ETHICAL CONCERNS IN PROTECTIVE AND GUARDIANSHIP PROCEEDINGS

When an attorney is asked to initiate protective or guardianship proceedings, the facts of the particular case may raise a number of ethical concerns. The purpose of this article is to identify situations in which an attorney must carefully evaluate the ethical propriety of such representation.

Under O.R.S. Chapter 9 and the Oregon State Bar's Code of Professional Responsibility, an attorney's ethical responsibilities are, in large part, owed to the attorney's client. Payment of the attorney's fees is relevant, but not determinative, in identifying the client, *In Re Bristow,* 301 Or 194, 721 P2d 437 (1986). In a protective or guardianship proceeding, the client of the initiating attorney is the petitioner.

If an attorney-client relationship exists or has existed between the attorney and the proposed person to be protected or ward (hereinafter referred to as the protected person), there are two ethical restrictions that may apply: (1) ORS 9.460(5) and Disciplinary Rule (DR) 4-101, which involve the preservation of a client's confidences and secrets: and, (2) DR 5-105, Conflict of Interest: Former, Current and Multiple Clients. Under these rules, the attorney may represent the petitioner only if the protected person is competent and consents after full disclosure. If the protected person is incompetent, the attorney may not be the petitioner or represent the petitioner unless extreme circumstances exist. See Oregon State Bar Legal Ethics Opinions No. 229 and 237.

If an attorney-client relationship has not existed between the attorney and the protected person, there are fewer ethical restrictions on the attorney's representation of the petitioner. There are, however, situations in which an impermissible conflict of interest may exist. Such a situation was found when an insurance company asked an attorney to initiate guardianship proceedings for a minor for the purpose of effecting a settlement the insurance company had reached with the minor's parents. The insurance company was to pay the attorney's fee and the minor and the minor's parents were not represented by another attorney. The attorney's duty to the insurance company to proceed with the guardianship petition conflicted with the interests of the minor and his parents in obtaining the best possible settlement. See OSB Legal Ethics Opinion No. 104 and DR 5-108.

If an attorney is appointed as the conservator or guardian of a person, the attorney's ability to simultaneously act as attorney for the conservator or guardian is subject to DR 5-101 Conflict of Interest: Lawyer's Self Interest. Under the provisions of that rule, an attorney may act in the dual roles of fiduciary and attorney for the fiduciary if the protected person is competent and consents after full disclosure. The fiduciary-attorney may not, however, act under a contingency fee agreement without the approval of the probate court. See OSB Legal Ethics Opinions No. 441 and 444. Furthermore, any attorney fees requested for guardianship or conservatorship proceedings must be approved by the probate court after notice to interested parties. Failure to comply with this requirement can subject the attorney to disciplinary proceedings. See 1987 Uniform Trial Court Rules, Rule 9.090 and *In re Conduct of Thomas,* 294 Or 505, 659 P2d 960 (1983).

A summary of the rules discussed follows:

1. An attorney proposing to act in dual roles of the fiduciary and attorney for the fiduciary must obtain the consent of the protected person after full disclosure. The Probate Court must consent to such representation if the protected person is incompetent.
2. An attorney's ethical initiation of conservatorship or guardianship proceedings may substantially depend upon whether the initiating attorney ever represented the protected person. If an attorney-client relationship did exist, the attorney's representation of the petitioner in the proceeding will require the informed consent of the protected person. However, if the protected person is incompetent, the attorney, generally, may not initiate such proceedings.
3. Even if the attorney never represented the protected person, the attorney would be prohibited from initiating such proceedings on behalf of a third party who has interests which conflict with the interests of the protected person.

Daniel C. Re
Hari Nam Singh Khalsa

THE EXECUTIVE COMMITTEE WANTS YOUR INPUT

The Estate Planning and Administration Section has become very active in a number of areas during the past several years.

In the CLE area, the Section has co-sponsored several major programs with the Bar: Administering Decedents' Estates (1983), Basic Estate Planning (1984), Planning for the Taxable Estate (1986), Oregon Probate System Seminar (1987), Ethics in Estate Planning and Administration (9/15/88), and Administering the Taxable Estate (11/4/88). The Section assisted the Bar in publishing the new Oregon Probate System Manual last year and will help revise the CLE "black book," Administering Oregon Estates, during the coming year.

In the legislative area, the Section monitors all bills introduced during legislative sessions and takes positions on those of interest to the Section. Between legislative sessions, the Section's legislative committee studies proposed Uniform Acts and other developments in the law to determine whether the Section should sponsor or support legislation in Oregon. In the 1987 legislature, the Section sponsored such measures as an amendment to ORS 112.025 (changing the laws of interstate succession to favor the surviving spouse), several changes to ORS Chapter 118 (including elimination of the requirement to file an Oregon inheritance tax return for most estates), and new ORS 118.025 (creating a statutory marital deduction savings clause). Several legislative projects are currently under way, including proposals to expand powers of attorney statutes, revise probate claims procedures to comply with the recent U.S. Supreme Court decision in *Tulsa Professional Collection Services, Inc. v. Pope,* and reform the common law Rule Against Perpetuities.

The Section also publishes this newsletter three times a year and considers special issues such as the proposed plan of specialization recently rejected by the Bar's membership.

The Executive Committee solicits your involvement in ongoing Section projects and wants to know how you think Section dues can best be used. **PLEASE TAKE THE TIME RIGHT NOW TO COMPLETE AND RETURN THE ENCLOSED MEMBERSHIP SURVEY.**

Valerie J. Vollmar

SCHEDULE OF SEMINARS AND EVENTS

The following is a selected schedule of seminars which may be of particular interest to Section members:

SEPTEMBER 8-9, 1988: 1988 ALI-ABA, SOPHISTICATED ESTATE PLANNING TECHNIQUES, Boston, The Copley Plaza.

SEPTEMBER 20, 1988: NBI, BASIC DRAFTING OF WILLS – TRUSTS IN OREGON, Eugene, Hilton.

SEPTEMBER 21, 1988: NBI, BASIC DRAFTING OF WILLS – TRUSTS IN OREGON, Portland, Viscount Hotel.

SEPTEMBER 29-30, 1988: PLI, ESTATE PLANNING INSTITUTE, New Orleans, Fairmont Hotel.

OCTOBER 13-14, 1988: PLI, ESTATE PLANNING INSTITUTE, New York City, The Essex House.

OCTOBER 19-22, 1988: EIGHTH ANNUAL SOUTHERN CALIFORNIA TAX & ESTATE PLANNING FORUM, San Diego, California, San Diego Marriott.

OCTOBER 20-21, 1988: WASHINGTON STATE BAR 33rd ANNUAL ESTATE PLANNING SEMINAR, Seattle, Westin Hotel.

OCTOBER 27, 1988: Portland Tax Forum, USE OF TRUSTS IN ESTATE PLANNING, John Price, Multnomah Athletic Club, Portland, Oregon, 7:00 a.m. - 8:45 a.m.

NOVEMBER 4, 1988: OREGON STATE BAR ESTATE PLANNING AND ADMINISTRATION SECTION, ADMINISTERING THE TAXABLE ESTATE, Portland, Holiday Inn Airport.

NOVEMBER 13-19, 1988: NYU, 47TH ANNUAL INSTITUTE ON FEDERAL TAXATION, New York, Grand Hyatt.

NOVEMBER 14-18, 1988: ALI-ABA Course of Study, PLANNING TECHNIQUES FOR LARGE ESTATES, San Francisco, California.

DECEMBER 11-17, 1988: NYU, 47th ANNUAL INSTITUTE ON FEDERAL TAXATION, San Francisco, Fairmont Hotel.

JANUARY 9-13, 1989: UNIVERSITY OF MIAMI 23rd ANNUAL INSTITUTE ON ESTATE PLANNING, Miami, Sheridan Bal Harbour.

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PLANNING FOR INCAPACITATED PERSONS

TWO STEPS FORWARD: Protecting Income and Resources for a Spouse Under the Medicare Catastrophic Coverage Act of 1988

The financial outlook is bleak for people who require nursing home care. Faced with costs ranging from $1,300 to $4,000 per month, the average nursing home resident exhausts his or her resources in less than a year. The Medicaid program can help pay for long term care after the individual's resources have been spent down to program limits. However, the process of qualifying for Medicaid benefits often forces the spouse of a nursing home resident to live in poverty. These "community spouses" will get some financial relief in 1989 as a result of the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988, P.L. 100-360.

Medicaid is a joint federal-state program of medical assistance for low-income families and individuals. 42 USC §§1396 *et seq.* In Oregon, the program is administered primarily by the Adult and Family Services Division. The Senior Services Division and local area agencies on aging manage the long term care services covered under Medicaid, which include nursing home care, adult foster care, residential care and in-home services. When a person who needs long term care qualifies for Medicaid assistance, he or she receives a small monthly personal needs allowance from his or her income ($30 for nursing home residents, slightly higher for those in foster care or residential care). In addition, the person's community spouse is entitled to receive an allowance to bring his or her income up to $354 per month. The rest of the Medicaid recipient's income must go to pay the costs of care. OAR 461-04-635.

The Act will make several dramatic changes in how the Medicaid program affects community spouses. The provisions will help to ensure that community spouses who plan ahead will have adeqate incomes and resources. Beginning September 30, 1989, each state must set a spousal allowance for the community spouse equal to at least 122% of the poverty level for a two-person household. For 1988, this amount is $786 per month. The 122% will increase to 133% on July 1, 1991, and 150% on July 1, 1992. Income from the Medicaid recipient will be used to bring the community spouse's monthly income up to the amount of the spousal allowance. Community spouses whose shelter costs (defined as rent or mortgage, property taxes, insurance and utilities) total more than 30% of the amount of the state's spousal allowance will be entitled to receive an "excess shelter allowance" to cover those additional costs. The total amount of the monthly spousal allowance is capped at $1,500, but the cap is indexed to inflation. Community spouses with dependents can receive an additional sum for each dependent from the Medicaid recipient's income.

The Act permits funds in excess of the state's spousal allowance (and the $1,500 cap) to be paid under two circumstances. The state will honor a court order requiring the Medicaid recipient to pay support for the community spouse. In the alternative, either spouse can request that the state agency increase the allowance based upon "exceptional circumstances resulting in significant financial duress." PRACTICE TIP: The Senior Services Division currently recognizes court-ordered support as a valid deduction from a Medicaid recipient's income. ORS 108.110 authorizes the entry of a spousal support order without the need for divorce or separation. Several attorneys, including this author, have used that statute to get support orders for spouses of nursing home residents. Support orders are also available in conservatorships under ORS 126.317.

Historically, transferring assets for less than fair market value has rendered individuals ineligible for Medicaid benefits. As of July 1, 1988, section 303(b) of the Act increased the potential period of ineligibility for people receiving long term care from 24 months to 30 months. The actual period of ineligibility is calculated by dividing the total uncompensated value of the transferred resources by the average monthly private pay rate. On the positive side, the Act specifically

Expanding Newsletter

Beginning this year the Newsletter will be published four times a year rather than three. We plan to cover the following seven areas: estate planning, probate and trust administration, tax, ethics, planning for incapacitated persons, What's New and section committee reports. The editorial board would like to encourage members to submit articles or topics for articles to the newsletter.

Helen Rives-Hendricks
Editor in Chief

authorizes certain transfers of resources, primarily to assist community spouses. The major exception to the general prohibition against transfers has been the ability to transfer an interest in the family home to a spouse, or to a minor or disabled child, without losing Medicaid eligibility. The Act expands this exception to allow the home to be transferred to a son or daughter who has resided with and cared for the Medicaid applicant/recipient for at least two years immediately before the individual began receiving long term care services or to a sibling with an equity interest in the home who has resided there for at least one year immediately before the individual began receiving long term care services.

The treatment of a married couple's resources also changes under the Act. Beginning September 30, 1989, section 303(c) requires that the total value of the resources of both spouses be figured at the beginning of a continuous period of need for long term care. Either spouse can request an assessment from the state. All resources held by either or both spouses at the time of the Medicaid application are considered available to the spouse who needs long term care, except for those exempt under the statute. Exempt resources include the home, household goods, personal effects and burial fund. *See* 42 USC §1382b; 20 CFR §§416.1205 *et seq;* OAR 461-04-076.

The community spouse is entitled to a portion of the couple's resources equal to the greatest of the following:

a) $12,000 (or a larger amount as set by the state);
b) the lesser of ½ the total spousal resources or $60,000;
c) the resources needed to generate income equal to the monthly spousal allowance; or
d) the amount transferred pursuant to a court support order.

The spouse who needs long term care may transfer resources to the community spouse up to the applicable limit without penalty. If the non-exempt resources in the community spouse's name exceed $60,000, the excess must be used to pay the cost of the needed care. However, if the community spouse accumulates resources over $60,000 after the other spouse becomes eligible for Medicaid benefits, the community spouse does not have to spend those resources on care. The dollar amounts for the resource allowance are indexed to inflation. As is the case with the spousal allowance, the amount of the resource allowance for a community spouse can be raised by a court support order or a state agency determination.

The Senior Services Division has not yet announced how it plans to exercise the state's options under the Act. Given the state budget constraints, Oregon may opt for the minimum spousal income and resource allowances. With proper advance planning, even the minimums set by the Medicare Catastrophic Coverage Act of 1988 will protect community spouses from the almost certain poverty they now face.

Penny Davis

NURSING HOME INSURANCE

As people live longer in the United States, one area of increasing concern for the elderly population and their children is the cost of nursing home or extended care. Four of every ten persons can expect to need such care. The House Select Committee on Aging reports that two thirds of the single elderly and one third of married elderly who enter a nursing home are impoverished within 90 days. Half of the couples with one spouse in a nursing home become impoverished within six months. The new rules for qualifying for Medicaid assistance to pay nursing home costs as discussed in Penny Davis' article provide some relief for the spouse who is not in the nursing home. People with substantial assets generally do not see Medicaid as an option, so nursing home insurance offers a way to protect against such expense.

The need for nursing home care has increased in part because changes in the Medicaid payment system are causing hospitals to discharge Medicare recipients as soon as medically possible. To control the use of hospitalization for Medicare recipients, Medicare has categorized medical care into what it calls diagnostically related groups or DRG's. It pays the hospital a set fee for the medical care provided according to its DRG schedule regardless of the actual length or cost of the Medicare recipient's stay in the hospital. This system of payment gives the hospitals a clear incentive for early discharge because if the recipient's hospital stay extends beyond the time allotted under the DRG fee schedule, the hospital must absorb the cost. The result is that people are being discharged from the hospital when they may no longer need the acute level nursing care provided by the hospital, but still may need some level of nursing care. In this instance the physician will generally prescribe nursing home care. The patient generally presumes that Medicare will pay for such care.

Unfortunately the nursing care most people need upon discharge from the hospital does *not* qualify for coverage by Medicare. Medicare provides coverage only for care at a Medicare-certified skilled nursing facility (SNF) when the person has a "qualifying inpatient hospital stay prior to admission to the SNF". The inpatient hospital stay must be medically necessary, be three days or more in duration and the length of time between discharge from the hospital to admission to the SNF can not exceed 30 days. In Oregon only 5% of the nursing homes choose to be Medicare certified because of the difficulty of meeting Medicare's requirements for payment.

Medicare supplement policies, because they often have the same requirements as Medicare for coverage, provide little, if any, benefits for nursing home care. Similarly, the first generation of nursing home policies were written using Medicare as a model and provided coverage only when the insured had been hospitalized for at least three days under the Medicare guidelines. Oregon Health Care Association statistics indicate that only 40% of the persons entering nursing homes have required hospitalization just prior to entry. This means that these types of policies would provide no benefit for 60% of the persons who eventually need nursing home care.

In 1987 Oregon and Washington passed legislation requiring insurance carriers who market nursing home care policies to make available policies which do not require hospitalization. The insurance industry's reaction to the legislation has been slow. On September 28, 1987 when the Oregon legislation became effective, only three out of the previously approved twenty-four carriers offered such a policy. As of March 1988, there were fifteen carriers who had met the requirements. During the later part of 1988, major improvements have occurred. There are now close to forty carriers offering a wide variety of options.

Insurance agents tend to push the hospital rather than the no-hospital policy to potential purchasers because it is "more affordable." After all, agents make their money through commissions and are geared to sell some policy rather than none at all. This attitude, however, ignores a central feature of the decision of whether or not to purchase a policy. If a person cannot afford to purchase a no-hospital policy, it is probable that the person does not have sufficient assets to protect to justify the purchase of a policy in the first place! This will probably be even more likely for couples under the new Medicaid guidelines.

Some insurance agents suggest to persons who are considering the purchase of nursing home care insurance, that if and when they need nursing home care that they have their physician hospitalize them for at least three days to trigger coverage under the policy. Such a suggestion is a serious disservice. Even if the physician complies with the patient's request, the insurance carrier could

deny coverage on the basis of fraud because the hospital stay would not meet the "medically necessary" requirement.

Policies which require no hospitalization for coverage have premiums which are 30% 80% higher than policies requiring hospitalization. This is justified on the basis that the likelihood of coverage is much greater in the no-hospitalization policy. The premiums generally represent 1% to 3% of the potential total benefit. Coverage under these policies is triggered by meeting two requirements:

(1) Physician certification that the person's medical need is met by the care provided by the nursing home; and

(2) The facility is certified and licensed by the state as a nursing home.

The second requirement is *not* met by a facility which is classified as an "intermediate care facility" or "group home" by the State of Oregon. A policy may, however, offer alternative care benefits which will cover the care provided by these facilities.

All policies have a stated cap for the period of coverage and the dollar amount per day paid. The industry average is a maximum benefit period of four years but policies are written for as short as one year and as long as ten. According to the May 1988 issue of Consumer Reports, the average stay in a nursing home is 500 days or about one and one-half years. Some health professionals estimate the average stay at two and one-half years. It appears that a four year benefit period would cover up to ninety-five percent (95%) of people needing nursing home care. The per dollar amount per day will also vary and should be considered in the overall value of the policy.

The nursing home/long term care insurance marketplace is confusing because it is changing rapidly. Nursing home insurance, however, can be a viable means of protecting against the horrific cost of such care. Persons who have policies should read them carefully. Persons who are considering such coverage should be prepared to do some thorough shopping.

Sandy Wenzel
Sannell Associates, Inc.

ETHICS

AMENDMENT TO DISCIPLINARY RULES

Effective September 12, 1988, Disciplinary Rules 1-101 (E), 5-101 (A), 5-104(A) and 5-105 were amended and new Disciplinary Rule 10-101 was adopted. The purpose of this article is to review the effect of those changes on DR 5-101 (A), DR 5-104(A) and DR 5-105 which deal with conflicts of interest.

The primary amendment to DR 5-101 (A), Conflict of Interest, Lawyers' Self-Interest, and DR 5-104(A), Limiting Business Relations With a Client, involves the meaning of the term "full disclosure". Under both the old and new rules, clients may, in certain circumstances, consent to a conflict of interest. Full disclosure to the client is required, however, before such consent can be given. Prior to the amendment, the Disciplinary Rules did not define full disclosure. The old rules simply provided that full disclosure must include the recommendation that the client seek independent legal advice concerning the continued legal representation by the lawyer. As a result of the amendment, this is no longer the case.

New DR 10-101 (B) defines full disclosure. Specifically, it is ". . .an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient of the matter to which the recipient is asked to consent". In addition to defining the term, the rule imposes two procedural requirements. The lawyer must recommend that the recipient seek independent legal advice to determine if consent should be given, and the lawyer must make a contemporaneous, written confirmation of the full disclosure. Without all three of these steps being complied with, full disclosure cannot exist. Without full disclosure any required client consent would be ineffective.

DR 5-105 is concerned with conflicts of interest between former and current clients. Prior to its amendment the rule provided that if the exercise of a lawyer's independent judgment in behalf of a client would or would likely be adversely affected by the acceptance of employment or by the representation of another client, the lawyer should not accept or continue the representation. The rule also provided for the possibility of the client's consent to such representation, the circumstances under which a lawyer's affiliates would be disqualified from representing the client, and what happened when a lawyer terminated employment with one firm and became affiliated with other lawyers.

New DR 5-105 basically retains the prior provisions on disqualification of affiliates and termination of employment, but with those exceptions, it significantly changes the old rule.

First, the new DR 5-105 creates two categories of conflicts of interest: actual conflicts and likely conflicts. An actual conflict exists ". . . when the lawyer has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client". A likely conflict ". . . exists in all other situations in which the objective personal, business or property interests of the clients are adverse". It will not exist, however, in situations in which the only conflict is of a general economic or business nature. In determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or should have known by the exercise of reasonable care, will be attributed to the lawyer.

After defining the different types of conflicts of interest, the rule deals separately with conflicts between current and former clients and conflicts between multiple current clients.

In the case of an actual or likely conflict between a current and a former client, in the same or a significantly related matter, a lawyer shall not represent the current client unless both current and former client consent to such representation after full disclosure.

Under the amended rule, a lawyer shall not represent multiple current clients in any matters in which their interests are in actual conflict. If a likely conflict of interest exists, the lawyer may represent the clients if they consent to the representation after full disclosure. It is important to note that the rule on current client conflicts does not limit them to the same or to significantly related matters as the rule on conflicts between current and former clients does, nor does it permit the clients' consent to an actual conflict. Consequently under a strict interpretation of the rule, the existence of a conflict would be based solely on the positions being contended for by a lawyer or the lawyer's firm, without regard to whether those positions are being contended for in the same or in a related case.

It is clear that the September 12, 1988 amendment to the Disciplinary Rules of the Code of Professional Responsibility makes significant changes of which all lawyers should be aware. The actual limits of the amendment will have to be set through ethical opinions and disciplinary proceedings. In the estate planning area it appears certain that lawyers who give estate planning advice to husbands and wives or to other multiple parties will want to carefully examine the possibility that an actual or likely conflict of interest exists. If an actual conflict exists, the representation can not be undertaken. Where a likely conflict of interest is established, no advice can be given prior to receiving the consent of the clients after full disclosure.

proposed legislation in the following areas: (1) amendments of ORS 93.240 to extend rights of survivorship to certain promissory notes secured by mortgages or deeds of trust, (2) revisions to the probate claims statutes to make notice requirements comply with the recent U.S. Supreme Court decision in *Tulsa Professional Collection Service, Inc. v. Pope* and to correct other statutory deficiencies, (3) minor changes to guardianship and conservatorship statutes, and (4) revisions to the statutes on small estate proceedings. Ron Shellan also reported on other pending legislation projects. Gretchen Morris reported on the success of the "Administering the Taxable Estate" CLE held on November 4 and indicated that planning had begun for a November 1989 program on planning for "special problems" in estate planning, to include such topics as use of guardianships and conservatorships and estate planning for older clients, minors, and disabled persons. The CLE Committee has tentatively scheduled a program for fall 1990 to accompany publication of the revised version of "Administering Oregon Estates."

Walter L. Crow, Jr., Secretary

SCHEDULE OF SEMINARS AND EVENTS

The following is a selected schedule of seminars which may be of particular interest to Section members:

JANUARY 9-13, 1989: UNIVERSITY OF MIAMI, 23RD ANNUAL PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING, Miami Beach, Florida, Sheraton Bal Harbour Hotel

JANUARY 16-19, 1989: UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER, 41ST ANNUAL INSTITUTE ON FEDERAL TAXATION, Los Angeles, California, Century Plaza Hotel

JANUARY 28, 1989: NORTHWESTERN SCHOOL OF LAW, ESTATE PLANNING SEMINAR, Portland, Oregon, Columbia Red Lion Motel

FEBRUARY 3, 1989: PLI, SPOUSAL RIGHTS AND MARITAL AGREEMENTS IN ESTATE PLANNING, New York City, Helmsley Hotel

FEBRUARY 5-12, 1989: NATIONAL LAW FOUNDATION, TENTH ANNUAL ESTATE PLANNING CONFERENCE, Charlotte Amalie, St. Thomas, U.S. Virgin Islands, Frenchman's Reef Beach Resort

FEBRUARY 9-10, 1989: PLI, ESTATE & FINANCIAL PLANNING FOR THE AGING OR INCAPACITATED CLIENTS, Tampa, Florida, Hyatt Regency Tampa

FEBRUARY 16, 1989: PORTLAND TAX FORUM, ESTATE PLANNING, Portland, Oregon, Multnomah Athletic Club, Speaker: Malcolm A. Moore

FEBRUARY 27-28, 1989: ALI/ABA, ADVANCED ESTATE TECHNIQUES, Maui, Hawaii, Maui Marriott

FEBRUARY 27-28, 1989: PLI, PREPARATION OF THE FIDUCIARY INCOME TAX RETURN, New York City, Helmsley Hotel

MARCH 9-10, 1989: PLI, PREPARATION OF THE FIDUCIARY INCOME TAX RETURN, Tampa, Hyatt Regency Tampa

MARCH 9-10, 1989: PLI, ESTATE & FINANCIAL PLANNING FOR THE AGING OR INCAPACITATED CLIENTS, New York City, Doral Inn

MAY 3-4, 1989: NEW YORK UNIVERSITY SCHOOL OF CONTINUING EDUCATION, TRUSTS AND ESTATES, New York City, Grant Hyatt

MAY 8-12, 1989: ALI/ABA, PLANNING TECHNIQUES FOR LARGE ESTATES, New York, Waldorf Astoria

JUNE 7-8, 1989: NEW YORK UNIVERSITY SCHOOL OF CONTINUING EDUCATION, TRUSTS AND ESTATES, San Francisco, California, Fairmont Hotel

JUNE 19-23, 1989: ALI/ABA, ESTATE PLANNING IN DEPTH, Madison, Wisconsin, University of Wisconsin Law School

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KOHLER V. ARMSTRONG, 92 Or App 326 (1988)

Plaintiff, who had extensive home health care and nursing experience, lived with decedent during the last ten months of decedent's life. The plaintiff had previously lived with the decedent for several years as a child.

After decedent died, the plaintiff filed a claim against the estate for the reasonable value of the services which she had provided to decedent. The claim was based upon the decedent's alleged promise to pay for those services. Defendant personal representative denied plaintiff's claim. The trial court upheld the claim and defendant appealed.

The Court of Appeals affirmed the trial court. The primary issue was whether the claim was corroborated by independent evidence as required by ORS 115.195, when a claim is disallowed by the personal representative. The independent evidence must establish a prima facie case. In this case plaintiff's daughters had testified that decedent stated that she intended to pay plaintiff for her services. That testimony was found to be sufficient to establish that plaintiff had performed services which decedent had intended to pay for. It was also sufficient to overcome the presumption that services rendered to a close relative are gratuitous.

Daniel C. Re

TAX

Relevant Highlights of the Technical and Miscellaneous Revenue Act of 1988

Estate planning practitioners are cautioned to review how the Technical and Miscellaneous Revenue Act of 1988 (the "Act") affects planning techniques in the following areas:

Estate Tax Valuation Freezes. (Section 3031 of the Act). Provisions amend Section 2036(c) of the Internal Revenue Code of 1986 ("IRC") and other related IRC sections. "Deemed gifts" provisions are added for transfers where IRC Section 2036(c) applies. Grantor Retained Income Trusts ("GRITs") are also impacted by Section 2036(c) with some exceptions. Safe harbor rules for Qualified Debt for sales and Qualified Startup Debt provisions have been added. A related IRC Section 2207B is added allowing a right of recovery by the estate from persons receiving property included in the estate under IRC Section 2036(c).

Treatment of Modified Endowment Contracts. (Section 5012 of the Act). New Section 7702A and modified Section 72 of the IRC dictate different treatment of some life insurance products. If the definition of Modified Endowment Contract fits, income may be generated from distributions or loans on account of such contracts. In addition to income tax that may result, a new ten percent tax is imposed on "distributions" from the Modified Endowment Contracts.

IRS Valuation Tables. (Section 5031 of the Act). Section 7520 adds new valuation tables to be updated regularly using interest rates at 120 percent of the applicable federal rates in effect for that period. The tables must be used for the rates in effect for the valuation date for valuing term or life estates, annuities and remainder interests.

Estate Tax Changes for Aliens. (Sections 5032 and 5033 of the Act). The estate tax rates are modified for nonresident non-citizen decedents. Except where a Qualified Domestic Trust is used, no estate tax marital deduction is available for property passing to a surviving spouse who is not a U.S. citizen.

C. Jeffrey Abbott

EXECUTIVE COMMITTEE NOTES

(Estate Planning and Administration Section)

The Section Executive Committee has met twice since the annual meeting in September.

On October 7, 1988, the Committee met at Willamette University in Salem. Donald K. Denman was appointed as a one-year Member-at-Large to fill an executive committee position which was vacant due to a resignation. Valerie Vollmar's presentation at the Bar convention on "Professional Responsibility in Estate Planning and Administration" was reported to have been a successful program. The Section-sponsored CLE "Administering the Taxable Estate" to be held November 4, 1988 was previewed. Carol Kyle reported on the proposed revision of "Administering Oregon Estates," indicating that the editors are considering consolidating "Administering Oregon Estates" with the "Oregon Probate System Manual" in an 8-½" x 11" three-ring binder format. Ron Shellan reported on the revamped structure of the Legislative Committee and reviewed the list of legislative matters on the agenda for 1988-89. Dan Re presented the results of the membership newsletter survey and the Committee voted to expand the newsletter to four issues per year, two issues with four pages and two issues with six pages.

Future Executive Committee meetings were scheduled as follows:

Date	Location
December 2, 1988	Portland
February 18, 1989	Bend
April 7, 1989	Portland
May 19, 1989	Portland (optional)
July 14, 1989	Eugene/Springfield
September 16, 1989	Pendleton

The Committee approved the 1989 Section budget projecting total revenue of $11,130 and total expenses of $11,240, resulting in a projected deficit of $110.

Gretchen Morris, Bob Dayton, Steve Kantor, Carol Kyle, Carolyn Wilson Miller, Mike Morgan and Valerie Vollmar were appointed to the CLE Committee. Helen Rives-Hendricks, Dan Re and Laurie Caldwell-Lee were appointed to the Newsletter Committee. Stan Loeb reported on rights of the Section members to remove their names from the mailing list made available to the public by the OSB.

The Executive Committee also met on December 2, 1988, in Portland. The chief item of business was the consideration of

Questions concerning interpretation of the amendments to the Disciplinary rules may be directed in writing to George Riemer at the Oregon State Bar, who will submit them to the Ethics Committee.

Daniel C. Re

IN RE METTLER *305 Or 12, 748 P2d 1010 (1988)*

This case represents the Oregon Supreme Court's latest effort to define the term "client" as that word is used in the Disciplinary Rules of the Code of Professional Responsibility. The definition of "client" is extremely important since it is to the "client" that a lawyer's ethical responsibility is primarily owed.

The case dealt specifically with DR 7-104 Communicating With One Represented by Counsel, as it existed in September 1985. There is nothing in the decision, however, that would limit it only to that rule. The accused lawyer was employed as a securities examiner for the State of Oregon. He was charged with directly communicating with a person represented by a lawyer and giving advice to a person not represented by a lawyer. The primary issue before the court was whether the accused's communications were in the capacity of a lawyer on behalf of a client. (In 1986 DR 7-104 was amended to also prohibit communication by a lawyer representing the lawyer's own interest.)

The court, after recognizing that the accused was a lawyer and that his actions were taken in the course of representing the Corporation Division, found that the Corporation Division was not his "client". Consequently, no ethical violation occurred. In reaching this decision, the court noted that the word "client" is not defined in the State Bar Act (ORS 9.005 to 9.665) nor the Disciplinary Rules. It then reviewed the definition under the Evidence Code, ORS 40.225 (1) (a), and prior cases. From that review, the court determined that "client" is viewed in its most enlarged sense. The relationship generally requires that a person consult with a lawyer for legal services. A formal fee agreement is not a prerequisite and it can be inferred from the conduct of the parties. However, the existence of the relationship will require usually that at least one of the parties intends for it to exist. Consequently, a subjective examination of the facts will be important in determining whether a person is a client. In this case, both the lawyer and the alleged client argued that no attorney-client relationship was intended and the record contained no evidence to the contrary.

As a result, whenever a person consults with an attorney for purposes of receiving legal advice, it is likely that an attorney-client relationship will be found to exist unless it is clear that this was not what both parties intended. In such a case, this intent should be documented. A letter to the person summarizing the consultation and stating that no attorney-client relationship resulted would be prudent.

Daniel C. Re

WHAT'S NEW

HOCKS V. JEREMIAH, *92 Or App 549, clarified 93 Or App 580 (1988).*

Plaintiff, personally and as personal representative of the estate of Robert Hocks, appealed from a judgment dismissing her action against defendant for replevin and conversion. Robert Hocks had met with the defendant, his sister, in December of 1980, and, at that meeting, had given her four bearer bonds. Hocks and the defendant then opened a joint safety deposit box where they kept the bonds. Hocks, with defendant's general consent, periodically clipped the bond coupons and placed additional property in the box. He also put two handwritten notes in the box indicating his intent that the contents of the box were to belong to the defendant upon his death. At the time of his death, the box contained 26 bonds and a diamond. Defendant contended and the trial court agreed that Hocks had transferred the box contents to the defendant by gift prior to his death.

The Court of Appeals held that, to establish a gift, it must be shown that there was an actual or symbolic delivery to the donee by the transfer of possession and absolute dominion over the property accompanied by a manifested intent to make a present gift. A gift of the first four bonds was established because Hocks had delivered them to the defendant and she accepted them.

With respect to the other bonds and the diamond, however, the court held that there was no clear and convincing evidence from which the trier of fact could find that Hocks had transferred possession and absolute dominion over that property to defendant. These items had been placed in the box by Hocks without the defendant's knowledge and the fact that Hocks and defendant were the joint lessees of the box was insufficient to establish the necessary delivery.

Daniel C. Re

WEST V. WHITE, *92 Or App 401 (1988)*

At the time of decedent's death, he was domiciled in Massachusetts and he was owed a debt, evidenced by a promissory note, which was secured by a trust deed on real property in Oregon. Decedent's Will was admitted to probate in Oregon but, on a motion for summary judgment, the court set aside its order admitting the will to probate. The ground for the court's decision was that it lacked jurisdiction since there was no property in Oregon.

On appeal the Court of Appeals affirmed the trial court's decision. The Will of a non-domiciliary may be probated in Oregon only if there is property in Oregon subject to the Will. The situs of personal property is the decedent's domicile. A promissory note is personal property. The fact that the note is secured by real property does not change its character as personal property. A trust deed is not a legal or equitable interest in land. It is only a lien on the land. Consequently, the trust deed is not real property under Oregon's Probate Code. Since no property of the decedent was located in Oregon, the decedent's Will could not be probated in this state.

Daniel C. Re

MARTIN V. KENWORTHY, *92 Or App 697 (1988)*

Plaintiffs filed an action against defendant's personal representative alleging that the decedent's will had been revoked by his subsequent marriage. The action purported to be based on a rejected claim and request for declaratory judgment. Plaintiffs appealed a judgment for the defendant.

The Court of Appeals affirmed the judgment on the ground that the action had been filed after the four-month limitation for a will contest under ORS 113.075. That statute permits a will to be contested within four months of the later of the filing of the affidavit of mailing or delivery of information to devisees and heirs or the first publication of notice to interested persons. This limitation period can not be avoided by designating the action as one based upon a rejected claim or a request for declaratory judgment.

Daniel C. Re

newsletter

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ETHICS

AN INTRODUCTION TO CONFLICTS OF INTEREST

Conflicts of interest present the most complex and difficult ethical problems for the practicing lawyer. Today, merely being honest or well-intentioned is not enough. As increased attention is focused on conflicts of interest, courts are becoming less tolerant of lawyer ignorance and insensitivity. The lawyer who fails to recognize a conflict of interest or, having recognized one, fails to react properly may face disciplinary sanctions, a malpractice suit, or disqualification from representing a client in pending litigation.

This article is the first of a series addressing conflicts of interest for lawyers engaged in estate planning and administration. The first article is a general introduction to conflicts of interest. Later articles will discuss specific ethical problems likely to be encountered in practice. Much of the material for these articles is drawn from a lengthy outline on "Professional Responsibility in Estate Planning and Administration" prepared for a CLE presentation at the Oregon State Bar annual meeting in September 1988. (The Oregon State Bar Publications Department has a limited number of copies of the complete outline available for sale at a cost of $15.00. Copies may be ordered by calling Christy Roelfs at the Oregon State Bar, extension 326.)

In essence, a conflict of interest arises whenever the lawyer faces some risk of divided loyalties: although the lawyer ought to be looking out for the client's interests, the lawyer is being tugged in another direction by some other interest. The conflict may arise (1) from differences between the client's interests and the interest of **the lawyer**, (2) from differences between the client's interests and the interests of **another client**, or (3) from the lawyer's relationship with **third parties who are not clients**. Sometimes, a conflict of interest may result because of the lawyer's duty of confidentiality: under many circumstances, the duty to avoid conflicts of interest and the duty to maintain client confidences are inextricably intertwined.

The best general advice that can be given about conflicts of interest is, "WHEN IN DOUBT, DON'T!" The Oregon Supreme Court has given Oregon lawyers precisely that advice:

> "...No man can serve two masters." If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients or with a former client, or a conflict between the interests of any client and that of the attorney, or may require the use of information obtained through the service of another client, the employment should be refused. *In re Boivin,* 271 Or 419, 425, 533 P2d 171, 174 (1975).

The lawyer who wants to avoid conflicts of interest violations must first identify the client or clients to whom the lawyer's ethical duties are owed. But the estate planner and the probate lawyer often find it very difficult to answer the most fundamental question: who is the client?

In the estate planning setting, a lawyer may represent parents, their adult children, the family business, fiduciaries appointed for the benefit of family members (such as trustees, conservators, or custodians under the Oregon Uniform Transfers to Minors Act), or family members for whose benefit such arrangements have been established. A probate lawyer may represent the personal representative (or co-personal representatives), beneficiaries of the estate, persons entitled to nonprobate property of the decedent, or creditors of the decedent.

Too often, the lawyer fails to identify his or her client (or clients) early in the representation. As a result, the lawyer may owe ethical duties to multiple clients whose interests conflict. Sometimes, even though the lawyer has identified the client at an early stage, the lawyer fails to make it clear to other parties that the lawyer will not be representing their interests.

How can the lawyer tell who will be considered to be a "client"? First, the lawyer must be aware that an initial conference with a prospective client is generally considered to be within the attorney-client relationship, whether or not the lawyer is ever retained. Moreover, the attorney-client relationship may arise even though no

formal retainer agreement has been entered into and no fee has been paid (for example, a social acquaintance may be viewed as a "client" because of a seemingly casual conversation about some legal matter). Even more important, the attorney-client relationship is likely to be viewed as a continuing one where the lawyer has previously done work of an intermittent nature (such as estate planning or business work), whether or not the lawyer has seen the client recently.

One of the leading Oregon disciplinary cases discussing the meaning of the word "client" is ***In re Mettler***, 305 Or 12, 748 P2d 1010 (1988), which held that a lawyer working for the State of Oregon as a securities examiner was not representing a "client" and thus did not violate the disciplinary rule prohibiting communication with a represented party without the prior consent of the party's lawyer. The opinion in ***Mettler*** cites several earlier Oregon cases, all of which are consistent with the general principles set forth above. Especially significant among the prior cases is ***In re Robertson,*** 290 Or 639, 624 P2d 603 (1981), which held that a couple who had been represented by a lawyer for several years in various matters reasonably believed that he was still representing them, as well as the purchaser, in a land sale transaction. The lawyer in ***Robertson*** failed to explain to the sellers that he was not acting as their attorney, but was acting solely as attorney for the purchaser, and did not advise them that they should get independent legal advice.

What is the moral of the Oregon cases? That the lawyer must **always** know whom the lawyer is representing - and must make sure that everyone else knows, too. If any question might exist, a prudent lawyer will follow the advise contained in Oregon Ethics Opinion No. 506 (1986): make a full written disclosure, advising the parties that the lawyer does not represent them, thereby avoiding any subsequent claim to the contrary. Of course, if the lawyer chooses to represent multiple clients, that choice should be made only after determining that no ethical violations will result from the multiple representation.

Two general ethical principles are relevant to all types of conflicts of interest. The first is vicarious disqualification (sometimes called the "firm unit" rule); the second is client waiver of a conflict of interest.

DR 5-105(G) codifies the principle of vicarious disqualification:

Except as permitted in subsections (D) and (F) [which permit client waiver of certain conflicts], when a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule other than DR 2-110(B)(3) or DR 5-102(A), no other member of the lawyer's firm may accept or continue such employment.

In other words, if one member of a firm cannot accept or continue employment because of a conflict of interest, no other member of the lawyer's firm can do so. "Member of a firm" is defined broadly in DR 10-101(A) to include a lawyer's partner, associate (whether full or part-time or on contract), and any other lawyer serving as "Of Counsel" or otherwise working for the lawyer's firm, but the definition excludes an office sharer absent indicia sufficient to establish a de facto law firm among the lawyers involved. The only Disciplinary Rules excepted from vicarious disqualification are DR 2-110(B)(3) [mandating withdrawal from employment when a lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment effectively] and DR 5-102(A) [prohibiting a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client]. (DR 5-105(H) and (I) also permit a special "Chinese wall" screening procedure when a lawyer moves from one firm to another.)

The principle of a client waiver is very important in the area of conflicts of interest. Several Disciplinary Rules permit a lawyer to engage in conduct which would otherwise be unethical, provided that (1) "**full disclosure**" is made and (2) **client consent** is obtained. Examples include DRs 5-101(A) and 5-104(A) [covering conflicts between the client and the lawyer], DR 5-105 [conflicts between current clients or between a current client and a former client], and DR 5-108(A) [conflicts created by the lawyer's relationship with a third party].

New DR 10-101(B) now codifies the definition of "full disclosure" previously articulated only in case law. To obtain an effective client waiver, the lawyer must give the client an explanation sufficient to apprise the client of the potential adverse impact on the client if consent is given. For example, before a lawyer may ethically borrow money from a client, the lawyer may be required to explain that the interests of the lawyer and the client are adverse, that the lawyer's professional judgment may be affected by the lawyer's own interests, and that the proposed loan may be risky due to the lawyer's financial condition, the terms of the loan, or the security provided to the client. See, *e.g., **In re Drake***, 292 Or 704, 642 P2d 296 (1982). Even if the client is a friend who resists or resents the lawyer's insistence on making a detailed explanation, the lawyer must make the required disclosure. See ***In re Germundson,*** 301 Or 656, 724 P2d 793 (1986).

DR 10-101(B) explicitly requires that full disclosure include **a recommendation that the client seek independent legal advice** to determine if consent should be given. The Disciplinary Rule also requires that the full disclosure be "contemporaneously confirmed" in writing, but the better practice is to **obtain the client's signature on a disclosure letter before proceeding** with the proposed action.

To avoid ethical violations, a lawyer must not only be familiar with the Disciplinary Rules and sensitive to conflicts issues, but must also practice constant vigilance. Even if no conflict existed at the outset of the representation or the client has effectively waived any conflict, circumstances may later change. An unforeseen conflict may develop, a likely conflict may become an actual one, or a prior disclosure may no longer be adequate. In every such case, the lawyer must respond in an ethical fashion in light of the changed circumstances.

In some situations, a lawyer who has accepted employment will later be required to withdraw from employment because of a conflict of interest. The

lawyer should be familiar with the requirements of DR 2-110, which governs withdrawal. DR 2-110(B)(2), for example, makes withdrawal mandatory if the lawyer knows or it is obvious that the lawyer's continued employment will result in violation of a Disciplinary Rule. DR 2-110(C) describes a number of situations in which withdrawal is permitted, but not required. DR 2-110(A), which applies to both mandatory and permissive withdrawal, requires a withdrawing lawyer to obtain permission for withdrawal if required by the rules of a tribunal to take reasonable steps to avoid foreseeable prejudice to the client (including giving due notice to the client, allowing time for employment of other counsel, and delivering client papers and property to the client), and refund promptly any unearned fees.

The Oregon lawyer should be familiar with the current version of the Oregon Code of Professional Responsibility, which is published each year in the Bar's **Membership Directory**. The **Oregon State Bar Professional Responsibility Manual** contains the full text of all formal Oregon Ethics Opinions, as well as annotations to the Code (current only through 10/84). An excellent research tool is Jarvis, Moore & Sapiro, **Oregon Rules of Professional Responsibility Annotated,** which is current through December, 1988, and can be purchased from the Oregon Law Institute. Work is now under way on a new Oregon State Bar treatise on **Ethics and Professionalism**.

A number of good articles have been written about ethical problems commonly encountered by lawyers engaged in estate planning and administration. The Oregon State Bar CLE outline described at the beginning of this article contains an extensive bibliography. A recent article is Tate, "Handling Conflicts of Interest That May Occur in an Estate Planning Practice," 16 **Estate Planning** 32 (Jan./Feb. 1989).

Valerie J. Vollmar

AMENDMENT TO DISCIPLINARY RULE 2 ADVERTISING, SOLICITATION AND LEGAL EMPLOYMENT

Effective December 1, 1988, the Oregon Supreme Court adopted an amendment to Disciplinary Rule 2. The amendment makes the following changes:

1. The definition of a false or misleading communication now includes a communication which states or clearly implies that a lawyer handled matters in a particular area when the lawyer routinely refers such matters to others [DR 2-101(A)(4)], or which states or clearly implies that the lawyer is experienced in handling specific matters when the lawyer is not so experienced [DR 2-101(A)(5)].
2. Records must be kept showing when and where a written communication was used [DR 2-101(C)].
3. Advertisements, other than direct mail advertisements, must be clearly identified as such, unless it is apparent from the context that it is a paid advertisement. Direct mail advertisements must be identified on the envelope and the top of each page by the word "ADVERTISEMENT" in at least 10 point bold type, which is larger and darker than the text of the communication [DR 2-101(D)].
4. All advertisements must clearly identify the name and office of the lawyer or firm whose services are being offered to the public [DR 2-101(E)].
5. For the purposes of DR 2-104, Suggestion of Need of Legal Services, "personal contact" for the purpose of obtaining professional employment means in-person or telephone contact, but does not include direct mail advertising. Under DR 2-104, "personal contact" is permitted in some circumstances and prohibited in others. Direct mail advertising, however, is subject to DR 2-101 and DR 2-104(B) [DR 2-104(C)].
6. A lawyer may withdraw from employment if a client fails to keep an agreement or obligation to the lawyer concerning fees or expenses, after reasonable notice from the lawyer [DR 2-110(C)(1)(f)].

QUERY: Does new DR 2-101(D), which requires direct mail advertisements to be marked with the word "ADVERTISEMENT" in at least 10 point bold print on the envelope and the top of each page, apply to newsletters? Legal Ethics Opinion No. 518 (April, 1988), issued prior to the effective date of the most recent DR 2 amendments, specifically stated that a labor law newsletter prepared by an attorney in private practice had a substantial advertising and solicitation component. Therefore, the newsletter was required to comply with DR 2-101.

Daniel C. Re

IN RE CAREY 307 Or 315 (1989)

The accused attorney had been appointed as the guardian and conservator of three legally incompetent persons. The accused determined that the assets and future income of the protected persons would not be sufficient to cover their nursing home costs. Therefore, he loaned estate funds to personal friends at interest rates higher than could be received at financial institutions. Five of the loans were repaid and the accused personally satisfied the two which were not. The Oregon State Bar initiated a disciplinary proceeding against the accused, arguing that his actions violated the conflicts of interest rules and that he failed to maintain adequate records as required by former DR 9-102(B)(3).

The court, in reaching its decision, noted that its opinion was based upon the propriety of the accused's actions as an attorney and not as guardian or conservator. This is an important distinction since the disciplinary rules involved in this case apply only when an attorney-client relationship exists.

The court noted that prior to making the loans, the accused did not consult with or get the consent of the protected persons, nor did he obtain permission of the court or the permission of any impartial representative of the protected persons.

Based on the facts of the case, the court held that:

1. A personal loan to the accused's legal secretary and the accused's guarantee of another loan violated former DR 5-101(A), Conflicts of Interest: Lawyer's Self-Interest. It is a *per se* violation of that rule for an attorney to loan estate assets to partners, associates or employees.
2. Loans to clients violated former DR 5-105(A) and (B), Conflicts of Interest: Former, Current and Multiple Clients. The court noted that it was not deciding whether this type of conflict could be consented to.
3. With respect to loans to the accused's personal friends who were not clients, there was no clear and convincing evidence that any disciplinary rules had been violated.
4. The accused's commingling of the assets of the three protected persons estates did not violate any disciplinary rule under the facts of this case, but the failure to keep adequate records of the loans and to accurately report the loans to the court violated former DR 9-102(B)(3), Preserving Identity of Funds and Property of a Client.

The court noted that the purpose of a sanction is to protect the public and the integrity of the profession. To accomplish this, it considers the duty violated, the accused's mental state at the time of the violation, the injuries caused, and any aggravating or mitigating factors. After applying this test, the court rejected the OSB's request for a 60-day suspension and instead reprimanded the accused. It imposed the lesser sanction because the accused was not motivated by self-interest or personal avarice and neither his clients nor the P.L.F. suffered an economic loss.

Unfortunately, the court did not explain why the attorney-client relationship existed in this case. Attorneys should be aware, however, that their actions will likely be subject to the disciplinary rules when acting in a non-attorney capacity unless the fact that an attorney-client relationship does not exist is clearly set out and agreed to by all of the parties.

Daniel C. Re

TAX

IRS RESPONDS TO HOWARD DECISION; QTIP TRUSTS MAY NOT QUALIFY

The Internal Revenue Service has issued a notice responding to the Tax Court decision of *Est. of Rose D. Howard*, 91 TC No. 26 (1988). In *Howard*, the personal representative filed a federal estate tax return and elected to treat trust property as qualified terminable interest property under IRS § 2056(b)(7). Several months later, after the decedent's surviving spouse died, the personal representative filed an amended federal estate tax return stating that the trust was not a "QTIP" trust and therefore not eligible for the marital deduction.

The trust did not provide that income accumulated, but not distributed, at the death of the surviving spouse be paid to the surviving spouse's estate or according to the surviving spouse's general power of appointment. Rather, the income passed to the remainder beneficiaries of the trust. The personal representative argued that a "QTIP" trust **must** provide that such income be paid to the surviving spouse's estate or according to the surviving spouse's power of appointment.

Proposed regulations under § 2056(b)(7) state that the statutory requirement that the spouse be entitled to all of the income from the property is satisfied even though income accrued after the last distribution date prior to the spouse's death is payable to the remainder beneficiaries. Prop. Est. Tax Reg. Section 20.2056 (b)-(7)(c)(1).

Despite the proposed regulation, the Tax Court held that the personal representative correctly asserted that the trust did not qualify as a "QTIP" trust.

The IRS maintains that the proposed regulations are correct; however, taxpayers may abandon this position.

The IRS has addressed concerns of the taxpayers who have relied on the proposed regulations in Internal Revenue Notice 89-4, December 20, 1988. The Notice states the procedure for trusts that address the issue in *Howard*. The procedure requires that any person having an interest in the trust acknowledge that the marital deduction is available for property passing to the trust and acknowledge that property in the trust passing to the spouse is a "qualifying income interest for life" for purposes of IRC sections 2044 and 2519. The terms of the settlement agreement will be included in a closing statement.

The settlement procedure is available for any transfer in trust which is an open year under the statute of limitations. The taxpayer may initiate the settlement procedure.

The IRS states that if the Service does change its position with respect to the issue in Howard, it will discontinue the settlement procedure only after a reasonable time for changes to be made to wills, trusts or other relevant documents.

Practitioners should consider the conservative approach and draft trusts intended to be "QTIPS" to meet the requirements established in Howard.

C. Jeffrey Abbott