Practical and Ethical Considerations

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I. [2.1] INTRODUCTION

The terms “asset protection” and the more recently coined “wealth preservation” have, unfortunately, been linked to unethical, immoral, abusive, fraudulent, and illegal activities intended to defraud and hinder creditors. There are notable examples such as found in Federal Trade Commission v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999), referred to as the “Anderson case” in most commentaries, and In re Lawrence, 238 B.R. 498 (Bankr. S.D.Fla. 1999). As a result, many practitioners feel it is “unethical” to advise clients on strategies to shelter assets from the reach of legitimate but unknown potential creditors. In some cases it is.

However, the vast majority of practitioners engaging in estate planning and business planning represent honest and successful clients who are solvent, pay their taxes and bills, and merely intend to preserve what they have worked for and saved, for their retirement and their family’s future in the event some catastrophe should strike or business failure should befall them. To put the engagement in proper perspective, isn’t an estate plan supposed to put assets beyond the reach of the taxing authorities and perhaps a subsequent spouse of the survivor? Doesn’t a business lawyer utilize an entity to avoid personal liability for business debts and utilize strategies to minimize employment and income taxes for the owners? Those attorneys understand that there are rules to follow in any tax planning or estate planning engagement and are willing to counsel their clients to follow them. It is their duty to so counsel the clients.

Asset protection planning functions within the confines of rules, chiefly involving the definition of “fraudulent conveyances,” similar to the way tax planning functions within the Internal Revenue Code’s set of rules. Therefore, it is clearly ethical to plan for asset protection within the applicable limits prescribed by law. Moreover, there is arguably a duty to assist clients, during the estate planning, business planning, or real estate engagement, to prepare a plan or transaction in a way that accomplishes the maximum amount of asset protection, given in some cases the client’s tolerance for some or all loss of control and, perhaps, loss of enjoyment of various assets for either the client or the ultimate donees and beneficiaries.

A noted author on asset protection planning, Duncan E. Osborne, has argued that the client’s right to conduct estate and asset planning within the moral, legal, and ethical guidelines creates a duty to assist the client in that planning. He argues that creative plaintiffs’ attorneys will seek damages when clients have suffered financial reverses that could have been avoided with reasonable planning. Duncan E. Osborn and John A. Terrill, II, Fundamentals of Asset Protection Planning, 31 ACTEC J. 319 (2006).

Although asset protection planning can, and does, arise in engagements ostensibly for estate planning, creation of new businesses, structuring transactions for acquisitions of assets, etc., there may also be engagements that are specifically for the purpose of advising clients as to how to structure and restructure their current asset ownership for purposes of avoiding unforeseen potential subsequent creditors and unknown future creditors. The parameters of who may be eligible to seek such advice, given the laws on fraudulent conveyances, are discussed extensively in Chapter 3 of this handbook.
This chapter focuses on the initial client contacts, meetings, and communications in engagements specifically requesting asset protection advice for current and future-acquired assets. It pertains only to estate planning or business advice engagements in which asset protection advice is sought, or in which the counselor recommends implementing such strategies due to the occupation or other characteristics presented by the client.

NOTE: While it may be advisable to revise estate planning or tax planning engagement letters and other documents to include references to asset protection services, that decision is up to counsel. Attached in §2.18 is a sample engagement letter involving asset protection.

It is extremely important for the attorney to protect himself or herself with regard to the scope of services being provided. Asset protection is inherently risky for the lawyer since fraudulent transfer laws are protective of “potential subsequent creditors” who cannot be identified when the assets are actually transferred but who can later be shown to have been intended to be deprived of assets under the circumstances present at the time of transfer. In addition, clients and their attorneys are both subject to sanctions, including criminal consequences in a few states, for violations of fraudulent transfer laws. Additionally, many of the strategies, including domestic asset protection trusts, are too new and are not fully “bulletproof” in all jurisdictions, especially when the grantor of the trust resides outside the asset protection trust situs and the grantor’s state does not sanction asset protection trusts.

However, it should be noted that courts today have not strained to find fraudulent transfers. When there is no timing issue such as occurs when the transfer happens immediately after the liability-causing event, courts, and particularly bankruptcy courts, have been quite permissive in the protection of assets.

For those practitioners who are reluctant to utilize domestic or foreign asset protection trusts, believing them to be too extreme, even when no indicia of fraudulent transfer elements are present, it may be a matter of timing. For all we know, when we meet with that client, it might be the last opportunity to employ that strategy. His or her liability-causing event may become reality sooner rather than later.

Finally, it should be noted that there is no inherent duty to preserve one’s assets for the benefit of some unforeseen and unforeseeable potential creditors. There can be no intent to defraud inuring to the benefit of an unknown creditor. Proper planning for appropriate assets, done with due regard for known creditors and reasonably foreseeable creditors who are worthy of protection, should be eligible for the same treatment as accorded to assets our legislatures and court systems have long deemed to be exempt, such as qualified retirement plans, life insurance payable to a spouse or dependant, real estate in a tenancy by the entirety, etc.

II. [2.2] ETHICAL CONSIDERATIONS

Attorneys giving asset protection counseling and advice must be concerned with several of the Illinois Rules of Professional Conduct (RPC) and other ethical considerations. As is always the case, it is crucial to document the terms of the engagement, including any limitations on the
engagement deemed appropriate because of the ethical considerations involved. A statement acknowledging receipt of the engagement letter and agreement to its terms should be set forth in the written communication. A place for the client to date and sign the acknowledgment should be provided.

In identifying the ethical considerations that need to be documented in the letter, the attorney must make a preliminary determination as to the identity of the client or clients represented. Often the asset protection portion of the engagement is unstated, coming in the form of an estate planning engagement, forming a new business entity to carry on a trade or business or to accomplish discounts in the value of assets, advice to children with elderly or disabled parents, a real estate transaction, or drafting or reviewing a premarital agreement. As an example, in an estate planning engagement, there may be an opportunity to give advice to a married client with children from a prior marriage that will protect assets of the client to the potential detriment of the spouse. Increasingly, however, clients may approach an attorney seeking specifically and exclusively advice as to how to protect assets from potential creditors. The discussion in this chapter concentrates on the latter set of clients. Advice as to ethical considerations in the other hybrid situations may be obtained from other sources, such as Chapter 2 of ESTATE PLANNING FOR ILLINOIS ATTORNEYS: THE BASICS AND BEYOND (IICLE, 2005).

A. [2.3] Defining the Scope of Representation

Once the client or clients have been identified, it is then necessary to define the scope of representation. In an asset protection engagement, it is crucial to include in the description of the engagement each essential function to be performed by the attorney, along with a description of the circumstances presented by the client.

Because of the perils of engaging in asset protection that may later be found to be fraudulent as it pertains to a creditor or creditors, it is suggested that the engagement letter recite the circumstances or posture of the client at the outset of the engagement. A hypothetical letter would contain the following:

You have indicated that you are a physician practicing orthopedic surgery in the State of Illinois and are duly licensed and board certified to so practice. You have also indicated that you know of no surgical procedures or medical advice given that would be likely to ripen into a claim against you for malpractice as it relates to your services to patients within a reasonable period of time, and that no claims are currently pending against you. In addition, you have indicated no knowledge of any other act or failure to act, by you, that is likely to ripen into a claim or cause of action for damages to another. In that context, you seek advice as to available strategies for protecting a portion of your assets, over and above assets needed for satisfaction of known debts and necessary to maintain your current lifestyle and the lifestyle of your family. In order to render that advice, we shall require a detailed and accurate statement of assets, income, and liabilities that is current as of the date of the statement and that must be verified by you. After completing our due diligence, we will discuss the extent, if any, to which a portion of your assets may be transferred or otherwise committed to gifts, trusts, entities, or other strategies that offer asset protection characteristics consistent with your goals. If so requested, we would then assist in the carrying out of the approved strategies through creation of the gifts, trusts, entities, or transfers deemed necessary.
A well-crafted statement of the scope of representation, when acknowledged by the client, creates a presumption, although self-serving, that the client is not seeking to avoid current creditors and is not aware of circumstances or an event that would change an unknown future creditor into a potential subsequent creditor that the transferor intends to preclude from reaching his or her assets. It is important to avoid the “badges of fraud,” as is discussed in more detail in Chapter 3 of this handbook.

B. [2.4] Defining the Client

Since many asset protection engagements will involve a married couple, or perhaps children seeking advice as to the disposition of assets of aged parents, it may not be possible to define the client as a single individual. Clients generally insist on multiple representation due to its efficiency, its economy, and the fact that it is likely to produce a more uniform, consistent, and comprehensive plan than individual representation. However, under some circumstances, multiple representation will not be appropriate even with written waivers from each party represented.

1. Multiple Representation

a. [2.5] Confidentiality

The first inquiry regarding multiple representation should be under RPC 1.6 on confidentiality of information. An example of a joint representation letter for representing multiple clients in an estate planning engagement is found in §2.18 below. One essential function of the letter is to describe the duty, and to obtain a waiver, of confidentiality as between the parties represented without waiving it as to the rest of the world. The letter explains the implications of common representation, including the fact that there can be no secrets between the lawyer and one of the parties and that all communications will be revealed to the other party (with one exception, as described in the letter), and that there is a risk inherent in the relationship that a conflict of interest will develop that cannot be handled through a waiver, resulting in the withdrawal of the attorney from representation of both parties. Please note the third paragraph of the “Conflicts of Interest — Joint Representation” section in the letter. It attempts to avoid the problem caused by a client’s insistence in communicating something to be held confidential and allowing your withdrawal letter to alert the other party to the existence of such a communication. See §2.7 below. However, sometimes the goals of the parties are too diverse, a premarital agreement is involved, or furthering the goal of one party will breach a duty to the other, and in those situations no multiparty representation may be had.

b. [2.6] Independent Judgment

The other Rule of Professional Conduct at work in multiple representation engagements is RPC 1.7. That Rule precludes multiple representation in a matter if there is a substantial risk that the lawyer’s independent professional judgment will be, or is likely to be, materially limited or adversely affected by the common representation. There is an exception if it is reasonably likely that the lawyer can adequately represent all the parties and they give informed consent after full disclosure. RPC 1.7(b), 1.7(c). The sample joint engagement letter at §2.18 below is designed to address that situation.
How should the lawyer analyze the engagement in light of RPC 1.7? First, each potential client’s goals and objectives should be determined. What is each person attempting to achieve? Are the goals compatible? If one spouse is comfortable with giving up control over assets conveyed to an asset protection trust but the other spouse is unwilling to completely give up some aspects of control, can the lawyer exercise independent professional judgment?

The second step is to analyze the functions the lawyer is expected to perform in achieving the clients’ goals and the likelihood that a disagreement or dispute will arise between the represented parties in carrying out that goal. It should be noted here that when asset protection is sought through a premarital agreement, multiple representation is never appropriate and separate counsel are always required.

In conducting the analysis, it may be necessary to hold individual meetings with all potential clients so that their goals and objectives can be candidly discussed. However, it is often possible to ferret out potential problems in a joint meeting by discussing the limitations of the multiple party representation in an open and frank manner.

One way of alerting the clients to the implications of joint representation is to insist that all meetings be attended by all parties represented. A client with a hidden agenda will immediately recognize that separate counsel will be needed, and often will offer that suggestion at that point in the discussion.

c. [2.7] What Happens When a Conflict of Interest Later Arises?

Although the lawyer will have covered the possibility of a conflict of interest that arises after the engagement has commenced in the letter (see §2.18 below), the lawyer should be prepared to create innovative appropriate ways to handle the situation. The conflict may arise subtly through disagreements between the clients on some aspect of the transaction, or it may be overt, such as when one client asks the attorney to do something but not inform the other client of the nature of the action requested. The lawyer must immediately make a determination regarding the significance of the action requested vis-à-vis the lawyer’s ability to continue to represent one or both of the clients. In carrying out instructions from one of the clients, will the interests of the other client be impacted or compromised in a negative way?

If the conflict of interest arises subtly, the lawyer should disclose his or her belief that a conflict has occurred unless the lawyer is certain that the duty of loyalty to each client can be maintained without compromise as advice is given and services are performed. It may be possible to resolve the conflict once it is disclosed.

If the conflict arises overtly, such as when an express agreement contained in the engagement letter is violated or when a request to take an action without disclosing it to the other party is made, the disclosure must be made to the clients and, if not readily resolved, the lawyer would have to withdraw from representation of both clients. In some situations, when the new information revealed to the lawyer is of such a nature that the lawyer believes it cannot be disclosed to the other client despite the terms of the engagement letter, the lawyer would be required to request that the information be revealed and, failing that, that the attorney-client relationship be ended.
However, take the situation in which a client discloses to the attorney, after he or she has accepted a joint representation of the client and his spouse, that the client has had another attorney create an offshore trust for some of his assets since he knew from the engagement letter and the initial meeting that the attorney could not do it, due to resistance to that idea from his spouse, and the attorney is instructed that he or she may not let the spouse know of the existence of the trust. Obviously, given the terms of the form engagement letter in §2.18 below, which clearly informs the clients that there can be no confidences, the attorney cannot perform as instructed and must so communicate to the client. If the client does not withdraw the request and allow the attorney to share the communication with the spouse, the attorney will have to withdraw from the representation of both clients and must do so in writing. The real underlying question is what can be communicated to the spouse in the withdrawal letter. If the language suggested in the joint representation letter in §2.18 has been used, the attorney can send a letter to both spouses using the language taken from the engagement letter, which allows the attorney to withhold the information without breaching the contractual terms of the engagement yet communicates to the innocent spouse that there has been an attempt to convey confidential information that is of sufficient significance as to impair the attorney-client relationship. For additional discussion of this potential dilemma and suggestions for prophylactic measures, see Chapter 2 of ESTATE PLANNING FOR ILLINOIS ATTORNEYS: THE BASICS AND BEYOND (IICLE, 2005).

2. [2.8] Separate Representation

Rule of Professional Conduct 1.7 permits separate representation of clients when joint representation is deemed inappropriate. It should go without saying that such a representation is fraught with potential liability for the lawyer when the scope of each representation will impact the lawyer’s duties of impartiality and loyalty to each of the separate clients. In such a representation, no waiver of confidentiality is possible or desirable. Thus, there is no forum for working out potential conflicts of interest before they become actual conflicts of interest. It is much more likely that a conflict of interest will be deemed to be actual and will require the lawyer to withdraw from representation of both parties. In any event, the attorney must obtain the consent and waiver of each client to the representation of the other. There must be full disclosure of the scope of the engagement of each separately represented client in order for the consent and waiver to be meaningful. The letter should describe the lawyer’s duty to preserve confidentiality for all information revealed during the separate conferences unless the client specifically waives the right. Obviously, written waivers should be obtained, which will require additional work, as will the separate communications and meetings with each client. The impact on the fee to be charged may also be discussed in the letter to preclude a dispute at billing time.

3. [2.9] Termination of Engagement

If the lawyer is forced to withdraw from representation of multiple parties, or if the engagement is concluded by termination of services at the end of the project, the lawyer should send a letter clearly stating that the engagement has terminated and that the lawyer’s file will be closed on this matter. If the firm has a file destruction policy mandating that files over a certain age be shredded, that policy should be set forth in the letter. An example of such a termination letter is found at §2.19 below. Even though the engagement has ended, the lawyer’s duties of loyalty and confidentiality continue as to the former client or clients under RPC 1.6. The
exceptions to confidentiality are very narrow and apply both during active representation and after termination. Thus, it is important to get a former client’s consent to any disclosure requested by a bank, trust company, or other source after the representation when the information requested came through the client during the course of the representation.

Another troublesome after-termination issue is that representation of a former client may preclude the attorney from representing a new client whose interests are materially adverse to the former client’s interests unless the former client consents after full disclosure. This could easily arise in the asset protection engagement when a former spouse, after a divorce, requests assistance from the lawyer who formerly represented both parties in an estate planning matter. Under RPC 1.9, it is also improper to use information relating to the former representation to the disadvantage of the former client unless the use is permitted by RPC 1.6 or the information has become generally known.

Whether a lawyer can represent a new client in a new matter in which he or she is adverse to a former client depends on whether the old and new matters are “substantially related.” If so, consent after full disclosure is required. A substantial relationship is present when the lawyer may be performing services or giving advice that causes a detriment to the former client or a substantial disadvantage to the new client in a matter that pertains to the work the lawyer did for the former client. Another situation in which the Rule applies occurs when the lawyer obtained confidences from the former client during the prior engagement that could now be used to that former client’s detriment in the new engagement. Again, under RPC 1.9, consent is required if either of those circumstances exists.

There is some judicial guidance on this issue. LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983), sets forth a three-stage test. First, the court must undertake a factual reconstruction of the scope of the former representation and understand the services performed for the former clients. Second, the court must determine whether it is reasonable to infer that the information that is now alleged to be confidential would have been likely to have been provided to the lawyer representing clients within that scope of representation. Third, the court must consider whether the information that is allegedly confidential is relevant to the issues raised in the matter pending involving the former client. The Illinois Supreme Court in Schwartz v. Cortelloni, 177 Ill.2d 166, 685 N.E.2d 871, 226 Ill.Dec. 416 (1997), adopted the test annunciated in LaSalle National Bank.

4. [2.10] Children Requesting Services for Parents

Many engagements regarding asset protection begin with, or include, participation by the children of an elderly or disabled parent. Even if the engagement is instigated by the parent, the parent often is dependant on a child for transportation, home care, and help with day-to-day financial transactions when the engagement is commenced. In either case, it is exceptionally clear that the definition of the “client” is all important. If a child is acting under an existing power of attorney, it is clear that the agent is the client in his or her representative capacity, which should be noted in all correspondence.
In some instances, a lawyer may be required to make an assessment of the competency of the alleged client, the parent, to engage his or her services as counsel. Lawyers need to be familiar with the facets of diminished capacity and determine whether a clinical consultation or formal evaluation by a clinician is required. Obviously, if the lawyer observes signs of diminished capacity such as an inability to articulate reasons behind the decisions and direction put forth, variability of state of mind, or a lack of appreciation of the consequences of the decisions, further evaluation is indicated. It may also be that the lawyer has a question as to the substantive fairness of the decisions, if clearly inequitable given the lawyer’s knowledge of the family circumstances or if inconsistent with the client’s lifetime values. It is beyond the scope of this chapter to discuss in detail the handling of a client or potential client with challenging capacity issues. Suffice it to say that any significant concerns should be carefully documented, including the use of notes, independent third-party witnesses, possibly videotaping, and intervention by healthcare professionals. Obviously, if the lawyer clearly determines that the client lacks capacity, or even has substantial doubts as to the client’s capacity, representation must be declined or, in the alternative, representation must be through a guardian or agent under a power of attorney.

After thoroughly explaining the nature of the attorney-client relationship to all parties at the meeting, it is important to specify that the lawyer will act to protect the best interests of the client and take directions about the representation of that client only from the client, as well as explaining the lawyer’s duty to maintain the client’s confidences. The lawyer should explain that while family members and/or friends will be solicited as to their input, the decisions will come solely from the client. If the client knowingly consents to communicating through a family member, or having family members present in the meetings, that’s fine. As in any other engagement, the engagement letter or follow-up correspondence should reiterate and reinforce those comments.

If the other persons also seek representation individually in the process, all of the guidelines of RPC 1.7 apply. The lawyer must initially determine that the interests are “generally aligned” with the client’s interests. The discussion with regard to multiple representation needs to take place, and the signed engagement letter (see §2.18 below), as revised to fit the circumstances, must be obtained. It is also recommended that the lawyer meet separately with the family members and the elderly client to attempt to determine any overt conflicts of interest. Notes of those meetings should be meticulously transcribed and retained in the file.

It should be noted that RPC 1.7 requires that any representation disclose the limitations of a lawyer’s responsibility due to the lawyer’s own interests. Thus, if the lawyer has any interest in any bank, trust company, or firm involved in the handling of the client’s assets under the asset protection plan established, the lawyer must disclose all details of the relationship and obtain a written consent from the client. If representation of multiple clients is involved, the disclosure shall include an explanation of the implications of the common representation and the advantages and risks involved. RPC 1.7(c).

5. [2.11] Business Representation

An asset protection planning client may be involved in a business with multiple owners, and the other owners are not involved in the representation. The client is seeking to protect his or her
interest in that business, but without the concurrence or knowledge of the other owners of the business. If the attorney has previously represented the business in its formation or other operational aspects, this may be an unavoidable conflict of interest. Assuming the attorney has no prior representation in connection with the business itself, the next inquiry is whether the transactions necessary to protect the owner’s interest in the business require affirmance, confirmation, or other participation by the business entity or other owners in their capacity as owners, directors, members, or officers. It is necessary to determine whether the engagement includes representation of the business entity. RPC 1.13(a) states that a lawyer who represents a partnership interest does not represent the individual partners. The lawyer must make a clear identification of the client, which is extremely important if the other shareholders, members, or partners may be relying on the lawyer for advice as to the business entity.


Often children seeking to protect the assets of their parents from their creditors, such as nursing homes, unscrupulous sales persons or charities, etc., come to see the lawyer who did the parents’ estate planning some years previously. If the end of the engagement letter to the parents clearly indicated that the attorney-client relationship was over and that the attorney had no further duty to the clients, the lawyer must determine who the clients will be in this new engagement and clearly define the relationship in a new engagement letter. If no such letter was sent, there may still be an implied or inherent attorney-client relationship with the parents. It is clear that without representing the parents, there can be no effective actions taken with respect to the assets to be protected. Can the attorney consider representing the interests of the children too?

The comments in §§2.5 – 2.7 above regarding the duty of loyalty, conflicts of interest, and confidentiality are all applicable, and these issues must be dealt with from the outset in determining whether an engagement can be undertaken and in identifying the client to be represented. The lawyer must determine whether the parents have the requisite mental capacity to engage a lawyer and direct the lawyer to provide advice for services with regard to protecting their assets. The analysis becomes somewhat easier if one of the children has been given a power of attorney for the property, person, or both of the parents.

The engagement letter must contain a discussion of the lack of attorney-client privilege as between the parents themselves, between the parents and the children, and between the children themselves. The discussion about not keeping confidences and the consequences of asking the attorney to do so noted in §2.5 above is recommended.

7. [2.13] Supervising Staff

It is important that the lawyer adequately educate and supervise the secretaries, law clerks, paraprofessionals, and receptionists with regard to maintaining client confidences and safeguarding documents from unauthorized disclosure. It should be remembered that although the staff is not subject to the disciplinary process, the lawyer is.
III. [2.14] CIVIL LIABILITY OF ATTORNEYS TO THIRD PARTIES

Rule of Professional Conduct 1.2(d) provides:

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

No reported cases interpreting this rule have been found in Illinois, but see In re Complaint as to Conduct of Hockett, 303 Or. 150, 734 P.2d 877 (1987), in which an attorney was suspended from the practice of law for 63 days for transfers of property from husband to wife to defraud creditors of the husband. See also two cases from California that also involve fraudulent transfers of real estate. In Townsend v. State Bar of California, 32 Cal.2d 592, 197 P.2d 326 (1948), a three-year suspension resulted from assisting a client to transfer real estate after a judgment had been rendered against the client but before a lien was created. In Allen v. State Bar of California, 20 Cal.3d 172, 570 P.2d 1226, 141 Cal.Rptr. 808 (1977), disbarment resulted from the lawyer’s assistance in conveying real estate to a straw person who was to later reconvey it when the attorney knew that the transferee would not reconvey it at the later date. The foregoing are disciplinary matters. However, some courts have imposed liability for money damages on attorneys in similar contexts, either under the theory that the lawyer aided and abetted the making of a fraudulent transfer or under a conspiracy theory.

The topic of fraudulent transfers is covered in more depth in Chapter 3 of this handbook, but suffice it to say here, as a caution when meeting a new client seeking asset protection planning and help in implementing strategies, that Illinois is in the group of states that has imposed damages under the conspiracy theory. In Celano v. Frederick, 54 Ill.App.2d 393, 203 N.E.2d 774 (1st Dist. 1964), the defendant had insufficient assets to satisfy a judgment, but then filed suit against third parties. An order was entered in the first action that any recovery obtained in the second action should be paid to satisfy the judgment in the earlier case. The appellate court found that the complaint, which alleged that the attorneys who aided the defendant in settling the second case without applying any of the funds to the earlier judgment were liable under a conspiracy theory, stated a cause of action. The obvious point is that no fee can be large enough to justify participation, through preparing deeds, trusts, gifts, or other documents, in the planning or carrying out of a scheme that would enable a client to knowingly defraud a creditor.

Thornwood, Inc. v. Jenner & Block, 344 Ill.App.3d 15, 799 N.E.2d 756, 278 Ill.Dec. 891 (1st Dist. 2003), involved an allegation that the attorneys for a former partner of the plaintiff, a golf course developer, aided and abetted the commission of fraud in preparing a settlement agreement between the former partners that acted to the detriment of the plaintiff. The complaint alleged that the failure to disclose circumstances known to the attorneys that made the interest being given up much more valuable, and for which a fiduciary duty between the partners required disclosure, was tantamount to aiding and abetting fraud and breach of fiduciary duty. The release drafted by the attorneys purporting to release the attorneys as well as the party, heirs, assigns, etc., from liability.
was ineffective. The appellate court announced that it saw no reason to impose a per se bar preventing imposing liability on attorneys who knowingly assist their clients in causing injury to another party and stated that attorneys cannot use a law license as a shield from the consequences of participating in an illegal activity.

Another subsection of RPC 1.2 states:

A lawyer who knows a client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. RPC 1.2(g).

Illinois State Bar Association Advisory Opinion on Professional Conduct No. 98-07 (Mar. 1999) states that a lawyer representing a guardian who has filed annual accountings subsequently discovered to have been false has to take appropriate remedial action to avoid assisting the guardian in concealing from the court the guardian’s misappropriation of estate assets, even if it results in the disclosure of client information otherwise protected by RPC 1.6. Add to that In re Estate of Minsky, 59 Ill.App.3d 974, 376 N.E.2d 647, 17 Ill.Dec. 501 (1st Dist. 1978), in which the court, without any discussion of confidentiality, found that the lawyer had an obligation, as an officer of the court, to inform the court of any suspicions of wrongdoing on the part of the client, who was the executor of an estate. Thus, the rule in Illinois may be that, despite the final phrase in RPC 1.2(g), the lawyer will have more trouble from keeping silent than from revealing a confidence when fraud is involved.

IV. [2.15] CRIMINAL LIABILITY

There are even circumstances arising from implementing an improper asset protection strategy that can give rise to criminal liability for both the client and the attorney. Bankruptcy fraud, as defined in 18 U.S.C. §152, carries with it a possibility of imprisonment for up to five years for knowingly and fraudulently concealing property from a trustee or swearing a false oath in the proceeding. Cases involving convictions of attorneys include United States v. Devine, 775 F.2d 612 (5th Cir. 1985), and United States v. Brown, 943 F.2d 1246 (10th Cir. 1991). An attorney was convicted of conspiracy to commit bankruptcy fraud in United States v. Bartlett, 633 F.2d 1184 (5th Cir. 1981). Some states, including Ohio and California but not including Illinois at this time, have statutes that impose criminal liability on the attorney as well as the client for engaging in fraudulent transfers to hinder creditors.

Again, the analogy to tax advice is appropriate. The game must be played within the rules, as there are harsh penalties for tax fraud that may imposed on the taxpayer and the tax advisor. These rules should not dissuade one from engaging in the practice of tax advice any more than the rules should dissuade one from engaging in an asset protection practice. It is, however, essential that the attorney not to become so caught up in doing a job for the client that he or she loses sight of the distinction between a valid transfer and a fraudulent transfer.
V. [2.16] DISCIPLINARY ACTION

Should an attorney step over the line in aiding and abetting a client to defraud a creditor, it opens up the likelihood of disciplinary action by the Illinois Attorney Registration and Disciplinary Commission. The commission of a criminal act that reflects adversely on an attorney’s honesty, trustworthiness, or fitness as a lawyer violates RPC 8.4(a)(3), which will invoke sanctions from the Illinois Supreme Court up to and including disbarment. Even if no criminal violation is involved, conduct involving dishonesty, fraud, deceit, or misrepresentation violates RPC 8.4(a)(4), and conduct that is prejudicial to the administration of justice, or that tends to defeat the administration of justice or brings the courts or legal system into disrepute, is also subject to sanctions (RPC 8.4(a)(5)). In the typical asset protection scenario, when an attorney has misrepresented some material factual aspect of the transaction during the course of an engagement or has drafted documents and suggested strategies that facilitate the fraud, one or more of these sections of the RPC will be applicable. In re Minneman, No. 98 SH 38 (ARDC Hr’g Bd. Feb. 8, 2000), although involving conviction of an attorney for conspiring with his clients to commit tax fraud rather than fraud against creditors, is nonetheless instructive on the issues.

VI. [2.17] INITIAL MEETING WITH CLIENT

At the outset of any asset protection engagement, it is essential that the lawyer ascertain the client’s tolerance to all of the restrictions on the use of assets and access to income, etc., that will be imposed because of implementation of the plan. It is necessary that due diligence be undertaken to analyze the client’s solvency. In order to do so, all real and potential creditors must be identified and classified. The classes of creditors include the following:

Present creditors. Those holding actual matured debt, such as a mortgagee, credit card company, etc., and those with actual unmatured debt, such as a personal guaranty or demand promissory note, are present creditors. A transaction will be deemed fraudulent regardless of intent if it renders the transferor insolvent (unable to pay all existing liabilities).

Potential subsequent creditors. A creditor a person could reasonably expect to have in the future is a potential subsequent creditor. This is a creditor that may be reasonably foreseen. Therefore, the duty to protect this class of creditors arises, if at all, after the transfer of the asset. Intent becomes of crucial importance. Several “badges of fraud” have been identified to aid in determining intent, e.g., retaining control of property after it is transferred to another or to a trust, transferring substantially all assets of the transferor, or making a transfer just before or after the debt is incurred or suit filed. The timing of the asset transfer becomes of crucial importance when it adversely affects a potential subsequent creditor.

Unknown future creditor. If a creditor is not reasonably foreseen, no duty is owed to it. The most obvious example is a traffic accident victim before a crash occurs.
Using the list of creditors, all current debts, liabilities, claims, guarantees, and pending lawsuits should be identified and listed. If a debt is not liquidated, a value must be assigned. Second, all foreseeable potential liabilities, such as contingent liabilities, current real estate taxes not yet due and payable, income tax estimated payments, the next college tuition payment for a child in college, etc., should be listed.

Next, all current assets and expectancies, such as a distribution from a pending probate estate, should be listed on the asset side of the ledger. Finally, all previously protected and exempt assets must be identified, such as homestead (primary residence), life insurance payable to a spouse or dependent, tenancy-by-the-entirety property, and qualified retirement plans. (See Chapter 7 of this handbook for a more comprehensive list.) These assets are deemed to be exempt and need not be considered in the solvency analysis.

The total liabilities and foreseeable potential liabilities are then compared to present assets less the exempt assets. There must be sufficient liquidity to satisfy all present creditors and foreseeable subsequent potential creditors.

If asset protection is merely a byproduct of estate planning, when a QTIP spendthrift trust is used to protect assets from the spouse’s creditors or a subsequent spouse in the event of a remarriage, this analysis is not generally needed. However, the analysis is essential to preclude exposure to an inadvertent conspiracy charge when the engagement is clearly one involving lifetime conveyances.

It is recommended that the client be provided an information-gathering form and that the form require the client’s signature. See §2.20 below for a sample form.

Consideration should be given to discussing in general terms the civil and criminal consequences of improper asset protection actions for the client and the attorney during the initial meeting, to impress on the client that he or she must play the game within the rules and that the attorney will withdraw from the engagement at such time as the client insists on implementing a strategy that the attorney advises against, with or without the assistance of the attorney.

VII. APPENDIX

A. [2.18] General Long-Form Engagement Letter, Joint Representation

Dear ________________________:

Thank you for selecting [firm] to provide legal services to [clients].

The purpose of this letter is to set forth the terms on which we understand you intend us to proceed. Although this letter is somewhat lengthy, we believe it is better for both attorneys and clients to address matters up front in order to minimize the likelihood of subsequent misunderstandings or disagreements.
1. **Scope of Services**

   [Clients] have engaged [firm] to represent them in connection with [express in detail the exact description of the matter and the nature of the services to be provided].

   This engagement letter does not engage us to undertake any matter not described above. For example, this letter does not include [express in detail any limitations, such as trials versus appeals, representation in other transactions, representations of subsidiaries, etc.]

2. **Conflicts of Interest — Joint Representation**

   Spouses can sometimes have conflicting interests regarding their estate plan. For example, they may have different views as to how much power the surviving spouse should have over the property of a deceased spouse, how assets should be distributed upon the death of one or both of them, or how family assets should be divided between them during their lifetimes. Also, in order to take advantage of available tax benefits, lawyers frequently recommend that family assets be divided between a husband and wife to increase one estate or decrease the other by dividing jointly owned assets or by recommending gifts from one to the other. These are just some examples of potential conflicts that sometimes arise during the estate planning process.

   If each of you had your own separate lawyer, you would each have an “advocate” for your position and would each receive totally independent and confidential advice from your own lawyer. Under such an arrangement, the information given to your respective lawyers would be confidential and could not be disclosed to your spouse without your consent.

   This is not the case when one firm advises both of you jointly. Although we will encourage the resolution of any differences of opinion or conflicting interests, we cannot be an advocate for one of you against the other if we represent both of you. When your individual interests differ, we will attempt to explain to both of you the interests of each of you and the effect on each of you of a particular course of action. Similarly, whatever one of you tells us relating to your estate plan cannot be kept confidential from the other. Should one of you communicate information to us that is requested to be kept confidential, we will honor that request, but at that time we will likely have to end our representation of both of you. In such a situation we would notify both of you in writing that facts have come to our attention leading us to believe that we may be unable to continue to effectively represent both of you.

   In the interests of efficiency, you may choose to communicate with us primarily through one of you, in which event we will provide any necessary explanation of the issues to that individual. Of course, either of you may put questions to us at any time.

   By signing this letter, each of you confirms that you have requested and consented to our joint representation of both of you in connection with the preparation of your estate plan and that you each agree that communication and information received from each of
you relating to your estate plan will not be kept confidential from the other. Of course, either of you may retain separate counsel at any time. In that event, we will be free to continue to represent the other one of you with the consent of the one who retained separate counsel.

In very unusual circumstances, a law firm representing both the husband and wife regarding their estate plan confronts a conflict of interest between them that is so serious that the firm cannot continue to represent either of them. Although such a situation seems highly unlikely in your case, were it to occur, we would promptly notify both of you that we could no longer continue to represent either of you. In some such cases, it may not be possible to disclose to both of you precisely why we have concluded that we should discontinue our representation.

3. Firm Personnel

I will be primarily responsible for the supervision of this matter, but you are engaging the firm as a whole and not me individually. As and when necessary, I will draw on the talent and expertise of other partners and associates within the firm and utilize paralegal staff to handle administrative tasks. [Wherever possible, identify others involved and give the name of an additional contact person in the firm in case the writer is unavailable.]

4. Legal Fees

[Clients] will pay fees for the services of firm personnel. The presently applicable rates are:

- **Partners:** [specify rates/ranges]
- **Associates:** [specify rates/ranges]
- **Legal Assistants:** [specify rates/ranges]

These rates are subject to periodic change at our discretion but will not change more than once per year. Please understand that time spent will include a broad array of telephone and personal contacts, e-mail and traditional correspondence, legal research, conferences, and document drafting and review, among other activities.

[Although we bill primarily on an hourly basis, we reserve the right to adjust our billings to reflect such factors as (a) the nature of the legal issue, including its novelty, complexity, and importance; (b) preclusion of other employment; (c) the amount or consequence at stake and the result obtained; (d) time limitations imposed by the client or by the situation; (e) the experience, reputation, and ability of our attorneys; and (f) the particular skill or skills necessary to handle the matter correctly.]
5. Costs and Disbursements

[Clients] are responsible for payment of all costs and disbursements reasonably incurred on their behalf. Such costs and disbursements may include, but are not limited to, photocopying and facsimile charges, long distance telephone calls, travel expenses (economy class unless otherwise approved in advance), and computer research charges.

6. Billing Arrangements

In general, itemized statements of services and disbursements will be sent [monthly] [at the end of the task], with payment to be made within 30 days of the invoice date. [(Firm) reserves the right to charge interest, not to exceed _____ percent per annum, on any bill outstanding for more than 30 days.]

If you ever have any questions regarding the billing format or any information contained in any invoice or statement, please let me know immediately so that we can attempt to resolve any concerns fairly and without delay.

7. No Guarantees of Fees, Costs, or Results

It is difficult to estimate, in advance, the amount of fees and costs or disbursements that we will incur in connection with this matter. Please note that any statement or estimate about this subject that we have given you is just that — an estimate — and not a commitment to a flat or fixed fee.

Similarly, and although we will give you our reasoned judgment and advice at all times, we cannot guarantee a particular outcome of any engagement and thus cannot guarantee that the ultimate outcome will be consistent with your wishes.

8. Advance Deposit/Retainer

We are requiring an initial advance deposit of $_________. This retainer is a partial advance against anticipated legal fees and disbursements and must be paid [before we will begin work on the file] [within _____ days of the date of this letter or we will cease work on this file].

Any unused portion of any retainer will be refunded to you when all of our work is completed and all related bills have been paid.

9. Mutual Communication

A solid attorney-client relationship is a two-way street. Lawyers need timely and complete cooperation and assistance from their clients just as clients need timely and complete cooperation and assistance from their lawyers.
We will therefore keep you informed of the progress of this matter and would be pleased to discuss the preparation of periodic status reports. In addition, please feel free to contact _________________________ or _________________________ at any time if you have questions about any aspect of our work on this matter.

We must also require, however, that you provide us with timely responses to requests for documentation and information that we may need to carry out our function. Please bear in mind that if we do not obtain such cooperation, the quality of our representation may suffer and we may, in fact, feel constrained to withdraw from any further work.

10. **Withdrawal**

[Clients] may terminate the attorney-client relationship at any time and for any reason. Such a termination does not, however, absolve you of responsibility to pay for services or costs and disbursements incurred prior to our receipt of notice of termination or incurred subsequent to notice but, in our view, reasonably necessary to protect your interests.

To the extent permitted by the applicable Rules of Professional Conduct, we also reserve the right to terminate the attorney-client relationship. Similarly, and again to the extent permitted by the applicable Rules of Professional Conduct, you will remain liable for services or costs and disbursements incurred prior to our decision to withdraw or incurred subsequent to our decision but, in our view, reasonably necessary to protect your interests.

We do not ordinarily undertake to keep clients informed about subsequent developments once the matter in question is at an end. If you would like us to do so, please so inform us in writing so that special arrangements can be made.

11. **Binding and Entire Agreement**

This letter represents the entire agreement between the parties, and no party is relying or is entitled to rely on any representations not expressly contained herein. In addition, no changes may be made to this letter without the written consent of all of the parties hereto.

If this letter reflects your understanding of our relationship, please sign and return the enclosed duplicate copy. Please note that unless and until we hear from you to the contrary, we will assume that we are entitled to proceed under the terms of this letter. Consistent with firm policy, however, we reserve the right to [delay commencement of work on this matter until you have signed and returned the letter to us] [cease work on this matter if you do not sign and return a copy to us within _____ days].

12. **Confidentiality of Communications**

In light of the work we propose to do, we would like to reach agreement with you regarding the kinds of communications technology we may employ. For instance, depending on the degree of security that you wish to maintain, it may not be appropriate to speak using cellular telephones (or at least not to do so when substantive information is being discussed). Similarly, the exchange...
of documents using the Internet, or even direct computer-to-computer data transfer, may involve some risk that information will be retrieved by third parties with no right to see it. In fact, even the use of fax machines can cause problems if documents are sent to numbers where the documents sit in open view.

We therefore request that you address the questions below concerning your thoughts on this subject. We will then send you a separate memorandum for your signatures detailing the agreed-on communication methodologies, the nature and level of security to be employed, and the attendant risks.

a. Do you intend to use/are you willing to have us use cellular telephones for any and/or all communications? ___ Yes. ___ No.

b. Do you intend to receive documents by facsimile, and, if so, are you certain that there is adequate security at the receiving location? ___ Yes. ___ No.

c. Do you intend to communicate with us by e-mail? ___ Yes. ___ No.

d. Are there other communications and confidentiality issues of which we should be aware? ___ Yes. ___ No. If “yes,” please explain.

[12][13]. Conclusion

Again, we thank you for your trust in us and look forward to a mutually satisfactory and productive relationship.

Sincerely,

______________________________

Accepted and agreed to:

______________________________

By ____________________________

______________________________

By ____________________________

Date: __________, 20__
B. [2.19] Termination Letter

Dear _________________________:

I want to thank you for choosing me to represent you in connection with your estate planning/wealth preservation planning. Enclosed is a conformed copy of your [Will, Trust, etc.] that [was] [were] executed in my office __________, 20__. As we discussed, [this copy] [these copies] can be kept in a place readily available to you for quick reference.

This letter confirms that you took the originally signed [Will, Trust, etc.] with you after [it was] [they were] executed in my office. The original[s] should be placed in your bank safe deposit box or other fireproof location where [it] [they] can be found by your Executor or any successor Executor.

It is not possible for me to be in regular communication with you to advise you on all changes in the law that may affect your planning. Accordingly, these documents should be reviewed by you and your attorney periodically and especially after a significant change in your life or circumstances (e.g., birth, adoption, death, change of state of domicile, divorce, marriage) or the size of your estate or the composition of your assets. If changes to the documents are needed, mark-outs or interlineation will not be effective. A Codicil to the Will, a Restatement of the Trust, or a new document must be properly executed and witnessed to effect the change.

[This document is] [These documents are] drafted while the federal estate tax and Illinois estate tax are in effect, and the formula used to allocate property between the spouse and other beneficiaries makes reference to those estate taxes. In 2010, the federal estate tax is scheduled to be repealed, so this document will have to be redrafted to deal with that eventuality at some point. However, due to a “sunset” provision in the law repealing the federal estate tax, it will reappear again in 2011 unless Congress reenacts the tax law with the requisite number of votes to kill the sunset provision. Due to this uncertainty, I have not attempted to draft language to deal with the year 2010 at this time and merely point out that you must have this document reviewed periodically, and especially after any further changes in the tax laws.

This will conclude all tasks I have undertaken for you, and this concludes my [estate] [asset protection] planning engagement. I am closing your file, which will be kept for a period of ten years. [I am returning the original documents you supplied relating to the estate planning project with this letter.]

[In case of a declaration of trust, add the following:

This firm has no responsibility for transferring any assets (except ____________________) to your Trust. Unless I hear from you to the contrary, I will assume that you and your other advisors have completed or will complete all beneficiary designation, title, and account holder changes. If you have not completed the process, please do so to make the Trust fully effective.]
It was a pleasure working with you. If I can be of any further assistance to you, please do not hesitate to call.

Sincerely,

_______________________________________

C. [2.20] Financial Information Fact-Finder

FINANCIAL INFORMATION FACT-FINDER

IF YOU HAVE A DETAILED PERSONAL FINANCIAL STATEMENT OR COMPUTER SPREADSHEET LISTING ALL ASSETS, REAL ESTATE, IRAS, RETIREMENT PLANS, AND INSURANCE, THAT WILL SUFFICE FOR THE INITIAL MEETING, AS WILL A PLAN SUMMARY PREPARED BY A FINANCIAL PLANNER.

Attached is an asset protection planning “fact-finder” that is intended to provide us with a summary of your current assets, anticipated assets, current liabilities, and reasonably foreseeable potential liabilities, their approximate values, and how they are currently titled or to whom the liabilities are or will be owed.

The primary purpose of this fact-finder is to give us information concerning your solvency. This is an important step for you (and us as your advisors) in determining a strategy for an asset protection plan. The information requested under the form, in order of importance and usefulness to us, is as follows:

1. LISTING OF ALL YOUR ASSETS: Once we have a listing of all your assets, we can work from that list to obtain any additional information that is needed.

2. OWNERSHIP OF ASSETS: It is often necessary to determine how assets are currently owned (i.e., by one spouse or the other, or in joint tenancy) so that recommendations and suggestions can be made with respect to changes in ownership necessary to assist in the reduction of estate tax liability.

3. APPROXIMATE VALUE OF ASSETS: It is not necessary that you determine the exact balance or value of each of your assets. A reasonable approximation or average balance of an asset will be sufficient.

4. LISTING OF ALL YOUR PRESENT CREDITORS. Those holding actual matured debt, such as a mortgagee, credit card company, etc., and those with actual unmatured debt, e.g., a personal guaranty or demand promissory note, are present creditors. A transaction will be deemed fraudulent regardless of intent if it renders the transferor insolvent (unable to pay all existing liabilities).

5. LISTING OF ALL POTENTIAL SUBSEQUENT CREDITORS. A creditor a person could reasonably expect to have in the future is a “potential subsequent creditor.” This is a creditor that may be reasonably foreseen.
With the foregoing in mind, we request that you fill out the attached fact-finder in whatever detail you find comfortable. Whatever information you are unable to provide we should be able to secure from your financial professionals or other sources. Obviously, the more information you are able to obtain, the less we will have to secure and the less time for which we will have to bill you.

The information that you do provide should be listed on separate lines, with each item being described by institution, number, and/or another identifying factor. Do not worry about getting each item under the “proper” heading. All of the assets and liabilities are totaled at the end of the form — regardless of the heading they are under — so if an asset or liability would seem to fit under more than one heading, just put it under one of the headings.

We will not be making an independent verification of the information you provide to us, but it is essential that we have complete and accurate information. Our planning recommendations to you may not be appropriate if they are based on inadequate information.

As always, please do not hesitate to call if you have any questions.

Thank you.

FINANCIAL INFORMATION

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<td>CASH</td>
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<td>BANK ACCOUNTS</td>
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<td>CERTIFICATES OF DEPOSIT</td>
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### §2.20 ASSET PROTECTION PLANNING

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**BROKERAGE HOUSE ACCOUNTS**

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**STOCKS**

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**GOVERNMENT SAVINGS BONDS (Series E, H, EE, HH)**

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**TAX-FREE BONDS**

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**OTHER BONDS**

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### Individual Retirement Accounts (IRAs)

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### Keogh Plans*

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### Qualified or Nonqualified Employer Plans*

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*Are you currently receiving distributions from any of these retirement plans or the plan of another naming you as beneficiary?  __________ yes  __________ no

Please list the beneficiary or beneficiaries currently named for any of these retirement plans:

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### §2.20 ASSET PROTECTION PLANNING

**ANNUITIES**

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**LIFE INSURANCE PAYABLE TO SPOUSE OR DEPENDENT** (Face Value/Death Benefit)

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**LIFE INSURANCE PAYABLE TO OTHERS** (Face Value/Death Benefit)

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**REAL ESTATE**

*Include primary residence, vacation homes, rental property, vacant land

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*Indicate if owned as Tenants by the Entirety

**PASSIVE REAL ESTATE INVESTMENTS** (*i.e.*, limited partnerships, etc.)

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### LIABILITIES

Short-Term (to be repaid within one year, *e.g.*, credit cards, payable-on-demand promissory notes, etc.)

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**TOTAL SHORT-TERM LIABILITIES** $_________ $_________ $_________

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**TOTAL PERSONAL GUARANTEES** $_________ $_________ $_________

Long-Term (mortgages or notes not to be repaid within one year)

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**TOTAL LONG-TERM LIABILITIES** $_________ $_________ $_________

**TOTAL LIABILITIES** $_________ $_________ $_________

**NET WORTH** $_________ $_________ $_________

Do you have any reasonably anticipated debts, liabilities, or exposures to liability due to any reason, *i.e.*, contractual, business, accident, malpractice (if applicable), etc.? If so, list
the potential claimant, the amount potentially due, if ascertainable, and the cause of potential liability. ______________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

[I] [We] have prepared this form with the understanding that it will be relied on for asset protection planning advice, and any material omissions, overstated or understated amounts, or inaccurate ownership information may cause that advice to be inappropriate. [I] [We] verify that the information furnished is complete and accurate and that you will not be making an independent investigation to confirm the data.

Dated: __________, 20__

_______________________________________

_______________________________________
Practical and Ethical Considerations

JAMES M. LESTIKOW
Hinshaw & Culbertson LLP
Springfield
I. [2S.1] Introduction

II. [2S.2] Ethical Considerations

A. [2S.3] Defining the Scope of Representation
B. Defining the Client
   1. Multiple Representation
      a. [2S.5] Confidentiality
      b. [2S.6] Independent Judgment
      b1. [2S.6A] Duty of Loyalty (New Section)
      c. [2S.7] What Happens When a Conflict of Interest Later Arises?
   2. [2S.8] Separate Representation
   3. [2S.9] Termination of Engagement
   4. [2S.10] Children Requesting Services for Parents
   41. [2S.10A] Diminished Capacity (New Section)
   42. [2S.10B] Common Interests (New Section)
   8. [2S.13A] Duties to a Prospective Client (New Section)

III. [2S.14] Civil Liability of Attorneys to Third Parties

V. [2S.16] Disciplinary Action

VI1. [2S.17A] Conclusion (New Section)

VII. Appendix

C. [2S.20] Financial Information Fact-Finder
I [2S.1] INTRODUCTION

The paragraph after the NOTE on p. 2-4 is revised:

It is extremely important for the attorney to protect himself or herself with regard to the scope of services being provided. Asset protection is inherently risky for the lawyer since the Uniform Fraudulent Transfer Act, 740 ILCS 160/1, et seq., is protective of “potential subsequent creditors” who cannot be identified when the assets are actually transferred but who can later be shown to have been intended to be deprived of assets under the circumstances present at the time of transfer. In addition, in some states, notably including Illinois, attorneys may be liable for aiding and abetting a fraudulent transfer. Some states, notably California, may include criminal liability for violations of fraudulent transfer laws. San Diego Bar Association Ethics Opinion (1993-1). Additionally, many of the strategies, including domestic asset protection trusts, are relatively new and may not be fully “bulletproof” to attack in all jurisdictions that do not authorize or sanction self-settled irrevocable asset protection trusts when the grantor of the trust resides outside the asset protection trust situs.

The next-to-last paragraph is revised:

Many practitioners are reluctant to utilize domestic or foreign asset protection trusts, believing them to be too extreme, and therefore too indicative of the intent to avoid creditors. They prefer recommending strategies that also involve an investment opportunity such as whole life insurance or annuities, or that have a business purpose such as utilizing limited liability entities to hold assets, which are themselves owned by multiple owners. However, when no indicia of fraudulent transfer elements are present, beginning the asset protection process, even utilizing “extreme” strategies, must be done in order to start the limitations period on challenging the transaction. It may be a matter of timing. For all we know, when we meet with that client, it might be the last opportunity to employ a strategy. His or her liability-causing event may become reality sooner rather than later.

II. [2S.2] ETHICAL CONSIDERATIONS

The section is revised:

Attorneys giving asset protection counseling and advice must be concerned with several of the Illinois Rules of Professional Conduct (RPC) and other ethical considerations. Effective January 1, 2010, the Illinois Rules of Professional Conduct were repealed and replaced with a new version containing substantial changes. A redline copy of the new RPC showing those changes can be obtained at www.iardc.org/newrules2010.htm.

Often the asset protection portion of the engagement is unstated, coming in the form of an estate planning engagement or one to form a new business entity to carry on a trade or business or to accomplish discounts in the value of assets. It may come in the form of giving advice to children with elderly or disabled parents, a real estate transaction, or drafting or reviewing a premarital agreement. It might come in the form of a defense of a mortgage foreclosure or other
law suit. As an example, in an estate planning engagement, there may be an opportunity to give advice to a married client with children from a prior marriage that will protect assets of the client to the potential detriment of the spouse. Increasingly, however, clients may approach an attorney seeking specifically and exclusively advice as to how to protect assets from potential creditors. The discussion in this chapter concentrates on the latter set of clients.

As is always the case, it is crucial to document the terms of the engagement, including any limitations on the engagement deemed appropriate because of the ethical considerations involved. A statement acknowledging receipt of the engagement letter and agreement to its terms should be set forth in the written communication. A place for the client to date and sign the acknowledgment should be provided. It is prudent to tickle a calendar to make sure a follow-up letter goes out if the first attempt is not returned in a timely manner.

In identifying the ethical considerations that need to be documented in the letter, the attorney must first make a preliminary determination to identify the client or clients represented. Advice as to ethical considerations in the other hybrid situations may be obtained from other sources, such as Chapter 2 of ESTATE PLANNING FOR ILLINOIS ATTORNEYS: THE BASICS AND BEYOND (IICLE, 2008).

Always ask yourself, who is the service really intended to help or benefit. It may not be the person seated in your conference room seeking advice. These situations often arise when the children of one of your clients ask for advice for protecting the parents’ assets or other transactions on behalf of the parents. The often unstated, but present, motivation is to make sure there are assets available for inheritance. Consider sending the engagement letter to all parties specifically indicating that you can only represent the parents due to your past representation of them and the confidential information already in your possession, and that they must authorize you to disclose the information and documents to the children if they want them to be aware of the new plan or transaction.

A. [2S.3] Defining the Scope of Representation

Add at the end of the first paragraph:

RPC 1.2(c) allows the lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” [Emphasis added.] “Informed consent” is defined in Comments [6] and [7] to RPC 1.0, Terminology, which is a new addition to the Rules. It allows that the nature of the communication necessary to provide informed consent will vary under the circumstances that give rise to the need, but the lawyer must make “reasonable” efforts (another defined term, RPC 1.0(h)) to ensure that the client has information reasonably adequate to make an informed decision. Whenever possible and practical, that should indicate a written document. As Oakbrook attorney and frequent contributor to IICLE publications and programs, William Pokorny, often says, “if it isn’t in writing, it did not happen.”

Also note in the new definitions, the suggestion in Comment [7] to RPC 1.0 that informed consent usually requires an affirmative response from the client. Note that the terms “writing” and “confirmed in writing” are now defined in RPC 1.0, paragraphs (n) and (b) respectively.
(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attachment to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

*Add after the bold text on p. 2-5:*

It should also be noted that we will not _____________ [insert specific limitations] as a part of the engagement. If those or any other services are requested, we shall evaluate the matter at the time of the request and submit a new engagement letter for your consideration.

B. Defining the Client

1. Multiple Representation

   a. [2S.5] Confidentiality

*The section is revised:*

The first inquiry regarding multiple representation should be under RPC 1.6 on Confidentiality of Information. RPC 1.6 is absolute that no information relating to the representation of a client may be revealed unless the client gives “informed consent” or unless one of the exceptions enumerated in the rule applies. The exceptions pertain to protection of the public from crime, death, or substantial bodily harm. The other exceptions allowing disclosure of information even though adverse to the client are particularly applicable to asset protection planning. RPC 1.6(b)(2) and 1.6(b)(3) state:

   (2) to prevent the client from committing 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;

   (3) 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.
“Fraud” is defined in RPC 1.0(d) as, being “fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” Given the substance of the Uniform Fraudulent Transfer Act, the definition is clearly applicable. Further guidance is available through Comment [7] to RPC 1.6:

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Like paragraph (b)(1), paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, but the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Also, Comment [15A] to RPC 1.6 states:

[15A] If the lawyer’s services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). The lawyer may give notice of the fact of withdrawal regardless of whether the lawyer decides to disclose information relating to a client’s representation as permitted by paragraph (b). The lawyer may also withdraw or disaffirm any opinion or other document that had been prepared for the client or others. Where the client is an organization, the lawyer must also consider the provisions of Rule 1.13.

This change in the RPC is a direct result of the Enron case, and recognizes that the lawyer of a client engaged in a fraudulent scheme or practice has a duty to disclose the information if the provisions of RPC 1.6(b) are deemed to be present. This is obviously a major liberalization of the lawyer’s former confidentiality limitations.

One other change of note affecting confidentiality is found in RPC 1.18. It requires a lawyer who receives confidential information from a person, and who then declines to enter into an attorney-client relationship or when the client so declines, to keep that information confidential in the same manner as would be required for a former client. This makes it incumbent on the lawyer to refuse to review information that would need to be kept confidential before deciding to accept the engagement. This is easier said than done in a potential asset protection engagement, since the solvency analysis may need to be done before a determination can be made as to the feasibility of the engagement. In those situations, the lawyer must be aware of the continuing duty despite any formal attorney-client relationship.
As stated above, the issues should be addressed in the client engagement letter. The additional concerns involving multiple representations present their own problems. An example of a joint representation letter for multiple clients in an estate planning engagement with an asset protection component is found in §2.18. One essential function of the letter is to describe the duty, and to obtain a waiver, of confidentiality as between the parties represented without waiving it as to the rest of the world. The letter explains the implications of common representation, including the fact that there can be no secrets between the lawyer and one of the parties and that all communications will be revealed to the other party (with one exception, as described in the letter), and that there is a risk inherent in the relationship that a conflict of interest will develop that cannot be handled through a waiver, resulting in the withdrawal of the attorney from representation of both parties. Please note the third paragraph of the “Conflicts of Interest — Joint Representation” section in the letter. It attempts to avoid the problem caused by a client’s insistence in communicating something to be held confidential and having the resulting withdrawal letter alert the other party to the existence of such a communication. See §2.7. However, sometimes the goals of the parties are too diverse, a premarital agreement is involved, or furthering the goal of one party will breach a duty to the other, and in those situations no multiparty representation may be had.

b. [2S.6] Independent Judgment

The first paragraph is revised:

The other Rule of Professional Conduct at work in multiple representation engagements is RPC 1.7. That rule precludes multiple representation in a matter if there is a significant risk that the lawyer’s representation of one or more clients will be materially limited by the common representation. There is an exception if the lawyer reasonably believes that he or she can provide competent and diligent representation to each affected client and each affected client gives informed consent after full disclosure. RPC 1.7(b). The sample joint engagement letter in §2.18 is designed to address that situation.

b1. [2S.6A] Duty of Loyalty

New section:

The problem caused by one client in a multiple representation asking the lawyer not to disclose to the other client information relevant to the representation is also problematic due to the duty of loyalty. The lawyer has an equal duty of loyalty to each client, and each client has a right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use the information to that client’s benefit. See Comment [1] to RPC 1.7:

[1] Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from a lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests. For specific Rules regarding certain concurrent conflicts of
interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For a definition of “informed consent” see Rule 1.0(e).

c. [2S.7] What Happens When a Conflict of Interest Later Arises?

Add at the end of the section:

If a conflict arises after representation as been undertaken, Comment [4] to RPC 1.7 states:

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9. See also Comments [5] and [29].

Additional guidance is provided in Comment [5] to RPC 1.7:

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to project the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Sometimes the advice that is sought will involve business or real estate interests that are owned with others who are not going to be represented. In that circumstance Comment [28] to RPC 1.7 has this guidance:

[28] Whether a conflict is consentible depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by
developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Finally, the representation may involve transfers of assets from revocable trusts or other entities established for estate planning purposes. In that event the guidance provided by Comment [27] to RPC 1.7 may be useful:

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

2. [2S.8] Separate Representation

The section is revised:

RPC 1.7 permits separate representation of clients when joint representation is deemed inappropriate. In such a situation, common representation would be deemed to be inappropriate, but the conflict of interest would be deemed waivable by each party. It should go without saying that such a representation is fraught with potential liability for the lawyer when the scope of each representation will impact the lawyer’s duties of impartiality and loyalty to each of the separate clients. In such a representation, no waiver of confidentiality is possible or desirable. Thus, there is no forum for working out any new potential conflicts of interest before they become actual non-waivable conflicts of interest. It is much more likely that a conflict of interest will be deemed to be actual and will require the lawyer to withdraw from representation of both parties in such a situation. In any event, the attorney must obtain the consent and waiver of each client to the representation of the other. There must be full disclosure of the scope of the engagement of each separately represented client in order for the consent and waiver to be meaningful. The letter should describe the lawyer’s duty to preserve confidentiality for all information revealed during the separate conferences unless the client specifically waives the right. Obviously, written waivers should be obtained, which will require additional work, as will the separate communications and meetings with each client. The impact on the fee to be charged may also be discussed in the letter to preclude a dispute at billing time. Since fees will be higher than in a common representation, due to the separate meetings, it may just be a better practice to refer one of the clients to another lawyer.
3. [2S.9] Termination of Engagement

The last sentence in the carryover paragraph at the top of p. 2-9 is revised:

Thus, it is important to get a former client’s consent to any disclosure requested by a bank, trust company, or other source, even after the representation is terminated, when the information requested came through the client during the course of the representation.

The first two sentences in the next-to-last paragraph are revised:

Whether a lawyer can represent a new client in a new matter in which he or she is adverse to a former client depends on whether the old and new matters are “substantially related,” as defined in RPC 1.9. Consent from both the new and the former clients, after full disclosure, is required.

Add before the last paragraph:

Comment [3] to RPC 1.9 gives the following guidance regarding that test:

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. . . . Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. . . . A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

4. [2S.10] Children Requesting Services for Parents

The first paragraph on p. 2-10 is replaced:

Often children seeking to protect the assets of their parents from their creditors, such as nursing homes, unscrupulous sales persons, or charities, etc., come to see the lawyer who did the parents’ estate planning some years previously. If the end of the engagement letter to the parents clearly indicated that the attorney-client relationship was over and that the attorney had no further duty to the clients, the lawyer must determine who the clients will be in this new engagement and clearly define the relationship in a new engagement letter. If no such letter was sent, there may still be an implied or inherent attorney-client relationship with the parents. It is clear that without representing the parents, there can be no effective actions taken with respect to the assets to be protected. Can the attorney consider representing the interests of the children too?
The comments in §§2.5 – 2.7 regarding the duty of loyalty, conflicts of interest, and confidentiality are all applicable, and these issues must be dealt with from the outset in determining whether an engagement can be undertaken and in identifying the client to be represented. The lawyer must determine whether the parents have the requisite mental capacity to engage a lawyer and direct the lawyer to provide advice for services with regard to protecting their assets. The analysis becomes somewhat easier if one of the children has been given a power of attorney for the property, person, or both of the parents.

The engagement letter must contain a discussion of the lack of attorney-client privilege as between the parents themselves, between the parents and the children, and between the children themselves. The discussion about not keeping confidences and the consequences of asking the attorney to do so noted in §2.5 is recommended.

The last paragraph is deleted.

41. [2S.10A] Diminished Capacity

New section:

In some instances, a lawyer may be required to make an assessment of the competency of the alleged client, the parent, to engage his or her services as counsel. Lawyers need to be familiar with the facets of diminished capacity and determine whether a clinical consultation or formal evaluation by a clinician is required. Obviously, if the lawyer observes signs of diminished capacity such as an inability to articulate reasons behind the decisions and direction put forth, variability of state of mind, or a lack of appreciation of the consequences of the decisions, further evaluation is indicated. RPC 1.14 states:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.
The Comments to RPC 1.14 are quite extensive and cover taking protective action while maintaining the client’s confidentiality regarding the existence of the impairment, and other issues beyond the scope of this chapter.

It may also be that the lawyer has a question as to the substantive fairness of the decisions, if clearly inequitable given the lawyer’s knowledge of the family circumstances or if inconsistent with the client’s lifetime values. It is beyond the scope of this chapter to discuss in detail the handling of a client or potential client with challenging capacity issues. Suffice it to say that any significant concerns should be carefully documented, including the use of notes, independent third-party witnesses, possibly videotaping, and intervention by healthcare professionals. Obviously, if the lawyer clearly determines that the client lacks capacity, or even has substantial doubts as to the client’s capacity, representation must be declined or, in the alternative, representation must be through a guardian or agent under a power of attorney.

42. [2S.10B] Common Interests

New section:

It should be noted that RPC 1.7 requires that any representation disclose the limitations of a lawyer’s responsibility due to the lawyer’s own interests. Thus, if the lawyer has any interest in any bank, trust company, or firm involved in the handling of the client’s assets under the asset protection plan established, the lawyer must disclose all details of the relationship and obtain a written consent from the client. If representation of multiple clients is involved, the disclosure shall include an explanation of the implications of the common representation and the advantages and risks involved.


The section is deleted.

8. [2S.13A] Duties to a Prospective Client

New section:

A new RPC was added and is effective as of January 1, 2010. If a person discusses asset protection planning and then elects not to engage the lawyer, the lawyer still has certain duties to the “prospective” client as set forth in RPC 1.18(b), to “not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” Further guidance is provided in Comment [4] to RPC 1.18:

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective
client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

III. [2S.14] CIVIL LIABILITY OF ATTORNEYS TO THIRD PARTIES

The bold quotation on p. 2-13 and its introductory sentence are replaced:

Comment [10] to RPC 1.2 states:

[10] When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1. In such situations, the lawyer should also consider whether disclosure of information relating to the representation is appropriate. See Rule 1.6(b).

V. [2S.16] DISCIPLINARY ACTION

The second and third sentences are revised:

The commission of a criminal act that reflects adversely on an attorney’s honesty, trustworthiness, or fitness as a lawyer violates RPC 8.4(b), which will invoke sanctions from the Illinois Supreme Court up to and including disbarment. Even if no criminal violation is involved, conduct involving dishonesty, fraud, deceit, or misrepresentation violates RPC 8.4(c), and conduct that is prejudicial to the administration of justice is also subject to sanctions under RPC 8.4(d).

VI. [2S.17A] CONCLUSION

New section:

The new Rules of Professional Conduct are much more comprehensive and provide valuable detailed analysis in the myriad Comments as compared to the now repealed RPC. A full discussion of all applicable RPC and accompanying Comments pertaining to an asset protection planning engagement is beyond the scope of this chapter. It will be incumbent upon each lawyer to become familiar with the RPC that are effective as of January 1, 2010. For guidance, the
Illinois Attorney Registration and Disciplinary Commission may be reached at www.iardc.org. The attorney will be directed to call either a toll free number or the Chicago office number and a staff attorney will attempt to give “guidance,” with the admonition the that comments are not the official position of the Illinois Supreme Court, which is only found in the RPC and Comments therein, or in the Hearing Board opinions as adopted by the Supreme Court. However, while attorneys are struggling to assimilate the massive changes in the new RPC, any guidance will be helpful.

VII. APPENDIX

C. [2S.20] Financial Information Fact-Finder

The section is revised:

Re: Estate Planning and Asset Protection Fact-Finders and Preliminary Decisions

Dear _____________:

Thank you for selecting me to handle your estate planning and asset protection needs. To begin the process, I have enclosed two fact-finder documents we ask that you carefully complete and, in the case of the financial document, sign, and return to us prior to our first meeting. That information will help us identify any tax or property ownership issues and properly identify the persons involved.

As you prepare for the first meeting, you should give some thought to the following:

Executor. Most often a husband and wife will act as each other’s executor, but you will need to name one or more successor executors. The role of the executor is to identify and gather all assets, identify all debts and potential claims against the estate, safeguard and protect assets, including any real estate and investments, carry out the provisions in the Will for distribution of assets, payment of expenses, claims, taxes, if any, and debts, account for all services and finally, distribute the balance of the estate. At the very least, a checking account will need to be opened for the estate and careful notation of the deposit of each check separately and each expenditure, with the source or the purpose for each, will greatly aide in the preparation of the accounting. If the executor intends to take a fee, time records should be kept of all activities performed. Likewise, any out-of-pocket expenditures should be noted for reimbursement from the estate.

Trustee. In the event minor children or young adults will be postponed in their possession of the funds so that they can be managed by a trustee, a person, bank, or trust company will need to be selected. Likewise, a beneficiary may suffer from a disability or for some other reason may be unable to handle the funds, in which case, a special trust may be needed. The selection of an individual verses a corporate trustee depends on several factors,
including the size of the estate, the difficulty in managing the assets, the length of the anticipated trust term, and the presence or absence of competent and trusted individuals willing to act in this capacity.

Personal Property. If you intend to make specific gifts of items of personal property, detailed descriptions, especially of jewelry items, need to be obtained. It is often best to handle those distributions in a separate letter, which in Illinois is not strictly binding on the executor, but which usually operates efficiently to direct those gifts to the proper persons. If no specific gifts are needed, you will still need to give thought as to who should have the personal property, especially if minor children, who cannot effectively possess or enjoy the property, are involved.

Trust Distributions. If Trusts are imposed for minor children or young adults, the Trust instrument should specify the age or ages at which distributions will be made to the beneficiaries. Alternatively, we often provide that the child may withdraw the property at those ages so that the property is not forced on someone not in a position to readily accept it, such as might happen during a divorce or bankruptcy.

Special Needs. If any beneficiary has special needs or circumstances (physical, mental, financial, marital, or otherwise), we can address those through special drafting. They will need to be identified.

Asset Protection. Planning of any type must be done within the rules. In estate planning the rules are largely imposed by the tax codes. In asset protection, it is the laws of fraudulent transfers. If a court determines that a transfer was intended to defraud a present creditor, such as a person against whom a tort was committed or with whom a debt was contracted, or in some cases, to defraud a potential subsequent creditor, a future creditor that is reasonably foreseeable and where the property transfer is accompanied by certain “badges of fraud” identified by the courts, then the transaction can be set aside. Badges of fraud include, among other things, a transfer of substantially all the debtor’s assets, a lawsuit was filed against the debtor shortly before or after the transfer, or retaining possession and control of the asset after transfer. I will not assist in facilitating any transfer that may be deemed fraudulent based on the information available to me. I will rely on you to provide complete and accurate information on your assets, liabilities, and reasonably foreseeable liabilities, and to update that information as often as necessary, so that I can assess the consequences of the planning. In the event of a failure to perform any of the duties contained in this engagement letter, I shall withdraw from the representation in this matter.

Guardian. If any minor children are involved, a guardian may be nominated for appointment by the Court if the spouse does not survive.

Power of Attorney for Healthcare. We routinely draft a Statutory Power of Attorney for Healthcare to appoint an agent, and as many successor agents as you deem necessary, to make healthcare decisions for you in the event of a temporary or permanent disability. Please give thought to the persons you would select as the agent and successor agents.
Power of Attorney for Property. We likewise suggest a Statutory Power of Attorney for Property that would allow an agent, and as many successor agents as you deem necessary, to handle your assets, investments, receive income, pay bills, file tax returns, and otherwise handle your financial affairs. Please consider the persons who would act as agent and successor agents prior to the meeting.

Scope of Representation. Spouses can sometimes have conflicting interests regarding their estate plans. These differences can include views on how family assets should be divided between them during their lifetimes, how much power a surviving spouse should have over property received from the first spouse to die, and how assets should be distributed upon the death of one or both of them. If each of you had your own separate attorney, you would each have an advocate for your own position and would receive totally independent and confidential advice. This is not the case when one law firm represents and advises you jointly. Although we will encourage the resolution of any differences of opinions or conflicting interests, we cannot be an advocate for the positions or interests of just one of you.

If at any point during the process, one spouse desires to have separate counsel, we would be able to remain as the attorney for the other spouse only with the consent of the spouse retaining separate counsel. In very rare cases, the firm representing both of you confronts a conflict of interest so serious that the firm cannot continue to represent either of you. Were that to occur, we would promptly notify both of you that we could no longer continue to represent either of you.

In a joint representation situation, such as we will be entering, all information regarding your estate planning matters will be shared and discussed by both of you. Information communicated by one of you cannot be kept confidential from the other spouse and, to that extent, you are waiving the attorney-client privilege against disclosure of information learned during the estate planning process. That information is of course confidential as to anyone else. In the event we are given information that is specifically stated to be held in confidence, we would have to withdraw from representation of both parties at that time.

[The Internal Revenue Service has issued Circular 230 which sets forth guidelines on the issuance of certain types of written federal tax advise. We understand that no advice to be issued by [Firm] under the terms of our engagement with you will be considered a “Covered Opinion” for purposes of Circular 230. Therefore, you may not rely on any advice that we render to avoid federal tax penalties. Should a circumstance arise that requires that you obtain a “Covered Opinion” on any matter, please contact us and we will discuss your needs. If the Firm agrees at that time to perform a “Covered Opinion” on your behalf, a separate engagement letter will be issued and it will be considered a freestanding representation.]

Charges for Estate Planning Services. It is impossible to specifically quote a charge for an estate planning service before the initial meeting. After the initial meeting, we will be able to give an estimate of the fees for the services, since we will have an idea of the nature and extent of the documents to be prepared. I will follow up with a written proposal for the
project if it is needed due to complexity. If after the initial meeting, you would elect, for some reason, not to retain our services, there would be no charge for the initial meeting. Otherwise, it is considered a billable service. If I am retained, I will ask for a retainer in the amount of 1/3 of the estimated fee. I will bill monthly and apply the retainer to the balance until exhausted. Thereafter, the amount billed will be due and payable within 30 days from the date of the invoice.

In addition to our fees, should there be any expenses incurred for travel, long distance telephone, large batch photocopying, messenger or courier charges, computerized legal research, or other out-of-pocket expenditures, we would ask for reimbursement.

Once we have your fact-finders, the initial meeting can be scheduled. Please call me or my secretary to schedule that meeting. Please return the photocopy of this letter with your signatures at the bottom acknowledging receipt of the letter, and that you understand the terms of the engagement. I look forward to working with you.

Sincerely,

ESTATE AND ASSET PROTECTION PLANNING
FINANCIAL INFORMATION FACT-FINDER

IF YOU HAVE A DETAILED PERSONAL FINANCIAL STATEMENT OR COMPUTER SPREADSHEET LISTING ALL ASSETS, REAL ESTATE, IRA’S, RETIREMENT PLANS, AND INSURANCE, THAT WILL SUFFICE FOR THE INITIAL MEETING, AS WILL A PLAN SUMMARY PREPARED BY A FINANCIAL PLANNER.

Attached is an estate planning “fact-finder” that is intended to provide us with a summary of your current assets, their approximate values, and how they are currently titled. The primary purpose of this fact-finder is to give us information concerning what assets you currently possess. This is an important step for you (and us as your advisors) in determining your estate plan. The information requested under the form, in order of importance and usefulness to us, is:

1. LISTING OF ALL YOUR ASSETS: Once we have a listing of all your assets, we can work from that list to obtain any additional information that is needed.

2. OWNERSHIP OF ASSETS: It is often necessary to determine how assets are currently owned (i.e., by one spouse or the other, or in joint tenancy) so that recommendation and suggestions can be made with respect to changes in ownership necessary to assist in the reduction of estate tax liability.

3. APPROXIMATE VALUE OF ASSETS: It is not necessary that you determine the exact balance or value of each of your assets. A reasonable approximation or average balance of an asset will be more than sufficient.
4. **LISTING OF ALL YOUR LIABILITIES.** We need to know all your current long-term liabilities including Promissory Notes, Leases, Installment Purchase Contracts, a total sum representing your current short-term liabilities including average monthly credit card debt, and any known contingent liabilities such as a personal guaranty of another’s debt.

With the foregoing in mind, we would request that you fill out the attached fact-finder in whatever detail you find comfortable. Whatever information you are unable to provide, we should be able to secure from your financial professionals or other sources. Obviously, the more information you are able to obtain the less we will have to secure. However, we do not want you to spend an inordinate amount of time with the fact-finder nor do we want you to go beyond your comfort level in filling this form out.

The information that you do provide should be listed on separate lines with each item being described by institution, number, and/or other identifying factor. Do not worry about getting each item under the “proper” heading. All of the assets are totaled at the end of the form regardless of the heading they are under so if an asset would seem to fit under more than one heading, just put it under one of the headings and go on from there.

I will not be making an independent verification of the information you provide to me, but it is essential that I have complete and accurate information. My planning recommendations to you may not be appropriate if they are based on inadequate information.

As always, please do not hesitate to call if you have any questions. Thank you.

---

**ESTATE PLANNING**
**FINANCIAL INFORMATION FACT-FINDER**
**OWNERSHIP AND VALUE**

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<td><strong>CERTIFICATES OF DEPOSIT</strong></td>
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MUTUAL FUNDS

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INDIVIDUAL RETIREMENT ACCOUNTS (IRAs)

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KEOGH PLAN *

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QUALIFIED OR NONQUALIFIED EMPLOYER PLANS *

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*Are you currently receiving distributions from any of these retirement plans or the plan of another naming you as beneficiary? _________ yes _________ no

Please list the beneficiary or beneficiaries currently named for any of these retirement plans:

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<tr>
<th>Plan</th>
<th>Beneficiary</th>
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<tr>
<td>Annuities</td>
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<tr>
<td>Life Insurance (Face Value/Death Benefit)</td>
<td>$______</td>
<td>$______</td>
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<tr>
<td>Real Estate (Include primary residence, vacation homes, rental property, vacant land)</td>
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<td>$______</td>
<td>$______</td>
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<tr>
<td>Passive Real Estate Investment (i.e., limited partnerships, etc.)</td>
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<tr>
<td>Automobiles</td>
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<tr>
<td>Interest in Close-Held Business</td>
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<td>$______</td>
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**Is the business incorporated?**

- [ ] Yes
- [ ] No

**If so, has it elected Subchapter “S” status?**

- [ ] Yes
- [ ] No
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<thead>
<tr>
<th>Description</th>
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<tr>
<td>PERSONAL/MISCELLANEOUS ASSETS</td>
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<tr>
<td>OTHER ASSETS (continued)</td>
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<td>TOTAL ASSETS</td>
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<td>GRAND TOTAL</td>
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<tr>
<td>LIABILITIES</td>
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<td>Long-Term (mortgages or notes not to</td>
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<td>be repaid within one year)</td>
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<tr>
<td>TOTAL LONG-TERM LIABILITIES</td>
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</table>
Short-Term (total of all monthly recurring debt, debts due within one year)

TOTAL SHORT-TERM LIABILITIES $_________ $_________ $_________

TOTAL LIABILITIES $_________ $_________ $_________

NET WORTH $_________ $_________ $_________

I (We) represent that there are no pending law suits in which we are named as a party, except as disclosed here ___________________________________________________. I (We) also represent that neither I (we) nor any company that I (we) have been closely associated with have filed for protection in the U.S. Bankruptcy Court within the past 10 years, that all my (our) income tax returns, both State and Federal, are filed on a current basis, and if not, the reason for the lack of timeliness is ____________________________, that I (we) are not currently being audited by any tax collecting authority, there are no threatened legal actions or proceedings against me (us), except _______________________, and that after any asset transfers that result from the engagement of these services, I (we) will be in a position to pay all current bills as they come due and will retain sufficient assets to cover not only current and anticipated obligations, but also potential emergency obligations of a reasonable scope. I (We) also represent that I (we) have never been convicted of a crime, other than routine moving vehicle violations, and that there are no known criminal investigations or grand jury proceedings pending against me (us).

I (we) agree to provide full and accurate documentation on any asset, liability, or representation set forth herein, and to provide updated documents and information from time to time as necessary.

I (We) have prepared this form with the understanding that it will be relied on for estate planning advice, and any material omissions, over or understated amounts, or inaccurate ownership information may cause that advice to be inappropriate. I (We) verify that the information furnished is complete and accurate, and that you will not be making an independent investigation to confirm the data.

Dated: _______________________, 20__