

ETHICS

Martin J. Ganderson, Esquire

Suite 200, 409 Bank Street

Norfolk, Virginia 23510

It is my purpose in this portion of the seminar, dealing with Ethics, to (i) cause the attorney to realize there are ethical issues with which he (or she) should be concerned, and (ii) have the attorney better prepared to identify and respond to these ethical issues. Various Disciplinary Rules, Ethical Considerations, Legal Ethics Opinions, Unauthorized Practice Rules, Unauthorized Practice Considerations, and an Unauthorized Practice of Law Opinion will be presented in this outline. Two cases will also be presented. Several hypothetical situations will be presented, which contain ethical issues which the attorney should identify. The broad purpose of this section of the outline is not to set forth "yes" and "no" answers to specific ethical issues raised. The purpose is (i) to cause the attorney to realize there are ethical issues with which he (or she) should be concerned, (ii) to have the attorney better prepared to identify these ethical issues, and which in the past may not have been considered by the attorney,

and (iii) in some cases, to give the attorney the proper response to some of the ethical issues raised in the hypothetical situations.

In the field of wills and trusts, or estate planning, an attorney must recognize the "personal" nature of this area of law practice. The client may feel a need to disclose his (or her) most intimate feelings about individuals (whom the attorney may or may not know) in attempting to explain why he (or she) wishes property to pass in a certain manner. The client may very likely explain what he (or she) has in mind as to how it is intended for property to pass at death, but look to the attorney for specific advice on how to implement his (or her) wishes. A client with a large estate will likely expect tax planning advice from the attorney drafting the testamentary instrument. The attorney must always be clear as to the identity of the client, and to whom the attorney owes various duties. The attorney must also be ever mindful of the ethical obligations owed to the client, and the ethical obligations in conducting the attorney's law practice.

An attorney must always bear in mind The Code of Professional Responsibility when performing any type of legal services. In the field of estate planning, an attorney will be dealing with only his (or her) client (or perhaps clients, in the case of a husband and wife), as opposed to other matters,

such as litigation or transactional matters, where more than one party is necessarily involved. However, because an attorney is working on a matter in which only one party is involved does not excuse the attorney from keeping ever-mindful of the Code of Professional Responsibility and his (or her) responsibilities thereunder.

Review of Various Disciplinary Rules and
Unauthorized Practice Rules

DR 1-102. Misconduct.

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule or knowingly aid another to do so.
- (2) ...
- (3) Commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

(B) ...

An attorney who has prepared a Will (presently unexecuted) for a major client may find himself (or herself) in a situation where the client unexpectedly arrives at the attorney's office and notifies the attorney he is leaving in one hour on an emergency business trip and wishes to execute his Will at this time. No one, other than the attorney, is in the office, and

there are no other individuals available to witness the client's Will. The client says he wishes to sign the Will anyway, and the attorney can have his office employees, who know the client's signature, "witness" the Will when they arrive for work the next day. Should the attorney proceed in the manner the client wishes? This is an obvious act which the attorney cannot allow.

The following Ethical Consideration is of interest.

EC 1-5.A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and ethically reprehensible conduct which reflects adversely on his fitness to practice law. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

DR 2-104. Specialists; Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist except in accordance with either DR2-101, DR2-102 or DR2-103, or except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office ...

(2) ...

(B) A lawyer may state, announce or hold himself out as limiting his practice to a particular area or field of law so long as his communication of such limitation of practice is in accordance with the standards of DR2-101, DR2-102, or DR2-103, as appropriate.

The attorney who limits his practice to estate planning should neither state nor imply that he is a "recognized or certified

estate planning specialist." (See Legal Ethics Opinion No. 923) If professionals in fields other than law (such as certified public accountants or insurance professionals) refer to the attorney as a "recognized or certified estate planning specialist," should the attorney sit idly by and allow this type of representation? The attorney should correct this misrepresentation at once. The attorney may choose to hold himself out as limiting his practice to the field of estate planning. This can be illustrated by the following Ethical Consideration.

EC 2-16. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls or other standards to insure that the public is not misled about the existence of special competence, a lawyer should not hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate, in public announcements and personal communications, if it is factual, a limitation of his practice or that he practices in one or more particular areas or fields of law, which will assist laypersons in selecting counsel and accurately describe the limited area in which the lawyer practices.

DR 3-101. Aiding Unauthorized Practice of Law.

- (A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
- (B) ...
- (C) ...

DR 3-104. Non-lawyer Personnel.

- (A) A lawyer or law firm may employ non-lawyer personnel to perform delegated functions under the direct supervision of a licensed attorney, but shall not permit such non-lawyer personnel to:
 - (1) Counsel clients about legal matters;
 - (2) ...
 - (3) Engage in the unauthorized practice of law.
- (B) ...
- (C) ...
- (D) The delegated work of non-lawyer personnel shall be such that it will assist only the employing attorney and will be merged into the lawyer's completed product. The lawyer shall examine and be responsible for all work delegated to non-lawyer personnel.
- (E) ...

UPR 4-101. Estate Planning Advice

- (A) A non-lawyer shall not advise another for compensation, direct or indirect, in any matter involving the application of legal principles to particular facts or purposes or desires, except:
 - (1) A non-lawyer may collect information and analyze the facts and assets of a particular estate in relation to its economic or investment needs.
 - (2) A non-lawyer may, incident to the sale or transfer of a particular investment asset, give information about the laws affecting the holding or disposition of such asset, such as making projections of possible tax effects arising from a transfer of ownership of a life insurance policy, security or other investment.
 - (3) A non-lawyer may specifically recommend dispositive provisions for a will or trust.

UPR 4-102. Holding Out With Regard to Estate Planning.

- (A) Except to the extent estate planning advice is permitted under UPR 4-101, a non-lawyer shall not hold himself out as authorized to furnish another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, to a specific set of facts for a particular person.
- (B) A non-lawyer shall not be excused from any violation of these Rules by any disclaimer or other statement that his unauthorized advice or conduct should be reviewed by his customer's own lawyer.

UPR 5-101. Holding Out as a Tax Expert.

- (A) A non-lawyer shall not hold himself out as authorized to furnish to another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, dealing with taxes, except:
- (1) A non-lawyer may hold himself out as an expert in the preparation of tax returns.
 - (2) A certified public accountant or a person duly enrolled may hold himself out as authorized to practice before the Internal Revenue Service, as those terms are defined by the then applicable federal regulations and to the extent permitted therein.
 - (3) ...
 - (4) As permitted by UPR 5-102.

UPR 5-102. Practicing Law in Tax Matters.

- (A) A non-lawyer shall not furnish to another for compensation, direct or indirect, advice or service under circumstances which require his use of legal knowledge or skill in the application of any law, federal, state or local, dealing with taxes, except:
- (1) ...

- (2) ...
- (3) ...
- (4) A non-lawyer may render such advice or service incident to an engagement to provide products or services which he is otherwise authorized to provide, where such advice or service arises out of the providing of such other products or services and was not the principal purpose of the engagement.
- (5) A non-lawyer may render such advice or service to his regular employer other than in aid of such employer's unauthorized rendition of legal advice or services to another.

Consider Unauthorized Practice of Law Opinion No. 121, rendered in 1988, in which an attorney inquired whether it would be permissible to have a non-lawyer (an accountant) counsel the attorney's clients directly "in the areas of taxation, estate planning and investments." The attorney related that the clients would be notified that the individual performing the service was not an attorney, and that, in addition, the attorney would in fact "oversee all work performed." This opinion held

... It would be improper for your nonlawyer employee to directly counsel clients in the areas of taxation, estate planning and investments since this would imply that he possesses legal knowledge or skill in these areas.

It is permissible under the Rule for such an employee to advise you on matters of taxation, estate planning and investments so long as the contact with, and advice given to, the client is performed by a properly licensed lawyer.

The following Unauthorized Practice Considerations are also important for review.

UPC 4-3. The holding out to the public, directly or indirectly, overtly or subtly, by any non-lawyer of his willingness to give advice as to the legal consequences

of a particular plan which goes beyond matters incident to the sale or transfer of a particular investment asset, such as a life insurance policy or security, in the regular course of the non-lawyer's business, or his willingness to perform legal services in the field of estate planning, is a holding out to engage in the unauthorized practice of law. A non-lawyer cannot solicit such services and then hire a lawyer to perform them. A non-lawyer consultant or adviser cannot offer the legal services of his own lawyer. Such practices are not purged or purified by an acknowledgment that the consultant or adviser is not authorized to give legal advice, or by any disclaimer or suggestion that such advice should be reviewed by the customer's own lawyer.

UPC 4-4. Activities geared to motivating an individual to give consideration to his estate, and to seek the advice of a lawyer of his own choosing as early as possible, preferably from the outset, with regard to the development of an overall estate plan, are in the public interest.

Advice on matters of law with respect to the particular factual situation of the individual concerned, however, is the unauthorized practice of law whenever it goes beyond advice on matters incident to the sale or transfer of a particular investment asset, such as a life insurance policy or security, in the regular course of the non-lawyer's business.

UPC 5-4. In general, tax planning is not considered to be the unauthorized practice of law. Attempting to resolve uncertainties as to the interpretation or application of tax or general law to a particular transaction, however, involves the practice of law unless it is incidental to a tax return preparer's engagement or the regular course of conducting a licensed business, for example, an investment business, or is limited to an analysis of merely the facts and assets of an estate.

UPC 5-5. Only a lawyer may prepare legal instruments for others or take the necessary steps to create, amend or dissolve a partnership, corporation or other business entity. Suggesting that any such legal work should be reviewed by the taxpayer's lawyer will not cure any unauthorized practice. In general, a lawyer working for a corporation not engaged in the practice of law as a registered law corporation is not entitled in the course of his employment to provide such services for customers

or patrons of his employer.

DR 4-101. Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other 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.

(B) Except as provided by DR4-101 (C) and (D), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) ...

(3) ...

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when required by law or court order.

(3) Information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.

(4) ...

(D) A lawyer shall reveal:

(1) The intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury

by the client, that the attorney shall seek to withdraw as counsel.

(2) ...

(E) ...

Consider the situation where an attorney represents two generations of one family, has previously prepared Wills for Mr. and Mrs. Joshua Painter, and is presently active with an estate planning engagement with their son and daughter-in-law, James and Laura Painter. During a conference with the attorney, James and Laura Painter inquire of the attorney (i) whether James' parent's wealth is larger than \$3,000,000.00, (ii) whether they (James and Laura) need to be concerned with tax and financial planning in anticipation of James' future inheritance, (iii) whether James' parents are leaving any of James' inheritance in trust, and (iv) whether James' parents leave any bequests to charity in their Wills. They further relate to the attorney that James' parents have told them it is satisfactory for the attorney to share this information with them. Should the attorney discuss the Wills of Mr. and Mrs. Joshua Painter with James and Laura at this time? The answer is no.

Legal Ethics Opinion No. 378, from July 15, 1980 reads as follows:

It would be ethically impermissible, under DR 4-101(B), for an attorney to reveal either the contents of, or the existence of, a client's will to anyone outside the confidential sphere of the attorney-client relationship, including another client whose interest may be affected by that will.

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

(E) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

Legal Ethics Opinion No. 1473, from September 1, 1992, presented a situation where three individuals qualified as executors under a Will, and retained an attorney to represent the estate. Later, another attorney from the same firm began to represent the estate. Each of the three executors retained

separate counsel, and the lawyer representing the estate kept each of the executors and their individual counsel informed on all matters. Additional facts included in the summary of this Legal Ethics Opinion, as well as the Committee's decision, were:

Dissension developed among the executors, with Y and Z agreeing, and X disagreeing, with Lawyer B's advice. Eventually, all three children/executors qualified as trustees. However, the dissension appeared likely to continue. Should adversity arise between X on one hand and Y and Z on the other, it appeared unlikely that X would consent to Lawyer B's representation of Y and Z as trustees. Lawyer B was not aware of any information imparted to him in confidence by any of the co-executors and had tried to advise all executors of the positions taken by each and the response thereto.

The issues involved in the establishment and administration of the trusts evolved from the same set of facts, i.e., from a single document of the same decedent, as did the estate administration. Therefore, the matters were substantially related under DR 5-105(D).

By virtue of Lawyer B's representation of the estate, he had an attorney-client relationship with all three executors X, Y, and Z. Thus, the subsequent adverse interests among the three executors/trustees required Lawyer B to obtain consent of all three in order to continue to represent two of the three executors/trustees. In the absence of such consent, Lawyer B could not continue representation of two of the three co-executors.

Where the earlier and present matters were substantially related, the attorney's non-receipt of secret or confidential information was irrelevant.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) ...

(2) ...

(3) ...

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) ...

(1) ...

Consider the situation where an attorney, who previously drafted the Will of the decedent, has been engaged to represent the decedent's estate, including the preparation of the United States Estate (and Generation Skipping) Tax Return and the Virginia Estate Tax Return. The attorney knows, from his prior representation of the decedent, that the decedent made at least eight gifts over the past five years to two individuals, who are the Executors of the decedent's estate, and that these gifts were each in excess of \$10,000.00. In preparing a draft of the estate tax return, the attorney inquires of the executors whether the decedent ever filed gift tax returns, and relates the need for his obtaining this information, as well as his learning the exact value of the gifts, and the dates made, so that he may calculate the proper estate tax liability. The executors relate to the attorney that no one else knows of these gifts, that the decedent never filed gift tax returns, and that

they do not wish to report the gifts. The executors relate to the attorney to complete the estate tax return without mention of the gifts, and that they (the executors) will take all responsibility for this action. Should the attorney comply with the wishes of the executors? The attorney should not complete the estate tax return as instructed by the executors.

Several Ethical Considerations of interest are as follows:

EC 7-5. A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.... A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC 7-6. Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motives, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. ...

EC 7-8.... Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.... In the event that the client in a nonadjudicatory matter insists upon a course

of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

Conflicts of Interest

Consider the situation where an attorney, in March of this year, was engaged by Perry Hart and Catherine Hart to draft Wills on their behalf. Prior to accepting the engagement, the attorney had each of Mr. and Mrs. Hart execute a letter whereby they acknowledged that if they each had separate counsel they would each receive completely independent advice, but that they wished the attorney being engaged to represent each of them.

Further, in this letter they also authorized, by their acknowledgment of same, for the attorney to notify either of them of any private communications which the other spouse may relate to the attorney, with regard to the estate planning engagement. Mr. and Mrs. Hart executed their Wills in the attorneys' office in April, and the attorney was requested by the clients to retain the original of their Wills for safekeeping. Within the past two weeks, Mr. Hart has had several meetings alone with the attorney concerning the revising of his Will. Mr. Hart has demanded of the attorney that he keep these communications secret from his wife. Mr. Hart has confided in his attorney that he wishes to change his Will, which presently names his wife, Catherine, as Executrix,

and presently contains a bequest for his 75% interest in his closely-held corporation (which the attorney has represented for the past few years) to Justin Matthew (who is the vice-president of the corporation, but is not a shareholder, and who also is the brother-in-law of the attorney), and bequeaths and devises the residuary of his estate outright to his wife, Catherine. Mr. Hart has confided to the attorney that he wishes to leave his stock in the corporation to his executive assistant, Robin Patricia. Further, Mr. Hart has related to his attorney that as opposed to leaving his residuary estate outright to his wife, he now wishes to leave one-half of his residuary estate in trust for the benefit of his wife, and the remaining one-half of his residuary estate outright to his executive assistant, Robin Patricia, and that he wishes to delete his wife as Executrix, and appoint Robin Patricia as Executrix and Trustee.

Mr. Hart, who is in a hurry to complete some unfinished business prior to leaving for a business trip to the West Coast, picks up the newly drafted Will from his attorney, and notifies the attorney that he will review it that night. The following day Mr. Hart telephones the attorney, relates to him there are several items he does not like about the recently prepared Will, and though he will wish some revisions in the future, he intends to execute the Will prior to leaving on his business trip. The attorney would prefer Mr. Hart allow him to make any necessary revisions prior to execution of the Will, and that

Mr. Hart execute the Will in the attorney's office. However, the attorney emphasizes to Mr. Hart the Will needs to be executed in front of two witnesses.

The following evening, as the attorney is sitting down to dinner with his family and his brother-in-law's family, he receives a telephone call from Robin Patricia, who informs the attorney that Perry Hart has died of a heart attack in Seattle, and that he previously told her to call the attorney if an emergency ever occurred. Her immediate concern to the attorney is that she feels "99% certain" Perry Hart executed his Will the prior evening at his residence, but is worried Catherine Hart will "rip it to shreds." Ms. Patricia relates she wishes to engage the attorney to represent her, and he must do all in his power to stop "Catherine from destroying the Will." The attorney tells Ms. Patricia to telephone him at the office the next day.

The next morning Catherine Hart visits the attorney at his office, notifies him her husband died of a heart attack in Seattle the previous evening, and requests the attorney to advise and represent her with regard to her husband's Will, executed in April, and which she reminds the attorney he is holding. She relates to the attorney that she would like him to retrieve the Will from his safe deposit box, and accompany her to the Clerk's Office to attend to the immediate probate of the Will, so that she may qualify as Executrix of her husband's estate and begin the estate administration process. Mrs. Hart

also relates to the attorney that her husband confided in her the night prior to leaving for Seattle that he had considered changing the Will executed in April, but that he decided against doing same, and had decided to terminate his executive assistant, Robin Patricia, for improper conduct, upon returning from his business trip to Seattle.

An item the attorney initially should have addressed is whether he had a duty to notify Mrs. Hart when her husband first met with him with regard to revising his Will executed in April.

Did the engagement letter executed by Mr. and Mrs. Hart with the attorney with regard to the estate planning engagement impose upon the attorney an affirmative duty to notify Mrs. Hart of her husband's contemplating the revocation of his Will and the execution of a new Will? Was the engagement of the attorney by Mr. Hart to draft a new Will a new engagement, or a continuation of the prior engagement with Mr. and Mrs. Hart?

Had the attorney felt he was under a duty to contact Mrs. Hart to notify her of her husband's contemplating changing his Will, should the attorney have also informed her of the specific revisions Mr. Hart was considering? Should the attorney have informed Mr. Hart, at their first meeting when Mr. Hart began to address the revisions he was contemplating, that he (the attorney) was under a duty to notify Mrs. Hart of this matter?

If the attorney notified Mr. Hart of his duty to notify Mrs. Hart, and Mr. Hart then responded that he should discuss these matters with another lawyer, should the attorney with whom Mr.

Hart was meeting refrain from saying anything to Mrs. Hart about their brief conversation? Is the attorney presently under an obligation to notify Mrs. Hart of what has transpired, even though her husband is dead? Could the attorney have taken steps to protect himself from the situation presented in this hypothetical? Should the attorney's engagement letter with Mr. and Mrs. Hart been very specific as to the duty of the attorney to notify the other among Mr. and Mrs. Hart of any matters pertaining to the estate planning engagement coming to his attention which he feels the other party should be aware, "no matter when such facts come to his attention?"

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).
- (C) In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that

person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

(E) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

The following Ethical Considerations are of interest in connection with this hypothetical.

EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.... On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple

clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent....

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent ..., and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case....

EC 5-18.A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC 5-19.A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

The following disciplinary rule is also appropriate for review

in this hypothetical:

DR 4-101. Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other 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.

(B) Except as provided by DR4-101 (C) and (D), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) ...

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) ...
- (3) Information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.
- (4) ...

(D) A lawyer shall reveal:

- (1) The intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise his client of the possible legal consequences of his action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.
- (2) ...

(E) ...

Was it appropriate for the attorney to request Robin Patricia to telephone him the next day? When the attorney meets with

Mrs. Hart, what is his obligation to pursue with her whether her husband did in fact execute a new Will prior to leaving for Seattle? Based upon his previous conversations with Mr. Hart, and Robin Patricia's feeling that Mr. Hart executed a new Will, and that she was concerned Mrs. Hart will "rip it to shreds," should the attorney accept the new engagement from Mrs. Hart with regard to representing her husband's estate?

The attorney should also review "DR 5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness." Should the attorney, if he decides to accept the engagement from Mrs. Hart, proceed to immediate probate of Mr. Hart's Will executed in April, or should he impress upon Mrs. Hart a need to conduct a search to determine if another Will of Mr. Hart's can be located? Should the attorney refrain from representing Mr. Hart's estate, Mrs. Hart, and Robin Patricia? If Robin Patricia engages another attorney who seeks to question Mr. Hart's attorney, should the attorney refuse to answer any inquiries from Robin Patricia's attorney concerning Mr. Hart's conversations with him about revising his Will, as well as all other matters with regard to his estate planning engagement with Mr. and Mrs. Hart?

In addition to these matters, do you think it was proper for the attorney who drafted the Will Mr. Hart executed in April to provide for a bequest for the attorney's brother-in-law?

In addition to the following disciplinary rule, see Legal Ethics Opinion No. 1100.

DR 5-104. Limiting Business Relations with a Client.

(A) ...

(B) A lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee.

Is the attorney's brother-in-law considered a member of the lawyer's family?

Consider the situation where an attorney drafted a Will for a client, who has recently died, and such Will appointed two individuals to serve as both Executors of the decedent's estate, and as Trustees of a trust for the benefit of the decedent's children from a former marriage ("Bypass trust").

The decedent bequeathed his holdings of stock in a closely-held corporation (Corporation X) of which he was the majority shareholder equally among the two remaining shareholders of Corporation X. The attorney has previously represented the decedent, as well as Corporation X. The individuals appointed as Executors and Trustees, and the decedent's spouse, meet with the attorney, and the individuals appointed as Executors and Trustees engage such attorney to advise and represent the estate with regard to (i) probate of the Will, (ii) inventory and accounting matters arising from the estate and for which filings will be due to the Commissioner of Accounts, and (iii) all federal and state tax filing requirements for the estate.

During the representation, the attorney becomes aware of

one note made payable to the decedent, and one note made payable to Corporation X, which are neither marked "Paid in Full" nor "Cancelled", nor carry any similar language on their face. The note payable to the decedent had been previously omitted from financial statements supplied by the decedent to various lending institutions. The existence of the note payable to Corporation X was omitted from the financial statements of the closely-held corporation. These notes were all made by one of the Executors of the decedent's Will, who was the former administrative assistant to the decedent. This Executor relates to you that the notes (which were made within the past two years, and in the aggregate total \$250,000.00) were "previously forgiven" by the decedent and she considered them to be "gifts" from the decedent, and that it would cause a great deal of embarrassment to the decedent's spouse if she were to learn of these notes. This same Executor then asks you to turn over possession of the notes to her, and to say nothing to anyone (including the remaining Executor) about their existence. The note payable to the decedent would equal approximately ten percent of his gross estate for federal estate tax purposes, and the note payable to the corporation would equal approximately twenty percent of the assets otherwise appearing on the balance sheet of the corporation.

Should the attorney merely turn these notes over to the Executor who requests same, and ignore them for purposes of (i) estimating the decedent's probate estate at the time of

the probate of his Will, (ii) completing the inventory and accounting for the estate, and (iii) completing the estate tax returns (both federal and Virginia)? Does the attorney have a duty to bring these matters to the attention of the remaining Executor, who is the controller of Corporation X, and to which a note is made payable? Does the attorney have a duty to recommend that gift tax returns be filed by the estate of the decedent for "prior gifts" should the attorney believe the Executor who related the notes were "forgiven"? Does the attorney have a duty to report to the board of directors of Corporation X the discovery of the note made payable to the corporation, and seek the advice of the board of directors as to its disposition, and further recommend to the board of directors that they should have their auditors review how a large amount of funds left the corporation without being reported in the financial statements of the corporation? Let us further assume that just prior to the death of the decedent, the certified public accounting firm performing an audit of Corporation X requested from the attorney certain responses in connection with the services performed by the attorney for the corporation. Is the discovery of the note made payable to Corporation X an item for which the attorney should supplement his prior response to the certified public accounting firm?

Were the decedent to have truly "forgiven" these notes, and made gifts to the maker, the Bypass Trust contained in the decedent's Will should be funded with property of a lesser value

than otherwise, as the then remaining unified credit of the decedent available at his death would be less than had no gifts been made by the decedent. Therefore, is the attorney under a "duty" to discuss the issue of the notes directly with the beneficiaries of the Bypass Trust?

The attorney is faced with a number of ethical dilemmas, and this outline does not attempt to address all of these dilemmas. However, at the outset of the engagement, the attorney should have identified who the client is. Are the existence of the notes a "confidence" or a "secret" as referred to in DR4-101(A)? May the attorney reveal the discovery of the notes without the consent of the Executor who has made clear to the attorney her feelings on this matter, without running afoul of DR4-101(B) (1), and DR4-101(C) (1), (2), and/or (3)?

Does the fact that one of the Executors has revealed this information preclude the attorney from bringing this to the attention of the remaining Executor? Should the attorney include the one note payable to the decedent in the value of the decedents estate (and the note made payable to Corporation X in the value of Corporation X for purposes of calculating the decedent's interest in Corporation X) at the time of probate of the Will of the decedent? Should the attorney in preparing drafts of the estate tax return for review by the Executors (i) include the present existence of these notes, (ii) indicate gifts previously made, or (iii) ignore the existence of the notes as requested by one of the Executors?

Could the attorney have provided, prior to the engagement, for the unforeseen situation involving the notes with regard to whom he may now discuss their existence? A properly drafted engagement letter, setting out the identity of the client, and that all matters coming to the attention of the lawyer with regard to the estate of the decedent are to be brought to the attention of each of the Executors, would have addressed several of the issues facing the attorney. Assume for a moment the remaining Executor does not take seriously the issues which the attorney brings to his attention, does not investigate the matter of the notes, and whether they were or were not "forgiven", and tells the attorney to forget the existence of the notes and not to raise the issue of any gifts being made and the use of any of the prior unified credit. The Executors wish the attorney to prepare the United States Estate (and Generation Skipping) Tax Return in accordance with the instructions given in the prior sentence. May the attorney abide by the Executors' wishes to forget about the existence of the notes and complete the United States Estate (and Generation Skipping) Tax Return in accordance with their instructions?

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule or knowingly aid another to do so.

(2) ...

(3) Commit a crime or other deliberately wrongful act

that reflects adversely on the lawyer's fitness to practice law.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

(B) ...

Certainly the attorney should give consideration to the above Disciplinary Rule. The certification, under penalties of perjury, required of the preparer on both the United States Estate (and Generation Skipping) Tax Return and the Virginia Estate Tax Return should prevent the attorney from completing these returns based only upon the facts presented in this hypothetical, without further investigation and information.

Are the existence of the notes a "confidence" or "secret?"

May the attorney reveal the discovery of the notes without the consent of the Executor who has made clear to the attorney her feelings on this matter? As the attorney was already representing Corporation X at the time of the decedent's death, should the attorney have (i) agreed to represent the estate, or (ii) continued representing Corporation X, prior to learning of the matter of the note to such corporation? Would your response change with regard to whether to continue representation of Corporation X after you learned of the matter of the note to such corporation? Had the Executors, who now had the right to vote the decedent's shares of stock in Corporation X and which shares represented a majority position in such corporation, related to the attorney that they did not

feel there was any conflict of interest in the attorney representing both the estate and Corporation X, need the attorney be concerned about the possibility of a conflict of interest?

Some Ethical Considerations which I would like to highlight for you are as follows:

EC 4-1. 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....

EC 4-2.... A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-4. The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client.... A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend.

EC 4-6. The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment....

It is suggested that Legal Ethics Opinion No. 1452, from March 13, 1992, be reviewed. This opinion reads in part:

You have indicated that hypothetically an attorney is retained by the personal representative of a decedent's estate to render whatever legal services may be required in the settlement of the estate.

You have asked the Committee to opine as to with whom the attorney has an attorney-client relationship, i.e., the estate, the personal representative, the beneficiaries, or some combination of the foregoing.

Although there are no disciplinary rules directly addressing the issue you raise, the Committee is of the opinion that the attorney engaged to render services in connection with the settlement of a decedent's estate enjoys a similar status to that of an attorney engaged to represent a corporation or similar entity. ...

Thus, since the personal representative assumes the legal status as the agent of the decedent and is the only available conduit of information between the entity [i.e., the estate] and the attorney, the Committee opines that the attorney/client relationship arises between the attorney and the personal representative, albeit for the ultimate benefit of the estate. ...

The estate's personal representative assumes legal and fiduciary responsibilities to the estate which may include obtaining the services of an attorney. Although the attorney, in providing those services, may benefit the beneficiaries of the estate, the Committee is of the further opinion that there is no contractual privity with the beneficiaries which can give rise to an attorney-client relationship with those beneficiaries.

...

Given that the attorney enjoys an attorney/client relationship with the personal representative, the Committee cautions that the prohibitions contained in the Code of Professional Responsibility as to multiple clients' conflicting interests and client confidentiality apply to that relationship...

Competence and Knowing When to Seek Help

DR 6-101. Competence and Promptness.

(A) A lawyer shall undertake representation only in matters in which:

(1) The lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters, or

(2) The lawyer has associated with another lawyer who is competent in those matters.

(B) A lawyer shall attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client.

(C) A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered.

(D) A lawyer shall inform his client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Consider the situation where an attorney, who has been limiting his practice to real estate matters for the past twenty years, is contacted by an individual whom he had previously represented in connection with the individual's purchase of a residence.

The individual relates to the client that his father passed away last week, and he would like the attorney to represent the estate with regard to (i) probate of the Will, (ii) inventory and accounting matters arising from the estate and for which filings will be due to the Commissioner of Accounts, and (iii) all federal and state tax filing requirements for the estate.

The individual also relates he estimates his father's estate at \$6,000,000.00, and his father's Will contains numerous trusts. Do you think this attorney should undertake this representation? The following Ethical Considerations merit

attention.

EC 6-1....., a lawyer.... He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-3.While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4..... If a lawyer has accepted employment in a matter beyond his competence but in which he expects to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

In the prior hypothetical, assume the attorney decided to accept the engagement and attempted to do all the work himself. Assume further that the attorney made numerous errors during his representation of the estate, which ultimately caused the estate to pay many unnecessary expenses. It is felt the attorney should not have accepted this engagement and attempted to do all the work himself. It is felt the attorney will be liable for negligence in his handling of this matter, and that

he was not competent to handle this matter. In hindsight, the attorney will realize he was not qualified to handle the engagement. Sometimes an attorney who has undertaken a representation will not discover until he (or she) is more involved with the matter that outside assistance is necessary from more experienced counsel. An attorney should not be embarrassed to go to a client and explain that the matter is more complicated than originally envisioned, and that the attorney needs assistance from more experienced counsel to continue with this matter. Or, the attorney may decide, upon discovering complexities not previously known about a case, that the client may be better served by securing more experienced counsel, and that once other counsel has been engaged, the assistance of this attorney may no longer be necessary.

Consider the following two cases, which were precipitated by attorney errors. In the West Virginia case of F & M Bank v. F & M Bank, 216 S.E.2d 769 (W.Va. 1975), the amount of a specific bequest was left out of a Will due to the draftsman's mistake. The lower court, based on the testimony of the attorney who prepared the Will, inserted the amount and instructed the executor to pay that amount. The attorney testified "... that apparently two lines were omitted by the typist ...", and he went on to testify as to what was the testatrix's intention for this specific bequest. See *id.* at 771. The Supreme Court of Appeals of West Virginia held that this was not just a matter of an ambiguously stated bequest

amount, but that it was nonexistent. The Court held that it would not allow extrinsic evidence to fill in a blank. "This result obtains whether the mistake or omission is one of the testator or of a scrivener." See *id.* at 773. The Court went on to say that "While it may be unfortunate in particular cases that intention of testators cannot be ascertained by broader evidentiary inquiries, we adhere to the policy of preserving the integrity of wills." See *id.* at 773. The Court reversed the lower court's decision.

This case illustrates the harsh results that may come about due to a "simple" error in drafting. Had the Will been carefully reread by the attorney prior to its final review by the client and ultimate execution, this error could have been avoided.

It is felt that an attorney's competence should extend to the final product for his client. The use today of computers and word-processing equipment can make many tasks much shorter, but they are not a substitute for an attorney's careful review of a final document.

As in every other area of the law, the attorney must keep up with statutory changes and case law developments. In the area of Will and Trust drafting, the attorney must also keep abreast of the interpretation given to this area of the law by the Internal Revenue Service, as well as by courts. The attorney should periodically review his form documents and request forms to ensure that they are up to date and that they address all necessary matters. Sometimes the attorney may be

dealing with a unique situation where either a previously used boilerplate provision may no longer be applicable, or may possibly be in direct conflict with the unique provision inserted in the Will or Trust for a client. An attorney should not refrain, when reviewing a Will or Trust prior to presentation for a client's final review and subsequent execution, from reviewing the entire document, including all boilerplate provisions. The case of Virginia National Bank v. United States, 443 F.2d 1030 (4th Cir. 1971), involved the appeal of an action by Virginia National Bank, as executor and trustee under a decedent's Will, to recover additional taxes and interest which were assessed because the Internal Revenue Service disallowed the marital deduction for one of the two Trusts created under the Will of the decedent. There was a clause in the Will which was inconsistent with the creation of a Trust which qualified for the marital deduction. This clause was a spendthrift clause which also contained a "forfeiture" provision. The lower court had found for the plaintiff because it held that "... within the four corners of the will ...", that clause did not apply to the Trust at issue. See *id.* at 1033. The attorney who drafted the Will testified in the lower court that the conflicting clause was "... boiler plate ..." and "... that the language of clause Sixth was not analyzed, or explained to the decedent except to say, "This is a spendthrift clause. We usually use it. It's been approved by the bank and I have used it in many wills."

" See *id.* at 1033. The Court of Appeals upheld the lower court's decision although they found that the provisions of the Will were ambiguous and based their decision on the decedent's intent based on the facts and circumstances at the time of the execution of the Will. Each Will or Trust is unique and all provisions must be analyzed in connection with all of the other provisions of the Will or Trust. The client is relying on the attorney even in "simple" Will situations to make sure that the technical aspects of the Will are correct, and that the client's wishes are carried out in accordance with the Will in the manner explained to him by the attorney.

In the areas of Will and Trust drafting and Estate Planning, the attorney should not undertake an engagement to draft a Will or Trust unless such attorney is competent to do so. While the attorney may be competent to draft a "simple" Will, when it comes to complex Wills and Trusts, it may be prudent to refer your client to an attorney who emphasizes this practice area, unless you can become qualified in a relatively short period of time without expense to your client. The attorney should also work to maintain competency in the area of Will and Trust drafting by keeping up with changes in the applicable Virginia statutes, case development, as well as changes in federal tax laws. Once an attorney becomes competent in a given area, it is a matter requiring constant attention to maintain that competency. The attorney should periodically review the Will and Trust forms being utilized, as well as the forms used

for requesting objectives and documents. These forms can quickly become outdated with the ever constant changes in the law.

A lawyer must recognize when not to accept an engagement, as well as recognize when he (or she) needs to speak to the client about seeking assistance on an engagement, or the need for the client to secure more experienced counsel. It may also very well be that matters as simple as "proofreading" are what makes the difference between doing a job "competently" or "incompetently."

The various Disciplinary Rules and Ethical Considerations quoted in this outline have come from the Virginia Code of Professional Responsibility, and were taken from the August 1993 issue of the VIRGINIA LAWYER REGISTER. The Unauthorized Practice Rules and the Unauthorized Practice Considerations quoted in this outline were taken from the August 1993 issue of the VIRGINIA LAWYER REGISTER. The Legal Ethics Opinions and the Unauthorized Practice of Law Opinion in this outline were taken from the volume titled Legal Ethics and Unauthorized Practice Opinions of the Code of Virginia, 1950. The summary of a Legal Ethics Opinion was taken from the August 1993 issue of the VIRGINIA LAWYER REGISTER.