THE HAZARDS OF ETHICAL LAWYERING: PERSPECTIVES FROM A PLANNER AND A PROBATE LITIGATOR

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I. INTRODUCTION.

A. This presentation and the corresponding materials address certain ethical issues faced by estate planning and probate litigation attorneys.

B. For more than 90 years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the law governing the legal profession.

1. To read the history of the American Bar Association's Model Rules of Professional Conduct and/or for a chronological or alphabetical list of the States adopting the Model Rules, go to: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html

2. "Neither the Model Rules of Professional Conduct (MRPC) nor the Comments to them provide sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. Recognizing the need to fill this gap, American College of Trust and Estate Counsel (ACTEC) has developed [c]ommentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others regarding their professional responsibilities. . . . Although the Commentaries refer specifically to the MRPC, their content is also usually applicable to the Code of Professional Responsibility, which remains in effect in some states and, like the MRPC, does not provide sufficient guidance to trusts and estates lawyers. The Commentaries generally seek to identify various ways in which common problems can be dealt with, without expressly mandating or prohibiting particular conduct by trusts and estates lawyers. . ."[4]

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[4] *See http://www.actec.org/publications/commentaries/.*

C. The materials herein are comprised of:

1. Connecticut Rules of Professional Conduct;[5]

2. American Bar Association's Model Rules of Professional Conduct, including the official commentary thereto;[6]

3. American College of Trusts and Estate Counsel Commentaries; and

4. Relevant Federal and State Case Law.

NB: This presentation will move between these four resources depending on which provides the best guidance.

II. WHO IS THE CLIENT?

A. Prospective Client. A prospective client is "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship."[7]

1. "Who" is your client: before initial contact, perform some (unofficial) due diligence. For example, search social media and other internet sites, check party names on court websites, and perform brief rundowns on land records. This research can yield helpful information as to the integrity of a prospective client.

2. Professional Rules of Responsibilities apply to prospective clients.

a) Duty of Confidentiality. It is well-understood that our duty of confidentiality typically extends to prospective clients. Rule 1.18 confirms that, even when no client-lawyer relationship is formed, "[a] lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation except as Rule 1.9 [Duties to Former Clients] would permit with respect to information of a former client." (Rule 1.9 prohibits a lawyer from using information relating to the representation of a former client to that party's disadvantage until the information has become generally known.)[8]

b) Conflicts of Interest. It is less-understood how conflict-of-interest rules apply to prospective clients. Rule 1.18 imposes duties on us that offer substantial protection to the prospective client and provides a certain degree of flexibility for the lawyer. For example, a lawyer who had discussions with a prospective client is disqualified from a subsequent representation that is adverse to the prospective client only when "the lawyer received information from the prospective client that could be significantly harmful to the person in the matter."

B. But "who" is our client? Once we have done our due diligence and are satisfied with the bona fides of this potential client (and, of course, we have internally cleared any potential conflicts with previous or existing clients), we must ask who is our client. A seemingly easy question with an often difficult answer. The answer is crucial, however, in establishing to whom the series of legal and ethical duties of loyalty, confidentiality and conflicts of interest are owed. The "who is our client" dilemma arises most commonly when there are multiple parties.

C. Multiple Parties.

1. Spouses. Estate planning is, for the most part, non-adversarial and often spouses share a common interest and goal. It is generally cost effective to represent both spouses under these circumstances and ethically appropriate, provided, professional responsibilities are extended to each and to both.[9]

2. Joint Representation of Multiple Clients. Multiple clients refers to more than one beneficiary with a common interest in an estate or trust administration matter or co-fiduciary of an estate or trust. It is important to determine what information is protected by the attorney-client privilege and be clear on the professional responsibilities to each family member.

NB: Careful consideration of the attorney-client privilege must be given when a family member brings a client to the office, wants to be included in the meetings, but will not be a client.

3. Separate Representation of Multiple Clients. We usually represent multiple clients *jointly*. In some instances, however, it is preferable to represent multiple parties as *separate* clients. In a separate representation of parties (for example, spouses), we treat each spouse as a separate client. We do not share information between the two clients, except to the extent that is fosters the purposes of each. When representing as separate clients, each client must give his or her informed consent to the lawyer's representation of the other party.

[5] In subsequent footnotes, the Connecticut Rules of Professional Conduct are cited as: RULES OF PROF'L CONDUCT.
[6] In subsequent footnotes, the American Bar Association's Model Rules of Professional Conduct are cited as: MODEL RULES OF PROF'L CONDUCT.
[7] RULES OF PROF'L CONDUCT r. 1.18 (2015).
[8] Thus, an attorney who had discussions with a prospective client is disqualified from a subsequent representation that is adverse to the prospective client only when "the lawyer received information from the prospective client that could be significantly harmful to the person in the matter."
[9] ACTEC Commentaries at 101–02.

4. Consent. In multiple client (joint or separate) representations, including representation of spouses, each client must provide his or her informed consent to the attorney's representation of the other party.[10]

D. Fiduciary as Client.[11]

1. Duty of Loyalty. When representing a fiduciary, an attorney must be clear as to whom he/she owes the duty of loyalty.[12]

2. Majority Rule. Connecticut follows the majority rule whereby an attorney for a fiduciary represents only the fiduciary.[13] As a result, in Connecticut, the attorney's legal duty extends only to the fiduciary and not the beneficiaries. In states that do not follow the majority rule, courts draw a distinction between whether an attorney represents a fiduciary generally on behalf of an estate or whether an attorney represents the fiduciary individually.[14] In these states, the attorney's professional duties extend to the beneficiaries.[15]

[10] *Id*.

[11] This presentation does not address the topic in detail, but note that there are instances when the attorney serves the client both as a fiduciary and attorney. There are various complications that arise in this scenario and the attorney must be careful during representation to avoid breaching the fiduciary duties that may arise. In particular, issues can arise regarding financial benefits the attorney may receive as fiduciary and the attorney's ability to commence actions on behalf of the trust for the attorney's benefit. For more information, *see* ACTEC Commentaries at 106; Chief Disciplinary Counsel v. Rozbicki, 2013 WL 1277298, at *12 (Conn. Super. Mar. 8, 2013) (Finding a violation of Rule 1.7 where attorney executor, over the beneficiaries' objections, commenced a constructive trust action to collect insurance proceeds for the primary purpose of collecting funds to pay his personal claim against the estate for his attorney's fee); Connecticut Estates Practice Series, Settlement of Estates in Connecticut 3d, § 7:21 (2010).

[12] See, Peter Rice, *Attorney-Client Privilege in the U.S*. § 4:45 (2d ed. Mar. 2003) ("[T]he most common question that has arisen has been who is the client – the trust entity, the trustees or individuals who act for the entity, or the beneficiaries or individuals for whom the entities were created?").

[13] *See* Hubbell v. Ratcliffe, 50 Conn. L. Rptr. 856, at *3–6 (Conn. Super. 2010) ("Should we decide that a trustee's attorney owes a duty not only to the trustees but also to the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee. This we refuse to do."); Daniel R. Nappier, *Blurred Lines: Analyzing an Attorney's Duties to a Fiduciary-Client's Beneficiaries*, 71 WASH. & LEE L. REV. 2609, 2631–2645 (2014).

[14] ACTEC Commentaries at 39; Nappier, 71 WASH. & LEE L. REV. at 2621–2628.

[15] ACTEC Commentaries at 39.

III. CREATING THE ATTORNEY CLIENT RELATIONSHIP.

A. Generally. Once we know who we are working for and the desired goal of representation, we must define the scope, the objective, the timetable, and the basis upon which the fee will be determined.

> "The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sent the client an engagement letter at the outset of the representation."[16]

B. Engagement Letters. Rule 1.5 requires an attorney memorialize for the client, in writing, "before or within a reasonable time after commencing the representation," three important items: (i) the scope of the representation; (ii) the basis or rate of the fee; and (iii) the expenses for which the client will be responsible.[17]

1. The Scope of the Representation (Rules 1.2 and 1.5).

a) Rule 1.2: limiting the scope.

(1) "The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client."[18]

(2) Practice Tips:

(a) Be specific. Making the scope of the work under the terms of an engagement letter as broad as possible is a natural inclination. Unfortunately, an engagement letter with a loosely defined scope of the work significantly increases our exposure to potential liability.[19]

(b) A plainly worded provision setting forth the defined scope of our services is one of the most important risk management tools we can adopt.

(c) If the ongoing representation expands beyond the original scope defined in the initial engagement letter, prepare a new engagement for the additional tasks to be performed or amend the original agreement.

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[16] *See,* ACTEC Commentaries on MRPC 1.3 at 51.
[17] RULES OF PROF'L CONDUCT r. 1.5(b) (2013); ACTEC offers scenarios and checklists for creating comprehensive engagement letters.
[18] RULES OF PROF'L CONDUCT r. 1.2 cmt. (2007).
[19] *See* RULES OF PROF'L CONDUCT r. 1.5(b) (2013).

(d) If the client will participate in the work (i.e., gathering financial information for an estate inventory), the allocation of responsibility between the attorney and client should be memorialized. Likewise, if the attorney is representing multiple clients, the scope should carefully define what work will be performed for each individual client or the clients collectively.

(e) The letter should also make note of the confidential conflicts that may arise and how that confidential information will be conveyed to other clients.

(f) Never guarantee a particular result (either in terms of dollars or what we can do for the client) in the engagement letter.

2. The Basis or Rate of the Fee and the Expenses for Which Client will be Responsible.[20]

a) Rule 1.5 states that "[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client." A high degree of scrutiny is applied to changes in the terms of compensation that are not detailed in an engagement letter.

b) Rule 1.5(a) provides that an attorney may not charge "unreasonable" fees or expenses. The factors that weigh in on reasonableness include these:[21]

- The time and labor required
- The novelty of the issue presented, and the skill required to perform the requested tasks
- The extent to which the engagement would preclude the attorney's ability to service other clients
- The usual and customary fee for similar services
- The amount involved and the results obtained
- The time limitations imposed by the client or the circumstances
- The nature and length of the client-attorney relationship
- The experience and reputation of the attorney
- Whether the fee is fixed or contingent

[20] RULES OF PROF'L CONDUCT r. 1.5(a) (2013).

[21] No single factor is determinative. Even if a client has provided his or her informed consent in advance, a fee that is disproportionate to the work performed will not be allowed and may form the basis for a grievance and order of restitution.

- The engagement letter should also spell out the consequences of the failure to pay in a timely manner the legal fees invoiced to the client.

NB: Suits for unpaid legal fees can often provoke retaliatory claims of malpractice.[22]

c) Include definition of the expenses for which the client is responsible. This includes court costs, litigation expenses, copying, telephone charges, and how and when these expenses are to be deducted.

d) If it is anticipated that the compensation will change, address that change in the letter.

3. File Retention. Outline a document retention policy in the engagement letter which advises the client of the duration for which copies of the file will be held. This avoids disputes later regarding whether an attorney kept or did not keep documents for a specific period of time.[23]

C. Common Conflicts of Interest and Waivers Thereof (Rules 1.7, 1.9, and 1.10)

1. Conflicts of Interest and Waivers. An attorney cannot represent a client when that client's interest is adverse to another client.[24]

a) Prospective waivers. A client who is adequately informed may waive some conflicts that might otherwise prevent us from representing another person in connection with the same or a related matter. These are "waivable" conflicts.

b) The effectiveness of a waiver of a conflict of interest is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.[25] See Comment to MRPC 1.7.

c) Some conflicts are so serious that the informed consent of the parties is insufficient to allow us to undertake or continue the representations. This is a "non-waivable" conflict.

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[22] *Id.*

[23] A few jurisdictions delineate precise guidelines on how long we are obligated to maintain a file generated during the course of representing a client. *See* Jim Calloway, *Managing Files in the Digital Age*, 39 No. 6 L. PRAC. 68, 68–69 (2013); Anthony E. Davis & David J. Elkanich, *The Risk Management Challenges of Record Retention and Destruction – Developing Records Management Policies That Protect Both Law Firms and Their Clients*, 19 No. 1 PROF. L. 1, 6 (2008).

[24] RULES OF PROF'L CONDUCT r. 1.7 (2007).

[25] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2002).

2. Rule 1.7 ("Conflict of Interests: Current Client") generally provides that an attorney shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (i) the representation of one client will be directly adverse to another client; or (ii) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person, or by a personal interest of the attorney.[26] Issues can arise under Rule 1.7 when:

a) Client has been appointed as executrix of the decedent's estate and named beneficiary of the estate.

b) When the attorney preparing the will is named the executor of client's estate.

3. Waiver. Clients, however, can waive a conflict of interest under Rule 1.7. A client who is adequately informed may waive a conflict.[27] Effectiveness of the waiver is determined by the extent to which the client understands the material risks the waiver entails.[28]

4. Rule 1.9 (Duties to Former Clients). This issue can arise when an attorney has represented a husband and wife jointly in connection with estate planning matters, but the husband and wife have since divorced. In this scenario, Rule 1.9 imposes specific limitations on the types of matters in which the attorney can represent one party.

a) If the attorney receives informed consent (waiver) confirmed in writing from one party, the attorney can continue representing the other party. If the attorney, however, does not receive consent, the attorney cannot represent the other party in any matter that is substantially related to the attorney's prior joint representation in which one party's interests are now materially adverse to the other's interests.[29]

b) But, if the matter is unrelated to the attorney's prior joint representation and does not implicate (i) any interest that is adverse to one party or (ii) confidential communications related to the prior joint representation, the attorney may represent that party.[30]

[26] RULES OF PROF'L CONDUCT r. 1.7 (2007).
[27] *Id.*
[28] RULES OF PROF'L CONDUCT r. 1.7 cmt. (2007).
[29] ACTEC Commentaries at 139.
[30] Newlands v. NRT Assocs., LLC, 2008 WL 4415752, at *2–3 (Conn. Super. Sept. 17, 2008).

5. Rule 1.10 Imputation of Conflicts of Interest. The rule is intended to apply the principal of loyalty to the client vicariously to attorneys who practice in a law firm. The rule treats all attorneys in a firm as one attorney for purposes of applying principles of loyalty to a client.[31] The rule states that all attorneys in a firm are disqualified from representing a client when one attorney associated with the firm is disqualified.[32]

a) There are exceptions, however, that allow representation to take place if: (i) the prohibition is due to a personal interest and does not present a serious risk to the other attorneys in the firm representing the client and (ii) if the conflict arose from the attorney's affiliation with a prior firm.

b) To satisfy the rule, the prohibited attorney: (i) must not participate in the matter, (ii) be screened from participating in the matter including fees, and (iii) written notice must be given to any affected former client.[33]

6. Non waivable conflicts. These arise when a conflict is so serious that the informed consent is insufficient to allow the attorney to continue the representation. This might include directly adverse clients or a situation where one client's material interests would be so greatly affected that representation of the other client would be inappropriate.[34]

IV. THE ATTORNEY CLIENT PRIVILEGE AND THE DUTY OF CONFIDENTIALITY (RULE 1.6)

A. Scope and Duration.

1. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[35]

2. Its purpose is to encourage open and honest communication between client and attorney to enable the attorney to provide sound and informed legal advice.[36]

3. The privilege belongs to the client and can be asserted by the client.[37]

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[31] RULES OF PROF'L CONDUCT r. 1.10 cmt. (2012).
[32] RULES OF PROF'L CONDUCT r. 1.10(a) (2012).
[33] *Id.*
[34] RULES OF PROF'L CONDUCT r. 1.10 cmt. (2012).
[35] U.S. v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011).
[36] Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 14–15 (2003).
[37] RULES OF PROF'L CONDUCT r. 1.6 (2014).

4. In Connecticut as under federal law, the attorney client privilege is the product of common law.[38] It is also codified in the Code of Evidence.[39]

5. Rule 1.6 states that the attorney may not reveal information relating to the attorney's representation without the client's informed consent.[40]

6. In Connecticut, the attorney-client privilege protects both confidential advice provided to a client as a legal advisor and the information provided to the attorney by the client that allows the attorney to provide advice.[41]

7. The privilege survives the client's death.[42]

B. Difference Between Confidentiality and Attorney Client Privilege.

1. Generally, confidentiality is broader than the attorney client privilege. All information relating to the representation of a client is confidential.[43]

2. The attorney client privilege might arise from a situation where the privilege may be raised such as a judicial proceeding where an attorney may be called as a witness or be required to produce evidence regarding a client whereas the duty of confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. It applies not only to matters communicated in confidence to the client, but also to all information relating to the representation, regardless of its source.[44] For communication to be confidential, it is not necessary that it be marked "confidential". This is only a factor that a court may consider in determining confidentiality.[45]

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[38] Beal v. Washton, 39 Conn. Supp. 167 (Super. 1983) ("Connecticut has adopted the common law principle of attorney-client privilege which has not been altered by statute."); Rienzo v. Santangelo, 160 Conn. 391 (1971); Doyle v. Reeves, 112 Conn. 521 (1931).

[39] "Communications when made in confidence between a client and an attorney for the purpose of seeking or giving legal advice are privileged." Conn. Code. Evid. 5-2; *see Kimber Mfg. Inc*., 265 Conn. at 10 (The attorney client privilege is a privilege protecting confidential communications between an attorney and client for the purpose of seeking or giving legal advice).

[40] RULES OF PROF'L CONDUCT r.1.6(a) (2014); RULES OF PROF'L CONDUCT r. 1.6 cmt (2014).

[41] Metro. Life Ins. Co. v. Aetna Cas. and Sur. Co., 249 Conn. 36, 52 (2012).

[42] *See* Swidler & Berlin v. United States, 524 U.S. 399, 410 (1988) (affirming the survival of the privilege based largely on long-standing common law assumption: "It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of a client."); Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 273 Conn. 315, 326–27 (2005) ("Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all."); *see also* ACTEC Commentaries at 80 ("In general, the lawyer's duty of confidentiality continues after the death of a client.").

[43] RULES OF PROF'L CONDUCT r. 1.6 (2014).

[44] *Id*.

[45] Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 22 (2003).

3. The privilege extends to communications between agents of both the attorney and the client.[46]

C. Exceptions to the Attorney-Client Privilege.[47]

1. Fiduciary Exception

a) The fiduciary exception makes confidential communications and materials exchanged between the attorney and the fiduciary-client discoverable by the beneficiaries.[48]

b) Connecticut does not recognize the fiduciary exception to the attorney client privilege.[49] Accordingly, beneficiaries do not have a right to review confidential attorney-fiduciary communications.[50]

2. Probate Exception

a) In Connecticut, an exception exists in a will contest in which an attorney who prepares a will may be required to disclose what the attorney knows about the testator's state of mind at the time of the execution of the will.[51]

b) "The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction."[52]

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[46] Restatement (Third) Law Governing Lawyers § 70 (2000).
[47] Exceptions to the rule of confidentiality will be addressed *infra* § V (E).
[48] *See* Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541, 560 (1996).
[49] *See* Heisenger v. Cleary, 58 Conn. L. Rptr. 658, at *3–4 (Conn. Super. 2014) ("[T]his court is not persuaded that the Supreme Court of the State of Connecticut would adopt and recognize the fiduciary exception to the attorney client privilege within this state."); *Hubbell, supra*. No Connecticut appellate court has determined whether the fiduciary exception to the attorney-client privilege applies in Connecticut.
[50] *Id.*
[51] Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 273 Conn. 315, 327 (2005) ("When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interests. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind.").
[52] Restatement (Third) Law Governing Lawyers § 81 (2000); Glover v. Patten, 165 U.S. 394, 406 (1897); Swidler & Berlin v. U.S., 524 U.S. 399, 405 (1998); *see also* ACTEC Commentaries, at 80, commentary on Model Rule of

D. Waiver to the Attorney Client Privilege.

1. Waiver can be voluntary.

2. Waiver can be involuntary by inadvertent disclosure to third party recipients, advisors outside of the privilege, experts, and consultants or by an email to opposing counsel.

3. If an attorney is representing two clients jointly, a client may unilaterally waive the privilege to his or her own communications with the attorney, so long as those communications concern only the waiving client. The client may not unilaterally waive the privilege to any other joint client's communications.[53]

4. In some instances, the court can require attorneys to waive the privilege and produce attorney client privileged documents.[54]

V. CLIENT CAPACITY ISSUES

A. Testing Capacity. It is easy to identify the standard test for testamentary capacity (knowledge of one's estate and the natural objectives of one's bounty and an understanding of the consequences of the intended disposition) but the impact of diminished testamentary capacity can be difficult to assess.[55]

Professional Conduct 1.6 ("A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.").

[53] *Id.,* at § 75, cmt. e (2000).

[54] *See* Bria v. U.S., 89 A.F.T.R.2d 2002-2141, 2002 WL 663862 (D. Conn. 2002) (Co-executors of an estate retained counsel but were terminated while preparing a tax form. The IRS investigated whether the co-executors understated the value of the estate on the tax form. The IRS issued a summons to the former attorneys for the co-executors and an objection was raised based on the attorney-client privilege. The court ordered the attorneys to answer questions and produce documents as to certain areas including joint bank accounts that would otherwise be protected by the attorney client privilege).

[55] Appeal of St. Leger, 34 Conn. 434, 448–49 (1867).

1. While the current commentaries seem to suggest that freedom of testation should take precedence over a lawyer's subjective doubts as to a client's capacity, or that resort to court-supervised estate planning may be desirable in some cases, an estate planning representation for a client with diminished capacity frequently arises in a complicated and/or an urgent factual context.

2. Nevertheless, even in a crisis, a consultation with a knowledgeable physician or mental health professional may serve the client's and the lawyer's best interests.

B. Substituted Judgment.[56] Testamentary freedom is very important. Thus, when capacity is borderline, we should take steps to preserve evidence regarding the client's capacity at the time of the execution. (If the client clearly does not have the requisite capacity, we should generally avoid assisting with modifications to their estate plans.) We can also consider, if available, procedures for obtaining court supervision of the estate plan, including substituted judgment proceedings.

C. Estate Planning with Court Approval. Premised on the concept of substituted judgment, upon notice, petition and good cause shown, the court continues to have broad powers to approve estate planning which benefits not only the incapacitated person, but also his or her family, members of the household, friends and charities in which he or she was interested.[57]

1. Lifetime Gifts. If the court is satisfied that assets exist which are not required for the maintenance, support and well-being of the incapacitated person, it may adopt a plan of giving which minimizes current or prospective taxes and/or which carries out a lifetime giving pattern. The court may consider any ascertainable testamentary or inter vivos intentions of the incapacitated person. Such gifts may be made outright or in trust.[58]

2. Codicils and Trust Amendments. There may be instances when the court approves the amendment of a will or revocable trust created by the incapacitated person if there has been changes in the tax laws.[59]

3. Creation of Revocable or Irrevocable Trust. There may be instances when the court may approve the creation of a revocable or irrevocable trust for the benefit of the incapacitated person or others, which may extend beyond the incapacitated person's disability or life.[60]

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[56] The doctrine of substituted judgment has been codified in Connecticut General Statutes § 45a-655 (e). *See* Dep't of Soc. Servs. v. Saunders, 247 Conn. 686, 695 (1999).
[57] *See* Connecticut General Statutes § 45a-655.
[58] *Id.*
[59] *Id.*
[60] *Id.*

4. Exercise, Release and Disclaimer of Powers and Interests. In some instances, the court may approve the exercise, release or disclaimer of powers held by the incapacitated person, including but not limited to powers held as a fiduciary and powers held as donee of a power of appointment. The court may also approve the exercise, release or disclaimer of the incapacitated person's interests in property, including but not limited to contingent interests, marital property rights, rights of survivorship in joint tenancies or tenancies by the entirety, elective share interests in the estate of deceased spouse, any testate, interests in intestate or inter vivos transfers, options to purchase and rights under life insurance policies, annuity contracts or other contracts providing for payment to incapacitated person or others after his or her death.[61]

D. Representation After Diminished Capacity. If we represented a client before the client suffered diminished capacity, we may be considered to continue to represent the client after a fiduciary is appointed. Although incapacity may prevent a person with diminished capacity from entering into a contract or legal relationship, if we represented the person with diminished capacity prior to the incapacity, it may still be appropriate to continue to meet with and counsel the client. Also, we may represent the court appointed fiduciary of the current or former client, provided the representation of one will not be *directly* adverse to the other.[62]

1. Routinely, we represent competent adults in estate planning matters, and we provide our clients with information regarding how to protect their interests in the event of their diminished capacity. The obvious challenge arises when the clients themselves can no longer take protective actions and there is a risk of substantial harm to the client.

2. Under subsections (b) and (c) of MRPC 1.14, we have an implied authority to make disclosures of otherwise confidential information and take protective action when there is risk of substantial harm to our client exists.[63] Before we make such disclosures, we *must* consider:

- The client's wishes;
- The impact of our actions on potential challenges to our clients estate plans;

[61] *Id.*
[62] *See* ACTEC Commentaries at 91; ACTEC Commentaries at 123.
[63] MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2002).

- The impact of our ability to maintain the clients confidential information; and
- The impact on our clients right to privacy and physical mental and emotional well being.[64]

3. As far as possible, we must accord our client with diminished capacity the status of "client" and maintain as many of the tenets of that relationship as reasonable under the circumstances.

4. In keeping the client's interests foremost, the client may wish to have a family member present during meetings. We must rely on our client's directions under the circumstances and *not* the inconsistent direction of family members. And we must always consider the impact of a joint meeting between client and family members on the attorney-client evidentiary privilege.

5. Safeguards to Determine the True Intent of the Client:

- Even if a family member is present during the meetings, the attorney must rely on client's directions and not the family members.
- When capacity is borderline, the attorney should take steps to preserve evidence regarding client's capacity.
- Examine the testator's physical and mental capacity.
- Scrutinize unexpected gifts and/or significant changes to a longstanding estate plan.
- Look for isolation and opportunities where a third party had the opportunity to exercise undue influence.

E. Exceptions to the Duty of Confidentiality (Rule 1.6). In determining whether to take protective action to protect the client, the attorney may consult with family members or adult protective agencies to determine how to best meet the client's needs.[65]

F. Undue Influence.

1. Attorney must be careful and evaluate the amount of interest and participation other members of the family exhibit when assisting with the creation of a trust or drafting a will.

2. The document must reflect the client's will and not that of someone who influenced the client.[66]

VI. ENDING THE ATTORNEY CLIENT RELATIONSHIP (RULES 1.15 AND 1.16)

[64] *See* ACTEC Commentaries at 131.
[65] RULES OF PROF'L CONDUCT r. 1.14 cmt. (2009).
[66] Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 273 Conn. 315, 324 (2005).

A. Closing Your File

1. Closure Letter.[67]

a) *Terminating scope of representation*

- By sending the client a letter terminating the scope of representation, the attorney avoids any issues regarding whether a client is characterized as a former or current client under Rule 1.16.

b) *How should an attorney do this?*

- The attorney should send the client a letter clearly withdrawing from the scope of the representation.[68] The letter should include language explaining that the attorney's representation of the client has concluded. The letter should also include events, dates, and the circumstances that terminate the representation. Further, it should include how the attorney will withdraw and what will happen to the records — specifically to whom they will be sent and for how long and where they will be stored.

- This does not mean that the attorney cannot represent the client in the future nor that the client is no longer a client of the attorney — it simply means that the attorney no longer represents the client in that specific matter.

c) *Why is it beneficial to do?*

(1) Informs client when representation on the matter has concluded.

(2) It fixes the accrual date for the period of limitations.

(3) Establishes the point at which the client becomes a former client for conflicts of analysis purposes.[69]

[67] RONALD E. MALLEN, LEGAL MALPRACTICE § 2:46 (2020 ed. 2020).
[68] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAW. DESKBOOK ON PROF. RESP. § 1.16-2(b)(5) (2018-2019 ed. 2018).
[69] RULES OF PROF'L CONDUCT r. 1.9 (2007).

2. Rule 1.16 Declining or Termination representation.[70]

> "A written statement to the client confirming the termination of the relationship and the basis of the termination reduces the possibility of misunderstanding the status of the relationship. The written statement should be sent to the client before or within a reasonable time after the termination of the relationship."[71]

3. A client whose representation is dormant becomes a former client if the attorney or the client terminates the relationship.[72]

VII. MAINTAINING COMPETENCE PURSUANT TO RULE 1.1

A. The Obligation to Keep Abreast of Changes in the Law and its Practice, Including the Benefits and Risks Associated with Relevant Technology.

1. The commentary to Rule 1.1 provides: "To maintain the requisite knowledge and skill, an attorney should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the attorney is subject."[73]

B. A Case Study – The Internet of Things.[74]

1. The internet of things is comprised of everything connected to the internet linked through wired and wireless networks around the globe.[75]

2. The internet of things generates trillions of gigabytes of data per year.[76]

3. This can include data that a user might actively input into a device such as name, email, address, height, age, weight and eating habits. The data can also include GPS mapping, heartrate, geolocations of photos taken on a smart phone, the types of exercise one engages in, and sleep schedules. It also includes discrete cameras, smart doorbells, Google Home or Amazon Alexa.[77]

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[70] RULES OF PROF'L CONDUCT r. 1.16 (2007).
[71] *Id.,* cmt. (2007).
[72] *Id*. and RULES OF PROF'L CONDUCT r. 1.9; ACTEC Commentaries at 123 and 140.
[73] RULES OF PROF'L CONDUCT r. 1.1 cmt. (1978).
[74] The "Internet of Things" is a shorthand reference to "smart" devices. *See* Ronald J. Hedges and Kevin F. Ryan, *The IoT: What Is It, What Can Happen With It, and What Can Be Done When Something Happens*, N.Y. ST. B. ASS'N. (Mar/Apr. 2018).
[75] William Neuman and Luis James Butters, *The Internet of Things Is Coming for Us*, N.Y. TIMES, Jan. 22, 2017 at SR4.
[76] *Cisco Visual Networking Index: Forecast and Methodology, 2016-2021* (June 6, 2017), available at *cisco.com.*
[77] Steven I. Friedland, *Drinking from the Fire Hose: How Massive Self-Surveillance from the Internet of Things is Changing the Face of Privacy*, 119 W. VA. L. REV. 891, 897 (2017).

4. This data can be gathered by smart phones, wearables, connected toys, appliances, smart home goods, and smart vehicles.[78]

5. This data can potentially be used in discovery to prove or disprove allegations.[79] It can be used to help determine the credibility of witness testimony.[80] For elderly clients with memory or mobility issues, smart devices can assist by providing notifications about appointments or when certain bills may be due, while cleaning appliances such as the Roomba vacuum clean the house without requiring manual labor. The information collected by these devices will become more available and sought after in discovery, specifically in cases where wills, guardianships, and mental competence is being challenged.

6. There remains the question, however, of whether these devices are infallible. Because they are imperfect machines, they may not always be reliable and provide perfect data.

[78] SAMUEL GREENGARD, THE INTERNET OF THINGS 90 (2015).
[79] Kristen B. Weil and Ronald J. Hedges, *The "Internet of Things": New Challenges in Civil Discovery,* PRETRIAL PRAC. & DISCOVERY, ABA SEC. OF LITG. (Mar. 20, 2018).
[80] Katherine E. Vinez, *The Admissibility of Data Collected from Wearable Devices*, 4 STETSON J. ADVOC. & L. 1 (2017).