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Ethical Considerations for Attorneys Involved in Estate Planning and Asset Protection

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Celesq, Inc. Presents:

Ethical Considerations for Lawyers Involved in

Estate Planning and Asset Protection

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I. IS IT ETHICAL TO ADVISE CLIENTS TO ENGAGE IN ASSET PROTECTION STRATEGIES?

A. Introduction.

1. Attorneys can advise ways to better insulate assets from lawsuits so long as the client is able to represent that there are no pending, threatened, or expected claims or outstanding judgments that would cause him or her to be insolvent post-planning. It is key for all attorneys working in this space, as in much of the estate planning space, to have broad intake questionnaires and know-your-client processes to determine whether there are any pending judgments/claims against a potential client and to evaluate the

nature of any pending judgments/claims before putting an asset protection plan in place.

2. Otherwise, a fraudulent transfer may exist (aka Voidable Transaction)

   a. Many of the civil issues regarding asset protection planning involve transfers made when there is a pending, threatened, or expected claim.

   b. A transfer that is made when there is a pending, threatened or expected claim may be deemed to be a fraudulent conveyance.

   c. In this respect, one of the very first and most crucial questions that an asset protection planner needs to address with the prospective client is whether there are any pending, threatened, or expected claims or whether there are any outstanding judgments.

   d. If there are any pending, threatened, or expected claims or outstanding judgments, this does not mean that the asset protection planner should automatically terminate the engagement. Rather, the specifics of the claim and, if possible, the estimated maximum exposure need to be assessed.

   e. Then, some degree of asset protection planning may still be done with respect to future potential creditors.

3. If the client is contemplating bankruptcy, the planner should probably not be involved with any transfers. Rather, the planner should look at the possibility of protection under state exemption statutes, and (in certain cases) the possibility of changing domicile to a state that has more liberal exemptions than the current state of the debtor's residence.

4. If the client states that he or she is not aware of any pending, threatened, or expected claims, and that there are no outstanding judgments, an asset protection planner generally has no duty to perform a background check or actively question a client's integrity.

5. However, a planner should not proceed with "willful blindness" and ignore facts or circumstances that come to his or her attention.

B. Fraud

1. Fraud has been defined as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."[1]

2. The following cases illustrate ethical sanctions when the attorney advised a client to engage in transactions that were fraudulent:

   a. In *The Florida Bar v. Beaver,*[2] an attorney was disciplined for advising his client to hide assets, commit perjury, and deposit funds in the attorney's trust account in a divorce proceeding.

   b. In *In re De Pamphilis,*[3] an attorney was disciplined for suggesting that transfers of property be made to a relative in satisfaction of a nonexistent debt prior to filing bankruptcy.

   c. In *In re Appel,*[4] an attorney was disbarred after he was convicted of a felony for having his client transfer property to the attorney prior to filing for bankruptcy.

   d. In *Coppock v. State Bar of California,*[5] an attorney was disciplined for permitting a client to use the attorney's trust account to conceal assets from creditors.

C. Fraudulent Transfer

1. The Model Rules define "fraud" or "fraudulent" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[6]

2. If the attorney conduct does not amount to fraud or is otherwise not fraudulent, an attorney practicing in a Model Rules jurisdiction would be acting within the bounds of propriety when engaging in integrated estate planning and its asset protection component. The reader should remember the substantive legal distinctions between a fraudulent transfer and conduct that is fraudulent in nature.

3. Whether a transfer is a fraudulent transfer will depend on the applicable law. Fraudulent transfer law varies state by state, and

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[1] *Black's Law Dictionary* 670-671 (7th ed. 1999).
[2] 248 So.2d 477 (Fla. 1971).
[3] 153 A.2d 680 (N.J. 1959).
[4] 405 N.Y.S.2d 66 (N.Y. App. Div. 1978).
[5] 749 P.2d 1317 (Cal. 1988).
[6] Model Rule of Professional Conduct 1.0(d).

varies where it appears at the federal level too. Typically, a transfer will be a fraudulent transfer either because it satisfies a state of mind test, or it satisfies an objective standards test applied regardless of the transferor's state of mind. Additionally, a fraudulent transfer may occur when there is no per se transfer, such as the admittance of a second member to a single member limited liability company when such admittance is not done in good faith.[7]

4. For example, under the Uniform Voidable Transaction Act (UVTA) (formerly known as the Uniform Fraudulent Transfer Act), a transfer that is made or an obligation that is incurred is a fraudulent transfer if:

   a. the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor; or

   b. the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

      i. the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

      ii. the debtor intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond the debtor's ability to pay as they became due.

   c. The test in a. above is the state-of-mind test, and the tests in b.i. and ii. above are the objective standards tests. These rules apply regardless of whether the creditor's claim arose before or after the transfer was made or the obligation was incurred.[8]

5. Badges of fraud or indicia of fraud used to show intent

   a. Obviously, it may be very difficult to determine the state of mind of the transferor at the time of a transfer. Therefore, under American law, actual intent may be established by inference from the facts and circumstances (i.e., by circumstantial evidence).

[7] *See UBS Financial Services, Inc. v. Lacava, 2018 Ohio 3055, 2018 WL 3689450 (Ohio App., Aug. 2, 2018).*
[8] UFTA §4(a).

b. Court cases and section 4(b) of the UVTA detail certain factors that may be considered in determining whether a transferor had actual intent to hinder, delay, or defraud one or more creditors. These factors are commonly known or referred to as badges of fraud, as circumstantial evidence of fraud, or as indicia of fraud.

c. The following list of badges of fraud is from the UVTA, which states that in determining actual intent, consideration may be given to a number of factors including whether:

   i. The transfer or obligation was to an insider;

   ii. The debtor retained possession or control of the property transferred after the transfer;

   iii The transfer or obligation was disclosed or concealed;

   iv Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

   v. The transfer was of substantially all the debtor's assets;

   vi. The debtor absconded;

   vii. The debtor removed or concealed assets;

   viii. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

   ix. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

   x. The transfer occurred shortly before or shortly after a substantial debt was incurred; and

   xi. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[9]

[9] UFTA §4(b).

d. The list of factors in the UVTA is not an exclusive list; therefore, other factors may also be considered by a court as badges of fraud. The comments to the UVTA state that in considering these factors, a court should evaluate all of the relevant circumstances involving a challenged transfer or obligation.[10]

e. Whether badges of fraud can be utilized to establish actual intent to defraud in the subsequent (future) creditor context is entirely dependent upon state law. In general, badges of fraud can be used to establish actual intent to defraud in subsequent (future) creditor cases under UVTA-style fraudulent transfer law, but not under UFCA-style or Statute of Elizabeth-style fraudulent transfer law.[11]

f. Value can be one thing to a creditor, and quite another thing to a debtor. The majority view is that whether reasonably equivalent value is received in exchange is determined from the vantage point of the creditor, and not from not the vantage point of the debtor.[12]

6. *Sardis v. Frankel*[13]

a. The issue in this case was whether defendant Sofia Frankel's conveyance of a condominium to her son, Michael Frankel, was constructively fraudulent pursuant to New York Debtor and Creditor Law §§ 273-a and 278.

b. On October 30, 2008, a $2.5 million arbitration award (the "Award") was rendered jointly and severally against Sofia Frankel ("Sofia") and Lehman Brothers, Inc. Within days after the Award was rendered, Sofia met with an attorney to create an asset protection plan. Also attending this meeting was Sofia's son, Michael Frankel ("Michael").

c. At the time of the Award, Sofia's assets included:

i. a Miami Beach, Florida condominium (owned by Sofia and her husband as tenants by the entirety and claimed as a homestead);

ii. a New York City condominium (owned by Sofia and her husband as tenants by the entirety);

[10] Comment (6), UFTA §4.
[11] 37 Am. Jur. 2d, Fraudulent Conveyances §128 (2001).
[12] See, e.g., *Interpool Limited v. Paterrerson*, 890 F.Supp. 259 (1995); see also *In re Glenn*, 108 BR 70 (1989)
[13] 978 N.Y.S.2d 135 (Supreme Court, Appellate Division, First Department, New York, January 7, 2014).

iii. a New York City condominium (the "Condo") (<u>solely owned by Sofia and the subject asset of this case</u>);

iv. a 100% ownership interest in a Florida limited liability company (the "Florida LLC"); and

v. a Fidelity Investment account valued at approximately $4 million.

d. Sofia's asset protection plan was implemented in early 2009. In January 2009, Sofia withdrew approximately $3.3 million from the Fidelity account. Shortly thereafter, she paid $2.9 million in cash for another Miami Beach condominium that is held solely in her name and also claimed by her as a homestead.

e. In August 2009, Michael became a 10% member in the Florida LLC. This prevented the assets in the Florida LLC from being subject to seizure as the Florida LLC was converted from a single-member limited liability company to a multi-member limited liability company.[14]

f. On February 20, 2009, Sofia transferred the Condo's title to Michael for one dollar and other valuable consideration. The plaintiffs filed an action in an attempt to set aside the Condo's transfer as a fraudulent conveyance.

g. Sofia and Michael asserted that in 1999, they entered into an oral agreement which was never reduced to writing (the "Agreement") whereby Michael was to take immediate possession of the Condo and assume all expenses related thereto. Sofia and Michael also allegedly agreed that a reasonable market value of the Condo was to be ascertained in 2009, at which time Sofia would transfer title to the Condo to Michael in exchange for Michael's promise to pay the purchase price.

h. The Supreme Court of New York County (the "Lower Court") held that while payment of the carrying expenses might constitute past consideration sufficient to make a valid contract, such consideration must be made in writing.

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[14] As held by the Florida Supreme Court in *Olmstead v. Federal Trade Commission*, 44 So.3d 76, 78 (Fla. 2010), a court may "order a judgment debtor to surrender all right, title and interest in the debtor's single-member LLC to satisfy an outstanding judgment, but limits the court to issuing a "charging order" against a debtor's ownership interest in a multi-member limited liability company."

i. Further, the Lower Court held that Sofia and Michael failed to demonstrate that such payments comprised fair consideration under New York Debtor & Creditor Law § 272.

j. Therefore, summary judgment was granted in the plaintiffs' favor with respect to their claim that the Condo's transfer from Sofia to Michael was a fraudulent conveyance.

k. Sofia and Michael appealed to the Supreme Court, Appellate Division (the "Court") by contending that Michael took title to the Condo in good faith as part of an executory contract with Sofia.

l. On appeal, Plaintiffs alleged that the Condo's transfer was fraudulent under New York Debtor and Creditor Law § 273-a and § 278 in that Sofia and Michael could not establish "fair consideration" for the transfer of title.

m. The two indicia of "fair consideration" for conveyed property includes:

    i. the adequacy of what is given in exchange for it; and

    ii. good faith.[15]

n. "Fair consideration" under New York Debtor and Creditor Law § 272 "is not only a matter of whether the amount given for the transferred property was a 'fair equivalent' or 'not disproportionately small,' . . . but whether the transaction is made 'in good faith,' an obligation that is imposed on both the transferor and transferee."[16]

o. New York Debtor and Creditor Law § 278 states that a fraudulent conveyance may be set aside on behalf of a creditor whose claim has matured "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase."[17]

p. Further, New York Debtor and Creditor Law § 273-a states:

> Every conveyance made without fair consideration when the person making it is a defendant in an

[15] Id. at 140.
[16] Id. at 141.
[17] Id.

action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.[18]

q. In order for Sofia and Michael to prevail on their assertion that the Condo's transfer satisfied the requirements of § 273-a, they must show that Sofia was a good faith seller of the property under § 272 or that Michael was a good faith purchaser for fair consideration without knowledge of any fraud under § 278. "Where the transferor has knowledge of a judgment, the transfer of funds available to satisfy the judgment made at the judgment debtor's direction will be set aside as lacking in good faith."[19] "Likewise, where the transferee is aware of an impending enforceable judgment against the transferor, the conveyance does not meet the statutory good faith requirement and generally will be set aside as constructively fraudulent."[20]

r. In viewing Sofia's asset protection plan as a whole, the Court stated "[i]t is apparent that Sofia's conveyance of the [Condo] to her son was but one of a series of transactions undertaken as part of an 'asset protection plan' devised with the assistance of counsel immediately after the [Award] was rendered against her. The emptying of a brokerage account, the purchase of Florida real estate claimed as a homestead and the transfer of the [Condo] . . . demonstrate not merely a series of transactions coincidental to estate planning . . . but a concerted effort to place her assets beyond the reach of impending judgment creditors. Finally, the addition of Michael as a member of [the Florida LLC], of which Sofia was formerly the sole member, precludes plaintiffs from obtaining an order from a Florida court directing the surrender of her entire interest in the company to satisfy the [Award] against her. Notably, defendants do not contend that Sofia acted in good faith, and the record before us affords no basis for such finding."[21]

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[18] Id. at 140-141.
[19] Id. at 141 quoting *Berner Trucking v. Brown*, 722 N.Y.S.2d 656 [4th Dept. 2001].
[20] Id. at 141 quoting *Matter of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria v. Upstate Bldg. Corp.*, 692 N.Y.S.2d 285 [4th Dept. 1999].
[21] Id. at 142.

s. After determining that Sofia lacked good faith, the Court then noted that Michael did not provide proof that he received the Condo as a good faith purchaser for value without knowledge of any fraud. "It is apparent that Michael was a participant in the asset protection plan from its inception, having conferred with [Sofia] and her counsel. He was clearly instrumental to its implementation, having been installed as a member of [the Florida LLC] to frustrate seizure of its assets and having received title to [the Condo] conveyed by Sofia."[22]

t. In sum, the Court ruled:

i. Sofia did not transfer the Condo in good faith;

ii. Sofia and Michael's "Agreement" was not binding; and

iii. Michael did not receive the Condo in good faith.

As a result, the Court affirmed the Lower Court's ruling that the Condo's transfer was to be set aside as a fraudulent conveyance.

7. Without careful screening of clients, potential civil liability for the asset protection planner may result, such as for malpractice, fraud, breach of fiduciary duty, conversion, or fraudulent transfers, which (depending on the jurisdiction and/or the facts) could be couched in terms of direct liability, co-conspirator liability, and/or aiding and abetting liability. As a result, it is necessary, as stated above, for significant KYC before helping a client set up an asset protection plan.

II. APPLICATION OF THE RULES OF PROFESSIONAL CONDUCT.

A. Applicable Model Rules of Professional Conduct

1. Model Rule 1.2(d)—"Scope of Representation and Allocation of Authority Between Client and Lawyer"

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a

[22] Id. at 142-143.

client to make a good faith effort to determine the validity, scope, meaning or application of the law.

2. Model Rule 8.4—"Misconduct." "It is professional misconduct for a lawyer to:

   a. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

   b. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

   c. <u>engage in conduct involving dishonesty, fraud, deceit or misrepresentation;</u>

   d. engage in conduct that is prejudicial to the administration of justice;

   e. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

   f. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

3. *Misrepresentation.*

   a. Section 525 of the Restatement (Second) of Torts states that if a person fraudulently makes a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or to refrain from action in reliance upon it, then the person making the misrepresentation is subject to liability to the other person for the pecuniary loss caused by the other person's justifiable reliance upon the misrepresentation.[23] The comments to Section 525 of the Restatement (Second) of Torts provide the following example of a misrepresentation:

   Example 1: Jack Arlens is a dealer in used automobiles. Before offering a second-hand car for sale, Arlens turns the odometer reading back from 60,000 to 18,000 miles. Marshall Barley, relying on the odometer reading,

[23] Restatement (Second) of Torts §525 (1977).

purchases the car from Arlens. Arlens has made a misrepresentation.[24]

B. Zealous Representation of the Client.

1. Model Rule of Professional Conduct 1.3, entitled "Diligence," states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

2. Comment 1 to this Rule states: "[A] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."[25]

3. Comment 2 to Model Rule 1.3 states "a lawyer's work load must be controlled so that each matter can be handled competently."[26]

4. Colorado Rule of Professional Conduct 1.3 mirrors Model Rule 1.3, discussed immediately above.

5. New York Rule of Professional Conduct 1.3.[27]

   a. New York Rule 1.3, entitled "Diligence," is more in-depth as compared to Model Rule 1.3. New York Rule 1.3 states:

      i. A lawyer shall act with reasonable diligence and promptness in representing a client.

      ii. A lawyer shall not neglect a legal matter entrusted to the lawyer.

      iii. A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.[28]

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[24] Restatement (Second) of Torts, §525 cmt. b, illus. 1 (1977).
[25] MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt (1) (2002).
[26] Id. at cmt (2).
[27] Effective as of April 1, 2009, as amended May 4, 2010.
[28] New York Rule of Professional Conduct 1.3.

b. Comment 2 to New York Rule 1.3, pertaining to a lawyer's work load being controlled so that each matter can be handled diligently and competently also states that "lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective."[29]

c. The encouragement of lawyers to implement and enforce office procedures to ensure diligence in their work is more comprehensive than suggested in the Model Rules.

6. California Rules of Professional Conduct.[30]

a. Rule 3-110, entitled "Failing to Act Competently," states:

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

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

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

b. Pursuant to the discussion section of California Rule 3-110, the duties set forth in the rule include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.

c. The discussion to this rule also states that in an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance

[29] Id. at cmt (2).
[30] As of January 1, 2014.

should be limited to that reasonably necessary in the circumstances.

7. In *Suffield Development Associates Ltd. Partnership v. National Loan Investor,*[31] an attorney's obligation to zealously represent his client has been cited as the basis for negating civil liability for aiding a client's fraudulent transfer. In *Suffield*, the Court held:

> Protecting professional conduct from . . . liability ensures that no attorney is discouraged from intentional and aggressive actions, believed to be in the interest of a client, by fear of being held liable.

C. The Ethical Duty of Confidentiality

1. Model Rule 1.6 pertains to the confidentiality of information.

a. "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

b. "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

i. to prevent reasonably certain death or substantial bodily harm;

ii. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

iii. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

iv. to secure legal advice about the lawyer's compliance with these Rules;

[31] 260 Conn. 766, 784 (2002).

v. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

vi. to comply with other law or court order; or

vii. to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."

c. "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

2. Each state has the authority to adopt a different version of the rule pertaining to the confidentiality of information.

3. Rule 1.6 of the Colorado Rules of Professional Conduct is entitled "Confidentiality of Information." This rule states:

a. Paragraph (a)--A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

b. Paragraph (b)--A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

i. to prevent reasonably certain death or substantial bodily harm;

ii. to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

iii. to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

iv. to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

v. to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

vi. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

vii. to comply with other law or a court order.

4. Rule 3-100 of the California Rules of Professional Conduct is entitled "Confidentiality Information of a Client." This rule states:

   a. Paragraph (A)—A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

   b. Paragraph (B)—A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

   c. Paragraph (C)—Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

      i. make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

ii. inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

d. Paragraph (D)—In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

e. Paragraph (E)--A member who does not reveal information permitted by paragraph (B) does not violate this rule.

f. Pursuant to Paragraph 2 of the discussion to Rule 3-100, "[T]he principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy."

g. Paragraph 2 of the discussion to Rule 3-100 also states "[T]he attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion."

5. Rule 1.6 of the New York Rules of Professional Conduct is entitled "Confidentiality of Information." This rule states:

a. A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

i. the client gives informed consent, as defined in Rule 1.0(j);

ii. the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

iii. the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

b. A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

i. to prevent reasonably certain death or substantial bodily harm;

ii. to prevent the client from committing a crime;

iii. to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

iv. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

v. to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or to establish or collect a fee; or

vi. when permitted or required under these Rules or to comply with other law or court order.

c. A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

6. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

7. A fundamental principle in the client-lawyer relationship is that the lawyer maintains the confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

8. Comparison between the attorney-client privilege and the ethical duty of confidentiality.

   a. The principle of confidentiality is given effect by related bodies of law, the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.

   b. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

   c. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

   d. The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard confidential information of the client.

   e. When is disclosure "authorized?"

      i. Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

ii. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

f. Disclosure adverse to the client.

i. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.

ii. Distinguishable situations.

(A) A lawyer may not counsel or assist a client in conduct that is criminal or fraudulent.

(B) If a lawyer has been innocently involved in past conduct by the client that was criminal or fraudulent, then no rules of professional conduct have been violated because in order to violate the rule, counseling or assisting criminal or fraudulent conduct requires knowing that the conduct is of that character.

(C) If a lawyer becomes aware that a client intends prospective conduct that is criminal, the lawyer has a professional responsibility to reveal such information in order to prevent such consequences.

iii. A disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.

g. The duty of confidentiality continues after the client-lawyer relationship has terminated. See *Rodriguez v. District Court for the City and County of Denver.*[32]

h. The prevailing rule is that it will be presumed that confidences were reposed where an attorney-client

[32] 719 P.2d 699 (Colo. 1986).

relationship has been shown to exist. See *Osborn v. District Court.*[33]

i. *Metropolitan Life Insurance Company v. Aetna Casualty and Surety Company*[34]

   i. In this case, an insured brought an action against an excess liability insurer to recover cost of settling asbestos tort cases after the insurer refused to defend the insured.

   ii. In its holding, the Connecticut Supreme Court stated "Connecticut has a long-standing, strong public policy of protecting attorney-client communications . . . It is important not to weaken the privilege with various exceptions because, as the United States Supreme Court has explained, even the threat of disclosure would have a detrimental effect on attorneys' ability to advocate for their clients while preserving their ethical duty of confidentiality."[35]

   iii. The Court further stated that the appeal in this case must be placed within the context of the thousands of other ongoing asbestos tort actions throughout the country.

   iv. If this appeal were dismissed and the relevant documents were disclosed in the present case, the claimants in other asbestos tort actions would be likely to seek discovery orders forcing the plaintiff to disclose the documents it had disclosed to the defendants in the present dispute.

   v. The plaintiff may be prejudiced regarding its handling of ongoing and future asbestos tort actions because it would be forced to communicate with its attorneys in that context knowing that their communications might not be kept confidential if later requested by the defendants.

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[33] 619 P.2d 41 (Colo. 1980).
[34] 730 A.2d 51 (Conn. 1999).
[35] Id. at 58 *quoting Hickman v. Taylor*, 329 U.S. 495 at 511 (1947) (where threat of disclosure, inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial . . . [causing] the interests of the clients and the cause of justice to be poorly served.)

III. POTENTIAL FOR CONFLICTS OF INTEREST

A. Current Clients—Colorado.

1. Colorado Rule of Professional Conduct 1.7, entitled "Conflict of Interest: Current Clients" states:

   a. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

      i. the representation of one client will be directly adverse to another client; or

      ii. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of a lawyer.

   b. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

      i. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

      ii. the representation is not prohibited by law;

      iii. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

      iv. each affected client gives informed consent, confirmed in writing.

2. Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-

lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.[36]

3. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.[37]

4. Colorado Rule of Professional Conduct 1.8, entitled "Conflict of Interest: Current Clients: Specific Rules," states:

   a. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

      i. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

      ii. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

      iii. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in that transaction, including whether the lawyer is representing the client in the transaction.

   b. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

   c. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child,

[36] Colorado Rule of Professional Conduct 1.7, cmt. 6.
[37] Id.

grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

d. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

e. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

   i. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

   ii. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

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

   i. the client gives informed consent;

   ii. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

   iii. information relating to representation of a client is protected as required by Rule 1.6.

g. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

h. A lawyer shall not:

   i. make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

ii. settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

i. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client, except that the lawyer may:

i. acquire a lien authorized by law to secure the lawyer's fee or expenses; and

ii. contract with a client for a reasonable contingent fee in a civil case.

j. A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

k. While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them.

B. Current Clients—New York.

1. New York Rule of Professional Conduct 1.7, entitled "Conflict of Interest: Current Clients" states:

a. Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

i. the representation will involve the lawyer in representing differing interests; or

ii. there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

b. Notwithstanding the existence of a concurrent conflict of interest under paragraph a., a lawyer may represent a client if:

i. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

ii. the representation is not prohibited by law;

iii. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

iv. each affected client gives informed consent, confirmed in writing.

c. It should be noted that in paragraph (a) of New York Rule 1.7, the phrase “concurrent conflict of interest” is not used (as compared to the Model Rules); however, in paragraph (b) of New York Rule 1.7, the term does, in fact, appear. Query whether New York inadvertently omitted this phrase from paragraph (a) of its own rule.

2. New York Rule of Professional Conduct 1.8, entitled “Current Clients: Specific Conflict of Interest Rules” is similar to the Colorado Rule 1.8, discussed above.

C. Current Clients—California.

1. California Rule of Professional Conduct 3-310 is entitled “Avoiding the Representation of Adverse Interests.”

a. Rule 3-310(B) states: “A member shall not accept or continue representation of a client without providing written disclosure to the client where:

i. the member has a legal, business, financial, professional, or personal relationship with a party or witness in the same manner; or

ii. the member knows or reasonably should know that:

(A) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(B) the previous relationship would substantially affect the member’s representation; or

iii. the member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

iv. the member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

b. Rule 3-310(E) states: "a member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

c. The discussion to the above-referenced sections of Rule 3-310 states: "paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies."

d. The discussion further states: "paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation."

2. California Rule 3-300, entitled "Avoiding Interests Adverse to a Client" states:

a. A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

i. The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

ii. The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

iii. The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

D. Former Clients—Colorado.

1 The attorney-client privilege still attaches after the representation terminates as to communications between a client and his/her former attorney.

2. Colorado Rule of Professional Conduct 1.9, entitled "Duties to Former Clients," states:

a. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

b. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client

i. whose interests are materially adverse to that person; and

ii. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

c. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

i. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

ii. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

D. Former Clients—New York. New York Rule of Professional Conduct 1.9, entitled "Duties to Former Clients" is substantially similar to the Model Rules and Colorado's version.

E. Former Clients—California. California Rule of Professional Conduct 3-310 (discussed above) also pertains to former clients.

IV. WITHDRAWING OR TERMINATING REPRESENTATION.

A. Model Rule 1.16, entitled "Declining or Terminating Representation."

1. This Model Rule states: Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

   i. the representation will result in violation of the rules of professional conduct or other law;

   ii. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

   iii. the lawyer is discharged.

Except as stated in paragraph iii., a lawyer may withdraw from representing a client if:

   i. withdrawal can be accomplished without material adverse effect on the interests of the client;

   ii. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

   iii. the client has used the lawyer's services to perpetrate a crime or fraud;

   iv. the client insists upon taking an action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

   v. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

   vi. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

vii. other good cause for withdrawal exists.

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. (Colorado is an "entire file approach" state).

2. Comment 7 to Model Rule 1.16 states that a lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it.

3. Comment 7 also states that withdrawal is permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

4. Colorado Rule of Professional Conduct 1.16 mirrors Model Rule 1.16, as discussed immediately above.

5. New York Rule of Professional Conduct 1.16, entitled "Declining or Terminating Representation," is more comprehensive than Model Rule 1.16. New York Rule 1.16 states:

   a. A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

      i. bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

ii. present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

b. Except as stated in paragraph d., a lawyer shall withdraw from the representation of a client when:

i. the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

ii. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

iii. the lawyer is discharged; or

iv. the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

c. Except as stated in paragraph d., a lawyer may withdraw from representing a client when:

i. withdrawal can be accomplished without material adverse effect on the interests of the client;

ii. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

iii. the client has used the lawyer's services to perpetrate a crime or fraud;

iv. the client insists upon taking action with which the lawyer has a fundamental disagreement;

v. the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

vi. the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

vii. the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

viii. the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

ix. the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

x. the client knowingly and freely assents to termination of the employment;

xi. withdrawal is permitted under Rule 1.13(c) or other law;

xii. the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

xiii. the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

d. If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

e. Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

f. New York Rule 1.16 is more in-depth than Model Rule 1.16 in that it adds a section to the rule regarding when a lawyer shall not accept employment on a person's behalf.

g. Additionally, New York Rule 1.16 contains additional criteria in which an attorney may withdraw his or her representation (subject to a court's approval).

6. California Rule of Professional Conduct 3-700, entitled "Termination of Employment," states:

   a. In General.

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

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

   b. Mandatory Withdrawal. A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if

      i. The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

      ii. The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

      iii. The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

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

i. The client:

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(B) seeks to pursue an illegal course of conduct, or

(C) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(D) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(E) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(F) breaches an agreement or obligation to the member as to expenses or fees.

ii. The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

iii. The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

iv. The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

v. The client knowingly and freely assents to termination of the employment; or

vi. The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

d. Papers, Property, and Fees.

i. A member whose employment has terminated shall:

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

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

V. WHEN IS ASSET PROTECTION PLANNING ETHICAL AND WHEN DOES IT CROSS THE LINE INTO THE UNETHICAL?

A. Introduction.

1. The asset protection planner must take certain considerations into account before proceeding with the implementation of a client's overall asset protection plan, in the interest of safeguarding against civil liability exposure.

2. If an asset protection plan cannot be implemented without subjecting the planner to more than the usual level of liability exposure (which every lawyer has in day to day practice, to varying degrees depending on his or her area of practice), the planner should reconsider whether to become involved. No fee is worth the asset protection planner risking his or her license or inheriting the client's financial problems.

3. Sources of potential civil liability for the asset protection planner include claims sounding in malpractice, fraud, breach of fiduciary duty, conversion, and fraudulent transfer, which (depending on the jurisdiction and/or the facts) could be couched in terms of direct liability, co-conspirator liability, and/or aiding and abetting liability.

4. Asset protection planners should take note that under conditions akin to a "perfect storm," especially in our litigious society, it is conceivable that civil claims may be asserted against a planner for assisting a client regardless of the level of care asserted or the amount of due diligence exercised.

5. American Bar Association Asset Protection Group

   a. The Asset Protection Planning Committee sprung from the widespread acknowledgment throughout the estate planning bar that planning to protect a client's capital accumulation during the client's lifetime and after death should be one of the essential considerations in an estate plan.

   b. Members of the Committee aim to apply high ethical standards, while employing and promulgating the latest techniques in domestic and international wealth preservation strategies.

   c. Members enthusiastically exchange legal developments, ideas, and personal experience with other Committee members as well as members of the bar in general, through regular presentations at ABA conferences, webinars, and the like, with a view toward education and the development of professional recognition and respect for this sub-specialty and how it benefits clients.

6. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*[38]

   a. In this seminal case in which the United States Supreme Court failed to apply an equitable pre-judgment remedy of a preliminary injunction restraining a party from transferring its assets, the Court stated:

      > [W]e suspect there is absolutely nothing new about debtors trying to avoid paying their debts, or seeking to favor some creditors over others—or even about their seeking to achieve these ends through sophisticated . . . strategies. The law of fraudulent conveyances and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor's use of his unencumbered property before judgment was not.[39]

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[38] 119 S. Ct. 1961 (1999).
[39] Id. at 1970.

B. Model Rule of Professional Conduct 4.4—"Respect for Rights of Third Persons"

1. In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

2. A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

C. Malpractice Claims

1. An attorney who assists or advises a client with respect to property transfers that are ultimately found to constitute fraudulent transfers could be sued for malpractice.

2. A common malpractice action involves a client's allegations of negligence on the attorney's part. The client would thus attempt to prove that the attorney owed the client a duty of care that was breached, and the client suffered damages that he/she would not have suffered had the attorney advised another course of action.

3. A more interesting issue is whether the attorney's client's adversary can sue an attorney for malpractice.

a. In a majority of jurisdictions, a plaintiff must stand in privity of contract with the attorney to have standing to bring a malpractice action, unless collusion or fraud is also alleged.

b. Certain jurisdictions, however, may allow such a cause of action under third-party beneficiary principles. Third party causes of action have been upheld in suits by will and trust beneficiaries, both under breach of contract and negligence theories.[40]

c. The attorney's role with regard to third party plaintiffs in these estate planning situations is distinguishable, however, from the attorney's role *vis-a-vis* a client's creditors. The beneficiaries of a will or trust are, of course, intended beneficiaries of the client's overall estate plan. This is

[40] See, e.g., *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962); *Heyer v. Flaig*, 149 P.2d 161 (Cal. 1969); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976); and *Needham v. Hamilton*, 459 A.2d 1060 (D.C. App. 1983), *aff'd* 519 A.2d 172 (D.C. App. 1986).

quite different from the situation that exists with regard to a client's creditors.

4. A balancing test has been adopted in some states to determine whether an attorney can be found to have a duty of care to third parties.

   a. Among the criteria that courts have examined are the extent to which the transaction was intended to affect the third party, the foreseeability of harm, the moral blame associated with the attorney's conduct, the plaintiff's injury, and the connection between the attorney's actions and the injury.[41]

   b. Other states have both rejected such a balancing test and refused to extend the exception to the privity requirement that has in some cases been extended in the area of will drafting.[42]

5. Another potential type of malpractice claim that a client (or, more likely, a former client) might bring is one alleging that the asset protection plan "didn't work;" that it failed to protect assets when it was later attacked. The lawyer can mitigate these claims, however, by disclosing to the client up front the risks associated with a given asset protection plan. Of course, every situation is case specific and fact sensitive.

6. Consider as well the liability exposure of the estate planning attorney who either fails to advise the client of asset protection opportunities as the estate is planned or who fails to exclude asset protection from the scope of the engagement, and whose client's estate is later moderately to materially depleted by unexpected litigation.

D. Aiding and Abetting Claims - Generally

1. The potential exists for an asset protection planner to be accused of being liable for aiding and abetting a client with respect to one or more types of civil liability issues.

[41] See, e.g., *Flaherty v. Weinberg*, 492 A.2d 618, 622 (Md. App. 1985).
[42] See, e.g., *Angel, Cohen & Rogovin v. Oberon Inv.*, 512 So. 2d 192 (Fla. 1987) (an attorney had no duty to a corporation where the corporation's attorney hired him to purchase, as his nominee, stock of the corporation's subsidiary so that he could sell the subsidiary's primary asset at a profit which was secreted from the corporation); *Baker v. Wood, Ris & Hames*, Case No. 13SC554 (Colo. January 19, 2016) applied a "strict privity rule" with regard to any third party beneficiaries. Attorney owed no duty to any such beneficiaries.

2. That is, if proper procedures and due diligence are not undertaken by the planner at the time a client's asset protection plan is prepared and implemented, a claimant or creditor (or perhaps other adversary) may allege that the planner is liable for aiding and abetting the client with underlying civil liability sounding in fraud, breach of fiduciary duty, conversion, fraudulent transfer, or the like.

3. In order to assert a viable claim against an asset protection planner for aiding and abetting, the elements generally include demonstrating the existence of an underlying tort, "actual knowledge," and the providing of "substantial assistance."

4. To guard against these types of claims, the planner should take certain precautions in the early stages of the representation to ensure that the client is being honest and forthcoming with respect to the planning for which the planner was hired. Even here, this is no guarantee against a suit. Remember, you don't have to be wrong to be sued, and you don't have to be wrong to lose. Both of the practical considerations are good arguments in favor of advance asset protection planning!

5. If, in the course of representing a client, the planner receives "actual knowledge" of a client's fraud or intended fraud or other wrongful conduct, the planner should immediately withdraw his or her representation and/or seek legal counsel from a specialist in legal ethics as to the proper course of action to take.

E. Aiding and Abetting a Fraud.

1. The elements for a claim of aiding and abetting a fraud in, for example, New York include:

a. the existence of an underlying fraud;

b. the defendant attorney had knowledge of the fraud; and

c. the defendant attorney provided substantial assistance to advance the fraud's commission.[43]

2. To establish a cause of action alleging fraud, the plaintiff must show "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the

[43] See *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995); *McDaniel v. Bear Stearns & Co, Inc.*, 196 F.Supp. 2d 343 (S.D.N.Y. 2002); *Lerner v. Fleet Bank et al.*, 2006 WL 2260822 (2d Cir. 2006).

other party and to induce them to act upon it, causing injury."[44] An omission of a material fact can also serve as the basis of a fraud claim.

3. Moreover, the plaintiff must show not only that he or she actually relied on the misrepresentation, but also that such reliance was reasonable. "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."[45]

4. Claims involving aiding and abetting a fraud in New York are subject to Federal Rule of Civil Procedure 9(b), which sets forth a heightened pleading standard for fraud allegations.

   a. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[46]

   b. In order to comply with Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[47]

   c. Further, a plaintiff must allege facts that give rise to a *strong inference* of fraudulent intent.[48] A "strong inference" may be established by either (a) alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness."[49]

5. A defendant "substantially assists" the commission of a fraud when the defendant "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to

[44] *Twentysix New York, Inc., v. Sporn Group, Inc.* 2008 NY Slip Op 31626(U) (N.Y. Sup. Ct. 6/13/2008) citing *McMorrow v. Dime Sav. Bank of Williamsburgh*, 48 A.D.3d 646 (2d Dept. 2008) and *Jo Ann Homes at Bellmore v. Dworetz*, 25 N.Y.2d 112, 119 (1969).
[45] Id. citing *Bernstein v. Kelso & Co., Inc.*, 231 A.D.2d 314, 320 (1st Dept. 1997).
[46] Id. at 31-32.
[47] *Mills v. Polar Molecular Corp*, 12 F.3d 1170, 1175 (2d Cir. 1993).
[48] *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995).
[49] *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994).

proceed," and when its "actions . . . proximately cause the harm on which the primary liability is predicated."[50]

6. Further, "where a defendant does not owe a fiduciary duty directly to the plaintiffs, mere 'inaction' by the defendant cannot constitute 'actionable participation.'"[51] "Indeed, the 'scienter' requirement scales upward, and plaintiffs have the additional burden of showing that the assistance rendered is 'both substantial and knowing;' in other words, there must be something close to an actual intent to aid in fraud or scienter of the 'conscious intent' variety."[52]

F. Aiding and Abetting a Breach of Fiduciary Duty.

1. Using New York law as an example, there are three elements to a claim for aiding and abetting a breach of fiduciary duty:

   a. "a breach by a fiduciary of obligations to another, of which the aider and abettor had 'actual knowledge;'"[53]

   b. "the defendant knowingly induced or participated in the breach;"[54] and

   c. "plaintiff suffered damage as a result of the breach."[55]

2. "Inducement" is defined by Black's Law Dictionary as "the act or process of enticing or persuading another person to take a certain cause of action." "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator."[56]

3. Substantial assistance may only be found where the alleged aider and abettor "affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur."[57]

4. Further, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.[58]

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[50] *Filler v. Hanvit Bank*, 339 F.Supp. 2d 553, 557 (S.D.N.Y. 2004) quoting *Cromer Fin. Ltd. v. Berger*, 137 F.Supp.2d 452, 470 (S.D.N.Y. 2001).
[51] *McDaniel v. Bear Stearns & Co., Inc.* 196 F.Supp. 2d 343, 352 (S.D.N.Y. 2002) quoting *Kolbeck v. LIT Am, Inc.*, 939 F.Supp. 240, 249 (S.D.N.Y. 1996).
[52] *McDaniel v. Bear Stearns & Co., Inc.*, 196 F.Supp. 2d at 352.
[53] *In re Sharp Corp.* 403 F.3d 43 (2d Cir. 2005) quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 125; 760 N.Y.S.2d 157, 169 (1st Dept. 2003).
[54] Id. quoting *Kaufman*, 307 A.D.2d at 125; 760 N.Y.S.2d 157.
[55] Id.
[56] Id.
[57] Id.

G. Aiding and Abetting a Conversion.

1. Conversion has been defined as the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights."[59]

2. In order to state a claim for aiding and abetting a conversion, the plaintiff must allege:

a. the existence of a primary violation;

b. knowledge of this violation on the part of the aider and abettor; and

c. substantial assistance by the aider and abettor in the achievement of the primary violation.[60]

H. Aiding and Abetting a Fraudulent Transfer—discussed further below in this outline.

I. Conspiracy Claims.

1. There is no independent cause of action for conspiracy. The underlying basis for a conspiracy action must be an independent wrong or tort that, by itself, would constitute a cause of action if done by one person.

2. To successfully bring a conspiracy action against a planner based on an underlying allegation of fraud, a third-party plaintiff would have to prove:

a. a fraudulent act had, in fact, been committed;

b. a conspiracy existed (i.e., the asset protection planner acted with the client in a series of actions that included or culminated in the fraudulent act); and

c. the plaintiff suffered injury as a result of the fraudulent acts.[61]

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[58] Id.
[59] *Vigilant Insurance Company of America v. Housing Authority of the City of El Paso, Texas*, 637 N.Y.S.2d 342, 660 N.E.2d 1121 (1995).
[60] *Calcutti v. SBU, Inc.*, 273 F.Supp. 2d 488, 493 (S.D.N.Y. 2003).
[61] See *Bosak v. McDonough*, 549 N.E.2d 643 (Ill. App. 1st Dist. 1989) (absent evidence that the attorney counseled the debtor to defraud the lender or agreed to participate in any fraud, the attorney was not guilty of conspiracy).

3. Under New York law, for example, a prima facie showing of a conspiracy requires an allegation of a *primary tort*, and then four additional elements:

   a. a corrupt agreement between two or more parties;

   b. an overt act in furtherance of the agreement;

   c. the parties' intentional participation in the furtherance of a plan or purpose; and

   d. resulting damage or injury.[62]

4. According to reported New York cases, the requisite relationship between a defendant and its New York co-conspirators is established by showing that:

   a. the defendant had an awareness of the effects in New York of its activity;

   b. the activity of the co-conspirators in New York was to *benefit* the out-of-state conspirators; and

   c. the co-conspirators acting in New York acted 'at the direction or under the control,' or 'at the request of or on behalf of' the out-of-state defendant.[63]

5. As a conspiracy can rarely be established by direct proof, the law permits a conspiracy to be shown by circumstantial evidence. "This is but a rule of necessity; even so, neither conjecture, surmise, nor suspicion can take the place of evidence. The rule carries no such implication or dispensation and the rule permitting proof of a conspiracy by means of circumstantial evidence is but the adoption of a formula that if from an established set of circumstances a fair and reasonable inference or deduction may be drawn as indicating the existence of a fact, it may be considered as proof of the fact."[64]

VI. PROPERLY SCREENING THE CLIENT

A. As discussed above, conducting the requisite amount of due diligence on a client may assist an attorney in avoiding liability should it turn out that the

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[62] *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F.Supp.2d 431 (S.D.N.Y. 2000) citing *Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1267 and *Kashi v. Gratsos,* 790 F.2d 1050, 1055 (2d Cir. 1986).
[63] *Best Cellars, Inc.*, 90 F.Supp. 2d at 446 quoting *Chrysler Capital Corp.*, 778 F.Supp. at 1268-1269.
[64] *Best Cellars, Inc.*, 90 F.Supp. 2d at 446 quoting *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 240 (2d Cir. 1999).

client was not fully above-board when explaining the nature and extent of any claimant or creditor issues or the source of their existing assets and wealth.

B. Initial Client Interview

1. The attorney should ask questions regarding the client's need or desire for asset protection, and should inquire about past, current and anticipated claims and suits.

2. A simple Internet search of the client's name could be undertaken.

3. Personal, tax and financial information on the client should be requested.

4. Inquiry should be made about the origins and sources of wealth.

C. Solvency Determination

1. The attorney should ascertain that the client is and post-planning will be solvent (on an assets less liabilities basis, as well as on the basis of the client's ability pay his or her reasonably anticipated obligations as they become due). An affidavit of solvency, discussed below, is invaluable in making this determination.

2. *Goldberg v. Rosen*[65]

a. *Goldberg v. Rosen* was a case of first impression with respect to asset protection trusts, as it is the first time a settlor's Affidavit of Solvency was so pivotal in the case.

b. An Affidavit of Solvency is typically required not only by the asset protection attorney but by the trustee(s) of the trust as well, for these professionals want the client to swear or attest, in a notarized document, as to the client's financial well-being as of the time of settlement. In an Affidavit of Solvency, the client will typically represent that (among other things) there are no pending, threatened, or expected claims or outstanding judgments, and that the client is not contemplating bankruptcy at the time the trust is settled.

c. *Goldberg v. Rosen* involved Akram Niroomand ("Debtor"), who in 2007 hired Howard D. Rosen, Esq. of Donlevy-Rosen & Rosen, P.A. ("Rosen") in Florida to prepare an

[65] 2012 WL 4933299 (11th Cir. October 17, 2012).

offshore asset protection trust (the “Trust”), for $45,000 in legal fees.

d. About a year later, a judgment of close to $3 million (the “Judgment”) was entered against Debtor. About six months later, Debtor filed for bankruptcy protection. Alan Goldberg was the bankruptcy trustee (“Trustee”) in Debtor’s Chapter 7 bankruptcy case.

e. Trustee filed a claim against Rosen seeking to recover the $45,000.00 in attorney fees and costs paid as fraudulent transfers under 11 U.S.C. Section 548, arguing, among other things, that Debtor was insolvent at the time of the Debtor’s transfers to the Trust.

f. “The bankruptcy court conducted a bench trial of Trustee’s claims. The Trustee presented only testimony of the Debtor and then rested, although the district court [in subsequent proceedings] admitted ‘voluminous documentary and testimonial evidence.’ Included in that evidence was the Debtor’s Affidavit of Solvency executed when she retained the defendants’ services in which she testified that she was solvent and could pay her anticipated debts, including lawsuit judgments.”[66]

g. “The Debtor testified that she was insolvent at the time of the transfers, but the record evidence, including her affidavits (sic) of solvency, was used to impeach her. As a result, the bankruptcy court did not credit her testimony.”[67]

h. The bankruptcy court found against the Trustee, and the Trustee appealed to the District Court. The District Court also found against the Trustee, who then appealed to the United States Court of Appeals for the 11th Circuit.

The Court of Appeals found that there was no establishment of insolvency with respect to potential obstructive fraud or fraudulent transfer claims, and stated:

> In fact, the record is abundant with records of solvency. The witness signed a solvency affidavit, which she said she did not read, but the Court notes—noted that the witness could remember some things in the way of financial numbers of a rather complicated structure down to the penny, and other

[66] Id. at *1.
[67] Id.

things, she couldn't remember at all. But aside from that, it's the opinion of the Court that the [Trustee's] case is woefully lacking in any proof on any of the counts, and therefore, [Rosen's] motion to dismiss should be granted.[68]

D. Engagement letter. Before commencing with representing a client, law firms are best served to prepare an engagement letter to be reviewed and signed by the client(s) in order to confirm the terms of the law firm's engagement as well as to prevent any future issues or surprises for one of the parties concerning the scope of the firm's representation.

E. There are no specific ethics "rules" that refer either to asset protection planning or integrated estate planning.

F. Ethics opinions or rulings in some states have dealt with attorneys advising or assisting clients with transfers that may later be found to be a fraudulent transfer.

G. Forty-nine states and the District of Columbia have enacted some form of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules").

1. The Model Rules define "fraud" or "fraudulent" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[69]

2. If the attorney conduct does not amount to fraud or is otherwise not fraudulent, an attorney practicing in a Model Rules jurisdiction would be acting within the bounds of propriety when engaging in integrated estate planning and its asset protection component. The reader should remember the substantive legal distinctions between a fraudulent transfer and conduct that is fraudulent in nature.

H. State and Local Ethics Opinions.

1. Connecticut

a. In Informal Opinion 91-23, an attorney requested an opinion about whether a lawyer could ethically recommend and/or assist a client in transferring a client's jointly owned home to his wife when the client had substantial debts beyond his ability to repay.

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[68] Id. at **1-2.
[69] Model Rule of Professional Conduct 1.0(d).

b. The Connecticut Bar Association's Committee on Professional Ethics ruled:

> A lawyer may not counsel or assist a client to engage in a fraudulent transfer that the lawyer knows is either intended to deceive creditors or that has no substantial purpose other than to delay or burden creditors.
>
> Whether or not a particular transaction is a fraudulent transfer as a matter of substantive law is not the decisive factor in applying the Rules. The decisive factors are whether the lawyer knows that the transfer constitutes conduct having a purpose to deceive or whether in counseling or assisting the client the lawyer is using means that have no substantial purpose other than to embarrass, delay or burden third parties.
>
> While all fraudulent transfers are generally thought of as illegal and can be set aside, the Rules do not apply to all illegal conduct but rather to conduct that is known to be criminal or fraudulent.

2. San Diego County Bar Association.

a. Ethics Opinion 1993-1 of the Legal Ethics and Unlawful Practice Committee considered the extent to which a member of the California State Bar Association could ethically advise or otherwise assist a client avoid existing and identifiable creditors' rights.

b. The Committee held that any attorney could not furnish advice or institute asset protection techniques unless the attorney did so in compliance with Rule 3-210 of the California Rules of Professional Conduct, entitled "Advising the Violation of the Law," which states:

> A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

c. Also, as California has criminalized the act of causing a fraudulent conveyance,[70] the committee held that it would be a violation of the California Rules of Professional Conduct for the attorney to furnish advice or institute asset protection planning techniques where the client had existing and identifiable creditors.

d. Conversely, where no creditors exist, and the client's intent is not wrongful, there is no stated prohibition against asset protection planning in California.

3. South Carolina

a. A 1984 opinion of the Bar Ethics Advisory Committee held that it is ethical for an attorney to transfer a client's assets to protect against the potential claims of future creditors.[71]

b. The underlying issue was whether an attorney was prohibited from transferring a client's property from the client's name into the client's spouse's name in anticipation of the possibility of a judgment being entered against the client.

c. The committee held that such conduct for the sole purpose of avoiding an immediate reasonable probability of judgment would be an ethical violation.

d. The committee also stated:

> The critical issue would be whether or not the transfer took place with a reasonable prospect that a judgment would be obtained against the client, or whether or not the transfer took place to avoid some possibility in the distant future.
>
> If . . . there does not exist the immediate reasonable prospect of a judgment being entered against the client, the transfer merely to avoid the future

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[70] Id. at p. 44. See California Penal Code Section 531, which states: "Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract or conveyance, had, made, or contrived with intent to deceive and defraud others, or to defeat, hinder, or delay creditors or others of their just debts, damages, or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies, or defends the same, or any of them, as true, and done, had, or made in good faith, or upon good consideration, or aliens, assigns, or sells any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor."

[71] Id. at p. 44.

possibility of an action by a creditor or creditors would not be [an ethical violation].

VII. FRAUD VS. FRAUDULENT CONVEYANCE.

1. Fraud involves a knowing misrepresentation. Fraudulent transfer law focuses on transactions that wrong creditors.

2. The term "fraudulent transfer" implies fraud, however, the definitions of fraud and fraudulent transfer are actually quite different. Simply put, fraud is lying. Courts have not limited themselves to an "all-embracing definition" of fraud and have determined the existence of fraud based on the facts of each case.[72]

3. The penalty that applies to a littering (a misdemeanor) applies to a fraudulent conveyance. The penalty applied to fraud could be negligence and grossly negligent misrepresentations.[73]

4. *In re Wassenaar*[74]

   a. In *Wassenaar*, a federal bankruptcy court recognized the significant difference between a fraudulent conveyance and fraud.

   b. *Wassenaar* involved the issue of whether creditors in a bankruptcy, who were successful in asserting a claim for fraudulent conveyance, were entitled to attorneys' fees under Virginia's law permitting an award of fees in a "fraud" suit.

   c. The court observed that the tort of fraud required an "intentional, knowing, misrepresentation by the defendant of a material fact upon which the plaintiff has relied to his detriment."[75]

   d. Because the creditors had only established that a fraudulent conveyance occurred, and had not proven that there was any intentional misrepresentation to the creditors upon which they detrimentally relied, there was no fraud and the creditors were not entitled to additional attorneys' fees.

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[72] *American Laundry Machinery Co. v. Skinner*, 34 S.E. 2d. 190, 193 (N.C. 1945), see also *Meldrum v. Meldrum*, 24 P. 1083, 1086 (Colo. 1890).
[73] *Ellerin v. Fairfax Sav., F.S.B.*, 652 A. 2d 1117, 1127 (Md. 1995).
[74] 268 B.R. 477 (W.D. Va. 2001).
[75] Id. at 480.

e. The court clearly based its holding upon the obvious; that fraud and fraudulent conveyance are separate and distinctly different actions.

f. In *Wassenaar*, the court was faced with the same issue presented here: is a fraudulent conveyance claim a fraud claim for the purpose of waiving or granting rights that are only waived or granted when there is a fraud claim. The court framed the issue as "*Is a 'fraudulent conveyance' equivalent to 'fraud' for the purpose of awarding attorney's fees under Virginia state law?*"[76]

g. The court continued by explaining that under Virginia law, a chancellor in equity, in his discretion, may award attorneys' fees to a prevailing party in a fraud suit. The appellants in the case were claiming that a fraudulent conveyance was fraud under Virginia law, and that they should be awarded attorneys' fees.

h. In deciding that the appellants were not entitled to be considered for an award of attorneys' fees, the federal court relied upon a decision of the Virginia Supreme Court which observed as follows:

> The wrong of fraud and deceit requires an intentional, knowing misrepresentation by the defendant of a material fact upon which the plaintiff has relied to his detriment. [The plaintiff] has not established the essential elements of that wrong…[The plaintiff's] argument, at most, amounts to an assertion that a fraudulent conveyance occurred…In short, common-law fraud and fraudulent conveyance under [the Virginia statute] are distinct causes of action.[77]

5. *Kommanditselskab Supertrans v. O.C.C. Shipping, Inc.*[78]

a. In this case, the difference between a fraud and a fraudulent conveyance was dispositive on the question whether the court had admiralty jurisdiction.

b. The plaintiff proposed to assert a claim for common law intentional fraud; however, the defendant argued that the claim really stated a cause of action, if at all, for fraudulent conveyance.

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[76] Id.
[77] Id., quoting from *Cheatle v. Rudd's Swimming Pool Supply Co., Inc*., 234 Va. 207, 360 S.E.2d 828 (1987).
[78] 79 B.R. 534 (S.D.N.Y. 1987).

c. The distinction was critical because the court would not have jurisdiction if the plaintiff was stating a claim for intentional fraud as opposed to a claim for fraudulent conveyance; and the automatic stay provisions of the Bankruptcy Code (the defendant had previously filed for bankruptcy) would not operate to bar the plaintiff's lawsuit if it stated a claim for fraud, but would do so if the plaintiff's claim was really one for fraudulent conveyance because the plaintiff failed to establish that it had relied on any misrepresentation of the defendant to it detriment.

6. *Milroy v. Hanson*.[79]

a. In this case, the court was presented the question of whether evidence of oppression of a minority shareholder, including a breach of fiduciary duty, is properly equated with "fraud" for the purpose of establishing the crime/fraud exception.

b. The court held that unless the movant seeking to waive the attorney-client privilege makes a showing of an "intentional misrepresentation" for the purposes of gain, there is no justification to abrogate the attorney-client privilege through the crime/fraud exception.

c. The court stated that absent an intentional misrepresentation for the purposes of gain, the word 'fraud' has little or no meaning save for that which a particular judge chooses to give it.[80]

d. Because the movant failed to show an intentional misrepresentation, the court ruled that it had failed to establish the applicability of the crime-fraud exception.

VIII. WHEN CAN THE ATTORNEY BE TARGETED AS A CO-CONSPIRATOR WITH A CLIENT ENGAGING IN FRAUDULENT TRANSFERS?

A. Attorneys who assist clients with creditor protection matters, create creditor-protected entities, or develop and utilize asset protection techniques will be confronted with decisions every day that could have adverse effects on both their practice and their client's welfare.[81]

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[79] 902 F.Supp. 1029 (D. Neb. 1995).
[80] Id. at 1034.
[81] Gillen, Robert D., *Attorney Liability for Assisting in Asset Protection*, Asset Protection Strategies: Wealth Preservation Planning with Domestic and Offshore Entities Volume II, Chapter 17, p. 453.

B. Although an attorney can legally and ethically engage in an asset protection practice, the attorney must understand the limitations imposed by the law and ethical rules to determine the nature and extent of advice that may be provided to a client.[82]

C. Attorneys must take care not to be assisting a client with committing a fraudulent transfer to an integrated estate plan.

D. Aiding and Abetting a Fraudulent Transfer.

1. *Freeman v. First Union National Bank*[83]

a. The issue in *Freeman* was whether Florida's Uniform Fraudulent Transfer Act (FUFTA) created a cause of action for damages in favor of a creditor against an aider or abettor to a fraudulent transaction.

b. The plaintiff creditors ("Appellants") filed suit against First Union National Bank ("First Union") seeking monetary damages for First Union's role in an alleged fraudulent Ponzi scheme conducted by a company known as Unique Gems.

c. Appellants alleged that First Union, in its capacity as the financial institution that serviced Unique Gems' financial transactions, aided and abetted Unique Gems' fraudulent transfers of money that resulted in harm to Appellants.

d. The District Court dismissed Appellants' claim for failure to state a cause of action under Florida law because each case relied upon by Appellants recognized aiding and abetting under common law principles, but not as a violation of FUFTA.

e. The District Court stated that to attach common law aiding and abetting liability to a FUFTA violation is "inapposite in light of the remedies available under the statute."[84]

f. Appellants appealed the District Court's ruling to the United States Court of Appeals for the Eleventh Circuit. After examining Florida case law, the Eleventh Circuit concluded that the aiding and abetting claim was problematic because the lower courts had not approved such a cause of action and the Florida Supreme Court had

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[82] Id.
[83] 865 So.2d 1272; 2004 Fla. LEXIS 106 (Fla. 2004).
[84] Id. at *6.

not yet examined that particular question. The Eleventh Circuit certified the above issue to the Florida Supreme Court.

g. The Florida Supreme Court concluded that FUFTA was *not* intended to serve as a vehicle by which a creditor may bring a suit against a non-transferee party for monetary damages arising from the non-transferee party's alleged aiding-abetting of a fraudulent money transfer.[85]

h. The Florida Supreme Court focused its analysis on Section 726.108 of the Florida Statutes, which is the FUFTA creditor remedy section. Subsection (c)(3) states that a creditor may obtain as a remedy "any other relief the circumstances may require."

i. The Court stated that they believed that the "catch-all" phrase allowing courts to award "other relief" was intended by the Florida legislature to facilitate the use of the other remedies provided in the statute as opposed to creating a new and independent cause of action such as aider-abettor liability.

j. The Court opined that on the statute's face, there was no ambiguity with respect to whether FUFTA created an independent cause of action for aiding-abetting liability. "There simply is no language in FUFTA that suggests the creation of a distinct cause of action for aiding-abetting claims against non-transferees."[86]

k. As a result, the Court concluded that if it was to find in Appellants' favor, the Court would expand FUFTA beyond its facial application and in a manner that was outside the purpose and plain language of the statute.

l. Therefore, the Court held that FUFTA did not create a cause of action for damages in favor of a creditor against an aider or abettor to a fraudulent transaction.

2. *Double Oak Construction, L.L.C. v. Cornerstone Development International, L.L.C., et al.*[87]

a. Double Oak Construction, L.L.C. ("Plaintiff") entered into a contract with Cornerstone Development International,

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[85] Id. at *14.
[86] Id. at *11.
[87] 97 P.3d 140 (Colo. App. 2003).

L.L.C. ("Cornerstone"), Bonghil Ho, Brian Yoo and Muscanto, L.L.C. (collectively referred to as the "Defendants") to construct and expand a shopping plaza.

b. Ho named Yoo as Cornerstone's owner because Ho could not conduct business under his name due to outstanding and unsatisfied civil money judgments against him.

c. Plaintiff was not fully paid for its work and served Defendants with a demand for arbitration in January 1997.

d. In August 1997, Plaintiff obtained an arbitration award against Defendants for approximately $47,000.00 for work performed by Plaintiff in the construction of the shopping plaza.

e. The arbitration award was reduced to judgment in December 1997.

f. In February 1997, Cornerstone sold the shopping plaza for $1.4 million to a California corporation owned and managed by a business associate of Ho's brother.

g. The money received by Cornerstone was transferred to an individual in Hong Kong. In July 1998, the California corporation conveyed the property to the individual in Hong Kong in exchange for a promissory note in the amount of $1.389 million. The individual then conveyed the property to Muscanto, which is an entity controlled by Ho.

i. Plaintiff filed an action for civil conspiracy and for fraudulent conveyance. At trial, Ho admitted the reason for the transfers was to avoid execution on the property and to frustrate creditors. The court entered judgment for Plaintiff on the fraudulent transfer claim.

j. However, because the parties agreed that title to the property would remain with Muscanto, instead of voiding the conveyances, the trial court entered judgment for Plaintiff for more than $62,000.00 (the original judgment amount against Cornerstone, less a garnishment obtained, plus interest.)

k. The court further found that Cornerstone was the alter ego of Ho and Yoo and held them both personally liable for the amount of the judgment.

l. The trial court also found in Plaintiff's favor on the civil conspiracy claim and held Defendants jointly and severally liable for actual damages.

m. Defendants appealed the trial court's rulings.

n. The issues before the Colorado Court of Appeals included:

  i. Whether an underlying tort basis for a civil conspiracy claim is possible after tort claims, including fraudulent representation and breach of special duty, have been dismissed;

  ii. Whether a violation of the Colorado Uniform Fraudulent Transfer Act (CUFTA) constitutes a tort that would support a civil conspiracy claim; and

  iii. Whether a plaintiff's remedies are limited to those expressed under CUFTA.

o. The Colorado Court of Appeals concluded that a transfer in violation of CUFTA is a legal wrong which will support a conspiracy claim.[88] The court further held that a creditor who does not have a lien on the subject property is nevertheless entitled to assert a civil conspiracy cause of action against persons who participate in a fraudulent conveyance.[89]

p. In its analysis, the Colorado Court of Appeals stated that Defendants first asserted that because Plaintiff's tort claims for fraudulent representation and breach of special duty were dismissed, there was no underlying "tort" basis for the civil conspiracy claim. Defendants further asserted that a fraudulent conveyance is not a legal wrong that will support a conspiracy, at least until the creditor obtains a lien against the property transferred (based upon the applicable common law rule).

q. To establish a claim for civil conspiracy, a plaintiff must show by a preponderance of the evidence that there exists:

  i. an object to be accomplished;

  ii. an agreement by two or more persons on a course of action to accomplish that object;

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[88] Id. at 146.
[89] Id. at 147.

iii. in furtherance of that course of action, one or more unlawful acts which were performed to accomplish a lawful or unlawful goal, or one or more lawful acts which were performed to accomplish an unlawful goal; and

iv. damages to the plaintiff as a proximate result.[90]

r. The court ruled that implementation of CUFTA changed the common law rule and that a creditor who does not have a lien on the subject property is nevertheless entitled to assert a civil conspiracy cause of action against persons who participate in a fraudulent conveyance.

s. Defendants next asserted that the nature of the relief afforded by CUFTA is equitable, and therefore, a violation of the statute does not constitute a tort that would support a conspiracy claim. The court disagreed with Defendants' assertion, citing Colorado cases where a claim for conspiracy to defraud creditors was recognized.[91]

t. Next, Defendants contended that Plaintiff's remedies are limited to those expressed under CUFTA, and therefore, the lower court erred in imposing joint liability on the Defendants.

u. The Colorado Court of Appeals concluded that the remedies available to a victim of a fraudulent conveyance are not limited to those expressed within the applicable statute.

v. Colorado Revised Statutes § 38-8-108 lists CUFTA's remedies that are available to a victim of a fraudulent conveyance. These remedies include:

i. avoidance of the transfer to the extent necessary to satisfy the creditor’s claim;

ii. an attachment or other provisional remedy against the transferred asset;

iii. an injunction against further disposition by the debtor or transferee;

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[90] Id. at 146. See also *Magin v. DVCO Fuel Sys. Inc.*, 981 P.2d 673 (Colo. App. 1999) and *Nelson v. Elway*, 908 P.2d 102 (Colo. 1995).

[91] Id. at 147. See *Schreiber v. Burton*, 81 Colo. 370, 256 P. 1 (Colo. 1927); *Magin v. DVCO Fuel Sys. Inc., supra*; and *Hunter v. Ferguson*, 3 Colo. App. 287; 33 P. 82 (Colo. App. 1893).

iv. appointment of a receiver to take charge of the transferred asset; or

v. any other relief the circumstances may require.

w. The court opined that language of C.R.S. § 38-8-108 does not limit remedies available at law. Further, C.R.S. § 38-8-111 states: “unless displaced by the provisions of this article, the principles of law and equity ... supplement the provisions of this article.” Therefore, this statutory language expressly permits parties to pursue other remedies, which demonstrates the Colorado state legislature's intention not to do away with preexisting common law claims and remedies by CUFTA's enactment.

x. The court further stated that civil conspiracy is an “independent tort,” and a claim for damages arising from a civil conspiracy may be pled as a separate claim.

y. Therefore, a civil conspiracy claim would likely provide Plaintiff with damage remedies independent of those provided for under CUFTA.

z. The Court of Appeals concluded that the trial court did not err in imposing joint liability on the Defendants for a conspiracy to fraudulently convey property.

3. *FDIC v. Porco*[92]

a. Plaintiff, the receiver of an insolvent bank, obtained a $6,000,000 money judgment in federal court against a director of the bank’s parent corporation for losses suffered by the bank as a result of the director’s involvement in the bank’s financial affairs.

b. Several years later, Plaintiff brought an action alleging that, during the lawsuit, Defendants (two bank officials) assisted the director in transferring money, in which the director had a beneficial interest, to a Swiss account.

c. Plaintiffs did not allege that Defendants were the funds’ recipients or that they benefited in any way from the transfer.

d. Plaintiffs alleged only that Defendants helped the director make the transfer, and thereby, fraudulently deprived

[92] 552 N.Y.S.2d 910 (Ct. App. 1990).

Plaintiff of money to which it should be entitled as a result of the prior judgment.

e. The New York Supreme Court denied Defendants' motion to dismiss the complaint for failure to state a cause of action. The Appellate Division reversed on grounds that under long-standing New York law, a creditor has no cause of action against a party who merely assists a debtor in transferring assets where there was neither a lien on the assets nor a judgment on the debt.

f. In its appeal to the New York Court of Appeals (the "Court"), Plaintiff conceded that New York's traditional rule rejects any cause of action for mere participation in the transfer of a debtor's property prior to the creditor obtaining a judgment or lien on the property.

g. Plaintiff argued, however, that the rule was changed with the enactment of sections 278 and 279 of New York's Debtor and Creditor Law.

h. The Court opined that as courts have held that a creditor's remedy for the transfer of its debtor's assets, where taken prior to a judgment on the debt, is to obtain a nullification of the conveyance and, where undertaken after judgment, additionally to secure the assets in satisfaction of the debt.

i. The Court further stated that sections 278 and 279 "did not, either explicitly or implicitly, create a creditor's remedy for money damages against parties who . . . were neither transferees of the assets nor beneficiaries of the conveyance."[93]

j. Plaintiff's next argument was that section 273-a of New York's Debtor and Creditor law created a creditor's cause of action in conspiracy, assertable against nontransferees or nonbeneficiaries solely for assisting in the conveyance of a debtor's assets.

k. The Court disagreed with this argument, and held that "the statute still cannot fairly be read as creating a remedy against nontransferees who . . . are not alleged to have dominion or control over those assets or to have benefited

[93] Id. at 911.

in any way from the conveyance. It is not for us to write such a remedy into the statute by judicial construction."[94]

4. *Joel v. Weber*[95]

   a. A claim that attorneys had knowingly and recklessly encouraged and assisted a client to commit a fraudulent transfer was found to state a legitimate cause of action for aiding and abetting.

   b. The plaintiff had to prove that a tort had been committed, that the attorney had knowledge of the tortious act, and that the attorney had given significant assistance to the debtor client.[96]

   c. *Joel* differs from *Porco* because the *Joel* defendants not only assisted in the transfer; *they were also the recipients of the transferred assets*.

5. *In re D.H. Overmyer Telecasting Co.*[97]

   a. The court held that an attorney who prepared transfer documents and received payment from funds that he knew resulted from the transaction was not liable under an independent tort claim, even though the attorney was aware of an earlier-filed constructive trust claim against the assets and even though the debtor realized only one-third of the assets' value as a result of the transfer.

   b. The concern was that the conspiracy theory may be expanded as courts get frustrated with finding the creditor protected assets located outside of the court's jurisdiction or in entities the court cannot reach, making the court more receptive to plaintiff's counsel's arguments that the professional adviser is liable as a co-conspirator.

   c. The possibility of a creditor pursuing the attorney who was advising the debtor on a conspiracy claim is still rather remote, since it takes *more than ministerial acts to create co-conspirator liability*.[98]

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[94] Id. at 912.
[95] 197 A.D.2d 396 (N.Y. App. Div., 1st Dept. 1993).
[96] See, e.g., *Crowthers McCall Patterns Inc. v. Lewis*, 129 B.R. 992, 999 (S.D.N.Y. 1991).
[97] 77 B.R. 128 (Bankr. N.D. Ohio 1987).
[98] See generally *Gutierrez et al. v. Givens et al*, 989 F.Supp. 1033 (S.D. Cal. 1997).

6. *Nastro v. D'Onofrio*[99]

a. *Nastro* involved an attempt by a debtor to transfer shares of stock and other assets to a Jersey trust. The debtor created and funded a Jersey (Channel Islands) Trust for the benefit of himself and his family two weeks after a California Superior Court entered a judgment against him for compensatory and punitive damages.

b. In June 2001, Nastro won a judgment against D'Onofrio for approximately $515,000 in compensatory damages and $1.6 million in punitive damages arising from D'Onofrio's misappropriation of corporate funds.

c. Nastro sought to enforce a judgment against D'Onofrio by attempting to attach D'Onofrio's assets. Two weeks after the judgment was entered, D'Onofrio transferred approximately $650,000 in company stock and a 50% limited liability company interest to Continental Trust Company Limited, a Jersey (Channel Islands) corporate trustee (the "Trustee"), who held the interests for the benefit of D'Onofrio, his wife and children in an irrevocable trust (which prohibited any transfers to D'Onofrio or his creditors).

d. Nastro alleged that the transfers were made without consideration and that the transfers left D'Onofrio without sufficient funds to satisfy Nastro's judgment.

e. Therefore, Nastro sought interim relief in the form of a preliminary injunction, naming the entire D'Onofrio family, the companies and the Trustee as the defendants.

f. The United States District Court for the District of Connecticut (the "Court") stated there was no Connecticut authority confirming the validity of a cause of action against an attorney for aiding a fraudulent transfer.

g. The Court further stated "to acknowledge this cause of action would be contrary to the Connecticut Supreme Court's reluctance to impose liability when such liability had the potential of interfering with the ethical obligations owed by an attorney to his or her client."[100]

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[99] 263 F.Supp. 446 (D. Conn. May 16, 2003).
[100] Id. quoting *Krawczyk v. Stingle*, 208 Conn. 239, 246, 543 A.2d 733 (1988).

h. In particular, with respect to liability under [the Connecticut Unfair Trade Practices Act], the Connecticut Supreme Court has stated:

> [providing] a private cause of action under [the Connecticut Unfair Trade Practices Act] ("CUTPA") to a supposedly aggrieved party for the actions of his or her opponent's attorney would stand the attorney-client relationship on its head and would compromise an attorney's duty of undivided loyalty to his or her client and thwart the exercise of the attorney's independent professional judgment on his or her clients behalf.[101]

7. In *McElhanon v. Hing,*[102]the Arizona Court of Appeals found that where an attorney assisted his client in making transfers with the actual intent to hinder, delay and defraud a judgment creditor, and where the actions of the attorney and his co-conspirator caused the property to depreciate in value or to be placed beyond the reach of the court, thus rendering the creditor's remedies under applicable fraudulent transfer law inadequate, the fraudulent transfer became a legal wrong that was properly the subject of a civil conspiracy suit, and the attorney could be held liable for damages.

8. *Iowa Supreme Court Attorney Disciplinary Board v. Ouderkirk*[103]

a. In *Ouderkirk*, the Iowa Supreme Court Attorney Disciplinary Board (the "Board") had to decide whether Mason Ouderkirk ("Ouderkirk") violated Iowa's disciplinary rules by assisting a client with asset transfers at a time when the client was subject to civil litigation after being convicted of voluntary manslaughter against his neighbor.

b. On January 13, 2003, Rodney Heemstra ("Heemstra") fatally shot Tommy Lyon ("Lyon") over a dispute related to farmland.

c. Heemstra alleged that he shot Lyon in self-defense and retained Ouderkirk to defend him against the charges. Ouderkirk, who was the Heemstra family attorney for many years prior, continued to assist the Heemstra family with real estate transactions after Lyon's death. Heemstra

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[101] Id. quoting *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 727, 627 A.2d 374 (Conn. 1993).
[102] 728 P.2d 256 (Ariz. Ct. App. 1985), aff'd in part and vacated in part, 728 P.2d 273 (Ariz. 1986), cert. denied, 481 U.S. 1030 (1987).
[103] 2014 WL 1260419 (Iowa, March 28, 2014).

transferred millions of dollars of property to his wife, Berta, who thereafter conveyed the property into various trusts. These trusts then conveyed such property to other members of the Heemstra family.

d. Lyon's estate challenged the asset transfers as fraudulent conveyances. The district court ruled in the estate's favor and found the transactions with which Ouderkirk assisted to be part of a complex shell game. The district court found that the Heemstras transferred assets in an intentional, harsh and cruel effort to put truth in [Heemstra's] arrogant claim that Lyon's wife would never see a dime of his money.

e. The district court unwound a number of the asset transfers and awarded actual and punitive damages against the Heemstras.

f. Lyon's widow thereafter filed an ethics complaint against Ouderkirk. The Board charged Ouderkirk with violating several ethical rules.

g. The Grievance Commission of the Supreme Court of Iowa (the "Commission") found that the Heemstras deceived Ouderkirk, telling him that they had valid reasons for transferring their property and that they were selling much of their property to a bona fide purchaser.

h. The Commission also found that Ouderkirk lacked actual knowledge that the key transaction involved was a sham. The Commission found Ouderkirk's representation in one particular transaction violated several rules and recommended a public reprimand.

i. On appeal to the Board, the Board found that the Commission failed to prove any rule violation by a preponderance of the evidence, and therefore, the complaint against Ouderkirk was dismissed with prejudice.

j. In its analysis, the Board noted:

> As the Board noted at oral argument, assisting clients to defraud creditors is a type of behavior that increases public distrust of attorneys. Yet, lawyers routinely and appropriately advise clients on asset protection measures and represent clients defending collection actions. We would not want to chill proper advocacy or deter lawyers from representing

> clients who need legal advice and who without it may be more likely to break the law in evading creditors. We also note the dearth of precedent sanctioning lawyers, in the absence of self-dealing, for assisting clients in transactions later found to be a fraud on creditors. We recognize the factual and legal complexities in determining whether a particular conveyance is a fraud on creditors. And, we approach with caution ethics complaints initiated by a litigation adversary.

k. The Board further made it clear that if an attorney knows that a client is committing an act meant to defeat the clients creditors, then the line is crossed and the attorney is subject to discipline. The Board stated:

> If a lawyer knows a transfer is fraudulent and assists a client in completing the transfer nonetheless, it is no defense that the lawyer is acting merely as a scrivener. Though a client has the ultimate authority to determine the purposes to be served by legal representation, 'this authority is subject to the limitations of the law and the attorney's professional obligations. Iowa R. Prof'l Conduct 32:1.2 cmt. 1. As the New Jersey Supreme Court observed:
>
> It is no excuse for an attorney to say that he only did what he did because [he was] directed to do so by his client. The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. It is for the lawyer, not the client, to make this decision. *In re Blatt*, 324 A.2d 15, 18 (N.J. 1974).
>
> It should also go without saying that a lawyer cannot avoid disciplinary sanctions simply because a particular unethical practice is commonplace among lawyers.

l. In considering all the factors, the Board found that Ouderkirk did not possess the wrongful intent necessary to have conducted an ethical violation.

9. *The Cadle Company v. Woods & Erickson, LLP*[104]

a. The issue in *Cadle* was whether, under Nevada's fraudulent transfer law, a nontransferee law firm may be held liable for its client's fraudulent transfers under the accessory liability theories of conspiracy, aiding and abetting, or concert of action.

b. In 2004, Robert Krause ("Krause") retained Woods & Erickson, LLP ("Defendant") for estate planning services. In 2005, Defendant created various legal entities for Krause, including an asset protection trust, into which Krause eventually transferred his assets.

c. During this time, The Cadle Company ("Plaintiff") was attempting to collect on a California judgment against Krause. After learning of the transferred assets, Plaintiff sued Krause and Defendant in the underlying action, alleging:

   i. Krause fraudulently transferred assets in order to escape execution of the judgment; and

   ii. Defendant unlawfully facilitated the fraudulent transfers.

d. The district court dismissed Plaintiff's claims against Defendant without prejudice. Plaintiff then filed a second amended complaint against Defendant asserting claims for conspiracy, aiding and abetting and concert of action, all arising from Krause's alleged fraudulent transfers. After the district court denied Defendant's motion to dismiss the second amended complaint or for summary judgment, Defendant offered Plaintiff $8,000 to settle. The offer was refused and the case went to trial.

e. During trial, Defendant testified that at the time of Krause's estate planning, Defendant was unaware of Plaintiff's judgment against Krause. Once Defendant learned of the judgment, Krause informed Defendant that he would take care of it. Defendant informed Krause that transfers of assets into the trust could be set aside by a creditor.

f. The district court found in favor of Plaintiff against Krause. However, the district court found that Plaintiff had not shown clear and convincing evidence against Defendant's

[104] 2015 WL 1402689 (Nev. March 26, 2015).

intent to defraud or deceive. Therefore, the district court entered judgment in favor of Defendant on all claims. Plaintiff then appealed to the Nevada Supreme Court (the "Court").

g. In its analysis, the Court agreed with other states that rejected accessory liability because their respective state's fraudulent transfer statutes do not recognize claims against a nontransferee.[105] The Court also agreed with a subset of these decisions which reasoned "that fraudulent transfer claims are traditionally claims for equitable relief, noting that it makes little sense to impose an equitable remedy against someone who never had possession of the property."[106]

h. The Court opined that "[c]reditors do not possess *legal* claims for damages when they are the victims of fraudulent transfers. Instead, creditors have recourse in *equitable* proceedings in order to recover the property, or payment for its value, by which they are returned to their pre-transfer position. Nevada law does not create a legal cause of action for damages in excess of the value of the property to be recovered."[107]

i. The Court proceeded to distinguish legal and equitable remedies. "A judgment for damages is a legal remedy, whereas other remedies, such as avoidance or attachment, are equitable remedies. Nevada's fraudulent transfer statute creates equitable remedies including avoidance, attachment, and, subject to principles of equity and the rules of civil procedure, injunction, receivership, or other relief. This is in accord with the general rule that 'the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property.'"[108]

j. Next, the Court indicated that it made no sense to apply the equitable remedy of voiding a transfer of property against a party (Defendant) who never had possession of the transferred property. "First, the third party has no control over the property and, therefore, cannot return it to a

[105] See *FDIC v. Porco*, 552 N.E.2d 158, 160 (N.Y. 1990) which held that the New York debtor and creditor statute did not create a remedy against nontransferees who have no control over the asset or have not benefited, from the conveyance.
[106] *The Cadle Company v. Woods & Erickson, LLP*, 2015 WL 1402689 at *2.
[107] Id. at *3.
[108] Id.

creditor. Second, once a creditor is made whole by a successful action against the transferor or transferee, he is no longer in need of an equitable remedy against a third party.

k. As such, the Court concluded that "Nevada law does not recognize claims against nontransferees under theories of accessory liability."[109]

IX. CAN THE ATTORNEY BE LIABLE FOR NOT ADVISING THE CLIENT AS TO THE FULL RANGE OF ASSET PROTECTION STRATEGIES?

A. Assume a client meets with an attorney for estate planning. Further assume the client has a reasonably-sized estate and is involved in a profession where lawsuits are not uncommon.

B. The attorney does a very nice job on death-time aspects of the plan, but does not discuss asset protection goals and techniques with the client and, as such, no asset protection is incorporated into the plan.

C. Further assume a liability event occurs in two years and the client is sued, loses, and his estate is diminished to a sizable extent.

D. Does the attorney have meaningful exposure under a claim by the client for resulting losses to the estate, if there was a reasonable possibility that advance integrated estate planning would have better protected the estate from this sort of outcome? At a minimum, the client will be unhappy if the client knows that actions could have been taken to protect their assets and such actions were not taken. Thus, regardless of potential exposure, best practices would dictate that an estate planner should be familiar with basic asset protection strategies and discuss such strategies with the client.

E. As covered at the front end of this outline, many of the civil issues regarding asset protection planning involve transfers made when there is a pending, threatened, or expected claim.

F. A transfer that is made when there is a pending, threatened or expected claim may be deemed to be a fraudulent conveyance.

1. In this respect, one of the very first and most crucial questions that an asset protection planner needs to address with the prospective client is whether there are any pending, threatened, or expected claims or whether there are any outstanding judgments.

2. If there are any pending, threatened, or expected claims or outstanding judgments, this does not mean that the asset protection

[109] Id. at *4.

planner should automatically terminate the engagement. Rather, the specifics of the claim and, if possible, the estimated maximum exposure need to be assessed.

3. Then, some degree of asset protection planning may still be done with respect to future potential creditors.

G. If the client is contemplating bankruptcy, the planner should probably not be involved with any transfers. Rather, the planner should look at the possibility of protection under state exemption statutes, and, in certain cases (and subject to the new rules under recent bankruptcy reform), the possibility of changing domicile to a state that has more liberal exemptions than the current state of the debtor's residence.

H. If the client states that he or she is not aware of any pending, threatened, or expected claims, and that there are no outstanding judgments, an asset protection planner generally has no duty to perform a background check or actively question a client's integrity.

I. However, a planner should not proceed with "willful blindness" and ignore facts or circumstances that come to his or her attention.

X. WHO IS THE CLIENT?

A. Introduction

3. In the beginning stages of the attorney-client relationship, the attorney-client privilege applies to all communications made between the attorney and client for the purpose of furthering the scope of their relationship.

2. Typically, attorneys and law firms who deal with asset protection planning matters originally represent the client as an individual (the "Settlor") who has settled an integrated estate planning trust ("IEPT").

3. Asset protection planners should make sure to provide for what may happen in the event of a claimant or creditor threat.

l. One suggested course of action includes discontinuing the relationship between the attorney and the client as an individual and having the attorney represent solely the trustees in their capacity as fiduciaries of the IEPT.

m. The attorney-client privilege would then apply from that point forward to all communications between the attorney and the domestic and foreign trustees, (or just the foreign trustee if there are no domestic trustees or if all domestic trustees have been removed since the creditor situation arose).

n. Concomitantly, the privilege would apply to the Settlor of the IEPT as to previous communications.

4. Because of this background, integrated estate planning attorneys may deal with certain unique aspects of the attorney-client privilege.

B. Engagement Letters.

1. Before commencing with representing a client, law firms are best served to prepare an engagement letter to be reviewed and signed by the client(s) in order to confirm the terms of the law firm's engagement as well as to prevent any future issues or surprises for one of the parties concerning the scope of the firm's representation.

2. The engagement letter's basic terms should include at least the following information:

a. The scope of the firm's services;

b. The fee structure (i.e., flat fee or hourly rates);

c. How the clients' payments are to be structured;

d. Contingencies for additions or variations from the law firm's initial scope of work;

e. information pertaining to billing statements;

f. provisions regarding dispute resolution; and

g. the law firm's file retention policies upon the termination of the attorney-client relationship.

3. In the integrated estate planning context, certain additional issues should be addressed in the engagement letter.

a. Most importantly, the clients should be advised in the engagement letter against making fraudulent transfers as a result or consequence of their integrated estate planning. Sample language to this effect may include:

> We wish to confirm that any conveyancing that may be involved must not involve transfers that are

fraudulent as to creditors. Part of this analysis dictates that conveyances must not be made to the extent that you are thereby rendered insolvent, with due consideration being given to contingent liabilities and like factors. We also wish to confirm that you are not contemplating filing for relief under applicable provisions of the U.S. Bankruptcy Code, and that you do not believe any such filing to be reasonably likely in the foreseeable future.

b. Additional language pertaining to complete disclosure of financial information that should be included in the engagement letter includes:

During the course of our working together it will be extremely important for you to make full disclosure to us of all relevant financial information. This includes, without limitation, the pendency or threat of any legal claim or liability. By signing below you acknowledge this obligation and understand that failure to meet this obligation may result in our resigning as counsel, either during the course of our current services or at such other point in the future as relevant information may become known to us. By signing below, you also agree to indemnify and hold [insert firm's name here] and its employees and successors harmless of and from any claim, cost or liability one or more them may suffer by reason of being involved in your planning.

4. Spousal conflict language.

a. In a situation where the law firm will jointly represent a husband and wife with respect to their integrated estate planning, language pertaining to potential conflicts must be included.

b. The Colorado Estate Planning Forms Book[110] contains a sample engagement letter with conflict of interest language for a law firm that will jointly represent a husband and wife. The relevant language states:

While it is customary for a husband and wife to employ the same law firm to assist them in planning their estate, ethical rules

[110] *Colorado Estate Planning Forms (Orange Book Forms)*, Tab C, Seventh Ed. (CLE in Colo., Inc. 2010).

governing all lawyers, nevertheless, limit our ability to represent multiple clients. We may not, for example, jointly represent a husband and wife whose interests are directly adverse, unless (1) we reasonably believe our services will not adversely affect our representation of either party, and (2) both parties consent after consultation regarding the advantages and risks involved.

We have discussed with you the differences between "joint" and "separate" representation, including the fact that if you were represented separately you would each have an advocate for your position and information given to your own lawyer would remain confidential and unobtainable by your spouse.

Marriage, in our opinion, does not necessarily cause a husband's and wife's interests to be adverse. However, spouses can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example, they may have different views on how property should pass after the death of one or both of them. In addition, we may recommend in some cases that property ownership be changed to take advantage of available tax benefits which may involve gifts from one spouse to the other. Such gifts may affect the classification under applicable law of the property transferred which in turn may affect the division of such property in the event of a divorce, unless the estate plan also includes a marital property agreement.

Since the information you have provided so far suggests no indication of differences that would result in a conflict, we agree to represent you jointly, with the understanding that the following ethical considerations will apply:

i. When we represent you jointly, matters which either of you discusses with our firm are not protected by the attorney/client privilege from disclosure to your spouse. In order to properly represent you both, therefore, we cannot agree with one of you to withhold information from the other. Generally, matters that you discuss with us will be protected from disclosure to third parties, except with your consent or as we may be required to disclose by law or rules governing professional conduct. For instance, in the event of a will contest, we may be required to testify regarding the communications and circumstances surrounding the making or execution of your will.

ii. If there are differences of opinion between you about your proposed estate plan, we may point out the pros and cons of such differences; however, the ethical rules prohibit us, as the lawyer for you both, from advocating one of your positions over the other.

iii. If a conflict between you does arise, which in our judgment renders it impossible for us to continue to represent you jointly, we must withdraw as your joint attorney and advise you to obtain separate counsel.

iv. Upon the death of either of you, the survivor's statutory rights to a share of the deceased spouse's estate may differ from, or be greater than, the rights granted to the survivor by the deceased spouse's estate plan. In this or similar cases, lawyers are compelled by the ethics of their profession to counsel the surviving spouse regarding his or her statutory rights.