VII. ETHICAL CONSIDERATIONS AND ATTORNEY'S FEES

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Ethical Issues for Trusts and Estates Lawyers

Introduction – Source Materials

- Introduction:
  - Our goal: raise issues for Surrogate's Court practitioners so we are better able to work with the ethics rules and to become effective lawyers for our clients
  - What is professionalism? How does a lawyer maintain professionalism and a successful business?
  - What are lawyers selling? Knowledge, competence and experience in solving a client's problem?
  - In the wake of the internet, how can you, the lawyer, compete in this market place? How do you compete in a market in which, following a community based seminar on estate planning, someone asks you if you could recommend (1) books or periodicals on estate planning or (2) good web sites
  - Have you ever talked to anyone who attended a "lawyer bashing" revocable trust seminar?

- "Old" Canons of Ethics: Code of Professional Responsibility

  - Canons (Topical Headings)
  - Ethical Considerations (ECs) (aspirational standards)
  - Disciplinary Rules (DRs) (black letter rules)

- American Bar Association's Model Rules of Professional Conduct, adopted, in part, in New York, effective April 1, 2009, called the New York Rules of Professional Conduct

- Bar Association Opinions

- New York State Bar Association Committee on Professional Ethics
- Association of the Bar of the City of New York
- New York County Lawyers Association

- Court decisions

- New York Rules of Professional Conduct
  - "New" ABA Code v. "Old" New York Code
    - ABA: Restatement-type structure
    - Black letter rules took the place of the DRs
    - Explanatory comments (not aspirational) provided additional guidance to lawyers seeking answers to their ethical questions
    - However, in New York many of the provisions of the "Old" Code have simply carried over from the old Code. It is anticipated that, sometime in the future NY will be ready to join adopt much of the substantive change, but not in the foreseeable future
    - "Comments" for the new Code have now been released.
    - However, the new rules will makes it easier for NY lawyers to research the nationwide body of law that has developed under the Model Rules since 1983
    - Bottom line overview of "New" v. "Old" Code:
      - Many of the Disciplinary Rules are adopted
      - Structure of "new" Code permits expansion and possibilities for New York to adopt more of the Model Rules
    - Structure of New Code:
      - Rules are logically organized by the various roles that lawyers play and the tasks that they perform
      - New Code is 37 pages long and can be downloaded from NYSBA web site: http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf
      - New Code, with comments, is 190 pages long and can be downloaded from NYSBA web site: http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments(April12009).pdf
      - 8 basic roles/modules for lawyers

Structure of New Code: the Bullet Points

- **Client-Lawyer Relationship (The 1 Series)**

- **Terminology and Definitions (Rule 1.0)**
- **Competence and Neglect (Rule 1.1)**
- **Scope of Representation and Allocation of Authority Between Lawyer and Client (Rule 1.2)**
- **Diligence in Representation (Rule 1.3)**
- **Communication with Client(Rule 1.4)**
- **Fees and Division of Fees (Rule 1.5)**
- **Confidentiality of Information (Rule 1.6)**
- **Conflicts of Interest: Current Clients (Rule 1.7)**
- **Current Clients: Specific Conflict of Interest Rules (Rule 1.8) –10 Rules in 1**
    - Business Transactions with Clients
    - Rule 1.8(b) – Use of Information Relating to a Representation
    - Rule 1.8(c) – Solicitation of Gifts from Clients
    - Rule 1.8(d) –Literary and Media Deals with Clients
    - Rule 1.8(e) – Financial Assistance to Clients
    - Rule 1.8(f) – Accepting Payment from Third Parties
    - Rule 1.8(g) – Aggregate Settlements (Multiple Clients)
    - Rule 1.8(h) – Limiting Liability to Clients and Settling Malpractice Claims
    - Rule 1.8(i) – Acquiring Proprietary Interests in Litigation
    - Rule 1.8(j) – Sexual Relations with Clients
    - Rule 1.8(k) – Imputation of Sexual Relations Conflicts
- **Duties to Former Clients (Rule 1.9)**
- **Specific Conflicts of Interest for Former and Current Governmental Officers and Employees (Rule 1.11)**
- **Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or other Third-Party Neutrals (Rule 1.12)**
- **Organization as Client (versus employee of organization) (Rule 1.13)**
- **Client with Diminished Capacity (Rule 1.14)**
- **Handling Client and Third-Party Property (Escrow Accounts) (Rule 1.15)**
    - **It's Still the Number One Rule . . . .**
- **Declining or Terminating Representation (Rule 1.16)**
- **Sale of Law Practice ("retirement" only) (Rule 1.17)**
- **Duties to Prospective Clients (Rule 1.18)**

- **Counselor (The 2 Series)**

- **Lawyer as advisor, including nonlegal considerations (Rule 2.1)**
- **Evaluation by lawyers for Use by Third Persons (Rule 2.3)**
- **Lawyer Serving as Third-Party Neutral (Rule 2.4)**

- **Advocate (The 3 Series)**

- **Non-Meritorious Claims and Contentions (Rule 3.1)**
- **Delay of Litigation (Rule 3.2)**
- **Conduct Before a Tribunal (Rule 3.3)**
- **Fairness to Opposing Party and Counsel (Rule 3.4)**
- **Maintaining and Preserving the Impartiality of Tribunals and Jurors (Rule 3.5)**
- **Trial Publicity (Rule 3.6)**
- **Lawyer as Witness (witness advocacy) (Rule 3.7)**
- **Special Responsibilities of Prosecutors and Other Government Lawyers (Rule 3.8)**
- **Advocate in Non-Adjudicative Matters (Rule 3.9)**

- **Transactions with Persons Other than Clients (The 4 Series)**

- **Truthfulness in Statements to Others (Rule 4.1)**
- **Communication with Person Represented by Counsel (Rule 4.2)**
- **Communicating with Unrepresented Persons (Rule 4.3)**
- **Respect for Rights of Third Persons (Rule 4.4)**
- **Communication after Incidents Involving Personal Injury or Wrongful Death (Rule 4.5)**

- **Law Firms and Associations (The 5 Series)**

- **Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers (Rule 5.1)**
- **Responsibilities of a Subordinate Lawyer (Rule 5.2)**
- **Lawyer's Responsibility for Conduct of Non-lawyers (Rule 5.3)**
- **Professional Independence of a Lawyer (fee sharing with nonlawyers) (Rule 5.4)**
- **Unauthorized Practice of Law (Rule 5.5)**
- **Restrictions on Right to Practice (Rule 5.6)**
- **Responsibilities Regarding Nonlegal Services (Rule 5.7)**
- **Contractual Relationships Between Lawyers and Nonlegal Professionals (Rule 5.8)**

- **Public Service (The 6 Series)**

- **Voluntary Pro Bono Service (Rule 6.1)**
- **Membership in a Legal Services Organization (Rule 6.3)**
- **Law Reform Activities Affecting Client interests (Rule 6.4)**
- **Participation in Limited Pro Bono Legal Service Programs (Rule 6.5)**

- **Information About Legal Services (The 7 Series)**

- **Advertising and Solicitation Rules (Rules 7.1, 7.2, 7.3 and 7.5)**
- **Advertising of Specialization (Rule 7.4)**

- **<u>Maintaining the Integrity of the Profession (The 8 Series)</u>**

- **Candor in Bar Admission Process (Rule 8.1)**
- **Rule 8.2: Judicial Officers and Candidates**
- **Reporting Professional Misconduct (Rule 8.3)**
- **Definition of Misconduct (Rule 8.4)**
- **Disciplinary Authority and Choice of Law (Rule 8.5)**

<u>Structure of Outline</u>: Take us through the New Code and ethical rules and cases relevant to Surrogate's Court practice

A. <u>Attorney Fee Issues (Rule 1.5)) (New Code largely leaves Old Code Alone)</u>

- **Factors for the Fixation of Fees**

  - Factors to be considered in determining prohibits entering into an agreement to charge or collect an excessive fee

    - The time, labor, difficulty and skill involved;
    - The likelihood that the employment will preclude other employment;
    - The customary fee charged in the locality;
    - The amount involved and the results;
    - The time limitations imposed;
    - The length and nature of the relationship with the client;
    - The experience, reputation and ability of the lawyer

  - Matter of Freeman, 34 N.Y.2d 1 (1974)

  - Matter of Potts, 213 A.D. 59, 62 (4th Dep't 1925), aff'd, 241 N.Y. 593, where the Appellate Division said:

    > In general the court, in determining the justice and reasonableness of an attorney's claim for services, should consider the time spent, the difficulties

involved in the matters to which the services were rendered, the nature of the services, the amounts involved, the professional standing of the counsel, and the results obtained.

- Caution for Meritless Cases: In Matter of Hyde, 2010 NY Slip Op 05676(June 29, 2010), the Court of Appeals held that SCPA 2110 gives Surrogate's Courts discretion to determine whether attorneys fees paid from the trust or estate to the fiduciary in defending against a beneficiary's objections to the accounting should be allocated against that beneficiary's share of the estate. In reaching a decision, the Surrogate can consider the following factors:

    - (1) whether the objecting beneficiary acted solely in his or her interest or in the common interest of the estate; (2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary's participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and (7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally.

      Id.

- Application for Attorney Fees under SCPA 2110

    - Rule 207.45:
        - Petition;
        - Affidavit of services;
        - State
            - when by and by whom the attorney was retained;
            - terms of retainer;
            - amount requested;
            - whether the client has been consulted as to fee requested;

- whether client has consented to fee requested; if not, the extent of disagreement and nature of controversy;
- period in which services rendered;
- services rendered;
- the time spent;
- method or basis of compensation;
- whether fee includes services to be rendered through decree and distribution; and
- whether hearing is waived;

- Attorney/Fiduciary Issues
    - SCPA 2111 (an attorney who is also a sole fiduciary must obtain court approval to receive advance legal fees).
    - See separate discussion on attorney/legatee and attorney/fiduciary issues

- **Written Letters Of Engagement In Civil And Criminal Matters With Fees Of $3,000 Or More (New Code leaves alone)**
    - Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York
    - Effective March 4, 2002, all attorneys must have a written letter of engagement before commencing representation OR within a reasonable time after commencing representation of a client if it is impracticable at the time of commencement or if the scope of services cannot be determined at the time of the commencement of representation.
    - For purposes of Part 1215, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney.
    - Where there is a significant change in the scope of services or the fee to be charged, an "updated letter of engagement" must be given to the client.
    - Part 1215 does not apply:
    - if legal fees are expected to be less than $3,000

- where the attorney's services "are of the same general kind as previously rendered to and paid for by the client" [i.e., regularly existing clients]; or
- to domestic relations matters which are still subject to Part 1400 of the Joint Rules of the Appellate Division.

- Contents of Letters of Engagement

  - Letters of Engagement **Must** Include:
    - scope of legal services;
    - attorney's fees to be charged, expenses and billing practices; and
    - where applicable, notice of the client's right to arbitration of fee disputes under Part 137.

  - Letters of Engagement **May** Include:

    - Under §137.1(b)(2), an attorney may make fee arbitration apply to disputed amounts less than $1,000 or more than $50,000 "if the parties have consented. ..." Without the client's consent, fee arbitration does not apply to sums less than $1,000 or more than $50,000.
    - Under §137.2(b), an attorney may make fee arbitration mandatory for the client by obtaining the client's written consent in "a retainer agreement or other writing..." If not included in the retainer agreement, fee dispute arbitration commenced by a client is mandatory for the attorney but is not mandatory for the client if commenced by the attorney.
    - Under §137.2(c), an attorney can make the arbitration award final, instead of subject to a de novo review, by obtaining the client's written consent.
    - Under §137.2(d), an attorney can select a different arbitral forum for fee dispute arbitration, by obtaining the client's written consent.

- What if there is no retainer agreement? Trend of cases, especially in Matrimonial Law arena, to disallow fees

- Fee Dispute Arbitration v. Determination of Fees by Surrogate’s Court

B. <u>Attorney Advertising – Highlights of New Rules effective 2/1/2007 (New Code leaves alone)</u> (Rules 7.1, 7.2, 7.3 and 7.5)

- **"Advertisement"** defined:
  - communication aimed primarily at securing business.
    - (k) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. (emphasis added). (22 NYCRR 1200.1)
- **"Computer-accessed communication"** defined
  - (l) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto. (22 NYCRR 1200.1)

- **Some Dos and Don'ts:**.
  - client testimonials are permitted if the client does not have a pending legal matter involving the attorney.
  - Words or statements required by new rule to appear in an advertisement must be "clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud."
  - the use of celebrities, voice-overs and depictions of fictionalized events is permitted so long as the attorney makes a full disclosure.
  - monikers, nicknames and mottoes are banned -- such as "heavy hitter" or "dream team" -- that imply an ability to obtain results. Implications on commercial free speech?
    - In Alexander v. Cahill, Judge Scullin, in the Northern District of New York, partially struck down portions of rule on commercial free speech grounds, thereby permitting a Syracuse law firm to continue advertising their alleged "heavy hitter" status.

- Judge Scullin's ruling was mostly affirmed by the Second Circuit (3/12/2010) http://www.citizen.org/documents/AlexanderDecision.pdf), with some modifications. The modification related to fictitious law firms, which the Second Circuit ruled was a proper infringement on commercial free speech. The rule that resulted in a medication of a the lower court opinion: :"portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case"

- "factually supported" descriptions in advertising and web sites are okay, so long as they are accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."
- Email advertising is okay, provided the subject line contains the notation "ATTORNEY ADVERTISING."
- Complex Solicitation Rules, with many dos and don'ts
- names of clients "regularly represented" are okay, provided that the client has given "prior written consent"
- complex rules regarding advertising on attorney fees and rates
- business cards and announcements okay
  - "1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the code of professional responsibility this Part; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings"

- **Specific Web Site Rules**
  - "Attorney Advertising": You need to have the words "Attorney Advertising" on your home page.
    - No description of size or type of font

- Pop-Up Ads/MetaTags: (g) A lawyer or law firm shall not utilize: (1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm's own web site or other internet presence; or (2) meta tags or other hidden computer codes that, if displayed, would violate a disciplinary rule.
- Domain Names: (e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided: (1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate a disciplinary rule. (f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate a disciplinary rule.
- Address of Lawyer or Law Firm. Lawyer websites must include the street address of the office of the advertising lawyer or law firm
- Description of Cases/Results Obtained. A factually-supported description of a lawyer's or law firm's accomplishment is okay, so long as it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."
  - Disclaimer on web site
  - Home page?
  - Practice pages?

- **Filing requirements and Record Retention**
  - Must be "open to public inspection"
  - Retain print advertisements for three years
  - Filing with Departmental Disciplinary Committee of the appropriate judicial department.
    - "All advertisements of legal services that are mailed, or are distributed other than by radio, television, directory, newspaper, magazine or other periodical, by a lawyer or law firm that practices law in this State"

- Retain e-mail and Web Site solicitations for only one year.
- Initial version or edits of web site
  - Initial: “preserved upon the initial publication of the web site”
  - Changes: “any major web site redesign, or a meaningful and extensive content change
  - Omnibus: retain no “less frequently than once every 90 days.”

C. Attorney-Client Privilege (No big changes in New Code) (Rule 1.6)

Rule 1.6

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;

(5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

CPLR 4503(a) "[U]nless the client waives the privilege, an attorney . . . shall not disclose, or be allowed to disclose such communication . . . ."

CPLR 4503(b) "in any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent."

- Reconciling the traditional attorney-client privilege rules with the attorney-client relationship between a lawyer and a fiduciary of an estate. What is different about trusts and estates clients? In theory, estate planning clients are no different than any other client whose confidence we must uphold. But see CPLR 4503(b) (will exception) ("tend to disgrace" the decedent's memory; concerned about how the decedent will be seen)

- CPLR 4503 (as amended): there **is** an attorney-client privilege for communications with an executor or trustee in an estate or trust. Prior to the amendment of 4503, there was a fiduciary exception for the attorney-client privilege. That exception was derived from case law

- In Hoopes v. Carota, 74 N.Y.2d 716 (1989), the Court of Appeals held that, since the trustees of a trust were acting in a fiduciary capacity, the privilege is not absolute and may be set aside on a showing of "good cause" by the beneficiaries. The Court also noted that "some courts have held that the privilege does not attach at all." Id. at 717. The Court upheld the Appellate Division's finding of "good cause" and concluded that "the communications are not privileged in any event." Id. But see AMBAC Indemnity Corp. v. Bankers Trust Co., 151 Misc. 2d 204 (Sup. Ct., N.Y. Co. 1991) (good cause not shown for indentured trustee)

- What does it mean to "act in a fiduciary capacity" Is it different to "act in a representative capacity"? No; you are acting "in behalf" of someone else – the beneficiaries.

- In Matter of Baker, 139 Misc. 2d 573 (Surr. Ct., Nassau Co. 1988), Surrogate Radigan, after analyzing the various cases and issues as to whether a privilege can be asserted by a fiduciary of an estate, compelled the fiduciary to turn over a sensitive document in the estate that pertained to distributions from the estate. Surrogate Radigan held as follows:

  > This court is of the opinion that a fiduciary has an obligation to disclose the advice of counsel with respect to matters affecting the administration of the estate (2A Scott, Trusts § 173 [4th ed]). This is subject to the limitation that the fiduciary should have the protection of the privilege when litigation has commenced or is anticipated (2A Scott, Trusts § 173 [4th ed]); see, In re LTV Sec. Litig., 89 FRD 595). Certainly, the fiduciary is entitled to the benefit of counsel in the preparation of his defense in a contested accounting or other proceeding.
  >
  > Id. at 577 (Emphasis Supplied)

  - When does a lawyer advise the fiduciary that "litigation . . . is anticipated"? For purposes of privilege, should we be identifying areas where litigation might be "anticipated"?

  - The answer, prior to the amendment to CPLR 4503, tell executors and trustees that, with few exceptions, they cannot be expected to have a true privilege.

    - How about:
      - Conflicts between beneficiaries of estate and fiduciary/beneficiary of nonprobate assets
      - Estate tax penalty issues
      - Noninterest bearing funds and possibility of surcharges
      - A "blown deal" for the sale of estate assets on the part of the executor, with clear fault/imprudence on the executor's part; communications with executor before and after the blown deal
      - Retention by client to represent executor in contested estate accounting proceeding, and objectant seeks surcharges against the executor

  - Waiver of attorney-client privilege in fee disputes. But is there a risk in asserting privilege for trusts and estates lawyers whose fee applications may need to be determined by the Court; and

the lawyer is considered, more than in other areas, to be "officers of the Court"?

- Incestuous nature of trusts and estates practice, with an attorney often representing multiple interests. After the client's death, who does the lawyer represent:
  - the estate?
  - the executor(s)?
  - specific legatees of tangible personal property
  - cash or pecuniary legatees
  - the independent trustee of residuary trust?
  - permissible lifetime beneficiaries of residuary trust?
  - remainderman of residuary trust?
  - the outright residuary beneficiaries?
  - **all of the above?**

D. Conflict of Interests

- **Witness Advocacy Rule (New Code largely unchanged from Old Code) (Rule 3.7)**

Can you take a case if you will be a witness?

Rule 3.7

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

* * * *

- Witness Advocacy Rule. When can a lawyer:
    - Act as the sole advocate?
    - Act as "co-counsel" and use a trial counsel?
- Examples:
    - Will contest on **your** Will. Answer: Get trial counsel for probate proceeding; and represent the fiduciary of the estate on administration issues. In many instances, it might be advisable to have a different lawyer acting as counsel of record; and not simply as a trial counsel.
    - Estate Litigation seeking surcharges. Likelihood that your fiduciary is the person in control. However, when there is estate litigation, you may have estate counsel giving testimony; and it may be helpful or harmful to fiduciary
    - Estate Litigation dealing with nonprobate assets payable to fiduciary. Keep in mind who you represent.

New Rule 3.7(a) as compared to 5-102(A) (C):[1]

- Similar in substance to DRs, but Rule 3.7(a) eliminates the distinction between accepting employment (see DR 5-102(A)) and continuing employment (see DR 5-102(C)) in favor of a unified rule impliedly covering both.
- Typically, the advocate/witness rule becomes relevant in will contests.

Q: May an attorney-draftsman initially represent the proponent, as the nominated executor, in a probate proceeding? If so, may he continue if SCPA 1404 exams are requested? If so, may the attorney-draftsmen continue to represent the proponent if he is one of only two witnesses to the Will? Suppose the attorney-draftsman's law firm represents the sole residuary legatee under the Will, may he represent the proponent? Suppose objections to the Will are filed, may the attorney-draftsman continue to represent the proponent?

[1] Portions of the witness advocacy discussion of the outline that follows was prepared by Nancy J. Rudolph, Esq., a partner of Bleakley, Platt & Schmidt LLP, and used with her permission.

A: All these questions were posited and decided in a decision entered by Surrogate Reitz, Putnam County, in an unpublished Decision entered January 26, 2009 in the Matter of Skolinsky.

The facts in Skolinsky led to a disqualification of the attorney-draftsman's law firm from presenting the proponent of Mr. Skolinsky's Will. Here, the attorney-draftsman represented the proponent in the probate proceeding and also was one of two witnesses to propounded Will. In addition, the attorney's law firm also represented the sole residuary charitable beneficiary. Counsel for the potential objectants moved to compel certain documents from the attorney-draftsmen during a 1404 examination which pertained to the charitable beneficiary and also sought to disqualify the attorney-draftsman's law firm from representing the proponent.

Surrogate Reitz reasoned that:

> "Although it is well recognized that a party to litigation may select an attorney of his or her own choosing, this general right is not limitless, citing Green v Green, (citation omitted). Disqualification is in order where there is a reasonable probability of disclosure of confidential information obtained in a prior representation (citation omitted). Moreover, disqualification is in order when the testimony of an attorney-witness is necessary, citing S & H Hotel Ventures Limited Partnership v 777 S.H. Corp, 69 NY 2d 445-446 (1987)."

Q: May an attorney who is the executor of an estate, represent himself as the fiduciary in a discovery proceeding?

Consider Matter of Walsh, 17 Misc. 3d 407 (Surr. Ct., Bronx, 2007); Surrogate Holtzman, found that "in this SCPA 2103 discovery proceeding, the respondent moves to disqualify the petitioner, who is the executor of the estate and an attorney, from representing himself in his fiduciary capacity. The respondent contends that the advocate-witness rule mandates the petitioner's disqualification (Code of Professional Responsibility, DR 5-102 [22 NYCRR 1200.21]. The novel issue presented is whether the petitioner has the same right to represent himself in his fiduciary capacity as he does individually. The court holds that he does not." Id. at 408.

The Walsh case involved an interesting clash between an individual's fundamental right to represent him or herself and the ethical proscription against an

advocate also being a witness in a proceeding (DR 5-102). Walsh case involved a SCPA 2103 discovery proceeding commenced by the executor, an attorney who was representing himself as the petitioner. The respondent moved to disqualify the attorney because the respondent had consulted a lawyer friend about an issue in the proceeding and, through happenstance, the lawyer friend subsequently consulted the petitioner-lawyer who gave certain advice contrary to the position he was taking in the discovery proceeding.

In analyzing the issue, the court was required to balance the strong policy in favor of the right to counsel of one's choice and the right to represent oneself, against the code's proscription against an advocate acting as a witness. The policy behind the advocate witness rule is that the roles of an advocate and a witness are inconsistent as it is unseemly for the advocate/witness to argue his own credibility before the trier of fact.

Surrogate Holtzman held that the policy behind the advocate/witness rule trumps the right of self-representation where the advocate is not a party in his/her individual capacity.

- **<u>Conflict of Interests – Multiple Clients (Rule 1.7)</u>**

Rule 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict 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 to 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.

- Conflict Rules. Existence of Conflict: Under Rule 1.7, you first determine whether a conflict exists. A conflict exists if either (1) the

attorney's exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by representing the other client, or (2) the simultaneous representation of both clients would be likely to involve the lawyer in representing differing interests.

- Possible Waiver of Conflict by Clients: If there is a conflict, the attorney must determine whether the conflict may be waived by both clients. Specifically, both clients can waive the conflict, provided it is obvious that the lawyer can adequately represent the interests of each client.

- Disclosure before Obtaining Waivers: If the attorney concludes that, upon waiver, he or she can still adequately represent client, the attorney can obtain waiver from both clients only after full disclosure of the possible effect of the joint representation on the exercise of the lawyer's independent professional judgment on behalf of each.

- Representing multiple clients with potential conflicts of interest is a common theme for many trusts and estates lawyers, particularly since a substantial part of trusts and estates practice is considered to be "nonadversarial." Examples of some problems follow.

Comparison of the Old Code and the new rules:[2]

- A good chart for comparison of the old Code and the new Rules was created by Roy Simon which may be found on line, see website: www.nyprr.com
    - Rule 1.7(a) compares with DR 5-101 & 5-105(A)-(B). The new rule is similar in substance to DRs but combines personal conflicts and client-to-client conflicts into a single paragraph, and combines restrictions on accepting representation and continuing representation into a single paragraph.
    - Rule 1.7(a)(1) compares with DR 5-105(A)-(B) This new rule is similar in substance to DR, but Rule 1.7 deletes from both DR 5- 105(A) and (B) the phrase "if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client," leaving only the reference only to "representing differing interests."
    - Rule 1.7(a)(2) compares with DR 5-101. This new rule is similar in substance to DR, but Rule 1.7(a)(2) replaces the old phrase "if the

[2] Portions of the conflicts of interest discussion of the outline that follows was prepared by Nancy J. Rudolph, Esq., a partner of Bleakley, Platt & Schmidt LLP, and used with her permission.

exercise of professional judgment on behalf of the client will be or reasonably may be affected" with the new phrase "significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected."

- Rule 1.7(b) compares with DR 5-101 & 5-105(C). This new rule is partly similar in substance to the consent provisions in DRs 5-101 and 5-105(C), but Rule 1.7(b) adds additional criteria for 'consent ability' and specifies two forms of non-consentable conflicts. The Rules also contain a definition of what is informed consent.

Perhaps, the most notable change in the new Rule 1.7, as compared to the old Code, is the requirement that a client's give informed consent which must be confirmed in writing. I believe this means that the lawyer must set down in a writing the potential consequences to the clients where a simultaneous or multiple party presentation is anticipated. The commentaries on the new rules (which I believe have not yet been adopted) point out that the writing does not supplant the conversation with the client. Rather, the writing confirms the oral communication.

In Roy Simon's NY Code of Professional Responsibility, [Annotated (1998 ed) with respect to DR 105] he suggested that the following points be substantially discussed with the client and confirmed in the writing:

- the advantages and risks of multiple representation;
- the situations that might cause the interests of one client to diverge from the interest of another client and how likely those situations are to occur;
- the harm it may cause to the various clients if the lawyer is forced to withdraw from the representation (including the delay, increased expense, and the probable lack of any attorney-client privilege among the clients in the prior, joint representation);
- the effect on the attorney-client privilege if the clients get into a dispute with each other in the future.

Gary B. Freidman and John R. Morken's Article in their NYS Bar Journal, Winter, 2001, at page 22 entitled "Estates with Multiple Fiduciaries Pose Ethical and Practical issues for Attorneys and Clients Like", suggested that to implement these principles, some or all of the following subjects should be covered in a consent/disclosure letter when multiple fiduciaries are to be represented:

- Inform each potential client of her/his right to separate counsel in both individual and fiduciary capacities. In certain instances, the estate attorney might insist that before signing a retainer letter the potential client be represented individually.

- Specify in the retainer letter the capacity of representation, i.e., as a fiduciary, not as a beneficiary or individually. Emphasize in this regard that counsel will not represent the client individually against the estate.

- Include a waiver by the clients of any future claims of conflict arising from the multiple representation, including a statement that the lawyer would not be conflicted out in defending the estate against any claim that the client might bring against the estate in his/her own individual capacity. In the event that one of the clients determines in the future to retain separate counsel in his/her fiduciary capacity, the consents could also include a waiver of any claim at that point that counsel cannot continue to represent the other fiduciaries.

- Spell out with specificity all potential areas of potential conflict.

- Describe the advantages and risks of multiple representations, emphasizing the latter, particularly if disqualification is necessary in the future, resulting in the need to hire new attorneys.

- Include a provision indicating that where litigation is brought by one client in her/his individual capacity against the others in their fiduciary capacities, the attorney's communication with the latter regarding the same will be privileged and not subject to disclosure, as will the attorney's work product.

- Have a provision explaining that the attorney-client privilege will not apply generally between the co-clients, nor will it apply to beneficiaries, at least when there is no litigation.

- Consider a provision stating that in the event the court determines that there is a conflict and disqualifies the attorney, while also holding that the estate is not obligated for the attorney's services, the clients will be individually responsible for fees. (The authors believed this provision is problematic and may be unenforceable.)

Comments: Some of these provisions might seem onerous, possibly causing the clients not to hire the attorney. However, that is precisely the point - to wit, the estate attorney should approach any multiple representations with a great deal of caution. Further, multiple representation where there are actual conflicts of interest should be avoided assiduously. In addition, when these issues have both been discussed and put in writing

in the engagement letter, the clients are able to make an educated decision whether to proceed with one attorney or seek separate counsel.

- **Apply the Principles: Q & A**

Q: Does a lawyer who obtained consent to a conflict prior to the effective date of the new rules needs to obtain a new consent to the conflict?

A: In Ethics Opinion # 829, published in the NYS Bar News, May/June, 2009, Special Counsel Richard Rifkin, answered this transitional question in the negative. Rifkin opined that although the Appellate Division of the Supreme Court set the effective date of the new rules to be April 1, 2009, "there is no basis to conclude that consents given prior to the adoption of the new Rules are impaired or invalid…"

Q: May a lawyer represent a husband and wife in preparing wills and trusts and related estate planning?

A: Yes, it happens frequently. Since the enactment of the new rules, the attorney must obtain in writing the informed consent of the couple; the best practice is to insert the pertinent disclosure into the engagement letter.

Q: Should you discuss with the couple the potential conflicts?

A: Yes, consider the new Rule and its definition of the informed consent with confirmation in writing of the oral discussion about future potential conflicts. The more obvious situations where potential conflicts may arise are couples on their second and third marriages present additional complexities. For example, where couples are waiving elective shares or executing pre-nuptial agreements, an attorney should never represent both couples. A less than clear situation is when an attorney is drafting will for couples who cannot agree on the ultimate beneficiaries of the estate, or cannot agree on the choice of guardians for their minor children. In such situations, the attorney is wise to be clear with clients that their respective communications with the attorney and each spouse are open to each spouse and not considered confidential.

Q: What happens if the couple later separates or divorces? May the attorney continue with representing one spouse for estate planning matters?

A: Not likely, the attorney will need to obtain the other spouse's waiver and consent.

Comment: In a second marriage situation, it is understandable that a lawyer may find it difficult to represent the interests of both the second wife income beneficiary and the children from the first marriage remainder persons. See Matter of Heller, 23 A.D.3d 61 (2d Dep't 2005), aff'd, 6 N.Y.3d 649 (2006) which is a case dealing with a unitrust election by a trustee.

Q: May one attorney represent family members as the 'family lawyer"?

A: Yes, says the American College of Trusts and Estates Counsel. In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans. "… Recognition should be given to the fact that estate planning is fundamentally non-adversarial in nature…" See generally, ACTC Commentary on MRPC 1.7.

Comment: Two cases recite these principals where clients may be better served by retaining counsel to represent the family as a unit, including possible family controlled entities in the context of estate planning, administration and even litigation. See Matter of Brandman [NYLJ, 11/15/99, 29, col. 3]; and Matter of Roccesano, [NYLJ, 6/11/2002, 34, col. 1].

Contrast these principles with the argument attempted by the attorney for the executor facing a motion to disqualify him from representing a residuary legatee in the Estate of Harris [NJLJ, 8/27/2008, 34, col. 5]. The attorney argued that his law firm had been appearing on behalf of the estate, rather than the executor. The Court found that such an argument is technically incorrect. The attorney represents the personal representative of the estate, not the estate itself or the beneficiaries of the estate.

In Harris, the firm's representation of the executor had continued for one year and the executor terminated the law firm's representation. Thereafter, a residuary legatee of the same estate retained the same firm to commence a SCPA 711 proceeding to revoke the executor's letters testamentary. Surrogate Feinberg held that the executor had met three conditions necessary to cause the irrebuttable presumption of disqualification to arise, to wit: the existence of an attorney-client relationship in a substantially related action; the interests of the executor and the attorney's new client are materially adverse; and the executor is entitled to be free from apprehension that the attorney's prior representation of him will inure to the advantage of the adversary.

- There are a number of situations in which lawyers representing co-executors, co-administrators, grantors, trustees and beneficiaries may possibly violate the rules.

  Q: May a lawyer who represented co-administrators in the original petition seeking letters of administration, later represent one administrator compelling an accounting in the same estate from the other executor?

  A: Not likely

Consider in Matter of Hof, 102 A.D.2d 591 (2d Dep't 1984)], the Appellate Division, Second Department, reversed Surrogate Laurino's decision which, without an evidentiary hearing, denied a motion to disqualify the estate attorney from representing Philip Hof, as one the administrator against Mrs. Hof, the decedent's surviving spouse by a subsequent marriage as the other administrator.

You may wonder on what basis did the Surrogate deny the motion to disqualify the estate attorney? Judge Laurino relied upon Matter of Dix (11 A.D.2d 555). The Dix case involved dual representation in a probate proceeding. The party seeking disqualification, the decedent's widow, Mrs. Dix, had originally joined in seeking probate of the will as a coexecutrix, then withdrew as a co-petitioner and contested probate. The appellate division in Dix reasoned, there was no representation of a conflicting interest or potential for use of confidential information. Surrogate Laurino also relied upon the well recognized holding by the Court of Appeals in 1979, articulated in Green v Greene [47 N.Y.2d 447] that a party to litigation may select an attorney of his or her own choosing. In Hof, however, the Appellate Division noted Philip was not a party to the appeal, and the record below was devoid of evidence indicating Philip's choice of attorney. Mrs. Hof's motion to disqualify the attorney was held not to be a litigation strategy. Rather, the Appellate Division reasoned that the attorney's

> "[C]ontinued representation under the circumstances would tend to inflame the atmosphere of distrust extant between the co-administrators, impede the cooperation between their counsel and the free flow of information between them, resulting in the prolongation of the final settlement of the estate to the detriment of all the distributees. Further representation of Philip Hof could tend to taint that testimony and further the appearance of impropriety."
>
> Id at 598.

Q: May a lawyer for a grantor also represent the trustee?

A: Rule 1.7(a)(1) provides that a lawyer may not represent a client “if the representation will involve the lawyer in representing differing interests.”

Q: Do grantors and trustees have differing or directly adverse interests?

A: The answer may depend on the facts and circumstances in each case.

Consider the case of In Matter of Ruth Harmon, [NYLJ, Oct. 16, 2006, p 42, col. 6 (Surr. Ct., Suffolk)]. The settlor of an inter vivos trust sought to remove the trustees and obtain the trust's assets. The settlor then moved to disqualify the attorney for the trustees on the ground that he had been the settlor's attorney in drafting the trust indenture, citing DR 5-108. The trustees' attorney argued in opposition that, following the creation of the trust, the settlor had hired two other attorneys to set the trust aside, and that he had represented the trustees since inception without objection from the settlor.

The Surrogate in Ruth Harmon began by setting forth the requirements for disqualification:

A party seeking disqualification of opposing counsel must satisfy three criteria in order for the court to conclude that there is an irrebuttable presumption of disqualification:

(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel;

(2) that the matters involved in both representations are substantially related, and

(3) that the interests of the present client and the former client are materially adverse.

In Ruth Harmon, the court ruled that the settlor had failed to meet this test based on the papers submitted and scheduled a hearing 'before summarily disqualifying a party's chosen counsel.

Q: May a lawyer cure a potential violation with informed consent?

A: Informed consent is defined in Rule 1.0(j):

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Q: May the grantor's lawyer also represent the beneficiaries?

A: Conflicting interests between grantors and beneficiaries may arise. The grantor's wishes may not necessarily be in the best interests of the beneficiaries.

Q: May a lawyer represent the interests of the trustee and the beneficiaries?

- Asset allocation, discretionary distributions, accountings, and exercise of trustee powers - these are only some of the matters rife with potential conflict between trustees and beneficiaries. May a lawyer properly advocate for these different and potentially conflicting interests?

- Stock concentration cases like In Matter of Dumont, 4 Misc. 3d 1003 (Surr. Ct., Monroe), reversed, 28 A.D. 3d 1257 (4th Dep't 2006), lv appl. denied, 7 N.Y.3d 922; rearg denied, 7 N.Y.3d 649) provides examples of situations in which the interests of the trustee and income beneficiary are not aligned.

Q: May a lawyer represent co-executors, where one is a corporate fiduciary and the other an individual where there is an allegation involving the Prudent Investor Act?

A: It depends.

Yes, if the decision about investing funds is supported by both executors. EPTL 10-10.7 provides that a joint power conferred upon two fiduciaries may be exercised jointly by both such fiduciaries. In general, a joint power is one which requires the exercise of discretion and in addition, that they

act unanimously, (Fritz v. City Trust Co., 72 A.D. 532, aff'd, 173 NY 622; See also Scott on Trusts, [4th ed.] § 194).

No, if they do not appear to be aligned as in the following case.

Consider the Estate of Iskyan, (NYLJ, 10/12/1994, p. 28, col. 3, Surrogate Court, Nassau County), where Surrogate Radigan found that the duty to invest funds is one which requires the exercise of judgment and discretion and accordingly requires that the trustees act jointly, and in the case of two, since there are only two, unanimously. Hence, the Court concluded that:

> "While the prayer for relief requests that the bank alone be authorized to make investments, the cases indicate the proper relief may include a direction to exercise the power or where the refusal to join in the exercise of a power is unreasonable, the trustees removal (Scott on Trusts [4th ed.] § 194)." Id.

Q: May a lawyer represent both the income beneficiaries and the remainder persons?

A: Trust litigation case law highlights many of the conflicts that can arise between income beneficiaries and remainder persons. However, are these conflicts so pervasive that a lawyer can never represent both interests under Rule 1.7?

Comment: As a practical matter, a lawyer may find it difficult to obtain informed consent from both parties.

For example, consider the case of Margesson v. Bank of New York, 291 A.D.2d 694 (3d Dep't 2002)

- Francis Margesson was the sole income beneficiary of a trust, founded predominantly with large concentrations of four stocks. Bank of New York had been a co-trustee since 1989 and became sole trustee in 1996.

- Because sale of the highly appreciated stocks would result in substantial tax liability, there was a long-standing understanding that the trust would be managed to avoid unnecessary sale of these stocks. Francis was 74 years old when Bank of New York became sole trustee.

- In 1997, the Bank of New York sought to diversify the trust assets. Without communicating with the trust's administrative officer or Francis, the trust's investment officer sold a portion of the stock holdings. The sale resulted in Francis being personally liable for over $22,000 in capital gains. Francis then sued the Bank of New York for breach of fiduciary duty.

- The bank claimed it was merely complying with the prudent investor rule and the sale was made for the purpose of diversifying the trust's investments.

- The Appellate Division overturned a lower court's grant of summary judgment, finding that, although the bank complied with the prudent investor rule, a triable issue of fact existed as to whether it breached its fiduciary duty by failing to communicate:

> "She [the administrative officer] had no conversation with [the investment officer] regarding this sale or the plaintiff's need as income beneficiary. [The investment officer] has a responsibility to communicate with [the administrative officer]... to ensure his understanding of the investment objectives." Id at __.

- Rule 1.18(c) compared with 5-105(D) & 5-108(A)(1)

Conceptually the new rule is similar to DRs 5-108 (A) (1) but the new rule combines disqualification and imputation into a single subparagraph and applies the concepts to prospective clients. However, Rule 1.18(c) disqualifies a lawyer from opposing a former prospective client in a substantially related matter only "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." Id. There are exceptions created by Rule 1.18(d). The Harris case, discussed earlier, is a good example of this rule.

- Medicaid Eligibility for Institutionalized Spouse f/b/o Community Spouse. Is all fair in love and Medicaid eligibility?

- Spousal Refusal Technique: A natural conflict with a married person's duty of support [Domestic Relations Law § 32; Family Court Act § 412.

- Can we ethically represent the community spouse on spousal refusal matters even though, as part of the assignment process, the "refusing" spouse is subject to a lawsuit by "your client" – albeit, with the local Department of Social Services acting as "your client's agent?

- Consider financial benefits that community spouse may get and why, as matter of substituted judgment, the institutionalize spouse (a) consents or (b) would consent as a matter of substituted judgment. But . . . how do you protect yourself. What if institutionalized spouse unable to consent because of mental disability?

- Lifetime Planning: Can you represent both clients in these scenarios? Does it matter whether husband and/or wife are on second or third marriages and have children of prior marriages?

    - Husband and Wife in preparation of Wills and Trust Agreements and Related Estate Planning.
    - Husband and Wife in Execution of Spousal Waivers of Elective Share. Bad Idea
    - Husband and Wife in Husband's or Wife's creation of Irrevocable Life Insurance Trust.
    - Husband and Wife in Husband's or Wife's execution of spousal waiver of Qualified Plan accounts.
    - Husband and Wife who cannot agree on who the "ultimate" beneficiaries of estate will be.
    - Both fiancées in prospective marriage in the preparation and execution of prenuptial agreements.

- Multiple Fiduciaries. Inform fiduciaries of the consequences of representing all of them. In the event of a conflict, you may continue to represent one of them, with the consent of the other fiduciary. See discussion below on representing fiduciaries and beneficiaries.

    - Fiduciary and Surviving Spouse in Will with Q-Tip trust with issues as to Whether Spouse Files Elective Share. Husband and Wife make reciprocal wills creating Credit Shelter outright bequests and Q-Tip trusts. Husband predeceases and an issue exists as to whether the wife will get "more money" by an elective share. Must there be independent representation for the wife?

- Communications with Beneficiaries. Can a lawyer represent one or more of the beneficiaries of the estate and the fiduciary of the estate? No, not in the

proper sense, and the beneficiaries would need to engage separate counsel to represent their interest. But, to the extent that the fiduciary of the estate is considered to be acting in a representative capacity (as the representative of the residuary beneficiaries of the estate), then the lawyer for the fiduciary arguably has a duty to such beneficiaries (see Matter of Clarke, 12 N.Y.2d 183, 187 (1962) ("An attorney for the fiduciary has the same duty of undivided loyalty to the cestui as the fiduciary himself"). That duty is sometimes discharged by the lawyer having necessary communications with such beneficiaries in the proper representation of the fiduciary as the client. See discussion above for issues arising out of attorney-client privilege. Indeed, pursuant to SCPA 2102(1), a fiduciary has a duty to respond to written requests for information concerning an estate, and the attorney for the fiduciary will frequently provide to such beneficiaries copies of important documents in the estate, such as Federal and New York estate tax returns and related papers, even prior to an accounting.

- Representing Fiduciary in Individual and Representative Capacities. Can a lawyer represent a fiduciary both in his or her capacity as a fiduciary and his or her capacity as a beneficiary. Yes, and it happens all the time. But, what if the fiduciary/beneficiary has offered a will for probate and substantial litigation and/or controversies take place in the estate, such as a will contest and other similar problems for which your client is the target? The answer is still yes, but the lawyer needs to evaluate all of the consequences in these difficult scenarios.

    - Consider: Retainer agreement. Who do you represent and who pays the bill?

- Representing Multiple Objectants in Will Contest with Different Interests. Can you represent multiple objectants in will contest even though their interest are different? Examples:

    - multiple classes of distributees/beneficiaries (distributees, with no interest in prior will; distributees with interest in prior will;
    - clients with differing goals in will contest (distributees with interest in challenging will; distributees with interest in sustaining a claim against the estate for debt.

E. Gifts from Clients (Rule 1.8(c) – Solicitation of Gifts from Clients)

A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge

the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit.

- **The Putnam rule:**

Almost needs no introduction: It started with an attorney, in which, in 1931, the Court of Appeals held that, in the absence of an acceptable explanation, a jury would be justified in drawing an inference of undue influence as to a bequest drafted by the drafting attorney to the drafting attorney. Court advised: have someone else draw the Will under these circumstances.

- Hearing v. Affidavit
    - Even when attorney did not draft, court can hold hearing
    - Bare minimum Court will require an affidavit explaining circumstances of the bequest to attorney
    - Usually Court renders decision

- Putnam rule has been widely expanded to apply to just about anyone with a confidential relationship able to exercise influence.
    - Examples: doctors, dentists, nurses, clergyman, accountants, secretary and relatives of attorney, charity created by attorney

- Ethical Considerations
    - Do not influence a client to name you as fiduciary; avoid the appearance of impropriety.
    - See NYSBA Opinion #481 (3/28/78): Opinion holds that a lawyer offering to serve as executor is not improper, per se, but you must exercise great caution. Initially, the opinion stresses the propriety of the drafter using his or her influence in being named as an executor. However, the opinion found a substantial exception as follows:

> There may be circumstances which can justify a lawyer's conduct in offering his services as executor. Principally, those circumstances must be such as support a firm conviction that the client would request his lawyer to serve in that capacity if he were aware of the lawyer's willingness to accept the responsibility. <u>Not only should the lawyer have enjoyed a long-standing relationship with the client, but it must also appear that the client is experiencing difficulty in selecting other persons qualified and competent to serve as executor.</u>
>
> (Emphasis Supplied)

- What if you don't have the relationship? Can you still accept an appointment? Yes, in my judgment, if the client wants you, an independent lawyer (who was well recommended to him/her) to handle the estate or planning

- Sanctions can be applied if you are not careful and follow the letter and spirit of the ethical considerations

  - Weinstock case: attorney fiduciary is denied letters in probate proceeding

  - Harris permits Weinstock objection in accounting proceeding

  - Courts take action

    - Denial of letters
    - Denial of commissions
    - Limitation to one commission where multiple fiduciaries
    - Possible disciplinary ruling
    - Relationship between attorney fees and commissions

      - SCPA 2307-a: Absence compliance with the statute's disclosure forms to be executed by client - client agrees that you are entitled to full commissions and full fees - then commission is one-half of statutory commission[3]

      - extensively amended effective 8/31/07
      - Applies to Wills executed on or after 1/1/96 and, irrespective of the date of the Will, to estates of decedent's dying after 12/31/96.
      - Failure to obtain acknowledgment will not diminish the statutory commissions as to rents
      - Statute provides a form – use it.
      - 2004 amendment requires that the acknowledgement appear in a document separate from the Will, but it can be affixed to the Will..
      - Applies if either the attorney, a then affiliated attorney, or an employee of such attorney or then affiliated attorney is the Executor-Designee (effectively overrules the Third Dept, in Matter of Wagoner, 30 A.D.3d 805 (3d Dep't 2006), which refused to limit to one-half the commissions of the attorney's paralegal-executor, even though the

[3] I acknowledge the assistance of Michael H. Friedman, Esq., a partner of the firm of Kurzman, Eisenberg, Corbin & Lever, LLP, who contributed portions of the outline on SCPA 2307-a.

attorney was the sole witness to the acknowledgment, in that the statute at that point only applied to attorney-designees).

- Must be acknowledged in the presence of at least one witness other than the Executor-Designee
- What if the witness is affiliated with the Executor-Designee? Surrogate Roth, in Matter of Hess, 21 Misc. 3d 507 (Surr. Ct., NY 2008), held that since the Attorney-Executor's partner was the witness, and the Attorney-Executor were affiliated and therefore interested in the transaction, it was as if the Attorney-Executor has witnessed the Acknowledgement, which would be ineffective, and the attorney-executor was therefore limited to one-half statutory commissions. Later on, however, the Court indicated that it would not follow that rule.
- Query: What if the Will is prepared in CT by CT counsel? In Matter of Newell (NYLJ 6/6/02 p. 27, c. 4) [Surr. Ct., Suffolk], the Testator was domiciled in CT, there was no comparable statute in CT when the Will was executed, the draftsman was not admitted in NY, and at the time of execution it was not anticipated that the Testator would ever live in NY. Surrogate Czygier held that since at the time it was prepared it was not foreseeable that the Will would be probated in NY, it was not necessary to adhere to 2307-a and the attorney-executor would be entitled to full commissions.
- But, the statute does apply to an out of state attorney names as an executor in the Will of a NY domiciliary (Estate of Deener, 2008 Slip. Op. 28470 (Surr. Ct., NY).
- Can the attorney-designee receive full commissions if all of the beneficiaries waive and provide informed consents? Surrogate Roth said "yes" in Matter of Brokken, NYLJ 3/28/06, p.24.
- Earlier acknowledgements do not survive later instruments (Matter of Gurnee, 16 Misc. 3d 1113(A), (Surr. Ct., Suffolk 2007); Matter of Karlan, NYLJ 4/11/06 p. 19 (Surr. Ct., Albany). Therefore, have a new acknowledgment signed for each new Will. However, a new acknowledgement is not required if one exists with respect to the Will, and a Codicil is executed that does not affect the designation of the Executor (Matter of Moss, 21 Misc. 3d 507 (Surr. Ct., NY 2008)

- Attorney fiduciary can act as witness to will, but beware: if there is will contest, perhaps the attorney fiduciary appointment may prove to be fodder for objectant

(The paragraphs below are reprinted with permission from McQuaid, Streng and LaPiana, NEW YORK WILLS AND TRUSTS (3rd Ed. Lexis, 1998))

> Persons who are in a confidential relationship to a testator, and who receive legacies or other benefits under a will, have a special burden to explain the circumstances leading to such benefit. The principle leading to this rule was enunciated by the Court of Appeals in 1931 in Matter of Putnam,[21] in which the Court said: "Attorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer. Any suspicion which may arise of improper influence used under the cover of the confidential relationship may thus be avoided."[22]
>
> Under the Putnam Rule, a legacy in favor of a person who is in a confidential relationship to the testator may be excised from a will if the Surrogate finds that the legacy was the product of undue influence. While the Putnam Rule is an offspring of the objection of undue influence,[23] the Surrogate can allow the probate of the will but expunge the legacy.[24] In applying the rule, the court either requires the submission of an affidavit or schedules a hearing to explore the circumstances that led to the legacy.
>
> The Putnam Rule has its most obvious application to an attorney-drafter, but it has been applied to individuals who share different confidential relationships with the testator, including, but not limited to, relatives of the attorney-drafter,[25] doctors,[26] nurses,[27] nursing home

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21 257 NY 140, 177 NE 399 (1931).

22 *Id* at 143, 177 NE at 400. *See also* New York State Bar Association Code of Professional Responsibility EC 5-5 (1975). *See generally* Groppe, *Putnam/Weinstock Revisited:* Problems Facing the Attorney/Legatee/ Fiduciary, 7 Newsletter of General Practice Section NYSBA (1986).

23 *See generally* Children's Aid Socy v Loveridge, 70 NY 387 (1877).

24 Matter of Lawson, 75 AD2d 20, 428 NYS2d 106 (4th Dept 1980); Matter of Eckert, 93 Misc 2d 677, 403 NYS2d 633 (1978).

25 Matter of Hayes, 49 Misc 2d 152, 267 NYS2d 452 (1966).

26 Matter of Satterlee, 281 AD 251, 119 NYS2d 309 (1st Dept 1953).

27 Matter of McCarthy, 269 AD 145 54 NYS2d 591 (1st Dept 1945), *affd* , 296 NY 987, 73 NE2d 566 (1947).

personnel,[28] accountants and financial advisors,[29] and clergy.[30] If another attorney is selected to prepare a will in which the testator's primary attorney, or a member of his or her family, is a beneficiary, the attorney who is selected must be independent of the control or interest of the initial attorney.[31]

In a developing area of the law, the Putnam Rule has been used by Surrogates to review the propriety of the designation of an attorney-drafter as an executor or trustee under the will. In Matter of Weinstock,[32] the Court of Appeals reinstated a Surrogate's decree in which letters testamentary had been denied to attorneys, a father and a son, who were named as executors in a will prepared by the father, but who had had no previous professional relationship with the testator. Noting that the attorneys were aware of the testator's intention to avoid executor's commissions, the Court held that the testator's confidential relationship with the attorneys required that the attorneys disclose the effect of a joint designation to the testator.[33]

The designation of attorneys as fiduciaries, which is illustrated by Weinstock , has led to close supervision by Surrogate's Courts over compensation to the attorney-fiduciary for both legal services and statutory commissions. In Matter of Laflin ,[34] the Appellate Division, Second Department, held that objections to multiple executors' commissions may be made by the beneficiaries in the final accounting proceeding. And in view of the "fact that an attorney draftsman of a will is uniquely situated to selfishly gain additional employment"[35] as counsel for a testator's estate, Surrogates generally are giving strict scrutiny to attorney fees for the attorney-fiduciary.[36]

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[28] Gordon v Bialystoker Center, 45 NY2d 692, 385 NE2d 285, 412 NYS2d 593 (1978); Matter of Burke, 82 AD2d 260, 441 NYS2d 542 (2d Dept 1981).

[29] Matter of Collins, 124 AD2d 48, 510 NYS2d 940 (9th Dept 1987).

[30] Marx v McGlynn, 88 NY 357 (1882) (a precursor to *Putnam* , in which it is cited, Matter of Putman, 257 NY 140, 144, 146, 177 NE 399, 400-01 (1931)).

[31] Matter of Guidi, 259 AD 652, 20 NYS2d 240 (1940).

[32] 40 NY2d 1, 351 NE2d 647, 386 NYS2d 1 (1976).

[33] *Id* at 5, 351 NE2d at 648, 386 NYS2d at 3.

[34] 111 AD2d 924, 491 NYS2d 35 (2d Dept 1985).

[35] Matter of Stalbe, 130 Misc 2d 725, 727, 497 NYS2d 237, 240 (1985).

[36] *See, e.g.*, Matter of Harris, 123 Misc 2d 247, 473 NYS2d 125 (1984). Some Surrogate's Courts require the probate petition to disclose whether an attorney-fiduciary or a member of the firm is a drafter

of the will, and if so the drafter is required to prepare and file an affirmation setting forth the facts and circumstances surrounding the testator's selection of the drafter as a fiduciary of the estate. These affirmations, which are sometimes required to be filed in probate and accounting proceedings, are apparently being used to determine the reasonableness of commissions and attorney fees for an attorney-fiduciary.

Competent Representation of Client (Rule 1.1)

Rule 1.1

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

- If a lawyer does not have prior experience in a particular legal matter, he or she can still be engaged. For example, a lawyer who has no experience even in litigation in the Surrogate's Court involving sophisticated tax issues can be engaged, provided that lawyer commits himself or herself in becoming competent or associates with a lawyer who is competent on the tax issues.
  - For lawyers with insufficient experience in this area, consult and pay out of your own pocket someone who is. Ethically, professionally and economically required. The alternative: your very sophisticated client sees your lack of experience in working on the tax aspect of the litigation; and your client either gets bum work or fires you.

- Before mandatory CLE, maintaining your skills and ability, through CLE, permitted us lawyers to satisfying our ethical obligations.

- The use of legal assistants by trusts and estates lawyers brings on ethical obligations. Assuring proper oversight and training is necessary to assure that competent legal work is carried out in behalf of a client.

- Performing legal work effectively, and expeditiously, is an important component of carrying out competent legal work.

- **Communicate, Communicate, Communicate!!!!** The single biggest criticism of lawyers is their failure to return phone calls or otherwise communicate with their clients.

- **Ethics Rules and Malpractice Claims**

    - What is Privity?

    - New York Court of Appeals modifies prior privity requirement. In Matter of Schneider, 2010 NY Slip Op 05281 (June 17, 2010) chipped away at the privity requirement, holding that an estate fiduciary may maintain a legal malpractice claim against its decedent's estate tax planning attorneys for negligent representation.

    - In Schneider, the executors of the estate commenced a malpractice case in Supreme Court, arguing that the decedent should have been advised to transfer his $1 million life insurance policy to or from an entity of which he was the principal owner in order to reduce his gross taxable estate, thereby decreasing his estate's tax liability. The Supreme Court dismissed the claim for failure to state a cause of action. In reversing, the Court of Appeals equated the relationship between an estate and its decedent to one of privity, or one "sufficiently approaching privity" for purposes of pursuing a legal malpractice action. The Court also held that "'the estate essentially stands in the shoes of the decedent' and therefore 'has the capacity to maintain the malpractice claim on the estate's behalf'".

    - **How to protect yourself**:

        - Refer matters to a specialist
        - Keep current on law
        - establish routines
        - print and proofread documents
        - document the file
        - ask about unusual assets or a relationship
        - consider problems with multiple estate planning documents
        - do disengagement letters

F. Representing a Client with Diminished Capacity (Rule 1.14)

Rule 1.14

(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 conventional 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.

- Power of Attorney issues
  - Who's the client?
  - Representing principal on power of attorney
  - Representing agent on power of attorney
  - Representing done of gifts on power of attorney
  - Advice to client on creating power of attorney re options on gift giving, Medicaid
    - Advice on "best interest" of client, considering language Court of Appeals in Ferrari

- Preparing Wills for a potentially incapacitated client or dying client
  - Be Very Careful!!!

  - Engagement by client
    - What if referred by
      - potential beneficiary
      - current client
        - consider built-in claim of undue influence
        - cannot reverse undue influence problem once you have permitted it to happen
      - engagement letter

  - Initial client interview
    - Attorney-client privilege
    - Preserving confidentiality of communications
    - Obtaining information/documents from client

  - Transmittal of drafts of wills with explanations

- Communication with client alone concerning draft
- Your role: “scrivener” v. “estate planner”
- Execution of documents

- Can you represent a third party in bringing a guardianship proceeding to appoint a guardian for your client?

  - Probably not, but there appears to be very little precedent:
  - As a general rule, I agree that an attorney who has previously represented an “alleged incapacitated person” should not participate in a guardianship proceeding, either by petitioning the Court or representing a petitioner
    - Consider duty of advocacy to AIP
    - Consider attorney-client privilege
      - Nassau County Bar Association 1990 opinion [can’t disclose information to third parties regarding client’s lack of decision-making capacity]
      - Ass. of Bar of City of NY [1987-7] (can disclose confidential information if necessary to protect client’s interest, and disclosure made in camera
      - But, what if client “consents” to appointment
      - And what if there a consensual joint representation

- NYS Bar Opinion 746:

  “A lawyer serving as a client’s attorney-in-fact may not petition for the appointment of a guardian without the client’s consent unless the lawyer determines that the client is incapacitated; there is not practical alternative, through the use of the power of attorney or otherwise, to protect the client’s best interests; and there is no one else available to serve as petitioner. Subject to conflict of interest restrictions, if the lawyer petitions for the appointment of a guardian, the client does not oppose the petition, and the lawyer will not be a witness in a contested hearing, the lawyer may represent him-or herself in the proceeding.”

  - Ethical dilemmas for advocates: When does your duty of advocacy end and your relationship to the Surrogate’s Court and its personnel begin?

G. <u>Handling Client and Third-Party Property (Escrow Accounts) (Rule 1.15)</u>

Rule 1.15

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," or "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a

successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

- Full compliance with Rule 1.15 in dealing with client escrow accounts is essential to assure that a lawyer maintains his or her license to practice.

- Proper record keeping is the key.

- Should you use escrow accounts in the management of estates and trusts?

- Rule 1.15 goes beyond the management of escrow accounts; it goes to the core of the lawyer's business records. Rule 1.15 requires retention for 7 years many business records, including, but not limited to, all escrow account records, special account records, retainer and compensation agreements, client disbursement records and bills.

- What are the stakes in proper management of escrow accounts: Westchester lawyers had their license suspended (later modified by the Second Department), in following circumstances.
  - Balances fell below 0, through inadvertence
    - Obligation of bank to inform Central Registry at the Lawyers' Fund for Client Protection within 5 days when negative balance takes place
  - Bookkeeping errors
  - Failed efforts in curing bookkeeping problem
  - Lessons from such cases:
    - Control your bookkeeper
    - Instruct your bookkeeper
    - Exercise control over your bookkeeper
    - Develop strict procedures to assure that, under no circumstances, are escrow accounts over drafted
    - What about check fees, for example, certified check fees? Either know, with certainty, what they are if you permit them to be charged against the escrow account. Or, do what my firm does, and have such charges assessed against our firm's business account.