
How to Draft Effective Wills and Trusts for Your Clients in California



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HOW TO DRAFT EFFECTIVE WILLS AND TRUSTS FOR YOUR CLIENTS IN CALIFORNIA

TABLE OF CONTENTS

FUNDAMENTAL PRINCIPLES OF WILL DRAFTING	1
A. Selecting the Vehicle – Initial Advice to the Client	2
B. Gathering Client Information.....	2
C. The Statutory ABCs: What is Required to Execute a Will?	3
D. Methods of Designating Fiduciaries	6
E. Disinheritance	7
F. Protective Clauses for Minors, Incompetent Persons and Beneficiaries With Special Needs.....	10
G. Building Flexibility Into the Plan – Checklist of Special Provisions	17
H. Practical Points With Sample Forms	20
I. Developing a Document Preparation System	22
 USING LIVING TRUSTS AND POWERS OF ATTORNEY AS ESTATE PLANNING TOOLS	 25
- Table of Contents for The Doe Family Living Trust	26
- Last Will of John Doe.....	129
- Advance Healthcare Directive and Durable Power of Attorney for Healthcare and Personal Care Decisions of John Doe.....	134
- Grant of Authority to Health Care Agent and Authorization Under HIPAA and California Law for Release of Health Information of John Doe	151
 BASIC TAX CONSIDERATIONS – WHAT YOU NEED TO KNOW IN ORDER TO CHOOSE THE APPROPRIATE PLAN	 153
A. Tax Considerations of Drafting Living or Testamentary Trusts.....	154
B. Marital Deduction Planning – Qualifications and Basic Formula Approaches.....	156
C. Estate and Gift Taxes	163
D. Generation Skipping Transfer Taxes	167
E. Income Tax-Ramifications of Trusts	168
 ETHICS IN THE ESTATE PLANNING CONTEXT.....	 170
A. Selected Rules of Professional Conduct	171
B. Who’s the Client? Conflict of Interest.....	179
C. Competency – A Word to the Wise	200
D. Practice Before the I.R.S.....	204
E. Attorney Fees.....	210

ETHICS IN THE ESTATE PLANNING CONTEXT

Richard A. McFarlane

Ethics in the Estate Planning Context

by

Richard A. McFarlane, Esq.

“An eminent lawyer cannot be a dishonest man” — Daniel Webster

A. Selected Rules of Professional Conduct

The California Rules of Professional Conduct state, “A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member’s parent, child, sibling, or spouse, except where the client is related to the member.”¹ The official discussion to this Rule states:

A member *may accept* a gift from a member’s client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible *ought not to be subject to professional discipline*. On the other hand, where impermissible influence occurred, discipline is appropriate.²

Notwithstanding the permissive language of the official discussion, the better practice is to not accept any gifts from clients who are not relatives.

In the case *Estate of Auen*, the Court of Appeal invalidated an decedent’s entire will because of testamentary gifts made to the decedent’s lawyers and the lawyer’s family.³ In *Auen*, the trial court found that the decedent and the decedent’s attorney had developed a “personal relationship” with each other. The trial court also found that, although the decedent’s attorney did not personally draft the will, she did “participated in

¹ CAL. R. PROF’L CONDUCT 4-400 (West 2005).

² *Id.*, discussion.

³ *Estate of Auen*, 30 Cal.App.4th 300, 35 Cal.Rptr.2d 557 (1994)

its drafting, both in content and in form.”⁴ On appeal, the Court of Appeal affirmed the trial court

For the foregoing reasons, we agree with the trial court that a presumption of undue influence arises upon proof that the person alleged to have exerted undue influence (1) had an attorney-client relationship with the testator at the time the will was prepared, (2) actively participated in preparation or execution of the will, and (3) benefitted thereby.⁵

The seminal case on attorneys receiving gifts from clients is *Magee v. State Bar*.⁶ In this case the attorney in fact drafted the decedent’s will and included large gifts to himself.

The California Supreme Court ruled:

The highest good faith an attorney owes his client requires the attorney to rebut the inference of undue influence that arises when he receives a gift from the client under circumstances that reasonably suggest such influence.

....

An attorney’s duty of fidelity to his client involves far more than refraining from exercising undue influence. His fiduciary duty is of the very highest character. For this reason all business dealings between attorney and client whereby the attorney benefits are closely scrutinized for any unfairness on the attorney’s part.

....

There is no rule that attorneys should never draw wills in which they receive gifts. There is nothing improper in an attorney’s drawing wills for his family or for relatives, provided the gift to him is reasonable under the circumstances. Similarly, there is nothing improper in drawing wills for close friends or for clients if the gift to the attorney is a modest one. As the instant case suggests, however, attorneys take a grave risk in drawing wills in which they receive more than a modest gift that is in keeping with the nature of the relationship they have with the client. Petitioner took this risk, unwisely, and one consequence was that he lost

⁴ *Id.* at 307.

⁵ *Id.* at 311.

⁶ *Magee v. State Bar*, 58 Cal.2d 423, 24 Cal.Rptr. 839 (1962).

the substantial gift in [his client's] will when it was contested.

Even though an attorney may be acting only to carry out the wishes of his client in drawing a will containing a gift to himself, he should send the client to another lawyer when the circumstances would support an inference of wrongdoing.⁷

Magee anticipated Probate Code sections 21350-21356 by three decades.⁸ “The 1993 legislation was introduced in response to report that an Orange County attorney who represented a large number of Leisure World residents has drafted numerous wills and trusts under which he was a major or exclusive beneficiary, and had abused his position as trustee or conservator in many case to benefit himself or his law partners.”⁹ Probate Code section 21350 states:

- (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:
 - (1) The person who drafted the instrument.
 - (2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.
 - (3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation.
 - (4) Any person who has a fiduciary relationship with the transferor,

⁷ *Id.* at 431-433 (Citations omitted). Although Attorney Magee was not disciplined in this case, the Supreme Court ruled “An attorney who by undue influence obtains a gift from a client *inter vivos* or in a will is guilty of an act involving moral turpitude. [citations]” *Id.* at 429.

⁸ Act of July 30, 1993, 1993 Cal. Stat. ch. 293, § 8 *codified at* CAL. PROBATE CODE § 21350.

⁹ *Rice v. Clark*, 28 Cal.4th 89 (2002).

including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).

(6) A care custodian of a dependent adult who is the transferor.

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

(b) For purposes of this section, "a person who is related by blood or marriage" to a person means all of the following:

(1) The person's spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person's spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6 shall be applicable.

(c) For purposes of this section, the term "dependent adult" has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64. The term "care custodian" has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code.

(d) For purposes of this section, "domestic partner" means a domestic partner as defined under Section 297 of the Family Code.¹⁰

Proceedings to enforce this statute are not "contests" in violation of a "no contest" clause contained in any will or trust.¹¹ There are specific exceptions to this prohibition contained in section 21351. The exceptions are:

¹⁰ CAL. PROBATE CODE § 21350 (West 2005).

¹¹ CAL. PROBATE CODE § 21306(a)(3) (West 2005); *see also Graham v Lenzi* 37 Cal App 4th 248, 43 Cal Rptr 2d 407 (1995).

Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the Family Code, of the transferee or the person who drafted the instrument. For purposes of this section, "cohabitant" has the meaning set forth in Section 13700 of the Penal Code. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:

"CERTIFICATE OF INDEPENDENT REVIEW

I, -----, (attorney's name) have reviewed -----
----- (name of instrument) and counseled my client, -----
----- (name of client), on the nature and consequences of the
transfer, or transfers, of property to -----
(name of potentially disqualified person) contained in the instrument. I am
so disassociated from the interest of the transferee as to be in a position to
advise my client independently, impartially, and confidentially as to the
consequences of the transfer. On the basis of this counsel, I conclude that
the transfer, or transfers, in the instrument that otherwise might be invalid
under Section 21350 of the Probate Code are valid because the transfer, or
transfers, are not the product of fraud, menace, duress, or undue influence.
-----"

(Name of Attorney) (Date)

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable

attorney's fees.

(e) Subdivision (d) shall apply only to the following instruments:

(1) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

(2) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

(3) Any instrument executed by a resident of California who was not a resident at the time the instrument was executed.

(f) The transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(g) For purposes of this section, "related by blood or marriage" shall include persons within the fifth degree or heirs of the transferor.

(h) The transfer does not exceed the sum of three thousand dollars (\$3,000). This subdivision shall not apply if the total value of the property in the estate of the transferor does not exceed the amount prescribed in Section 13100.

(i) The transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California.¹²

In the case *Osornio v. Wiengarten*, the Court of Appeal extended the rule of *Lucas v. Hamm*, discussed in the next section, and found that attorneys who do not advise their clients of the consequences of Probate Code 21350 may be held liable for professional negligence to both the client-testator and the nonclient-beneficiary.¹³ The Court of Appeal ruled:

¹² CAL. PROBATE CODE § 21351 (West 2005).

¹³ *Osornio, v. Weingarten*, 124 Cal.App.4th 304; 21 Cal.Rptr.3d 246, 312-313 (2004).

The imposition of liability upon attorneys to advise their transferor-clients concerning the potential disqualifying effects of transfers to persons identified in [Probate Code] section 21350(a) does not impose an undue burden on the legal profession. Further, such a finding of duty . . . will not compromise the attorney's duty of undivided loyalty to the client-transferor. . . . Instead, it imposes a duty upon the attorney to advise the client of section 21350(a)'s effect of potentially disqualifying the proposed donee, and to assist the client in attempting to eliminate those consequences to effectuate the client's donative intentions.¹⁴

Paul W. Vapnek and his coauthors write, "Clients have the absolute right to terminate their lawyer's services any time *with or without cause*."¹⁵ Such a discharge is not a breach of contract.¹⁶

On the other hand, the attorney has no absolute right to withdraw. Rule of Professional Conduct 3-700 governs an attorney's withdrawal from representation. The Rule states:

(A). In General

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B). Mandatory Withdrawal

A member representing a client before a tribunal shall withdraw from

¹⁴ *Id.* at 337.

¹⁵ PAUL W. VAPNEK, CAL. PRACTICE GROUP: PROF'L RESPONSIBILITY, § 10:1 (The Rutter Group, 2005).

¹⁶ *Id.* at § 10:2.

employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

- (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
- (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C). Permissive Withdrawal

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) The client
 - (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
 - (b) seeks to pursue an illegal course of conduct, or
 - (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
 - (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
 - (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
 - (f) breaches an agreement or obligation to the member as to expenses or fees.
- (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
- (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
- (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
- (5) The client knowingly and freely assents to termination of the employment; or
- (6) The member believes in good faith, in a proceeding pending before a

tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D). Papers, Property, and Fees

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.¹⁷

When withdrawing from or even completing an estate plan, attorneys should return *all* of the client's materials. Rule 3-700(D) speaks of an attorney's employment being "terminated," and does not speak of how that came about. Further, attorney's who hold original estate planning documents have certain obligations.¹⁸

B. Who's The Client? Conflict of Interest

1. The Attorney-Client Relationship

The attorney-client relationship is a fiduciary relationship as well as a contractual relationship and an agency relationship with the "client." As a fiduciary relationship it is a relationship of the very highest character.¹⁹ It includes duties of loyalty and confidentiality. In an estate planning context, the client may be the settlor, the trustee, or the beneficiary of a trust, or the testator, executor, or beneficiary of a will, or some of the

¹⁷ CAL. R. PROF'L CONDUCT § 3-700 (West 2005).

¹⁸ CAL. PROBATE CODE § 710 (West 2005).

¹⁹ *Lee v. State Bar* 2 Cal.3d 927, 239; 88 Cal.Rptr. 361 (1970).

above. Some of these parties may have conflicting interests. Therefore, identifying the client is of the highest importance.

Hypothetical A: Adam is getting on in years and hasn't created an estate plan of any type. Adam's son Bob calls his lawyers, Shyster & Pettifog, and sets an appointment for Adam on Tuesday. On Tuesday, Bob drives Adam to Mr. Pettifog's office for the appointment.

Neither the California Rules of Professional Conduct nor the State Bar Act defines the term "client"; however, Black's Law Dictionary defines "client" as

a person who employs or retains an attorney, or counselor, to appear for him in courts, advise, assist and defend him in legal proceedings, and to act for him in any legal business. It should include one who disclosed confidential matters to attorney while seeking professional aid, whether attorney was employed or not.²⁰

For purposes of attorney-client privilege, the Evidence Code defines "client" as

a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.²¹

These two definitions are substantially the same and are suitable for estate planning, trusts, and probate purposes.²² Applying these definitions to the facts in Hypothetical A, it is clear that Dad is the person consulting Mr. Pettifog, in his professional capacity and

²⁰ BLACK'S LAW DICTIONARY, 230 (5th ed. 1979).

²¹ CAL. EVID. CODE § 951 (West 2005).

²² See also *People v. Canfield*, 12 Cal.3d 699, 705, 117 Cal. Rptr. 81, 527 P.2d 633 (1974); *Benge v. Superior Court*, 131 Cal.App.3d 336, 345, 182 Cal. Rptr. 275 (1982).

that Bob is only an authorized representative. Thus, Dad is the client.

One of the attorney's responsibilities is to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."²³ The American Bar Association's Model Code of Professional Responsibility points out that

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed about all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.²⁴

In the case *In Re Jordan*, Justice Peters, writing for a unanimous California Supreme Court, opined:

Petitioner points out that the purpose and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives, and actions. Thus the protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance which are reflected in numerous statutes.²⁵

The duty of confidentiality is broader than the attorney-client privilege found in the

²³ CAL. BUS. & PROF. CODE § 6068(e) (West 2005).

²⁴ MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (2005).

²⁵ *In re Jordan*, 7 Cal. 3d 930, 940-941, 500 P.2d 873, 103 Cal. Rptr. 849 (1972).

Evidence Code.²⁶ The ABA opines

This ethical percept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserved the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.²⁷

The Business & Professions Code does not define "confidences" nor does it define "secrets." The ABA's Model Code defines "confidence" as "information protected by the attorney-client privilege under applicable law," and "secret" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."²⁸ The Evidence Code defines "confidential communication" as

information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.²⁹

The attorney-client privilege is lost, and by extension the duty of confidentiality is

²⁶ *Goldstein v. Lees*, 46 Cal.App.3d 614, 612, fn. 5; MODEL CODE OF PROF'L RESPONSIBILITY EC 4-4 (2005).

²⁷ MODEL CODE OF PROF'L RESPONSIBILITY EC 4-4 (2005).

²⁸ MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (A) (2005).

²⁹ CAL. EVID. CODE § 952 (West 2005).

breached, when the client's secrets or confidential information is communicate to any third-person whose presence is not necessary to advance the client's interests.³⁰ The estate planning attorney must be particularly mindful of this duty when the client is brought in by another person.

Hypothetical B: Mr. Pettifog meets Adam and Bob in his outer office and escorts them to a conference room. All three men sit down. After social pleasantries, Mr. Pettifog begins to ask Adam about his desires for an estate plan.

Unless Bob's presence is required to advance Adam's matter (that is, preparing an estate plan, which is not obvious on these facts), Bob's presence waives the attorney-client privilege. Mr. Pettifog should have asked Bob to leave the room, or received an explicit waiver of the privilege after a full explanation of it.

Hypothetical C: Despite having lived in the United States for many years, Adam never mastered English. Bob remains in the meeting to serve as interpreter.

In Hypothetical C, Bob's presence is necessary to advance Adam's interests and the privilege is not lost.

The attorney-client privilege and the duty of confidentiality continue so long as the client is alive, or, in other words, so long as there is a "holder of the privilege."³¹ It logically follows that there is no attorney-client privilege nor duty of confidentiality "as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate, intestate succession, or by inter vivos transaction."³² Nor is there an attorney-client privilege or duty of

³⁰ *In re Jordan*, 7 Cal.3d at 940.

³¹ CAL. EVID. CODE § 954(c) (West 2005).

³² CAL. EVID. CODE § 957 (West 2005).

confidentiality “as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will or other writing, executed by the client purporting to affect an interest in property.”³³ Further, there is no attorney-client privilege or duty of confidentiality “as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.”³⁴ These statutory exceptions are based on the presumption that the deceased client would want his or her intentions known and the validity of his or her actions supported.³⁵ Finally, there is no attorney-client privilege nor duty of confidentiality “as to a communication relevant to the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution of attestation of such a document.”³⁶ In this last situation, the privilege is waived and the lawyer may “divulge only information received in his capacity as an attesting witness and not in his capacity as a lawyer.”³⁷

Joint Clients

However, “where two or more persons seek advice or assistance (e.g. to form a partnership or prepare an estate plan), the attorney must be alert to who is the ‘client’ and

³³ CAL. EVID. CODE § 960 (West 2005).

³⁴ CAL. EVID. CODE § 961 (West 2005).

³⁵ PAUL W. VAPNEK ET AL., PROFESSIONAL RESPONSIBILITY §§ 7:277-7:278, 7:324-7:324.1.

³⁶ CAL. EVID. CODE § 959 (West 2005).

³⁷ *Estate of Kime*, 144 Cal.App.3d 246, 257 (1983).

whether the attorney will have more than one client."³⁸ The lawyer-client relationship is created by court appointment, or by contract which might be express or implied, formal or informal.³⁹ In the first instance, the attorney should apply the definitions found in Evidence Code section 951 or in Black's Law Dictionary to each person coming to see him or her. Then, in analyzing whether two persons are joint clients or not,

it also is necessary (in conducting this inquiry into all the relevant circumstances) to analyze all pertinent aspects of the relationship and dynamics between (a) the party that claims to have been a joint client and (b) the party that clearly was a client of the lawyer in question. This analysis should include (but not necessarily be limited to) (1) the conduct of the two parties toward one another, (2) the terms of any contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other special obligations that existed between them, (4) the communications between the two parties (directly or indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private communication between either of them and the lawyer as to whom a "joint" relationship allegedly existed, (6) if there was any such separate, private communication between either party and the alleged joint counsel, whether the other party knew about it, and, if so, whether that party objected or sought to learn the content of the private communication, (7) the nature and legitimacy of each party's expectations about its ability to access communications between the other party and the allegedly joint counsel, (8) whether, to what extent, and with respect to which matters either or both of the alleged joint clients communicated privately with other lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common, and the relationship between common interests and communications with the alleged joint counsel, (10) actual and potential conflicts of interest between the two parties, especially as they might relate to matters with respect to which there appeared to be some commonality of interest between the parties, and (11) if disputes arose with third parties that related to matters the two parties had in common, whether the alleged joint counsel represented both parties with respect to those disputes or whether the two parties were separately

³⁸ P.W. VAPNEK, ET AL., PROFESSIONAL RESPONSIBILITY, § 3:89, p. 3-36 (The Rutter Group, 2003).

³⁹ *Fox v. Pollack*, 181 Cal.App.3d 954, 959, ____ Cal.Rptr. ____ (1986).

represented.⁴⁰

In applying the factors mentioned by the District Court, factors (1), (2), (3), and (9) are always present when dealing with married couples.⁴¹ These factors are also present when dealing with domestic partners.⁴² A more careful consideration of all eleven factors, and possibly more, might be needed for other situations, including representing some or all of the beneficiaries of a will or trust.

Hypothetical D: Adam and Charlotte, his wife, come to see Mr. Pettifog about preparing an estate plan for both of them.

In Hypothetical D both Adam and Charlotte sought professional advice. Therefore, Adam and Charlotte are Mr. Pettifog's joint clients. On the other hand, in Hypothetical A and B, even though Bob made the appointment and attended the meeting, only Adam is receiving legal advice, so only Adam is Mr. Pettifog's client.

When dealing with joint clients, an attorney must be mindful of the joint client exception to the duty of confidentiality and the attorney-client privilege, and of potential and actual conflicts of interest. Rule of Professional Conduct 3-500 requires "A member to keep a client reasonably informed about significant developments relating to the

⁴⁰ *Sky Valley Ltd. Partnership v. ATX Sky Valley Ltd.*, 150 FRD 648, 652-653 (N.D. Cal. 1993) (Construing California law).

⁴¹ See e.g. CAL. FAM. CODE § 300 (West 2005) (Marriage is a contract); CAL. FAM. CODE § 720 (West 2005) (Mutual obligations of husband and wife); CAL. FAM. CODE § 721 (West 2005) (Fiduciary relationship of husband and wife); CAL. FAM. CODE §§ 750-755 (West 2005) (Marital property, including community property).

⁴² CAL. FAM. CODE § 297.5 (West 2005).

employment or representation.”⁴³ Clearly, where one joint client provides an attorney with information that materially effects the case, the attorney’s duty to communicate with all clients requires the attorney to disclose the information received from one joint client to the other. Neither the attorney’s duty of confidentiality nor the attorney-client privilege, prevents the disclosure. In deed, in the opinion of some, the attorney *must* disclose to one joint client what the other joint client communicated to the attorney.⁴⁴

The Evidence Code provides

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privileged under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or this successor in interest).⁴⁵

In the case *Glacier General Assurance Company v. Superior Court (Camou)*, the Court of Appeal ruled that the language of section 962 seems “explicitly and unambiguously to include all communications—bilateral as well as trilateral.”⁴⁶ The *Glacier* decision “stands for the proposition [that] the exception of section 962 is intended to provide joint

⁴³ CAL. R. PROF’L CONDUCT 3-500 (West 2005); *see also* CAL. BUS. & PROF. CODE § 6068(m) (West 2005).

⁴⁴ PAUL W. VAPNEK ET AL., PROFESSIONAL RESPONSIBILITY § 7:271 (The Rutter Group, 2003) *citing* *Wortham & Van Liew v. Superior Court (Clubb)* 188 Cal.App.3d 927, 932 (1987).

⁴⁵ CAL. EVID. CODE § 962 (West 2005).

⁴⁶ *Glacier General Assurance Company v. Superior Court (Camou)*, 95 Cal.App.3d 836, 841 (1979).

clients access to communications with the jointly retained attorney which touch on matters affecting both clients.”⁴⁷ *Glacier*, in turn, relied on *Petty v. Superior Court (Gibson)*. The Court of Appeal in *Petty* held

Where two persons mutually employ the same attorney to represent them as their common agent and attorney in a particular transaction, the communications made by either of them in the presence of the other to the attorney are privileged as to strangers to the transaction, but are not privileged as between either of them and the attorney. The reason assigned for the rule is that, as between the clients, communications made of the mutual benefit of all lack the element of confidentiality which is the basis of privileged communications.⁴⁸

The rule was succinctly expressed in *Nowell v. Superior Court (Silver)*, “Where two or more persons engage an attorney to represent all the them, the privilege is waived as between the parties, but it remains as to strangers.”⁴⁹

Hypothetical E: In their meeting with Mr. Pettifog, Adam and Charlotte agreed on a particular plan to distribute their assets among their children. The day after the meeting, Charlotte called Mr. Pettifog and told him that she wanted to change the plan by giving a large, diamond ring to the couple’s older daughter, Diana, rather than to the couple’s younger daughter, Emma.

Under these facts, Mr. Pettifog is required to contact Adam and inform him of Charlotte’s change to the plan. If Adam does not agree to the change, an actual conflict of interest

⁴⁷ *Wortham & Van Liew v. Superior Court (Clubb)*, 188 Cal.App.3d 927, 932 (1987).

⁴⁸ *Petty v. Superior Court (Gibson)*, 116 Cal.App.2d 20, 33, 253 P.2d 28 (1953) (Internal quotation marks and citations omitted.).

⁴⁹ *Nowell v. Superior Court (Silver)* 223 Cal.App.2d 652, 567, fn. 4 (Citations omitted).

results.

Rule of Professional Conduct 3-310 states, in relevant part:

A member [of the Bar] shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the client potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the client actually conflict.⁵⁰

The official comment to these subparagraphs states:

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership of several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g. Evid. Code §962) and must obtain informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).⁵¹

In all situations of joint representation, *informed written consent* is absolutely essential. The writing must inform the clients of all the relevant facts, all issues on which the clients' interests might diverge, the reasonably foreseeable consequences of the conflicts, and that the attorney-client privilege does not apply as to each of them.⁵² Mr. Vapnek

⁵⁰ CAL. R. PROF'L CONDUCT 3-310(C) (West 2005).

⁵¹ CAL. R. PROF'L CONDUCT 3-310 discussion (West 2005).

⁵² PAUL W. VAPNEK ET AL., PROFESSIONAL RESPONSIBILITY §§ 4:64-4:67 (The

and his co-authors continue:

It is immaterial that the parties are in complete agreement on all essential points of the transaction. It is your [the attorney's] job to point out the areas of potential conflict even if this places you in the role of "deal killer" or "upsetting the apple cart."

When advising the potential clients, consider the following circumstances which may give rise to adverse consequences in the representation: conflicting client instructions; disputes that may arise among clients; two clients give conflicting instructions and following one instruction violates another; clients have divergent objectives; effective advancement of one client's cause may be detrimental to another client; the facts of the case require advocating antagonistic positions of two or more clients on the same matter; disputes arise among the clients or they disagree as to resolution of the matter; one client discloses information to the attorney and demands that it not be disclosed to the other clients; a preexisting relationship with one of the clients clouds the exercise of independent judgment on behalf of the other client; or after the matter is concluded, the clients make conflicting demands for the client file.

In analyzing the matter, you may conclude that your clients interests are neither actually nor potentially conflicting and that joint representation is entirely proper. Even so, you should discuss these issues with potential clients.⁵³

If a potential conflict ripens to an actual conflict, an additional, separate disclosure and informed consent to continue the representation is required.⁵⁴ Failure to do so may lead to professional discipline by the State Bar.⁵⁵

Rutter Group, 2003).

⁵³ PAUL W. VAPNEK ET AL., PROFESSIONAL RESPONSIBILITY § 4:68 (The Rutter Group, 2003)

⁵⁴ PAUL W. VAPNEK ET AL., PROFESSIONAL RESPONSIBILITY § 4:72 (The Rutter Group, 2003)

⁵⁵ *Hartford v. State Bar of California*, 50 Cal.3d 1139, 1149-1150, 791 P.2d 598,

Duties to Third Parties

The attorney-client relationship is a fiduciary relationship as well as a contractual relationship and an agency relationship with the "client." As a fiduciary relationship it is a relationship of the very highest character.⁵⁶ It includes duties of loyalty and confidentiality. Nevertheless, an attorney may have duties toward nonclients as well.

In the recent case *Borainan v. Clark*, Attorney Clark was contacted by Chevaz and asked to prepare a will for Farris. Clark testified at trial that he always considered Farris to be his client and Chevaz to be only her agent. Clark drafted the will which left substantial assets to Chevaz rather than to Farris' daughter Boranian, and her brother. After Farris died and an ensuing will contest was settled, Boranian and her brother sued Clark for professional negligence and breach of fiduciary duty. Clark contended that he owed no duty to Boranian or her brother, and the Court of Appeal agreed.⁵⁷

In reaching its conclusion, the Court of Appeal opined:

An attorney who assumes preparation of a will incurs a duty not only to the testator client, but also to his intended beneficiaries, and lack of privity does not preclude the testamentary beneficiary from maintaining an action against the attorney based on either the contractual theory of third party beneficiary or the tort theory of negligence. ¶ But the lawyers liability to the "intended beneficiary" is not automatic or absolute, and there is no such liability where the testator's intent or capacity is placed in issue by the alleged *intended* beneficiary.⁵⁸

The Court of Appeal ruled:

270 Cal.Rptr. 12 (1990).

⁵⁶ *Lee v. State Bar* 2 Cal.3d 927, 239; 88 Cal.Rptr. 361 (1970).

⁵⁷ *Borainan v. Clark*, 123 Cal.App.4th 1012, 1014-1017 (2004).

⁵⁸ *Id.* at 1017 (Italics in the original. Citations omitted.).

Although a lawyer retained to provide testamentary legal services to a testator may also have a duty to act with due care for the interests of an intended third-party beneficiary, the lawyer's primary duty is owed to his client and his primary obligation is to serve and carry out the client's intentions.⁵⁹

The Court further ruled that the attorney has no duty to urge an alternative distribution plan on the testator, nor to determine the testator's testamentary capacity.⁶⁰

In reaching its conclusion, the Court of Appeal distinguished *Biakanja v. Irving*,⁶¹ *Lucas v. Hamm*,⁶² and *Heyer v. Flaig*,⁶³ and relied upon *Ventura County Humane Society v. Holloway*,⁶⁴ *Radovich v. Locke-Paddon*,⁶⁵ and *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*.⁶⁶

In *Biakanja v. Irving*, the defendant was a notary public who prepared a will for

⁵⁹ *Id.* at 1014.

⁶⁰ *Id.* at 1020.

⁶¹ *Biakanja v. Irving* 49 Cal.2d 647 (1958).

⁶² *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821 (1961).

⁶³ *Heyer v. Flaig*, 70 Cal.2d 223, 74 Cal.Rptr. 225 (1969).

⁶⁴ *Ventura County Humane Society v. Holloway*, 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (1974).

⁶⁵ *Radovich v. Locke-Paddon*, 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573 (1995).

⁶⁶ *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 109 Cal.App.4th 1287, 135 Cal.Rptr.2d 888 (2003).

decedent Maroevich. The will was notarized, but was not properly witnessed. After Maroevich's death, the purported will was offered for probate, which was denied. Plaintiff received only one-eighth of the decedent's estate rather all of it as the purported will intended.⁶⁷ The California Supreme Court, citing both tort and contract principles, ruled:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.⁶⁸

In *Lucas*, the California Supreme Court extended its holding in *Biakanja* to include lawyers. Defendant Hamm, a lawyer, "agreed with the testator, for a consideration, to prepare a will and codicils thereto for him by which plaintiffs were to be designated as beneficiaries of a trust."⁶⁹ Because of negligent drafting, the trust failed by virtue of the rule against perpetuities and restraints on alienation;⁷⁰ however, defendant also negligently drafted releases in the subsequent will contest "which did not preclude

⁶⁷ *Biakanja*, 49 Cal. at 648.

⁶⁸ *Id.* at 650. The Court also made special mention of the fact that defendant's conduct was "not only negligent, but was also highly improper. He engaged in the unauthorized practice of the law." *Id.* at 651.

⁶⁹ *Lucas*, at 586.

⁷⁰ *Id.* The Court forgave the defendant for running afoul of the rule against perpetuities and restraints on alienation, "closely akin subjects [which] have long perplexed the courts and the bar." *Id.* at 592.

the contestants from a subsequent attack on the validity of the of the testamentary instruments.”⁷¹ The Court ruled:

The lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant [and] intended beneficiaries of a will who lose their testamentary rights because of the failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries.⁷²

In the third case, *Heyer v. Flaig*, the California Supreme Court explicitly imposed a duty of care on the attorney toward the nonclient intended beneficiaries of the attorney’s client testator.⁷³ In *Heyer*, Defendant Flaig, an attorney, was retained by the decedent to draft her will. The decedent wished all of her estate to pass to her two daughters by a previous marriage. Soon after signing the will, the decedent married again. About six months after this marriage, she died. Her new husband claimed a

⁷¹ *Id.* at 593.

⁷² *Id.* at 589-591. The Court limited its holding slightly. “The general rule with respect to the liability of an attorney for failure to properly perform his duties to this 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. [Citations] The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers. [Citations] These principles are equally applicable whether the plaintiff’s claim is base on tort or breach of contract.” *Id.* 591-592.

⁷³ *Heyer*, 70 Cal.2d at 226.

portion of the estate as a post-testamentary spouse, which he was awarded by the probate court.⁷⁴ Justice Tobriner, writing for a divided Court, opined:

When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact *assumes a relationship not only with the client but also with the client's intended beneficiaries*. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. . . .

Although the duty accrues directly in favor of the intended testamentary beneficiary, the scope of the duty is determined by reference to the attorney-client context. Out of the agreement to provide legal services to a client, the prospective testator, arises the duty to act with due care as to the interests of the intended beneficiary. We do not mean to say that the attorney-client contract for legal services serves as the fundamental touchstone to fix the scope of this direct tort duty to the third party. The actual circumstances under which the attorney undertakes to perform his legal services, however, will bear on a judicial assessment of the care with which he performs his services.⁷⁵

The Court also determined that the statute of limitations begins to run at the time of the testator's death, "at which time the defendant's negligence becomes irremediable and before which time the plaintiff's possess no recognized legal interest in the testatrix's estate."⁷⁶ This is different from the statute of limitations in other attorney malpractice

⁷⁴ *Id.* at 225-226. Provisions for "post-testamentary" spouses are now found at CAL. PROBATE CODE §§ 21610-21612 (West 2005).

⁷⁵ *Heyer*, 20 Cal.2d at 228-229.

⁷⁶ *Id.* at 229.

actions, which is one year from discovery, or four years from the date of the error or omission, which ever occurs first.⁷⁷

The Court of Appeal came to a different conclusion in *Ventura County Humane Society for the Prevention of Cruelty to Children and Animals, Inc. v. Holloway*.⁷⁸ In this case, the decedent's will gave twenty-five percent to the "Society for the Prevention of Cruelty to Animals (Local or National)." Plaintiffs alleged that defendants breached their duty of care by drafting a document that "ambiguously designating the intended beneficiaries . . . as "Society for the Prevention of Cruelty to Animals (Local or National)," a nonexistent organization."⁷⁹ The Court of Appeal rejected this argument as "a matter of law."⁸⁰ The Court analyzed the *Biakanja-Lucas-Heyer* line of cases and found that the "contention that respondents owned a duty of care towards appellant class as potential beneficiaries . . . is not supported by the existing case law."⁸¹ The Court explained:

The primary duty is owed to the testator-client and the attorney's paramount obligation is to serve and carry out the intention of the testator. Consequently, when, as in the case at bench, the testamentary intent has been implemented, no good reason exists why the attorney should be held accountable for using certain words suggested or selected by the testator which later prove to be ambiguous. In addition, the task of proving whether claimed ambiguity was the result of negligence of the drafting

⁷⁷ CAL. CIV. PROC. CODE § 340.6 (West 2005).

⁷⁸ *Ventura County Humane Society v. Holloway*, 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (1974).

⁷⁹ *Id.* at 902.

⁸⁰ *Id.*

⁸¹ *Id.* at 904.

attorney or whether it was the deliberate choice of the testator, would impose an insurmountable burden on the parties, since in such a case the trier of fact would be required to decide this crucial issue without the benefit of the testimony of the most important witness, the testator himself. Once recognized, such a duty would apply by parity of reasoning not only to wills, but also to contracts, conveyances and other legal instruments. The duty thus created would amount to a requirement to draft litigation-proof legal documents. This unlimited liability, as the learned trial judge aptly observed, would result in a speculative and almost intolerable burden on the legal profession indeed.

....

But aside from the foregoing considerations, in the situation here presented appellants must be precluded from recovery as a matter of law.

First, in interpreting the will, the probate court found that although there were ambiguities in the designation of the beneficiaries, the trust purpose was clear and could be fully implemented. Accordingly, unlike the cases cited, in the present case the testamentary intent was fully carried out and the beneficiaries under the clause complained of did get their full share.⁸²

Twenty-one years after *Ventura County Humane Society* was decided, the Court of Appeal decided *Radovich v. Locke-Paddon*.⁸³ In this case, the decedent approached her attorney Locke-Paddon in June 1991 and asked him to prepare a new will which would make her husband the income beneficiary of a testamentary trust for life. Locke-Paddon prepared a draft document and sent to the decedent for her comments in October 1991. He testified, that the decedent ““did not communicate with me regarding the draft of the new will prior to her death,”” which was on December 19, 1991.⁸⁴ Radovich, citing various text writers and the cases *Biakanja*, *Lucas*, and *Heyer*, claimed a right to recover as a third-party beneficiary of the contract between the decedent and Locke-

⁸² *Id.* at 904-906.

⁸³ *Radovich*, 35 Cal.App.4th at 948.

⁸⁴ *Id.* at 951-952.

Paddon.⁸⁵ The Court rejected these arguments and held:

we see both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Although a potential testator may also change his or her mind after a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature. From a policy standpoint, we must be sensitive to the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent-the only person who can say what he or she intended-has died. Thus we must as a policy matter insist on the clearest manifestation of commitment the circumstances will permit.

We conclude that in all the circumstances of record (including the circumstance that the decedent, given two months to sign the will, did not do so), the June meeting and preparation of the October will draft were insufficient in and of themselves to manifest a commitment by the decedent to benefit Radovich.⁸⁶

In *Moore*, the Court of Appeal relied on *Radovich*, the Restatement (Third) of the Law Governing Lawyers, and various out-of-state decisions to answer “an issue of first impression . . . whether an attorney has a duty to beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend the will or to make a new will and whether the attorney also has a duty to beneficiaries to preserve evidence of that evaluation.”⁸⁷ “Appellants had sued respondents for malpractice in connection with

⁸⁵ *Id.* at 955.

⁸⁶ *Id.* at 964.

⁸⁷ *Moore*, 109 Cal.App.4th at 1290.

respondents' preparation of amendments to the estate plan of appellants' father."⁸⁸ Relying on the "fundamental importance of an attorney's duty of undivided loyalty to his or her client,"⁸⁹ the Court concluded "that an attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will to ascertain and document the testamentary capacity of the client.*"⁹⁰ The Court explained its ruling thus:

In the *Biakanja-Lucas-Heyer* line of cases, there is clearly no potential for conflict between the duty the attorney owes to the client and the duty the attorney owes to intended beneficiaries. The testator and the beneficiaries want the will allowed. The intention of the testator is certain in the circumstance presented in those cases. Only the negligence of the attorney, resulting in the invalidity of the document or bequest, frustrates the intention of the testator.

In contrast, where the testamentary capacity of the testator is the basis for a will challenge, the true intent of the testator *is* the central question. That intent cannot be ascertained from the will or other challenged estate plan document itself. The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will.

The extension of the duty to intended beneficiaries recognized in *Biakanja*, *Lucas*, and *Heyer* to this context would place an intolerable burden upon attorneys. Not only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries. The testator's attorney would be placed in the position of potential liability to either the beneficiaries disinherited if the attorney prepares the will or to the potential beneficiaries of the new will if the

⁸⁸ *Id.*

⁸⁹ *Id.* at 1298 (Citations omitted.).

⁹⁰ *Id.* (Italics in the original.).

attorney refuses to prepare it in accordance with the testator's wishes.⁹¹

In analyzing these seven cases, the state of the law is that an attorney owes a duty of loyalty to his or her testator-client first, and only secondarily to the beneficiaries of the will. The attorney must use reasonable skill and diligence in carrying out the intentions of the client, but is not responsible for the client's lack of diligence or choice of words in preparing the estate plan. The attorney has no obligation to determine the client's testamentary capacity, or to draft a perfect document.

C. Competency — A Word to the Wise

Rule of Professional Conduct 3-110 states:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal services shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

To the three elements listed in subdivision (B), the California Supreme Court added the duty to communicate. In the case *Calvert v. State Bar*, the Court ruled, "Adequate communication with clients is an integral part of competent professional performance as an attorney."⁹²

⁹¹ *Id.* at 1299 (Italics in the original.).

⁹² *Calvert v. State Bar*, 54 Cal.3d 765, 782-783, 819 P.2d 424; 1 Cal. Rptr. 2d

Abraham Lincoln, when still practicing law, wrote, "The leading rule for the lawyer, as for the man of every other calling, is diligence."⁹³ "Diligence" means "to use reasonable speed in accomplishing the purposes for which they were employed."⁹⁴ Stated another way, a lack of diligence is "inattention to the needs of clients."⁹⁵ "Diligence" requires attorneys to have adequate resources of time to attend to the client's business by avoiding unnecessary outside commitments or taking on too much work.⁹⁶ "Diligence" also requires attorneys to have adequate tools and staff, such as computers, software, Internet access, library, secretaries, paralegals, associates, etc.

Elbert Hubbard got it wrong when he said, "Lawyer: The only man in whom ignorance of the law is not punished."⁹⁷ Ignorance of the law, or a lack of "learning and

684 (1991); *see also* *Matthew v. State Bar*, 49 Cal.3d 784, 790, 263 Cal.Rptr. 660, 781 P.2d 952 (1989).

⁹³ Abraham Lincoln, in FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS, 257 (1993).

⁹⁴ *Calvert*, 54 Cal.3d at 785.

⁹⁵ *Matthew*, 49 Cal.3d at 790; *accord. Van Sloten v. State Bar*, 48 Cal. 3d 921, 932, 258 Cal. Rptr. 235, 771 P.2d 1323 (1989); *Kapelus v. State Bar*, 44 Cal. 3d 179, 188 [242 Cal. Rptr. 196, 745 P.2d 917 (1987)] .

⁹⁶ *See e.g. Garlow v. State Bar*, 44 Cal.689, 711, 244 Cal.Rptr. 452 (1988).

⁹⁷ Elbert Hubbard, in FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS, 276 (1993).

skill," is punished by the State Bar.⁹⁸ The cure for ignorance is study. Lincoln once told John M. Brockman the best way to gain a knowledge of the law "is very simple, though laborious, and tedious. It is only to get the books, and read, and study them carefully."⁹⁹ Modernly, attorneys may take advantage of many seminars and continuing legal education classes. Indeed, every active member of the Bar must take a minimum of twenty-five hours of continuing legal education each three years.¹⁰⁰ Estate planning, trusts, and probate law is one of the field's of practice in which the State Bar certifies attorneys as specialists.¹⁰¹ An attorney who lacks the necessary "learning and skill" may also associate with another attorney who has the requisite learning and skill.¹⁰²

Sometimes, an attorney's personal problems prevent him or her from competently representing his or her clients. Alcohol or drug addiction, marital problems, financial problems, physical or mental health problems may make it unreasonably difficult for an

⁹⁸ *Jones, v. State Bar*, 49 Cal. 3d 273, 285, 777 P.2d 170, 261 Cal. Rptr. 397 (1989).

⁹⁹ Abraham Lincoln, in FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS, 283 (1993).

¹⁰⁰ CAL. BUS. & PROF. CODE § 6070 (West 2005); CAL. R. COURT 958 (West 2005); CAL. BAR M.C.L.E. R. & REG. ¶ 1.0.

¹⁰¹ See STANDARDS FOR CERTIFICATION AND RECERTIFICATION IN ESTATE PLANNING, TRUST AND PROBATE LAW (Jan. 1, 2003)

¹⁰² CAL. R. PROF'L CONDUCT 3-110(C) (West 2005).

attorney to carry out the attorney's professional responsibilities.¹⁰³ In such a case, withdrawal is mandatory.¹⁰⁴ Help is available from the State Bar's Lawyer Assistance Program.¹⁰⁵

The fourth prong of competent representation is the duty to communication with clients. This duty is found in Rule 3-500:

A member shall keep a client reasonably well informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client informed.¹⁰⁶

Substantially the same obligation is imposed by the Business & Professions Code.¹⁰⁷ As mentioned previously, the California Supreme Court has ruled that communication with clients is an element of professional competence.¹⁰⁸ Even failure to return phone calls is grounds for discipline. The Supreme Court adopted the findings of the State Bar review panel that;

¹⁰³ CAL. R. PROF'L CONDUCT 3-110 (B)(3) (West 2005).

¹⁰⁴ CAL. R. PROF'L CONDUCT 3-700(B)(3) (West 2005).

¹⁰⁵ Contact the Lawyers Assistance Program through the State Bar's website www.calbar.ca.gov or by telephone, 1-866-436-6644.

¹⁰⁶ CAL. R. PROF'L CONDUCT 3-500 (West 2005).

¹⁰⁷ CAL. BUS. & PROF. CODE § 6068(m) (West 2005).

¹⁰⁸ *Calvert v. State Bar*, 54 Cal.3d 765, 782-783, 819 P.2d 424; 1 Cal. Rptr. 2d 684 (1991); *see also Matthew v. State Bar*, 49 Cal.3d 784, 790, 263 Cal.Rptr. 660, 781 P.2d 952 (1989).

The client made numerous telephone calls to petitioner to determine the status of her matter. Petitioner did not return her calls. The referee concluded that petitioner violated Business and Professions Code sections 6103 and 6068 by failing to respond promptly to the reasonable inquiries of his client and by failing to keep her informed of significant developments in the matter.¹⁰⁹

Paul Vapnek and his co-authors offer the most sound advice possible to avoid this problem:

PRACTICE POINTER: Make it a practice to *routinely* copy your clients on *all* correspondence, pleadings, and papers in the case; include a cover letter explaining any enclosures that may not be readily understood. (This step will ensure compliance with your duty to keep the client advised of all pertinent developments and will also help the client understand your monthly billing charges.

....

PRACTICE POINTER: In addition to the risk of discipline, failure to return calls is an extreme discourtesy to the client and often leads to rupture of the attorney-client relationship.

....

In any event, make it your first priority to return clients' calls *as soon as possible*. If you cannot return client call the same day or next day, have your secretary contact the client to advise *when* you will return their calls.¹¹⁰

D. Practice Before the I.R.S.

The Economic Growth and Tax Relief Reconciliation Act of 2001¹¹¹ amended

¹⁰⁹ *Aronin, v. State Bar*, 52 Cal. 3d 276, 287-288, 801 P.2d 403, 276 Cal. Rptr. 160 (1990)

¹¹⁰ PAUL W. VAPNEK, CAL. PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY, 6:131-6:134 (The Rutter Group, 2003).

¹¹¹ The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L.

title 26, United States Code section 2010 to increase the amount of unified credit applicable to estate taxes to \$1,500,000.00 for each decedent dying in 2005. In 2006, the amount will be raised to \$2,000,000 and in 2009, the amount will be raised to \$3,000,000.00.¹¹² Legislation is currently pending before the Congress to repeal the "death taxes" permanently.¹¹³ At the moment, estate taxes are not an issue for most people; however, attorneys representing decedents and their estates and fiduciaries still often have business with the Internal Revenue Service.

Practice before the I.R.S. covers all matters relating to any of the following:

Communicating with the I.R.S. for a taxpayer regarding the taxpayer's rights, privileges, or liabilities under laws and regulations administered by the I.R.S.

Representing a taxpayer at conferences, hearings, or meetings with the I.R.S.

Preparing and filing documents with the I.R.S. for a taxpayer.

Corresponding and communicating.¹¹⁴

I.R.S. Publication 947 states, "Any attorney who is not currently under suspension or disbarment from practice before the I.R.S. and who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, or of the District of Columbia may practice before the I.R.S."¹¹⁵ Individuals who wish to practice before the I.R.S. must file Form 2848 for each client. The I.R.S. will issue a centralized

No. 107-16, § 521(a), 115 Stat. 71.

¹¹² 26 U.S.C.A. § 2010 (West 2005).

¹¹³ Death Tax Repeal Permanency Act of 2005, H.R. 8, 109th Cong. (2005).

¹¹⁴ I.R.S. Pub. 947 (5/2004).

¹¹⁵ *Id.*

authorization file (CAF) number to the practitioner which should be listed on all subsequent Forms 2848. A practitioner may also use a power of attorney document other than Form 2848, but it must contain the following information: (1) the client's name and mailing address; (2) the client's social security number and/or employer identification number; (3) the client's employee plan number, if applicable; (4) The name and mailing address of the attorney; (5) the types of tax involved; (6) the federal tax form number; (7) the specific year(s) or period(s) involved; (8) for estate tax matters, the decedent's date of death, (9) a clear expression of the client's intention concerning the scope of authority granted to the attorney; and (10) the client's signature and date.¹¹⁶ The attorney must also attach to the non-IRS power of attorney a signed and dated statement. This statement, which is referred to as the Declaration of Representative, is contained in Part II of Form 2848. The statement should read:

"I am not currently under suspension or disbarment from practice before the Internal Revenue Service or other practice of my profession by any other authority; I am aware of the regulations contained in Treasury Department Circular No. 230 (31 CFR, Part 10) concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others; I am authorized to represent the taxpayer(s) identified in the power of attorney; and I am authorized to practice before the Internal Revenue Service as an individual described in 26 CFR 601.502(b).¹¹⁷

The rules of professional conduct for practitioners before the I.R.S. are essentially the same for all attorneys who practice in other forums. However, "individuals authorized to practice before the I.R.S. are subject to disciplinary proceedings and may be suspended or disbarred for violating any regulation governing practice before the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

I.R.S. Publication 947 states:

An attorney . . . authorized to practice before the IRS (referred to hereafter as a practitioner) has the duty to perform certain acts and is restricted from performing other acts. In addition, a practitioner cannot engage in disreputable conduct (discussed later). Any practitioner who does not comply with the rules of practice or engages in disreputable conduct is subject to disciplinary action. . . .

Duties

Practitioners must promptly submit records or information requested by officers or employees of the IRS. When the Office of Professional Responsibility requests information concerning possible violations of the regulations by other parties, the practitioner must provide the information and be prepared to testify in disbarment or suspension proceedings. A practitioner can be exempted from these rules if he or she believes in good faith and on reasonable grounds that the information requested is privileged or that the request is of doubtful legality.

Confidentiality privilege.

The confidentiality protection for certain communications between a taxpayer and an attorney (privileged communications) applies to similar communications between a taxpayer and any federally authorized tax practitioner.

Federally authorized tax practitioners include attorneys, certified public accountants, enrolled agents, enrolled actuaries, and certain other individuals allowed to practice before the IRS.

Communications that are protected. The protection of this privilege applies only to tax advice given to the taxpayer by any individual who is a federally authorized tax practitioner. Tax advice is advice in regard to a matter that is within the scope of the practitioner's authority to practice. The confidentiality protection applies to communications that would be considered privileged if they were between the taxpayer and an attorney and that relate to:

Noncriminal tax matters before the IRS, or

Noncriminal tax proceedings brought in federal court by or against the United States.

Communications regarding corporate tax shelters. This protection of tax

¹¹⁸ *Id.*

advice communications does not apply to any written communications between a federally authorized tax practitioner and a director, shareholder, officer, employee, agent, or representative of a corporation. It also does not apply if the communication involves the promotion of the direct or indirect participation of the corporation in any tax shelter.

Duty to advise.

A practitioner who knows that his or her client has not complied with the revenue laws or has made an error or omission in any return, document, affidavit, or other required paper, has the responsibility to advise the client promptly of the noncompliance, error, or omission, and the consequences of the noncompliance, error, or omission.

Due diligence.

A practitioner must exercise due diligence when performing the following duties:

Preparing or assisting in the preparing, approving, and filing of returns, documents, affidavits, and other papers relating to IRS matters.

Determining the correctness of oral or written representations made by him or her to the Department of the Treasury.

Determining the correctness of oral or written representations made by him or her to clients with reference to any matter administered by the IRS.

Restrictions

Practitioners are restricted from engaging in certain practices. The following paragraphs discuss some of these restricted practices.

Delays.

A practitioner must not unreasonably delay the prompt disposition of any matter before the IRS.

Assistance from disbarred or suspended persons and former IRS employees.

A practitioner must not knowingly, directly or indirectly, do the following.

Accept assistance from any person who is under disbarment or suspension from practice before the IRS if the assistance relates to matters considered practice before the IRS.

Accept assistance from any former government employee where provisions of Treasury Department Circular No. 230 or any federal law would be violated.

Performance as a notary.

A practitioner who is a notary public and is employed as counsel, attorney,

or agent in a matter before the IRS, or has a material interest in the matter, cannot engage in any notary activities related to that matter.

Negotiations of taxpayer refund checks.

Practitioners who are income tax return preparers must not endorse or otherwise negotiate (cash) any refund check issued to the taxpayer.

Disreputable Conduct

Any practitioner or unenrolled return preparer may be disbarred or suspended from practice before the IRS, or censured, for disreputable conduct. The following list contains examples of conduct that is considered disreputable.

Being convicted of any criminal offense under the revenue laws or of any offense involving dishonesty or breach of trust.

Knowingly giving false or misleading information in connection with federal tax matters, or participating in such activity.

Soliciting employment by prohibited means as discussed in section 10.30 of Treasury Department Circular No. 230.

Willfully failing to file a tax return, evading or attempting to evade any federal tax or payment, or participating in such actions.

Misappropriating, or failing to properly and promptly remit, funds received from clients for payment of taxes or other obligations due the United States.

Directly or indirectly attempting to influence the official action of IRS employees by the use of threats, false accusations, duress, or coercion, or by offering gifts, favors, or any special inducements.

Being disbarred or suspended from practice as an attorney, . . . by the District of Columbia or any state, possession, territory, commonwealth, or any federal court, or any body or board of any federal agency.

Knowingly aiding and abetting another person to practice before the IRS during a period of suspension, disbarment, or ineligibility.

Using abusive language, making false accusations and statements knowing them to be false, circulating or publishing malicious or libelous matter, or engaging in any contemptuous conduct in connection with practice before the IRS.

Giving a false opinion knowingly, recklessly, or through gross incompetence; or following a pattern of providing incompetent opinions in questions arising under the federal tax laws.

Censure, Disbarments, and Suspensions

The Office of Professional Responsibility may censure or institute proceedings to suspend or disbar any attorney, CPA, or enrolled agent who the Office of Professional Responsibility has reason to believe violated the rules of practice. Except in certain unusual circumstances, the Director will not institute a proceeding for censure, suspension, or disbarment against a practitioner until the facts (or conduct) which may warrant such action have been given in writing to that practitioner and the practitioner has been given the opportunity to demonstrate or achieve compliance with the rules.

Occasionally, disputed tax matters cannot be resolved through the Internal Revenue Service's administrative procedures and must be litigated in the United States Tax Court. The U.S. Tax Court is an "Article I Court." Admission to the Court is open to all attorneys in good standing before the supreme court of any State, or territory of the United States upon request and payment of ten dollars. Additional information may be obtained from the Clerk of the U.S. Tax Court at the Court's website www.ustaxcourt.gov.

E. Attorney Fees

The Business & Professional Code requires all attorney-client fee agreements to be in writing whenever "it is reasonably foreseeable that the total expense to a client will exceed one thousand dollars."¹¹⁹ The contract must be in duplicate and signed by both the attorney and the client.¹²⁰ The contract contain the all the following:

- (1) Any basis of compensation including, but not limited to hourly rate, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- (2) The general nature of the legal services to be provided to the client.
- (3) The respective responsibilities of the attorney and the client as to the

¹¹⁹ CAL. BUS. & PROF. CODE § 6148(a) (West 2005).

¹²⁰ *Id.*

performance of the contract.¹²¹

Failure to comply with the provisions of section 6148 renders the fee agreement voidable by the client, in which case the attorney is entitled to a "reasonable fee."¹²²

The fees referred to subsection (a)(1) cannot be "illegal or unconscionable fee."¹²³ Whether or not a fee is unconscionable is "determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events."¹²⁴ The conscionability or unconscionability of a fee is determined by reference to the facts and circumstances case and the attorney-client relationship, including the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.

¹²¹ *Id.*

¹²² *Id.* at (c).

¹²³ CAL. R. PROF'L CONDUCT 4-200(A) (West 2005).

¹²⁴ *Id.* at 4-200(B).

- (10) The time and labor required.
- (11) The informed consent of the client to the fee.¹²⁵

In the estate planning context, some or all of these factors may be considered, but in the probate context fees are set by statute. Probate Code section 10810 provides:

(a) Subject to the provisions of this part, for ordinary services the attorney for the personal representative shall receive compensation based on the value of the estate accounted for by the personal representative, as follows:

- (1) Four percent on the first one hundred thousand dollars (\$100,000).
- (2) Three percent on the next one hundred thousand dollars (\$100,000).
- (3) Two percent on the next eight hundred thousand dollars (\$800,000).
- (4) One percent on the next nine million dollars (\$9,000,000).
- (5) One-half of 1 percent on the next fifteen million dollars (\$15,000,000).
- (6) For all amounts above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.

“Ordinary services” means “the services which are involved in substantially every probate case.”¹²⁶ In *Estate of Getty*, the Court of Appeal ruled:

The statutory commissions and fees are not gratuities, but are the compensation which the statute gives to the personal representative and to

¹²⁵ *Id.*

¹²⁶ *In re Estate of Hilton*, 44 Cal.App.4th 890, 895; 52 Cal.Rptr.2d 491 (1996)

its attorney for all services performed by them in their respective capacities from the commencement of probate proceedings until the estate is wound up and distributed, except for those services that are remarkable, uncommon or rare. The personal representative and his attorneys are entitled to statutory fees as a matter of right, and the fact that an estate is a simple one and the fees larger than would be adequate compensation for the work involved, does not affect the right to the full statutory compensation. Conversely, if the estate is more complicated and requires more work, effort and skill than is required in the simple estate, that does not change the nature of services from ordinary to extraordinary. Those undertaking the duties of offices of this character take the bitter with the sweet.¹²⁷

An attorney may agree to accept a smaller fee than allowable by statute, and such a contract may be enforced, but a contract for the full statutory fees may not be cut down by the court.¹²⁸ Also, a contract for a higher fee than the statute allows is void.¹²⁹

In addition to ordinary compensation for ordinary services, attorneys may be entitled to "extraordinary compensation" for "extraordinary services." "Extraordinary" services may include services in connection with such matters as litigation with third parties, federal estate tax matters, sales of property, etc."¹³⁰ An attorney's services in defending the will may be the basis for the allowance of extra compensation for

¹²⁷ *In re Estate of Getty*, 143 Cal.App.3d 455, 465-466; 191 Cal.Rptr. 897; 40 A.L.R.4th 1175 (1983) citing *Estate of Buchman* 38 Cal.App.2d 228, 235, 291 P.2d 547 (1955), accord. *Estate of Hilton*, 44 Cal.App.4th 890, 909; 52 Cal.Rptr.2d 491 (1996)

¹²⁸ *In re Estate of Goodrich* 6 Cal App 730, 93 P 121 (1907).

¹²⁹ CAL.PROBATE CODE § 10813 (West 2005).

¹³⁰ *Estate of Hilton*, 44 Cal.App.4th 890, 909, fn. 5; 52 Cal.Rptr.2d 491 (1996)

extraordinary services.¹³¹ An attorney may contract to “perform extraordinary services on a contingent fee basis subject to the following conditions:

- (1) The agreement is written and complies with all the requirements of Section 6147 of the Business and Professions Code.
- (2) The agreement is approved by the court following a hearing noticed as provided in Section 10812.
- (3) The court determines that the compensation provided in the agreement is just and reasonable and the agreement is to the advantage of the estate and in the best interests of the persons who are interested in the estate.

Although the court must allow statutory fees,¹³² the award of extraordinary fees is discretionary with the court.¹³³

In the case *Rossman v. State Bar*, the California Supreme Court found that an attorney who collected fees in a conservatorship matter without prior court approval violated Probate Code sections 2640 and 2642, and thus wilfully received an illegal fee in violation of former Rule of Professional Conduct 2-107(A) and was suspended from the

¹³¹ *Estate of Dunton* 15 Cal App 2d 729, 60 P2d 159 (1936).

¹³² *Estate of Getty*, 143 Cal.App.3d 455, 465-466; 191 Cal.Rptr. 897; 40 A.L.R.4th 1175 (1983); *Estate of Buchman* 38 Cal.App.2d 228, 235, 291 P.2d 547 (1955), *Estate of Hilton*, 44 Cal.App.4th 890, 909; 52 Cal.Rptr.2d 491 (1996)

¹³³ *Estate of Byrne* 122 Cal. 260, 54 P. 957 (1898); *Estate of Richmond* 9 Cal.App. 413, 99 P. 558 (1908); *Estate of Turner*, 50 Cal.App.2d 332, 123 P.2d 66 (1942); *Estate of Neff* 56 Cal.App.2d 728, 133 P.2d 413 (1943); *Estate of Van Every* 67 Cal.App.2d 164, 153 P.2d 614 (1944); *Estate of Raphael* 128 Cal.App.2d 92, 274 P.2d 880 (1954); *Estate of Fraysher* 47 Cal.2d 131, 301 P.2d 848 (1956); *Estate of Behr* 149 Cal.App.2d 84, 307 P.2d 937 (1957).

practice of law for three months and placed on two years probation.¹³⁴ It follows that an attorney who accepts fees in a probate matter without court approval would suffer the same fate.

In the case *Estate of Kerr*, the California Superior Court found

Although a contingent fee contract for services rendered as attorney for an executor is invalid, contingent attorney fee contracts with an heir, devisee or legatee to secure the probate of a document as a will or to protect or advance his claims to share in an estate have been upheld as proper.¹³⁵

“A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code.”¹³⁶

It is common in an estate planning context for someone other than the client to pay the attorney's fees, such as the client's adult children. The California Rules of Professional Conduct controls such arrangements:

¹³⁴ *Rossman v State Bar* 39 Cal.3d 539, 216 Cal.Rptr. 919, 703 P.2d 390 (1985). Rule of Professional Conduct 2-107 (Operative Jan. 1, 1975) is now Rule of Professional Conduct 2-400 (West 2005).

¹³⁵ *Estate of Kerr*, 63 Cal.2d 875, 878-879, 48 Cal.Rptr. 707 (1966); see *Estate of Hastings* 108 Cal.App.2d 713, 239 P.2d 684 (1952) see also *Houge v. Ford* 44 Cal.2d 706, 285 P.2d 257 (1955); *Estate of Raphael* 103 Cal.App.2d 792, 796-798, 230 P.2d 436 (1951); *Estate of Cazaurang* (1934) 1 Cal.2d 712, 717, 36 P.2d 1069 (1934); *Estate of Cazaurang* 75 Cal.App.2d 217, 170 P.2d 694 (1946); PAUL W. VAPNEK, CAL. PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY, §5:136 (The Rutter Group, 2003) but see CAL. PROBATE CODE § 10811 (West 2005).

¹³⁶ CAL. BUS. & PROF. CODE § 6149 (West 2005).

A member shall not accept compensation for representing a client from one other than the client unless:

- (1) There is no interference with the member's independence of professional judgment or with the lawyer-client relationship; and
- (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
- (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.¹³⁷

¹³⁷ CAL. R. PROF'L CONDUCT 3-310(F) (West 2005).