MAINTAINING AN ETHICAL PRACTICE

BY
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I. Standards of Ethical Conduct

A. Attorney-Client Relationship

A lawyer has a duty of competence to his clients. This requires legal knowledge, skill, thoroughness and preparation necessary to represent the client. NEVADA RULE OF PROF'L CONDUCT R. 1.1 (2006) (hereinafter NRPC).

The lawyer must also be diligent in representing the client. NRPC 1.3.

A lawyer must abide by the client's decisions regarding the purpose of the representation, and must consult the client about the means by which that objective will be fulfilled. This means that the lawyer must promptly inform the client of decisions and circumstances requiring the client's consent and must explain matters to the extent necessary for the client to make informed decisions. In addition, the lawyer must keep the client informed of the status of the matter and promptly comply with requests for information. NRPC 1.2; 1.4.

1. Prospective Client and Duty of Confidentiality

When a prospective client seeks the lawyer's counsel and advice, the lawyer must not use that information to the person's detriment, or otherwise reveal the information gained from that consultation, even if no attorney client relationship is formed. Furthermore, a lawyer must not represent a client with interests materially adverse to the prospective client in the same or substantially related matter if the attorney has gained information from the prospective client that would be harmful to the prospective client. This rule does not apply if the client and prospective client have given informed consent or if the lawyer took steps to limit his or her exposure to disqualifying information, the attorney is screened from the matter, and the prospective client is notified. NRPC 1.18. A person who communicates information to a lawyer with no expectation of forming an attorney client relationship is not a prospective client. MODEL RULE OF PROF'L CONDUCT R. 1.18 cmt. (2000) (hereinafter MRPC).

2. Client and Duty of Confidentiality

A lawyer may not reveal confidential information gained from the representation of a client unless that client gives informed consent or the disclosure is impliedly authorized to carry out the representation. A lawyer may, however, reveal confidential information if reasonably necessary: (1) to prevent or mitigate a crime or fraud if the lawyer's services have been used (but the lawyer must first try and persuade the client to act otherwise); (2) to secure legal advice or establish a claim or defense; or (3) to prevent reasonably certain death or serious bodily injury. But, a lawyer must reveal confidential

information to prevent a criminal act the lawyer believes is likely to result in reasonably certain death or serious bodily injury. NRPC 1.6.

3. Incapacitated Client and Duty of Confidentiality

Whenever a client has diminished capacity, either from a mental impairment, minority, or otherwise, the lawyer must, as far as possible, maintain a normal attorney-client relationship with the person. The lawyer may seek to have a guardian appointed if the lawyer reasonably believes that the client has a diminished capacity; is at risk of physical, financial, or other harm' and if the client cannot act in his own best interests. If a guardian is appointed, the lawyer must continue to keep the client's information confidential, but may reveal information that is necessary to protect the client's interests. NRPC 1.14. A lawyer may disclose information necessary to protect the interests of a client with diminished capacity. AM. COLL. OF TRUST AND ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 75 (4th ed. 2006) (commentary on MRPC 1.6) (hereinafter ACTEC Commentary).

4. Deceased Client and Duty of Confidentiality

A lawyer may not reveal confidential information gained from the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. A lawyer may reveal confidential information if reasonably necessary: (1) to prevent or mitigate a crime or fraud, if the lawyer's services have been used (but the lawyer must first try and persuade the client to act otherwise); (2) to secure legal advice or establish a claim or defense; or (3) to prevent reasonably certain death or serious bodily injury. However, a lawyer must reveal confidential information to prevent a criminal act the lawyer believes is likely to result in reasonably certain death or serious bodily injury. NRPC 1.6.

a. Testamentary/Posthumous Disclosure Exception: A lawyer's duty of confidentiality extends beyond the client's death. However, the general rule with respect to confidential communications between attorney and client for the purpose of preparing a client's will is that such communications are privileged during the testator's lifetime, and also after the testator's death, unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client. *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977). The U.S. Supreme Court concurred with the testamentary/posthumous disclosure exception, and further cited from the *Osborn* decision, when it held: "The rationale for such disclosure is that it furthers the client's intent." *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998) (citing *Osborn*, 561 F.2d at 1340, n. 11).

The Nevada Supreme Court adopted the *Osborn* reasoning in *Clark v. Second Judicial District of the State of Nevada*, 692 P.2d 512 (Nev. 1985). In *Clark*, the Court held that statements made by the decedent to his attorney during the preparation of a will could be disclosed where the parties to the litigation were

heirs and next of kin. *Id.* at 514 (citing *Glover v. Patten*, 165 U.S. 394, 406 (1897)). The Nevada Supreme Court also cited the Advisory Committee Notes to the Draft Federal Rules of Evidence, from which it noted the Nevada Legislature had drawn its attorney-client privilege rules. Those notes stated that where "the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter." *Id.* at 515.

The U.S. Supreme Court further stated that, "[a]bout half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client (as opposed to parties claiming against the estate, for whom the privilege is not waived). *Swindler*, 524 U.S. at 403, n.2. *See, e.g.*, ALA. R. EVID. 502(d)(2) (2008); ARK. CODE ANN. § 16-41-101, Rule 502(d)(2) (2008); NEB. REV. STAT. ANN. § 27-503(4)(b) (2008). California's statute is exceptional in that it apparently allow the attorney to assert the privilege only so long as a holder of the privilege(the estate's personal representative exists), suggesting the privilege terminates when the estate is wound up. *See* CAL. EVID. CODE §§ 954, 957 (Deering 2008); *Swidler*, 524 U.S. at 405. These statutes do not expressly address the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. *See, e.g.*, ARK. CODE ANN. § 16-41-101, Rule 502(c). Thus, they do not refute or affirm the general presumption in the case law that the privilege survives.

The U.S. Supreme Court explained that the testamentary or posthumous disclosure was permissible because the privilege could be impliedly waived in order to fulfill the client's testamentary intent. *Swindler*, 524 U.S. at 405 (citing *Glover*, 165 U.S. at 407-08 (citations omitted)).

The Nevada Rules of Professional Conduct also imply that a testamentary exception would apply to confidential communications under the rationale that the lawyer must continue to keep the client's information confidential in the context of a guardianship (i.e., due to diminished capacity), *but may reveal information that is necessary to protect the client's interests. See* NRPC 1.14.

The American College of Trusts and Estate Counsel ("ACTEC") concurs with the general case consensus on this matter by stating in its commentaries to the Model Rules of Professional Conduct, "A lawyer's duty of confidentiality extends beyond the client's death, except where consent is given by the client's personal representative or if the client expressly or impliedly authorized the disclosure, but only to the extent that the lawyer would be compelled to testify as a witness. *A lawyer may also be impliedly authorized to disclose client information to promote the client's estate plan, forestall litigation, preserve*

assets, or further family understanding of a client's wishes. ACTEC Commentary on MRPC 1.6 (Confidentiality of Information) (emphasis added).

B. Duty of Candor

1. Statements to Third Parties.

When dealing with third persons, a lawyer may not knowingly make false statements of material fact or fail to disclose material facts when necessary to avoid assisting a client's fraudulent or criminal act. NRPC 4.1. A lawyer is also prohibited from communicating with represented persons without the consent of the other attorney. NRPC 4.2. When an individual is unrepresented, an attorney may not counsel the unrepresented person, other than to tell them to obtain counsel, and must not imply that he is disinterested in the matter. NRPC 4.3. Finally, the lawyer shall not use means of practice with no other purpose than to embarrass, delay, or burden the third person. NRPC 4.4.

2. Representations to the Court

An attorney must also be careful to avoid subjecting him or herself or his or her client to Rule 11 sanctions under the Nevada Rules of Civil Procedure (NRCP) through abrogation of NRPC 4.4. NRCP 11(b) requires an attorney who files any document with a court to represent that:

> (1) [the information he provides] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Failure to follow the four requirements of NRCP 11(b) may result in sanctions, not only to the lawyer and his firm, but potentially to his clients. Under Rule 11(c), these sanctions may be imposed upon the filing of a motion by opposing counsel, or by the court, sua sponte, and are generally monetary in nature. NRCP 11(b) conforms so closely to the requirements of NRPC 4.4 in purpose and practice that it would be difficult to break one without breaking the other.

In *Harlyn Sales Corp. v. Investment Portfolios*, the federal district court for the Northern District of Illinois offered some suggestions for ensuring that a claim is not filed in a frivolous manner. They include the following:

> (1) Make a reasonable inquiry into the facts of the case before filing a pleading, motion, or any paper;
>
> (2) Make a reasonable investigation into the law applying to the case;
>
> (3) Do not submit any pleading to harass, delay, or increase the cost of litigation for the opposing party;
>
> (4) Do not include unnecessary parties;
>
> (5) Do not sign any document that could mislead the court; and
>
> (6) Make sure every document explains the matter without a requirement for qualification. The writing must speak the entire truth by itself.

142 F.R.D. 671 (N.D. Ill. 1992). It is also important to recognize that, although a court may exercise its discretion and decline to levy sanctions on an attorney or his client, the court may still pursue other avenues. In the August 2003 issue of *Nevada Lawyer*, an article entitled *Rule 11: Policing Ourselves* offered the reminder that "[e]ven if a judge decides that an attorney should not be sanctioned, there is always the opportunity to file a complaint against the alleged offender with the State Bar. According to an Assistant Bar Counsel, the most frequent complaints against attorneys are for failure to communicate and failure to supervise employees." Kathleen S. Niggemyer, *Rule 11: Policing Ourselves*, NEVADA LAWYER (Aug. 2003). For example, disciplinary actions could arise under NRPC 3.1 (prohibiting the assertion of frivolous claims), NRPC 4.1(imposing a duty to be truthful in dealing with others on the client's behalf), or NRPC 4.4 (prohibiting the use of acts with no other purpose than to embarrass, delay, or burden another person).

In addition to the requirements outlined above, local court rules often mandate the duty of candor by statute to ensure justice and judicial economy. For example, an attorney attempting to exclude evidence with a motion in limine may not file it until first holding a personal or telephone conference with the opposing attorney to attempt to resolve the issues, and then signing an unsworn declaration, under penalty of perjury, or affidavit concerning his or her efforts to resolve these issues. *See* EIGHTH JUDICIAL DIST. CT R. 2.47 (for an example from the Nevada Eighth Judicial District Court).

3. Reporting Misconduct of Other Lawyers

A lawyer must report misconduct of another lawyer. NRPC 8.3. Misconduct is (1) a violation of the rules of professional conduct; (2) commission of a criminal act adversely reflecting on the lawyer's ability to practice; (3) dishonest conduct; (4)

indicating an ability to improperly influence a government official or agency; or (5) conduct prejudicial to the administration of justice. NRPC 8.3. However, threats by counsel to file disciplinary charges against his opponent may violate one or more of Rules 8.4(b), 3.1, 4.1, 4.4 and 8.4 (d) (which are identical to the NRPC). Model Rule 8.4(d) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. "We have previously opined that if a lawyer's conduct is extortionate under the criminal law of the respective jurisdiction, that conduct violates Rule 8.4(b)." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992)). A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel to coerce settlement in a civil case would appear to come under the Model Penal Code's definition of criminal extortion unless it concerns the lawyer's conduct in the very case in which the threat is made, or conduct with is the subject of the case in which the threat is made (i.e., a malpractice action). *Id.*

C. Communication of Legal Services

1. Communication to Public

The lawyer may not make false or misleading statements about legal services, create unjustified or unreasonable expectations, or make comparisons unless they can be factually substantiated. NRPC 7.1. A lawyer may advertise in print or broadcast media so long as the advertisement does not constitute solicitation (see below) and is factual. A lawyer may not give anything of value for referrals, but may pay for a referral service. NRPC 7.2.

2. Solicitation to Public

A lawyer may not directly solicit employment in person from a prospective client with whom the lawyer has no prior family or professional relationship when such solicitation is for the lawyer's pecuniary gain. NRPC 7.3. A lawyer may, however, send out targeted mailing to prospective clients if the mailing is sent out no earlier than forty five (45) days after the occurrence creating the need for representation and the mailing clearly states on the outside "THIS IS AN ADVERTISEMENT." *Id.*

3. Communication of Qualifications to Public

A lawyer may state that he is a specialist or an expert in an area provided that he: (1) is certified by the state; (2) devotes at least one third of his practice in the area, completes ten (10) hours of CLE in the area, and carries $500,000 of liability insurance; and (3) registers with the state bar. NRPC 7.4.

II. Avoiding Conflicts of Interest (Do You Know Who Your Client Is?)

A. Avoiding Conflicts of Interest

1. Current Clients

A lawyer must avoid conflicts with current clients. A conflict exists where representation of one person will adversely affect representation of another or there is a risk that representation will be materially limited by responsibilities to another client. NRPC 1.7. Notwithstanding this rule, a lawyer may represent clients where a conflict of interest exists if (1) the lawyer reasonably believes that he may provide competent representation to the affected client; (2) representation is not prohibited by law; (3) it is not a claim of one client against the other client; and (4) *each client gives informed consent*. *Id.* (emphasis added).

A lawyer may not use information relating to the representation of a client to that client's disadvantage unless the client gives informed consent. In addition, a lawyer may not make an aggregate settlement unless each client gives informed consent. NRPC 1.8.

2. Multiple Representation

Two potential areas in which future conflicts may arise occur where clients keep secrets from family members and where clients claim to have stable familial relationships, but where future conflicts lie on the horizon. Joseph M. Hartley, *Hidden Conflicts of Interest*, GPSOLO, July/August 2002. Possible conflicts scenarios could include future conflicts among family members, secretive clients who keep secrets from the family members they refer to an attorney, and multigenerational representation. *Id.* Under these circumstances, it is appropriate to make an initial disclosure that the attorney will be unable to represent the clients if a conflict arises. *Id.*

Problems may also arise between married couples when children from prior marriages are involved, the spouses have significantly different sizes of estates, or where the spouses simply have different goals, due to age differences or other factors. In addition, problems may arise where children are involved, especially where one or more children are becoming involved in a family business. In each of these cases, separate representation may be advisable so as to avoid potential conflicts. 36 MODERN ESTATE PLANNING § 36.04.

A lawyer may represent multiple potential clients (i.e., husband and wife or parent and child), but should review the terms and potential problems with the representation and should also consider holding separate interviews with the clients in which potential conflicts could more easily surface. However, a lawyer should not take on an inherently adversarial contract not subject to rescission by one party without the consent and joinder of the other. A lawyer may wish to urge a joint client who unilaterally imparts confidential information to make an effort to communicate confidences to the other party. ACTEC Commentary on MRPC 1.6.

One means of ensuring that the representation of multiple potential clients preserves client confidences is through the use of a confidentiality waiver in which certain conflicts may be waived. *See* attached form entitled, "Statement of Client Representation" (adapted from ACTEC.org "Forms").

3. Who Do You Represent?

In order to properly determine the duties owed by an attorney to his client, the client and those in privity with the client must first be identified. In *Lucas v. Hamm*, the drafter of a trust was sued when the beneficiaries were informed that they were going to receive $75,000 less than they should have received under the trust because the drafting attorney made a mistake in writing the will. 364 P.2d 685 (Cal. 1961). The California Supreme Court recognized a right of action on the part of the beneficiaries under the will, and held him liable for his breach, which breach was determined to be a failure to draft the will in conformity with the testator's wishes. *Id*. at 689. In reaching this conclusion, the court stated:

> Since . . . the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries.

Id. Therefore, in considering potential conflicts that could arise in multigenerational estate planning situations, the estate planning attorney should never forget that the beneficiaries of the instruments he is drafting are additional parties to whom he may be held accountable. It should also be noted that this liability arises from the fiduciary relationship between the attorney and his original client. The court in *Lucas* went on to state:

> The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.

Id.

The Nevada Supreme Court distinguished *Hamm* in *Hartford Accident & Indemnity Co. v. Rogers*, 613 P.2d 1025 (Nev. 1980). There, the plaintiff insurance company sought recovery from the attorney originally hired to represent the insured. The attorney had previously received an insurance payment that he was to apply to the insured's medical bills. The attorney's relationship with the insured was terminated shortly thereafter, and the attorney told his client (the insured) that he would return the check to the insurance company after he received compensation for his services. The

client (insured) never paid, and the attorney subsequently retained the money. The insurance company then sent another payment to the insured's new attorney and filed an action against the original attorney to recover the double payment.

The Court held that the insurance company did not have standing to assert a claim against the original attorney because it was not an intended beneficiary of the attorney's services. In so holding, the Nevada Supreme Court stated, "[t]he dispositive fact in this case is that appellant and respondent where not in a professional relationship. . . . Appellant was . . . not an intended beneficiary of any of respondent's services." *Id.* at 1027.

Therefore, the key factor in holding an attorney liable to third-party beneficiaries is that there must be privity between the attorney and the parties claiming to have been wronged by the attorney's actions. Where third parties are intended beneficiaries of a contract between an attorney and his client, the attorney may be held liable to the third-party beneficiaries.

C. Designated Agents and Potential Conflicts

1. Powers of Attorney

Another area in which conflicts may arise is in principal-agent situations, especially those involving powers of attorney. A power of attorney is "a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term 'power of attorney' is used." Uniform Power of Attorney Act § 102(7) (2006) (hereinafter "UPAA"). When an attorney represents an individual who has granted a power of attorney to a third party agent to act on their behalf, questions may arise as to whether the attorney represents the principal, the principal's agent, or both.

The Uniform Power of Attorney Act (UPAA) unequivocally indicates that an agent must "(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest; (2) act in good faith; and (3) act only within the scope of authority granted in the power of attorney." UPAA § 114(a). Absent language in the power of attorney to indicate otherwise, an agent must

> (1) act loyally for the principal's benefit; (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest; (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal; (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and (6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the

> plan is consistent with the principal's best interest based on all relevant factors, including: (A) the value and nature of the principal's property; (B) the principal's foreseeable obligations and need for maintenance; (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (D) eligibility for a benefit, a program, or assistance under a statute or regulation.

UPAA § 114(b).

An agent who benefits from an act, or who has a conflict of interest with the client, is not necessarily liable for a breach so long as he acted with care, competence, and diligence for the best interests of the principal. UPAA § 114(d).

It is clear that that under the UPAA, an agent is responsible for using diligence in accounting for the best interests of the principal. However, so long as the agent acts with due care, he will not be liable for a breach of his fiduciary duty even if he benefits from his actions or decisions.

Even though Nevada has not officially adopted the UPAA, its courts concur with the determinations of the National Conference of Commissioners on Uniform State Laws. In *LeMon v. Landers*, the Nevada Supreme Court held that an agent in a power of attorney situation is a fiduciary to the principal, and owes her the highest duties of fidelity, loyalty, and honesty. *LeMon v. Landers*, 402 P.2d 648, 649 (Nev. 1965). The Court continued by stating that the object of agency is to ensure the best business advantage of the principal, and that an agent may not seek personal gain in hostility to the principal. *Id.* (*citing* Restatement 2d, *Agency* § 387).

In Nevada, the principal's agent owes the highest fiduciary duties to the principal, including those of fidelity, loyalty, and care. The agent must also seek to further the principal's best interests. However, it would be pure folly for an attorney to condition his or her fiduciary duties to the client-principal upon any reliance or expectation that the agent of the principal is properly performing his or her fiduciary duties under the power of attorney. The attorney must focus on the client's needs and wishes when working with the client-principal's agent, and should make decisions based upon the attorney's fiduciary duty to safeguard and preserve the client-principal's best interests. An attorney may not hide behind his client's agent when that agent has consulted the attorney and acted in such a way as to benefit the agent at the principal's expense.

III. How to Avoid Unknowingly Creating Civil Liability

A. Avoiding Malpractice Liability

A lawyer shall not make an agreement prospectively limiting malpractice liability unless the client is independently represented in making the agreement. NRPC 1.8. Interestingly, however, the comments to the American Bar Association's Model Rules of Professional Conduct state that this rule, which is identical to the Nevada rule, does not

prohibit an attorney from entering into an agreement to arbitrate a malpractice claim or to practice as a limited liability entity. MRPC 1.8 cmt. 14.

Although an attorney may not bargain away his liability for malpractice, the lawyer may take steps to ensure that he does not act so as to create civil liability for himself. One such step is to understand the documents that the attorney creates for his clients. For example, this includes understanding the terms of a legal document and how it affects the legal rights of the client.

An attorney may create civil liability in making representations to clients, third parties, the tribunal, or even the opposing counsel. In *Ricks v. Dabney*, the Nevada Supreme Court stated that "any violation of the Nevada Rules of Professional Conduct does not create a private right of action;" however, it is possible that acts that violate the Nevada Rules of Professional Conduct may also create liability under civil and criminal law. 177 P.3d 1060, 1064 (Nev. 2008). For example, in *Cicone v. Urs Corp.*, the California Court of Appeals held an attorney liable for making false statements, even though he believed them to be true, because he did not have grounds for a good faith belief in their truthfulness.

> Although a duty to disclose a material fact normally arises only where there exists a confidential relation between the parties or other special circumstances require disclosure, where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.

Cicone v. Urs Corp., 227 Cal. Rptr. 887, 891 (Cal. Ct. App. 1986); *Goodman v. Kennedy*, 556 P.2d 737, 745 (Cal. 1976); *Rogers v. Warden*, 125 P.2d 7, 9 (Cal. 1942).

In *Horne v. Peckham*, another legal malpractice action, the court upheld a jury instruction which stated:

> It is the duty of an attorney who is a general practitioner to refer his client to a specialist or recommend the assistance of a specialist under the circumstances a reasonably careful and skilful practitioner would do so.
>
> If he fails to perform that duty and undertakes to perform professional services without the aid of a specialist, it is his further duty to have the knowledge and skill ordinarily used by specialists in good standing in the same or similar locality and under the same circumstances.
>
> A failure to perform any such duty is negligence.

158 Cal. Rptr. 714, 720 (1979), *disapproved on other grounds*, Itt Small Business Fin. Corp. v. Niles, 885 P.2d 965 (Cal. 1994). It is clear that an attorney's failure to provide a duty of competence to the client, which is imposed concurrently by the ethical rules, may

also be grounds for civil liability. In Nevada, the attorney has both a fiduciary duty under civil and criminal law and an ethical duty under NRPC 1.1, which requires an attorney to provide competent representation.

> When a lawyer agrees to take a client's case, that lawyer takes on a fiduciary responsibility to the client. Like "competence," the term "fiduciary duty" . . . has both an ethical and negligence usage. . . . It is that duty which a lawyer owes to each client, by virtue of the lawyer's special position of trust over the client's affairs. It requires the lawyer to place the client's cause above the lawyer's own individual interests, and always to act on the client's behalf in the utmost good faith.

RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 53-54 (2d ed., 2003). In addition, NRPC 7.4 places additional ethical requirements upon attorneys who claim to be certified in specialized areas of practice.

B. Competence is the Key

In *Price on Contemporary Estate Planning*, John Price suggests that estate planners can avoid most civil liability risks by being competent, maintaining the confidences of clients, and by avoiding conflicts. JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING § 1.1 (2008). He continues by noting that there are two major ways in which an attorney may encounter problems. They are violations of the ethical rules and malpractice claims. Although a violation of the ethical rules will not necessarily subject a lawyer to civil liability, it can be evidence of a breach of a fiduciary duty. MRPC, Scope of Rules § 20.

Lawyers must obtain and keep current information regarding estate and gift taxation, as well as information regarding business law and taxation and family law. Lawyers are increasingly being held liable for failure to recognize a problem that could have been solved or avoided through doing some simple, or at times extensive, research. 3-36 MODERN ESTATE PLANNING § 36.05.

In addition to specific knowledge of taxation and business and family law, a lawyer needs to be aware of, and follow closely, the requirements for the execution and attestation of wills. Attorneys will not be excused for failing to obtain the correct number of witnesses to oversee the signing of a will or for other simple failures. *Id.* Yet another area in which a lawyer can encounter trouble, and one which has been addressed above, is in not understanding the particulars of a power of attorney.

In sum, an attorney is most likely to limit his liability by working only within his areas of specialty and staying current in his field. In addition, clear communication with clients, disclosure of potential conflicts, and extensive documentation throughout the process will ensure that the attorney has taken the necessary steps to avoid liability. *Id.* Finally, a lawyer should understand the legal effect of the documents he or she prepares

for the client. The attorney must supervise his or her employees, thoroughly read prepared documents, and involve him or herself in the drafting process.

IV. Improving Your Ability to Set and Collect Fair Legal Fees

A. Collecting Legal Fees

The reasonableness of legal fees is determined under local law by the court having jurisdiction over the estate. The reasonableness of fees is determined based upon the following factors: (1) the size and complexity of the estate; (2) the time expended by the attorney; and (3) the seriousness of estate problems and the results that were obtained. 1-11 MODERN ESTATE PLANNING § 11.06 (citing First Nat'l Bank of Topeka v. United States, 233 F. Supp. 19 (D. Kan. 1964); Bank of Nevada v. United States, 1980 U.S. Dist. LEXIS 12145 (D. Nev. 1980); Estate of Prell v. Commissioner, 48 T.C. 67 (1967); Estate of Hunt v. Commissioner, 11 T.C. 984 (1948)).

B. Tax Considerations with Legal Fees

The Internal Revenue Service has established guidelines for collecting legal fees in Circular 230 which state generally that a lawyer may not charge an unconscionable fee in any matter before the IRS. 31 C.F.R. § 10.27 (2008). Legal matters before the IRS include tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the IRS or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the IRS. *Id.* § 10.27(c)(2). A presentation includes communications with the IRS and its agents, the preparation of documents, and communications and advice to clients. *Id.* In addition, the IRS allows for contingent fees, so long as they meet established guidelines. *Id.*

"The willingness of clients to pay legal fees can be increased, and their pain in so doing decreased, if they can obtain a tax deduction for their payment." Frank S. Berall, *Deductibility of Legal Fees for Estate Planning and Administration*, PRACTICAL TAX LAWYER, Spring 2003, 35, 36. One suggestion is to break the billing of legal fees into three categories: "(1) those incurred to prepare wills and other testamentary documents, which are not allowable as deductions; (2) those incurred for tax advice and return preparation, which are deductible; and (3) other estate planning expenses the deduction of which will probably be disallowed by the IRS, but might be sustained by a court, thus placing them in a gray area." *Id.* This will allow the client to understand the bill more fully and to more easily determine which fees may be deducted on their tax returns.

A fee agreement should give a description of what is and is not included in the services provided by the attorney. BARRY S. ENGEL, ASSET PROTECTION PLANNING GUIDE: A STATE-OF-THE-ART APPROACH TO INTEGRATED ESTATE PLANNING, ¶ 125. See *Engagement Agreement and Legal Fee Policy.*