator's later marriage]; *Garcia v. Borelli*, *supra* 129 Cal. App.3d 24 [bequest failed because testator's declaration in will regarding nature of property was insufficient]; *Bucquet v. Livingston*, *supra* 57 Cal. App.3d 914 [marital deduction technique failed]; *Osornio*, *supra* 124 Cal. App.4th 304 [bequest challenged because there was no certificate of independent review as to the caregiver-beneficiary].)
>
> Conversely, when the claim—as here—is that a will or trust, although properly executed and free of other legal defects, did not accurately express the testator's intent, no duty or liability to the nonclient potential beneficiary has been recognized. That is, where there is a question about whether the third-party beneficiary was, in fact, the decedent's intended beneficiary—where intent is placed in issue—the lawyer will not be held accountable to the potential beneficiary. (*Boranian v. Clark*, *supra* 123 Cal. App.4th at pp. 1012, 1017; *see id.* at pp. 1018 ["liability to a third party will not be imposed where there is a substantial question about whether the third party was in fact the decedent's *intended* beneficiary"] 1019-21 [no duty owed to potential beneficiary to determine testator's testamentary capacity]; *Moore*, *supra* 109 Cal. App.4th at pp. 1298–1307 [same]; *Radovich*, *supra* 35 Cal. App.4th at pp. 955–66 [no duty owed to named beneficiary to get will finalized and signed].).
>
> To be sure, accepting as true the factual allegations of the second amended complaint, as we must, at least four of the six *Biakanja/Lucas* factors point toward extending Lederman's duty of care to include Chang. Thus, Chang has alleged, following their marriage in August 2004, Schumert advised Lederman of his desire to leave his entire estate to Chang and instructed Lederman to prepare a further amendment to the Raphael Schumert 2004 Revocable Trust to that end—indicating both the transaction at this

122. *Id.*
123. *Id.*

> point was intended to directly affect Chang (the first factor) and it was plainly foreseeable Lederman's failure to exercise due care in carrying out Schumert's instructions would harm Chang (the second factor). Chang has also alleged she suffered injury as a result of Schumert's negligence (the third factor); and from the allegations in her complaint there appear to be no intervening circumstances that might have broken the causal connection between Lederman's conduct and Chang's damage (the fourth factor). The policy of preventing future harm, the fifth factor, is less clear, given the absence of an express bequest of the entire estate to Chang; but accepting her allegations, imposing a duty of care enforceable by the prospective beneficiary under these circumstances would arguably encourage a higher quality of legal practice by counsel representing testators, settlors and other clients making donative transfers. . . .
>
> The difficulty, of course, is that any disappointed potential beneficiary—even a total stranger to the testator—could make factual allegations similar in most respects to those in the second amended complaint; and, without requiring an explicit manifestation of the testator's intentions, the existence of a duty—a legal question—would always turn on the resolution of disputed facts and could never be decided as a matter of law. If a complaint alleges the decedent intended to benefit the plaintiff and the lawyers responsible for the decedent's estate plan were aware of that intent, no more would be required to survive a demurrer.
>
> For this reason, we conclude, as have the other appellate courts to consider a similar issue, the sixth factor—whether extension of liability would "impose an undue burden on the profession" (*Lucas*, *supra* '56 Cal.2d at p. 589)—mandates rejection of the argument that estate planners owe a duty of care to unnamed potential beneficiaries. (See *Boranian v. Clark*, *supra* 123 Cal. App.4th at pp. 1012, 1017; *Moore*, *supra* 109 Cal. App.4th at pp. 1298-1307; *Radovich*, *supra* 35 Cal. App.4th at pp. 955-66.). Without a finite, objective limit on the identity of individuals to whom they owe a duty of care, the burden on lawyers preparing wills and trusts would be intolerable.[124]

The court of appeal rejected the contention that because Chang was expressly named as a beneficiary of a $15,000 gift, that Lederman owed her a duty, not only with respect to the $15,000 gift, but to Schumert's alleged intent to revise the trust to bequeath to her the entire estate.[125]

While the court of appeal discusses the six-factor "*Biakanja/Lucas*" test, it is the author's view that the courts really do not balance these factors, but have settled upon a rule that the attorney's duty extends only to non-client, intended beneficiaries of an express gift. When the testator's intent is ambiguous or at issue, extending the duty of an attorney to third parties is an intolerable burden on the profession. The *Chang* court, in fact, acknowledged that in most cases the plaintiff will be able to satisfy most of the factors, but the California courts

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124. *Id.* at 770–72.
125. *Id.* at 772.

nevertheless do not confer standing on the plaintiff when testator intent is at issue.[126] The *Chang* court explained that it is really the "undue burden on the profession factor" that is the most crucial factor which establishes the rule.[127]

3. Other States

Hawaii and Missouri follow the multi-factored balancing test established by the California courts.[128] Nebraska, New York, Ohio, and Texas still uphold the rule that only a client, the one who is in privity of contract with the attorney, may sue the attorney for malpractice.[129] Other states, including Florida, Pennsylvania, and Virginia, follow a middle ground, recognizing a cause of action when it can be shown that the legatee or devisee was the intended, third-party beneficiary of the attorney's promised performance.[130]

The Pennsylvania Supreme Court recognized a cause of action for malpractice by a beneficiary of a will that was invalid because the drafting attorney caused the beneficiary to witness the will's execution.[131] In recognizing this cause of action, the Pennsylvania Supreme Court stated that the California rule articulated in *Lucas v. Hamm* was too broad:

> The California courts have not adopted a simple negligence standard, but beginning with *Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958)* have applied a six part balancing test on a case-by-case basis. Of special relevance to cases such as the present one is what the attorney 'knew or should have known,' a task made all the more difficult by the fact that the

126. *See id.*

127. *Id.*

128. *See, e.g.*, Blair v. Ing, 21 P.3d 452, 459–60 (Haw. 2001); Donahue v. Shughart, 900 S.W.2d 624, 629 (Mo. 1995).

129. *See, e.g.*, Lilyhorn v. Dier, 335 N.W.2d 554, 555 (Neb. 1983); Lewis v. Star Bank, 630 N.E.2d 418, 421 (Ohio 1993); Barcelo v. Elliott, 923 S.W.2d 575, 580 (Tex. 1996); Felson v. Miller, 674 F. Supp. 975, 978 (E.D.N.Y. 1987); Weingarten v. Warren, 753 F. Supp. 491, 496 (S.D.N.Y. 1990); *cf.* Baer v. Broder, 447 N.Y.S.2d 538, 539 (N.Y. App. Div. 1982) (in the only case to hold that a person who did not have privity with the attorney could sue the attorney for malpractice, based on the rule in New York that "absent special circumstances, a party not in contractual privity with an attorney may not recover for harm caused by the attorney's negligence," the court held special circumstances existed, where a widow, who was the executrix of her late husband's estate, hired an attorney to file a wrongful death action and later sued the attorney for malpractice in her individual capacity: "plaintiff and defendant were engaged in a face-to-face relationship in the underlying wrongful death action and '[if] defendant breached a duty to the plaintiff in that action the foreseeable harm to the plaintiff individually as the widow was the obvious and the direct result thereof. In a real sense, the plaintiff in this action was also one of the real parties in interest in the wrongful death action.' (Her son was the other)."). *Id.*; *Felson*, 674 F. Supp. at 978. In *Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006), the court held that the claim of malpractice in estate planning survived death and that the decedent's personal representatives succeeded to the claim against a law firm whose negligence caused the estate to incur $1.5 million in taxes that allegedly could have been avoided by competent estate planning. *Id.* at 784–85.

130. *See, e.g.*, Espinosa v. Sparber, et. al., 612 So.2d 1378, 1378 (Fla. 1993); Guy v. Liederbach, 459 A.2d 744, 744 (Pa. 1983); Copenhayer v. Rogers, 384 S.E.2d 593, 596 (Va. 1989).

131. *Guy*, 459 A.2d at 744.

> testator, whose intentions and estate the attorney is to have knowledge of, will not be present to testify.[132]

The court explained that a narrower rule was appropriate: "However, the grant of standing to a narrow class of third party beneficiaries seems 'appropriate' under Restatement (Second) of Contracts section 302 where the intent to benefit is clear and the promisee (testator) is unable to enforce the contract."[133] The court articulated a two-prong test to determine whether a beneficiary is an intended, third-party beneficiary of the attorney-client relationship:

> There is thus a two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." The first part of the test sets forth a standing requirement. For any suit to be brought, the right to performance must be "appropriate to effectuate the intentions of the parties." This general condition restricts the application of the second part of the test, which defines the intended beneficiary as either a creditor beneficiary (§ 302(1)(a)) or a donee beneficiary (§ 302(1)(b)), though these terms are not themselves used by Restatement (Second). Section 302(2) defines all beneficiaries who are not intentional beneficiaries as incidental beneficiaries. The standing requirement leaves discretion with the trial court to determine whether recognition of third party beneficiary status would be "appropriate." If the two steps of the test are met, the beneficiary is an intended beneficiary "unless otherwise agreed between promisor and promisee.[134]

The supreme court explained the application of this rule in the context of a will beneficiary as follows:

> Applying these general considerations and Restatement (Second) § 302 to the case of beneficiaries under a will, the following analysis emerges. The underlying contract is that between the testator and the attorney for the drafting of a will. The will, providing for one or more named beneficiaries, clearly manifests the intent of the testator to benefit the legatee. Under Restatement (Second) § 302(1), the recognition of the "right to performance in the beneficiary" would be "appropriate to effectuate the intention of the parties" since the estate either cannot or will not bring suit. Since only named beneficiaries can bring suit, they meet the first step standing requirement of § 302. Being named beneficiaries of the will, the legatees are intended, rather than incidental, beneficiaries who would be § 302(1)(b) beneficiaries for

132. *Id.* at 749–50.
133. *Id.* at 747.
134. *Id.* at 751.

> whom "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." In the case of a testator-attorney contract, the attorney is the promisor, promising to draft a will which carries out the testator's intention to benefit the legatees. The testator is the promisee, who intends that the named beneficiaries have the benefit of the attorney's promised performance. The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will.[135]

Of note, *Guy v. Liederbach* is a case that fits within our theme as it applies in the context of the California decisions.[136] That is to say that the testator's intentions were clearly unambiguous and beyond dispute, but through an error in the execution of the will, the instrument was invalid, and the beneficiary's sole remedy (if she had one at all) would be against the attorney.[137] The same can be said of Hawaii's decision in *Blair v. Ing*, where the trust instrument clearly provided for the creation of a bypass trust, but failed to include instructions as to how to fund the bypass trust, causing the entirety of the trust estate to be subject to an estate tax upon the death of the first spouse.[138]

Of similar interest, in the Florida Supreme Court decision of *Espinosa v. Sparber*, a law firm drafted a will for Rene Azcunce.[139] At the time, Rene and his wife Marta had three children.[140] The will provided for the three children, but did not provide for any after-born children.[141] Subsequently, Rene and Marta had a fourth child, Patricia.[142] Rene instructed the law firm to prepare a new will to provide for Patricia, but Rene and his attorney had a disagreement about the amount of available assets to dispose of, and Rene never signed the new will.[143] However, Rene signed a new codicil simply to change the identity of the personal representatives.[144] The execution of the new codicil after Patricia's birth destroyed her rights as a pretermitted child.[145] Marta sued the law firm on behalf of Patricia (a minor) and Rene's estate.[146] The Florida Supreme Court held that legal malpractice actions by a non-client beneficiary are "limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney."[147] The court explained that Rene did not express in his will any intention to exclude Patricia,

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135. *Id*. at 751–52.
136. *See id.*
137. *See id.*
138. *See* Blair v. Ing, 21 P.3d 452, 456 (Haw. 2001).
139. *See* Espinosa v. Sparber *et al.,* 612 So. 2d 1378, 1378 (Fla. 1993).
140. *See id.* at 1379.
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.* at n.1.
146. *See id.* at 1379.
147. *Id.* at 1380.

nor any intent to provide for her.[148] Therefore, Patricia could not be described as one in privity with the attorney or as an intended, third-party beneficiary, and she had no standing to sue the attorney for legal malpractice.[149] However, the court held that Rene's estate, in the shoes of Rene, would have standing, but telegraphed that damages is an essential element of a claim of malpractice, which the Court was not addressing, but certainly damages would be a problem for the estate to prove.[150]

Florida's decision is also in accord with our theme since the testator's intent was not clear and was at issue, the beneficiary should not have standing to sue.[151] The decision in *Espinosa* has an interesting parallel to the California decision in *Heyer v. Flaig*.[152] In that case, the testator's orally-expressed intent to omit the new husband was not disputed.[153] The failure to express the intent in the instrument gave the husband a right as an omitted spouse, and the children, who were supposed to receive the entirety of the estate, had no other remedy except a malpractice action against the attorney who failed to follow the testator's clear instruction.[154] The Florida case, however, reaches a different result that may be consistent with our theme, in that Rene's intent was not clear because he had declined to sign a new will because of a disagreement with his attorney over the amount of available assets.[155] It cannot be said that Rene's intent was clear and undisputed, or that the attorney was at fault due to a drafting or execution error.[156]

In New Jersey, in *Pivnick v. Beck*, the court determined that when a beneficiary sues an attorney for malpractice, claiming that an otherwise valid instrument fails to reflect the testator's true intent, the beneficiary must prove her claim by clear and convincing evidence:

> So too here, where the only person who could explain what he wanted to accomplish by the Trust Agreement is dead. We conclude that a clear and convincing burden of proof for plaintiffs in malpractice actions who seek to contradict solemnly drafted and executed testamentary documents appropriately balances all the competing interests. Our skepticism for oral proofs in such situations is accommodated, yet, truly meritorious cases would not be precluded. Extrinsic evidence may be submitted in an attempt to establish malpractice. However, attorneys will not become insurers of beneficiaries' testamentary expectations. The clear and convincing burden fosters our strong policy that the language of testamentary instruments controls the disposition of property at death. By requiring the heightened

148. *See id.*
149. *See id.*
150. *See id.*
151. *Id.*
152. *Compare Espinosa*, 612 So. 2d at 1380, *with* Heyer v. Flaig, 449 P.2d 161, 161 (Cal. 1969).
153. *See Heyer,* 449 P.2d at 162.
154. *See id.* at 163–64.
155. *See Espinosa*, 612 So. 2d at 1379.
156. *See id.*

> burden of proof we also discourage fraudulent claims. Such a burden also deters the more common problem of suits based on the sincerely held belief that the claimant deserved more than the will provided. Nevertheless, if a legal malpractice claim is supported by clear and convincing evidence that establishes an error in capturing the testator's intent, the claim can succeed despite explicit conflicting language in the testamentary document.[157]

The *Pivnick* case arose in the context of Harry Pivnick's will that provided a pecuniary bequest to his daughter, and a trust that provided for the disposition of his business to his son.[158] The estate, however, had insufficient assets to make the bequest.[159] The daughter petitioned to compel the trustee to satisfy the bequest under the will, but the son claimed that a letter written by Harry's attorney evidenced Harry's clear intent to convey the business to his son without any interference or claim by his daughter.[160] The trust instrument, however, contained a provision that directed the trustee to satisfy bequests under the will from trust assets to the extent there were insufficient assets in his estate.[161] The son failed in the probate court to reform the trust to reflect the purported intent expressed in the letter (in fact, the court found that the letter could be read harmoniously with the trust), and the son sued the attorney for malpractice.[162] The trial court held that the son's claim was barred by collateral estoppel.[163] The son argued on appeal that collateral estoppel would not apply because the standard in New Jersey to reform an instrument is by clear and convincing proof, whereas malpractice claims are subject to a preponderance standard.[164] The appellate court held that because the son was attempting to contradict a properly executed testamentary instrument, the standard was also clear and convincing evidence; hence, collateral estoppel barred his claim.[165]

The New Jersey decision may be said to be consistent with our theme in that the court restricted the malpractice claim to a heightened standard when a beneficiary seeks to prove an intent that is different from that expressed in a properly executed instrument. On the other hand, New Jersey does provide standing to the beneficiary to assert the claim.[166] In this author's opinion, the utilization of a heightened standard of proof, while helpful, usually ends up encouraging result-oriented decisions. Courts and juries will generally find it easy to conclude that they were persuaded by clear and convincing evidence when they believe the plaintiff should win. A better approach, therefore, is to deny standing to beneficiaries, as the California courts do, when they seek to

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157. Pivnick v. Beck, 741 A.2d 655, 661 (N.J. Super. Ct. App. Div. 1999).
158. *See id.* at 658.
159. *See id.* at 657.
160. *See id.*
161. *See id.* at 658.
162. *See id.*
163. *See id.* at 661.
164. *See id.*
165. *Id.* at 655.
166. *See id.* at 661.

prove an intent that is different from that expressed in an otherwise properly drawn and executed testamentary document.

4. The Privity States: Can the Personal Representative Sue the Decedent's Estate Planning Attorney?

Until the New York Court of Appeals, New York's highest court, decided *Estate of Schneider*, New York's rule of strict privity extended so far that even the personal representative of a decedent's estate could not sue the decedent's attorney for malpractice in the preparation of the decedent's estate planning documents.[167] Abrogating a long line of cases in New York, and reversing the New York Supreme Court Appellate Division's reliance on these cases, the court in *Schneider* announced:

> We now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney. We agree with the Texas Supreme Court that the estate essentially "'stands in the shoes' of a decedent" and, therefore, "has the capacity to maintain the malpractice claim on the estate's behalf" (*Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787 [Tex. 2006]). The personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional. Moreover, such a result comports with EPTL 11-3.2(b), which generally permits the personal representative of a decedent to maintain an action for "injury to person or property" after that person's death.
>
> Despite the holding in this case, strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability. These concerns, however, are not present in the case of an estate planning malpractice action commenced by the estate's personal representative.[168]

B. Do I Have a Duty to Recommend Estate Planning Devices?

Going far beyond the notion of a drafting or execution error is the question of whether an attorney could be found liable for failing to recommend a particular planning device to a client. The question began to receive serious consideration as a result of a trial in a Minnesota district court in 2006.[169] This

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167. *See* Estate of Schneider v. Finmann, 933 N.E.2d 718, 718–21 (N.Y. 2010).
168. *Id.* at 720–21.
169. *In the matter of Jane Galloway Trust*, No. CS-04-200042 (Minn. Dist. Ct. 2000).

was not a malpractice case against an attorney.[170] And indeed, it is unlikely that the beneficiaries would have had standing to bring such a suit.[171] Instead, the case arose as a surcharge claim against the trustee, U.S. Bank, for failing to form a family limited partnership as a means of reducing estate taxes.[172] Of course, one could imagine an effort to sue the attorney, and even the possibility that a beneficiary might have standing to bring such a suit. The case is of interest beyond its obvious importance as a surcharge case against a trustee.

In *Galloway*, Hebert Galloway created a revocable trust in 1988.[173] The trust divided at his death into three subtrusts, an exempt marital trust, a nonexempt marital trust and a credit shelter trust.[174] Both marital trusts were QTIP trusts.[175] They consisted solely of marketable securities.[176] U.S. Bank was sole trustee of the three trusts created under Herbert's trust.[177] He died in 1994, survived by his wife Janice, two adult children, and five grandchildren.[178]

After Janice's death, the Galloway children filed objections to U.S. Bank's account, and sought to surcharge the bank for failing to form a family limited partnership after Herbert's death, and transferring the marketable securities held in the marital trusts to that limited partnership in order to reduce estate tax liability at Janice's death.[179] After thirty-four days in trial, including the testimony of thirteen percipient witnesses and twelve experts, the trial court found in favor of the bank.[180] The court explained that the trust instrument did not indicate that one of its manifest purposes was to minimize its estate tax.[181] As a rationale, that statement is frankly worrisome because in most circumstances, one could easily reach a conclusion that one of the goals of a trust is tax minimization.[182]

The court also held that the bank did not have a duty to engage in an estate planning technique that is as questionable in nature as a family limited partnership, and the court also noted that this is not a technique that is so common that the reasons for failing to pursue it were inconceivable.[183] To the contrary, the court noted that family limited partnerships in a QTIP trust are rare, and there are numerous reasons that clients decline to pursue such a

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *See, e.g.*, Bucquet v. Livingston, 129 Cal. Rptr. 514, 514 (Cal. Ct. App. 1976).
183. *In re Galloway*, No. CS-04-200042.

strategy.[184] The court also rejected the beneficiaries' argument that there were specific non-tax reasons that would have supported the creation of a family limited partnership in the circumstances of this case.[185]

The *Galloway* case is probably most striking because it even made its way to trial.[186] It is frankly very difficult to imagine how it could have survived a motion to dismiss on the pleadings, or at least summary judgment. That it survived only reaffirms the principle that the courts can be unpredictable. Whether it augurs for the future cases that may make it to trial, and even to judgment against attorneys for failing to recommend particular estate planning devices, only time will tell. In the author's view, an attorney should be held to the standard of care in the profession for properly implementing a client's clearly expressed intention, but any greater or wider duty is unwarranted. This is not to say that we should aspire for only this as a bar, but to impose a standard that all artists must be at least Picasso is to ensure that very few would ever dare try.

C. Do I Have a Duty to Non-Client Beneficiaries when I Act as a Lawyer for the Fiduciary?

In many states, courts hold that the lawyer for the fiduciary has a duty—the same duty as the fiduciary—to non-client beneficiaries.[187] The duty is described as a derivative of the fiduciary's duties to the beneficiaries.[188] These courts often point out, in support of this duty, that the lawyer is being paid from assets of the estate.[189] The ACTEC Commentaries to Model Rule of Professional Conduct 1.2 explain:

> If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity—the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries—not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some

184. *Id.* (For example, the disinclination to part with control over assets, the unsuitability of certain assets to be included in a limited partnership, the risk of audit by the I.R.S. and the vulnerability to attack by the I.R.S. when there are no good non-tax reasons for the creation of a family limited partnership). *Id.*

185. *Id.*

186. *Id.*

187. *See, e.g.*, Clarke's Estate, 188 N.E.2d 128, 130 (N.Y. 1962); *In re* Bond & Mortgage Guarantee Co., 103 N.E.2d 721, 721 (N.Y. 1952).

188. *See Clarke's Estate*, 188 N.E.2d at 130; *In re Bond*, 103 N.E.2d at 721.

189. *See Clarke's Estate*, 188 N.E.2d at 130; *In re Bond*, 103 N.E.2d at 721.

> circumstances it is appropriate for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate.[190]

In California, however, the rule is to the contrary.[191] That is, the lawyer for the fiduciary has no duty to the beneficiaries.[192] California courts conclude that when an attorney represents a fiduciary, such as an executor or trustee, the attorney's client is the fiduciary, in her capacity as a fiduciary.[193] Neither a trust nor an estate can be the client, because neither is a legal person, but rather the terminology is merely descriptive of a fiduciary relationship with property.[194] The beneficiary is not the client either, because the beneficiary and the fiduciary are distinct legal persons with distinct legal interests.[195] For this reason, the California Supreme Court has held that beneficiaries are not entitled to communications between the fiduciary and her attorney.[196]

The fiduciary's attorney, therefore, owes no duty to the beneficiaries.[197] The fiduciary of course does have an obligation of loyalty and fidelity to the beneficiaries.[198] But this does not mean that counsel for the fiduciary has any obligation to the beneficiaries.[199] It does not mean that the attorney represents the beneficiaries or that the attorney has any obligation to take instruction from the beneficiaries.[200] In *Goldberg v. Frye*, the court explained:

> Contrary to the allegations of the complaint, it is well established that the attorney for the administrator of an estate represents the administrator and not the estate . . . . A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence . . . . By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate.[201]

The principle that no duty exists between the fiduciary's attorney and the beneficiaries has been followed and discussed with approval in *Johnson v.*

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190. ACTEC Commentaries on the Model Rules of Professional Conduct, The American College of Trust and Estate Counsel (4th ed. 2006).

191. *See, e.g.*, Johnson v. Super. Ct., 45 Cal. Rptr. 2d 312, 318–19 (Cal. App. Ct. 1995).

192. *See* Goldberg v. Frye, 266 Cal. Rptr. 483, 488–89 (Cal. Ct. App. 1990).

193. Moeller v. Super. Ct., 947 P.2d 279, 282–83 (Cal. 1997); Fletcher v. Super. Ct., 52 Cal. Rptr. 2d 65, 66–67 (Cal. App. Ct. 1996).

194. *See Moeller*, 947 P.2d at 283 n.3, (quoting Restatement (Second) of Torts §2).

195. *See* Wells Fargo Bank v. Super. Ct., 990 P.2d 591, 598 (Cal. 2000); Lasky, Haas, Cohler & Munter v. Super. Ct., 218 Cal. Rptr. 205, 216–19 (Cal. Ct. App. 1985).

196. *Wells Fargo Bank*, 990 P.2d at 598.

197. *Goldberg*, 266 Cal. Rptr. at 488–89 (affirming summary judgment by the trial court in an action by legatees against the attorneys for administrator alleging negligence in negotiation of the settlement agreement and based on the attorneys' conflict of interest); *cf. Wells Fargo*, 990 P.2d at 595–96.

198. *See Goldberg*, 266 Cal. Rptr. at 488–89.

199. *See id.*

200. *See id.*

201. *Id.*

Superior Court; *Lasky, Haas, Cohler & Munter v. Superior Court*; *Saks v. Damon, Raike & Co.*; and *Sullivan v. Dorsa*.[202]

There is one case, however, *Morales v. Field, DeGoff, Huppert & MacGowan*, in which the court of appeal expressed a different view: An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries.[203] It follows that when an attorney undertakes a relationship as adviser to a trustee, he, in reality, also assumes a relationship with the beneficiary akin to that between a trustee and a beneficiary.[204]

In *Johnson v. Superior Court*, the court of appeal explained that the California courts have never followed *Morales* or the principle articulated above.[205] The Court suggested that the *Morales* case should be limited to circumstances where the fiduciary's attorney makes express representations that they owe duties to the beneficiaries.[206]

Since the fiduciary's attorney has no duty to the beneficiaries in California, it follows that the beneficiaries have no right to sue the fiduciary's attorney for malpractice.[207] However, while the beneficiaries may have no standing to sue for malpractice, they may recover damages for intentional torts.[208]

While the beneficiaries have no standing to sue the fiduciary's attorney, in 2004, the California Supreme Court held in *Borissoff* that a successor personal representative may sue the attorney of a predecessor personal representative for malpractice.[209] In that case, the successor executor, Borissoff, alleged that the attorney for the prior executor negligently failed to file an extension in order to be able to seek a tax refund.[210] Borissoff argued among other reasons that the California Supreme Court's decision in *Moeller* supported Borissoff's

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202. *See* Johnson v. Super. Ct., 45 Cal. Rptr. 2d 312, 318–19 (Cal. App. Ct. 1995); Lasky, et. al. v. Super. Ct., 218 Cal. Rptr. 205, 216–19 (Cal. Ct. App. 1985) (the court denied the beneficiaries access to the work product of they attorney for the trustee, explaining the beneficiaries are not clients of the trustee's attorney); Saks v. Damon, Raike & Co., 8 Cal. Rptr. 2d 869, 875–76 (Cal. Ct. App. 1992) (the court rejected a negligence claim by a beneficiary against the trustee's attorney); Sullivan v. Dorsa, 27 Cal. Rptr. 3d. 547, 554–55 (Cal. Ct. App. 2005).

203. Morales v. Field, et. al., 160 Cal. Rptr. 239, 243–44 (Cal. Ct. App. 1979).

204. *See id.*

205. *See Johnson*, 45 Cal. Rptr. 2d at 317–19.

206. *See id.*

207. *See* Pierce v. Lyman, 3 Cal. Rptr. 2d 236, 236 (Cal. Ct. App. 1991) (holding that the beneficiary could state a cause of action against the attorney for the trustee is for breach of fiduciary duty when complaints alleged "[a]ctive concealment, misrepresentations to court, and self-dealing for personal financial gain. . . ."). *Pierce v. Lyman* is no longer good law as it was based upon the pre-1991 version of Civil Code § 1714.10 dealing with conspiracy actions against attorneys, but it is interesting to note that the court would have found a duty to the beneficiary for active misconduct. *See id.* at 245–46.

208. Tensfeldt v. Haberman & LaBudde, 768 N.W.2d 641, 641 (Wis. 2009) (attorney drafted estate plan that knowingly failed to comply with divorce decree between a client and his former spouse).

209. *See* Borissoff v. Taylor & Faust, 93 P.3d 337, 340–41 (Cal. 2004); *but see Estate of Deigh*, 135 Wash. App. 1007 (Wash. Ct. App. 2006) (holding successor executor had no standing to sue the attorney for removed, predecessor executor, because the lawyer owes duties to the executor, not the estate).

210. *Borisoff*, 93 P.3d at 339.

contention that the attorney owes a duty to the "office" of executor (or other fiduciary).[211] In *Moeller*, the court held that the attorney-client privilege exists between an attorney and the "office" of trustee, a previously non-existent concept under California law.[212] Borissoff argued that it follows logically that the successor fiduciary may sue the predecessor's attorney for malpractice.[213] The court, however, explained that it did not need to reach that issue, because the California Probate Code itself authorizes the action:

> To determine the question of standing presented here, we need not look beyond the Probate Code. The code's relevant provisions strongly support the inference that a successor fiduciary does have standing to sue an attorney retained by a predecessor fiduciary to give tax advice for the benefit of the estate. The code expressly authorizes a personal representative to "employ or retain tax counsel" (§ 10801, subd. (b)) and to "pay from the funds of the estate for such services" (*ibid.*). The code also provides that a "successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had" (§ 8524, subd. (c)), including the power to "[c]ommence and maintain actions and proceedings for the benefit of the estate" (§ 9820, subd. (a)). Reading these provisions together, the following two conclusions seem inescapable: First, a fiduciary who hires an attorney with estate funds to provide tax assistance to the estate (§ 10801, subd. (b)) may, if the attorney commits malpractice harming the estate, commence an action for the benefit of the estate to recover the loss (§ 9820, subd. (a)). Second, if the fiduciary who hired the attorney is replaced, the successor acquires the same powers the predecessor had in respect to trust administration (§ 8524, subd. (c)), including the power to sue for malpractice. In short, the absence of privity, viewed as an impediment to standing, is a gap the Legislature has filled.
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> In this respect, the successor fiduciary's power to sue for malpractice is no different than the successor's power to sue for nonperformance by a person hired by the predecessor to fix the roof of a house belonging to the estate. While privity of contract may not exist, the successor has the same powers and duties as the predecessor (§ 8524, subd. (c)), including the power to sue.[214]

The attorney defendants argued among other things that the appropriate remedy is to seek to surcharge the predecessor fiduciary (leaving it to the predecessor fiduciary to sue her attorney for malpractice).[215] The court explained that this was not a suitable remedy because it would be an abuse of

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211. *Id.* at 340; Moeller v. Super. Ct., 947 P.2d 279, 283–86 (Cal. 1997).

212. *See Moeller*, 947 P.2d at 283–86 (concluding that a successor trustee holds the privilege and is entitled to examine all communications between the predecessor trustee and her attorney).

213. *Borisoff*, 93 P.3d at 340.

214. *Id.* at 530 (citing CAL. PROB. CODE §§ 10801(b), 8524(c), 9820(a), 10801(b) (West)).

215. *Id.* at 531.

discretion to surcharge the fiduciary in circumstances where, through no fault of her own, the fiduciary's attorneys committed negligence:

> Defendants also argue the successor fiduciary may ask the probate court to surcharge the predecessor fiduciary, who in turn may assert a claim for malpractice against defendants. But this argument incorrectly assumes that the predecessor fiduciary is strictly liable, without fault, for losses caused by defendants' malpractice. To the contrary, a faultless fiduciary is not liable to surcharge. The Probate Code provides that, "[i]f the personal representative has acted reasonably and in good faith under the circumstances as known to the personal representative, the court, in its discretion, may excuse the personal representative in whole or in part from liability . . . if it would be equitable to do so." (§ 9601, subd. (b).) While this provision gives the court discretion, case law establishes that a court may not surcharge a fiduciary without substantial evidence that the particular loss was caused by the fiduciary's fault. (*Estate of Bonaccorsi* (1999) 69 Cal. App.4th 462, 472, 81 Cal. Rptr.2d 604.) "Liability [to surcharge] is predicated upon a *finding* that the [fiduciary] failed to faithfully perform the duties of managing the business affairs of the estate 'with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature.'" (*Estate of Lagios*, *supra* 118 Cal. App.3d at p. 464, 173 Cal. Rptr. 506, quoting *In re Moore's Estate* (1892) 96 Cal. 522, 525, 31 P. 584, italics in *Lagios*.) That being so, a court would abuse its discretion by surcharging a faultless predecessor fiduciary, at the request of a successor, simply to force the predecessor to sue an allegedly negligent attorney. A discretionary ruling predicated on a required finding of fact is necessarily an abuse of discretion if no substantial evidence supports the fact's existence. (E.g., *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681-82, 76 Cal. Rptr.2d 641, 958 P.2d 393; *People v. Eubanks* (1996) 14 Cal.4th 580, 594-95, 59 Cal. Rptr.2d 200, 927 P.2d 310.).[216]

In California, the attorney for the fiduciary has no duty to the beneficiaries that is derivative of the fiduciary's duty to beneficiaries.[217] However, California authorizes the successor fiduciary to sue the attorney for the predecessor fiduciary for negligence or breach of fiduciary duty.[218] Beneficiaries in California could, therefore, petition to remove the fiduciary in favor of a successor fiduciary who might be disposed to sue her predecessor's attorney.

In New Jersey, the courts have held that the attorney for a fiduciary owes her duties to the fiduciary and not to the estate, or by extension, the beneficiaries, except in "'egregious circumstances' such as fraud, collusion or malice, or where a separate duty to those beneficiaries has been undertaken by

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216. *Id.*
217. *See, e.g.*, Goldberg v. Frye, 266 Cal. Rptr. 483, 488–89 (Cal. Ct. App. 1990).
218. CAL. PROB. CODE § 8524(c) (West).

the attorney."[219] In Illinois, the courts hold that there is no duty by the fiduciary's attorney to the beneficiaries and, interestingly, characterize the relationship as adversarial:

> "Jennings [the attorney for the executor] strenuously argues that the relationship between the beneficiaries and himself is adversarial, and he cites *Neal v. Baker* (1990) 194 Ill. App.3d 485, 141 Ill. Dec. 517, 551 N.E.2d 704, in support of his argument. In *Neal*, this court held that an attorney hired by an executor to administer an estate had no duty to a beneficiary of that estate. The basis of the ruling was twofold: First, the scope of the attorney's representation of the executor involved matters that were adversarial as to the plaintiff/beneficiary, because she was contesting the attorney's decision to require her to pay inheritance taxes that she felt should have been paid by the estate. Second, the contract between the executor and the attorney was intended to benefit the executor and the estate, not the beneficiaries. This court held that the primary purpose of the attorney's relationship with the executor was to assist the executor in the proper administration of the estate. *Neal*, 194 Ill. App.3d at 488, 141 Ill. Dec. at 519, 551 N.E.2d at 706.
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> The same rationale applies to plaintiffs' claims against Jennings in his capacity as the attorney for the estate. Although the executor owes a fiduciary duty to the estate and the beneficiaries, the executor must also defend terms of the will and the best interests of the estate. . . Defending the terms of the will often results in an adversarial relationship between the estate and some other party. Often, the estate's adversary is a beneficiary of the estate who is contesting the will or making a claim against the estate or petitioning to have the executor removed or held liable for mismanagement of the estate. . . An attorney representing an estate must give his first and only allegiance to the estate, in the event that such an adversarial situation arises. Even though beneficiaries of a decedent's estate are intended to benefit from the estate, an attorney for an estate cannot be held to a duty to a beneficiary of an estate, due to the potentially adversarial relationship between the estate's interest in administering the estate and the interests of the beneficiaries of the estate.[220]

III. CONFLICTS OF INTEREST IN ESTATE PLANNING AND ADMINISTRATION

The analysis as to whether there is a conflict of interest in the representation of clients and whether the conflict may be waived by the clients, begins with the rules governing the professional conduct of lawyers in the state in which the lawyer practices. The ABA promulgated the Model Rules of Professional Conduct (Model Rules or MRPC) which have been adopted in one form or another in most states, or are nonetheless very similar to the rules

219. Fitzgerald v. Linnus, 765 A.2d 251, 258 (N.J. 2001) (citing Barner v. Sheldon, 678 A.2d 767 (N.J. 1995)).

220. Jewish Hosp. of St. Louis, Mo. v. Boatmen's Nat'l Bank of Belleville, 633 N.E.2d 1267, 1277 (Ill. App. Ct. 1990) (citing *Neal v. Baker*, 551 N.E.2d 704, 706 (Ill. App. Ct. 1990)).

adopted by those other states that established their own rules.[221] Model Rules 1.7 and 1.8 govern the representation of current clients with conflicting interests.[222] Pertinent to the discussion in this Article, those rules provide as follows:

> **MRPC 1.7 Conflict of Interest**
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
> (b) Notwithstanding the existence of a concurrent of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation of each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.
>
> **MRPC 1.8 Conflict of Interest**
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel on the transaction; and
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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221. MODEL RULES OF PROF'L CONDUCT, AMERICAN BAR ASSOCIATION, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

222. MODEL RULES OF PROF'L CONDUCT R.1.7, 1.8 (2010).

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
> (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. . . .
> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.[223]

A. What Are My Ethical Responsibilities when I Represent Joint Clients Like Husband and Wife? What Are My Ethical Responsibilities when I Represent Family Members as Separate Clients?

Estate planners often represent a husband and wife, gay and lesbian partners, registered domestic partners, and parents and children or even grandchildren. Lawyers involved in estate administration or litigation often represent co-executors, co-trustees, or multiple beneficiaries. It is an obvious point that in any of these representations, there is at least a potential for conflict between or among the joint clients. By conflict, I do not mean to suggest a dispute, but a conflict in the interests of the joint clients. Each of the clients must give their informed written consent.[224] California's Rule of Professional Conduct 3-310(A) provides clearer guidance than Model Rule 1.7 as to "informed written consent":

> **Rule 3-310. Avoiding the Representation of Adverse Interests**
> (A) For purposes of this rule:
> (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
> (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;[225]

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223. *Id.*

224. MODEL RULE OF PROF'L CONDUCT R. 1.7 (2010).

225. *Id.* The quality of the disclosure of the "relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client" cannot be overemphasized in its importance. While the law firm of Baker Botts in Texas obtained a reversal on appeal in a case in which the court nonetheless agreed that the waiver was not sufficiently informed, the outcome was far from certain and undoubtedly frightening for the partners of that firm. *See* Baker Botts LLP v. Cailloux, 224 S.W.3d 723, 723 (Tex. App. 2007). In that case, the trial court had imposed an equitable trust in the amount of $65.5 million on Baker Botts and Wells

> (3) "Written" means any writing as defined in Evidence Code section 250.[226]

It is common to represent multiple family members or generations in estate planning matters. The ACTEC Commentaries to the Model Rules of Professional Conduct seemingly encourage the practice:

> It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans . . . . In some instances, the clients may actually be better served by such a representation, which can result in more economical and . . . relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them . . . [227]

The joint representation of a husband and wife is, nonetheless, a potentially risky proposition. In *Smith v. Hastie*, the appellate court reversed summary judgment in favor of attorney Hastie and remanded for a trial on negligence and breach of fiduciary duty.[228] Hastie represented a husband and wife in creating a family limited partnership (FLP) and allegedly encouraged the wife to transfer assets into the FLP without advising her of the potential conflict he had in representing both of them, without inquiring into actual conflicts between them (there was substantial marital discord at the time), and without advising the wife of the consequences of the FLP upon divorce.[229] Even if the lawyer had obtained a conflict waiver, he might well have committed malpractice by failing to inquire about the actual conflict between the clients and by failing to advise the wife of the consequences of the FLP in a dissolution proceeding.[230]

A question often arises as to a lawyer's ethical responsibilities when the lawyer separately represents Client A and Client B in estate planning matters, and Client A asks the lawyer to prepare a document reducing a gift to Client B or disinheriting them. ABA Formal Opinion 05-434 (December 8, 2004) addresses this question: "This opinion addresses whether, under the Model Rules of Professional Conduct, there is a conflict of interest if a lawyer is retained by a testator to prepare instruments disinheriting a beneficiary whom

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Fargo, as executor. *Id.* The firm represented concurrently Wells Fargo, decedent's widow, who disclaimed her interest in the estate in favor of a charitable foundation, and the charitable foundation. *Id.* The widow sued claiming breach of fiduciary duty resulting in her insufficiently informed disclaimer. *Id.* The appellate court reversed on the ground that the evidence failed to support a finding of causation between the conflict and the widow's disclaimer. *Id.*

226. CAL. RULE OF PROF'L CONDUCT 3-310 (2010).

227. MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. (2010).

228. Smith v. Hastie, 626 S.E.2d 13, 13 (S.C. App. 2005).

229. *Id.* at 17.

230. *Id.*

the lawyer represents on unrelated matters."[231] The opinion concludes that there is ordinarily no conflict, reasoning as follows:

> 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. Thus, except where the testator has a legal duty to make the bequest that is to be revoked or altered, there is no conflict of legal rights and duties as between the testator and the beneficiary and there is no direct adversity.
>
> Even though there is no direct adversity, 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 her other client.
>
> 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. 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.[232]

The opinion then states that the issue becomes more complicated if the testator asks the lawyer whether she should disinherit the beneficiary.[233] As this is really not an appropriate area of advice by a lawyer, the opinion's concern would seem unwarranted. But assume that the lawyer now represents the surviving spouse as trustee of her late husband's trust, and that she asks the lawyer for advice concerning the interpretation of an ambiguous tax allocation clause, or the allocation of a receipt or expense between principal or income without clear guidance either in the law or the instrument. Now assume that the lawyer also represents the couple's daughter not as a beneficiary of the trust (although assume she is one), but in unrelated matters. Assume the lawyer's advice would adversely impact either the surviving spouse or daughter. We no longer have an "almost ministerial act" or a simple, straightforward task. In the author's view, the only advice the lawyer can give to the trustee is to seek instructions from the court.

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231. ABA Comm. on Ethical and Prof'l Responsibility, Formal Op. 05-434 (2004).
232. *Id.*
233. *Id.*

There are cases from a number of states that are in accord with the ABA opinion.[234] In *Chase v. Bowen*, the daughter sued the lawyer for malpractice because he revised the mother's will to disinherit the daughter.[235] The daughter claimed the attorney had a conflict because he represented both the mother and the daughter.[236] A majority of the court held that if a lawyer drafts wills for various family members, he assumes no obligation to oppose any changes to the wills and violates no duty to other clients even if the changes adversely affect his other clients.[237] However, the dissent contended that it was not only breach of the lawyer's ethical responsibilities, but that the daughter might have a claim of tortious interference with inheritance against lawyer.[238] While the decision is helpful to the attorney, it augurs strongly for obtaining a conflict waiver.

In *Mali v. DeForest & Duer*, a lawyer represented a family in estate planning matters.[239] The attorney recommended to the father that he put a cap on an option to acquire property the father offered the son to ensure that the son would have the financial ability to exercise it.[240] The father rejected the attorney's recommendation.[241] After the father died, the son sued the lawyer claiming he had a duty to disclose the advice to the father, and the father's rejection of it, so that the son could have discussed the issue with his father.[242] The court disagreed, holding that there is no duty to disclose, even though the lawyer was a long-time legal advisor to all family members; instead, the lawyer had a duty to keep client confidences.[243] The decision rested on the court's conclusion that the lawyer represented the family members separately and individually.[244] Thus, if they were joint clients, there would be an obligation of disclosure.[245]

In *Leff v. Fulbright & Jaworski*, the trial court granted summary judgment to the law firm in a malpractice action.[246] The firm represented husband (H) and wife (W) for their separate estate planning.[247] The lawyers did not discuss either spouse's estate plan with the other.[248] However, W was present at the execution of various instruments by H, and the lawyers answered W's question concerning her rights under an amendment executed by H.[249] The firm failed to

234. *See, e.g.*, Chase v. Bowen, 771 So.2d 1181 (Fla. Dist. Ct. App. 2000).
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 1183 (dissenting opinion).
239. Mali v. DeForest & Duer, 160 A.2d 297, 297 (N.Y. App. Div. 1990).
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 298.
244. *Id.*
245. *Id.*
246. Leff v. Fulbright & Jaworski, 78 A.D. 3d 531, 532 (N.Y. App. Div. 2010).
247. *Id.*
248. *Id.*
249. *Id.*

advise H of the effect of a separation agreement with his first wife, requiring H to leave half his estate to his son.[250] The son's claim against the estate reduced W's gift by $9 million.[251] The court held that the lawyers had no duty to W as a beneficiary of H's estate, even though the firm also represented W in her own estate planning.[252]

The court's ruling rested on its conclusion that H and W were not joint clients.[253] W was never involved with H's estate planning, did not know what H's estate plan entailed until he gave W a copy of the will, W never asked for details of extent of H's holdings, and admitted in deposition H's estate plan was none of her business.[254] Relying on *Mali*, the court noted that the lawyers represented W only in her own separate estate planning and H in his estate planning and jointly only in a real estate transaction that did not involve the wills.[255]

As an example of the problems that might confront the estate planner when representing joint clients without a conflict waiver, a North Carolina ethics opinion provides that an attorney who prepares estate planning documents for a husband and wife may not prepare a will codicil for the wife that adversely affects the husband without the husband's knowledge.[256] If the wife will not allow the attorney to disclose the facts to the husband, the attorney must withdraw from representing both of them.[257] In such circumstances, the lawyer would be wise to state expressly in the conflict waiver that the lawyer may draft separate estate planning instruments for each client that might adversely affect the other client, and the clients waive any right to any such information from the lawyer and waives the conflict that would exist in that situation.

A case out of New Jersey is also of significant interest. In *Haynes v. First Nat'l State Bank of New Jersey*, the New Jersey Supreme Court held that the proponent of a testamentary document had the burden to prove lack of undue influence by clear and convincing evidence based on the conflict of interest of the drafting attorney.[258] The attorney represented the testator's daughter and her family.[259] The testator came to live with her daughter at the age of 84.[260] The testator had an estate plan which she amended many times over the years.[261] She had the same lawyer for all of those years.[262] The estate plan's

250. *Id.* at 533.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 532.
255. *Id.*
256. N.C. Eth. Op. RPC 229 (1996).
257. *See id.*
258. Haynes v. First Nat'l State Bank of N.J., 432 A.2d 890, 900 (N.J. 1981).
259. *Id.* at 892.
260. *Id.* at 893.
261. *Id.*
262. *Id.*

dispositive scheme remained largely the same over that period of time treating two sides of the family equally.[263] After she came to live with her daughter, the testator retained the daughter's attorney.[264] The testator amended her plan dramatically to favor her daughter's family over the other side of the family.[265] The court held that a presumption of undue influence existed for reasons that included the attorney's conflict.[266] The presumption could only be overcome by clear and convincing evidence:

> It has been often recognized that a conflict on the part of an attorney in a testimonial situation is fraught with a high potential for undue influence, generating a strong presumption that there was such improper influence and warranting a greater quantum of proof to dispel the presumption . . . .
>
> In imposing the higher burden of proof in this genre of cases, our courts have continually emphasized the need for a lawyer of independence and undivided loyalty, owing professional allegiance to no one but the testator . . . .
>
> Accordingly, it is our determination that there must be imposed a significant burden of proof upon the advocates of a will where a presumption of undue influence has arisen because the testator's attorney has placed himself in a conflict of interest and professional loyalty between the testator and the beneficiary. . . . Hence, the presumption of undue influence created by a professional conflict of interest on the part of an attorney, coupled with confidential relationships between a testator and the beneficiary as well as the attorney, must be rebutted by clear and convincing evidence.[267]

It should be noted that a conflict waiver would not assist the will proponent in New Jersey.[268] The existence of the conflict, whether waived or not, creates the presumption which in New Jersey carries with it a heavy burden of proof to overcome the presumption.[269]

On the other hand, a Montana court affirmed summary judgment in favor of a lawyer who drafted a will, trust amendments, and a stock gift for his ex father-in law, naming the lawyer as the primary beneficiary.[270] While the court acknowledged that the attorney violated Model Rule 1.8(c), the court held that "a violation of a professional conduct rule 'should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.'"[271] The Nevada Supreme Court held that an estate planner violated Nevada's version of Model Rule 1.8(c) by drafting a trust naming the lawyer's

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263. *Id.*
264. *Id.* at 894.
265. *Id.* at 893.
266. *Id.* at 898.
267. *Id.* at 898–901.
268. *See id.* at 893.
269. *See id.*
270. *S*tanton v. Wells Fargo Bank Montana, N.A., 152 P.3d 115, 120 (Mont. 2007).
271. *Id.* (citing Schuff v. A.T. Kemens & Son, 16 P.3d 1002 (Mont. 2000)).

partner as the beneficiary of a house, and that a presumption of undue influence did arise from those set of facts.[272] However, the court held that the lawyer's violation of the rules of conduct did not create a right of action against the attorney, and also held the lawyer rebutted the presumption.[273]

B. If I Prepared the Decedent's Estate Plan, Can I Represent the Beneficiaries?

As long as there is no dispute concerning the effect or interpretation of the documents that would implicate the attorney's performance of his legal duties, and assuming the lawyer will not be a witness, there is no conflict in representing the beneficiaries of an estate plan prepared by the same lawyer.[274] It is generally impermissible for the drafting attorney who will be a witness at trial to also appear as counsel at trial to defend the plan.[275] Model Rule 3.7 provides as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in the trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.[276]

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272. *In re* Jane Tiffany Living Trust 2001, 177 P.3d 1060, 1060 (Nev. 2008).

273. *Id.*

274. *See* Penn. State Bar Op. 2005-107 (2005); Wash. Inf. Ethics Op. 2155 (2007) (concluding lawyer who represented decedent in opposing guardianship may represent a widow as personal representative of decedent's estate, unless lawyer is likely to be necessary witness or evidence exists that decedent was not competent to execute the will in question).

275. MODEL RULE 3.7; *see, e.g.*, Smith v. Wharton, 78 S.W.3d 79, 79 (Ark. 2002); Estate of Waters, 647 A.2 1091, 1091 (Del. 1994) (ruling it was "plain error" to allow attorney to appear in will contest both as trial counsel and testifying witness on contested issues of undue influence and testamentary capacity); State *ex rel.* Neb. State Bar Ass'n v. Neumeister, 449 N.W.2d 17, 20 (Neb. 1989) (disciplining a lawyer who represented client in a conservatorship action when he knew he would be a testifying witness as to the client's mental capacity); *Pew Trust (2)*, 16 Fid. Rep.2d 80 [Montg. Cty (Pa.) 1995] (granting petition of trust beneficiaries to disqualify law firm representing trustee in actions challenging prudence of reliance on tax and legal opinions rendered by law firm); Estate of Andrews v. U.S., 804 F. Supp. 820, 820 (E.D. Va. 1992) (disqualifying counsel from representing estate in tax refund action where lawyer's partner was party to action as personal representative and called as witness at trial on contested issues); *but see* Devins v. Peitzer, 622 So.2d 558, 560 (Fla. Dist. Ct. App. 1993) (court's refusal to disqualify estate's attorney after contestants announced intent to call him as adverse witness, explaining Rule 3.7 was not designed to permit party to disqualify lawyer simply by calling him as a witness).

276. MODEL RULES OF PROF'L CONDUCT R. 3.7 (2010).

As set forth in Model Rule 3.7, the conflict involved for an estate planner called as a witness, which prevents them from acting as trial counsel is not imputed to another member of the lawyer's firm.[277] In such circumstances, however, the lawyer should obtain the informed, written consent of the client that explains the consequences of employing an attorney in the same firm as the drafting attorney. While the conflict may not be imputed to the drafting attorney's partner under the Model Rules, the trier of fact may question the credibility of trial counsel who may be seen as defending the plan out of concern for her firm's potential exposure to liability.

C. Who Is My Client when I Represent a Person Who Is both a Fiduciary and a Beneficiary?

When an attorney represents a client who is both a fiduciary and a beneficiary, there is always a potential conflict. As the California Supreme Court said in *Moeller*, the law "require[s] a trustee to distinguish, scrupulously and painstakingly, his or her own interests from those of the beneficiaries . . . ."[278]

In *Borissoff*, the court stated that the lawyer for a fiduciary must observe the distinction between the client's role as a fiduciary and the fiduciary's personal interests.[279] The court analogized the role of fiduciary counsel to corporate counsel.[280] An attorney for a corporation represents the corporation, not the individual officers or directors.[281] Thus, the attorney for the corporation would be in a conflict position by advising a director how to avoid liability for malfeasance.[282] The court explained that counsel for a fiduciary would have a conflict in advising her fiduciary client how to avoid liability for misappropriating assets from the estate.[283]

The court's analysis is flawed and worrisome. It follows from the court's own flawed analysis in *Moeller,* which held that there is something called the "office of trustee."[284] In concluding that there is such a thing as an office of trustee, the court held that the attorney-client privilege belongs to the office; hence, whoever currently occupies the office is entitled to the attorney-client

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277. *See id.*

278. Moeller v. Super. Ct., 947 P.2d 279, 286 (Cal. 1997); *see also* Baker Manock & Jensen v. Super. Ct., 96 Cal. Rptr. 3d 785, 785 (Cal. Ct. App. 2009) (reversing trial court's order granting motion to disqualify firm based upon alleged conflict in representing executor and one beneficiary, when firm, on behalf of the client in his capacity as the beneficiary, opposed his brother's petition to take assets from the estate, ruling interest in preserving assets of the probate estate was the same whether as executor or beneficiary, even though the position would benefit the beneficiary personally).

279. Borissoff v. Taylor & Faust, 93 P.3d 337, 343 (Cal. 2004).

280. *See id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Moeller*, 947 P.2d at 288.

communications of any predecessor trustee with her counsel.[285] The flaw is that a trust is not a legal entity, but merely a description of the relationship between a trustee and beneficiary with respect to particular assets.[286] The attorney for the trustee represents the trustee and cannot represent a trust since it is not a legal entity.[287] By contrast, an attorney may represent a corporation because it is a legal entity with rights and obligations different from the shareholders, officers, directors, or employees.[288]

The court's analysis is worrisome because attorneys for fiduciaries are often called upon to defend the fiduciary from removal or surcharge for alleged misconduct. The fiduciary has a duty to defend an "unmeritorious" action against the trustee: "When a trustee has been appointed by the trustor, the identity of the trustee is part of the trustor's plan to benefit the be-neficiaries. In that event, the trustee has a duty to oppose any unmeritorious effort to have the selected trustee removed."[289] The trustee may pay her attorney from trust assets if the trustee is successful (even if only partially successful) in her defense.[290] Thus, this author does not believe the dictum in *Borissoff* should be read to mean that the attorney is always in a conflict position by advising a fiduciary how to avoid liability for alleged misconduct.[291] Instead, the attorney would have a conflict only when (a) the attorney is being paid from trust or estate assets; (b) the attorney knows that misconduct has occurred; and (c) the attorney counsels the fiduciary how to avoid liability.[292]

Rather than the example posited by *Borissoff*, a more apt example of an attorney's conflict of interest is where the attorney provides advice to a fiduciary to take actions that favor the client's interest as a beneficiary over the interests of other beneficiaries. For example, when the instrument is ambiguous, an attorney for a fiduciary should not endorse a tax allocation that favors the fiduciary personally to the detriment of other beneficiaries. Rather, the attorney should advise the client to file a petition for instructions and refrain from advocating any position, or retain separate counsel to be paid from personal assets to file a petition as a beneficiary.

Again, however, the question is who has standing to sue the attorney for abusing this conflict? Under *Borissoff*, the answer is that a beneficiary has no standing to sue an attorney for breach of duty in the conflict scenario discussed above.[293] The only exception might be where the attorney actively engages in

285. *Id.* at 283.
286. *Borissoff*, 93 P.3d at 340.
287. *See id.*
288. *Id.*
289. Conservatorship of Lefkowitz, 58 Cal. Rptr. 2d 299, 302 n.3 (Cal. Ct. App. 1996).
290. *See, e.g.*, Hollaway v. Edwards, 80 Cal. Rptr. 2d 166, 170 (Cal. Ct. App. 1998).
291. *See Borissoff*, 83 P.3d at 340.
292. *See id.*
293. *See Borisoff*, 93 P.3d at 344.

wrongful conduct, such as making misrepresentations to the court, or concealing material facts from the beneficiaries.[294]

In an interesting decision of the New York Surrogate on a disqualification motion, the court denied the motion by one co-executor (Morris) to disqualify the law firm representing another co-executor (Helen) as both a co-executor and personally.[295] On Helen's behalf, the law firm filed a petition alleging that the decedent gifted certain real property to Helen pursuant to decedent's written note.[296] Morris asserted that Helen, as co-executor, had a duty to defend against the petition by Helen in her personal capacity.[297] The court held that the law firm represented Helen personally with respect to her petition, that (curiously) Helen was not a respondent in her fiduciary capacity, and that the firm did not represent Helen as a fiduciary in connection with that petition.[298] The court's rationale appears to be that the conflict is Helen's conflict, and that as long as the law firm is careful to distinguish between its representation of Helen in her two capacities, it has no conflict.[299]

D. Who Is My Client when I Represent Client X in Its Fiduciary Capacity? May I Represent a Client Adverse to Client X in Its Personal Capacity?

When an attorney represents a fiduciary, such as an executor or trustee, the attorney's client is the fiduciary, in her capacity as a fiduciary.[300] Therefore, a lawyer who represents a fiduciary in the client's capacity as fiduciary (Client X) has no conflict of interest in representing another client (Client Y) adverse to Client X in its personal capacity.[301] For example, the lawyer may represent Client X, a trust company, as a trustee of a revocable trust, and may also represent Client Y, an employee of Client X, in a wrongful termination litigation against Client X.[302] On this point, the ACTEC Commentaries on the Model Rules of Professional Conduct (4th ed. 2006), under Model Rule 1.7, explains as follows:

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294. *See, e.g.*, Pederson v. Barnes, 139 P.3d 552, 557 (Alaska 2006) (affirming in part and reversing in part jury verdict against attorney for guardian for compensatory and punitive damages where guardian stole nearly all of ward's assets, finding attorney breached duty of care to ward, holding attorney owes duty of care to ward if "the lawyer knows that appropriate action by the lawyer is necessary . . . to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient." "Knows" means "actual knowledge" but encompasses "reason to know" as distinguished from "should know" as defined in Restatement Second of Torts § 12. Court held no basis for punitive damages, but affirmed award of compensatory damages).

295. Estate of Tennenbaum, 2006 N.Y. Misc. LEXIS 9013, at *9–10 (N.Y. Surrog. Jan. 4, 2006); *see also* Estate of Buoni, No. F048163 2006 Cal. App. LEXIS unpub. 9368 (Cal. Ct. App. Oct. 20, 2006) (denying motion to disqualify law firm representing personal representative of estate who is also a creditor).

296. *Tennenbaum*, 2006 N.Y. Misc. LEXIS at 1.

297. *Id.* at 3.

298. *Id.* at 3–4.

299. *See id.*

300. Moeller v. Super. Ct., 947 P.2d 279, 285 (Cal. 1997); Fletcher v. Super. Ct., 52 Cal. Rptr. 2d 65, 67 (Cal. Ct. App. 1996).

301. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010).

302. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010).

> A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration.[303]

Of course, while this may be the rule in a technical sense, as a practical matter, depending on the nature of the adverse representation, the lawyer for Client X can be certain never to be retained by Client X again.

E. May I Represent Trustee Adverse to Client in an Unrelated Matter?

Assume that you represent a trustee of a trust with numerous beneficiaries. The trustee requests your advice concerning a tax allocation provision that will have adverse consequences to one class of beneficiaries. Assume further that among the disfavored class of beneficiaries is a person whom your firm represents on an entirely unrelated matter. Without a conflict waiver, the lawyer may well violate Model Rule 1.7 in providing advice to the trustee.[304] By example, a Florida court held that a law firm representing a trustee had an unwaived, concurrent conflict of interest, because it also represented, on unrelated matters, an assignee of intestate heirs of the probate estate of the settlor.[305] The assignee's interest was in maximizing the assets of the probate estate at the expense of the trust estate.[306] In representing the trustee, the law firm was adverse to the interests of the assignee.[307] Even though the law firm did not represent the assignee in connection with the estate or trust, the firm was disqualified from representing the trustee.[308] By contrast, the fact that a law firm represents the personal representative of an estate does not create a conflict for the firm in representing a client adverse to a primary beneficiary of the estate.[309] Kaplan attempted unsuccessfully to disqualify a law firm representing the defendant in a personal injury suit brought by Kaplan on the

303. ACTEC Comm. on MODEL RULES ON PROF'L CONDUCT 1.7 (4th ed. 2006).
304. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010).
305. Morse v. Clark, 890 So.2d 496, 498 (Fla. Dist. Ct. App. 2004).
306. *See id.*
307. *Id.* at 498.
308. *Id.* at 499.
309. Kaplan v. Divosta Homes, L.P., 20 So.3d 459, 467 (Fla. Dist. Ct. App. 2009).

ground that the firm also represented the personal representative of an estate in which Kaplan was a beneficiary.[310]

In a decision that implicates Model Rule 1.9 (duties to former clients) and 3.7, a New York court disqualified an attorney from representing a client opposing the appointment of the surviving spouse of a decedent as executor.[311] The lawyer previously represented the decedent and the surviving spouse in estate planning and was a necessary witness to the decedent's testamentary intentions.[312] The court disqualified the lawyer under Rule 3.7 on the ground that the lawyer was now adverse to his former client, the surviving spouse, on a matter substantially related to the prior representation.[313]

F. My Client Is the Current Trustee, May I Represent the Successor Trustee?

Unless the successor trustee intends to object to actions by the predecessor, particularly if communications with you will be in issue, there is no ethical constraint in representing the successor trustee.[314] The Pennsylvania State Bar answered this question in the affirmative, as long as the successor will not object to the predecessor's accounting.[315] In the Pennsylvania State Bar opinion, the bar association indicated that it is permissible to represent a resigning trustee at the same time as the new trustee, who in that case was also a remainder beneficiary, notwithstanding the temporary overlap between the two representations.[316] The opinion explains that the best practice is to have the resigning trustee prepare a preliminary accounting for the proposed successor

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310. *See id.* at 463.

311. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2010) (Model Rule 1.9 provides: "(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 the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person, and
(2) about whom the lawyer ha acquired information protected by Rules 1.6 and 1.9d(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." *Id.*
MODEL RULE OF PROF'L CONDUCT R. 3.7 (2010); Estate of Goodman, 2009 N.Y. Misc. LEXIS 2445 (N.Y.S. 2009).

312. *Goodman*, 2009 N.Y. Misc. LEXIS 2445.

313. MODEL RULES OF PROF'L CONDUCT R. 3.7 (2010).

314. Penn. State Bar Op. 2006-20 (2006).

315. *Id.*

316. *Id.*

and obtain a waiver conditioned on there being no substantial change.[317] This author strongly urges the lawyer to obtain a conflict waiver from both clients, particularly if the lawyer is both submitting the preliminary accounting to the successor and obtaining the successor's waiver. The opinion explains that the successor should provide a waiver to the effect that:

> [T]he proposed [successor trustee] has reviewed the preliminary account and statement, and provided there are no substantial changes, thereto, the proposed successor in the capacity of successor trustee does not intend to object to the official account when filed."[318]

G. Do I Have a Conflict If I Recommend a Corporate Fiduciary Whom I Represent as a Fiduciary on Other Matters?

In the case of *Gunster, Yoakley & Stewart, P.A. v. McAdam*, the client visited with his estate planning attorney seeking to update his plan to disinherit one of his three sons.[319] During the initial meeting, the attorney also discussed reasons why the client might want to consider a corporate fiduciary to serve together with the two sons who were not disinherited.[320] The father's prior wills named the two favored sons as co-personal representatives.[321] The client also indicated that he wanted to maximize the amount that would pass to his two sons and wanted to avoid probate.[322] The attorney recommended the creation of a pourover will and revocable trust.[323]

The client asked for recommendations for a corporate trustee, and the attorney recommended two trust companies.[324] According to the attorney, he told the client that the law firm worked both for and with the two banks on various matters.[325] The client asked how much a corporate fiduciary would charge, and the lawyer said he told the client somewhere between two and three

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317. *Id.*

318. *Id.* (explaining that the opinion seems careful to indicate that the successor "in that capacity" does not intend to object to the predecessor's accounting. Is this a suggestion that the lawyer cannot represent the successor if the successor, in her capacity as a beneficiary, objects to the predecessor's accounting, even with a different lawyer? Undoubtedly, the successor will instruct you to refrain from supporting or opposing the predecessor's accounting. Who then will defend the predecessor? Will you defend the predecessor's accounting involving transactions occurring while you represented the predecessor? You will be adverse to your new client, but in a wholly separate capacity. The author believes this is untenable and that the appearance, if not the reality, in the eyes of one or the other client, will be that you are materially limited from acting as a zealous advocate for one or perhaps even both of them.).

319. Gunster, Yoakley & Stewart v. McAdam, 965 So.2d 182, 183 (Fla. Dist. Ct. App. 2007).

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *See* Defendant's, Gunster, Yoakley & Stewart and Daniel Hanley, Motion for Judgement in Accordance with Motion for a Directed Verdict, and Alternative Motion for a New Trial or Remittur at 37; McAdam v. Gunster, Yoakley & Stewart, No. 502003CA007992XXLMAB (Fla. Cir. Ct. 2006), *aff'd*, 965 So.2d 182 (Fla. Dist. Ct. App. 2007) [hereinafter Defendant's Motion].

325.

percent.[326] Despite copious notes of the meeting in the law firm's files, there was nothing to indicate that the attorney told the client the cost of using a corporate fiduciary.[327] Subsequent to the meeting, the attorney instructed his colleague to obtain fee schedules from the two banks.[328] No fee schedules were provided to the client, but he selected one of the banks anyway and named the bank as executor of the will and trustee of the trust.[329] The bank that was chosen just happened to be one of the largest clients of the firm and was featured prominently on the law firm's website.[330]

The documents also provided a two-year lock-in provision for the corporate trustee; in other words, the corporate trustee could not be removed for two years after the client's death in order to ensure continuity in filing the 706 and settling the estate taxes.[331] The sons claimed the lock-in provision was never discussed with their father.[332]

The attorney claimed that he provided the client with a memorandum at the time he executed his instruments that stated the law firm had no obligation to fund the trust and that it was solely the responsibility of the client.[333] The client lived another five years, during which time the client made various changes to the documents concerning gifts to beneficiaries.[334] The client made no change to the trustee provisions and never asked for fee schedules.[335]

During the five-year period of time, the attorney never asked the client what, if anything, the client had done to fund his trust.[336] The attorney testified at the trial of the malpractice action that he assumed that the trust had been funded.[337] A juror submitted a question to the judge, asking how the lawyer could have assumed that the trust had been funded.[338] The lawyer testified in response: "I assumed the wrong thing and, you know, it was incorrect at the time but I did, I made that assumption, and that was a mistake."[339]

As it turned out, significant assets were left outside of the trust and a probate was necessary.[340] As a result, the bank and the law firm were entitled

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326. *See* Plaintiff's Response to Defendant's Gunster, Yoakley & Stewart and Daniel Hanley's Motion for Judgment in Accordance with Motion for Directed Verdict, and Alternative Motion for New Trial or Remittitur with Incorporated Memorandum of Law at 30; McAdam v. Gunster, Yoakley & Stewart, No. 502003CA007992XXLMAB (Fla. Cir. Ct. 2006), *aff'd*, 965 So.2d 182 (Fla. Dist. Ct. App. 2007) [hereinafter Plaintiff's Response].

327. *See* Defendants' Motion, *supra* note 324, at 42.

328. *Id.* at 6 n.3.

329. *See* Defendant's Motion, *supra* note 324, at 4.

330. Plaintiffs' Response, *supra* note 326 at 1.

331. *See* Plaintiffs' Response, *supra* note 326, at 11.

332. *See* Plaintiffs' Response, *supra* note 326, at 12.

333. *See* Defendants' Motion, *supra* note 324, at 33.

334. *See* Defendants' Motion, *supra* note 324, at 2.

335. *Id.* at 6 n.3.

336. *See* Plaintiffs' Response, *supra* note 326, at 27.

337. *Id.* at 14.

338. *Id.*

339. *Id.*

340. *See* Plaintiffs' Response, *supra* note 326, at 3–4.

to statutory fees of $1 million and $500,000 respectively.[341] They did not receive those fees, however, because of the lawsuit initiated by the sons.[342]

The sons filed a civil action for malpractice against the law firm and claims for conspiracy as between the law firm and the bank.[343] The sons settled with the bank and, as part of the settlement, agreed to strike the allegations of a conspiracy in pursuing the law firm.[344] The sons therefore pursued the malpractice claim to trial.[345]

The sons claimed that the firm had a conflict of interest in that the law firm was motivated to turn a blind eye to whether the client had funded the trust, expecting that the bank would need to open a probate, that the bank would hire the law firm to represent it as the executor of the will in the probate proceedings, and both the bank and the law firm would profit handsomely from statutory commissions.[346]

The law firm contended it was not materially limited in its representation of the client by virtue of its representation on other unrelated matters of the bank.[347] The law firm also contended it was not negligent in failing to inquire during the five-year period after creation of the trust if the client had done what was necessary to fund the trust.[348]

The jury returned a verdict of $1.2 million against the law firm, more than the sons had requested.[349]

H. Multidisciplinary Practice: May I Provide Non-Legal Services or Accept Referral Fees from Providers of Non-Legal Services?

Some states like California, New York, and Texas prohibit lawyers from accepting referral fees from non-lawyers, such as investment advisors, or from offering clients non-legal services, such as insurance brokerage, real estate brokerage, title insurance, investment advice, accounting services, or fiduciary services.[350] Those states that prohibit such activity conclude that the conflict of interest and the potential for abuse of that conflict is simply too intractable a problem, even to obtain a truly informed written waiver.[351] On the other hand, thirty-eight states and the District of Columbia do permit lawyers to accept

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341. *See* Defendants' Motion, *supra* note 324, at 24–25.

342. *See* Plaintiffs' Response, *supra* note 326, at 35.

343. Gunster, Yoakley & Stewart v. McAdams, 965 So.2d 182, 183 (Fla. Dist. Ct. App. 2007).

344. *See* Plaintiffs' Response, *supra* note 326, at 4.

345. *See* McAdams v. Gunster, Yoakley & Stewart, No. 502003CA007992XXLMAB, 2006 WL 6167015 (Fla. Cir. Ct. 2006), *aff'd*, 965 So.2d 182 (Fla. Dist. Ct. App. 2007).

346. *See* Plaintiffs' Response, *supra* note 326, at 5.

347. *See* Defendants' Motion, *supra* note 324, at 36.

348. *See* Defendants' Motion, *supra* note 324, at 12–13.

349. Gunster, Yoakley & Stewart v. McAdams, 965 So.2d 182, 183 (Fla. Dist. Ct. App. 2007).

350. CAL. RULES OF PROF'L CONDUCT R. 1-320 (2010); *see* TEX. CODE OF PROF'L RESPONSIBILITY DR 5.04(b), 7.03(b) (2005); *see* N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-103(D), 5-104 (2009).

351. *See*, *e.g.*, TEX. CODE OF PROF'L RESPONSIBILITY DR. 7.03 cmt. 3 (2005).

referral fees or provide ancillary, non-legal services to clients, by adopting Model Rule 5.7.[352] MRPC 5.7 provides as follows:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.[353]

According to MRPC 5.7, if a lawyer fails to comply with the requirements of the rule, all of the Model Rules, including for example, rules on confidentiality, conflicts of interest, and fees, are applicable to the lawyer's non-legal services.[354] Of course, the lawyer is also subject to disciplinary action by the state bar, as is the case when a lawyer violates any of the Model Rules.[355] Based upon ethics opinions applying MRPC 5.7, the ability to avoid running afoul of it will depend on two factors: (1) the quality of the efforts taken by the lawyer to maintain the separateness between her law practice and the ancillary services, and (2) the measures taken to advise the client that the protections afforded to them by the lawyer-client relationship do not apply to the non-legal services.[356]

Although Utah permits lawyers to provide non-legal services to clients, an ethics opinion from its State Bar provides an interesting discussion of the conflicts that may arise in doing so.[357] Utah's State Bar opined that it is not per se unethical for a lawyer to form a cooperative organization to provide trust services to clients as long as the cooperative remains separate from the law firm and the law firm does not share in the cooperative's profits.[358] As for the conflicts of interest involved, the opinion has this to say:

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352. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 (2010), *available at* http://www.abanet.org/cpr/pic/5_7.pdf (including a state-by-state chart that indicates whether a particular state adopted Rule 5.7 and any variations from the Model Rule).

353. *Id.*

354. *See id.* at 5.7(b).

355. *Id.* at 8.5(a).

356. *See, e.g.*, Op. Utah State Bar Ethics Committee 04-05 (Dec. 2, 2004).

357. *Id.*

358. *Id.*

> Here, quite clearly, representation 'may be materially limited,' within the meaning of Rule 1.7(b), because of at least two potential conflicts. First, there is a potential conflict between the lawyer's representation of the client and the lawyer's interest in receiving compensation for referrals to the Co-op. Second, there is a potential conflict between the client's interest and a 'third person'-namely, the Co-op. . . .
>
> This Committee has addressed and decided this issue as applied to investment advisors in Opinion 99-07. . . .
>
> In our analysis in Opinion 99-07, we identified multiple potential conflicts that may arise under such circumstances, and the analysis, disclosures and consent the lawyer must undertake and secure to comply with Rule 1.7.
>
> "For example, notwithstanding having given written approval for the transaction, the client may later have concerns that the lawyer is not providing unbiased advice or that loyalty to the client is compromised by the financial arrangement with the investment advisor. It is possible that the lawyer's professional judgment might be compromised by a motivation, overt or subconscious, to preserve the advisor's fee-sharing arrangement, even though a change in the client's financial interests might suggest some other arrangement. It is possible a lawyer might be motivated to give the client different or inferior legal advice due to the pecuniary interest involved with the financial advisor. . . There is the possibility that the client might have been able to negotiate a lower commission had the lawyer not been receiving a commission from the investment advisor, and hence the arrangement might not be fair to the client. For example, a lawyer performing estate-planning services for the client might be in a position that is more likely to exert undue influence than a lawyer providing entirely unrelated legal services. Additional issues arise if the investment advisor is also a client of the lawyer."[359]

An ethics opinion from the State Bar of Oklahoma is instructive to lawyers about the measures that should be considered to avoid running afoul of MRPC 5.7:

> . . . .[I]f law-related services are provided through an entity that is distinct from the entity through which the lawyer provides legal services, and the lawyer takes reasonable measures to assure that the person obtaining the law-related services knows that the services are not legal services and that the protections of the lawyer-client relationship do not exist, the lawyer is not subject to all of the Rules of Professional Conduct with respect to the provision of law-related services. However, if the lawyer has a client-lawyer relationship with the person whom the lawyer refers to a separate law-related service entity controlled by the lawyer, the lawyer must comply with the

359. *Id.*

> disclosure and consent requirements in Rule 1.8(a). These rules place the burden on the lawyer to explain to the client which services are legal in nature, and which are not and thus do not carry the client-lawyer protections . . . .
>
> If legal services and the law-related services or products are billed separately and the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer's law practice and the lawyer's ancillary business enterprise in the same matter does not constitute impermissible fee-splitting with a nonlawyer, even if non lawyers have ownership interests in the ancillary enterprise.
>
> However, a dual lawyer's dual practice of law and the ancillary enterprise must be conducted in accordance with applicable legal restrictions (e.g., insurance or securities licensure, registration or disclosure requirements), including those of the Rules of Professional Conduct.
>
> . . . .The lawyer will have the burden of showing that his or her legal advice (or omission of advice) was free from any bias or conflict of interest created by the dual capacities in which the lawyer acted . . . . The nature and scope of such efforts will depend upon the facts, but may include:
>
> 1. Providing written notice of the lawyer's interest in the entity before providing the law-related services, with written acknowledgment of the notice by the client;
>
> 2. Keeping the offices of the lawyer and the law-related business physically separate;
>
> 3. Providing disclaimers in any marketing or advertising; and
>
> 4. Maintaining separate letterhead, or providing clear notice of the relationship between the lawyer and entity.[360]

IV. MULTIJURISDICTIONAL PRACTICE

Model Rule 5.5 governs the ability of a lawyer to represent a client in a state in which the lawyer is not admitted to practice.[361] The rule provides as follows:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

360. Oklahoma State Bar, Ethics Opinion No. 316 (Dec. 14, 2001).

361. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007).

> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
> (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
> (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
> (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.[362]

The ACTEC Commentary to Model Rule 5.5 explains that a lawyer may assist a client who has business or real estate needs in surrounding states as long as these are occasional rather than recurring matters.[363] It says:

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

362. *Id.*

363. American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, Commentary on MRPC 5.5 (4th ed. 2006), *available at* http://www.actec.org/public/Commentaries5.5.asp.

> On the other hand, a lawyer who is engaged to provide estate planning services by clients in a non-admitted jurisdiction and makes personal visits to those clients on a recurring basis should be cautious in relying upon MRPC 5.5(c).[364]

The ACTEC Commentary also indicates that a lawyer with "recognized expertise in federal, nationally-uniform, foreign or international law" may practice in non-admitted jurisdictions.[365] The commentary explains that "a lawyer with recognized expertise in retirement planning, charitable planning, estate and gift tax planning, or international estate planning may be able to practice in non-admitted jurisdictions."[366] However, the author strongly cautions the lawyer that each state has its own rules concerning what does or does not constitute the unauthorized practice of law.

A pair of decisions from California appear to take a somewhat schizophrenic view toward the practice of law in California by out-of-state attorneys.[367] In *Birbower*, ESQ, Inc., a company doing business in California, retained a New York law firm to represent the company in a dispute with another California company, Tandem Computers, over a contract between the two companies, executed and to be performed in California.[368] None of the law firm's lawyers were admitted to practice law in California.[369] The New York lawyers made several trips to California to analyze the claims and to negotiate a settlement with Tandem.[370] Under the contract, the firm, on ESQ's behalf, filed a demand for arbitration, but the matter was settled before arbitration was necessary.[371]

ESQ subsequently sued the law firm for malpractice in California.[372] The firm removed the action to federal court and counterclaimed for more than $1 million in fees.[373] The federal court remanded the case back to state court.[374] ESQ moved for summary judgment contending that the law firm was engaged in the unauthorized practice of law under California Business and Professions Code section 6125, and that the fee agreement was thus invalid.[375] The trial court granted the motion but struggled with the right of the firm to recover fees.[376] The court of appeal granted a petition for writ of mandamus and

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364. *Id.*
365. *Id.*
366. *Id.*
367. *See, e.g.*, Birbower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1, 4 (Cal. 1998); Estate of Condon, 76 Cal. Rptr. 2d 922, 925, *review denied* (Cal. Ct. App. 1998).
368. *Birbower*, 949 P.2d at 3.
369. *Id.*
370. *Id.*
371. *Id.* at 4.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*

generally agreed with the trial court decision.[377] The California Supreme Court granted review.[378] It held that the firm violated section 6125, which provides: "No person shall practice law in California unless the person is an active member of the State Bar."[379]

The primary issue for the court was deciding whether the law firm was practicing law in California:

> Section 6125 has generated numerous opinions on the meaning of "practice law" but none on the meaning of "in California." In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.
>
> Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. (*See, e.g.*, Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 543 [86 Cal. Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036] (Baron) ["practice law" does not encompass all professional activities].). Indeed, we disapprove Ring, *supra* 26 Cal. App.2d Supp. 768, and its progeny to the extent the cases are inconsistent with our discussion. We must decide each case on its individual facts.[380]

The court did determine, however, that if the law firm could prove on remand that certain services were performed exclusively in New York, the trial court could sever that portion of the fee arrangement from the illegal part of the

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377. *Id.*

378. *Id.* at 5.

379. CAL. BUS. & PROF. CODE § 6125 (West 2010).

380. *Birbower*, 949 P.2d at 5. The court declined to create an arbitration or a dispute resolution exception to the rule against the unauthorized practice of law in California. *Id.* at 8. The court decided, "any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and decide what constitutes the practice of law." *Id.*

contract (the value of services provided in California) and award them on a quantum merit basis.[381]

In *Condon*, Michael Katz and his law firm appealed from an order denying him attorneys' fees for services rendered to Michael Condon, as co-executor of the will of his mother, Evelyn Condon.[382] The court explains:

> The firm's primary representation involved the implementation of the buy/sell agreement which was part of an estate plan drafted by the firm in Colorado. Its services involved the negotiation, settlement and drafting of documents resolving the dispute among the heirs of the estate leading to the sale of the estate's principal asset, the family business. The negotiation and discussion with beneficiaries of the estate and their attorneys in California occurred for the most part by phone, fax and mail while the attorneys were physically located in Colorado. It appears that communication between Michael and the Elrod firm took place entirely within Colorado.[383]

The probate court denied a petition by Michael's California probate attorney for payment to Katz for ordinary and extraordinary services.[384] The court reasoned that Katz was not licensed to practice law in California and was not admitted *pro hac vice*, and therefore was not an attorney entitled to compensation for purposes of the California probate code.[385] The court held that Katz violated Business and Professions Code section 6125 by engaging in the unauthorized practice of law in California.[386] Katz was an attorney located in Colorado.[387] Michael Condon lived in Colorado.[388] Katz drafted the estate plan for Evelyn in Colorado, though she died a resident of California.[389]

The court of appeal reversed.[390] The court granted review and remanded directing the court of appeal to await the California Supreme Court's decision in *Birbower*.[391] The court of appeal then reconfirmed its earlier decision.[392] It construed *Birbower* to be limited to holding that an out-of-state attorney violates section 6125 only by purporting to represent a California client.[393] The court of appeal explained the difference in its decision from that of the *Birbower* case on the ground that California has no public policy interest in protecting out-of-state residents from incompetent, out-of-state attorneys:

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381. *Id.* at 11.
382. Condon v. McHenry, 76 Cal. Rptr 2d 922, 922 (Cal Ct. App. 1998).
383. *Id.* at 928.
384. *Id.* at 922.
385. *Id.* at 924.
386. *Id.*
387. *Id.* at 923.
388. *Id.*
389. *Id.*
390. *Id.* at 922.
391. *Id.*
392. *Id.* at 924.
393. *Id.* at 927.

> It is therefore obvious that, given the facts before us, the client's residence or its principal place of business is determinative of the question of whether the practice is proscribed by section 6125. Clearly the State of California has no interest in disciplining an out-of-state attorney practicing law on behalf of a client residing in the lawyer's home state. . . .
>
> It is apparent that both the facts and the issues in *Birbower* are distinguishable from those presented in this case. Most significantly Michael R. Condon was a resident of the State of Colorado. Thus, the issue was not "whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125, when it performed legal services in California for a *California-based client* . . ." (*Birbower*, *supra* 17 Cal.4th at p. 124), but whether an out-of-state law firm practicing law on behalf of a resident of the lawyer's home state violated section 6125 when that lawyer either physically or virtually entered the State of California and practiced law on behalf of that client. Adopting the premise, as articulated in *Birbower*, that the goal of section 6125 is to protect California citizens from incompetent or unscrupulous practitioners of law we must conclude that section 6125 is simply not applicable to our case.[394]

The court also rejected the notion that an out-of-state lawyer engages in the unauthorized practice of law by advising a client on California law:

> Under Birbower one of the factors to be considered by the court in determining the applicability of section 6125 is whether the practitioner is plying "California law." Nevertheless, our Supreme Court instructs that a person does not automatically practice law "in California" whenever that person practices "California law" anywhere. (*Birbower*, *supra* 17 Cal.. 4th at p. 129.). (2c) In the matter before this court there is no record reflecting that Katz was practicing "California law." Furthermore, that factor is not relevant to our holding. If indeed the goal of the statute is to protect California citizens from the incompetent and unscrupulous practitioner (licensed or unlicensed), it simply should make no difference whether the out-of-state lawyer is practicing California law or some other breed since the impact of incompetence on the client is precisely the same.
>
> Also, it would be presumptuous of this court to assume that in a multistate business transaction where parties are located in diverse states and represented by counsel in those states, the lawyers are practicing "California law." Furthermore, it is insular to assume that only California lawyers can be trained in California law. Surely the citizens of states outside of California should not have to retain California lawyers to advise them on California law. Finally, the fact that California law was not implicated in the Elrod firm's representation of Michael R. Condon provides us additional impetus to conclude that the policy of protecting California citizens from untrained and incompetent attorneys has not been breached.[395]

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394. Condon v. McHenry, 76 Cal. Rptr 2d 922, 927–28 (Cal Ct. App. 1998).
395. *Id.*

V. WHAT IS MY DUTY TO A CLIENT WITH DIMINISHED CAPACITY OR WHO MAY BE VULNERABLE TO ABUSE OR UNDUE INFLUENCE?

A. Do I Have a Duty to Ascertain My Client's Capacity or Vulnerability to Undue Influence?

What obligation, if any, does the lawyer have to ascertain her client's capacity before agreeing to draft a will or trust? What is the lawyer's duty to ascertain whether the client is acting of her own volition and free from any undue influence? Consider the following statement from an ethics opinion of the San Diego Bar Association: "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence."[396] The opinion explains how the attorney should proceed:

> Once the issue is raised in the attorney's mind, it must be resolved. The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship.[397]

Most lawyers would probably find it surprising and probably a bit alarming to learn that at least one ethics opinion in California has concluded that the lawyer "must" satisfy herself that the client is both competent and free from undue influence or fraud.[398] The suggested course of action seems woefully inadequate to satisfy such a high standard.[399] Even an extended interview with the client would not necessarily ferret out fraud or undue influence. The opinion is, however, advisory only, and is not binding on any bar association or member of any such association.[400] But it does raise the question as to whether a bar association would in some circumstances rebuke or otherwise sanction an attorney for violating the California Rules of Professional Conduct if they failed to determine whether the client lacked capacity. Any such decision would be extremely troubling and seemingly unwieldy. What rule would the lawyer be breaching? California has never adopted Model Rule 1.14.[401] What does it mean that the lawyer must be satisfied? To whose satisfaction? Is it the lawyer's subjective satisfaction? Is it some objective standard? What would be the appropriate standard?

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396. San Diego Bar Ass'n, Ethics Op. 1990-3 (1990) [hereinafter San Diego Bar].
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *See* CAL. RULES OF PROF'L CONDUCT (2010).

As discussed above, estate planners can rest easy at least in the context of a potential malpractice claim.[402] In 2003, the court of appeals, in a case of first impression, held that the lawyer owes no duty to beneficiaries to ascertain the capacity of their clients for purposes of a malpractice action.[403] Thus, the lawyer has no liability for failing to ascertain a client's capacity, even though there might still be some possibility that the lawyer could be breaching some ethical responsibility.[404]

B. May I Seek Help for a Vulnerable Client?

Under Model Rule of Professional Conduct 1.14, as modified in 2002 and 2003, the lawyer for a client with diminished capacity or one who may be vulnerable to abuse has the authority, but not the obligation, to take appropriate actions to protect the client, including revealing confidential information or initiating a conservatorship proceeding:

> **Rule 1.14 Client With Diminished Capacity**
> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[405]

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402. *See infra* note 404.

403. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 109 Cal. Appl. 4th 1287, 1290 (Cal. Ct. App. 2003).

404. *See id.*

405. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007). The comments to model rule 1.14 are instructive:

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a

The ACTEC Commentaries explain as follows:

> As provided in MRPC 1.14 [Client with Diminished Capacity], a lawyer for a client who has, or reasonably appears to have, diminished capacity is authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 [Client with Diminished Capacity], ABA Inf. Op. 89-1530 (1989), and *Restatement (Third) of the Law Governing Lawyers*, §§ 24, 51 (2000). In such cases the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client's condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client's interests. MRPC 1.14(c) [Client with Diminished Capacity].[406]

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reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. *Id.* cmts. 5–8.

406. *Client Who Apparently Has Diminished Capacity*, ACTEC Commentary on the Model R. of Prof'l Conduct 1.6, *available at* http://www.actec.org/public/commentaries1.6.asp (last visited Feb. 28, 2011).

Forty-six states have adopted Model Rule 1.14, and many states have now amended their rule to authorize an attorney to take reasonable steps to protect an impaired client.[407] The Texas Court of Appeals, in *Franks v. Roades*,[408] affirmed the decision of the trial court granting summary judgment to an attorney sued by a client for breach of fiduciary duty, negligence, fraud, and other claims.[409] Roades represented Christine Franks in the preparation of a durable power of attorney, first, in favor of her son Michael Franks, and, subsequently, for her daughter Carol Thompson.[410] Franks's mental condition deteriorated significantly thereafter.[411] She was diagnosed with severe cognitive problems and had a history of mini-strokes.[412] Michael continually fought the diagnoses and influenced his mother to refrain from taking medication prescribed by physicians to help her condition.[413] Thompson sought out Roades' advice.[414] Roades recommended an adult guardianship.[415] At the time of his recommendation, Roades had copies of psychiatric reports clearly indicating serious cognitive dysfunctions.[416] Roades felt that it was his duty to protect Franks under rule 1.02(g) of the disciplinary rules of professional conduct in Texas: "A lawyer shall take reasonable action to secure the appointment of a guardian . . . for . . . a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."[417]

What makes this case particularly interesting is that Thompson, using Franks's funds pursuant to the power of attorney drafted by Roades, retained Roades who filed the application for guardianship seeking to appoint Thompson as guardian.[418] Michael contested the guardianship application.[419] Franks had a private attorney to represent her during the proceedings.[420] The trial court appointed an attorney ad litem for Franks who moved to disqualify Roades from representing Thompson.[421] The court ordered an independent psychological and medical evaluation and concluded that Franks was incapacitated.[422] The court granted the application over Michael's

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407. *See id.*
408. Franks v. Roades, 310 S.W.3d 615, 630 (Tex. Ct. App.—Corpus Christie 2010).
409. *Id.* at 618.
410. *Id.*
411. *Id.*
412. *Id.* at 619.
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(g), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. c (Vernon 2005).
418. *Franks*, 310 S.W.3d at 619.
419. *Id.*
420. *Id.*
421. *Id.* at 620.
422. *Id.* at 619.

objections.[423] The court also denied the motion to disqualify Roades.[424] Subsequently, the parties filed a settlement agreement after mediation which stipulated to the termination of the guardianship.[425] Franks then sued Roades and Thompson.[426]

The court of appeals noted the undisputed fact that Thompson used her power of attorney to pay a retainer to Roades from Franks's assets to file the application which sought the appointment of Thompson as Franks's guardian.[427] But the court observed that Franks's expert failed to explain how that fact caused Franks and Thompson to become adverse parties, or that:

> Roades was representing anyone other than Franks through the person Franks appointed to handle matters on her behalf. *See* TEX. PROB. CODE ANN. § 642(b)(1) (Vernon 2003) (noting that a person with an interest adverse to the proposed ward cannot file an application to create a guardianship for the proposed ward); *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994), writ denied) (demonstrating that 'the appointment of an attorney-in-fact creates an agency relationship[,]' which 'creates a fiduciary relationship as a matter of law').[428]

The court further rejected the contention that Roades breached his duty of loyalty to Franks.[429] To the contrary, the court concluded that Roades followed what the rules of discipline for lawyers required of him, and that he could not have civil liability in doing so.[430] But the real question is whether Roades did more than the rule required by seeking Thompson's appointment and, as a result, becoming adverse to Franks.[431] To that question, the court stated: "Guardianships are not inherently adversarial proceedings; thus, the applicant is not automatically adverse to the ward."[432] The court continued: "Franks does not cite any authority indicating that, under the rule 1.02(g) duty, the attorney cannot file an application for guardianship on behalf of the person the client has already empowered with the ability to act on her behalf, and we are not aware of any."[433] Thus, Roades did not breach his duty of loyalty to Franks by filing the application seeking to have the trial court appoint Thompson as guardian.[434] Because Roades acted properly under the duty imposed by the disciplinary

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423. *Id.*
424. *Id.* at 620.
425. *Id.*
426. *Id.*
427. *Id.* at 624.
428. *Id.* at 625.
429. *Id.* at 627.
430. *Id.*
431. *Id.*
432. Id.
433. *Id.*
434. *Id.*

rules, we cannot conclude that he breached a duty of loyalty to her under these circumstances."[435]

By contrast, California has no rule regarding the representation of a client with diminished capacity.[436] Instead, California Business and Professions Code section 6068(e) provides that it is the duty of the attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[437] California Rule of Professional Conduct 3-100 provides that the only time that a lawyer may reveal client confidences is "to prevent [the commission of a crime] that the [lawyer] reasonably believes is likely to result in death . . . or serious bodily . . . [injury]:

> **Rule 3-100. Confidential Information of a Client**
> (A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
> (B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
> (C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
> (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
> (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
> (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
> (E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.[438]

With respect to taking some form of action to protect a vulnerable client from abuse, ethics opinions of the various California bar associations are in conflict.[439] Pursuant to a California State Bar ethics opinion, a lawyer may not,

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435. *Id.*

436. *California Legal Ethics*, CORNELL UNIVERSITY LAW SCHOOL, Feb. 14, 2011, http://www.law.cornell.edu/ethics/ca/narr/CA_NARR_1_14.HTM#1.14:200.

437. CAL. BUS. & PROF. CODE § 6068(e)(i) (West 2010).

438. CAL. RULES OF PROF'L CONDUCT § 3-100 (2010).

439. *See infra* notes 441–44.

under any circumstances, initiate a conservatorship proceeding on the client's behalf (or assist any other person in doing so).[440] The opinion explains that initiating such a proceeding would breach client confidences and constitute a conflict of interest.[441] The Los Angeles County Bar Association is in accord.[442] However, the San Francisco Bar Association differs, criticizing California Formal Opinion 1989-112:

> An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client.[443]

It is not clear to this author that it is ever necessary to reveal attorney-client privileged communications (i.e. communications involving legal advice) in order to alert family members or protective agencies of the client's diminished capacity or vulnerability to abuse. It is also not clear that there is a conflict of interest if the client is no longer able to give informed consent, is subject to abuse, and needs protection. The problem, however, is putting the lawyer in the position of making such a decision, no matter how well equipped she may be to do so, or even if it is entirely voluntary. The executive committee of the State Bar of California has proposed a rule that would allow attorneys to reveal information sufficient to alert third persons of a problem, but would not permit an attorney to initiate a conservatorship proceeding.[444]

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440. Cal. Formal Op., 1989-112 (1989).

441. *Id.*

442. L.A. Op., 450 (1988).

443. S.F. Op., 99-2 (1999) (citations omitted).

444. Prop. Ruled 1.14 "Client with Diminished Capacity" Discussion Draft, ETHICS CALIFORNIA BAR, Feb. 27, 2010, http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=_VKLP;LXRYU%3D&tabid=854.