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# Legal Ethics Applied to Initial Client-Lawyer Engagements in which Lawyers Develop Special Needs Pooled Trusts

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**LEGAL ETHICS APPLIED TO INITIAL CLIENT-LAWYER  
ENGAGEMENTS IN WHICH LAWYERS DEVELOP  
SPECIAL NEEDS POOLED TRUSTS**

A. Frank Johns<sup>†</sup>

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## I. INTRODUCTION

This article examines the self-settled special needs pooled trust, a relatively new option available to elder law attorneys, estate and trust lawyers, and other legal practitioners serving disabled or injured elderly clients. It also examines the legal ethics involved in various initial client-lawyer engagements where the trust specialist is being engaged to design, implement, and fund such a trust, raising questions of lawyer loyalty and conflict of interests, confidentiality, and privity running to the trustee, the beneficiary or both.

## II. A BRIEF HISTORY OF THE SELF-SETTLED SPECIAL NEEDS TRUST

### A. *The Discretionary Support Trust*

The self-settled special needs trust emanated from the discretionary support trust, a vehicle that has been well-defined for generations.<sup>1</sup> The discretionary support trust is created to provide the trustee unqualified power to pay the beneficiary a certain

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1. See RESTATEMENT (SECOND) OF TRUSTS § 155 (1959) (defining a discretionary trust).

amount of the income and capital of the trust, or to pay nothing at all.<sup>2</sup> The beneficiary has no way to access or control the trust interest whose character, even more than the express declarations of the settlor, may prevent alienation or attachment.<sup>3</sup> Historically, the nature of the discretionary support trust gives the beneficiary no assignable interest before the trustee distributes any portion of the income or principal to the beneficiary.<sup>4</sup> Once there is distribution, however, the distributed income or property is exposed to claims of creditors of the beneficiary.<sup>5</sup> Generally, to overcome the reach of attachment or creditor claims, spendthrift clauses are made a part of the trust.<sup>6</sup> Spendthrift clauses are a standard of practice among elder law, estate planning and trust and estate lawyers.<sup>7</sup>

When the beneficiary creates the discretionary trust, it is defined as a self-settled discretionary trust.<sup>8</sup> Such a trust vehicle has rarely been a safe harbor for asset protection against creditors.<sup>9</sup> Less protected has been the self-settled trust that a person creates when attempting to insulate resources from state agencies operating means tested benefit programs prior to the person qualifying for those programs.<sup>10</sup>

### *B. The Special Needs Trust*

Historically the special needs trust (“SNT”) evolved from the

2. See GEORGE G. BOGERT, *THE LAW OF TRUSTS* 113 (4th ed. 1963).

3. *Id.* at 114 (citing *Calloway v. Smith*, 186 S.W.2d 642, 643 (Ky. 1945)).

4. See A.W. SCOTT & W.F. FRATCHER, *THE LAW OF TRUSTS* § 155 (4th ed. 1987) (citing *McNiff v. Olmstead County Welfare Dept.*, 287 Minn. 40, 44, 176 N.W.2d 888, 892 (1970)).

5. This was the general policy across the country prior to 1997. In 1997, the statutory Self-Settled Discretionary Spendthrift (“SSDS”) trust was enacted in Alaska, and followed in 2000 by Nevada and Rhode Island with their own statutory SSDS trusts. See David G. Shaftel, *Newest Developments in Alaska Law Encourage Use of Alaska Trusts*, *ESTATE PLANNING* Feb. 1999 (citing Jonathan G. Blattmachr & Howard Zaritsky, *North to Alaska—Estate Planning Under the New Alaska Trust Act*, 32 U. MIAMI HECKERLING INST. ON EST. PLAN. (1998)); Jeffery N. Pennell, *1997 Current Estate Planning Developments*, *THE S. CAL. TAX & EST. PLAN. FORUM* (1997).

6. See BOGERT, *supra* note 2, at 114.

7. See ROBERT WHITMAN & DAVID M. ENGLISH, *FIDUCIARY ACCOUNTING AND TRUST ADMINISTRATION GUIDE* § 17.3 at 175 (ALI-ABA 2002).

8. See CLIFTON B. KRUSE, JR., *THIRD PARTY AND SELF-CREATED TRUSTS* 3 (ABA 1998).

9. See *id.* (citing *Vanderbilt Credit Corp. v. Chase Manhattan Bank*, 473 N.Y.S.2d 22, 245 (N.Y. App. Div. 1984)).

10. *Id.*

irrevocable discretionary trust.<sup>11</sup> With more than twenty years of SNT development, consumer driven organizations, including the ARC of America, and affiliated organizations in every state, the National Alliance for the Mentally Ill and the National Autistic Society, and its affiliates across the states, just to mention a few, have been advising their members, numbering in the millions, to utilize the SNT for estate planning purposes.<sup>12</sup>

### C. *What the SNT Does*

The SNT vehicle takes unilateral, discretionary powers given to trustees for various situations and broadens the scope by specifically expanding how the trustee supplements the needs of the trust beneficiary. There are several variations of SNT distribution.<sup>13</sup> In one, the SNT details how the trustee, within his/her/its sole discretion, administers the trust for the sole benefit of the beneficiary, providing: health and medical provisions; social and educational programs and services; recreation, vacations and even trips abroad where appropriate; and institutional or group home transition and placement, promoting community-based, least-restrictive alternatives that would enhance the quality of life of the trust beneficiary.<sup>14</sup>

Additionally, the SNT is developed as irrevocable and spendthrift in nature.<sup>15</sup> The settlor develops language that bars any use of trust funds for services already provided to the beneficiary through federal and state programs. The SNT is exempt under federal and state agency regulations that consider such trusts appropriate as a matter of public policy.<sup>16</sup>

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11. *Id.* at 4.

12. See Harriet P. Prensky & Patricia Tobin, *Using the Special Needs Trust*, 4<sup>TH</sup> ANNUAL NAELA SYMPOSIUM ON ELDER LAW § 15 (1992); M. Kent Olsen, *Pooled Income Trusts Following OBRA '93*, NAELA ADVANCED INSTITUTE ON ELDER LAW IV § 17 (1994).

13. See generally Cynthia L. Barrett, *Distribution Standard for the Special and Supplemental Needs Trust*, 14 J. OF NAT'L ACAD. OF ELDER L. ATT'YS (hereinafter "NAELA QUARTERLY") 10, 10-13 (Summer 2001) (describing the six most commonly used trust distribution standards and the likely impact on needs-based public programs).

14. *Id.*

15. *Id.*

16. See State Medicaid Manual, Part 3–Eligibility, HCFA Transmittal No. 64 (1994).

#### *D. Special Needs Pooled Trust History*

In 1950, parents of mentally retarded children organized the National Association of Parents and Friends of Mentally Retarded Children.<sup>17</sup> As the children became adults and their parents aged, the name changed (National Association of Retarded Citizens, aka ARC of the United States) and the focus turned to finding those who would care for the aging people with mental retardation after their parents died or were no longer able to care for them in the community.<sup>18</sup>

In the 1970s, parents of children with severe chronic disabilities, primarily mental retardation, worked with trust and estates counsel to develop vehicles that would not only provide for the transfer of funds for the benefit of their children with severe disabilities, but, more importantly, mandate to the trustees detailed instructions that addressed the quality of care and the quality of life of the children to be served by the trustees.<sup>19</sup>

State-based non-profit associations, organized as affiliates of ARC, created parallel umbrella or pooled trusts that would receive the assets of the parents in separate sub-accounts, and in return use the corpus of the sub-trusts for the care-giving and quality of life needs of the parents' mentally retarded children. This is where the concept and model for the d4C special needs pooled trust ("SNPT") came from when the legislation for prohibitions and restrictions on trusts as part of Medicaid eligibility was hammered out in congressional committee.<sup>20</sup>

#### *E. SNPT Politics*

In the early nineties, Congress, concerned about escalating Medicaid costs, made a concerted effort to stiffen regulations by

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17. See WOODHULL HAY, *Associations for Parents of Mental Retardates in* ENCYCLOPEDIA AMERICANA (1952), available at <http://www.thearc.org/history/hay.htm> (last visited Aug. 12, 2002).

18. Robert Segal, The National Association for Retarded Citizens, at <http://www.thearc.org/history/segal.htm> (last visited Aug. 23, 2002).

19. See OLSEN, *supra* note 12, at 3-4. See also Renee Lovelace, *The Dark Side of Pooled Trusts*, 14 J. OF NAT'L ACAD. ELDER L. ATT'YS 6, 7 (2001); ARC, *Aging Position Statement #23*, at <http://www.thearc.org/posits/agingpost.html> (last visited Aug. 23, 2002).

20. See A. Frank Johns, *Interface with Elder Law: Elder Law's Broader Application of Estate Planning Reaches Beyond the Legal Profession--Is It Beyond Lawyering as Well?*, 23rd Annual Duke Estate Planning Conference (2001).

which persons would become Medicaid-eligible.<sup>21</sup> As various congressional committees wrote legislation focused on so-called "Medicaid planning loop-holes," the Medicaid Qualifying Trust became a primary target for repeal.<sup>22</sup> However, the consumer groups identified above teamed with the AARP and other organizations in the aging network, including the National Academy of Elder Law Attorneys, to negotiate the exemption of several trusts that, if designed to allow for a "pay-over"<sup>23</sup> (paying to the nonprofit) or "pay-back"<sup>24</sup> (reimbursement of the state for Medicaid expenditures on behalf of the trust beneficiary) at the end of the trust beneficiary's life, would be exempt and not counted under Medicaid eligibility requirements.<sup>25</sup>

Lobbyists for the ARC and other organizations articulated that tens of thousands of citizens already had such trusts in place through hundreds of affiliated non-profit associations around the country.<sup>26</sup>

#### *F. The Expanded Prohibitions Against Self-Settled Discretionary Support or Special Needs Trusts*

In 1985, Congress declared a statutory prohibition that targets inter vivos self-settled trusts, including those for spouses, barring access or attachment by state agencies providing public resources to those trust creators and beneficiaries applying for Medicaid.<sup>27</sup> During this same period, the basic discretionary support trust was expanded into supplemental or special needs trusts for disabled persons, usually serving children of the grantors with mental retardation or mental illness.<sup>28</sup> As these trusts became more widely recognized and used, critics decried the misuse of Medicaid, a public benefits program for the poor, by children of the elderly

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21. See generally Ira S. Wiesner, *Asset Transfers, Trust Availability and Estate Recovery Under OBRA '93: Statutory Analysis in Context*, 3d NAELA Advanced Elder Law Institute §§ 2-3 (1993); M. Kent Olsen, *Trusts, Medicaid and OBRA '93*, NAELA Advanced Elder Law Institute III §§ 2-3 (1993).

22. See KRUSE, *supra* note 8, at 4, 11.

23. See Lovelace, *supra* note 19, at 6 n.2.

24. *Id.*

25. See *infra* note 33.

26. See *supra* note 21.

27. See 42 U.S.C. § 1396a(k) (2002).

28. See H. RUTHERFORD TURNBULL, III, ET AL., *DISABILITY AND THE FAMILY* Chs. 14-16 (Brookes ed., 1989).

middle class, attempting to salvage their inheritances.<sup>29</sup>

*G. OBRA '93 - Great Restrictions and Narrow Exceptions on SNTs*

The prohibition against self-settled trusts created to gain eligibility for Medicaid benefits was expanded in the early nineties with passage by Congress of the Revenue Reconciliation Act of 1993 (also known as the Omnibus Budget Reconciliation Act of 1993 or OBRA '93).<sup>30</sup> The specific language declares:

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2) (A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under

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29. The antagonists painted broad strokes and pithy sound bites, decrying so-called Medicaid Planners. *See, e.g.*, Jane Bryant Quinn, "Poor" Middle Class Eats Up Medicaid Program, THE GREENSBORO NEWS & RECORD, Sept. 15, 1996 ("[Medicaid planning] pops up when elderly people think about nursing homes. They may be able to pay the bill, at least for the first year or two. But they'd prefer to leave the money to their kids (or their kids would prefer it; they sometimes initiate this game).").

30. *See* Omnibus Budget Reconciliation Act 1993, H.R. 2264, 103d Cong. §§ 13611, 13612 (1993) (amending § 1917(c)(1) of the Social Security Act) (enacted).

subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to —

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3) (A) In the case of a revocable trust - -

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust —

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income —

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.<sup>31</sup>

With the sweeping prohibition came a narrowly structured set of three irrevocable “pay-back” or “pay-over” trusts against which the prohibition would not apply.<sup>32</sup> “Pay-back” or “pay-over” requirements would either repay Medicaid all payments made under the Medicaid Program to the beneficiary of the trust at the end of the beneficiary’s life, or pay over to the NPA the corpus of the trust remaining at the end of the beneficiary’s life. The trusts are statutorily described as follows:

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(B) A trust established in a State for the benefit of an individual if —

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total

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31. 42 U.S.C. § 1396p(d) (2002).

32. Repayment would be all amounts remaining in the trust up to the total amount of medical assistance paid on behalf of the beneficiary. *See infra* note 34.

medical assistance paid on behalf of the individual under a State plan under this subchapter, and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(v) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396(a)(10)(C) of this title.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382(c)(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specified.<sup>33</sup>

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33. See 42 U.S.C. §§ 1396p(d)(4)(A)(B) and (C) (2002) [hereinafter d4A,

### III. OPERATION OF THE d4C SPECIAL NEEDS POOLED TRUST

The statutory criteria for the SNPT focuses on: (A) eligibility of beneficiaries (especially those older than sixty-five); (B) a non-profit association [“hereinafter NPA”] establishing and managing the trust; (C) a separate or segregated account for each beneficiary; (D) a pooled umbrella trust for investment and management of the funds of all SNPTs held by the NPA; (E) accounts in the pooled umbrella trust are maintained for the sole benefit of the persons who are disabled; (F) creation of the trusts are by parents, grandparents or legal guardians of such persons, by such persons or by a court; and (G) remaining corpus of individual SNPTs left in the trust is retained by the NPA, repaying to the Medicaid program all other corpus not left in the trust up to the amount of medical assistance paid by Medicaid for the beneficiary of the SNPT.<sup>34</sup>

#### A. *No Age Restriction Expressly Declared in a d4C SNPT*

Since passage of OBRA ‘93, disabled, injured or elderly persons younger than sixty-five have had the benefit of special needs trusts under one particular section of the law.<sup>35</sup> Those over sixty-five were without such a benefit for many years.<sup>36</sup> The Social Security Administration took the position that: “such transfers are subject to transfer penalties. Nothing in the Medicaid statute permits us to reach a different conclusion. We believe that this policy is clearly set forth in sections 3258.10 and 3259.7 of the State Medicaid Manual.”<sup>37</sup>

A review of HCFA 64 sections 3258.10 and 3259.7 shows the circuitous argument HCFA used to reach its “belief.”<sup>38</sup> Nowhere in the “Medicaid” statute did Congress expressly declare that the d4C trust was restricted to use by those under sixty-five.<sup>39</sup> Congress was explicit in its language, only restricting the d4A trust to use by

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d4B and d4C], and implementing instructions, *State Medicaid Manual, Part 3-Eligibility, HCFA Transmittal No. 64* (1994) [hereinafter HCFA 64].

34. See d4C.

35. See d4A.

36. See KRUSE, *supra* note 8, at app. D, 241-42, Priv. Ltr. Rul. 95-24-023 (March 22, 1995) (regarding transfers into pooled trusts for beneficiaries over age sixty-five).

37. *Id.*

38. *Id.*

39. See *supra* note 33.

individuals under the age of sixty-five.<sup>40</sup> However, HCFA wrote a broader restriction in section 3258.10B, grafting the under-sixty-five restriction on all OBRA '93 exempt trusts, including the d4C SNPT.<sup>41</sup>

In the fall of 2001, HCFA responded to an inquiry by author Clifton Kruse, Jr., declaring that people sixty-five or older have not been limited from use of the d4C SNPT.<sup>42</sup> The actual language of the letter states:

With regard to your question about why certain trusts for the disabled are subject to an age limit, the conference report accompanying the enabling legislation (OBRA 92) provided very little insight into why Congress elected to write the legislation (including those portions that apply an age limit to the trusts in question) as it did. In the absence of any explanation from the Congress itself as to why it imposed an age limit on those trusts, we hesitate to speculate on Congress' motivations in imposing such a limit. As a technical point, however, we would note that while an age limit does apply to two of the trusts you cite, the statute does not impose an age limit on the trust cited at 42 U.S.C. 1396p(d)(4)(C).<sup>43</sup>

With such an option available, lawyers serving older Americans need to be aware of governmental benefit constraints, identifying who their client is throughout the process; maintaining careful attention to how the SNPT is developed, implemented and funded through an appropriately qualified, organized and operated NPA; and maintaining assurances that the elder persons for whom the trusts are created actually receive benefits that enhance the quality of their lives and extend their assets in ways that supplement their standard of care for longer periods than had they not had the trusts available.<sup>44</sup>

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40. *Id.*

41. See State Medicaid Manual, Part 3–Eligibility, HCFA Transmittal No. 64, *supra* note 16, § 3258.10, *Exceptions to Applications of Transfers of Assets Penalties*, B. “The assets were: . . . [t]ransferred to a trust (including a trust discussed in § 3259.7) established for the sole benefit of an individual under 65 years of age who is disabled as defined under SSI.” *Id.*

42. A copy of the Letter Ruling is on file with the author. See also KRUSE, *supra* note 8, at 328.

43. *Id.*

44. See John W. Staunton & Leo J. Govoni, *Special Needs Trusts: Planning Vehicles that Have Come of Age*, 3 ELDER'S ADVISOR, THE J. OF ELDER L. AND POST-RETIREMENT PLAN. 28, 30 (spring 2002).

An NPA qualifies as trustee to administer a d4C special needs pooled trust if it meets all necessary state corporate statutory and Internal Revenue Code requirements.<sup>45</sup>

*B. NPA Establishing and Managing d4C SNPTs*

*1. Typical Statutory Requirements for NPAs*

There are no extraordinary elements necessary to create and operate the NPA that qualifies to manage d4C SNPTs. There must be compliance with the charitable corporations or non-profit associations statutes in the state where the NPA is a resident. In many states, there need be only one incorporator, officer, and board member. At times, the lawyer serves in all positions just to create sufficient inertia to bring those operating and supporting the NPA into a forum that will serve the lawyer's clients and others as well. There is usually no stock issued, and often there are no members of an NPA created to manage d4C SNPTs.

Examples of NPAs providing care-giving and trust services for SNPTs stretch across the country. One such NPA is Life Plan Trust of North Carolina, an NPA started in 1990 by The Arc of North Carolina and NAMI North Carolina (formerly the North Carolina Alliance for the Mentally Ill). As explained on its website, Life Plan Trust works with families of individuals with developmental disabilities, mental illness and other disabilities to help develop comprehensive plans for future care, serving as trustee for funds designated for the benefit of disabled family members. Two other sponsoring organizations of the NPA include the Autism Society of North Carolina and United Cerebral Palsy.<sup>46</sup>

Similar to other NPAs, Life Plan Trust of North Carolina has an \$800 enrollment fee and a \$175 annual update fee with an assurance that once a family enrolls the fees will not increase.<sup>47</sup> The fees are not to be confused with delivery of case management services, currently billed at \$60 per service hour. The enrollment fee and annual update fees may be paid in monthly installments over a period of months or years.<sup>48</sup> The NPA makes it clear that fees for client services are not tax deductible, but the contributions

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45. *See supra* note 33.

46. *See* <http://www.arcnc.org/lpt/faq.htm> (last visited Aug. 12, 2002).

47. *Id.*

48. *Id.*

solicited by the organizations are tax deductible because the NPA has tax-exempt status under section 501(c)(3) of the Internal Revenue Code (IRC).<sup>49</sup>

Another example of an NPA serving d4C SNPTs is the self-incorporation of Tennessee Pooled Assets, Inc. by Timothy L. Takacs, in the summer of 2000.<sup>50</sup> Takacs, a well-recognized member of the National Academy of Elder Law Attorneys ("NAELA"), made his work product available to other NAELA members, hoping to assist advocates in other states to take the initiative to organize pooled trusts, making SNPTs more readily available to people with disabilities and older Americans.<sup>51</sup>

Once the incorporation is filed and the charter is issued by the secretary of state, the NPA often partners with a banking institution, a trust company or a securities entity with a trust component to bring asset investment and management sophistication into the process, meeting the financial and fiduciary responsibilities associated with d4C SNPTs.

The NPA created to be trustee of exempt d4C SNPTs must have sufficient charitable purposes.<sup>52</sup> Usually, the focus is on foundation status with additional components that allow for tax-exempt charitable gifts.<sup>53</sup>

## 2. *Internal Revenue Code Requirements for Tax-Exempt Status—IRC § 501(c)(3)*

A tax-exempt NPA under section 501(c)(3) of the IRC must be organized and operated exclusively for one or more of the purposes set out in the IRC, and none of the organization's earnings may be distributed to private shareholders. Also, the tax-exempt NPA is barred from political action because a substantial part of its activities attempts to influence legislation, and it is completely barred from participating in any political campaigns or

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49. *Id.*

50. The work product of Takacs, comprising nonprofit charter, nonprofit organizing by incorporator, nonprofit bylaws and nonprofit organizing by the board, are on file with the author.

51. *Id.*

52. See Lovelace, *supra* note 19, at 6. Lovelace actually describes the start-up of the pooled trust as one primarily founded by those with compassion and commitment to promote respectful quality of care and independent living options for persons with disabilities of all ages. *Id.*

53. *Id.* at 7.

activities for or against political candidates.<sup>54</sup>

The organizations described in section 501(c)(3) are commonly referred to as “charitable organizations.”<sup>55</sup> The exempt purposes set forth in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening of neighborhood tensions; elimination of prejudice and discrimination; defense of human and civil rights secured by law; and combating community deterioration and juvenile delinquency.<sup>56</sup>

Organization of an SNPT as tax-exempt must be exclusively for a charitable purpose. An individual or partnership will not qualify; only a corporate entity whose charter must limit its purposes to one or more activities that are not in furtherance of one or more of those purposes defined in the IRC will qualify. This requirement is met by reference to declared purposes in section 501(c)(3) in the corporation’s charter.

Additionally, the exempt entity must permanently dedicate its assets to an exempt purpose, including that its assets will be distributed for a section 501(c)(3) exempt purpose or to a federal, state or local government for a public purpose. Assurance of compliance may be shown by a provision in the corporate charter insuring assets will be distributed for an exempt purpose in the event of dissolution.<sup>57</sup>

An organization will be regarded as “operated exclusively” for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of the exempt purposes

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54. See generally IRS Publ’n 557, Tax-Exempt Status for Your Organization (Rev. July 2001).

55. Treas. Reg. § 1.501(c)(3)-1(d)(1)(i) (as amended in 1990).

56. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1990).

57. Treas. Reg. §§ 1.501(c)(3)-1(b)(4) and (5) (as amended in 1990). See also, IRS Publ’n 557 (Rev. July 2001) (“Although reliance may be placed upon state law to establish permanent dedication of assets for exempt purposes, an organization’s application can be processed by the IRS more rapidly if its articles of organization include a provision insuring permanent dedication of assets for exempt purposes.”).

specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is in furtherance of non-exempt purposes.<sup>58</sup> The organization must not be organized or operated for any private purpose, and no net earnings shall be of benefit or interest to private entities or individuals. If such a private benefit transaction passes to a person having substantial influence over the organization, then a possible excise tax may be imposed on the person and any managers agreeing to the transaction.<sup>59</sup>

### 3. Internal Revenue Code Requirements for Section 509

Often the NPAs are organized under the tax-exempt foundation requirements of section 509 of the IRC. Generally, "private foundation" means a domestic or foreign organization described in section 501(c)(3), with other exceptions.<sup>60</sup> NPAs functioning on a foundation basis must not receive more than one-third support in each taxable year from any combination of gifts, grants, contributions, or membership fees.<sup>61</sup> Gross receipts of the NPA may also come from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity which is not an unrelated trade or business, in any taxable year to the extent such receipts exceed the greater of \$5,000 or one percent of the organization's support in such taxable year, from persons other than disqualified persons with respect to the organization, from governmental units as described, or from organizations as described.<sup>62</sup> The NPA must continue singular operation of those functions that first gained tax-exempt status.<sup>63</sup>

While the NPA must be non-profit, OBRA '93 does not require such a narrow focus as to be created only by those entities that have members who will benefit from the SNPTs that would be administered by the NPA.<sup>64</sup> Lovelace writes that organizations creating the NPAs have voluntary boards and voluntary attorneys that use fundraising skills on the built in market of their own members. She explains that this is often necessary because SNPT

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58. Treas. Reg. § 1.501(c)(3)-1(b)(1)(iii) (as amended in 1990).

59. Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 1990).

60. See I.R.C. § 509 (2002).

61. I.R.C. § 509(a)(2)(A)(i) (2002).

62. I.R.C. § 509(a)(2)(A)(ii) (2002).

63. I.R.C. §§ 509(b), 507 (2002).

64. See *supra* note 34, and accompanying text.

administration is difficult and costs are high.<sup>65</sup>

*C. Separate or Segregated Account for Each Beneficiary*

For the trust to be exempt, the corpus of each individual's trust account must be separate and segregated, categorically benefiting only the persons with disability, including those sixty-five and older who are medically needy.<sup>66</sup> Banks or trust companies providing services for the trust funds under management have the necessary programs to maintain each account. The bank or trust company will also make necessary distributions, and apply interest accumulation with monthly or quarterly statements.<sup>67</sup>

*D. A Pooled Umbrella Trust for Investment and Management of the Funds of All SNPTs Held by the NPA*

As detailed above, pooled trusts are special needs trusts comprised of assets of elder citizens and people with disabilities and consolidated under an umbrella trust of an NPA, serving as trustee and responsible for the care of the trust beneficiaries.<sup>68</sup> It has been noted that the term "pooled income trust" has been used occasionally in describing the d4C SNPT.<sup>69</sup> Olsen mentions that it would be beneficial to use a trust form, meeting the requirements of the pooled income fund described in IRC § 642(c)(5), similar to the sample published by the IRS in 1988 to deal with pooled income trusts because there have been many requests for rulings dealing with the qualification of such trusts.<sup>70</sup>

Since pooled trusts are exempt under Medicaid, each beneficiary of the pooled trust is usually an eligible Medicaid recipient, if all other eligibility criteria are met.<sup>71</sup> The assets of the special needs trusts are pooled under an umbrella trust for management and cost efficiency, with accumulating interest credited to each individual's sub-account.<sup>72</sup> The supplemental or

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65. *Id.*

66. *Id.*

67. *See* Lovelace, *supra* note 19, at 8. *See also* Barrett, *supra* note 13.

68. *See supra* note 33.

69. *See* Olsen, *supra* note 12, at 3-4.

70. *Id.*

71. *Id.*

72. Not only is it a matter of cost efficiency, it is probably the only way that commercial banking or trust entities may be enticed to provide the investment and asset management services that many NPAs are incapable of providing. A

special needs of each individual are funded with the assets ascribed categorically to the individual during the individual's lifetime, or until the individual's funds are exhausted. If no court process is involved, then a joinder agreement establishes the sub-trust that frames the individual's care plan, providing the NPA the basis by which distributions through a structured annuity might be determined, or monthly care-giving expenses might be developed.<sup>73</sup>

An NPA providing care and advocacy for the beneficiaries of the trusts must be the trustee of the pooled trusts in order for the trusts to be exempt as d4C SNPTs. An incentive to NPAs comes when, rather than repaying Medicaid for all of the expenses that the client accumulated in long-term care, the NPAs retain the assets remaining in the trust in order to serve other Medicaid recipients of similar need.<sup>74</sup>

The importance of the concept deserves restatement. If Medicaid recipients have no one to care for them, and no families available to advocate their interests, then the NPA, as trustee of the pooled trust for the benefit of the Medicaid recipients, would supplement the Medicaid needs of the beneficiaries of the pooled trust in order to sustain the quality of their lives. Any assets remaining in the pooled trust beyond the lives of the beneficiaries would be retained by the NPA to be used for its purposes and mission in serving similarly situated vulnerable elder citizens or persons with disabilities.<sup>75</sup>

*E. Accounts in the Pooled Umbrella Trust are Maintained for the Sole Benefit of the Persons Who Are Disabled*

Every sub-trust of the NPA, carried under the umbrella trust must individually declare that its corpus is for the sole benefit of the primary beneficiary of the sub-trust.<sup>76</sup> As important as the declaration of sole benefit is in the sub-trust document, the administration and distribution requirements imposed on the NPA must at all times evidence the use of the principal and interest accumulation of the sub-trust for the sole benefit of the primary

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majority of the SNPTs created have modest amounts of principal incapable of meeting the minimum amount necessary to be accepted by commercial banks and trust companies.

73. See Olsen, *supra* note 12, at 6.

74. *Id.* See *supra* note 33.

75. *Id.*

76. *Id.* See *supra* note 33.

beneficiary.<sup>77</sup>

The impact of whether or not the sole benefit of the primary beneficiary extends beyond the language of the trust documents may be realized during the on-going administration of the trust, at the time that the trust terminates, or both.<sup>78</sup> If during a periodic review of trust receipts and disbursements, the reviewing agency finds that those other than the primary beneficiary benefited from distribution out of the trust, then the primary beneficiary may be declared ineligible with a sanction of some period of time. Additionally, when the trust terminates at the end of the beneficiary's life, or when the corpus of the trust is depleted, the state agency may declare that since the trust had operated in violation of the sole benefit rule, the "pay-back" provision would be invoked, denying the "pay-over" to the NPA as a penalty against it.<sup>79</sup>

*F. Creation of SNPTs by Parents, Grandparents or Legal Guardians of Such Persons, by Such Persons or by a Court*

The d4C SNPT is the only OBRA '93 exempt trust that may be self-settled or self-created. The individual, if competent, may create the trust him- or herself. However, a majority of the SNPT beneficiaries probably does not have sufficient capacity to create the trust. If a beneficiary is not competent, but her or his money is to be used to fund the SNPT, then the requisite durable power of attorney or guardianship must be in place to effectuate the SNPT's creation.

If the SNPT is created from funds derived from personal injury litigation, then there may be several complicated layers of procedural process added that may need more than just elder law or estate and trust expertise. To quickly end personal injury litigation, the funds may be offered in a lump sum, circumventing the time needed to develop a structured settlement. When this occurs, the lawyer involved must be experienced and capable of placing the funds in a Qualified Settlement Fund ("QSF") as a safe haven until the structure is set and the annuity purchased.<sup>80</sup>

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77. *Id.*

78. See Mary T. Schmitt Smith, *After the Wedding—Administration of Special Needs Trusts: Tuning Up the Trustees*, NAELA Advanced Elder Law Institute VII, § 19 (1997); Roger M. Bernstein, *Special Needs Trusts: Administration and Compliance*, 14 J. OF NAT'L ACAD. ELDER L. ATT'YS 13 (Summer 2001).

79. See Lovelace, *supra* note 19, at 6.

80. See IRC § 130(c). A qualified assignment may be made of any liability to

Having the funds initially placed in the QSF meets certain requirements of the Internal Revenue Code.<sup>81</sup>

When the elder law or estate and trust attorney is sought to develop an SNPT as a receptacle for the settlement or judgment of personal injury litigation, the first ethical question is no different than the ethical question raised at the beginning of any client-lawyer relationship--who is the client? The answer and its ethical discussion are found later in the article.<sup>82</sup>

*G. Remaining Corpus of Individual SNPTs Left in the Trust is Retained by the Non-profit Association, Repaying to the Medicaid Program All Other Corpus Not Left in the Trust Up to the Amount of Medical Assistance Paid by Medicaid for the Beneficiary of the SNPT*

The underlying reason for the way this part of the law is written is grounded in the public policy focus of the d4C SNPT exemption. One political agenda item in Congress at the time OBRA '93 was enacted<sup>83</sup> was the down-sizing of "big government" thereby reducing taxes and the so-called "Welfare State."<sup>84</sup> Changing the pay-back to Medicaid so that it became a pay-over to an NPA in essence created a revenue source for private NPAs to provide additional care-giving and advocacy for those otherwise dependant on federal and state funds and local government case management.<sup>85</sup>

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make periodic payments as damages awarded pursuant to a judgment or settlement, or as compensation under any workmen's compensation act, on account of a physical personal injury or sickness. In order to be a "qualified assignment," however, an assignment must meet requirements as detailed in the section. *Id.*; see also Rev. Proc. 93-34, 299, announcing that a "designated settlement fund" or a "qualified settlement fund" would be treated as a "party to the suit or agreement" within the meaning of IRC § 130(c)(1), and after August 10, 1993, an assignment made by a designated or qualified settlement fund is a qualified assignment if the certain requirements are met. *Id.*

81. Effective for claims filed after August 5, 1997, liability to make periodic payments as compensation under any workmen's compensation act, or other personal injury claim may also be validly assigned. IRC § 130(c).

82. See *infra* section IV.

83. See *supra* note 33.

84. *Id.*

85. *Id.*

#### IV. ETHICAL CONSIDERATIONS IN THE CONTEXT OF THIS ARTICLE

##### A. *The General Framework of Legal Ethics*

Generally, lawyers are mindful of the rules of professional conduct as they relate to client engagement.<sup>86</sup> Within the elder law and estate-planning context, lawyers need to be aware of the prospective client and the newly enacted ABA model rule that addresses the prospective client.<sup>87</sup> Beyond the concern for conflict of interest and confidentiality as relates to a prospective client, attention should also be given to the diminished capacity of the prospective client.<sup>88</sup> This has greater importance in the context of this article because trust beneficiaries must be disabled to be eligible for Medicaid.<sup>89</sup> Significant numbers of those who are disabled SNPT beneficiaries are mentally incompetent as well.<sup>90</sup>

Other recent changes to the ABA Model Rules of Professional Conduct are worth noting, as this article examines more complicated ethical considerations that elder law and estate and trust lawyers would confront in considering the benefit of the SNPTs as an option for clients.

##### B. *Recent Changes to the ABA Model Rules of Professional Conduct that Impact Lawyers Developing Special Needs Pooled Trusts when Serving Injured, Disabled and Elderly Clients*

Over the last several years, the ABA and state bars have confronted the changing status of the legal profession by generally responding to ethical and practice changes, many of which will specifically impact elder law and estate and trust attorneys. Through the Center for Professional Responsibility, the ABA developed and interpreted standards and scholarly resources in

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86. The ABA Model Rules of Professional Conduct are used throughout this article for the ethics analysis. Adoption of the Model Rules in virtually every state, whether in whole or in part is the broadest disciplinary mandate that is uniform across the country. See Jeffery N. Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, 2 (ALI-ABA 2002).

87. See MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002).

88. See MODEL RULES OF PROF'L CONDUCT, R. 1.14 and accompanying comments. See also the revisions to MODEL RULES OF PROF'L CONDUCT, R. 1.7 and accompanying comments 29-32.

89. See Social Security Act § 1614(a)(3), 42 U.S.C. 1382c(a)(3). See also *supra* note 33.

90. See *supra* note 13 and accompanying text.

legal ethics, professional regulation, professionalism and client protection mechanisms.<sup>91</sup> Since 1997, the ABA went further, organizing two commissions, one to look internally at the profession's ethics beyond the year 2000,<sup>92</sup> and the other to look externally at how law practices will be organized into the next century.<sup>93</sup>

The ABA Ethics 2000 (E2K) Commission worked at a feverish pace from its beginning in August 1997, to February of this year, finishing its task for presentation of its recommendations at the annual meeting of the ABA House of Delegates in August of 2001, and at its midwinter meeting in February 2002. The thirteen-member Commission, reflecting the ABA's diversity with judges, law professors, government lawyers, corporate counsel, civil and

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91. With substantial overlap and interaction, the Center describes its departments as follows: the Ethics Department is the place for study, development and implementation of model legal and judicial ethics standards; the Professionalism Department provides counsel to various ABA committees as well as support in efforts to improve the professionalism and competence of lawyers and judges; the Professional Regulation Department provides legal support and policy guidance for various ABA committees as well as responds to requests for information on case law, statistics and procedural standards; and The Client Protection Department serves the concerns and best interests of the client population through programs that prevent or redress harm done in the practice of law or the rendering of legal services. *See* <http://www.abanet.org/cpr/home.html>.

92. In support of its assertion that it has maintained a great leadership role in ethics and professionalism of the legal profession, the ABA cites the adoption of its ethical standards by virtually every jurisdiction, implicitly acknowledging that it is a recognized leader and the appropriate forum for discussing, drafting and adopting rules governing lawyer conduct. *See* <http://www.abanet.org/cpr/ethics2k.html>.

93. The ABA Commission on Multidisciplinary Practice (hereinafter ABA MDP Commission) was created in August, 1998, to face the unprecedented challenges of revolutionary advances in technology and information sharing, of the globalization of the capital and financial services markets, and of more expansive government regulation of commercial and private activities. The ABA MDP Commission's members included a cross-section of the legal profession including distinguished practitioners, judges, and academicians. It worked believing that there was a degree of urgency with the emergence of consulting firms that had been aggressively soliciting clients, offering services remarkably similar to those traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, human resources, and litigation support systems. In 1999, the recommendations for MDP were tabled. In 2000, the New York Session of the ABA House of Delegates overwhelmingly defeated the recommendations for MDP. The ABA Journal reported that on July 11, 2000, the delegates "crushed mixed practices in which lawyers and other professionals would work under the same roof, sharing fees and firm ownership." *See* John Gibeaut, "It's a Done Deal," *House of Delegates Vote Crushes Chances for MDP*, 86 A.B.A. J. 92 (September 2000).

criminal practitioners and one non-lawyer, was charged with: 1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; 3) conducting original research, surveys and hearings; and 4) formulating recommendations for action.<sup>94</sup>

The ABA E2K Commission met and fulfilled its charge when during the 2001 meeting of the American Bar Association House of Delegates in Chicago; the House voted on the recommended additions and revisions of the Model Rules from the Preamble through Rule 1.10 and approved the Commission's recommendations with several exceptions.<sup>95</sup>

The passage of a new definition of informed consent in Model Rule 1.0(e), revisions of confidentiality in Model Rule 1.6, and conflict of interest in Model Rule 1.7, brings clarity to elder law attorneys and estate and trust lawyers.<sup>96</sup> The new definition of informed consent in new Model Rule 1.1 will assist elder law attorneys and estate and trust lawyers to conclude whether or not elderly clients of diminished capacity still have sufficient informed consent to engage an attorney for representation and the delivery of legal services.<sup>97</sup>

The clarity of the amended definition of conflict of interest in Model Rule 1.7, removes the confusion between direct adversity conflicts and material limitation, assisting elder law attorneys and estate and trust lawyers in determining which situations pose "a significant risk" such that the representation will be limited by the lawyer's interests and duty to others.<sup>98</sup> This will be applied in this article when the lawyer is determining if there is a significant risk that compromises loyalty and duty when representing the NPA of an SNPT and the primary beneficiary as well.

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94. See <http://www.abanet.org/cpr/ethics2k.html>.

95. Rule 1.5: approved an amendment to delete the requirement of a writing in Rule 1.5(b). Rule 1.6: approved an amendment to delete proposed Rule 1.6(b)(2). In light of the House's action in deleting 1.6(b)(2), the Commission withdrew its proposed 1.6(b)(3). The House also approved an amendment from the Commission to modify Rule 1.6, Comment [13]. Rule 1.10: approved an amendment to delete proposed Rule 1.10(c). See <http://www.abanet.org/cpr/ethics2k.html>.

96. See MODEL RULES OF PROF'L CONDUCT (2002), available at [http://www.abanet.org/cpr/mrpc/mrpc\\_home.html](http://www.abanet.org/cpr/mrpc/mrpc_home.html).

97. *Id.*

98. *Id.*

Initially, the ethical analysis in this context is not difficult. The elder law attorney or estate and trust lawyer knows to pose the question, "Who is the client?" to those who have made the initial appointment.<sup>99</sup> The answer should always come from them. The client is often the elderly person seeking legal engagement for developing ways by which asset preservation and quality of life issues might be addressed for future needs. However, this initial contact becomes more complicated when there are members of the family other than the spouse in the conference, when multiple individuals are identified for involvement beyond the initial consult, or when the older person who is seeking legal services has diminished capacity.<sup>100</sup> While inter-generational or family unit representation is not within the scope of this article,<sup>101</sup> what is within its scope is multiple and secondary or derivative client representation, touching on the Doctrine of Privity as well.<sup>102</sup> The article's focus within that scope is the stress that presses against the ethical boundaries of lawyering as the lawyer begins the client-lawyer relationship, developing the SNPT for the injured or

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99. See generally Bruce A. Green & Nancy Coleman, *Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 961 (1994) (discussing potential conflicts of interest in the representation of joint clients, such as husbands and wives). See *infra* note 117.

100. See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1080 (1994); Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do? Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1153 (1994); Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, 35 GEORGIA L. REV. 735 (2001).

101. See Russell G. Pearce, *Family Values and Legal Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1258 n.17, citing Patricia M. Batt, Note, *The Family Unit As Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); see also Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

102. See Clifton B. Kruse, Jr., *Ethical Obligations of Counsel In Representing Clients Petitioning to be Appointed as Guardians of Others or of Their Estates, or Both*, 8 J. OF NAT'L ACAD. ELDER L. ATT'YS 13 (1995). See also *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976) (*Fickett*, considered seminal, is cited in most writings and decisions in this area of law); *In re Guardianship of Styer*, 536 P.2d 717 (Ariz. Ct. App. 1975) The facts of the guardian's misconduct on which the *Fickett* decision was predicated are found in this trial case where a judgment surcharge was affirmed against the guardian for \$378,789.62. *Id.* For an analysis, see A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth* (hereinafter *Fickett's Thicket*), 32 WAKE FOREST L. REV. 445 (1997); Pennell, *supra* note 86, at 56; Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide Through the Maze*, 31 STETSON L. REV. 757, 776-80 (2002).

disabled elderly client, involving the NPA trustee and counseling the NPA on administration of the trust and distribution of the income and principal of the trust, this being the more active component much later in the lawyer's engagement.<sup>103</sup>

For elder law, estate planning, family law, tax, and general practice attorneys, representation in the twenty-first century will go beyond identification of the single client, often including joint and multiple representation, involving intergenerational and multigenerational family layers.<sup>104</sup> Before representation may be established, there must be confirmation that the prospective client has sufficient competence or capacity to enter into the client-lawyer engagement.<sup>105</sup> Once the identification of the client is confirmed, the broader spectrum of elder law engagement may address quality of life and quality of services to the elders in the family.<sup>106</sup> Concomitant with medical and health care needs, the engagement may also delve into consideration of long term care insurance, estate and divestment planning for tax or governmental benefits consideration, asset exemptions and transfers and in-home options often leading to transition into assisted living or nursing home environments, or even transition of residency, domicile and state citizenship.<sup>107</sup>

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103. Notice how in this one sentence the lawyer begins by representing the beneficiary and ends by representing the NPA.

104. See generally A. Frank Johns, *Multiple and Intergenerational Relationships*, in THE PROFESSIONAL LAWYER 7 (2001 Symposium Issue, American Bar Association).

105. See Fleming & Morgan, *supra* note 100, at 750-51.

106. See William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 ELDER L. J. 1, 2 (1994). The National Elder Law Foundation (NELF), the only national American Bar Association-licensed entity certifying attorneys in elder law, identifies fourteen areas in which examination is required for lawyers to gain NELF board certification in elder law: (1) HEALTH AND PERSONAL CARE PLANNING; (2) PRE-MORTEM LEGAL PLANNING, including TRUSTS; (3) POST-MORTEM LEGAL PLANNING, Probate and Estate Administration; (4) FIDUCIARY REPRESENTATION; (5) LEGAL CAPACITY COUNSELING, GUARDIANSHIP and CONSERVATORSHIP; (6) PUBLIC BENEFITS ADVICE—from Medicare to Medicaid to Special Assistance; (7) INSURANCE MATTERS—from health, to GAP, to life, to long term care; (8) RESIDENT RIGHTS ADVOCACY; (9) HOUSING COUNSELING; (10) EMPLOYMENT AND RETIREMENT COUNSELING; (11) INCOME, ESTATE, AND GIFT TAX COUNSELING; (12) TORT CLAIMS AGAINST NURSING HOMES; (13) LITIGATION IN JUDICIAL AND ADMINISTRATIVE JURISDICTIONS; and (14) AGE OR DISABILITY DISCRIMINATION IN EMPLOYMENT AND HOUSING.

107. *Id.*

*C. Proceeding in the Client-Lawyer Engagement within the Context of Developing the SNPT*

This section briefly frames the general application of legal ethics at the inception of any client-lawyer engagement, then moves through several categories of individuals and entities with whom elder law attorneys and estate and trust lawyers might negotiate the SNPT client-lawyer engagement.

*1. General Application of the Ethics Rules at the Inception of Any Engagement*

At the inception of being engaged, all attorneys generally must deal with client competence, communication, confidences and loyalty. Elder law attorneys also must assess the client's competence to hire counsel or to have sufficient informed consent to enter into a contractual relationship that delivers future legal services. Many elder law attorneys have included as an element of the scope of prospective representation a reasonable screen, assessment or calculation of client capacity within the consult.<sup>108</sup> Acting with sensitivity, reasonable legal competence and diligence, elder law attorneys assess client capacity while honoring client confidences and protecting property.<sup>109</sup>

*a. Initial Client Contact*

Whether denominated lawyer-client, or client-lawyer,<sup>110</sup> the legal profession has proceeded at a snail's pace when it comes to including client capacity in discussions about the initial client conference.<sup>111</sup> Professor Rebecca Morgan, an elder law authority, wrote about the representation of older clients, "[a]lthough the *Model Rules of Professional Responsibility* . . . recognize the non-litigation roles of attorneys more explicitly . . . the Model Rules still fail to provide adequate practical guidance to the elder law

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108. See Fleming and Morgan, *supra* note 100, at 750-51.

109. See Pennell, *supra* note 86, at 19.

110. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 2.1 (explaining that the four duties [competence, communication, confidentiality and loyalty] of the core principles of the law of lawyering run to the client, and noting that The Kutak Commission symbolized the primacy of client interests by reversing the common "lawyer-client" reference). See also ACTEC Commentaries on the Model Rules of Professional Conduct (3d. ed. ACTEC Foundation 1999) [hereinafter ACTEC Commentaries].

111. See generally Johns, *supra* note 104.

practitioner.”<sup>112</sup> Little is found outside the elder law construct to guide lawyers through the rigors of confirming sufficient client competence or capacity at initial contact, allowing consultation, or determining what, if any, future legal services may be contracted. The recent revisions to the Model Rules introduced new Model Rule 1.18 relating to the prospective client, which, beginning with a concise definition, addresses confidentiality and examines possible material adverse interests between the prospective client and the lawyer.<sup>113</sup> Currently there is no connection between Rule 1.18, defining the prospective client, and Model Rule 1.14, client with diminished capacity, which addresses the ongoing client-lawyer relationship when the client has declining mental abilities.<sup>114</sup> There needs to be a connection between the two rules, providing

112. See Adams & Morgan, *supra* note 106, at 13 (citing, among others, Ronald C. Link, et al., *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1 (1987)).

113. MODEL RULES OF PROF'L CONDUCT, R. 1.18 (2002)

DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

114. See generally Johns, *supra* note 104.

guidance to lawyers dealing with prospective clients with diminished capacity.<sup>115</sup>

*b. Formation of Client-Lawyer Relationship*

The legal profession first views the relationship of the client and lawyer based on the manifestation of the person's intent. The relationship arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person.<sup>116</sup> While intent is founded on capacity, general legal texts address the client-lawyer relationship based on the client having fully informed consent,<sup>117</sup> which is based on what the lawyer discloses to the client concerning the benefits and advantages of the proposed representation and conflicts of interest. There is general legal comment about legally incompetent clients who require representation for which they are personally incapable of giving consent.<sup>118</sup> However, the writings identify those who are already incompetent and are either represented by a guardian or, if minors, represented by their parents.<sup>119</sup>

*c. Current and Future Consideration of the Prospective Client*

Currently, few general writings of the legal profession mention the attorney's need to assess the elderly client's competence to hire counsel or to assess capacity to function and make legal choices with informed consent.<sup>120</sup> Since the new Model Rule 1.18 regarding the prospective client only looks at confidentiality and

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115. *Id.*

116. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 14 (2000) [hereinafter RESTATEMENT 3D-LAW GOVERNING LAWYERS].

117. *See* Model Rule 1.0(e). New definition of informed consent applicable to all Model Rules of Professional Conduct:

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

118. *Id.*

119. *See* RESTATEMENT 3D-LAW GOVERNING LAWYERS, *supra* note 116 (referencing case law addressing legally incompetent clients based on minority).

120. *Cf.* Erica Wood & Audrey Straight, *Effective Counseling of Older Adults* (ABA Commission on Legal Problems of the Elderly of the ABA and Legal Counsel for the Elderly, Inc., 1995). Age myths that stereotype older people as senile, confused, disabled, and the like, promote the dangers of "ageism." While some degree of short-term memory loss is part of normal aging, a significant or complete failing in mental abilities is not a normal part of the aging process.

conflicts in terms of the lawyer's duty to the prospective client, there remains a lack of guidance regarding the prospective client's diminished capacity.<sup>121</sup> Consider Model Rules 1.2 and 1.16, bracketing the beginning and the ending of the client-lawyer relationship. These rules are more concerned with the lawyer's role and whether what the lawyer is being asked to do is moral or ethical, than whether the client has capacity to consummate the engagement.

*d. The Lawyer's Duties to Prospective Clients*

Even if not engaged, the lawyer may have duties to prospective clients that include protecting confidential information, property and providing reasonable care. This is where emphasis on the client's capacity deserves attention. Attention to client capacity is not currently examined in the legal profession until the client-attorney relationship has been established and is ongoing.<sup>122</sup> Texts referenced above provide information and basic primers on structuring initial contact, intake and the first consultation in an elder law practice. The client-lawyer relationship begins with the initial call, proceeds to the initial appointment and continues through the first conference.

*2. The Lawyer, the SNPT and the Initial Client Engagement*

The need for an SNPT surfaces in various ways in the practice of elder law and estate and trust lawyers. A disabled or elderly person may need specialized legal assistance to negotiate and develop the SNPT with a NPA or consumer group; plaintiff or defense counsel may seek specialized legal assistance to fund a trust with the settlement or judgment derived from personal injury litigation for a permanently disabled plaintiff; banking or trust counsel may refer their client for specialized legal assistance in the development of a supplemental or special needs trust for the client's banking customer; an NPA or consumer disability advocacy group may seek specialized legal assistance for a disabled member or to assist in the creation of the umbrella trust or separate sub-

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121. See *supra* note 110, and accompanying text.

122. See *supra* note 88, Model Rule 1.14; see also, RESTATEMENT 3D-LAW GOVERNING LAWYERS, *supra* note 117, § 24 A Client With Diminished Capacity, at 2-69 through 2-75, § 31 Termination of A Lawyer's Authority, 2-103-2-110; see ACTEC Commentaries, *supra* note 110, at 131.

trusts; a guardian or attorney in fact may seek specialized legal assistance to negotiate and develop the SNPT with a NPA or consumer group.

*a. Ethics Analysis*

As stated earlier in this article, the Model Rules of Professional Conduct of the ABA (“Model Rules”) are often used for ethics assessments.<sup>123</sup> Beyond the core requirements of loyalty and diligence, Pennell suggests the ethical issues confronting elder law and estate and trust lawyers fall under several general categories.<sup>124</sup> In this article, several of the above described areas of client-lawyer engagement are analyzed, focusing on conflicts of interest, failure to exercise independent judgment and violation of client confidences.

*(1) The Disabled Person as Client*

The d4C SNPT requires the individual beneficiary of the trust to be disabled.<sup>125</sup> However, the individual may be mentally competent, while at the same time meeting the statutory definition of disabled.<sup>126</sup> This is where a tension between the plaintiff and the family may surface, leading to possible material conflicts with the plaintiff’s attorney and the SNT specialist (“Specialist”) involved.

*(a) The Mentally Competent Disabled Client*

When the disabled client is competent, the attorney should make it a habit of practice to meet separately and privately with the disabled beneficiary to directly and frankly discuss the limitations on the use of judgment or settlement funds, and the distributions that will be available from the SNPT.<sup>127</sup> It is critical that the lawyer provide the client an explanation of the lack of wealth transfer at

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123. See Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, *supra* note 86, at 2.

124. *Id.* at 4. Conflicts of interest, failure to exercise independent judgment, violation of client confidences, incompetent or inadequate representation, excessive fees, special estate administration concerns, a general sense of duty to the system and misconduct involving solicitation and advertising. *Id.*

125. See *supra* note 33.

126. See generally revised MODEL RULES OF PROF’L CONDUCT, R. 1.14, *supra* note 88 and accompanying text (changing the emphasis from focusing on a client under disability to a client with diminished capacity).

127. See *supra* note 66, and accompanying text.

the end of the beneficiary's life under the SNPT, as well as the involvement of the NPA in carrying the authority and control over the client's case management and distributions from the SNPT.<sup>128</sup>

Many family members of the SNPT beneficiary assume that they have a right to funds of the personal injury judgment or settlement. Purchases of houses, vehicles and other personal property items in the names of family members become points of tension and contention between the family members and the lawyers even before the SNPT is funded. Those family members involved in hiring the SNT specialist often believe that Specialist is acting in their interests, beyond the interest of the SNPT beneficiary, supposedly his or her client. However, if the SNT specialist raises an objection, asserting opposition against self-serving actions of family members, (s)he may find that the family members have acquired the assistance of new counsel. First and foremost, the lawyer must counter the tensions and misunderstandings of the people involved with the identification of the client. When the identity of the client is confirmed at the inception of the engagement, then the lawyer's protection and focus on the SNT beneficiary is more easily accepted by the other family members, especially when it has been memorialized in an engagement contract.<sup>129</sup>

Often, spouses and other family members are identified as plaintiffs in the litigation. At the beginning of the client-lawyer relationship, the attorney must clarify if they are also clients of the SNT specialist in a multiple representation.<sup>130</sup> It should be made

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128. *Id.* If under the age of sixty-five, the client may choose to have the trust created under d4A, without the NPA and its receipt of the remaining assets at the end of the beneficiary's life. Under d4A, after Medicaid payback, the remaining corpus of the trust may be distributed to identified contingent beneficiaries, or distributed as dictated by the will of the primary beneficiary, or distributed to the deceased beneficiary's estate.

129. A proposed revision of the ABA Model Rules included a recommendation that lawyers have written engagement contracts. However, in the August 2001 meeting of the House of Delegates, it declined to require lawyers to put all fee agreements with their clients in writing. Under existing rules, only contingent fees must be committed to writing. See Margaret Colgate Love, *Summary Of House of Delegates Action On Ethics 2000 Commission Report*, [http://www.abanet.org/cpr/e2k-summary\\_2002.html](http://www.abanet.org/cpr/e2k-summary_2002.html) (last visited August 15, 2002). See also *Summary of House of Delegates action on Report 401 during ABA Midyear Meeting in Philadelphia* (February 2002) [http://www.abanet.org/cpr/e2k-202report\\_summ.html](http://www.abanet.org/cpr/e2k-202report_summ.html).

130. See ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct*, Rule 1.7, Simultaneous Representation of Multiple Parties in

clear that funds received through individual family members' causes of action are the only funds available for the individual use of family members and not the funds settling the SNT beneficiary's personal injury litigation. Otherwise, a core element of the eligibility requirements for the SNPT, namely that the SNPT solely benefits the primary beneficiary, is factually conflicted.<sup>131</sup>

*(b) The Mentally Incompetent Disabled Client*

There are countless facts, situations and relationships that may impact differently, often negatively, on the decision to create an SNPT.<sup>132</sup> That is why the SNT specialist should acquire sufficient facts about the case from the very beginning to confirm the necessity of the services.<sup>133</sup> If a guardian is already in place, then the situation may entail discussion with both the guardian's attorney and the ward's attorney in order to resolve engagement for legal services.<sup>134</sup> However, the ward's attorney may insist that the plaintiff's attorney engage the SNT specialist. This is possible and does not conflict with any ethics rules as long as the plaintiff's attorney understands that the fees of the SNT specialist may be his or her responsibility, thus requiring that the plaintiff's attorney pay for such services out of the contingency fee percentage of the suit.<sup>135</sup> Consider the following case study of Harrison:

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Non-Litigation Context, at 107-111 (4th ed. 1999).

131. See *supra* note 33.

132. Once the engagement and legal relationship have been confirmed, the disability trust Specialist should acquire the pleadings of the case, including the complaint, answer, dispositive motions, if any, summaries of any discovery, especially any documents, answers to interrogatories, and summaries of transcripts of deposition of any medical or health care professionals. This is necessary in order for the disability trust Specialist to have a full understanding of the status of the case, and how it presents a case involving a qualified disability.

133. Just as important, there needs to be documentation of any ancillary proceedings, including adjudication of incapacity and the appointment of a guardian and all approvals and denials of eligibility of federal and state benefits.

134. Often the lawyer for the guardian is the only lawyer involved in the guardianship and may represent the interests of both the guardian and the ward. Elder law and estate and trust attorneys must be inquisitive about such representation, raising questions of the guardian's attorney's ability to represent the ward as well.

135. See A. Frank Johns, *The Application of Recommended Changes to ABA Model Rule 1.14 When Initiating Guardianship Intervention for Clients*, 14 J. OF NAT'L ACAD. ELDER L. ATT'YS 16 (2001).

(c) *Case Study–Harrison and Personal Injury*

Harrison was 67, two years into retirement and heading to meet his wife for a long vacation. He and his wife were working class people of modest means. What little they had saved they were about to spend on that one cruise of their lifetimes. However, as life would have it, on the same road, a truck driver fell asleep, crossed the center line and hit Harrison's car at 80 miles per hour, demolishing it.

The accident permanently disabled Harrison, even after sixteen hours of reconstructive surgery and seventeen weeks in intensive care and rehabilitation. Between Medicare and Medicaid, \$266,000.00 was paid for the hospital, surgeries, medications and rehabilitation. Harrison would require intermediate nursing care for many years and attendant, in-home care for the rest of his life. He was also cognitively impaired to the extent that formal guardianship may be required to represent his interests in his personal injury litigation, to assist him in his daily life and to manage his affairs.

Lawyer may be representing Harrison in the personal injury litigation as well as representing Harrison's wife through the guardianship process, ending in her appointment as guardian for Harrison. Lawyer does not have the legal experience to develop, fund and implement a special needs trust. Lawyer decides that the help of SNT Specialist is needed. He calls SNT Specialist.

In the case study, no guardian is yet in place, however one is anticipated. When contacted by the Harrison family lawyer, SNT Specialist should inquire about whether there will be an appointment of a guardian ad litem for Harrison under Civil Procedure Rule 17(c)<sup>136</sup> if suit is filed.<sup>137</sup> The guardian ad litem, or

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136. Under most state rules of civil procedure, and under Federal Rule of Civil Procedure 17(c), provision is made for appointment of a next friend or guardian *ad litem*.

(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or

the next friend, is often the spouse. Harrison's wife could be the guardian ad litem, and should also be considered for appointment as plenary guardian or guardian of the person by the probate court. Depending upon state law, a guardian may be necessary to assert claims for Harrison in the personal injury litigation.<sup>138</sup>

Payment for SNT Specialist will often come from the proceeds of the settlement or award. It must be made clear to the disability trust specialist that if this is so, then fees may not be paid until after the legal services have been rendered and proceeds of the award or settlement are disbursed by the court.

### (2) *Conflict of Interest—Model Rule 1.7—General Rule*

The complications of Conflict of Interest Doctrine were recognized by the ABA E2K Commission, believing lawyers needed additional guidance.<sup>139</sup> The adopted Model Rule 1.7 revisions are designed to clarify the basic doctrine and to address a number of recurring situations. The reorganization of Rule 1.7 Comments provides an introduction (Comments 1-3), a general road-map to conflicts analysis (Comments 4-13), and finally an elaboration on different types of conflicts, especially non-litigation and estate and trust considerations (Comments 27-33 Special Considerations in Common Representations).<sup>140</sup>

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incompetent person.

FED. R. CIV. P. 17(c).

137. *Id.*

138. *See, e.g.,* Culton v. Culton, 386 S.E.2d 592, 592 (N.C. Ct. App. 1989).

139. *See supra* note 95 and accompanying text.

140. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 27-33 (2002) (showing the proposed revisions that were passed are restated here because of their import:

~~[27]~~ Conflict For example, conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

~~[12]~~ [28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually

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advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

#### Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not

The confusing aspects of Model Rule 1.7, when and how to apply a material limitation when direct adversity is not present, were the target of revising Model Rule 1.7 by the ABA E2K Commission.<sup>141</sup> The Reporter's Explanation of Changes to Model Rule 1.7 describes how it should make it easier for lawyers to apply "material limitation," "consentability" and "informed consent" to the assessment of "who the client is" when initiating client-lawyer relationships. It also explains the expansion of the comments to Model Rule 1.7 to provide better guidance to lawyers:

Unlike prior paragraph (b), in which a conflict exists if the representation "may be" materially limited by the lawyer's interests or duties to others, revised paragraph (a) (2) limits conflicts to situations in which there is "a significant risk" that the representation will be so limited. This change is not substantive, reflecting instead how prior paragraph (b) is presently interpreted by courts and ethics committees.<sup>142</sup>

Unlike the prior rule, the revised Rule 1.7 contains a single standard of consentability and informed consent, applicable both to direct adversity and material limitation conflicts. This standard is set forth in a separate paragraph, both to reflect the separate steps required in analyzing conflicts (i.e., first identify potentially impermissible conflicts, then determine if the representation is permissible with the client's consent) and to highlight the fact that not all conflicts are consentable.<sup>143</sup>

In the case study, Lawyer faces the common dilemma of

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adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.)

141. See *supra* note 72 and accompanying text.

142. See *id.*

143. See *id.*

conflict of interest as framed in Model Rules 1.7 and 1.18.<sup>144</sup> In identifying any potentially-impermissible conflict of Lawyer relating to Harrison and his wife, Lawyer must determine if the representation is permissible with Harrison and his wife's consent. Is there a reasonable belief that Lawyer would be able to represent the wife, as guardian, and Harrison as plaintiff, through the wife as guardian, while not adversely affecting the relationship that he would have with either Harrison or his wife to the extent that a conflict exists? In this analysis, the operative words may be "concurrent conflict." If Lawyer is first asked to assist Harrison's wife through the guardianship process, and then subsequently represents Harrison's wife as guardian in the judicial process to gain approval of the SNPT, the conflict would not be concurrent, as SNT Specialist at all times represents Harrison's wife as petitioner and then subsequently as guardian.<sup>145</sup> However, the way by which elder law and estate and trust lawyers are initially involved in personal injury cases such as this one is often not so carefully handled. A probable engagement will be similar to the one described in the case study--Lawyer, representing Harrison, subsequently finds a need to represent his wife or a family member through the guardianship process. If these are the facts of the engagement, then Model Rule 1.7(b) will further require Lawyer or SNT Specialist to determine whether to provide competent and diligent representation to each client affected by common representation.<sup>146</sup> This could mean that the SNT Specialist must consult with Harrison and his wife as potentially conflicted clients, giving them notice of the possible conflict so that they might make informed decisions about the engagement. If they choose to be jointly represented their decisions must be in writing.<sup>147</sup>

The twist here is that Harrison is identified as one who may have such diminished capacity that he cannot make an informed decision.<sup>148</sup> Therefore, one of SNT Specialist's clients is one who

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144. See *supra* note 96. See also MODEL RULES OF PROF'L CONDUCT R. 1.18, *supra* note 113 and accompanying text.

145. *Id.*; see also ACTEC Commentaries, *supra* note 110 at 152, 175.

146. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2002); ACTEC Commentaries, *supra* note 110 at 154.

147. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2002). See also ACTEC, *Engagement Letters: A Guide for Practitioners* 9, 19 (1999) [hereinafter *Engagement Letters*].

148. *Engagement Letters*, *supra* note 147, at 60.

may be incapable of giving consent.<sup>149</sup> Additionally, if SNT Specialist is representing Harrison and his wife, then current practice would probably bar the specialist from representing Harrison's wife as petitioner in the guardianship process.<sup>150</sup> The situation presents itself as "something that's just not right" where the wife of Harrison as guardian waives her lawyer's conflict of interest relating to her and gives written consent, at the same time she waives the lawyer's conflict of interest relating to Harrison and gives written consent for him as well.<sup>151</sup>

If Lawyer and SNT Specialist agree that Harrison is SNT Specialist's client, then concern for possible conflicts diminish.<sup>152</sup>

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149. See RESTATEMENT 3D-LAW GOVERNING LAWYERS, *supra* note 116 at § 202(1). However, as noted in ABA Form Ethics Opinion 96-404, at n. 3, considering comment (1) to Rule 1.14 lawyers are reminded that "a client lacking legal confidence often has the ability to understand, deliberate upon, and reach conclusions about matters effecting the client's own well-being. Furthermore, to an increasing extent, the law recognized intermediate degrees of competence." *Id.* Query whether Harrison has sufficient cognitive function would still allow him to understand what the disability Specialist is disclosing about conflict and sign a written consent that was informed?

150. See Johns, *supra* note 135; ABA Formal Ethics Opinion 96-404 (1996) (discussing provisions of Client Under Disability). A portion of the opinion is pertinent to this analysis and directive:

A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward.

Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. See Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian. The substantive law of the forum may require such disclosure.

*Id.*

151. RESTATEMENT 3D- THE LAW GOVERNING LAWYERS, at § 202 cmt. c (ii).

152. Under the privity doctrine, plaintiff has no contractual relationship with SNT Specialist. See *supra* note 111 and accompanying text; see also *infra* note 204 and accompanying text and analysis.

However, potential conflicts remain.<sup>153</sup> SNT Specialist must consider how Harrison's wife and how she (as a non-client) would feel about issues raised regarding Harrison's personal injury special needs trust. She might want to direct SNT Specialist into possible conflicts with SNT Specialist's representation of Harrison. This should be an obvious danger signal, enough to put the lawyer on notice and act accordingly.<sup>154</sup>

### (3) *Failure to Exercise Independent Judgment*

Consider the continuing case study of Harrison with the following variation:

Before SNT Specialist was brought into the case, the insurance claims adjuster told Lawyer that in other cases a trust was constructed to keep the injured person on Medicaid and still have the remaining settlement money available in a reserve fund. The adjuster had the insurance company's defense attorney contact Lawyer, explaining that the settlement could be greatly expanded with a Court ordered structured settlement distributing the proceeds to an SNPT. The adjuster explained to

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153. While states that have adopted Model Rule 1.14, or something similar, provide clear direction to lawyers when finding it necessary to consider filing for guardianship for a client, ethics opinions for states without the rule are also instructive. See North Carolina RPC 157 (before North Carolina adopted Model Rule 1.14). A lawyer who represented a person who the lawyer believed to be incompetent was permitted to seek to have the person declared incompetent but could not disclose any information that the lawyer had obtained in his course of representation that would give rise to the attorney's belief that the client was incompetent. The rationale was that there was no exception to the disclosure of confidential information permitted under the rules. *Id.*

154. See ABA Center for Professional Responsibility, *supra* note 130, at 108, (citing *In re Schaeffer*, 824 S.W.2d 1 (Mo. 1992)); Russell G. Pearce, *Forward to Symposium on "Should the Family Be Represented as an Entity?": Reexamining the Family Values of Legal Ethics*, 22 U. SEATTLE L. REV. 1, 2 n.5, 6 and 33 (1998) "[I]n the context of bar organization deliberations, arguments for a communitarian construction of legal ethics codes has been offered. . . . Apparently as a result of lobbying by bar groups, the American Law Institute modified the Restatement of Law Governing Lawyers to permit lawyers greater flexibility in limiting their obligations to individual family members in joint representation. . . ." *Id.*; Linda S. Whitton, *Durable Powers As a Hedge against Guardianship: Should the Attorney-at-law Accept Appointment As Attorney-in-fact?*, 2 ELDER L.J. 39, 39 (1994). See also Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 U. SEATTLE L. REV. 97, 106 (1998); Teresa Stanton Collett, *Love Among the Ruins: The Ethics of Counseling Happily Married Couples*, 22 U. SEATTLE L. REV. 97, 106 (1998); Steven H. Hobbs and Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role and Law Approach*, 62 FORDHAM L. REV. 1411 (1994).

Lawyer that if Lawyer agreed to a structured settlement that was the product of the insurance defense company, then the insurance defense company would pay a percentage of the commission to Lawyer as a finder's fee.

The adjustor assured Lawyer that this was done with many other lawyers and that documentation of the appropriateness and adequacy of the annuity and of the strength of the underlying insurance company would be disclosed for the Court's review.

*(a) Conflict of Interest—Model Rule 1.8—Current Clients: Specific Rules*

In the case study, Lawyer is knowingly acquiring a pecuniary interest adverse to Harrison.<sup>155</sup> Plaintiffs' lawyers in personal injury cases may be conflicted by the defense offering to settle with the specific requirement that the defense insurance company's products be used for structuring the settlement, otherwise no settlement. At a minimum, under Model Rule 1.8(a), everything offered to Lawyer must be fairly and fully disclosed in writing to Harrison and his wife, if she is the guardian, and to SNT Specialist.<sup>156</sup>

Being involved with the acquisition of an insurance product in the form of an annuity, and receiving a fee or commission when doing so requires Lawyer to exercise greater responsibilities as specifically framed in Model Rule 5.7 relating to ancillary related services and products.<sup>157</sup> If the state in which Lawyer practices has Model Rule 5.7, or a similar rule,<sup>158</sup> regarding ancillary and related services, then the concern will be whether Lawyer is receiving a fee for the product that is being sold for the settlement structure when nothing in the facts shows compliance with the rule.<sup>159</sup>

155. See MODEL RULES OF PROF'L CONDUCT R. 1.8(i) (2002).

156. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2002).

157. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2002). See Alex Moschella, *Model Rule 5.7—The Boundaries of the Profession*, 14 J. OF NAT'L ACAD. ELDER L. ATTY'S 3 (2001).

158. *Id.* Since 1994, Indiana, Maine, Massachusetts, North Dakota and Pennsylvania (with slight modification) have adopted Model Rule 5.7. Florida is in the process of considering Model Rule 5.7.

159. See *supra* note 157. In a broader sense, the actions of Lawyer meet the "presumptive, albeit rebuttable" design of the current rule in that the sale of the annuity is considered "law-related" in that it is being provided by Lawyer, and the rules of professional conduct apply. *Id.*

Elder law and estate and trust lawyers are pushed to expand the scope of their specialties in law, defining how the specialties are properly delivered to clients.<sup>160</sup> To cover the broader scope of lawyering, many legal specialists have hired non-lawyer professionals in their practices, while others have offered law-related and non-law related services and products to their clients in a one-stop-shop modality.<sup>161</sup> Many elder law and estate and trust lawyers are now providing various forms of insurance products to clients as a complement to asset preservation and estate planning legal services.<sup>162</sup> The recent revision to Model Rule 5.7,<sup>163</sup> has made it broader, clarifying ability of lawyers to deliver law-related services distinct from the lawyer's provision of legal services in certain circumstances.<sup>164</sup> The Reporter explains that the revision prevents a literal, strict application of paragraph (a) (1) so that there is never a time when law-related services would be distinct from the provision of legal services if directly provided by a lawyer or law firm, rather than by a separate entity.<sup>165</sup>

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160. *Id.*

161. *Id.*

162. *See* Moschella, *supra* note 157, at 3.

163. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2002). The full text of the rule is as follows:

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) ~~in other circumstances by a separate an~~ entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services ~~of the separate entity~~ are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

164. *See* Ethics 2000–February 2002 Report: Model Rule 5.7, Reporter's Explanation of Changes, <http://www.abanet.org/cpr/e2k-rule57rem.html> (last visited Aug. 15, 2002).

165. *Id.*

*(b) Ancillary and Related Legal Products and Services—Model Rule 5.7*

The Harrison case study calls for a generalized description of what ancillary services are and how the rule impacts on such services and products. The National Academy of Elder Law Attorneys (NAELA), under the leadership of past president Rebecca C. Morgan, professor of law at the Stetson University College of Law, examined ancillary and related services in a task force from which a NAELA White Paper was published in 1999.<sup>166</sup> The foundation of information on which the recommendations are based is a cross-section of many state cases, statutes or codes and the rules of state bar organizations across the country.<sup>167</sup> The services, relationships and products that may fit any practice area are broadly defined in two groups: (1) law related; and (2) non-law related.<sup>168</sup>

When is it appropriate to provide law-related ancillary services and products? The answer to this question is found in the 1994 findings of the ABA Committee on Ancillary Business Services, appointed to review ancillary business activities by lawyers in

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166. See Alex L. Moschella, Chair, *Interim Report on Multidisciplinary Practice and Ancillary Services*, 11 NAT'L ACAD. ELDER L. ATT'S SYMPOSIUM, at Tab 6, Exhibit 3 (May 2000) (Plenary session addressing the question of multi-disciplinary practice: point-counterpoint).

167. *Id.*

168. *Id.* Examples of law-related services, include, but certainly are not limited to, the following: (1) providing internet technology and access to law firms for legal research; (2) offering processes and forms for lawyers to integrate into their practices that help clients through federal and state fair hearings; (3) promoting a lawyer's trustee and guardianship expertise to be used by other firms for appointment to such positions; and (4) offering financial and tax analysis to lawyers for their clients. *Id.*

Examples of non law related services and products include, but certainly are not limited to: (1) selling all forms of insurance products, especially long term care insurance; (2) offering many forms of psychological assessments, geriatric nursing and care management services; (3) delivering a wide array of finance, investment and money management products and services; (4) publishing advisory bulletins and reporter services that keep lawyers and consumers informed about trends in elder law; and (5) mechanical and technical support and consultation to elder law attorneys who develop, design, and market to consumers, especially on the Internet with links, lists, home pages and web visibility. *Id.* All of the above references may actually fit in the broader scope of services and products considered law-related under the ABA's Model Rule 5.7. The Comment to Rule 5.7 includes title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental counseling. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 9 (2002).

preparation for the ABA House of Delegates' consideration of the proposed Model Rule 5.7.<sup>169</sup> The answer may also be found in each state's legal ethics rules, decisions, statutes and case law. NAELA's Task Force found that many of the ABA Committee on Ancillary Business Services' findings and recommendations were pertinent to any analysis of ancillary and related products and services.<sup>170</sup> Two are applicable here:

1. Whenever a lawyer provides law-related services, "there exists the potential for ethical problems," and that "[p]rincipal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship."
2. When law-related services are provided by a lawyer "under circumstances that are not distinct from the lawyer's provision of legal services to clients," the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7 (a) (1). . . .<sup>171</sup>

At the time of the findings, the ABA Committee on Ancillary Business Services found no reported disciplinary infractions or malpractice claims resulting from the delivery of law-related services by lawyers through separate entities.<sup>172</sup>

*(c) Applying the Case Study to Model Rule 5.7*

Consider the continuing case study of Harrison with the following variation:

SNT Specialist found it beneficial years ago to obtain an insurance license, authorizing her to sell structured annuities while working as an elder law attorney. She has continually maintained her insurance license, selling insurance and annuities as a complement to her SNT practice.

As with other cases, SNT Specialist went in with the insurance defense company's lawyer to purchase the defense insurance company's structured annuity for

169. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2002).

170. See Moschella, *supra* note 157, at 32-33.

171. *Id.*

172. *Id.* at 31-34.

Harrison. SNT Specialist would receive a significant commission if she sold Harrison and his wife the annuity. SNT Specialist went to great lengths to disclose orally and in writing what she was doing for Harrison and his wife, explaining that she was properly licensed and that the license was active and current.

SNT Specialist also explained orally and in writing that she would receive a commission or fee on the sale of the structured annuity policy that would fund Harrison's SNPT. She also provided Harrison and his wife with information regarding her license and a toll-free telephone number they could call to inquire of the state's Department of Insurance consumer protection ombudsman regarding the propriety of the arrangement. SNT Specialist went further, offering them information from the state's legal ethics commission that confirmed that such an arrangement was within the ethical boundaries of the legal profession and in compliance with the state's ethics rule 5.7.

Assuming the SNT specialist was within the ethical rules of the state bar where she practices,<sup>173</sup> she has met the primary requirements to sell the product to Harrison and his wife by being licensed, providing disclosure, and carefully explaining to the clients where they may seek more information about the propriety

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173. In states where there is no equivalent to Rule 5.7, state bar organizations are carefully examining the future. The North Carolina State Bar has not amended its rules to include Model Rule 5.7, Ancillary and Related Services and Products. However, the North Carolina Multidisciplinary Practice ("MDP") Task Force noted in its report and recommendations (September 2000) that RPC 238 already permits certain ancillary services by attorneys. The MDP Task Force believes the core values of the legal profession may be maintained when law firms offer such ancillary services. The MDP Task Force further suggested disclosure to the public of such arrangements and that such disclosure should be embodied in a new Rule of Professional Conduct, such as proposed Rule 5.7. *See also* North Carolina 2000 Formal Ethics Opinion 9, *available at* <http://www.ncbar.com/eth-op> (last visited Aug. 14, 2002) (addressing whether an attorney who was also a CPA could offer accounting services from within the law firm. By answering the question affirmatively, the North Carolina State Bar led some lawyers to assume that attorney/CPAs with proper securities and insurance licenses may provide clients with financial planning services and products and receive a fee or commission for selling such services or products since many accounting firms offer securities as part of their services. That jump seems to have been premature). *See also* North Carolina 2001 Formal Ethics Opinion 9, *available at* <http://ncbar.com/eth-op> (last visited Aug 14, 2002) (concluding that Rule 1.8(b) prevents an attorney from taking advantage of financial information received from a client during the legal relationship).

of her selling ancillary products for a commission. It is important to note that SNT Specialist's law firm conforms its delivery of ancillary services and products to meet the requirements of Model Rule 5.7, and those identified in Model 3 of the first ABA MDP Commission,<sup>174</sup> by assuring that all clients of the ancillary insurance service are given clear notice that the services are law related and provided in conjunction with the delivery of legal services, and if otherwise provided would not be unauthorized practice of law.

Regardless of the conclusion that the practice of the SNT Specialist conforms to Rule 5.7, the lawyer and the insurance defense company agent may be acting outside the mandate of other ethics rules.<sup>175</sup>

SNT Specialist, by taking a commission from the insurance defense company annuity, engages in an impropriety rising to a level that is improper based on the facts as presented in the variation. It is not apparent that SNT Specialist made clear to Harrison and his wife that she is literally in with the opposition, possibly clouding her independent judgment.<sup>176</sup> Regardless of the current ethics rule in SNT Specialist's state, state variations and iterations within the ABA clearly show that there is significant conflict over what rule should apply. If SNT Specialist intends to continue providing such a related service, then she must remain cautious and vigilant in tracking future rule developments and how changes may impact her ancillary work.<sup>177</sup>

#### *(4) Violation of Client Confidences*

Consider the continuing case study of Harrison with the following variation:

While devastated by the accident and severely disabled, Harrison lost no cognitive function. In the year that followed, it was never certain that Harrison would live. The strain on his wife and children was enormous, literally driving all of them away, burned out by the stress and continual demands Harrison made on all of them.

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174. See *supra* note 156 and accompanying text.

175. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002) (explaining whether a fee is fair and appropriate), R. 1.8 (2002) (explaining disclosure requirements), R. 5.4 (explaining the professional independence of a lawyer).

176. See Pennell, *supra* note 86, at 28 n.38 (citing Illinois State Bar Ass'n Advisory Op. No. 99-06, 1999, where an attorney received a fee from a trust company to which the attorney referred business).

177. *Id.* at 29.

Harrison was adamant that Lawyer was to do nothing and say nothing to his wife and children, contending that they only saw him as their gravy train. The conflict was so severe that Lawyer almost sent wife and children to another personal injury lawyer for their claims and causes of action, if any, resulting from the accident.

During that year, Lawyer at all times only dealt with Harrison, his client, on his claims. But then the defendant truck company offered its liability insurance policy limits of three million dollars for Harrison's claims only. This came after the initial demand letter and a life plan was followed by numerous letters and a mediation conference had been held before suit was filed. While three million dollars seemed large, one third would go to Lawyer, and one third would go to Medicare and Medicaid to pay back lien claims of almost one third. Over Lawyer's advice otherwise, Harrison made the decision to accept the offer and get the lawyering over with.

Lawyer goes to Harrison's wife and children, trying to get them to persuade Harrison otherwise. Harrison's wife and children agreed with Lawyer, and made it clear to Lawyer that they intended to go after the truck company for additional damages beyond the policy limits, especially since it impacted their own claims negatively.

The clarity of Rule 1.6 on confidentiality has been strengthened with recent model rule revisions.<sup>178</sup> Facts of the case study clearly show Lawyer violating the rule. No matter how much Lawyer believed that Harrison's decision was wrong, it was not enough to allow Lawyer to talk to persons with whom Harrison specifically directed him not to talk, and certainly not to divulge confidential information.

Although Lawyer's ethical break seems clear, it never seems clear when lawyers are in the middle of such situations. The pressure on lawyers to hold on to clients and to maximize their potential fees is significant. However, regardless of the want of lawyers to make more, violations bring necessary sanctions. Safeguarding confidentiality is one of the most important protections that lawyers give to their clients.<sup>179</sup>

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178. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

179. *Id.*

While Rule 1.6 is easily read and usually followed,<sup>180</sup> the difficulty comes most often when the lawyer has a relationship with family members of the client being served. Tensions regarding confidentiality between spouses and their lawyer in a multiple representation have been examined in countless symposia, books, and articles.<sup>181</sup> This particular situation is uncommon. However, similar situations commonly occur, often arising in the context of conventional estate planning and intergenerational communications. So important is this ethical protection that it even extends beyond death.<sup>182</sup>

If the above case study is too simplistic and an obvious violation of Rule 1.6, then consider a twist in the facts where lawyer has hired SNT Specialist and SNT Specialist does not represent Harrison, but represents Lawyer. SNT Specialist's engagement is to

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180. See Pennell, *supra* note 86, at 29.

181. See ABA Annotated Model Rules (4th ed. 1999), at 108 (citing In re Schaeffer, 824 S.W.2d 1 (Mo 1992)); Linda S. Whitton, Durable Powers As a Hedge against Guardianship: Should the Attorney-at-law Accept Appointment As Attorney-in-fact?, 2 ELDER L. J. 39 (1994). See also (i) Russell G. Pearce, Forward, Symposium: Should the Family Be Represented as an Entity?: Reexamining the Family Values of Legal Ethics, 22 SEATTLE U. L. REV. 1, 2 n.5, 6 and n.33 (1998) ("in the context of bar organization deliberations, arguments for a communitarian construction of legal ethics codes has been offered . . . . Apparently as a result of lobbying by bar groups, the American Law Institute modified the Restatement of Law Governing Lawyers to permit lawyers greater flexibility in limiting their obligations to individual family members in joint representation. . . ."); Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 106 (1998); Teresa Stanton Collett, *Love Among the Ruins: The Ethics of Counseling Happily Married Couples*, 22 SEATTLE U. L. REV. 139 (1998); and Steven H. Hobbs and Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role and Law Approach*, 62 FORDHAM L. REV. 1411 (1994).

182. See Pennell, *supra* note 86, at 34-35. See also, North Carolina RPC 206 where the personal representative of a decedent sought to have decedent's attorney disclose confidential information to the personal representative. RPC 206 indicates that the duty of confidentiality continues after death of a decedent and a lawyer may only reveal such confidential information of a deceased client if disclosure is permitted by an exception to the duty of confidentiality. See also *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding the attorney-client privilege continues after the death of a client). In RPC 206, it was assumed that the client impliedly authorized the release of confidential information to the person designated as personal representative so the estate might be properly and thoroughly administered. The RPC concludes that "unless the disclosure of confidential information to the personal representative . . . would be clearly contrary to the goals of the original representation or would be contrary to express instructions given by the client to his lawyer prior to the client's death, the lawyer may reveal a client's confidential information to the personal representative."

provide to Lawyer the special needs trust, structured so that an NPA is the pooled trustee. Wife and children are on the SNPT advisory committee, advising and instructing trustee on trust distributions. They also are contingent beneficiaries of the SNPT beyond Harrison's life.<sup>183</sup> In this situation, SNT Specialist divulges information that lawyer shares with her about the settlement and about lawyer's objection to Harrison settling on the policy limits. Does the result change when one is a step or two removed from the direct confidential relationship? The answer is no. Confidentiality has been violated and it does not matter from what source or by whom.<sup>184</sup> Lawyer had a duty to make clear to SNT Specialist that Harrison had qualified communications, barring communications between Lawyer and his wife and children. This extended to SNT Specialist even if SNT Specialist was not told by Lawyer. SNT Specialist should have more carefully discussed with Lawyer how SNT Specialist would accomplish her task without divulging confidential information, and with whom she could share Harrison's confidences.

*b. The Participants in Personal Injury Litigation*<sup>185</sup>

When sought to be involved in personal injury litigation, elder law and estate and trust lawyers answer the question "Who is my client?" correctly as long as they adhere to ethics rules invoking loyalty, duty and, confidences.<sup>186</sup> The lawyer may agree to be the plaintiff's lawyer, the plaintiff's lawyer's lawyer, the defendant's lawyer, the defendant's lawyer's lawyer or even the defense insurance company's lawyer.

Once the client or clients who have the client-lawyer relationship are identified in a personal injury case, the intervening elder law or estate and trust lawyer must resolve whether he or she

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183. The more restrictive application of d4c would require the total remaining corpus to remain in the NPA, or pay back Medicaid and then allow disbursement to contingent beneficiaries. See 42 U.S.C. § 1396p(d)(4)(C); *supra* note 33.

184. *Id.*

185. The author previously published portions of this part of the article in A. Frank Johns, *Preserving Assets with Supplemental Needs Trusts*, TRIAL, November 1998, at 90.

186. *Cf.* Pennell, *supra* note 86, at 20 (citing the late Fred Corneel, who suggests a reality check that asks two questions: "(1) who does the attorney think is the client, and (2) who do the clients think is their attorney? If the role the attorney thinks (s)he is playing and the role the clients think he is playing differ, it is a pretty safe guess that a conflict exists").

will be an attorney of record in the case. This often requires appearing at hearings where distribution of the damage award or settlement is considered.<sup>187</sup> In many cases, the SNT Specialist is not an attorney of record in the case; she or he only provides consultation and documents to the client or clients while not actually participating in the judicial process.<sup>188</sup>

In the variations above relating to confidences,<sup>189</sup> when the estate and trust practitioner or elder law attorney is engaged, there should be extensive documentation of the many conflicts and difficulties going on between Harrison and his family. Once engaged, SNT Specialist should reply with his or her own written documentation of what he or she believes the hooks and difficulties are within the client matter and have the client confirm the accuracy of what SNT Specialist has documented. If the client is the lawyer, then understanding what is being asked for should be clear. If not, written request for confirmation of the client-lawyer relationship is a must. However, when the client is the plaintiff, the plaintiff's family, or others who do not understand the rules of legal ethics, then an even more lengthy explanation and confirmation of position should be documented before any work begins.

*c. The Bank or Trust Company as a Client*

Problematic to the focus of this article, special needs pooled trusts, is the choice of a trustee, because the trustee by definition must be an NPA. No known banks or trust companies have within their corporate structures an NPA that serves as trustee of SNPTs.

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187. This could be customized on a case by case basis. However, the other attorneys involved will look to the Specialist to appear and field all questions raised by the court relating to the motions and pleadings before it.

188. It is this author's opinion that consulting without court appearance is not the best practice, and may not be the best advocacy for the disabled plaintiff. This is so in part because the best practice (and in some states the rule) is to give notice of the hearing on the motion for a court ordered trust to the government providers involved, or to be involved in covering costs of medical and health care needs and services of the disabled plaintiff benefiting from the resources diverted to the special needs trust. Attorneys representing government providers have not only appeared on a regular basis at hearings as attorneys of record, but have generated significant (sometimes credible) opposition to the disabled plaintiff's pursuit of the court's order authorizing the creation of the trust, and the distribution of the award or settlement funds into it.

189. See 42 U.S.C. §§ 1396p(d)(4)(A)(B) and (C) (2002); *supra* text accompanying note 34.

However, this author has had recent contact with boutique trust companies whose focus is partnering with those involved in personal injury litigation and structure settlement consultants negotiating the annuities that are subsequently a significant component of the SNTs or SNPTs that are the end result. The trust companies are also looking to partner with NPAs in the asset management of lump settlements, and the acquisition of structured annuities to be held in SNPTs. This has presented situations where the bank or trust company has been integrally involved in negotiating the engagement of the SNPT legal Specialist, creating a strong inference that the bank or trust company is the client. These situations are similar to banks and trust companies working with elder law attorneys and estate and trust lawyers to promote the use of the bank or trust company's revocable trust forms so that the customers and clients will usually choose the bank or trust company as trustee.<sup>190</sup>

In some situations, the analogy is closer to arrangements that surface in marketing living trusts. In an article for the Fordham Conference on Ethical Issues in Representing Older Clients,<sup>191</sup> Professor Pennell addressed problems involving various kinds of fiduciaries, raising the question of the lawyer's response when the fiduciary, or administrator, engages in illegal or improper acts or conduct, particularly when it impacts a vulnerable elderly beneficiary.<sup>192</sup> Pennell chronicled the confusion in authority that existed at the time while providing alternatives that may permit lawyers to make disclosures to beneficiaries.<sup>193</sup> Since publication of the Fordham Ethics Conference On the Elderly in 1994, the revision to Model Rule 1.7 and its comments has attempted to address situations when there is a need to not only confirm in writing who the client is to the client, but to those who are not the client as well.<sup>194</sup>

Consider the continuing case study of Harrison with the following variation:

Lawyer had on several occasions in the past used CeteBank to provide lines of credit to fund the larger

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190. See Pennell, *supra* note 86 and accompanying text.

191. See Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994).

192. *Id.*

193. *Id.*

194. See Model Rules of Prof. Conduct R. 1.7 cmt. 27-33 (2002); *supra* text accompanying note 140.

personal injury cases in his practice. Harrison's case was no different. CeteBank also provided Lawyer personally with securities and insurance services and products. When the time came for Lawyer to consider an SNPT for Harrison, he mentioned it to his CeteBank banker. It just so happened that the bank was a huge multi-national institutional conglomerate. Banker contacted his services and products division in Cete, Germany, finding out that not only did CeteBank have an SNPT, but it also had CareGivers, Inc., an NPA care-giving company on contract to CeteBank. CareGivers, Inc., would provide both the non-profit vehicle required by law, and the case management needed for Harrison. CeteBank convinced Lawyer that its structured annuity, nonprofit association, and SNPT documents were "tried and true," having been approved countless times in courts across the country.

CeteBank explained to Lawyer that he should hire a Specialist to be his counsel, to provide the actual SNPT document and to confirm the propriety of CareGivers, Inc., as the NPA. Lawyer hired SNT Specialist to develop the SNPT and advise about CareGivers, Inc. The written engagement contract made clear that SNT Specialist was only Lawyer's lawyer. SNT Specialist approved CareGivers, Inc., and sent Lawyer her proposed SNPT document. Lawyer sent it to CeteBank counsel in New York. The SNPT document was returned to SNT Specialist and with edit expressly confirming that CeteBank would be the asset management and investment advisor of CareGivers, Inc., but would also use CeteBank subsidiaries to provide products and services for which it would pay fees and commissions as in its normal banking arrangements with other customers. None of the additional fees and commissions would be considered a part of the fees that CeteBank or CareGivers, Inc. would be paid for trustee and banking services.

SNT Specialist made clear to its client, Lawyer, that Lawyer could be exposed to future criticism for what was added to the SNPT and that Lawyer had a duty to make clear to his client what was in the SNPT and how it would impact on Harrison. Lawyer countered that SNT Specialist was his lawyer and nothing was to be communicated to Harrison by SNT Specialist.

After the SNPT was in place and fully funded, Lawyer took responsibility for the SNPT estate and fiduciary

administration. Nothing was in writing, except for Lawyer's form letter sent to Harrison declaring the client-lawyer relationship in the personal injury case closed.

*(1) Conflict of Interest – Model Rule 1.7 – General Rule*

When working with SNPTs, applying the adversity component of Rule 1.7 is no less confusing than before the revisions. This is especially true since the House of Delegates rejected the E2K Commission's recommendation to require engagement letters in all client-lawyer relationships. It instead required a written contract only in those situations where the material limitation and adversity are significant.<sup>195</sup> In this case study variation, there are numerous points where clarity of relationship, as far as the client-lawyer representation is concerned, should have been confirmed in writing.<sup>196</sup> Certainly, SNT Specialist should have had a document that mandated the limitations imposed by Lawyer. When there is no oral or express written declaration of engagement that confirms who the client is, lawyers are at risk that what they have entered into does not comport with the conflicts rule.<sup>197</sup> Additionally, they will find no real support in existing authority,<sup>198</sup> which is

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195. See Model Rules, *supra* note 95 and accompanying text. The ABA E2K Commission recommended revising Rule 1.5 by adding a requirement that a lawyer communicate fees, scope and expenses in writing. The Summary Report from the ABA cryptically explained the vote by the House of Delegates as follows:

During the August 6-7, 2001 meeting of the American Bar Association House of Delegates in Chicago, the House considered the changes to the Model Rules of Professional Conduct proposed by the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000"). The House voted on the Rules from the Preamble through Rule 1.10 and approved all of the Commission's recommendations with the following exceptions:

Rule 1.5: approved an amendment to delete the requirement of a writing in Rule 1.5(b).

196. See Pennell, *supra* note 86, at 43. Pennell contends that the only way to answer virtually all the questions is to put them in the engagement letter. If this is done, it avoids a spillover of ancillary duties. Pennell suggests that this is the first, last and best advice on the topic. *Id.*

197. Cf. Geoffrey C. Hazard, *Conflicts of Interest in Estate Planning for Husband and Wife*, 20 THE PROBATE LAWYER 15, 23 (1994), cited in ACTEC Commentaries, *supra* note 110, at 177 ("There are basic principles of practice that apply when concurrent representation is undertaken in any such situation . . ."). See also ACTEC, *Engagement Letters: A Guide for Practitioners*, *supra* note 147.

198. See, e.g., *Reports of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association*, 28 REAL PROP. PROB. & TR. J. 763 (1994).

inconsistent.<sup>199</sup> The only source for what limited authority is available is found in Restatement (Third) of the Law, and even then it is hard to discern what constitutes a “likely misunderstanding.”<sup>200</sup>

In the last case study variation, where there is no writing, privity (not specifically ethics but contracts), nor the waiver of it, the attorney may be exposed to liability and the rights of non-parties asserting any action against the attorney must be examined. This is done on a state-by-state basis because each state addresses privity or any statutory equivalent differently.<sup>201</sup> When no relationship to the Lawyer is expressed in writing, then the “default rule” suggests that the only client of Lawyer is the fiduciary.<sup>202</sup> Here, the SNPT, Harrison, and the contingent beneficiaries of the SNPT are not actually clients within a client-lawyer relationship.<sup>203</sup>

The scope of the lawyer’s fiduciary and ethical boundaries surrounding the client-lawyer relationship is expanding beyond the privity construct when specifically applied in trusts and estates and elder law practices.<sup>204</sup> Concomitant with the expanding scope of the client-lawyer relationship is the inclusion of the lawyer’s fiduciary and ethical duties to those described as derivative clients, “almost clients” or non-clients.<sup>205</sup> Nowhere will these expanding boundaries of lawyering in trusts and estates and elder law have any greater impact than in a trust situation as shown in the case study variation involving Harrison, an elderly plaintiff and his family.<sup>206</sup>

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199. See Pennell, *supra* note 86, at 43.

200. See RESTATEMENT (THIRD) OF THE LAW § 163 (declaring that if there will be likely misunderstanding without an engagement contract, then it is a requirement of the attorney to make clear to those who are not clients that they are not clients).

201. See *supra* note 103 and accompanying text.

202. *Id.*

203. See Pennell, *supra* note 86, at 45.

204. Portions of this section were published by the author in FICKETT’S THICKET, *supra* note 102. See, e.g., Comment, *Arizona Appellate Decisions 1976-77, VI. Legal Profession*, 19 ARIZ. L. REV. 488, 653-671 (1977); Ronald C. Link et al., *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. (1987).

205. See HAZARD & HODES, *supra* note 110, at 772 (identifying those who are beneficiaries in fiduciary relationships with lawyers as “almost clients”).

206. The accuracy of this assertion is shown in *Mieras v. DeBona*, 550 N.W.2d 202 (Mich. 1996), where the American Association of Retired Persons (“AARP”), at the time numbering thirty-three million members and serving Americans age fifty and older, filed an *amicus* brief supporting judicial recognition of exceptions to the privity doctrine in the will drafting context. AARP asserted that a majority of states had already eliminated the requirement of privity in the will-drafting

That Harrison, much less his family as contingent beneficiaries, would ever be considered within the scope of Lawyer's duties is the result of pressure generated from many areas, including two that are quite visible: (1) within the legal profession, addressing the need for the legal profession to hold lawyers accountable for legal services, including those of a fiduciary nature, that harm or injure identifiable persons, or a limited class of persons, intended by the client to benefit from the lawyer's work;<sup>207</sup> and, (2) within the state courts, addressing the lawyer's duty of care beyond the lawyer's privity relationship to those, other than the client, receiving benefit from the client-lawyer relationship.<sup>208</sup>

In the context of this article older people like Harrison are growing in significant numbers. The expectations of this class of older Americans may be one reason why lawyers' scope of duties is expanding.<sup>209</sup> These older Americans are provided legal services that include a vast array of products and documents that serve third parties, and often address asset preservation options that transfer assets to achieve tax avoidance and governmental benefits. The elderly expect their legatees, beneficiaries, and intended recipients to be properly served by the legal documents that their lawyers

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context based on public policy concerns and recognition that the rationales underlying the requirement are inapplicable. *See Mieras v. DeBona, AARP Amicus Brief*, at 2-5. In the AARP *amicus* brief, statement of interest, the AARP confirmed how important the issue was to older Americans:

Older people place their trust and the well-being of themselves and their heirs in the hands of advisors, whether they are attorneys, accountants, bankers, or financial planners, with the expectation that these professionals possess the skills necessary to advise them and to implement the decisions they make in reliance on this advice. Attorneys who draft wills and who, due to their own negligence, fail to take the steps necessary to carry out their clients' wishes are in a unique situation because their clients typically are dead by the time their mistakes are discovered. Because neither the decedent nor his or her estate can seek relief, these attorneys should be held liable to the intended beneficiaries under the will, the only remaining parties truly injured by the attorney's acts or omissions. Allowing such liability is the only way to provide meaningful redress for the attorney's now-deceased client and to deter future negligence by the attorney.

*Mieras v. DeBona, AARP Amicus Brief*, at 2.

207. *See* GREEN & COLEMAN, *supra* note 99, at 1001.

208. *See Report of the Special Study Committee on Professional Responsibility, Counseling the Fiduciary*, 28 REAL PROP. PROB. & TR J. 825 (1994). *See also* Ross, *supra* note 102 and accompanying text.

209. *See* 42 U.S.C. §§ 1396p(d)(4)(A)(B) and (C) (2002); *supra* text and analysis accompanying note 189.

create.<sup>210</sup>

Additionally, the preparation must include the incorporation into the lawyer's habit of practice the choice of a client model, identifying when it is appropriate to confirm the individual, multiple, unit, or entity as the client.<sup>211</sup> Once the model is chosen, and the client identified, lawyers should reduce client engagements to writing, explain the content, and have clients sign an acceptance. As a part of the engagement document, lawyers also should make it a habit of practice to understand how they may or may not limit liability for delivery of services, or at least make certain disclosures that the scope of their representation does not include derivative clients, almost clients or non-clients.<sup>212</sup>

There are strong opposing positions on whether expansion of lawyer fiduciary and ethical duties should eliminate the doctrine of privity.<sup>213</sup> The position opposing expansion asserts the general argument that maintaining the doctrine of privity and barring recovery by third parties is grounded in two perspectives: one that the client creating the engagement should not lose control over the lawyer and how the agreement is implemented, and the other that contracting parties should not have imposed on them an expanded burden or liability to the general public.<sup>214</sup>

The position promoting expansion asserts the general argument that eliminating the doctrine of privity and justifying recovery by third parties is grounded in theories that include negligence in tort,<sup>215</sup> breach of contract relating to third party beneficiaries,<sup>216</sup> and a "hybrid" or multi-criteria combining contract and tort.<sup>217</sup>

210. See FICKETT'S THICKET, *supra* note 102 and accompanying text.

211. See ACTEC Commentaries, *supra* note 110, at 50-59.

212. See *Engagement Letters: A Guide for Practitioners*, *supra* note 147, at 9, 19.

213. See Christopher H. Gadsden, *Ethical Duties of Estate Planners—What Would You Do?—Keeping Client Confidence*, PROB. & PROP., 18 (Sept./Oct. 1995).

214. See Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client*, 61 A.L.R. 4th 464, 473-475 (1988); Joan Teshima, Annotation, *Attorney's Liability to one Other than Immediate Client for Negligence in Connection with Legal Duties*, 61 A.L.R. 4th 615, 625, 639 (1988); Patrick Emery Longan, *Middle-Class Lawyering in the Age of Alzheimer's: The Lawyer's Duties in Representing a Fiduciary*, 70 FORDHAM L. REV. 901 (2001).

215. See *Heyer v. Flaig*, 449 P.2d 161 (Cal. 1969).

216. See *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981).

217. See *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962). Examples of the opposing views were highlighted in case studies by Lawrence Fox and Christopher Gadsden in a recent issue of Probate and Property, the magazine of the Real Property Probate and Trust Section of the American Bar

The ACTEC Commentary on Model Rule 1.2 asserts the general principle that the lawyer and client are “relatively free to define the scope and objectives of representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client.”<sup>218</sup> As far as multiple clients are concerned, the commentary describes the lawyer’s responsibility to discuss with the client the functions of a personal representative, trustee or other fiduciary,<sup>219</sup> making it clear that the lawyer should discuss with the client or clients the lawyer’s role in representing fiduciaries in administrative functions, including the possibility that the lawyer may owe duties to the beneficiaries with the resulting benefit in better equipping clients to select and give directions to fiduciaries.<sup>220</sup>

As part of the general rule, the commentary states that beneficiaries should be told by the lawyer that the fiduciary has engaged a lawyer and that the fiduciary is the client, explaining further that while at times beneficiaries will receive information regarding the fiduciary estate, the lawyer does not represent them, and the beneficiaries should consider retaining independent counsel to represent their interests.<sup>221</sup>

The commentary goes on to explain that when a lawyer represents a fiduciary of an estate, there should be no attempt to diminish or eliminate by agreement with the fiduciary the duties the lawyer may otherwise owe to the beneficiaries of the fiduciary estate without first giving them notice.<sup>222</sup>

The commentary acknowledges that many circumstances may

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Association. See Gadsden, *supra* note 213; Lawrence J. Fox, *Ethical Duties of Estate Planners—What Would You Do?—Liability Squared*, PROB. & PROP., 19 (Sept./Oct. 1995).

218. See ACTEC Commentaries, *supra* note 110, at 50.

219. *Id.* at 51.

220. *Id.*

221. *Id.* at 51-52.

222. See ACTEC Commentaries, *supra* note 110, at 56-57 (the commentaries give an example that

without first giving notice to the beneficiaries of the fiduciary estate, a lawyer should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of fiduciary that the lawyer would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, [a] lawyer generally should not give up the opportunity to make such disclosures where the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

*Id.*

vary the nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate.<sup>223</sup> Although largely restrictive in nature, it is noteworthy that the commentary declares that the lawyer for the fiduciary owes some duties to non-client beneficiaries,<sup>224</sup> and at times, protection of the interests of the beneficiaries may require the affirmative action of the lawyer. The commentary makes reference to the characterization of beneficiaries as derivative or secondary clients of the lawyer for the fiduciary,<sup>225</sup> providing another example relating to duties to beneficiaries:

[A] lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than ones the lawyer owes to other third parties. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those due to other adverse parties or nonclients.<sup>226</sup>

On the premise that estate planning and estate administration are fundamentally nonadversarial in nature, the commentary on Model Rule 1.7 asserts that when estate planning goals of multiple clients are not entirely consistent, it does not necessarily preclude the lawyer from representing them.<sup>227</sup> This conclusion is rationalized by the fact that "[a]dvising related clients who have somewhat different goals may be consistent with their interests and the lawyer's traditional role as a lawyer for the 'family,'" and may prove to be the most cost effective representation in achieving the objectives.<sup>228</sup>

Multiple client representation regarding related matters often involves impermissible conflicts, including ones that affect the interest of third parties, or even the lawyer's own interests. While keeping this in mind, a lawyer who continues with a representation that involves tolerable conflicts at the outset may have to respond to changing conditions that make the conflicts intolerable by ending the client-lawyer relationship subject to Model Rules 1.7 and 2.2, which address conflict of interest and intermediary representation,

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223. *Id.* at 57.

224. *Id.*; see also ACTEC Commentaries, *supra* note 110, at 60-77, (providing case citations from every state and the District of Columbia omitted).

225. *Supra* note 110, at 57.

226. *Id.* at 57-58.

227. *Id.* at 154.

228. *Id.* at 150.

respectively.<sup>229</sup> The commentary gives two additional examples related to estate planning which are used later in this article as the basis for more descriptive case studies.<sup>230</sup>

*Biakanja v. Irving*,<sup>231</sup> was the first case to make a dent in the doctrine of privity. Since then, the doctrine of privity has been

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229. *Id.* at 153-54. The commentary notes that in some states certain services require independent representation or otherwise may be invalidated. On the other hand, the commentary notes that if “necessary preconditions are met, a lawyer may, with informed consent of the parties, represent both parties to a transaction, such as the formation of a business enterprise, the execution of an employment agreement or a buy-sell agreement, or a joint spousal election to split gifts.” *Id.* Note that Rule 2.2 has been repealed with its substance incorporated in to Comments to Rule 1.7.

230. *Id.* at 153. Example 1.7-2 illustrates:

Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge *T* for any substantial personal services that *L* performs for *T*.

*Id.* See also, Example 1.7-3:

Lawyer (*L*) represented Husband (*H*) and Wife (*W*) jointly with respect to estate planning matters. *H* died leaving a will that appointed Bank (*B*) as executor and as trustee of a trust for the benefit of *W* that meets the QTIP requirements under I.R.C. § 2056(b)(7). *L* has agreed to represent *B* and knows that *W* looks to him as her lawyer. *L* may represent both *B* and *W* if the requirements of MRPC 1.7 are met. If a serious conflict arises between *B* and *W*, *L* may be required to withdraw as counsel for *B* or *W* or both. *L* may inform *W* of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Conflict of Interest: Former Client). However, without the informed consent of all affected parties *L* should not represent *W* in connection with an attempt to set aside *H*'s will or to assert an elective share.

*Id.*

231. 320 P.2d 16, 18-19 (Cal. 1958). *Biakanja* is considered the leading case that rejected the privity requirement, allowing the intended beneficiary to recovery against the defendant notary public who incorrectly attested a will that was denied probate; see also *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961), *cert. den.* 386 U.S. 987:

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

*Id.* at 650.

thoroughly examined in many state jurisdictions.<sup>232</sup>

A majority of the jurisdictions that have addressed the privity doctrine in the context of trusts and estates have not adhered to it when examining third party, non-client malpractice, or liability against lawyers.<sup>233</sup> However, the demise of the doctrine of privity is far from complete.<sup>234</sup> While possibly moving from the doctrine of privity in the future, there are still many appellate court decisions that recognize it, even in the trusts and estates context.<sup>235</sup> The

232. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, 154–66, 242-96 (West Pub. Co. 1986).

233. See *Barcelo v. Elliott*, 923 S.W.2d 575, 577-578 (Tex. 1996), citing *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961), cert. denied, 368 U.S. 987(1962); *Stowe v. Smith*, 441 A.2d 81, 83 (Conn. 1981); *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983); *DeMaris v. Asti*, 426 So.2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Ogle v. Fuiten*, 466 N.E.2d 224, 226-27 (Ill. 1984); *Walker v. Lawson*, 526 N.E.2d 968, 968 (Ind. 1988); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987); *Pizel v. Zuspahn*, 795 P.2d 42, 51 (Kan. 1990); *In re Killingsworth*, 292 So.2d 536, 542 (La. 1973); *Hale v. Groce*, 744 P.2d 1289, 1292-93 (Or. 1987); *Guy v. Liederbach*, 459 A.2d 744, 751-53 (Pa. 1983); *Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 327 (Wis. 1983). But see *Lilyhorn v. Dier*, 335 N.W.2d 554, 555 (Neb. 1983); *Viscardi v. Lerner*, 125 A.D.2d 662, 663-64 (N.Y. App. Div. 2d Dep't 1986); *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987) (The court further explained that although several states allowed intended beneficiaries a broad cause of action, citing *Stowe*, 441 A.2d at 84; *Ogle*, 80 Ill.Dec. at 775, 466 N.E.2d at 227; and *Hale*, 744 P.2d at 1293, it cited other state courts limiting the class of plaintiffs to beneficiaries specifically identified in an invalid will or trust, citing *Ventura County Humane Society v. Holloway*, 40 Cal. App. 3d 897, 903-04 (1974); *DeMaris*, 426 So.2d at 1154; *Schreiner*, 410 N.W.2d at 683 (The court identified this case as an example of when "a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized"); *Kirgan v. Parks*, 478 A.2d 713, 718-19 (Md. Ct. Spec. App. 1984) (holding that, if cause of action exists, it does not extend to situation where testator's intent as expressed in the will has been carried out); *Ginther v. Zimmerman*, 491 N.W.2d 282, 286 (Mich. Ct. App. 1992); *Guy*, 459 A.2d at 751-52.

234. See Bruce S. Ross, *Legal Malpractice and Estate Planning and Administration*, 18 ACTEC Notes 240-248, 250-51 (1992) (acknowledging that the "dragon of 'privity,' applied to bar a malpractice claim for the alleged negligent drafting of a testamentary instrument, has not been slain, although the cases are short on discussion of the theoretical justification for the continued application of the doctrine").

235. See *Barcelo*, 923 S.W.2d at 580 n.1 (dissenting opinion of *Cornyn*, identifying courts that still adhere to the privity doctrine, citing *Williams v. Bryan, Cave, McPheeters and McRoberts*, 774 S.W.2d 847, 849 (Mo. Ct. App. 1989); *St. Mary's Church v. Tomek*, 325 N.W.2d 164, 165 (1982); *Viscardi v. Lerner*, 510 N.Y.S.2d 183, 185 (1986); *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987). In addition to the above referenced states of Missouri, Nebraska, New York and Ohio, the states of Washington, *Trask v. Butler*, 872 P.2d 1080 (Wash. 1994), Texas, *Barcelo*, 923 S.W.2d at 575, and Illinois, *Rutkowski v. Hollis*, 600 N.E.2d

Texas Supreme Court decision, *Barcelo v. Elliott*,<sup>236</sup> is an example of the retreat to the bright-line privity rule, denying a cause of action to beneficiaries of a trust whom the attorney for the settlor did not represent. However, the Michigan Supreme Court decision, *Mieras v. DeBona*,<sup>237</sup> is an example of the rejection of the doctrine of privity relating to beneficiaries of a will whom the drafting attorney never represented.

(2) *Failure to Exercise Independent Judgment*

In the Harrison variation, the state's case law and ethics opinions will weigh greatly on Lawyer's exposure to liability coming from losses and exorbitant fees and commissions assessed not by Lawyer, but by CeteBank and the NPA, CareGivers, Inc. One final point, if Lawyer and SNT Specialist have not fully explained to Harrison's wife and children why any remainder corpus in the SNPT beyond Harrison's life goes to the NPA, CareGivers, Inc., then they may be exposed to liability if the family prevails in causes of action as derivative clients.

d. *The NPA or Consumer Disability Advocacy Group as Client*

While the NPA is defined by federal and state law and the trust document as trustee, it usually is not. Most of the time, the NPA will be involved because of its disabled members or customers and its mission and goals of individual advocacy for the elderly.<sup>238</sup> As discussed earlier in the article, a mandatory element of the SNPT comes from the way in which federal and state laws have defined who the trustee must be.<sup>239</sup> The trustee must be a nonprofit association (NPA) serving the advocacy, case management, and care giving needs of the trust beneficiary. In the ordinary course of trust and estate development and administration, the institutional, financial or corporate trustee is the norm. Institutional trustees function within the institutional banking and trust environment, analytically focused on the corpus of the SNPT. These institutional trustees invest and manage assets, and administer the receipts and

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1284 (Ill. App. Ct. 1992) are identified as states supporting the privity doctrine in the trusts and estates context.

236. *Barcelo*, 923 S.W.2d at 575.

237. 550 N.W.2d at 202.

238. *See supra* note 46.

239. *See supra* note 33.

disbursements of the trust through periodic accountings mandated during the life of the SNPT.

The NPA trustee is a much stranger duck. The more that it is utilized, the stranger it seems to get.<sup>240</sup> Often, the NPA has no institutional banking, trust or fiduciary alignment. However, it needs constant assistance from some financial source to handle the managed funds under trust and properly account for receipts and disbursements.<sup>241</sup> Additionally, NPAs being sought to carry trust responsibilities of SNPTs seek legal assistance from lawyers to provide them, as NPA trustees, with legal counsel for trust administration, distribution of funds, and attending to the complexities of benefits eligibility, especially when the benefits are means-tested like that of Medicaid or SSI.<sup>242</sup>

*(1) Conflict of Interest—Model Rule 1.7—General Rule*

Using the same criteria and analysis as in earlier commentary on other relationships, several factual variations are briefly examined for the readers to carefully consider.

There are times when the SNT Specialist is the same person that has been hired by Lawyer to provide SNT documents and assist in moving the NPA into position to serve the interests of someone like Harrison. There is a potential for SNT Specialist to have her loyalties diluted between the NPA that she has assisted and worked with for decades, and Harrison. Of course, if SNT Specialist has expressly declared her client-lawyer relationship with Lawyer, then there is no direct relationship with Harrison. However, Lawyer is clearly Harrison's attorney, and if he is at all aware of the tangled relationship between SNT Specialist, the NPA, and Harrison, then what is his duty? Does he have a duty to do anything about SNT Specialist's divided loyalties? The current answer, based on the qualified assumptions above, is no. Lawyer does not have a duty to do anything about SNT Specialist's connection to the NPA because there has yet to be anything shown or asserted that would be

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240. This is the author's opinion based on the only available information on those visible NPAs that are either created by groups advocating the interests of their members, *see supra* note 46, or religious groups attempting to serve parishioners and "the least of these our bretheren." *Matthew 25:40*.

241. *See supra* note 46, and accompanying text and analysis. NPAs do not have the financial experience to properly account for the investment of assets under management in the pooled umbrella construct that is mandated by the law; *see also supra* note 33.

242. *See supra* note 46; *supra* note 33.

considered sufficient adversity to trigger notice, disclosure, and written waiver.<sup>243</sup>

*(2) Failure to Exercise Independent Judgment*

Again, using the same criteria and analysis as in earlier commentary on other relationships, the factual variation discussed in relation to independent judgment is examined within the context of independent judgment for the readers to carefully consider.

As in an earlier variation, assume that in her practice, SNT Specialist has had her firm habitually maintain the administration of SNTs and SNPTs. In Harrison's case, SNT Specialist's firm provides legal counseling to the NPA, Caregivers, Inc., and assists the institutional entity (CeteBank) with standard trust administrative services for both, all at a time when Harrison is no longer her client, if he ever was.

It should be obvious that SNT Specialist's loyalties might be divided between CeteBank and CareGivers. SNT Specialist must weigh potential adversity in determining whether or not CeteBank and CareGivers need to be given notice, to be provided full disclosure, and to be asked to sign acknowledgement of waivable conflicts.<sup>244</sup> It may not be so clear that SNT Specialist must also pay attention to Rule 1.9, addressing the protections of her prior client, Harrison.<sup>245</sup> If SNT Specialist has complied with Rule 1.9, having Harrison sign a written waiver, if allowed,<sup>246</sup> then what happens if something goes awry that damages Harrison? Where do the fees come from that pay for correcting the problem created by SNT Specialist, CeteBank or CareGivers? Does SNT Specialist expect to be paid for working out the damages that have befallen Harrison when the damages may have been SNT Specialist's fault?<sup>247</sup>

For example, assume a variation in the facts where CeteBank used SNPT assets under management to purchase an annuity product of "Life Long Benefits", a subsidiary. Life Long Benefits presented an invoice to CareGivers for payment of the annuity. Caregivers sent the invoice to Cetebank. CeteBank verified and

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243. See *supra* note 140 and accompanying text.

244. *Id.*

245. See 2002 Model Rules of Professional Conduct, *supra* note 96, at 44-46, Comments 8-9; see ACTEC Commentaries, *supra* note 110, at 201-203.

246. *Id.*

247. See generally Pennell, *supra* note 86.

paid the invoice. In addition to the invoice on the front end of the annuity, Life Long Benefits confirmed in writing to Caregivers, with a copy to SNT Specialist, that the rate of return on the annuity was variable; that it would be charging standard periodic administrative fees throughout the term of the annuity; and the annuity was life with no guaranteed period of payout certainty. Unknown to SNT Specialist, Life Long Benefits invested most of its managed funds in technology and energy stocks. Before the year was over, the annuity was worthless. That was about the time that certain accounting adjustments were made by CeteBank, and subsequently sent to SNT Specialist in the periodic statement and accounting of the corpus of the SNPT. However, SNT Specialist was off in the next big personal injury case where she was to develop another SNPT. She was not looking at what was being sent to here to be placed in the Harrison file, and neither was her staff, simply sticking the accounting in the file.

CeteBank Banker took the executive director of CareGivers and a SNT Specialist to lunch shortly after the filing of the accounting, explaining that reversals in the economy and the significant downturn in the markets would reflect badly on the corpus of the SNPT. He suggested, however, that it was going on everywhere and was unavoidable. In the same breath, CeteBank Banker begins discussing a marketing plan to help “get the word out” about the virtues of Caregivers as an NPA and the benefits of SNPTs. He explains that CeteBank is offering a very attractive equity line to fund the marketing campaign, to be used when necessary for Caregivers and SNT Specialist to cover expenses and salaries.

### *(3) Violation of Client Confidences*

Again, using the same criteria and analysis as in earlier commentary on other relationships, the factual variation discussed in relation to client confidences is examined within the context of client confidences for the readers to carefully consider.

As in an earlier variation, assume that in her practice, SNT Specialist has had her firm habitually maintain the administration of SNTs and SNPTs. In Harrison’s case, SNT Specialist’s firm provides legal counseling to the NPA, Caregivers, Inc., and assists the institutional entity (CeteBank) with standard trust administrative services for both, all at a time when Harrison is no longer her client, if he ever was.

In this variation, CeteBank Banker has been having conversations with SNT Specialist, banker explains that Life Long Benefits will be going out of business and CeteBank will not be covering the failure of annuities such as the one in the Harrison SNPT. This will completely gut the corpus of Harrison's SNPT and he will have no supplemental support. Further, Caregivers will receive no fees or have any corpus at the end of the SNPT from which to benefit. To make matters worse, in an attempt to reduce its deficit, the State has begun to file claims against SNPTs for Medicaid Estate Recovery or for Medicaid Payback. Harrison calls SNT Specialist's paralegal, demanding to know what happened to his million-dollar trust fund. The paralegal had worked with Harrison during the year that the SNPT was under administration. He blurts out the whole story. Harrison meets with SNT Specialist. She confirms what the paralegal told Harrison, but points the finger at Caregivers and CeteBank. She also explains that she was not Harrison's attorney when the SNPT was negotiated, she was Lawyer's attorney and he should take it up with Lawyer.

#### V. CONCLUSION

This article examined the self-settled special needs pooled trust, a relatively new option available to elder law attorneys, estate and trust lawyers, and other legal practitioners serving disabled or injured elderly clients. It first gave a brief summary of the discretionary support trust, and how the special needs pooled trust evolved. The brief history was followed by a summary of the components of the d4C special needs pooled trust (SNPT), with a summary analysis of how to operate the trust in compliance with Medicaid eligibility. The article then examined revisions to the Model Rules of Professional responsibility, applying several of them to various initial client-lawyer engagements where the trust Specialist is being engaged to design, implement, and fund an SNPT, raising questions of lawyer loyalty and conflict of interest, confidentiality and privity running running to the trustee, the beneficiary or both.