

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the August 7, 2019, Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
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Denver, CO 80222  
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**Notice of Meeting**

The first meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, August 7, 2019, 3:00 p.m.\****  
Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the May 1, 2019, meeting of the Council
2. Financial spreadsheets as of June 30, 2019

**Trust and Estate Section Council Agenda**  
**August 7, 2019**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the May 1, 2019, meeting of the Council
2. Presentation from Joe Hodges/Gene Zuspann
3. Chair's Report and Administrative Matters (Chair Josie Faix)
4. Secretary/Treasurer's report (Tim Bounds)
5. Tax Section Liaison (Georgine M. Kryda)
6. Elder Law Section Liaison (Brooke Brestel)
7. Real Estate Section Liaison (Chad Rounds)
8. Family Law Section Liaison (Kim Willoughby)
9. Statutory Revisions Committee (Molly Zwerdinger)
10. Legislative Liaison (Darla Daniel)
11. Council Notes (Kristin Dittus)
12. CLE/Estate Planning Retreat (Spencer Crona)
13. Orange Book Forms Committee (Heidi Gassman)
14. Rules and Forms Committee (Gordon Williams)
15. Civic and Community Affairs Joint Committee of the Elder Law Section (Sandra Sigler)
16. Diversity & Inclusivity Committee (Melissa R. Schwartz)
17. Probate Trial and Procedures Committee (Kathy Seidel/Norv Brasch)
18. Colorado Estate Planning Handbook (David K. Johns)
19. Green Book (David K. Johns)

20. New T&E Lawyers Committee (Alison Leary)
21. The Colorado Lawyer (Emily Bowman)
22. Communications Representative (Mark D. Masters)
23. Communications Representative/Ambassador Program (Melissa R. Schwartz)
24. Board of Governors Representative (Jonathan Haskell)
25. Miscellaneous/FYI
26. Adjournment

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of May 1, 2019, Meeting**

Council met on Wednesday, May 1, 2019, at the Colorado Bar Association offices, 1290 Broadway, Ste 1700, Denver, Colorado. The meeting was called to order at approximately 3:00 p.m.

The following members of Council were present or participated by phone and constituted a quorum:

Leia Ursery, Chair  
Josie Faix, Vice Chair  
Spencer Crona, Secretary/Treasurer  
Katie Null (CBA Staff)  
Jessica Broderick, Second Year Member  
Gordon Williams (Rules and Forms Liaison)  
Georgine Kryda (Tax Section Liaison)  
Peggy Gardner  
Tim Bounds, Second Year Member (Statutory Revisions Committee Liaison)  
Elizabeth Meck  
Kristin Dittus  
Steve Brainerd (Co-Liaison)  
Chad Rounds (Real Estate Liaison)  
Kim Willoughby (Family Law Liaison) (phone)  
Kayla Nelson  
Darla Daniel  
Sandra Sigler (Civic & Community Affairs)  
David Kirch  
Pete Bullard  
Kelly Cooper  
Elizabeth Akalin (CBA staff)  
Lauren da Cunha  
Alison Leary

**1. Approval of Minutes of Prior Meeting**

The Minutes of the April 3, 2019, Council meeting were approved without objection.

**2. Chair's Report (Leia Ursery)**

Per the Bylaws, the Chair called to order the Annual Meeting of the Trust and Estate Section, whereupon the Chair announced the slate nominees timely submitted for election to the

executive officer and other officer positions for 2019-2020, as follows (refer also to April 10 Notice of Section Annual Meeting):

**Chair:** Josie M. Faix  
**Vice-Chair:** Spencer J. Crona  
**Secretary/Treasurer:** Timothy Bounds

**Second-Year Council Members:**

Lauren da Cunha  
Peggy Gardner  
Elizabeth Meck

**First-Year Council Members:**

Kristin Dittus  
Louisa Ritsick  
Charles C. Spence

Mark Masters, Section Communications Representative  
Melissa Schwartz & Lindsay Andrew, Diversity & Inclusivity Committee  
Jessica Johnson, Chair of New Lawyers Committee  
Mallory Hasbrook, T & E Liaison to New Lawyers Committee  
Darla Daniel, Co-Legislative Liaison (with Steve Brainerd)  
Jonathan Haskell, Board of Governors  
Patrick Thiessen, Elder Law Liaison

No alternative slates were timely received. David Kirch moved to approve the executive-officer slate, with Josie Faix seconding the motion, and the slate unanimously was approved. The slate timely submitted of the secondary and liaison officer nominees was moved, seconded, and unanimously approved, whereupon, all business completed, the Annual Meeting was adjourned.

**Chair's Report:**

- Need update from CBA on by-law amendments.
- Ethics Practice Advisory Subcommittee: Melissa Schwartz willing to lead the subcommittee, with Jamie Schuler, Kelly Cooper, David Kirch, Gerard Deffenbaugh and Herb Tucker willing to serve as members. Additional participants are invited, and the initial objective is to complete a review by the end of summer. David Kirch reported the Subcommittee project includes: Review & report on eight specific advisories, with review and report on

advisory opinions as well. Meeting was set for the last week of May, with intent to complete project by end of July.

- Report on new member welcome letter, Zach Schlichting:
  - Official, distributed
  - T & E is the first CBA section to issue a welcome letter.
  - Congratulations to Zach Schlichting
- Higher Logic rollout: Outgoing Listserve currently being used more frequently; word needs to go out that it is disappearing, so people need to transition over.
- Again, committee chairs are reminded AGAIN that they should examine their pages to assure current accuracy of information.
- Duly warned, Katie Null was welcomed to join us as our new CBA staff liaison.

### **3. Secretary/Treasurer Report (Spencer Crona)**

Balance looks good: \$26,126.65 – \$7,500 for Retreat contribution = \$18,826.65 surplus.

We await consistency for further silent auction donations, in answer to Gordon Williams' question.

### **4. Tax Section Liaison (Georgine M. Kryda)**

- Final meeting June
- Successful outreach lunch event, with more than 20 attendees and CU Law faculty. Jointly sponsored by Solo Practice Section & Young Lawyers Division.
- Legislative Update scheduled for June at the Brown Palace Hotel.
- Generally reviewing multi-section updates

### **5. Elder Law Section Liaison (Kayla Nelson reported for Patrick Thiessen)**

- Elder Law Retreat August 22-24

- Practicum with contested hearing planned for Retreat, so register sooner rather than later, so people can be assigned to a practicum group.
- Another letter to stakeholders for UGCOPAA contemplated for this summer
- Sandra Sigler reported the Practicum will be an educational and entertaining event.
- Sandra Sigler also reported: The Office of Public Guardian Pilot Program has been scaled down for Denver. As to filing-fee funding, Jeremy Schupbach reported fees statewide will be increase as part of the funding structure, if enacted in the upcoming legislative session.

## **6. Real Estate Section Liaison (Chad Rounds)**

- Met April 16<sup>th</sup>, at DU Int'l Relations School, reception afterwards. Few students attended. Leia notes: How to work out call-in technology for such a T & E meeting would be logistical obstacle.
- Impressed with welcome letter, updated to them by Chad.
- Lawyer spoke about recent SCt dec'n, did amicus brief in case. Held unanimously: a business engaged in non-judicial foreclosure proceedings does not fall within debt-collector definition in federal Debt Collection Practices act, so not subject to those requirements. The ruling helped save Public Trustee system in Colorado, but posed an issue for other entities.
- Debate on Denver Initiative 300, on the Denver County ballot next week. Council opposes it because of the effect on real estate rights and values. Debate took place w/in the Section as to whether to release position information to section members and whether to weigh in on the Denver-only initiative. Consensus was that they would alert members of the initiative but remain neutral, providing information online links to both sides.

## **7. Statutory Revisions Committee (Tim Bounds)**

A. Jeremy provided a legislative issues report:

- Dealing with Remote Notarization issue, our version still on track.
- Abandoned EP documents, 50/50 on whether to send to Governor due to end of session
- OPG going through appropriations
- Criminalize abandonment of at-risk elder: still being amended, reviewed. Need to assure locking against wandering won't become a felony.

- Electronic repository for advance directives: stakeholders still working.
- UTC: Part 5 creditor claims will be examined over summer.

B. Other Statutory Revisions updates:

- Child Support in Probate update: Pat Mellon: Co-chair Jamie Schuler had spreadsheet she reviewed reflecting issues being examined. Recognize family allowance but could child support obligation possibly have an effect on the family allowance? Committee to meet over summer.
- Carl Stevens looking into forming subcommittee to examine formalities for execution of advance directives. Possibly mirror PoA statute; Catherine Seal noted potential interstate enforceability issues if those adopted.
- Lindsay Andrew: proposed amended FP & CR Report forms. Reduce need for frequent amendment by new JDF 885 combining Conservator Report & Updated Financial Plan. Motion approved for SRC to examine statutory revisions needed to accommodate such new forms. Will commence work in August.
- Steve Brainerd: Jeremy articulated that gamesmanship at CGA has reached new low. Effect on us: Abandoned EP documents bill stuck on consent docket. Bills could die on the vine, would need to start from scratch next session. Pete Bullard: If enacted, effective July 2020. Could be two years before attorneys could use it, due to needed ethical provisions consistent with new statute. Gordon Williams: Possible pilot program to be attempted only for wills. Tim: Form of statute originally passed by committee was constrained to wills.
- Leia notes that Jeremy wants to know about our interest in what a potential uniform law would look like on electronic wills. Solicitation for someone to work with him on the issue. Starter language red line of what Uniform Law Commissioners would produce. Jeremy notes that involvement would involve signing up for the ULC committee, receive messages and documents, listen to meetings on phone, review, report to T & E. Doing what Kevin Millard did. Consider drafts in comparison to what's happening legislatively. Jeremy characterizes it as "active monitoring." Suggestions to invite Kevin or Herb Tucker or those involved in Remote Notarization bill to serve. Kevin Herb Letty Frank

**8. Legislative Liaison (Stephen M. Brainerd/Jeremy Schupbach - CBA) Jeremy reported:**

No further report beyond today's legislative updates.



**9. Legislative Update (Jeremy Schupbach, CBA, as above, and)**

- Remote Notary bill: Waiting for second reading, hours of debate ahead.
- Storage of EP documents – work on a bill continuing before end of session. Testimony on behalf of CBA took place April 8.

**10. Council Notes (Josie Faix/Kristin Dittus)**

- Next issue June 15, article ready
- Looking for more articles of interest to section

**11. CLE/Estate Planning Retreat (Josie Faix)**

- Filling up, so register
- Huge call for donations to auction: gifts, events, tours, show & sports tickets, dinners, happy hours
- Various activities available via Retreat
- Play to be presented in Saturday plenary session, David Struthers announced

**12. Orange Book Forms Committee (Kim Raemdonck)**

- Individual retirement language specific to trust & minor beneficiaries of joint trust
- Heidi Gassman chair, Lisa Hartney co-chair
- Sample form engagement letters, beneficiary deeds of trust form, committee to deal with Uniform Trust Code, update forms, gifting language, committee for dementia-directed language for PoA

**13. Family Law (Kim Willoughby)**

- No report.

**14. Rules & Forms Committee (Gordon Williams)**

- Revocation of beneficiary deed form approved. When done, will be a Bradford form
- Kirch on Peggy Gardner's subcommittee of Orange Book notes work ongoing on deed forms. Coordination needed.
- Laurence Gendleman lauded as Secretary

- Work on proposed letter regarding forms issues, assure it's respectful: There is a Supreme Court Rules & Forms Subcommittee, in which Marcie McMinimee participates. Leia suggests a check with Connie Lind of SCAO, who oversees the subcommittee. Verification signature on forms is a question currently before the subcommittee. SCAO can coordinate uniform practice among the state's judicial districts. Elizabeth Akalin also notes that per CBA policy there must be CBA approval for any official position taken with a state agency, on behalf of the CBA or a section. Leia notes T & E will review, suggests presentation of draft letter for later May review, with summer left to prepare/finalize memorandum to accompany letter. Executive Council would review after that. Elizabeth: Per CBA protocol need letter and memo expressing pros & cons of Rules & Forms position, disseminated to other sections for review and input.

**15. Civic & Community Affairs (Sandra Sigler)**

- Senior Law Handbook at printer, delivery late May
- First SLD Jeffco June 1
- 17<sup>th</sup> Judicial June 8
- Denver July 11<sup>th</sup>
- Larimer Aug 3<sup>rd</sup>
- GJ October 25<sup>th</sup>
- What to Do When Someone Dies brochure. Kayla Nelson working on that. No comments on draft brochure. 8.5 X 11 for attorneys, quarter-fold for public from CBA, consistent with all brochures. Download versions will be available. Moved and seconded to approve brochures, approved.
- Working on joint tenancy brochure, others over summer.

**16. Diversity & Inclusivity Committee (Melissa R. Schwartz)**

- No meeting

**17. Probate Trial & Procedures Committee (Zachary Schlichting):**

- Discussion of CAPs issues, refer to Tim Bounds
- Tim reports discussion at SRC: problem of listing a party, person or private fiduciary and with virtually no due process, on CAPS site for "mistreatment," upon only a technician's report. SRC subcommittee to scrutinize process.
- Zach working with Shanna Montoya on some trial technique videos for community

**18. Colorado Estate Planning Handbook (David K. Johns/Constance B. Wood/Julia G. McVey)**

No report

**19. Green Book (David K. Johns)**

No report

**20. New T & E Lawyers Committee (Lauren da Cunha/Alison Leary) Alison reports:**

- Happy Hour Friday event contemplated at Retreat
- Council would participate

**21. *The Colorado Lawyer***

- Emily Bowman working on article, Alison Leary working on article, need article on abandoned EP docs Pete & Tim (wait until ethics rules completed)
- Will check on Alison's article on litigation coming along
- Patrick Thiessen has promised an article on appeals of probate issues
- Shorter articles desired

**22. Communications Representative (Mark D. Masters)**

No report

**23. Ambassador Coordinator (Melissa R. Schwartz/Lindsey Andrew)**

No report

**24. Board of Governors Representative (Jonathan Haskell)**

Attending meeting scheduled for the second Friday in June at Cheyenne Mountain Resort, Colorado Spring. Report on that in August.

**25. Miscellaneous/FY1**

Gordon Williams question: Can a section extend scholarship offers for a court clerk to attend EP or Elder Law Retreat?

Elizabeth: Bylaws approved by CBA Executive Council, update to follow.

**26. ADJOURNMENT**

The meeting was adjourned at 4:20 p.m. Next meeting will be August 7, 2019

Respectfully submitted,

Spencer J. Crona

## **Progress Report re Pending Termination of CBA-TES List**

**Dated 8/5/19**

**By Gene Zuspenn and Joe Hodges**

**Summary:** After working on closing the list since February when Council told us to do so, and having obtained input from L-Soft, we have concluded that it might not be in the best interests of the members of this Section to close the CBA-TES List by the end of August, which is our current target date, as opposed to a later date or perhaps even ever, and here are some of our suggested reasons why:

- 1) The actual costs of the List are \$300 per year plus \$2.5 per thousand of sent and bounced emails (archive storage is free). Volume has gone down some on TES based on recent billings and message traffic, and we now estimate that the List will run us an average of 300 messages per month and cost us in the neighborhood of \$1,200 per year provided the archives are managed on a yearly basis.
- 2) We have been monitoring the traffic on TES and T&E Community since February and can say that, while the volume has gone down some on TES due to its pending closure, the substance of the discussions has not, plus the volume on Community has not been near what it was or even still is on TES suggesting, if nothing else, that Community has been slow to catch on and needs more time to prove itself before TES is closed.
- 3) The Section now has sufficient resources to pay for TES to continue, at least into the near future, while Community proves itself out.
- 4) While we have backed up the TES archives from inception to date, CBA is telling us there is no way those archives can be imported into Community, but we still think there might be and we need more time to explore that since those archives use a proprietary method of coding to generate themselves. This may involve subscribing Community to TES so that any postings to TES automatically go to Community (and perhaps visa versa), perhaps at the risk of some message duplication.
- 5) Given the current volume of Community, much more frequent and comprehensive training in the use of Community is needed if it is going to catch on and succeed as the Section's sole source of communication amongst its members. This will take more time to complete given what little training has occurred to date, suggesting that it is too soon to close TES now.

Colorado Bar Association  
**Trust & Estate**  
For the Twelve Months Ending June 29, 2019

		June	YTD	Budget	Variance	%	Last FY
<b>Beginning balance</b>	<b>01-3160-31600</b>		<b>\$7,804.88</b>		<b>\$7,804.88</b>	<b>0%</b>	<b>(\$441.96)</b>
<b>Trust &amp; Estate Section</b>							
<b>Revenue</b>							
Dues Income Section	01-4050-31600	180.00	32,560.00		32,560.00	0%	33,010.00
Meal Income	01-4051-31600		1,040.00		1,040.00	0%	
<b>Total Revenue Trust &amp; Estate Sect</b>		<b>180.00</b>	<b>33,600.00</b>		<b>33,600.00</b>	<b>0%</b>	<b>33,010.00</b>
<b>Expenses</b>							
Other Expense	01-5000-31600		(25.80)		(25.80)	0%	(100.00)
AWARDS	01-5007-31600		(633.14)		(633.14)	0%	(356.78)
Travel	01-5102-31600					0%	(1.00)
Postage	01-5304-31600		(11.32)		(11.32)	0%	(0.92)
Telephone	01-5412-31600		(518.99)		(518.99)	0%	(887.03)
Internet/E-Mail Access	01-5413-31600		(1,304.75)		(1,304.75)	0%	(1,965.22)
Meals (Not travel related)	01-5491-31600	(134.52)	(10,442.21)		(10,442.21)	0%	(11,243.31)
Administration Fee	01-5494-31600	(503.75)	(6,045.00)		(6,045.00)	0%	(5,934.96)
Grants/Contributions	01-5500-31600					0%	(5,993.94)
<b>Total Expenses Trust &amp; Estate Sec</b>		<b>(638.27)</b>	<b>(18,981.21)</b>		<b>(18,981.21)</b>	<b>0%</b>	<b>(26,483.16)</b>
<b>Statutory Revisions Committee</b>							
<b>Revenue</b>							
<b>Rev. Elderlaw Joint Task Force</b>							
<b>Rev. Uniform POA Act</b>							
<b>Rev. Uniform Trust Code</b>							
<b>Expenses</b>							
<b>Exp. Elderlaw Joint Task Force</b>							
<b>Exp. Uniform POA Act</b>							
<b>Exp. Uniform Trust Code</b>							
<b>CLE</b>							
<b>Revenue</b>							

Colorado Bar Association  
**Trust & Estate**  
 For the Twelve Months Ending June 29, 2019

	June	YTD	Budget	Variance	%	Last FY
<b>Revenue Joint CLE</b>						
<b>Revenue CLE Retreat</b>						
<b>Revenue CLE Section Only</b>						
<b>Expenses</b>						
<b>Expenses Joint CLE</b>						
<b>Expenses CLE Retreat</b>						
<b>Expenses CLE Section Only</b>						
<b>Council Notes</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Community &amp; Civic Affairs</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Rules &amp; Forms Committee</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Orange Book Forms</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Local Liaison</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Uniform Trust Code</b>						
<b>Revenue</b>						

Colorado Bar Association  
**Trust & Estate**  
 For the Twelve Months Ending June 29, 2019

	June	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>						
<b>Transfer Deposits</b>						
Revenue						
<b>Expenses</b>						
<b>Admin. Chair</b>						
Revenue						
<b>Expenses</b>						
<b>Estate Planning Handbook</b>						
Revenue						
<b>Expenses</b>						
<b>Admin Council Dinner</b>						
Revenue						
Meal Income	01-4051-31612				0%	\$1,720.00
<b>Total Revenue Admin Council Din</b>					<b>0%</b>	<b>1,720.00</b>
<b>Expenses</b>						
<b>Legislative Liaison</b>						
Revenue						
<b>Expenses</b>						
<b>Internet Editor</b>						
Revenue						
<b>Expenses</b>						
<b>Technology Committee</b>						
Revenue						
<b>Expenses</b>						
<b>Real Estate Liaison</b>						



Colorado Bar Association  
**Trust & Estate**  
For the Twelve Months Ending June 29, 2019

		June	YTD	Budget	Variance	%	Last FY
<b>Revenue</b>							
<b>Expenses</b>							
<b>Green Book</b>							
Revenue							
Expenses							
<b>The Colorado Lawyer</b>							
Revenue							
Expenses							
<b>T&amp;E Diversity Committee</b>							
Revenue							
Expenses							
Judicial Liaison							
Revenue							
Expenses							
<b>Member Vouchers</b>							
Expenses							
<b>T&amp;E Young Lawyer Society</b>							
Revenue							
Expenses							
Meals (Not travel related)	01-5491-31629		(\$160.80)		(\$160.80)	0%	
<b>Total Expenses T&amp;E YLS</b>			<b>(160.80)</b>		<b>(160.80)</b>	<b>0%</b>	
<b>Beginning Balance</b>	01-3160-31600		7,804.88		7,804.88	0%	(441.96)
<b>Total Revenue All Sources</b>	01-4???-316??	180.00	33,600.00		33,600.00	0%	34,730.00
<b>Total Expense All Sources</b>	01-5???-316??	(638.27)	(19,142.01)		(19,142.01)	0%	(26,483.16)
<b>Ending Balance</b>		(458.27)	22,262.87		22,262.87	0%	7,804.88

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of September 4, 2019, Meeting**

Council met on Wednesday, September 4, 2019, at the Colorado Bar Association offices, 1290 Broadway, Suite 1700, Denver, Colorado. The meeting was called to order at approximately 3:15 p.m. by Josie Faix, Chair.

The following members of Council were present or participated by phone and constituted a quorum:

Josie Faix, Chair  
Spencer Crona, Vice Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem

Katie Null (CBA Staff)  
Gordon Williams (Chair, Rules & Forms Committee)  
Georgine Kryda (Tax Section liaison)  
Peggy Gardner (2<sup>nd</sup> year member)\*  
Chad Rounds (Real Estate Section liaison)  
Sandra Sigler (Chair, Civic & Community Affairs Committee)  
David Kirch (the *Colorado Lawyer*)  
Lauren da Cunha (2<sup>nd</sup> year member)  
Molly Zwerdinger (Chair, Statutory Revisions Committee)  
Melissa Schwartz (Chair, Diversity & Inclusivity Committee)  
Louisa Ritsick (1<sup>st</sup> year member)  
Darla Daniel (Legislative liaison)  
Lindsay Andrew (Chair, Ambassador Program)  
Kristin Dittus (1<sup>st</sup> year member)  
Kim Willoughby (Family Law Section liaison)  
Charles Spence (1<sup>st</sup> year member)\*  
Mallory Hasbrook\*

\*denotes attendance via telephone

**1. Approval of Minutes of Prior Meeting**

The Minutes of the August 7, 2019, Council meeting were approved unanimously.

**2. Chair's Report (Josie Faix)**

Josie discussed a recent trend where courts are returning original wills that have been lodged and/or submitted for probate. There was a discussion about possible options for addressing this issue. Josie is going to contact Judicial and report back to Council. Josie also discussed the current status of the Trust & Estates Section Listserv and increasing member use on the CBA Community platform. The Bar Association has offered to conduct additional training sessions with members on how to use the Community platform to ease with the transition. The Listserv will be officially terminated at the end of 2019. Josie also discussed the current contract lobbyist and CBA legislative liaison positions.

**3. Secretary/Treasurer Report (Tim Bounds)**

There was no financial information to discuss. The Annual Dinner will be sometime in October or November.

**4. Tax Section Liaison (Georgine M. Kryda)**

There was no report from the Tax Section.

**5. Elder Law Section Liaison (Patrick Thiessen)**

The Elder Law Section will be reviewing the proposed Guardianship "Bill of Rights" legislation during the upcoming legislative session. Tom Rodriguez and Scott Christian formed a subcommittee called the "Fiduciary Oversight Subcommittee." Patrick reported that the Elder Law Retreat went well and was well-attended.

**6. Real Estate Section Liaison (Chad Rounds)**

Chad Reported to Council on the Real Estate Section meeting which took place on August 20, 2019. The Real Estate Section's annual retreat occurred in July and there were over 400 attendees. The Section has added two new liaison positions: regional liaison and professional organization liaison. Chad will be attending the stakeholder meeting regarding protected proceedings and report back to Council in October.

**7. Family Law Section Liaison (Kim Willoughby)**

The Family Law Section is still on summer break; the first meeting will be later this month. Kim reported that the issues with the creditors section of the *Colorado Uniform Trust Code* have been resolved with respect to child support obligations.

**8. Statutory Revisions Committee (Molly Zwerdlinger)**

Molly reported that a new subcommittee was formed to address issues with the current form of conservator's reports. Gordon Williams presented on his subcommittee that previously submitted proposed changes to the *Information of Appointment* JDF form to include information about fiduciary fees. The proposed changes had previously been approved by SRC. **A motion was made to approve the proposed changes. The motion passed unanimously.**

**9. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)**

There was no report. The Legislature is not currently in session.

**10. Legislative Update**

There was no report. The Legislature is not currently in session.

**11. Council Notes (Josie Faix/Kristin Dittus)**

Kristin reported that Norv Brasch will have an article on basis adjustment in the upcoming edition. Anyone with article ideas or suggested topics should contact Kristin.

**12. Continuing Legal Education & Estate Planning Retreat (Spencer Crona)**

The agenda for the "Brown Bag Lunch" CLE series is nearly completed. The agenda for the annual *Fall Update* is also nearly completed, and will look at issues regarding elder abuse, tax planning for estates under \$5 million, UTC provisions, estate planning for cannabis assets, and fiduciary income tax returns. The 2020 *Estate Planning Retreat* will feature a presentation on estate administration.

**13. Orange Book Forms Committee (Heidi Gassman)**

The Committee is continuing to review the work from the *Retirement Assets* subcommittee.

**14. Rules & Forms Committee (Gordon Williams)**

Rules & Forms is continuing to review proposed forms for property affidavits and deeds.

**15. Civic & Community Affairs (Sandra Sigler)**

Sandra reported that “Senior Law Days” recently occurred in El Paso and Teller Counties, as well as Ft. Collins. Summit County is having Senior Law Day on September 11, 2019; Boulder County will be on September 28, 2019, and finally Mesa County will be on October 25, 2019. Anyone interested in more information about Senior Law Day in general or upcoming events can visit [www.seniorlawdaycolorado.com](http://www.seniorlawdaycolorado.com). The Committee will be asking for a grant from the Section to help fund the *Senior Law Handbook*. The estate planning brochure is almost finished, and the brochures for joint tenancy and probate in Colorado are almost done as well.

**16. Diversity & Inclusivity Committee (Melissa Schwartz)**

Melissa will be presenting the action plan on diversity and inclusivity to Council next month. The Section summit is going to be taking place on Thursday, September 5, 2019.

**17. Probate Trial & Procedures Committee (Kathy Seidel):**

Aaron Evans is forming a subcommittee to look at Rule 40 of the probate procedural rules, which addresses discovery and other case management issues.

**18. Colorado Estate Planning Handbook (David Johns)**

There was no report.

**19. Green Book (David Johns)**

There was no report.

**20. New T & E Lawyers Committee (Alison Leary)**

The Committee needs volunteers for the group study call. The Committee is also expanding to include older lawyers who are entering new fields of practice for the first time, not just younger lawyers. The Committee is also conducting a survey regarding topics for future presentations.

**21. The Colorado Lawyer (Emily Bowman & David Kirch)**

There are three upcoming articles in the *Colorado Lawyer*. The November article will discuss the new directed trustee statute.

**22. Communications Representative (Mark Masters)**

There was no report.

**23. Ambassador Coordinator (Lindsey Andrew)**

There have been two new requests for ambassadors, and Lindsey is working on putting them in touch with candidates.

**24. Board of Governors Representative (Jonathan Haskell)**

There was no report.

**25. Other Business**

Melissa Schwartz prepared a memorandum on the recent Ethics Advisories. Melissa will be making final revisions to the memorandum and submit them on behalf of the Trust & Estates Section.

**ADJOURNMENT**

The meeting was adjourned at 4:20 p.m. The next Council meeting will be held on October 2, 2019.

Respectfully submitted

/s/ Timothy Bounds, Secretary

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the October 2, 2019, Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, October 2, 2019, 3:00 p.m.\****

Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the September 4, 2019, meeting of the Council
2. Civic and Community Affairs Estate Planning Brochure (draft)
3. Memorandum on Section Administrative Fee Increase
4. Memorandum from Real Estate Section meeting
5. Financial spreadsheets as of September 30, 2019

**Trust and Estate Section Council Agenda**  
**October 2, 2019**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the September 4, 2019, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
  - a Proposed increase to CBA administration fee.
3. Secretary/Treasurer's report (Tim Bounds)
4. Tax Section Liaison (Georgine M. Kryda)
5. Elder Law Section Liaison (Patrick Thiessen)
6. Real Estate Section Liaison (Chad Rounds)
7. Family Law Section Liaison (Kim Willoughby)
8. Statutory Revisions Committee (Molly Zwerdlinger)
9. Legislative Liaison (Darla Daniel)
10. Council Notes (Kristin Dittus)
11. CLE/Estate Planning Retreat (Spencer Crona)
12. Orange Book Forms Committee (Heidi Gassman)
13. Rules and Forms Committee (Gordon Williams)
14. Civic and Community Affairs Joint Committee of the Elder Law Section (Sandra Sigler)
  - a Review/approval of Estate Planning brochure.
15. Diversity & Inclusivity Committee (Melissa Schwartz)
16. Probate Trial and Procedures Committee (Kathy Seidel & Norv Brasch)
17. Colorado Estate Planning Handbook (David Johns)



18. Green Book (David Johns)
19. New T&E Lawyers Committee (Alison Leary)
20. The Colorado Lawyer (Emily Bowman)
21. Communications Representative (Mark Masters)
22. Communications Representative/Ambassador Program (Lindsey Andrew)
23. Board of Governors Representative (Jonathan Haskell)
24. Miscellaneous/FYI
25. Adjournment

## Team of Professionals and Advisors Involved in Your Estate Plan

With your consent, your attorney may work closely with or consult with your professionals or advisors to coordinate and implement your estate plan. Those professionals or advisors may include:

- **Life Insurance Agent:** Life insurance may be a tool utilized in your estate plan, whether it is the purchase of policies or the coordination of your existing policies into your estate plan. The most important consideration is the beneficiary designation on existing policies. Current designations may need to be changed in order for your estate plan to work.
- **Financial Advisor:** Many Financial Advisors manage investment and retirement accounts for individuals. Your financial advisor plays an important role in implementing your estate plan by structuring and titling account ownership and can help ensure beneficiary designations on your retirement accounts are properly stated.
- **Certified Public Accountant (CPA):** Your attorney may consult with your CPA or other tax advisor for the purposes of tax planning or minimizing income and/or estate tax liabilities.

## Conclusion

The right type of estate plan for you depends on your goals, assets, and personal and health issues, and there are pros and cons to all options. Your estate plan should be reviewed by you or with your attorney every few years in case if changes in your life or in the law necessitate changes to your current plan.

Estate planning documents are important documents for every Colorado resident, no matter his or her economic circumstances. Hiring an attorney to draft your estate planning documents is one alternative to accomplish your estate plan.

This brochure is published as a public service by the Colorado Bar Association and was authored and is reviewed and updated as needed by the Civic & Community Affairs Committee, a Subcommittee of the Trusts and Estates Section. Its purpose is to provide general information about the topic contained herein, which is a common legal issue that may come up in estate planning, probate, and/or elder law cases. The information in this brochure is current as of **August 2019**. You should ensure that there have not been any changes in the law that may affect your matter, which may require consulting with an attorney.

# Estate Planning



**CBA**  
Est. in 1897

Colorado Bar Association

## ESTATE PLANNING

### What Is an Estate Plan?

An estate plan is a series of documents in which you provide instructions and declarations in the event that you become incapacitated or die. Estate planning documents can address the following goals:

- Direct who should speak for you or care for you when you are unable to;
- Direct who should protect and manage your assets while you are alive but unable to do so;
- Direct your medical or health treatment if you are unable to communicate your wishes later;
- Minimize tax liabilities during your life or upon your death;
- Direct who should inherit from you after your death; and
- Nominate someone to administer your assets after your death.

### How Does an Attorney Create an Estate Plan?

An attorney will schedule multiple meetings with you to counsel you through a variety of issues and ask a series of questions that will help them analyze your assets and your goals and recommend an estate plan that is designed for you. In the end, you should be able to identify your options, the scope of the proposed plan, the purpose of all the documents and how they are to be used.

Be prepared to ask the attorney about their fees for designing your plan, their experience, and their approach to estate planning. Working with an estate planning attorney involves spending a significant amount of time and placing a significant amount of trust in the attorney, so you should make sure you are comfortable with the attorney you choose. In addition, you may have an ongoing relationship with the attorney if you need to update or change your plan later or need help understanding or using the finished documents.

## Estate Planning Documents

There are a number of documents that may be part of your estate plan. Those documents may include:

- **Will:** A Will provides instruction for how you want your assets to pass after your death and who you want to administer your estate. In Colorado, the individual who administers your probate estate is called the “Personal Representative.” You may know the Personal Representative as the “Executor.”
- **Revocable Living Trust (RLT):** A RLT is one common type of trust. A RLT can provide instruction for how your assets are managed during your lifetime, as well as after you die. The person in charge of your trust is called a “Trustee.” Normally under an RLT, the person who creates the Trust, or “Settlor,” manages their own assets during their lifetime. If the Settlor is unable to manage his assets during his life or the Settlor dies, the person named as the successor trustee can step forward to manage the assets in the Trust. An estate planning attorney will talk with you to determine if a RLT or another type of trust is appropriate for your estate planning needs.
- **Financial Power of Attorney:** A financial power of attorney, sometimes called a “General Durable Power of Attorney,” is a document in which you give another person the authority to act on your behalf with respect to your finances. That person is called your “Agent.” The document is intended to allow your Agent to manage your personal finances for you when you are living but not able to do so yourself. A financial power of attorney can become effective immediately upon signing or after doctors certify in writing that you lack the ability to manage your own finances. An Agent has no authority after your death.
- **Medical Power of Attorney:** A medical power of attorney is a document in which you nominate an Agent to make health care decisions on your behalf while you are living but unable to do so yourself. A medical power

of attorney can also become effective immediately upon signing or at a later time.

- **Advanced Medical Directive/Living Will:** A Living Will is entirely different from the Will document described above. In a Living Will you can choose whether you would like to receive heroic measures, artificial nutrition, or artificial hydration should you become unable to communicate your wishes, and you (1) have a terminal condition or (2) are in a persistent vegetative state.

If you do not have a Living Will and your family members disagree about what the doctors should do, the decision might be left to a court.

- **Declaration of Last Remains/Burial Instructions:** A Declaration of Last Remains provides instruction for your remains after you die: do you want to be buried or cremated? Do you want a funeral or memorial service? If you have a pre-paid burial or cremation plan, this document may still be necessary in your estate plan.

### Taxes

A comprehensive estate plan may also include tax planning. Estate tax liabilities can be reduced and, in some cases, eliminated through some advanced estate planning techniques. In addition, some estate plans may reduce income tax liability during your life.

### Business Succession Planning

If you own a business or have an interest in a business, it is important to understand what may happen after your death. Business succession issues may be addressed in your estate plan, but business succession also depends on the structure of the business and its operating agreements. Therefore, business succession may be a component of your estate plan but will need to be addressed separately from your personal assets.

## Memorandum

To: CBA Section Leadership

From: Patrick Flaherty, CBA Executive Director

Date: August 22, 2019

Re: Section Administrative Fee

The Colorado Bar Association (CBA) is considering raising the administrative fee it charges sections to provide them administrative support. The proposal is to increase the fee from \$5 per member to \$10 per member for fiscal year 2020–21, and then raise it \$.25 each year thereafter (to roughly equate to the current consumer price increase). The fee has not changed in 15 years despite inflation and increased section support. If the CBA does not increase the fee, it will have to begin reducing services to sections or increase general membership dues.

The CBA's 30 substantive law sections are critical to the CBA's mission, and approximately two-thirds of CBA members belong to at least one section. Over the years, the CBA has increased its support of sections to improve member satisfaction. When the section administrative fee was last raised, the CBA employed two full-time equivalent section liaisons. Today, it employs five full-time equivalent staff to serve the sections. Consistent with our strategic goals, we've helped sections improve member satisfaction by introducing new services, tools, and best practices. We've also upgraded the technology and audiovisual services available to sections.

When last raised 15 years ago, the fee supported 70% of the costs incurred by the CBA to support sections. Today, the current fee supports only 36% of the CBA's costs. The proposed increase would cover 72% of the costs, and future increases would approximate the current rate of inflation.

Per member, the CBA's administrative fee is among the lowest in the country. State bar associations charge sections for the cost of administrative support in different ways. A few charge fixed fees like the CBA; some charge a percent of section membership dues; and some keep annual section revenue not spent. Even considering these various approaches, Colorado is currently the lowest. Arkansas is next lowest among the country's voluntary state bars; it charges a minimum of \$9 per member, and the fee increases for sections with higher dues. Among voluntary state bars, the average per member fee is between \$15 and \$20, and the highest per member fees are \$30 in Connecticut and \$40 in New Hampshire. At \$10 per member, the CBA's fee would remain among the lowest.

Please direct comments on this proposal, in writing, to Amy Sreenen, Director of Sections and Committees, [asreenen@cobar.org](mailto:asreenen@cobar.org), by September 27, 2019. The CBA Executive Council will consider the matter in October 2019, allowing sections time to adjust their dues, if necessary, before the dues cycle starts in April 2020 for the fiscal year beginning July 1, 2020.

**KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC**  
MEMORANDUM

**TO: Council of the CBA Trust and Estate Section**

**FROM: Chad Rounds**

**RE: Summary of 9/17/19 CBA Real Estate Section Council Meeting**

**DATE: 9/19/19**

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I attended the CBA Real Estate Section Council ("RESC") meeting on 9/17/19. The following is my report on matters discussed which the CBA Trust and Estate Section Council ("TESC") might find of interest:

**#1) "Licensed Lawyer" Directory:**

A presentation was made on the CBA's new online attorney directory called "Licensed Lawyer." It replaces the old "Find-A-Lawyer" search engine. All CBA members can take advantage of it. It allows other lawyers as well as potential clients to search for lawyers in different practice areas and geographic locations and then to contact them directly through the site. **To maximize its effectiveness, it is important that you update your profile.** To do so, you visit [www.LicensedLawyer.org/co](http://www.LicensedLawyer.org/co) and then login using your CBA username and password. A nice feature of this service is that on your profile page you can review some analytics including how many people clicked on your name or tried to contact you through the site.

**#2) CCIOA Task Force:**

One hot topic for the Real Estate Section this bar year will be the Colorado Common Interest Ownership Act (CCIOA) Task Force and what legislative action emerges from the task force's findings. The creation of the task force was a result of Governor Polis' veto of legislation which would have renewed the licensing of homeowner association (HOA) managers. He directed that the Department of Regulatory Agencies (DORA) lead multiple public meetings regarding issues related to regulating HOA's. A representative from the Real

Estate Section has been attending the meetings. The Real Estate Section is preparing for state lawmakers to react this coming session with proposed legislation which will likely be very broad in its scope in reforming HOA law. The Real Estate Section will want to be a check on the passage of vague and ambiguous laws in this area which would not be practical to enforce and which would only increase the already high costs being passed onto property owners participating in HOA's.

**#3) Stakeholder Meetings on Colorado Protected Proceedings:**

The new chair of the Real Estate Section had asked that I attend the stakeholder meetings on Colorado Protective Proceedings and report back on proposals that might affect real estate such as the concept of receiverships. I attended the final stakeholder meeting which met at the CBA on September 11<sup>th</sup>. The concerns/topics raised by protected person advocates and state legislators were narrowed down and used to create new subcommittees of the Elder Law Section to address the following issues: (1) protected person's bill of rights, (2) supported decision-making, (3) fiduciary oversight, and (4) regulation. Members for these subcommittees are being recruited and will start to discuss the topics at hand and eventually come up with recommended fixes to the system which may or may not include changes to the existing protective proceedings law.

Colorado Bar Association  
**Trust & Estate**  
For the Two Months Ending August 31, 2019

		August	YTD	Budget	Variance	%	Last FY
<b>Beginning balance</b>	<b>01-3160-31600</b>		<b>\$22,262.87</b>		<b>\$22,262.87</b>	<b>0%</b>	<b>\$7,804.88</b>
<b>Trust &amp; Estate Section</b>							
<b>Revenue</b>							
Dues Income Section	01-4050-31600	1,890.00	29,820.00		29,820.00	0%	30,115.00
<b>Total Revenue Trust &amp; Estate Sect</b>		<b>1,890.00</b>	<b>29,820.00</b>		<b>29,820.00</b>	<b>0%</b>	<b>30,115.00</b>
<b>Expenses</b>							
Telephone	01-5412-31600					0%	(9.87)
Internet/E-Mail Access	01-5413-31600		(544.99)		(544.99)	0%	(322.68)
Meals (Not travel related)	01-5491-31600	(1,439.64)	(1,439.64)		(1,439.64)	0%	(802.04)
Administration Fee	01-5494-31600	(504.17)	(1,008.34)		(1,008.34)	0%	(1,007.50)
Grants/Contributions	01-5500-31600		(7,500.00)		(7,500.00)	0%	
<b>Total Expenses Trust &amp; Estate Sec</b>		<b>(1,943.81)</b>	<b>(10,492.97)</b>		<b>(10,492.97)</b>	<b>0%</b>	<b>(2,142.09)</b>
<b>Statutory Revisions Committee</b>							
<b>Revenue</b>							
<b>Rev. Elderlaw Joint Task Force</b>							
<b>Rev. Uniform POA Act</b>							
<b>Rev. Uniform Trust Code</b>							
<b>Expenses</b>							
<b>Exp. Elderlaw Joint Task Force</b>							
<b>Exp. Uniform POA Act</b>							
<b>Exp. Uniform Trust Code</b>							
<b>CLE</b>							
<b>Revenue</b>							
<b>Revenue Joint CLE</b>							
<b>Revenue CLE Retreat</b>							
<b>Revenue CLE Section Only</b>							

Colorado Bar Association  
**Trust & Estate**  
 For the Two Months Ending August 31, 2019

	August	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>						
<b>Expenses Joint CLE</b>						
<b>Expenses CLE Retreat</b>						
<b>Expenses CLE Section Only</b>						
<b>Council Notes</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Community &amp; Civic Affairs</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Rules &amp; Forms Committee</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Orange Book Forms</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Local Liaison</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Uniform Trust Code</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Transfer Deposits</b>						
<b>Revenue</b>						



Colorado Bar Association  
**Trust & Estate**  
 For the Two Months Ending August 31, 2019

	August	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>						
<b>Admin. Chair Revenue</b>						
<b>Expenses</b>						
<b>Estate Planning Handbook Revenue</b>						
<b>Expenses</b>						
<b>Admin Council Dinner Revenue</b>						
<b>Expenses</b>						
<b>Legislative Liaison Revenue</b>						
<b>Expenses</b>						
<b>Internet Editor Revenue</b>						
<b>Expenses</b>						
<b>Technology Committee Revenue</b>						
<b>Expenses</b>						
<b>Real Estate Liaison Revenue</b>						
<b>Expenses</b>						
<b>Green Book Revenue</b>						

Colorado Bar Association  
**Trust & Estate**  
For the Two Months Ending August 31, 2019

		August	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>							
<b>The Colorado Lawyer</b>							
Revenue							
Expenses							
<b>T&amp;E Diversity Committee</b>							
Revenue							
Expenses							
Judicial Liaison							
Revenue							
Expenses							
<b>Member Vouchers</b>							
Expenses							
<b>T&amp;E Young Lawyer Society</b>							
Revenue							
Expenses							
<b>Beginning Balance</b>	<b>01-3160-31600</b>		\$22,262.87		\$22,262.87	0%	\$7,804.88
<b>Total Revenue All Sources</b>	<b>01-4???-316??</b>	1,890.00	29,820.00		29,820.00	0%	30,115.00
<b>Total Expense All Sources</b>	<b>01-5???-316??</b>	(1,943.81)	(10,492.97)		(10,492.97)	0%	(2,142.09)
<b>Ending Balance</b>		(53.81)	41,589.90		41,589.90	0%	35,777.79

Colorado Bar Association  
**Trust & Estate Summary**  
 For the Four Months Ending October 31, 2019

		October	YTD	Budget	Variance	%	Last FY
Beginning balance	01-3160-31600		\$22,262.87		\$22,262.87	0%	\$7,804.88
<b>Trust &amp; Estate Section- General</b>							
Revenue	01-4???-31600	450.00	31,110.00		31,110.00	0%	32,505.00
Expenses	01-5???-31600	(524.17)	(12,241.13)		(12,241.13)	0%	(4,912.90)
<b>Statutory Revisions Committee</b>							
<b>CLE</b>							
<b>Council Notes</b>							
<b>Community &amp; Civic Affairs</b>							
<b>Rules &amp; Forms Committee</b>							
<b>Orange Book Forms</b>							
<b>Local Liaison</b>							
<b>Uniform Trust Code</b>							
<b>Admin. Chair</b>							
<b>Estate Planning Handbook</b>							
<b>Admin Council Dinner</b>							
Revenue	01-4???-31612	1,000.00	1,600.00		1,600.00	0%	
Expenses	01-5???-31612	(1,000.00)	(1,000.00)		(1,000.00)	0%	
<b>Legislative Liaison</b>							
<b>Internet Editor</b>							
<b>Technology Committee</b>							
<b>Real Estate Liaison</b>							
<b>Green Book</b>							
<b>The Colorado Lawyer</b>							
<b>Diversity Committee</b>							
<b>Judicial Liaison</b>							
<b>Member Vouchers</b>							
<b>Uniform Trust Code</b>							
<b>Transfer Deposit</b>							
<b>Young Lawyer Society</b>							
Beginning Balance	01-3160-31600		22,262.87		22,262.87	0%	7,804.88
Total Revenue All Sources	01-4???-316??	1,450.00	32,710.00		32,710.00	0%	32,505.00
Total Expenses All Sources	01-5???-316??	(1,524.17)	(13,241.13)		(13,241.13)	0%	(4,912.90)
Ending Balance		(74.17)	41,731.74		41,731.74	0%	35,396.98

Colorado Bar Association  
**Trust & Estate**  
 For the Four Months Ending October 31, 2019

		October	YTD	Budget	Variance	%	Last FY
<b>Beginning balance</b>	<b>01-3160-31600</b>		<b>\$22,262.87</b>		<b>\$22,262.87</b>	<b>0%</b>	<b>\$7,804.88</b>
<b>Trust &amp; Estate Section</b>							
<b>Revenue</b>							
Dues Income Section	01-4050-31600	450.00	31,110.00		31,110.00	0%	31,465.00
Meal Income	01-4051-31600					0%	1,040.00
<b>Total Revenue Trust &amp; Estate Sect</b>		<b>450.00</b>	<b>31,110.00</b>		<b>31,110.00</b>	<b>0%</b>	<b>32,505.00</b>
<b>Expenses</b>							
Travel	01-5102-31600	(20.00)	(20.00)		(20.00)	0%	
Postage	01-5304-31600					0%	(5.64)
Telephone	01-5412-31600					0%	(129.63)
Internet/E-Mail Access	01-5413-31600		(544.99)		(544.99)	0%	(668.74)
Meals (Not travel related)	01-5491-31600		(2,159.46)		(2,159.46)	0%	(2,093.89)
Administration Fee	01-5494-31600	(504.17)	(2,016.68)		(2,016.68)	0%	(2,015.00)
Grants/Contributions	01-5500-31600		(7,500.00)		(7,500.00)	0%	
<b>Total Expenses Trust &amp; Estate Sec</b>		<b>(524.17)</b>	<b>(12,241.13)</b>		<b>(12,241.13)</b>	<b>0%</b>	<b>(4,912.90)</b>
<b>Statutory Revisions Committee</b>							
<b>Revenue</b>							
<b>Rev. Elderlaw Joint Task Force</b>							
<b>Rev. Uninform POA Act</b>							
<b>Rev. Uniform Trust Code</b>							
<b>Expenses</b>							
<b>Exp. Elderlaw Joint Task Force</b>							
<b>Exp. Uninform POA Act</b>							
<b>Exp. Uniform Trust Code</b>							
<b>CLE</b>							
<b>Revenue</b>							
<b>Revenue Joint CLE</b>							

Colorado Bar Association  
**Trust & Estate**  
 For the Four Months Ending October 31, 2019

	October	YTD	Budget	Variance	%	Last FY
<b>Revenue CLE Retreat</b>						
<b>Revenue CLE Section Only</b>						
<b>Expenses</b>						
<b>Expenses Joint CLE</b>						
<b>Expenses CLE Retreat</b>						
<b>Expenses CLE Section Only</b>						
<b>Council Notes</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Community &amp; Civic Affairs</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Rules &amp; Forms Committee</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Orange Book Forms</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Local Liaison</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Uniform Trust Code</b>						
<b>Revenue</b>						
<b>Expenses</b>						

Colorado Bar Association  
**Trust & Estate**  
 For the Four Months Ending October 31, 2019

		October	YTD	Budget	Variance	%	Last FY
<b>Transfer Deposits</b>							
Revenue							
Expenses							
<b>Admin. Chair</b>							
Revenue							
Expenses							
<b>Estate Planning Handbook</b>							
Revenue							
Expenses							
<b>Admin Council Dinner</b>							
Revenue							
Meal Income	01-4051-31612	\$1,000.00	\$1,600.00		\$1,600.00	0%	
<b>Total Revenue Admin Council Din</b>		<b>1,000.00</b>	<b>1,600.00</b>		<b>1,600.00</b>	<b>0%</b>	
Expenses							
Meals (Not travel related)	01-5491-31612	(1,000.00)	(1,000.00)		(1,000.00)	0%	
<b>Total Expenses Admin Council Di</b>		<b>(1,000.00)</b>	<b>(1,000.00)</b>		<b>(1,000.00)</b>	<b>0%</b>	
<b>Legislative Liaison</b>							
Revenue							
Expenses							
<b>Internet Editor</b>							
Revenue							
Expenses							
<b>Technology Committee</b>							
Revenue							
Expenses							
<b>Real Estate Liaison</b>							

Colorado Bar Association  
**Trust & Estate**  
 For the Four Months Ending October 31, 2019

		<u>October</u>	<u>YTD</u>	<u>Budget</u>	<u>Variance</u>	<u>%</u>	<u>Last FY</u>
<b>Revenue</b>							
<b>Expenses</b>							
<b>Green Book</b>							
Revenue							
Expenses							
<b>The Colorado Lawyer</b>							
Revenue							
Expenses							
<b>T&amp;E Diversity Committee</b>							
Revenue							
Expenses							
Judicial Liaison							
Revenue							
Expenses							
<b>Member Vouchers</b>							
Expenses							
<b>T&amp;E Young Lawyer Society</b>							
Revenue							
Expenses							
<b>Beginning Balance</b>	<b>01-3160-31600</b>		\$22,262.87		\$22,262.87	0%	\$7,804.88
<b>Total Revenue All Sources</b>	<b>01-4???-316??</b>	1,450.00	32,710.00		32,710.00	0%	32,505.00
<b>Total Expense All Sources</b>	<b>01-5???-316??</b>	(1,524.17)	(13,241.13)		(13,241.13)	0%	(4,912.90)
<b>Ending Balance</b>		(74.17)	41,731.74		41,731.74	0%	35,396.98

the probate process. Therefore, it is important to understand how your assets are titled and how your estate plan might be affected by the titling of your assets.

For example, in her will, Mary expresses a desire to have all her assets split evenly between her son, John, and her daughter, Sara. As she gets older, Mary asks John to help pay bills and take care of her other expenses. Mary talks to her bank and learns that John can write checks and access her checking account if he is added as a joint tenant. Accordingly, Mary re-titles her checking account to include John as a joint tenant. Mary dies several years later. At the time of Mary's death, John was still a joint tenant on her checking account. As a result of including John as a joint tenant, the entire checking account is owned by John after Mary's death, despite Mary's clear intent in her will to leave her assets to both John and Sara. Unfortunately, Sara's options to recover her share of the checking account after Mary's death may be limited and expensive.

This brochure is published as a public service by the Colorado Bar Association and was authored and is reviewed and updated as needed by the Civic & Community Affairs Committee, a Subcommittee of the Trusts and Estates Section. Its purpose is to provide general information about the topic contained herein, which is a common legal issue that may come up in estate planning, probate, and/or elder law cases. The information in this brochure is current as of August 2019. You should ensure that there have not been any changes in the law that may affect your matter, which may require consulting with an attorney.

# Joint Tenancy

Sponsored by the



## What is Joint Tenancy?

Two or more individuals can own assets together in joint tenancy. In “joint tenancy,” each owner has an equal and undivided interest in the property. Most importantly, a joint tenancy creates a “right of survivorship,” which means that when one owner dies, his or her interest passes to the surviving joint owner(s). For example, with respect to a financial account, each owner who contributes funds to the account has an equal right to access or withdraw money in the account during their ownership. When one joint owner on the account dies, their interest passes to the remaining owner(s).

A deed or other document reflecting the title to real property usually contains the words “joint tenants,” “joint tenancy,” or “joint tenancy with right of survivorship” when the property is owned in joint tenancy. If an asset is not owned in joint tenancy, then the asset is owned as tenants in common.

## What is Tenancy in Common?

Two or more individuals can also own assets together as tenants in common. Tenancy in common means that each owner owns a particular percentage of the asset. Upon the death of one of the tenants in common, their percentage of the asset passes to the deceased person’s heirs or beneficiaries. For example, if there are two tenants in common on real property and one of the tenants in common dies, the first tenant in common retains their 50% interest in the real property and the deceased owner’s interest passes to his or her heirs or beneficiaries, which could result in multiple individuals owning the real property after the death of a tenant in common.

## What is Tenancy by the Entirety?

In other states, two spouses can own property by tenancy by the entirety. Colorado law does not recognize tenancy by the entirety. Property in Colorado can only be owned between two or more individuals in joint tenancy or as tenants in common.

## What if I Want to Add Someone as a Joint Owner on My Asset?

Before you change the title or ownership of an asset, understand that any such change can cause significant legal and/or tax consequences.

If someone is a joint tenant, they have ownership rights to that asset. If you want someone to access your bank account while you are alive, you can consider alternative options, such as adding them as a signer on the account or executing a financial power of attorney. Similarly, adding someone on the title to your house so that they become an owner while you are alive is very different from executing a will or a beneficiary deed to leave the property to the person after you die.

You should seek the advice of an attorney about the options available to you before you consider changing the title of your assets. Consider the advantages and disadvantages of joint ownership listed below.

## Advantages vs. Disadvantages of Joint Tenancy

### Advantages:

- Owning an asset in joint tenancy allows the surviving owner(s) to receive the asset outside of any probate estate process because the title to the asset is transferred by operation of law.
- For Medicaid beneficiaries, if real property is owned in joint tenancy, there are limited circumstances in which the real property becomes subject to estate recovery claims by the Colorado Department of Health Care Policy and Financing.

### Disadvantages:

- If the original sole owner of an asset applies for Medicaid benefits within 5 years of a change in the asset’s title to multiple owners, Medicaid may consider the change in title to be a transfer without fair consideration and impose a penalty period on the Medicaid applicant’s eligibility to receive benefits.

- Property owned in joint tenancy is subject to the liabilities and creditors of each joint owner. For example, if one joint owner is held liable in a civil lawsuit, the plaintiff or creditor can force the sale of the entire property.
- If either joint tenant files for bankruptcy, the asset becomes a part of the bankruptcy estate.
- If a financial account is owned in joint tenancy and both joint owners contribute funds to the account, any of the joint tenants has the right to make a withdrawal of any amount at any time.
- There may be significant tax implications if you add a joint owner to an asset. Adding someone to the title of an asset as a joint owner may have gift tax implications if the owners are not spouses. You should consult with an attorney or tax professional regarding any tax implications of joint ownership.
- Assets owned in joint tenancy are not subject to the terms of a will. Therefore, adding someone as a joint owner on an asset may cause unintended changes to how your assets will be distributed upon your death.

## What is the Process for Transferring Title when a Joint Tenant dies?

The most common assets owned in joint tenancy are real property and financial accounts. In order to transfer the deceased joint tenant’s interest to the surviving joint tenant(s) for real property, usually all that is required is the recording of the death certificate and an affidavit in the Clerk and Recorder’s Office in the county where the property is owned. To transfer title of a financial account, usually the financial institution will require presentation of the death certificate.

## Does my Will affect property held in Joint Tenancy?

Assets in joint tenancy are not governed by the terms of your will. Joint tenancy property passes directly to the surviving joint tenant(s) and does not go through

### **Team of Professionals and Advisors Involved in Your Estate Plan**

With your consent, your attorney may work closely with or consult with your professionals or advisors to coordinate and implement your estate plan. Those professionals or advisors may include:

- **Life Insurance Agent:** Life insurance may be a tool utilized in your estate plan, whether it is the purchase of policies or the coordination of your existing policies into your estate plan. The most important consideration is the beneficiary designation on existing policies. Current designations may need to be changed in order for your estate plan to work.
- **Financial Advisor:** Many Financial Advisors manage investment and retirement accounts for individuals. Your financial advisor plays an important role in implementing your estate plan by structuring and titling account ownership and can help ensure beneficiary designations on your retirement accounts are properly stated.
- **Certified Public Accountant (CPA):** Your attorney may consult with your CPA or other tax advisor for the purposes of tax planning or minimizing income and/or estate tax liabilities.

### **Conclusion**

The right type of estate plan for you depends on your goals, assets, and personal and health issues, and there are pros and cons to all options. Your estate plan should be reviewed by you or with your attorney every few years in case changes in your life or in the law necessitate changes to your current plan.

Estate planning documents are important documents for every Colorado resident, no matter his or her economic circumstances. Hiring an attorney to draft your estate planning documents is one alternative to accomplish your estate plan.

This brochure is published as a public service by the Colorado Bar Association and was authored and is reviewed and updated as needed by the Civic & Community Affairs Committee, a Subcommittee of the Trusts and Estates Section. Its purpose is to provide general information about the topic contained herein, which is a common legal issue that may come up in estate planning, probate, and/or elder law cases. The information in this brochure is current as of **October November 2019**. You should ensure that there have not been any changes in the law that may affect your matter, which may require consulting with an attorney.

# *Estate Planning*



## ESTATE PLANNING

### What Is an Estate Plan?

An estate plan is a series of documents in which you provide instructions and declarations in the event that you become incapacitated or die. Estate planning documents can address the following goals:

- Direct who should speak for you or care for you when you are unable to;
- Direct who should protect and manage your assets while you are alive but unable to do so;
- Direct your medical or health treatment if you are unable to communicate your wishes later;
- Minimize tax liabilities during your life or upon your death;
- Direct who should inherit from you after your death; and
- Nominate someone to administer your assets after your death.

### How Does an Attorney Create an Estate Plan?

An attorney will schedule multiple meetings with you to counsel you through a variety of issues and ask a series of questions that will help them analyze your assets and your goals and recommend an estate plan that is designed for you. In the end, you should be able to identify your options, the scope of the proposed plan, the purpose of all the documents and how they are to be used.

Be prepared to ask the attorney about their fees for designing your plan, their experience, and their approach to estate planning. Working with an estate planning attorney involves spending a significant amount of time and placing a significant amount of trust in the attorney, so you should make sure you are comfortable with the attorney you choose. In addition, you may have an ongoing relationship with the attorney if you need to update or change your plan later or need help understanding or using the finished documents.

## Estate Planning Documents

There are a number of documents that may be part of your estate plan. Those documents may include:

- **Will:** A Will provides instruction for how you want your assets to pass after your death and who you want to administer your estate. In Colorado, the individual who administers your probate estate is called the “Personal Representative.” You may know the Personal Representative as the “Executor.”
- **Revocable Living Trust (RLT):** A RLT is one common type of trust. A RLT can provide instruction for how your assets are managed during your lifetime, as well as after you die. The person in charge of your trust is called a “Trustee.” Normally under an RLT, the person who creates the Trust, or “Settlor,” manages their own assets during their lifetime. If the Settlor is unable to manage his assets during his life or the Settlor dies, the person named as the successor trustee can step forward to manage the assets in the Trust. An estate planning attorney will talk with you to determine if a RLT or another type of trust is appropriate for your estate planning needs.
- **Financial Power of Attorney:** A financial power of attorney, sometimes called a “General Durable Power of Attorney,” is a document in which you give another person the authority to act on your behalf with respect to your finances. That person is called your “Agent.” The document is intended to allow your Agent to manage your personal finances for you when you are living but not able to do so yourself. A financial power of attorney can become effective immediately upon signing or after doctors certify in writing that you lack the ability to manage your own finances. An Agent has no authority after your death.
- **Medical Power of Attorney:** A medical power of attorney is a document in which you nominate an Agent to make health care decisions on your behalf while you are living but unable to do so yourself. A medical power

of attorney can also become effective immediately upon signing or at a later time.

- **Advanced Medical Directive/Living Will:** A Living Will is entirely different from the Will document described above. In a Living Will you can choose whether you would like to receive heroic measures, artificial nutrition, or artificial hydration should you become unable to communicate your wishes, and you (1) have a terminal condition or (2) are in a persistent vegetative state.

If you do not have a Living Will and your family members disagree about what the doctors should do, the decision might be left to a court.

- **Declaration of Disposition of Last Remains/Burial Instructions:** A Declaration of Disposition of Last Remains provides instruction for your remains after you die: do you want to be buried or cremated? Do you want a funeral or memorial service? If you have a pre-paid burial or cremation plan, this document may still be necessary in your estate plan.

Besides a will or trust, your heirs can also inherit your property after your death by other methods, including beneficiary designations, payable-on-death (POD) designations, transfer-on-death (TOD) designations, and joint tenancy. For further information about your estate planning options, contact an attorney, reference the Colorado Senior Law Handbook, or reference the following CBA brochures: [Joint Tenancy](#) and [Probate in Colorado](#).

### Taxes

A comprehensive estate plan may also include tax planning. Estate tax liabilities can be reduced and, in some cases, eliminated through some advanced estate planning techniques. In addition, some estate plans may reduce income tax liability during your life.

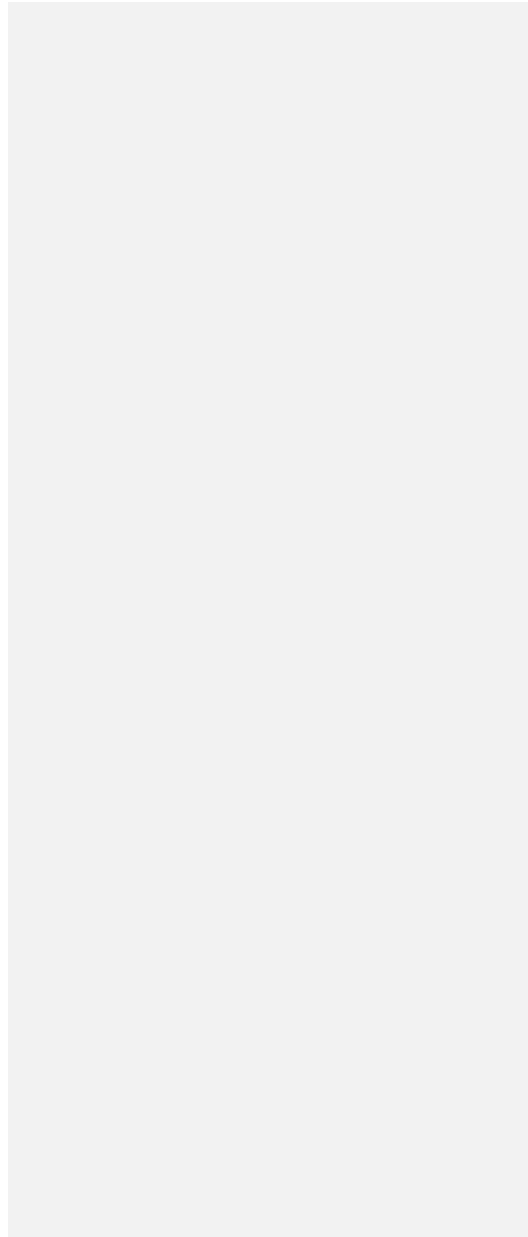
### Business Succession Planning

If you own a business or have an interest in a business, it is important to understand what may happen after your death. Business succession issues may be addressed in your estate plan, but business

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succession also depends on the structure of the business and its operating agreements. Therefore, business succession may be a component of your estate plan but will need to be addressed separately from your personal assets.



**KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC**

MEMORANDUM

**TO: Council of the CBA Trust and Estate Section**

**FROM: Chad Rounds**

**RE: Summary of 10/15/19 CBA Real Estate Section Council Meeting**

**DATE: 10/17/19**

---

I attended the CBA Real Estate Section Council ("RESC") meeting on 10/15/19. The following is my report on matters discussed which CBA Trust and Estate Section Council ("TESC") might find of interest:

**#1) Additional Comment to Title Standard 5.2.2. on POA's:**

A proposed additional comment to Title Standard 5.2.2 was presented by the CBA Title Standards Committee and approved in October by the RESC and now will be considered by the CBA Executive Committee. The comment analyzes the scope of authority of a statutory form power of attorney (§15-14-741, C.R.S.) as it relates to real estate matters. If the general power regarding "real estate" is granted to the agent, then the agent can execute contracts and deeds. A copy of the proposed comment as well as Title Standard 5.2.2. is attached to this memo.

**#2) Uniform Partition of Heirs Property Act**

LPC is reviewing ULC's Partition of Heirs Property Act. It came out in 2010. It is meant to curb abuse by investors who purchase rights in real property from certain family members who have inherited real property without the real estate being properly conveyed through a probate procedure. The investor then initiates an action for a quiet title partition by sale and ends up purchasing the whole property at the potential detriment of the other family members with small fractional shares who might not understand or protect their rights.

**#3) New Member Section Letter**

CBA staff encouraged RESC to put together a new member section letter. The Trust and Estate Section letter was mentioned as an example of one that automatically is sent to new members of that section.

Proposed New Comment to Title Standard 5.2.2

(2) Effective January 1, 2010, the use of a statutory form power of attorney is authorized. §15-14-741, C.R.S. A document substantially in the form described grants broad general authority as outlined in the “Uniform Power of Attorney Act”, part 7 of article 14 of title 15, C.R.S., unless such authority is specifically declared not to be included within that particular power of attorney. Under the Act, if real property is included in the agent’s authority using the statutory form, the agent may exercise the acts enumerated in §15-14-727, C.R.S., with respect to real property of the principal, including executing contracts and deeds. The Act supplements Colorado law existing prior to January 1, 2010, that required either an unlimited grant of authority (as in Problem A) or a specifically defined grant of authority (as in Problem B) to deal with real property. When reviewing a power of attorney affecting title to real property executed after January 1, 2010, and substantially in the form described in the Act, the review should include: (a) the scope of authority described in the Act, (b) statutory limitations on powers not expressly granted, and (c) any limitations stated in the power of attorney.

Comment added \_\_\_/\_\_\_/2019

## *Colorado Real Estate Title Standards*

**Answer:** Yes.

Promulgated: 10/24/53.

### **5.2**      **Attorneys-in-Fact**

#### **5.2.1**      **Power of Attorney — Where no Record of Military Service**

**Problem:** An instrument is executed by an attorney-in-fact under a power of attorney. There is no instrument of record indicating that the principal was in military service. Should an examiner require an affidavit by the attorney-in-fact under the provisions of Chapter 128A, Sections. 10 to 12, C.S.A. 1935 (1949 Replacement Volume) or Sections 107-4-1 to 107-4-4, C.R.S. 1963 (1967 Perm Supp.) (repealed with the adoption of the Colorado Probate Code) if the power of attorney is otherwise sufficient?

**Answer:** No.

COMMENT:

*See Sections 15-14-501 and 502, C.R.S.*

Promulgated: 10/14/50.

#### **5.2.2**      **Power of Attorney — Authority**

**Problem:** (A) A power of attorney authorizes the attorney-in-fact to perform any act whatsoever relating to certain real property. Does the lack of a specific authority to convey the real property in the power of attorney affect the validity of any conveyance executed pursuant thereto?

**Answer:** No.

**Problem:** (B) A power of attorney authorizes the attorney-in-fact to sell certain real property. Does the lack of a specific authority to convey the real property in a power of attorney affect the validity of any conveyance executed pursuant thereto?

## *Colorado Real Estate Title Standards*

**Answer:** Yes.

**COMMENT:**

Caution should be exercised in reviewing powers of attorney because powers of attorney are strictly construed. If, therefore, instead of authorizing any act relating to real property the power of attorney contains a limited authority, the agent cannot act outside that authority. For instance, it has been held that a power of attorney which authorized the agent to "sell" real property permits only the negotiation by the agent of a purchase contract to be signed by the principal and does not allow the agent to execute a binding agreement to sell, much less to convey the property. *Nunnally v. Hilderman*, 150 Colo. 363, 373 P.2d 940 (1962); *Springer v. City Bank & Trust Co.*, 59 Colo. 376, 149 P. 253 (1915).

Promulgated: 4/9/88.

### **5.2.3 Power of Attorney — Description of Property**

**Problem:** A power of attorney authorizes the attorney-in-fact "to convey any real property now owned or hereafter acquired" by the principal. The power of attorney does not contain a specific legal description of real property. Does the lack of a specific legal description of real property in the power of attorney affect its validity or the validity of any conveyance executed pursuant thereto?

**Answer:** No.

**COMMENT:**

A power of attorney need not particularly describe each specific tract of land with which the agent may deal as long as it is clear that the tract in question was intended to be included within the power of attorney. 2A C.J.S. Agency §227. For instance, a power of attorney containing language such as "all or any lots of ground in Denver" has been upheld as valid. *Holladay v. Dailey*, 1 Colo. 460 (1872).

Promulgated: 4/9/88.



**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of October 2, 2019, Meeting**

Council met on Wednesday, October 2, 2019, at the Colorado Bar Association offices, 1290 Broadway, Suite 1700, Denver, Colorado. The meeting was called to order at approximately 2:50 p.m. by Josie Faix, Chair.

The following members of Council were present or participated by phone and constituted a quorum:

Josie Faix, Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem

Katie Null (CBA Staff)  
Gordon Williams (Chair, Rules & Forms Committee)  
Georgine Kryda (Tax Section liaison)  
Peggy Gardner (2<sup>nd</sup> year member)  
Chad Rounds (Real Estate Section liaison)  
Sandra Sigler (Chair, Civic & Community Affairs Committee)  
David Kirch (the *Colorado Lawyer*)  
Lauren da Cunha (2<sup>nd</sup> year member)  
Molly Zwerdinger (Chair, Statutory Revisions Committee)  
Louisa Ritsick (1<sup>st</sup> year member)  
Darla Daniel (Legislative liaison)  
Kristin Dittus (1<sup>st</sup> year member)  
Kim Willoughby (Family Law Section liaison)  
Charles Spence (1<sup>st</sup> year member)\*  
Patrick Theissen (Elder Law Section liaison)\*  
Elizabeth Meck (2<sup>nd</sup> year member)\*

\*denotes attendance via telephone

**1. Approval of Minutes of Prior Meeting**

The Minutes of the September 4, 2019, Council meeting were approved unanimously.

**2. Chair's Report (Josie Faix)**

Josie reported on the proposed increase to the section administrative fees. The CBA has requested that this administrative fee be increased in the amount of \$5 per member. There was discussion about the proposed fee increase in light of the Trust & Estates Section increasing dues by \$5/member in 2018. The Council agreed to continue to discuss the issue in the upcoming months. Any members with questions about the proposed fee increase should contact a Council member.

**3. Secretary/Treasurer Report (Tim Bounds)**

Tim gave a report that the annual Section dinner will be held on October 15 at *Former Saint*, located in the Hyatt Regency. Invitees should RSVP to Katie Null with the CBA as soon as possible.

**4. Tax Section Liaison (Georgine M. Kryda)**

There was no report from the Tax Section.

**5. Elder Law Section Liaison (Patrick Thiessen)**

Patrick's report was as follows: the Elder Law retreat will once again take place over the weekend before Labor Day (Aug 27-29). The retreat will be held at Vail Resort.

The Medicaid subcommittee of ELS is reviewing the proposed Medicaid regulations regarding pooled trusts. The Medicaid Medical Services Board is hosting a meeting on the proposed regulations on November 8, 2019. The CBA recently voted to oppose the proposed regulations.

Patrick reported that Sofia Alvarez will begin her term as the Executive Director of the Office of Public Guardianship in October 2019. The proposed Uniform Guardianship Act is not going to run as uniform law in Colorado; however, Colorado may adopt the proposed uniform law in part.

Patrick announced that the Professional Fiduciary Oversight Subcommittee meets every other Thursday by telephone. Contact Tom Rodriguez or Scott Christian for call-in information or to join the subcommittee.

Patrick announced that ELS created an exploratory committee to look into issues and potentially file amicus brief in *In re. Estate of Rabin*, which involves questions about a personal representative's rights to decedent's attorney files and the attorney-client privilege.

**6. Real Estate Section Liaison (Chad Rounds)**

Chad reviewed the memorandum from the RES meeting on September 17, 2019. Chad also reported that the RES will be discussing the newly-formed Colorado Common Interest Ownership Task Force. Chad reported that this Task Force will look at changes to homeowner's association laws.

Josie Faix also reported that she recently met with the Chairs of RES and the Title Standards Committee, who expressed interest in having a liaison from Trust & Estates attend monthly meetings. JP Stouffer is current liaison. Heidi Gassman will be successor liaison.

**7. Family Law Section Liaison (Kim Willoughby)**

Kim discussed the September meeting of the FLS, which included discussion about the proposed changes to the Uniform Probate Code and the Parentage Act. The proposed changes involve amendments to the "parent-child relationship" provisions.

**8. Statutory Revisions Committee (Molly Zwerdinger)**

Molly reported that the committee which had been reviewing the proposed Uniform Guardianship & Protected Proceedings Act will be going inactive since the legislation will not be introduced in CO as a uniform law. Molly also reported that SRC will wait to review the *Feldman* case, which involved the application of the "slayer statute," until after the case is concluded. SRC has established a new committee to review proposed changes to the Uniform Probate Code regarding "parent-child relationship" provisions concurrent with Family Law Section's review of the Uniform Parentage Act.

**9. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)**

Darla and Steve attended the Uniform Law Commissioners meeting on September 25, 2019. The proposed uniform law concerning electronic wills was not on the agenda for 2020 and will likely be on the agenda in 2021. Proposed amendments to the Uniform Probate Code will be addressed at the December 9, 2019 meeting. Proposed revisions to the Uniform Fiduciary Income and Principal Act and Uniform Trust Code will be taken up by ULC as early as December 2019 or January 2020.

**10. Legislative Update**

There was no report.

**11. Council Notes (Josie Faix/Kristin Dittus)**

The September issue of Council Notes has been distributed. The September issue included an article on the step-up in basis on assets received from a decedent. Please reach out to Josie or Kristin for article ideas or suggestions. The upcoming issue of Council Notes will include an article by Kim Willoughby and Heidi Gassman on the new Marital Agreements Act.

**12. Continuing Legal Education & Estate Planning Retreat (Spencer Crona)**

Spencer is continuing to work on presentations for the lunch and learn CLEs, and is still working on the agenda for the upcoming Estate Planning Retreat in June 2020. The venue and date for the 2021 retreat has been confirmed. The retreat will take place in Snowmass on June 10-12, 2021.

**13. Orange Book Forms Committee (Heidi Gassman)**

Heidi reported that OBF has completed its review of the Retirement Assets Subcommittee's proposed language regarding a Common Trust for holding retirement assets. OBF will now review the subcommittee's proposed beneficiary designation language. Heidi also reported that OBF has discussed the potential impacts of the SECURE Act, which is currently in the US Senate.

**14. Rules & Forms Committee (Gordon Williams)**

Gordon gave a report on the Committee's review of Bradford forms as well as an update on the Deeds subcommittee.

**15. Civic & Community Affairs (Sandra Sigler)**

Kayla Nelson & Sandra presented on the Committee's Estate Planning brochure. Elder Law Section previously approved the form of the brochure. The "What to do When Someone Dies" brochure is now available on the CBA website and also in hard copy.

Sandra also discussed the T&E Section grant for the Senior Law Handbook. **A motion was made to approve \$2,500 for funding of the Senior Law Handbook. The motion was seconded and passed unanimously.**

Sandra announced that the Mesa County/Grand Junction Senior Law Day will take place on October 25, 2019.

**16. Diversity & Inclusivity Committee (Melissa Schwartz)**

There was no report.

**17. Probate Trial & Procedures Committee (Kathy Seidel):**

There was no report.

**18. Colorado Estate Planning Handbook (David Johns)**

There was no report.

**19. Green Book (David Johns)**

There was no report.

**20. New T & E Lawyers Committee (Alison Leary)**

There was no report.

**21. The Colorado Lawyer (Emily Bowman & David Kirch)**

David and Gerald Deffenbaugh submitted an article discussing powers of appointment and the effect on consideration of trusts as marital property in Colorado. The January edition will feature an article by Jennifer Spitz on revocable trusts.

**22. Communications Representative (Mark Masters)**

There was no report.

**23. Ambassador Coordinator (Lindsey Andrew)**

There was no report.

**24. Board of Governors Representative (Jonathan Haskell)**

There was no report.

**25. Other Business**

There was no other business.

## ADJOURNMENT

The meeting was adjourned at 4:02 p.m. The next Council meeting will be held on November 6, 2019.

Respectfully submitted

/s/ Timothy Bounds, Secretary

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the November 6, 2019, Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, November 6, 2019, 3:00 p.m.\****

Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the October 2, 2019, meeting of the Council
2. Financial spreadsheets as of October 31, 2019
3. Civic & Community Affairs brochures on estate planning and joint tenancy.
4. Memorandum from Real Estate Section meeting on October 15, 2019.

**Trust and Estate Section Council Agenda**  
**November 6, 2019**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the October 2, 2019, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
3. Secretary/Treasurer's report (Tim Bounds)
4. Tax Section Liaison (Georgine M. Kryda)
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11. CLE/Estate Planning Retreat (Spencer Crona)
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17. Colorado Estate Planning Handbook (David Johns)
18. Green Book (David Johns)
19. New T&E Lawyers Committee (Alison Leary)



20. The Colorado Lawyer (Emily Bowman)
21. Communications Representative (Mark Masters)
22. Communications Representative/Ambassador Program (Lindsey Andrew)
23. Board of Governors Representative (Jonathan Haskell)
24. Miscellaneous/FYI
25. Adjournment

Colorado Bar Association  
**Trust & Estate Summary**  
 For the Two Months Ending August 31, 2019

		August	YTD	Budget	Variance	%	Last FY
Beginning balance	01-3160-31600		\$22,262.87		\$22,262.87	0%	\$7,804.88
<b>Trust &amp; Estate Section- General</b>							
Revenue	01-4???-31600	1,890.00	29,820.00		29,820.00	0%	30,115.00
Expenses	01-5???-31600	(1,943.81)	(10,492.97)		(10,492.97)	0%	(2,142.09)
<b>Statutory Revisions Committee</b>							
CLE							
Council Notes							
Community & Civic Affairs							
Rules & Forms Committee							
Orange Book Forms							
Local Liaison							
Uniform Trust Code							
Admin. Chair							
Estate Planning Handbook							
Admin Council Dinner							
Legislative Liaison							
Internet Editor							
Technology Committee							
Real Estate Liaison							
Green Book							
The Colorado Lawyer							
Diversity Committee							
Judicial Liaison							
Member Vouchers							
Uniform Trust Code							
Transfer Deposit							
Young Lawyer Society							
Beginning Balance	01-3160-31600		22,262.87		22,262.87	0%	7,804.88
Total Revenue All Sources	01-4???-316??	1,890.00	29,820.00		29,820.00	0%	30,115.00
Total Expenses All Sources	01-5???-316??	(1,943.81)	(10,492.97)		(10,492.97)	0%	(2,142.09)
Ending Balance		(53.81)	41,589.90		41,589.90	0%	35,777.79

Colorado Bar Association  
**Trust & Estate**  
For the Two Months Ending August 31, 2019

		August	YTD	Budget	Variance	%	Last FY
<b>Beginning balance</b>	<b>01-3160-31600</b>		<b>\$22,262.87</b>		<b>\$22,262.87</b>	<b>0%</b>	<b>\$7,804.88</b>
<b>Trust &amp; Estate Section</b>							
<b>Revenue</b>							
Dues Income Section	01-4050-31600	1,890.00	29,820.00		29,820.00	0%	30,115.00
<b>Total Revenue Trust &amp; Estate Sect</b>		<b>1,890.00</b>	<b>29,820.00</b>		<b>29,820.00</b>	<b>0%</b>	<b>30,115.00</b>
<b>Expenses</b>							
Telephone	01-5412-31600					0%	(9.87)
Internet/E-Mail Access	01-5413-31600		(544.99)		(544.99)	0%	(322.68)
Meals (Not travel related)	01-5491-31600	(1,439.64)	(1,439.64)		(1,439.64)	0%	(802.04)
Administration Fee	01-5494-31600	(504.17)	(1,008.34)		(1,008.34)	0%	(1,007.50)
Grants/Contributions	01-5500-31600		(7,500.00)		(7,500.00)	0%	
<b>Total Expenses Trust &amp; Estate Sec</b>		<b>(1,943.81)</b>	<b>(10,492.97)</b>		<b>(10,492.97)</b>	<b>0%</b>	<b>(2,142.09)</b>
<b>Statutory Revisions Committee</b>							
<b>Revenue</b>							
<b>Rev. Elderlaw Joint Task Force</b>							
<b>Rev. Uniform POA Act</b>							
<b>Rev. Uniform Trust Code</b>							
<b>Expenses</b>							
<b>Exp. Elderlaw Joint Task Force</b>							
<b>Exp. Uniform POA Act</b>							
<b>Exp. Uniform Trust Code</b>							
<b>CLE</b>							
<b>Revenue</b>							
<b>Revenue Joint CLE</b>							
<b>Revenue CLE Retreat</b>							
<b>Revenue CLE Section Only</b>							

Colorado Bar Association  
**Trust & Estate**  
 For the Two Months Ending August 31, 2019

	August	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>						
<b>Expenses Joint CLE</b>						
<b>Expenses CLE Retreat</b>						
<b>Expenses CLE Section Only</b>						
<b>Council Notes</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Community &amp; Civic Affairs</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Rules &amp; Forms Committee</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Orange Book Forms</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Local Liaison</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Uniform Trust Code</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Transfer Deposits</b>						
<b>Revenue</b>						

Colorado Bar Association  
**Trust & Estate**  
 For the Two Months Ending August 31, 2019

	August	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>						
<b>Admin. Chair Revenue</b>						
<b>Expenses</b>						
<b>Estate Planning Handbook Revenue</b>						
<b>Expenses</b>						
<b>Admin Council Dinner Revenue</b>						
<b>Expenses</b>						
<b>Legislative Liaison Revenue</b>						
<b>Expenses</b>						
<b>Internet Editor Revenue</b>						
<b>Expenses</b>						
<b>Technology Committee Revenue</b>						
<b>Expenses</b>						
<b>Real Estate Liaison Revenue</b>						
<b>Expenses</b>						
<b>Green Book Revenue</b>						

Colorado Bar Association  
**Trust & Estate**  
For the Two Months Ending August 31, 2019

		August	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>							
<b>The Colorado Lawyer</b>							
Revenue							
Expenses							
<b>T&amp;E Diversity Committee</b>							
Revenue							
Expenses							
Judicial Liaison							
Revenue							
Expenses							
<b>Member Vouchers</b>							
Expenses							
<b>T&amp;E Young Lawyer Society</b>							
Revenue							
Expenses							
<b>Beginning Balance</b>	<b>01-3160-31600</b>		\$22,262.87		\$22,262.87	0%	\$7,804.88
<b>Total Revenue All Sources</b>	<b>01-4???-316??</b>	1,890.00	29,820.00		29,820.00	0%	30,115.00
<b>Total Expense All Sources</b>	<b>01-5???-316??</b>	(1,943.81)	(10,492.97)		(10,492.97)	0%	(2,142.09)
<b>Ending Balance</b>		(53.81)	41,589.90		41,589.90	0%	35,777.79

**KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC**  
MEMORANDUM

**TO: Council of the CBA Trust and Estate Section**

**FROM: Chad Rounds**

**RE: Summary of 8/20/19 CBA Real Estate Section Council Meeting**

**DATE: 8/21/19**

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I attended the CBA Real Estate Section Council ("RESC") meeting on 8/20/19. The following is my report on matters discussed which the CBA Trust and Estate Section Council ("TESC") might find of interest:

**#1) Miscellaneous Items:**

The Real Estate Section had a successful symposium (its annual "retreat") in July. There were over 400 attendees, which has been a consistent number for the last five years or so. Over 100 members of that section have not renewed their section membership as of now. Reminders and follow-ups will begin soon to try to reduce that number.

**#2) New Liaison Positions:**

One initiative proposed by the new chairperson of the Real Estate Section was to create new liaison positions: regional liaisons and professional organization liaisons. The purpose of a regional liaison would be to engage section members outside the Denver metro area by providing a designated channel to the RESC for bringing forth and addressing regional and local issues. Ideally, the position would also be a way to identify good future candidates from outside the Denver metro area to serve on the RESC, with regional diversity in mind. The hope with the professional organization liaisons is to open collegial communications with non-attorney organizations which are involved in Colorado real estate matters to try to get ahead of the game in avoiding conflicts on future proposed legislation. One organization targeted would be the Colorado Association of Realtors. The RESC voted to approve

the creation of these positions. Would this be something the TESC would want to consider in the trust and estate area?

**#3) Stakeholder Meetings on Colorado Protected Proceedings:**

The new chairperson of the Real Estate Section has asked that I attend the stakeholder meetings on Colorado Protective Proceedings and report back on proposals that might affect real estate such as the concept of receiverships. I was at the July stakeholder meeting and plan to attend the September one.



**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the September 4, 2019, Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, September 4, 2019, 3:00 p.m.\****  
Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the August 7, 2019, meeting of the Council
2. Financial spreadsheets as of July 31, 2019

**Trust and Estate Section Council Agenda  
September 4, 2019**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the August 7, 2019, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
3. Secretary/Treasurer's report (Tim Bounds)
4. Tax Section Liaison (Georgine M. Kryda)
5. Elder Law Section Liaison (Patrick Thiessen)
6. Real Estate Section Liaison (Chad Rounds)
7. Family Law Section Liaison (Kim Willoughby)
8. Statutory Revisions Committee (Molly Zwerdinger)
9. Legislative Liaison (Darla Daniel)
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11. CLE/Estate Planning Retreat (Spencer Crona)
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17. Colorado Estate Planning Handbook (David Johns)
18. Green Book (David Johns)
19. New T&E Lawyers Committee (Alison Leary)

20. The Colorado Lawyer (Emily Bowman)
21. Communications Representative (Mark Masters)
22. Communications Representative/Ambassador Program (Melissa Schwartz)
23. Board of Governors Representative (Jonathan Haskell)
24. Miscellaneous/FYI
25. Adjournment

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of August 7, 2019, Meeting**

Council met on Wednesday, August 7, 2019, at the Colorado Bar Association offices, 1290 Broadway, Suite 1700, Denver, Colorado. The meeting was called to order at approximately 3:02 p.m. by Josie Faix, Chair.

The following members of Council were present or participated by phone and constituted a quorum:

Josie Faix, Chair  
Spencer Crona, Vice Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Katie Null (CBA Staff)  
Gordon Williams  
Georgine Kryda  
Peggy Gardner  
Elizabeth Meck  
Kristin Dittus  
Steve Brainerd  
Chad Rounds  
Sandra Sigler  
David Kirch  
Lauren da Cunha  
Molly Zwerdlinger  
Jeremy Shupbach  
Kathy Seidel  
Jonathan Haskell  
Melissa Schwartz  
Bette Heller  
Louisa Ritsick  
Joe Hodges  
Charles Spence  
Gene Zuspann

**1. Approval of Minutes of Prior Meeting**

The Minutes of the May 1, 2019, Council meeting were approved unanimously.

**2. Trust & Estates Listserv (Gene Zuspahn and Joe Hodges)**

Gene Zuspahn and Joe Hodges circulated a memorandum to Council in February 2019 in response to Council's prior vote to shut down the Trust & Estates Listserv. The costs to operate the Listserv are approximately \$1,200.00 per year. The software company that operates the Listserv does not charge for storing digital archives. Gene Zuspahn discussed the amount of traffic on both the Listserv and the CBA Community software. Traffic on the Listserv remains generally constant, while the CBA Community has not seen a dramatic increase in usage. Both Joe and Gene would like more time to facilitate the transfer of the digital archives to the CBA Community platform. **A motion to extend the Listserv until December 2019 was unanimously approved by Council.**

**3. Practice Area Ethics Advisory (Melissa Schwartz)**

Melissa Schwartz updated council on the Advisory's progress through the summer. Meetings in June and July were held via phone, and Melissa circulated a memorandum to Council regarding the topics that were the subject of the Advisory. Melissa's group submitted their comments to the CBA Ethics Committee. The Committee is generally in agreement with the advisories; however, the memorandum circulated by Melissa during the meeting outlined the Committee's concerns. **Council agreed to review the memorandum in detail and further discuss at the September 2019 meeting.**

**4. Chair's Report (Josie Faix)**

Josie gave a report about the silent auction at the Estate Planning Retreat in June. The auction raised approximately \$6,000.

**5. Secretary/Treasurer Report (Tim Bounds)**

Tim reviewed the financial statements for June and July 2019.

**6. Tax Section Liaison (Georgine M. Kryda)**

Georgine reported that the Section is on break until the end of September. Justin Mills is the incoming Chair of the Section, and Georgine will serve as Vice Chair.

**7. Elder Law Section Liaison (Patrick Thiessen)**

Patrick Thiessen gave a report. Colorado Fund for People with Disabilities has requested to form a subcommittee of ELS to review current Medicaid regulations regarding the age limit for pooled trust candidates. If anyone is interested in joining the subcommittee please contact Patrick or Megan Brand, who is the president of

CFPD. ELS will also be forming a new subcommittee to review regulation of professional fiduciaries.

**8. Real Estate Section Liaison (Chad Rounds)**

The Section met in June to continue discussing the *Cohen* decision. The 10<sup>th</sup> Circuit decision deals with bankruptcy and joint tenancy. Suzanne Leff is the incoming Chair for the Section. Chad also reported that he submitted a summary of the new abandoned estate planning documents legislation to the Section.

**9. Family Law (Kim Willoughby)**

There was no report for this Committee.

**10. Statutory Revisions Committee (Molly Zwerdinger)**

There was a brief discussion about moving the first meeting of Statutory Revisions to September. Such a move would interfere with the scheduling of the Estate Planning retreat. Council did not entertain any motions to move the meetings. Gordon Williams would like to move forward with presenting the recommendations from his subcommittee re. disclosure of fiduciary fees to Council for approval.

**11. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)**

There was no report from the Legislative Liaisons.

**12. Legislative Update (Jeremy Schupbach)**

The Legislature is not currently in session. Jeremy anticipates a relatively active legislative year for Trust & Estates.

**13. Council Notes (Josie Faix/Kristin Dittus)**

Josie and Kristin both reported that Council Notes is looking for articles to publish in upcoming editions. Please contact either Josie or Kristin if interested.

**14. Continuing Legal Education & Estate Planning Retreat (Spencer Crona)**

Spencer gave a report. The CLE agenda for the annual fall update is nearly finalized. Spencer continues to work on the agenda for the Estate Planning Retreat in June 2020.

**15. Orange Book Forms Committee (Heidi Gassman)**

The Orange Book Committee continues to review the article, sample beneficiary designation, and draft language submitted by the subcommittee on retirement assets.

**16. Rules & Forms Committee (Gordon Williams)**

The Committee is reviewing the most recent changes to the JDF forms in response to the comments which Rules & Forms submitted to the Supreme Court Administrator's Office in May 2019. Rules & Forms will also be reviewing the form for affidavits to correct a conveyance to a fiduciary, life estate deeds, and the verification statement on conservator's reports.

**17. Civic & Community Affairs (Sandra Sigler)**

Sandra gave a report. Six "Senior Law Day" events have already occurred in 2019; three more events are still scheduled for Summit, Boulder, and Mesa counties. Anyone interested can visit [seniorlawdaycolorado.com](http://seniorlawdaycolorado.com) to view upcoming dates and to register. Sandra also reported that the brochures concerning decedent's estates, estate planning, and joint tenancy are moving along.

**18. Diversity & Inclusivity Committee (Melissa Schwartz)**

Melissa gave a report. The Committee will be meeting virtually going forward. The Committee's Action Plan has been approved by the Colorado & Denver Bar Associations. The Section will have a meeting on September 5, 2019. Location will be announced closer to the meeting date.

**19. Probate Trial & Procedures Committee (Kathy Seidel):**

Kathy gave a report. The Bench Books subcommittee will meet with Justice Boatwright for his comments and for finalization. Tom Rodriguez discussed forming a subcommittee to look into regulation of professional fiduciaries. Kathy also reported that subcommittees were formed to look into the *Feldman* case, which is a recent CO Supreme Court opinion concerning the "slayer statute."

**20. Colorado Estate Planning Handbook (David Johns)**

There was no report for this Committee.

**21. Green Book (David Johns)**

There was no report for this Subcommittee.

**22. New T & E Lawyers Committee (Alison Leary)**

Alison gave a report. The Committee needs volunteers for the group study call. The Committee is also expanding to include older lawyers who are entering new fields of practice for the first time, not just younger lawyers. The Committee is also conducting a survey regarding topics for future presentations.

**23. The Colorado Lawyer (David Kirch)**

David reported that Council member Jonathan Haskell's article will be published in the October edition. An article by Dylan Metzger and Jeffrey Kadavy will be published in the November edition. An article discussing powers of appointment and marital property will be published in December.

**24. Communications Representative (Mark Masters)**

There was no report from Mark. Council agreed to extend the position for another year.

**25. Ambassador Coordinator (Lindsey Andrew)**

Lindsey gave a report. She has received two requests for ambassadors, is continuing to work on additional requests.

**26. Board of Governors Representative (Jonathan Haskell)**

Jonathan gave a report. The Board of Governors met in June and discussed several topics. Membership in the BOG continues to increase, while the dues remain some of the lowest in the country. Jonathan also reported on the recent addition of 15 new district court judges in Colorado. The new President of the CO Bar Assoc. is Kathleen Croshal.

**27. Other Business**

Tim Bounds is working on scheduling the 2019 Council Dinner. Details will be forthcoming.

**ADJOURNMENT**

The meeting was adjourned at 4:52 p.m. The next Council meeting will be held on Sept 4, 2019.

Respectfully submitted

/s/ Timothy Bounds, Secretary



**HYPOTHETICAL REGARDING THE COLORADO ELECTRONIC PRESERVATION  
OF ABANDONED ESTATE PLANNING DOCUMENTS ACT  
C.R.S. § 15-23-101, et. seq.**

Connie Custodian (the “Custodian”) is a lawyer in the twilight of her estate planning career and wants to get rid of abandoned original estate planning documents that she and her partners have stored in the firm’s safe deposit box for clients over the years. These original documents may include documents concerning succession such as Wills. The Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (“CEPAEPDA”/ the “Act”) creates an electronic filing, storage and retrieval system for electronic copies of original Wills with the State Court Administrator.

Under CEPAEPDA, before filing an electronic estate planning document with the State Court Administrator, Connie as Custodian will need to conduct a diligent search to try to locate her firm’s former clients defined under the Act as the “Creator”. The Custodian is required to mail a letter to the Creator’s last known address known by the Custodian. If, within 90 days of the mailing of that letter, the Creator of an original estate planning document cannot be located or does not take possession of the original estate planning document and if the Custodian is not required to transfer possession of the original document to someone other than the Creator, the original document will be deemed abandoned, and the Custodian may preserve the original document electronically as provided by the State Court Administrator.

The Custodian must create an electronic estate planning document in color and in a format using technology prescribed by the State Court Administrator. The Custodian may then file the electronic document after she: (1) examines the original and is satisfied that it is an original; and (2) compares the electronic document to the original and is satisfied that the electronic document is a true and correct copy of the original.

In order to deposit documents with the State Court Administrator, the Custodian must certify in a Filing Statement, under penalty of perjury, that she has made a diligent search for the Creator and has been unable to locate the Creator. The Filing Statement is a statement from the Custodian which states among other things: (1) whether or not the Creator can be located; (2) the Creator has not taken possession of the original document; (3) the Custodian has neither been able nor required to transfer possession of the original document to someone other than the Creator under applicable law other than this Act; (4) a description of each document being transferred; and (5) identifying information regarding the Creator of each document.

The Custodian must complete the Filing Statement as to each Creator. The Custodian can also be assured by the revised Rules of Professional Conduct that her deposit of the electronic estate planning documents with the State Court Administrator will preserve the attorney/client privilege and confidentiality of the documents and, as the statute provides, the deposit of the documents does not waive the privilege or confidentiality. Similarly, professional fiduciaries and financial institutions will have no liability after the deposit of electronic estate planning documents with the State Court Administrator. The State Court Administrator may rely on the information

provided and declarations made by the Custodian in the Filing Statement and has no duty to make any further inquiry.

The State Court Administrator will then create an index of Creators names and aliases that is a searchable database for all electronic estate planning documents filed with the State Court Administrator. The name and each alias of each Creator will be added to the index last name first as listed in each Filing Statement. The State Court Administrator will provide the Custodian with a date stamped copy of the Filing Statement acknowledging receipt of the Filing Statement and electronic estate planning documents. The State Court Administrator will certify that each electronic estate planning document was deposited with that office establishing a chain of custody. Each certified electronic document shall be deemed to be an original estate planning document under Colorado law.

After complying with the above referenced protocol and receipt of the date stamped copy of the Filing Statement, the Custodian may then destroy the original estate planning document. With regard to Wills and Codicils, an electronic copy of the original document certified by the State Court Administrator must be submitted for formal probate.

The index of Creator names, including aliases, is searchable. A computer folder and its contents, including the Creator's profile, the Filing Statement and electronic estate planning documents, are not a public record and are not subject to any federal or state open records act or any specific information under federal, state or local law.

If the State Court Administrator receives a request from the Creator, his agent or authorized individual for a copy of an electronic document on a form provided by the State Court Administrator, upon presentation of proper identification and production of a copy of the executed estate planning document, the State Court Administrator will release the document.

If, however, the Creator is determined to be deceased, the State Court Administrator shall produce the electronic estate planning documents to the authorized recipient upon: (1) presentation of a death certificate or court order; (2) proof that the authorized recipient is appointed by a court as a fiduciary of the Creator's estate or a beneficiary of the Creator's estate, or named as a fiduciary or beneficiary under the requested document, and (3) presentation of proper identification.

The State Court Administrator is also required to honor court orders requiring the lodging of electronic estate planning documents with the particular court in the State of Colorado.

**VIA E-MAIL**

Marcy G. Glenn, Chair  
Supreme Court Rules of Professional  
Conduct Standing Committee

RE: Colorado Electronic Preservation of Abandoned Estate Planning Documents Act

Dear Ms. Glenn:

We were referred to you by Justice Gabriel regarding revisions to the Ethical Rules necessary to implement Colorado's new Electronic Preservation of Abandoned Estate Planning Documents Act ("CEPAEPDA"/the "Act"). By way of background, we are Co-Chairs of the CBA Trust & Estate Section subcommittee that drafted this Act.

The Colorado Legislature passed the Act as House Bill 19-1229 and it was signed by the Governor on May 22, 2019. The Act has been codified as C.R.S. § 15-23-101, *et seq.*, with conforming amendments to the Colorado Probate Code at C.R.S. §§ 15-12-304 and 15-12-402. (See signed Act attached as Exhibit "A")

The Act creates a procedure to determine whether an original will or codicil is abandoned and, if so, a process to store it with the State Court Administrator's Office in an electronic format. It is anticipated that the State Court Administrator will create the platform necessary for electronic storage. At this time, the Act is limited to original wills and codicils. Because of a fiscal note requiring state revenue for implementation of the Act, the proposed effective date is January 1, 2021. (See Final Fiscal Note attached as Exhibit "B").

We have also attached a Hypothetical which explains exactly how the statute requires a lawyer, as a custodian of original client documents, to make a diligent attempt to locate the former client prior to making a digital copy of the client's original document for electronic storage with the State Court Administrator and destruction of the paper originals by the lawyer. The Hypothetical also addresses the protocol for retrieval of those electronically stored documents for formal probate. (See Hypothetical attached as Exhibit "C".)

Current Ethical Rules provide that wills and codicils are client property and, therefore, lawyers have ethical duties to maintain and preserve these original documents.<sup>1</sup> Before lawyers may use the Act, Ethical Rules would need to be amended to create a safe harbor for lawyers to electronically store original wills and codicils with the State Court Administrator before

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<sup>1</sup> Ethical Rule 1.16A Comment [1]. ... A client's files, within the meaning of Rule 1.16A, consists of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.15A and 1.16(d). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds and wills.

destroying the original documents. Attached is a list of conforming amendments to the Rules of Professional Conduct which our subcommittee believes would need to be approved by the Colorado Supreme Court prior to the effective date of the new Act. (See proposed list conforming amendments to the Ethical Rules attached as Exhibit "D".)

We understand that the next meeting of the Standing Committee is January 10, 2020 at 9:00 a.m. We would respectfully request that you add our proposal for conforming amendments to the Colorado Rules of Professional Conduct to your agenda. Assuming we can get on the agenda, our subcommittee will send two of its members to the January meeting to answer any questions the Standing Committee members may have regarding this new Act and our proposed conforming amendments to the Ethical Rules.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Pete Bullard and Tim Bounds

# An Act

HOUSE BILL 19-1229

BY REPRESENTATIVE(S) Roberts and Snyder, Arndt, Bird, Buckner, Duran, Kennedy;  
also SENATOR(S) Gardner and Lee, Priola, Tate.

CONCERNING THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT".

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** In Colorado Revised Statutes, **add** article 23 to title 15 as follows:

## **ARTICLE 23** **Colorado Electronic Preservation of** **Abandoned Estate Planning Documents Act**

**15-23-101. Short title.** THE SHORT TITLE OF THIS ARTICLE 23 IS THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT".

**15-23-102. Legislative declaration.** (1) THE GENERAL ASSEMBLY FINDS AND DECLARES THAT:

*Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.*

**EXHIBIT A**

(a) ABANDONED ORIGINAL ESTATE PLANNING DOCUMENTS ARE IN THE CUSTODY OF PROFESSIONALS WHO ARE UNABLE TO LOCATE THE CREATORS OF THE DOCUMENTS;

(b) CREATING A CENTRAL REPOSITORY FOR THESE DOCUMENTS WOULD BE IN THE BEST INTERESTS OF THE CUSTODIANS AND CREATORS OF THESE DOCUMENTS AND THE CREATORS' REPRESENTATIVES WHO MAY LATER BE IN NEED OF THE DOCUMENTS;

(c) THE JUDICIAL DEPARTMENT IS AN APPROPRIATE REPOSITORY FOR THE DOCUMENTS;

(d) ECONOMICS DICTATE AND TECHNOLOGY PERMITS CONVERSION OF ORIGINAL ESTATE PLANNING DOCUMENTS INTO ELECTRONIC VERSIONS OF THE ORIGINALS AS RELIABLE SUBSTITUTES FOR THE ORIGINALS; AND

(e) CUSTODIANS ARE IN THE BEST POSITION TO CERTIFY THE AUTHENTICITY OF ORIGINAL ESTATE PLANNING DOCUMENTS BEFORE THEIR CONVERSION TO ELECTRONIC FORMAT AND FILING WITH THE JUDICIAL DEPARTMENT.

(2) THEREFORE, THE GENERAL ASSEMBLY DECLARES THAT:

(a) PUBLIC POLICY OF THIS STATE SHOULD ENCOURAGE A CUSTODIAN OF AN ABANDONED ORIGINAL ESTATE PLANNING DOCUMENT TO CERTIFY THE DOCUMENT AS SUCH AND, AFTER MAKING A GOOD-FAITH EFFORT TO LOCATE THE CREATOR OF THE DOCUMENT, CONVERT IT TO AN ELECTRONIC FORMAT AND FILE THE ELECTRONIC RECORD OF THE DOCUMENT WITH THE JUDICIAL DEPARTMENT;

(b) THE JUDICIAL DEPARTMENT SHOULD MAINTAIN THE ELECTRONIC RECORD OF EACH DOCUMENT FILED WITH IT UNDER THIS ARTICLE 23 AND FURNISH A CERTIFIED COPY THEREOF TO INDIVIDUALS AND ENTITIES REASONABLY ENTITLED THERETO UPON PROOF OF IDENTITY AND ENTITLEMENT;

(c) A CERTIFIED COPY OF AN ELECTRONIC RECORD MAINTAINED IN THE JUDICIAL DEPARTMENT SHOULD BE ACCORDED THE SAME STATUS AS THE ABANDONED ORIGINAL ESTATE PLANNING DOCUMENT; AND

(d) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THIS ARTICLE 23 BE LIBERALLY CONSTRUED TO GIVE EFFECT TO THE PURPOSES STATED IN THIS ARTICLE 23.

**15-23-103. Definitions.** AS USED IN THIS ARTICLE 23, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "AGENT" MEANS AN ATTORNEY-IN-FACT GRANTED AUTHORITY UNDER A DURABLE OR NONDURABLE POWER OF ATTORNEY.

(2) "CERTIFIED BY THE STATE COURT ADMINISTRATOR" MEANS A RECORD CERTIFIED BY THE STATE COURT ADMINISTRATOR AS BEING A TRUE COPY OF AN ELECTRONIC RECORD MAINTAINED BY THE STATE COURT ADMINISTRATOR.

(3) "COMPUTER FOLDER" MEANS A DIRECTORY IDENTIFIED UNDER THE NAME OF A CREATOR CONTAINING THE CREATOR'S ELECTRONIC DOCUMENTS AND RELATED ELECTRONIC RECORDS THAT IS ESTABLISHED AND MAINTAINED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (3)(c).

(4) "CREATOR" MEANS AN INDIVIDUAL WHO, EITHER ALONE, WITH ONE OR MORE OTHER INDIVIDUALS, OR THROUGH A FIDUCIARY, HAS EXECUTED AN ORIGINAL ESTATE PLANNING DOCUMENT, AS DEFINED IN SUBSECTION (13) OF THIS SECTION, PURSUANT TO THE LAW OF ANY JURISDICTION.

(5) "CUSTODIAN" MEANS ANY OF THE FOLLOWING THAT HAS SOLE POSSESSION AND CONTROL OF AN ORIGINAL ESTATE PLANNING DOCUMENT OF AN INDIVIDUAL:

(a) AN ATTORNEY LICENSED OR FORMERLY LICENSED TO PRACTICE IN COLORADO, THE ATTORNEY'S FIDUCIARY, OR AN AFFIANT OF AN AFFIDAVIT OF THE DECEASED ATTORNEY'S ESTATE PURSUANT TO PART 12 OF ARTICLE 12 OF THIS TITLE 15;

(b) AN ENTITY PROVIDING LEGAL SERVICES PURSUANT TO RULE 265 OF THE COLORADO RULES OF CIVIL PROCEDURE;

(c) A PROFESSIONAL FIDUCIARY APPOINTED UNDER AN ORIGINAL

ESTATE PLANNING DOCUMENT, THE SUCCESSOR TO THE PROFESSIONAL FIDUCIARY, THE PROFESSIONAL FIDUCIARY'S OR SUCCESSOR'S FIDUCIARY, OR AN AFFIANT OF AN AFFIDAVIT OF THE PROFESSIONAL FIDUCIARY'S OR SUCCESSOR'S ESTATE PURSUANT TO PART 12 OF ARTICLE 12 OF THIS TITLE 15;

(d) A FINANCIAL INSTITUTION PROVIDING FIDUCIARY SERVICES;

(e) A FINANCIAL INSTITUTION OR ITS SUBSIDIARY PROVIDING SAFE DEPOSIT BOX SERVICES; OR

(f) AN ATTORNEY APPOINTED BY THE CHIEF JUDGE OF A JUDICIAL DISTRICT TO INVENTORY FILES OF AN ATTORNEY PURSUANT TO RULE 251.32 (h) OF THE COLORADO RULES OF CIVIL PROCEDURE.

(6) "DILIGENT SEARCH" MEANS AN ATTEMPT TO LOCATE AND CONTACT A CREATOR BY TWO OR MORE OF THE FOLLOWING MEANS:

(a) SEARCHING A TELEPHONE DIRECTORY COVERING AT LEAST THE GEOGRAPHIC AREA OF THE LAST PHYSICAL ADDRESS OF THE CREATOR KNOWN TO THE CUSTODIAN;

(b) CALLING THE CREATOR AT THE LAST PHONE NUMBER OF THE CREATOR KNOWN TO THE CUSTODIAN;

(c) SENDING AN E-MAIL TO THE LAST E-MAIL ADDRESS OF THE CREATOR KNOWN TO THE CUSTODIAN;

(d) CONDUCTING AN INTERNET SEARCH FOR THE CREATOR; OR

(e) SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 23, ATTEMPTING TO CONTACT BY ANY MEANS DESCRIBED IN THIS SUBSECTION (6):

(I) AN HEIR OF THE CREATOR;

(II) A FIDUCIARY, DEVISEE, OR BENEFICIARY DESIGNATED IN THE CREATOR'S ORIGINAL DOCUMENT; OR

(III) IF APPLICABLE, ANOTHER PARTY TO THE DOCUMENT.



(7) "ELECTRONIC" MEANS RELATING TO TECHNOLOGY HAVING ELECTRICAL, DIGITAL, MAGNETIC, WIRELESS, OPTICAL, ELECTROMAGNETIC, OR SIMILAR CAPABILITIES.

(8) "ELECTRONIC ESTATE PLANNING DOCUMENT" AND "ELECTRONIC DOCUMENT" MEAN THE ELECTRONIC RECORD CREATED FROM AN ORIGINAL ESTATE PLANNING DOCUMENT.

(9) "FIDUCIARY" MEANS AN ORIGINAL, ADDITIONAL, OR SUCCESSOR PERSONAL REPRESENTATIVE, CONSERVATOR, AGENT, OR TRUSTEE.

(10) "FILING STATEMENT" MEANS INFORMATION PROVIDED AND DECLARATIONS MADE BY A CUSTODIAN PURSUANT TO SECTION 15-23-111.

(11) "FINANCIAL INSTITUTION" MEANS A FEDERAL- OR STATE-CHARTERED COMMERCIAL BANK, SAVINGS AND LOAN ASSOCIATION, SAVINGS BANK, TRUST COMPANY, OR CREDIT UNION.

(12) "INDEX OF CREATOR NAMES" MEANS THE SEARCHABLE DATABASE CREATED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (2).

(13) "ORIGINAL ESTATE PLANNING DOCUMENT" AND "ORIGINAL DOCUMENT" MEAN AN ORIGINAL INSTRUMENT IN WRITING THAT IS ANY WILL DOCUMENT, INCLUDING, BUT NOT LIMITED TO WILLS, AS DEFINED IN SECTION 15-10-201 (59); CODICILS; HOLOGRAPHIC WILLS; DOCUMENTS PURPORTING TO BE WILLS; INSTRUMENTS THAT REVOKE OR REVISE A TESTAMENTARY INSTRUMENT; TESTAMENTARY INSTRUMENTS THAT MERELY APPOINT A PERSONAL REPRESENTATIVE; OTHER TESTAMENTARY INSTRUMENTS, SUCH AS MEMORANDA DISTRIBUTING TANGIBLE PERSONAL PROPERTY, AS DESCRIBED IN SECTION 15-11-513; AND TESTAMENTARY APPOINTMENTS OF GUARDIAN AS DESCRIBED IN SECTION 15-14-202 (1).

(14) "PROFESSIONAL FIDUCIARY" MEANS AN INDIVIDUAL OR ENTITY THAT IS IN THE BUSINESS OF ACTING AS A FIDUCIARY.

(15) "PROFILE" MEANS AN ELECTRONIC RECORD CREATED AND MAINTAINED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (3)(d) UNDER THE NAME OF EACH CREATOR FOR WHOM THE STATE COURT ADMINISTRATOR HAS RECEIVED AN ELECTRONIC ESTATE PLANNING

DOCUMENT.

(16) "PROOF OF IDENTITY" MEANS ANY OF THE FOLLOWING:

(a) FOR AN INDIVIDUAL, A RECORD OF THE INDIVIDUAL'S:

(I) PASSPORT, DRIVER'S LICENSE, OR GOVERNMENT-ISSUED NON-DRIVER IDENTIFICATION CARD THAT IS CURRENT OR EXPIRED NOT MORE THAN ONE YEAR BEFORE THE TIME OF PRESENTATION; OR

(II) OTHER FORM OF GOVERNMENT IDENTIFICATION THAT IS CURRENT OR HAS BEEN EXPIRED FOR NOT MORE THAN ONE YEAR BEFORE THE TIME OF PRESENTATION, CONTAINS THE SIGNATURE OR A PHOTOGRAPH OF THE INDIVIDUAL, AND IS SATISFACTORY TO THE STATE COURT ADMINISTRATOR;

(b) FOR A COURT, A RECORD OF A CERTIFIED COURT ORDER;

(c) FOR AN ENTITY, A RECORD OF A WRITING STATING THAT THE INDIVIDUAL MAKING THE REQUEST ON BEHALF OF THE ENTITY IS AN OFFICER OF THE ENTITY AND PROOF OF IDENTITY FOR THE INDIVIDUAL IN THE SAME MANNER AS PROVIDED IN SUBSECTION (16)(a) OF THIS SECTION; AND

(d) FOR A GOVERNMENT AGENCY, A RECORD OF A WRITING STATING THAT THE INDIVIDUAL MAKING THE REQUEST ON BEHALF OF THE AGENCY IS A REPRESENTATIVE OF THE AGENCY AND PROOF OF IDENTITY FOR THE INDIVIDUAL IN THE SAME MANNER AS PROVIDED IN SUBSECTION (16)(a) OF THIS SECTION.

(17) "RECORD" MEANS INFORMATION THAT IS INSCRIBED ON A TANGIBLE MEDIUM OR THAT IS STORED IN AN ELECTRONIC OR OTHER MEDIUM AND IS RETRIEVABLE IN PERCEIVABLE FORM.

(18) "STATE COURT ADMINISTRATOR" MEANS THE STATE COURT ADMINISTRATOR ESTABLISHED PURSUANT TO SECTION 13-3-101.

**15-23-104. Applicability.** (1) SUBJECT TO SUBSECTION (2) OF THIS SECTION, THIS ARTICLE 23 APPLIES TO AN ORIGINAL ESTATE PLANNING DOCUMENT CREATED BEFORE, ON, OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE 23.

(2) THIS ARTICLE 23 DOES NOT APPLY TO AN ORIGINAL ESTATE PLANNING DOCUMENT OF A CREATOR WHOSE LOCATION IS KNOWN TO THE CUSTODIAN UNLESS THE CREATOR FAILS TO TAKE POSSESSION OF THE DOCUMENT AND THE CUSTODIAN HAS COMPLIED WITH THE REQUIREMENTS OF SECTION 15-23-105.

(3) A CUSTODIAN THAT COMPLIES WITH THE PROVISIONS OF THIS ARTICLE 23 CONCERNING AN ORIGINAL ESTATE PLANNING DOCUMENT IS NOT SUBJECT TO THE REQUIREMENTS OF THE "UNCLAIMED PROPERTY ACT", ARTICLE 13 OF TITLE 38, CONCERNING THAT ORIGINAL DOCUMENT.

(4) NOTHING IN THIS ARTICLE 23 ABROGATES THE DUTIES IMPOSED BY SECTIONS 15-10-111 AND 15-11-516.

**15-23-105. Transfer of possession to creator.** (1) BEFORE FILING AN ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE STATE COURT ADMINISTRATOR AS PROVIDED IN THIS ARTICLE 23, THE CUSTODIAN SHALL ATTEMPT TO TRANSFER POSSESSION OF THE ORIGINAL ESTATE PLANNING DOCUMENT TO THE CREATOR AFTER A DILIGENT SEARCH.

(2) (a) IF THE ATTEMPT TO TRANSFER THE ORIGINAL DOCUMENT TO THE CREATOR AFTER A DILIGENT SEARCH IS NOT SUCCESSFUL, THE CUSTODIAN SHALL SEND A LETTER TO THE LAST MAILING ADDRESS OF THE CREATOR KNOWN TO THE CUSTODIAN BY FIRST-CLASS MAIL OR CERTIFIED MAIL RETURN RECEIPT REQUESTED, NOTIFYING THE CREATOR THAT IF THE CREATOR DOES NOT TAKE POSSESSION OF THE ORIGINAL DOCUMENT WITHIN NINETY DAYS AFTER THE DATE OF MAILING, THE CUSTODIAN WILL FILE AN ELECTRONIC COPY OF THE ORIGINAL DOCUMENT WITH THE STATE COURT ADMINISTRATOR AND DESTROY THE ORIGINAL DOCUMENT.

(b) IN THE CASE OF AN ORIGINAL DOCUMENT FOUND IN A SAFE DEPOSIT BOX, THE CUSTODIAN MAY SEND THE LETTER REQUIRED BY THIS SUBSECTION (2) ADDRESSED TO THE CREATOR "IN CARE OF" THE LESSEE OR LESSEES OF THE SAFE DEPOSIT BOX AT THE MAILING ADDRESS OF THE LESSEE OR LESSEES LAST KNOWN TO THE CUSTODIAN.

**15-23-106. Preservation of an abandoned original estate planning document after diligent search.** IF THE CREATOR OF AN ORIGINAL ESTATE PLANNING DOCUMENT CANNOT BE LOCATED OR DOES NOT TAKE POSSESSION OF THE ORIGINAL DOCUMENT AS PROVIDED IN SECTION

15-23-105 AND IF THE CUSTODIAN IS NEITHER ABLE NOR REQUIRED TO TRANSFER POSSESSION OF THE ORIGINAL DOCUMENT TO SOMEONE OTHER THAN THE CREATOR UNDER APPLICABLE LAW OTHER THAN THIS ARTICLE 23, THE ORIGINAL DOCUMENT IS DEEMED ABANDONED FOR THE PURPOSES OF THIS ARTICLE 23, AND THE CUSTODIAN MAY PRESERVE THE ORIGINAL DOCUMENT ELECTRONICALLY AS PROVIDED IN THIS ARTICLE 23.

**15-23-107. Privilege.** SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 23, IF AN ORIGINAL ESTATE PLANNING DOCUMENT IS PRIVILEGED PURSUANT TO SECTION 13-90-107 (1)(b), THE CORRESPONDING ELECTRONIC ESTATE PLANNING DOCUMENT FILED WITH THE STATE COURT ADMINISTRATOR AS PROVIDED IN THIS ARTICLE 23 REMAINS PRIVILEGED.

**15-23-108. Exculpation of custodian.** A CUSTODIAN IS NOT LIABLE TO A PERSON FOR AN ACTION TAKEN UNDER THIS ARTICLE 23 OR FOR A FAILURE TO ACT AS PROVIDED IN THIS ARTICLE 23 UNLESS THE ACTION OR FAILURE TO ACT IS SHOWN TO HAVE RESULTED FROM THE CUSTODIAN'S BAD FAITH, GROSS NEGLIGENCE, OR INTENTIONAL MISCONDUCT.

**15-23-109. Electronic conversion and filing.** (1) IF THE CREATOR DOES NOT TAKE POSSESSION OF THE ORIGINAL ESTATE PLANNING DOCUMENT WITHIN NINETY DAYS AFTER THE DATE OF MAILING THE LETTER REQUIRED IN SECTION 15-23-105 (2), THE CUSTODIAN MAY CREATE AN ELECTRONIC ESTATE PLANNING DOCUMENT, WHICH MUST BE IN COLOR AND IN A FORMAT AND USING THE TECHNOLOGY PRESCRIBED BY THE STATE COURT ADMINISTRATOR, AND MAY FILE THE ELECTRONIC DOCUMENT WITH THE STATE COURT ADMINISTRATOR.

(2) AS TO EACH ELECTRONIC ESTATE PLANNING DOCUMENT BEING FILED, THE CUSTODIAN, OR, IF THE CUSTODIAN IS AN ENTITY, AN OFFICER OF THE CUSTODIAN, SHALL:

(a) EXAMINE THE ORIGINAL ESTATE PLANNING DOCUMENT;

(b) BASED UPON THAT EXAMINATION, BE SATISFIED THAT THE DOCUMENT IS AN ORIGINAL ESTATE PLANNING DOCUMENT OF THE CREATOR, AS THOSE TERMS ARE DEFINED IN SECTION 15-23-103;

(c) COMPARE THE ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE ORIGINAL ESTATE PLANNING DOCUMENT; AND

(d) BE SATISFIED THAT THE ELECTRONIC ESTATE PLANNING DOCUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ESTATE PLANNING DOCUMENT.

(3) NOTWITHSTANDING ANY PROVISION OF THIS ARTICLE 23 TO THE CONTRARY, A CUSTODIAN SUBJECT TO THE COLORADO RULES OF PROFESSIONAL CONDUCT SHALL COMPLY WITH THE RULES AS THEY MAY RELATE TO A FILING PURSUANT TO THIS ARTICLE 23 PRIOR TO FILING AN ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE STATE COURT ADMINISTRATOR.

**15-23-110. Penalty of perjury.** THE ACT OF SUBMITTING A FILING STATEMENT TO THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-111 OR SUBMITTING A REQUEST TO THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-119, 15-23-120, OR 15-23-122 CONSTITUTES THE AFFIRMATION OR ACKNOWLEDGMENT OF THE SUBMITTER, UNDER THE PENALTY OF PERJURY, THAT THE FILING STATEMENT OR REQUEST IS THE SUBMITTER'S ACT AND DEED, OR THAT THE SUBMITTER IN GOOD FAITH BELIEVES THAT THE FILING STATEMENT OR REQUEST IS THE ACT AND DEED OF THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING; THAT THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING IN GOOD FAITH BELIEVES THE INFORMATION PROVIDED AND DECLARATIONS MADE IN THE FILING STATEMENT OR REQUEST ARE TRUE; AND THAT THE FILING STATEMENT OR REQUEST COMPLIES WITH THE REQUIREMENTS OF THIS ARTICLE 23.

**15-23-111. Filing statement.** (1) A CUSTODIAN SHALL SUBMIT A FILING STATEMENT FOR EACH ELECTRONIC ESTATE PLANNING DOCUMENT FOR EACH CREATOR SUBMITTED TO THE STATE COURT ADMINISTRATOR PURSUANT TO THIS ARTICLE 23.

(2) A CUSTODIAN SHALL PROVIDE THE FOLLOWING INFORMATION AND MAKE THE FOLLOWING DECLARATIONS ON A FILING STATEMENT FORM FURNISHED BY THE STATE COURT ADMINISTRATOR:

(a) A DECLARATION THAT AFTER ATTEMPTING TO TRANSFER POSSESSION OF THE ORIGINAL ESTATE PLANNING DOCUMENT TO ITS CREATOR AS PROVIDED IN SECTION 15-23-105:

(I) THE CUSTODIAN CANNOT LOCATE THE CREATOR OF THE ORIGINAL

DOCUMENT;

(II) THE CREATOR HAS NOT TAKEN POSSESSION OF THE ORIGINAL DOCUMENT; OR

(III) THE CUSTODIAN HAS NEITHER BEEN ABLE NOR REQUIRED TO TRANSFER POSSESSION OF THE ORIGINAL DOCUMENT TO SOMEONE OTHER THAN THE CREATOR UNDER APPLICABLE LAW OTHER THAN THIS ARTICLE 23;

(b) THE NAME OF THE CREATOR, LAST NAME FIRST;

(c) ALL ALIASES OF THE CREATOR, LAST NAME FIRST, KNOWN TO THE CUSTODIAN;

(d) THE DATE OF BIRTH OF THE CREATOR, IF KNOWN TO THE CUSTODIAN;

(e) SUBJECT TO SUBSECTION (3) OF THIS SECTION, THE LAST MAILING AND PHYSICAL ADDRESSES OF THE CREATOR KNOWN TO THE CUSTODIAN;

(f) REGARDING THE CUSTODIAN:

(I) IF THE CUSTODIAN IS AN INDIVIDUAL, THE NAME AND ADDRESS OF THE INDIVIDUAL;

(II) IF THE CUSTODIAN IS AN ENTITY, THE NAME AND ADDRESS OF THE ENTITY, THE NAME AND POSITION OF THE INDIVIDUAL ACTING ON BEHALF OF THE ENTITY, AND THE INDIVIDUAL'S ADDRESS IF DIFFERENT THAN THAT OF THE ENTITY;

(g) FOR THE ELECTRONIC ESTATE PLANNING DOCUMENT FILED:

(I) THE NAME AND DATE OF THE ELECTRONIC DOCUMENT;

(II) THE CATEGORY OF THE ORIGINAL DOCUMENT, AS DESCRIBED IN SECTION 15-23-103 (13), THAT HAS BEEN CONVERTED TO AN ELECTRONIC DOCUMENT; AND

(III) THE NUMBER OF PAGES OF THE ELECTRONIC DOCUMENT;

(h) A DECLARATION THAT THE CUSTODIAN, OR IF AN ENTITY, THE OFFICER OF THE CUSTODIAN, SUBMITTING THE FILING STATEMENT HAS:

(I) EXAMINED THE ORIGINAL ESTATE PLANNING DOCUMENT;

(II) BASED UPON THAT EXAMINATION, BELIEVES THAT THE DOCUMENT IS AN ORIGINAL ESTATE PLANNING DOCUMENT OF THE CREATOR, AS THOSE TERMS ARE DEFINED IN SECTION 15-23-103;

(III) COMPARED THE ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE ORIGINAL ESTATE PLANNING DOCUMENT; AND

(IV) BASED UPON THAT COMPARISON, BELIEVES THAT THE ELECTRONIC ESTATE PLANNING DOCUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ESTATE PLANNING DOCUMENT;

(i) (I) A DECLARATION THAT, IF THE CUSTODIAN IS SUBJECT TO THE COLORADO RULES OF PROFESSIONAL CONDUCT, THE CUSTODIAN HAS COMPLIED WITH THE RULES AS THEY MAY RELATE TO THIS FILING;

(II) FOR THE PURPOSE OF THE DECLARATION MADE PURSUANT TO THIS SUBSECTION (2)(i), THE STATE COURT ADMINISTRATOR SHALL REFER TO THE COLORADO RULES OF PROFESSIONAL CONDUCT AS THE "COLORADO RULES OF PROFESSIONAL CONDUCT ADOPTED BY THE SUPREME COURT OF COLORADO";

(j) A DECLARATION THAT THE CUSTODIAN HAS COMPLIED WITH ALL APPLICABLE LAW OTHER THAN THIS ARTICLE 23; AND

(k) A DECLARATION THAT THE ACT OF SUBMITTING A FILING STATEMENT TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY, PURSUANT TO SECTION 15-23-110, FOR THE INFORMATION PROVIDED AND DECLARATIONS MADE IN THE FILING STATEMENT, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE FILING STATEMENT AS THE ONE SUBMITTING THE FILING STATEMENT.

(3) IN THE CASE OF AN ORIGINAL ESTATE PLANNING DOCUMENT FOUND IN A SAFE DEPOSIT BOX, IT IS SUFFICIENT UNDER SUBSECTION (2)(e) OF THIS SECTION TO FURNISH THE LAST MAILING AND PHYSICAL ADDRESSES

OF THE LESSEE OR LESSEES OF THE SAFE DEPOSIT BOX KNOWN TO THE CUSTODIAN.

(4) INFORMATION PROVIDED AND DECLARATIONS MADE IN THE FILING STATEMENT ARE PART OF THE PROFILE FOR EACH CREATOR.

**15-23-112. Reliance on filing statement.** THE STATE COURT ADMINISTRATOR MAY RELY ON INFORMATION PROVIDED AND DECLARATIONS MADE IN A FILING STATEMENT AND HAS NO DUTY TO MAKE FURTHER INQUIRY.

**15-23-113. Fees - disposition - appropriation - cash fund.**  
(1) THE STATE COURT ADMINISTRATOR SHALL DETERMINE AND COLLECT FEES TO COVER THE ASSOCIATED COSTS FOR SUBMITTING THE FOLLOWING:

(a) A FILING STATEMENT, INCLUDING THE ATTACHED ELECTRONIC ESTATE PLANNING DOCUMENT;

(b) A REQUEST FOR RETRIEVAL; AND

(c) A REQUEST FOR DELETION.

(2) THE FEES ESTABLISHED PURSUANT TO THIS SECTION MUST BE BASED ON THE ACTUAL COST OF THE SUBMISSION.

(3) THE STATE COURT ADMINISTRATOR SHALL TRANSMIT FEES COLLECTED PURSUANT TO THIS SECTION TO THE STATE TREASURER, WHO SHALL CREDIT THEM TO THE ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS CASH FUND CREATED IN SUBSECTION (4) OF THIS SECTION.

(4) THE ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS CASH FUND, REFERRED TO IN THIS SUBSECTION (4) AS THE "FUND", IS HEREBY CREATED IN THE STATE TREASURY. THE FUND CONSISTS OF MONEY CREDITED TO THE FUND PURSUANT TO SUBSECTION (3) OF THIS SECTION AND ANY OTHER MONEY THAT THE GENERAL ASSEMBLY MAY APPROPRIATE OR TRANSFER TO THE FUND. THE STATE TREASURER SHALL CREDIT ALL INTEREST AND INCOME DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEY IN THE FUND TO THE FUND. SUBJECT TO ANNUAL APPROPRIATION BY THE GENERAL ASSEMBLY, THE JUDICIAL DEPARTMENT



MAY EXPEND MONEY FROM THE FUND FOR THE ADMINISTRATION OF THIS ARTICLE 23.

**15-23-114. Duties of the state court administrator.** (1) THE STATE COURT ADMINISTRATOR SHALL PROVIDE THE FORMS REQUIRED TO ADMINISTER THE PROVISIONS OF THIS ARTICLE 23.

(2) THE STATE COURT ADMINISTRATOR SHALL CREATE AN INDEX OF CREATOR NAMES THAT IS A SEARCHABLE DATABASE OF ALL NAMES, ALIASES, AND LAST KNOWN PHYSICAL ADDRESSES OF ALL CREATORS FOR WHOM ELECTRONIC ESTATE PLANNING DOCUMENTS ARE FILED WITH THE STATE COURT ADMINISTRATOR AS PROVIDED IN THIS ARTICLE 23.

(3) UPON RECEIPT OF A FILING STATEMENT WITH AN ELECTRONIC ESTATE PLANNING DOCUMENT OF A CREATOR, THE STATE COURT ADMINISTRATOR SHALL:

(a) PROVIDE THE CUSTODIAN WITH A DATE-STAMPED COPY OF THE FILING STATEMENT ACKNOWLEDGING RECEIPT OF THE FILING STATEMENT AND THE ATTACHED ELECTRONIC ESTATE PLANNING DOCUMENT;

(b) ADD TO THE INDEX OF CREATOR NAMES THE NAME OF EACH CREATOR AND THE ALIASES OF THE CREATOR CROSS-REFERENCED TO THE CREATOR'S NAME, LAST NAME FIRST, AND THE LAST KNOWN PHYSICAL ADDRESS OF THE CREATOR AS SET FORTH IN THE FILING STATEMENT;

(c) CREATE AND MAINTAIN A COMPUTER FOLDER FOR EACH CREATOR;

(d) CREATE A PROFILE FOR EACH CREATOR, WHICH MUST BE FILED IN THE COMPUTER FOLDER OF EACH CREATOR AND WHICH MUST CONTAIN THE DATE OF FILING, INFORMATION PROVIDED IN THE FILING STATEMENT, AND DECLARATIONS MADE IN THE FILING STATEMENT; AND

(e) CREATE AND MAINTAIN A SEPARATE ELECTRONIC RECORD OF EACH ELECTRONIC ESTATE PLANNING DOCUMENT FILED FOR THE CREATOR IDENTIFIED IN THE FILING STATEMENT AND STORE THE ELECTRONIC RECORD IN A COMPUTER FOLDER UNDER THE CREATOR'S NAME, LAST NAME FIRST.

(4) (a) THE STATE COURT ADMINISTRATOR MAY ENTER INTO AN

INTERAGENCY AGREEMENT WITH ANOTHER STATE AGENCY TO MAINTAIN ANY COMPUTER FOLDER OR PROFILE REQUIRED BY THIS ARTICLE 23. ANY COMPUTER FOLDER OR PROFILE MAINTAINED PURSUANT TO SUCH AN AGREEMENT IS CONSIDERED TO BE MAINTAINED BY THE STATE COURT ADMINISTRATOR FOR THE PURPOSES OF THIS ARTICLE 23.

(b) AN INTERAGENCY AGREEMENT ENTERED INTO PURSUANT TO THIS SUBSECTION (4) MUST REQUIRE ANY PARTIES TO THE AGREEMENT TO DELIVER ANY INFORMATION OR ELECTRONIC RECORD MAINTAINED BY THE DEPARTMENT PURSUANT TO THE AGREEMENT TO THE STATE COURT ADMINISTRATOR UPON REQUEST.

(5) THE STATE COURT ADMINISTRATOR SHALL ADOPT STANDARDS AND PROCEDURES FOR THE IMPLEMENTATION OF THIS ARTICLE 23.

**15-23-115. Destruction of original estate planning document.** SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 23, THE CUSTODIAN SHALL DESTROY THE ORIGINAL ESTATE PLANNING DOCUMENT AFTER COMPLYING WITH THE PROVISIONS OF THIS ARTICLE 23 AND RECEIVING THE DATE-STAMPED COPY OF THE FILING STATEMENT FROM THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (3)(a).

**15-23-116. Authenticity of electronic estate planning document.** AN ELECTRONIC ESTATE PLANNING DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR THAT IS MADE FROM AN ORIGINAL ESTATE PLANNING DOCUMENT IS DEEMED TO BE THE ORIGINAL OF THE DOCUMENT FOR ALL PURPOSES UNDER COLORADO LAW.

**15-23-117. Public record.** (1) THE INDEX OF CREATOR NAMES CREATED PURSUANT TO SECTION 15-23-114 (2) IS A PUBLIC RECORD.

(2) A COMPUTER FOLDER AND ITS CONTENTS, INCLUDING THE CREATOR'S PROFILE, FILING STATEMENTS, AND ELECTRONIC ESTATE PLANNING DOCUMENTS IS NOT A PUBLIC RECORD AND IS NOT SUBJECT TO ANY FEDERAL OR STATE OPEN RECORDS ACT OR ANY REQUEST FOR PUBLIC INFORMATION UNDER ANY FEDERAL, STATE, OR LOCAL LAW.

**15-23-118. Access to filing statement.** THE STATE COURT ADMINISTRATOR SHALL PROVIDE AN INDIVIDUAL, ENTITY, COURT, OR GOVERNMENT AGENCY THAT IS AUTHORIZED TO RECEIVE A COPY OF A FILING

STATEMENT PURSUANT TO SECTION 15-23-119 OR 15-23-120, AND THAT HAS PROVIDED PROOF OF IDENTITY, ACCESS TO ANY FILING STATEMENT FILED UNDER ANY NAMES OR ALIASES THAT ARE THE SUBJECT OF AN INQUIRY.

**15-23-119. Access to electronic estate planning document prior to notification of creator's death.** (1) UNTIL NOTIFIED OF A CREATOR'S DEATH AS PROVIDED IN SECTION 15-23-120 (1)(b), THE STATE COURT ADMINISTRATOR MAY PRESUME THAT THE CREATOR IS LIVING.

(2) WHEN A CREATOR IS PRESUMED LIVING, THE STATE COURT ADMINISTRATOR SHALL DELIVER A COPY OF AN ELECTRONIC DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR TO ANY OF THE FOLLOWING INDIVIDUALS OR ENTITIES UPON REQUEST FOR A COPY OF THE ELECTRONIC ESTATE PLANNING DOCUMENT ON A FORM FURNISHED BY THE STATE COURT ADMINISTRATOR AND PAYMENT OF A RETRIEVAL FEE:

(a) THE CREATOR, UPON PRESENTATION OF PROOF OF IDENTITY OF THE CREATOR;

(b) AN INDIVIDUAL AUTHORIZED TO RECEIVE THE COPY OF AN ELECTRONIC DOCUMENT IN A WRITING SIGNED BY THE CREATOR AND NOTARIZED, UPON PRESENTATION OF:

(I) A RECORD OF THE WRITING; AND

(II) PROOF OF IDENTITY OF THE AUTHORIZED INDIVIDUAL;

(c) AN AGENT OF THE CREATOR, UPON PRESENTATION OF:

(I) A RECORD OF THE POWER OF ATTORNEY;

(II) A RECORD OF THE AGENT'S CERTIFICATION AS TO THE VALIDITY OF THE POWER OF ATTORNEY AND THE AGENT'S AUTHORITY AS PROVIDED IN SECTION 15-14-742; AND

(III) PROOF OF IDENTITY OF THE AGENT;

(d) AN INDIVIDUAL OR ENTITY NOMINATED OR APPOINTED AS A FIDUCIARY IN THE ELECTRONIC DOCUMENT OR APPOINTED BY A COURT, UPON PRESENTATION OF:

(I) A RECORD OF THE ORIGINAL ESTATE PLANNING DOCUMENT OR OF THE CERTIFIED COURT ORDER; AND

(II) PROOF OF IDENTITY OF THE FIDUCIARY;

(e) A COURT-APPOINTED CONSERVATOR FOR THE CREATOR, UPON PRESENTATION OF:

(I) A RECORD OF CERTIFIED LETTERS OF CONSERVATORSHIP; AND

(II) PROOF OF IDENTITY OF THE CONSERVATOR; OR

(f) AN INDIVIDUAL, ENTITY, COURT, OR GOVERNMENT AGENCY AUTHORIZED TO RECEIVE THE COPY OF THE ELECTRONIC DOCUMENT AS PROVIDED IN AN ORDER ENTERED BY A COURT, UPON PRESENTATION OF:

(I) A RECORD OF THE CERTIFIED COURT ORDER; AND

(II) PROOF OF IDENTITY OF THE AUTHORIZED INDIVIDUAL, OR OF THE INDIVIDUAL ACTING ON BEHALF OF THE AUTHORIZED ENTITY, COURT, OR GOVERNMENT AGENCY.

(3) A REQUEST MADE PURSUANT TO THIS SECTION MUST BE MADE ON A FORM PROVIDED BY THE STATE COURT ADMINISTRATOR THAT CONTAINS A DECLARATION THAT THE ACT OF SUBMITTING THE REQUEST TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY PURSUANT TO SECTION 15-23-110 FOR THE INFORMATION PROVIDED AND THE DECLARATIONS MADE IN THE REQUEST FORM, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE REQUEST AS THE ONE SUBMITTING THE REQUEST.

(4) THE STATE COURT ADMINISTRATOR SHALL FILE A REQUEST FORM SUBMITTED PURSUANT TO SUBSECTION (2) OF THIS SECTION IN THE CREATOR'S COMPUTER FOLDER.

**15-23-120. Access to electronic estate planning document after notification of creator's death - definitions.** (1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "AUTHORIZED RECIPIENT" MEANS:

(I) AN INDIVIDUAL OR ENTITY NOMINATED OR APPOINTED AS A FIDUCIARY IN AN ORIGINAL ESTATE PLANNING DOCUMENT OF A CREATOR OR APPOINTED ON BEHALF OF THE ESTATE OF A CREATOR BY A COURT, UPON PRESENTATION OF THE FOLLOWING:

(A) A RECORD OF THE ORIGINAL DOCUMENT OR THE CERTIFIED COURT ORDER; AND

(B) PROOF OF THE IDENTITY OF THE FIDUCIARY;

(II) AN INDIVIDUAL OR ENTITY NAMED AS A DEVISEE UNDER A WILL DOCUMENT OR BENEFICIARY UNDER A TRUST DOCUMENT, UPON PRESENTATION OF THE FOLLOWING:

(A) A RECORD OF THE WILL DOCUMENT OR THE TRUST DOCUMENT; AND

(B) PROOF OF IDENTITY OF THE INDIVIDUAL, OR THE INDIVIDUAL ACTING ON BEHALF OF THE ENTITY, NAMED AS A DEVISEE OR BENEFICIARY;

(III) A COURT-APPOINTED FIDUCIARY FOR AN INDIVIDUAL NAMED AS A DEVISEE UNDER A WILL DOCUMENT OR BENEFICIARY UNDER A TRUST DOCUMENT UPON PRESENTATION OF THE FOLLOWING:

(A) A RECORD OF THE WILL DOCUMENT OR THE TRUST DOCUMENT;

(B) A RECORD OF CERTIFIED LETTERS OF APPOINTMENT OF THE FIDUCIARY; AND

(C) PROOF OF IDENTITY OF THE FIDUCIARY; OR

(IV) AN INDIVIDUAL, ENTITY, COURT, OR GOVERNMENT AGENCY AUTHORIZED TO RECEIVE A COPY OF ANY OR ALL OF THE CONTENTS OF A COMPUTER FOLDER AS PROVIDED IN A COURT ORDER, UPON PRESENTATION OF THE FOLLOWING:

(A) RECORD OF THE CERTIFIED COURT ORDER; AND

(B) PROOF OF IDENTITY OF THE AUTHORIZED INDIVIDUAL, OR OF THE INDIVIDUAL ACTING ON BEHALF OF THE AUTHORIZED ENTITY, COURT, OR GOVERNMENT AGENCY.

(b) "NOTIFICATION OF DEATH" MEANS PRESENTATION TO THE STATE COURT ADMINISTRATOR OF:

(I) A RECORD OF THE CREATOR'S CERTIFIED DEATH CERTIFICATE; OR

(II) A RECORD OF THE CERTIFIED COURT ORDER DETERMINING THAT A CREATOR IS DECEASED.

(2) UPON NOTIFICATION OF DEATH AND A REQUEST FOR ANY OR ALL OF THE CONTENTS OF A COMPUTER FOLDER BY AN AUTHORIZED RECIPIENT ON A FORM FURNISHED BY THE STATE COURT ADMINISTRATOR AND PAYMENT OF A RETRIEVAL FEE, THE STATE COURT ADMINISTRATOR SHALL:

(a) DELIVER A COPY OF THE REQUESTED CONTENTS OF THE COMPUTER FOLDER WITH EACH ELECTRONIC ESTATE PLANNING DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR TO THE AUTHORIZED RECIPIENT;

(b) AS TO A WILL DOCUMENT OF A CREATOR, LODGE A COPY OF THE ELECTRONIC ESTATE PLANNING DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR AS REQUIRED BY SECTION 15-11-516; AND

(c) FILE THE REQUEST FORM IN THE CREATOR'S COMPUTER FOLDER.

(3) A REQUEST MADE PURSUANT TO THIS SECTION MUST BE MADE ON A FORM PROVIDED BY THE STATE COURT ADMINISTRATOR THAT CONTAINS A DECLARATION THAT THE ACT OF SUBMITTING THE REQUEST TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY PURSUANT TO SECTION 15-23-110 FOR THE INFORMATION PROVIDED AND THE DECLARATIONS MADE IN THE REQUEST FORM, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE REQUEST AS THE ONE SUBMITTING THE REQUEST.

**15-23-121. Action to establish a claim.** IF AN INDIVIDUAL, ENTITY, OR GOVERNMENT AGENCY SUBMITS A REQUEST FOR RETRIEVAL OF A COPY

OF ANY OR ALL OF THE CONTENTS OF A COMPUTER FOLDER AS PROVIDED IN THIS ARTICLE 23 AND THE REQUEST IS DENIED BY THE STATE COURT ADMINISTRATOR OR IS NOT ACTED UPON BY THE STATE COURT ADMINISTRATOR WITHIN NINETY DAYS AFTER ITS SUBMISSION, THE INDIVIDUAL, ENTITY, OR GOVERNMENT AGENCY MAY FILE AN ACTION IN THE PROBATE COURT OF THE CITY AND COUNTY OF DENVER, NAMING THE STATE COURT ADMINISTRATOR AS RESPONDENT, TO RETRIEVE A COPY OF ANY OR ALL OF THE CONTENTS OF THE COMPUTER FOLDER. THE INDIVIDUAL, ENTITY, OR GOVERNMENT AGENCY MUST FILE THE ACTION WITHIN NINETY DAYS AFTER THE DATE OF THE DENIAL BY THE STATE COURT ADMINISTRATOR OR WITHIN ONE HUNDRED EIGHTY DAYS AFTER THE DATE OF THE FILING OF THE REQUEST FOR RETRIEVAL IF THE STATE COURT ADMINISTRATOR HAS FAILED TO ACT ON IT.

**15-23-122. Deletion of electronic estate planning documents and computer folders - error correction.** (1) (a) THE STATE COURT ADMINISTRATOR SHALL DELETE AN ELECTRONIC ESTATE PLANNING DOCUMENT FILED PURSUANT TO THIS ARTICLE 23 UPON PRESENTATION OF:

(I) A REQUEST BY A CREATOR OF THE DOCUMENT ON A NOTARIZED FORM FURNISHED BY THE STATE COURT ADMINISTRATOR;

(II) PROOF OF IDENTITY OF THE CREATOR; AND

(III) PAYMENT OF A DELETION FEE.

(b) THE STATE COURT ADMINISTRATOR SHALL FILE THE REQUEST FORM IN THE CREATOR'S COMPUTER FOLDER AND SHALL MAINTAIN THE FOLDER FOR THE PERIOD OF TIME SPECIFIED IN SUBSECTION (4) OF THIS SECTION.

(c) UPON REQUEST FOR DELETION PURSUANT TO THIS SUBSECTION (1), THE STATE COURT ADMINISTRATOR SHALL DELETE THE ELECTRONIC DOCUMENT ONLY FROM THE COMPUTER FOLDER OF THE CREATOR WHO REQUESTS THE DELETION.

(2) A REQUEST PURSUANT TO THIS SECTION MUST BE MADE ON A FORM PROVIDED BY THE STATE COURT ADMINISTRATOR THAT CONTAINS THE DECLARATION THAT THE ACT OF SUBMITTING THE REQUEST TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON

WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY PURSUANT TO SECTION 15-23-110 FOR THE INFORMATION PROVIDED AND THE DECLARATIONS MADE ON THE REQUEST FORM, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE REQUEST AS THE ONE SUBMITTING THE REQUEST.

(3) THE STATE COURT ADMINISTRATOR MAY TAKE SUCH ACTIONS AS THE STATE COURT ADMINISTRATOR DEEMS NECESSARY TO CORRECT ANY TECHNOLOGICAL, TYPOGRAPHICAL, OR CLERICAL ERROR, AND, AT THE STATE COURT ADMINISTRATOR'S DISCRETION, HE OR SHE MAY DELETE A RECORD THAT A CUSTODIAN HAS FILED IN ERROR.

(4) THE STATE COURT ADMINISTRATOR MAY DELETE A COMPUTER FOLDER ONE HUNDRED YEARS AFTER THE DATE OF THE CREATION OF THE FOLDER.

**SECTION 2.** In Colorado Revised Statutes, 13-3-101, **add** (14) as follows:

**13-3-101. State court administrator - repeal.** (14) THE STATE COURT ADMINISTRATOR SHALL ADMINISTER THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT", ARTICLE 23 OF TITLE 15.

**SECTION 3.** In Colorado Revised Statutes, **repeal and reenact, with amendments**, 15-12-304 as follows:

**15-12-304. Informal probate - unavailable in certain cases.**

(1) APPLICATIONS FOR INFORMAL PROBATE THAT RELATE TO ANY OF THE FOLLOWING MUST BE DECLINED:

(a) ONE OR MORE OF A KNOWN SERIES OF TESTAMENTARY INSTRUMENTS, OTHER THAN A WILL AND ONE OR MORE CODICILS THERETO, THE LATEST OF WHICH DOES NOT EXPRESSLY REVOKE THE EARLIER; OR

(b) A COPY OF THE DECEDENT'S ORIGINAL WILL CERTIFIED BY THE STATE COURT ADMINISTRATOR PURSUANT TO ARTICLE 23 OF THIS TITLE 15.

**SECTION 4.** In Colorado Revised Statutes, 15-12-402, **amend** (1) introductory portion, (1)(c), and (2) as follows:



**15-12-402. Formal testacy or appointment proceedings - petition - contents.** (1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will ~~shall~~ MUST:

(c) State whether the original of the last will of the decedent, OR A COPY OF THE DECEDENT'S ORIGINAL WILL CERTIFIED BY THE STATE COURT ADMINISTRATOR PURSUANT TO ARTICLE 23 OF THIS TITLE 15, is in the possession of the court or accompanies the petition.

(2) If the original will, OR A COPY OF THE DECEDENT'S ORIGINAL WILL CERTIFIED BY THE STATE COURT ADMINISTRATOR PURSUANT TO ARTICLE 23 OF THIS TITLE 15, is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

**SECTION 5.** In Colorado Revised Statutes, 38-13-110, add (1)(c) as follows:

**38-13-110. Report and payment or delivery of abandoned property.** (1) (c) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE 13 TO THE CONTRARY, A HOLDER WHO QUALIFIES AS A CUSTODIAN PURSUANT TO SECTION 15-23-103 (5) AND WHO COMPLIES WITH THE PROVISIONS OF THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT", ARTICLE 23 OF TITLE 15, CONCERNING AN ORIGINAL ESTATE PLANNING DOCUMENT, AS DEFINED IN SECTION 15-23-103 (13), IS NOT SUBJECT TO THE REQUIREMENTS OF THIS ARTICLE 13 CONCERNING THAT ORIGINAL ESTATE PLANNING DOCUMENT.

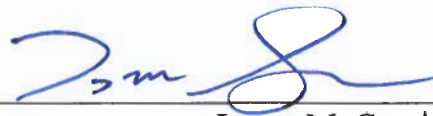
**SECTION 6. Act subject to petition - effective date.** (1) Except as otherwise provided in subsection (2) of this section, this act takes effect January 1, 2021; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within the ninety-day period after final adjournment of the general assembly, then the act, item, section, or part will not take effect unless approved by the people at the general election to be

held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) Section 5 of this act takes effect only if Senate Bill 19-088 does not become law.



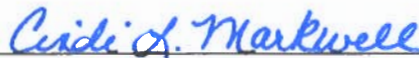
KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES



Leroy M. Garcia  
PRESIDENT OF  
THE SENATE

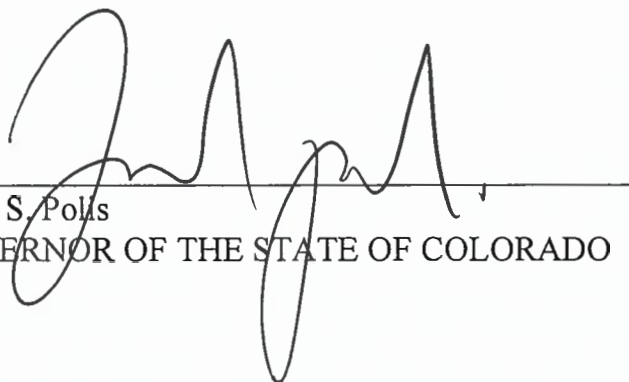


Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES



Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED May 22, 2019 at 1:23 p.m.  
(Date and Time)

  
\_\_\_\_\_  
Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO



## Summary of Legislation

This bill creates the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act. If an original estate planning document has been abandoned, the act requires the creation of an electronic estate planning document. An estate planning document is deemed to be abandoned if the possession of the original document cannot be transferred to the creator after conducting a thorough search. This bill also creates the Electronic Preservation of Abandoned Estate Planning Documents Cash Fund and allows the state court administrator's office (SCAO) in the Judicial Department to set and collect fees to cover the costs of electronically preserving estate planning documents. In addition, the SCAO may enter into an interagency agreement with another state agency to maintain any computer folder or profile required under this bill. Finally, the bill creates a process for the SCAO to grant access to electronic documents and provides requirements for the storage and deletion of such documents.

## Assumptions

The bill takes effect on January 1, 2021. The newly created cash fund will not have revenue to cover the expenditures created by this bill until individuals can access the electronic documents system. The fiscal note assumes a General Fund appropriation is required for six months during the program implementation period.

## State Revenue

Beginning in FY 2021-2022, state cash fund revenue to the Electronic Preservation of Abandoned Estate Planning Documents Cash Fund is expected to increase by at least \$68,750 per year, as shown in Table 2. This estimate is based on the assumption that there will be between 2,500 and 5,000 individuals who will access the system per year. This cash fund revenue is subject to TABOR.

**Fee Impact on Estate Planning Custodian.** Colorado law requires legislative service agency review of measures which create or increase any fee collected by a state agency. These fee amounts are estimates only, actual fees are set administratively by the Judicial Department based on cash fund balance, actual program costs, and the estimated number of individuals who access documents in the system. Assuming at least 2,500 individuals access the system, a fee of \$27.50 will generate approximately \$68,750 in cash fund revenue. The table below identifies the fee impact of this bill.

**Table 2**  
**Fee Impact on HB 19-1229**

<b>Fiscal Year</b>	<b>Type of Fee</b>	<b>Proposed Fee</b>	<b>Number Affected</b>	<b>Total Fee Impact</b>
FY 2021-22	Document Access	\$27.50	2,500	at least \$68,750
<b>FY 2021-22 Total</b>				<b>at least \$68,750</b>

**State Expenditures**

This bill increases state expenditures in the Judicial Department by \$165,995 and 0.3 FTE in FY 2020-21, \$83,602 and 0.8 FTE in FY 2021-22 and future years. These impacts are show in Table 3 and are discussed below. First year costs assume a January 2020 start date and reflect standard operating expenses and capital outlay costs.

**Table 3  
Expenditures Under HB 19-1229**

	FY 2019-20	FY 2020-21	FY 2021-22
<b>Judicial Department</b>			
Personal Services	-	\$23,063	\$51,893
Operating Expenses and Capital Outlay Costs	-	\$5,083	\$760
One-time License Purchase and Set Up Fee	-	\$80,230	-
System Development	-	\$45,000	-
Maintenance	-	-	\$15,000
Centrally Appropriated Costs*	-	\$12,619	\$15,949
<b>Total Cost</b>	-	<b>\$165,995</b>	<b>\$83,602</b>
<b>Total FTE</b>	-	<b>0.3 FTE</b>	<b>0.8 FTE</b>

\* Centrally appropriated costs are not included in the bill's appropriation.

**Judicial Department.** The bill increases state expenditures in the Judicial Department beginning in FY 2020-21 for a court programs analyst to process inquiries and access requests, ensure individuals are authorized to receive documents, and maintain a searchable database. In addition, the Judicial Department must create an electronic filing system for abandoned estate documents. The initial system set up is anticipated to cost \$125,230. Starting in FY 2021-22, annual maintenance costs of the system will be \$15,000.

**Centrally appropriated costs.** Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are estimated to be \$12,619 in FY 2020-21, \$15,949 in FY 2021-22.

**Local Government**

Beginning in FY 2021-22, local governments will have an increase in workload to change administrative procedures regarding locating and executing estate planning documents that have been abandoned. This impact is assumed to be minimal and absorbable within existing resources.

## Effective Date

The bill was signed into law by the Governor on May 22, 2019, and takes effect July 1, 2021, assuming no referendum petition is filed.

## State and Local Government Contacts

Counties  
Judicial  
Regulatory Agencies

County Clerks  
Local Affairs

Information Technology  
Personnel

**HYPOTHETICAL REGARDING THE COLORADO ELECTRONIC PRESERVATION  
OF ABANDONED ESTATE PLANNING DOCUMENTS ACT  
C.R.S. § 15-23-101, et. seq.**

Connie Custodian (the “Custodian”) is a lawyer in the twilight of her estate planning career and wants to get rid of abandoned original estate planning documents that she and her partners have stored in the firm’s safe deposit box for clients over the years. These original documents may include documents concerning succession such as Wills. The Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (“CEPAEPDA”/ the “Act”) creates an electronic filing, storage and retrieval system for electronic copies of original Wills with the State Court Administrator.

Under CEPAEPDA, before filing an electronic estate planning document with the State Court Administrator, Connie as Custodian will need to conduct a diligent search to try to locate her firm’s former clients defined under the Act as the “Creator”. The Custodian is required to mail a letter to the Creator’s last known address known by the Custodian. If, within 90 days of the mailing of that letter, the Creator of an original estate planning document cannot be located or does not take possession of the original estate planning document and if the Custodian is not required to transfer possession of the original document to someone other than the Creator, the original document will be deemed abandoned, and the Custodian may preserve the original document electronically as provided by the State Court Administrator.

The Custodian must create an electronic estate planning document in color and in a format using technology prescribed by the State Court Administrator. The Custodian may then file the electronic document after she: (1) examines the original and is satisfied that it is an original; and (2) compares the electronic document to the original and is satisfied that the electronic document is a true and correct copy of the original.

In order to deposit documents with the State Court Administrator, the Custodian must certify in a Filing Statement, under penalty of perjury, that she has made a diligent search for the Creator and has been unable to locate the Creator. The Filing Statement is a statement from the Custodian which states among other things: (1) whether or not the Creator can be located; (2) the Creator has not taken possession of the original document; (3) the Custodian has neither been able nor required to transfer possession of the original document to someone other than the Creator under applicable law other than this Act; (4) a description of each document being transferred; and (5) identifying information regarding the Creator of each document.

The Custodian must complete the Filing Statement as to each Creator. The Custodian can also be assured by the revised Rules of Professional Conduct that her deposit of the electronic estate planning documents with the State Court Administrator will preserve the attorney/client privilege and confidentiality of the documents and, as the statute provides, the deposit of the documents does not waive the privilege or confidentiality. Similarly, professional fiduciaries and financial institutions will have no liability after the deposit of electronic estate planning documents with the State Court Administrator. The State Court Administrator may rely on the information

provided and declarations made by the Custodian in the Filing Statement and has no duty to make any further inquiry.

The State Court Administrator will then create an index of Creators names and aliases that is a searchable database for all electronic estate planning documents filed with the State Court Administrator. The name and each alias of each Creator will be added to the index last name first as listed in each Filing Statement. The State Court Administrator will provide the Custodian with a date stamped copy of the Filing Statement acknowledging receipt of the Filing Statement and electronic estate planning documents. The State Court Administrator will certify that each electronic estate planning document was deposited with that office establishing a chain of custody. Each certified electronic document shall be deemed to be an original estate planning document under Colorado law.

After complying with the above referenced protocol and receipt of the date stamped copy of the Filing Statement, the Custodian may then destroy the original estate planning document. With regard to Wills and Codicils, an electronic copy of the original document certified by the State Court Administrator must be submitted for formal probate.

The index of Creator names, including aliases, is searchable. A computer folder and its contents, including the Creator's profile, the Filing Statement and electronic estate planning documents, are not a public record and are not subject to any federal or state open records act or any specific information under federal, state or local law.

If the State Court Administrator receives a request from the Creator, his agent or authorized individual for a copy of an electronic document on a form provided by the State Court Administrator, upon presentation of proper identification and production of a copy of the executed estate planning document, the State Court Administrator will release the document.

If, however, the Creator is determined to be deceased, the State Court Administrator shall produce the electronic estate planning documents to the authorized recipient upon: (1) presentation of a death certificate or court order; (2) proof that the authorized recipient is appointed by a court as a fiduciary of the Creator's estate or a beneficiary of the Creator's estate, or named as a fiduciary or beneficiary under the requested document, and (3) presentation of proper identification.

The State Court Administrator is also required to honor court orders requiring the lodging of electronic estate planning documents with the particular court in the State of Colorado.



**CONFORMING AMENDMENTS TO ETHICAL RULES IMPLICATED BY THE**  
**COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING**  
**DOCUMENTS ACT**

**ETHICAL RULE 1.15A(d) (Property of Client)**

**New (d)**

(d) After complying with the requirements placed upon a lawyer who is a custodian under the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (Act), the lawyer may destroy a client's original estate planning document after preserving the original document as an electronic record under the definitions and procedures set forth in the Act, provided there are no pending or threatened proceedings involving the original document known to the lawyer and the lawyer has not agreed to the contrary.

**ETHICAL RULE 1.15A(e) (Property of Client)**

**New (e)**

(e) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which a lawyer renders legal services, in connection with a representation.

**C.R.C.P. 251.32(i) (Inventory Counsel)**

**New (i)**

(i) If counsel appointed pursuant to this Rule discovers an original estate planning document including, but not limited to, a will, trust, or power of attorney, after complying with the requirements placed upon a lawyer who is a custodian under the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (Act), counsel may destroy the original document after preserving the original document as an electronic record under the definitions and procedures set forth in the Act and Rule 1.15A(d).

**ETHICAL RULE 1.16A (File Retention)**

**New Comment [6]**

[6] A lawyer appointed as inventory counsel pursuant to C.R.C.P. 251.32(h) does not violate the lawyer's continuing obligation to maintain confidentiality of information related to representation under Rules 1.6 and 1.9 by preserving a client's original estate planning document as an electronic record under the definitions and procedures set forth in the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act and Rule 1.15A(d).

## **OTHER ETHICAL RULES AND STATUTES AFFECTED BY RULE 1.15A(d)**

### **ETHICAL RULE 1.16A. CLIENT FILE RETENTION**

#### **Comment [1]**

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.15A and 1.16(d). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

#### **RULE 251.32(h)**

(h) **Protective Appointment of Counsel.** When an attorney has been transferred to disability inactive status; or when an attorney has disappeared; or when an attorney has died; or when an attorney has been suspended or disbarred and there is evidence that the attorney has not complied with the provisions of C.R.C.P. 251.28, and no partner, executor, or other responsible party capable of conducting the attorney's affairs is known to exist, the chief judge of any judicial district in which the attorney maintained his office, upon the request of the Regulation Counsel, shall appoint legal counsel to inventory the files of the lawyer in question and to take any steps necessary to protect the interests of the attorney in question and the attorney's clients. Counsel appointed pursuant to this Rule shall not disclose any information contained in the files so inventoried without the consent of the client to whom such files relate, except as necessary to carry out the order of the court that appointed the counsel to make such inventory.

### **INVENTORY COUNSEL TRAINING MANUAL**

8. However, if the client file contains original documentation (i.e. original signed documents such as wills, promissory notes, powers of attorney, deeds, checks, or any digital information including CDs, tapes, or video cassettes), these should be returned to clients even if created more than three years prior to the date of the event that triggered appointment of Inventory Counsel.

26. **Original Wills:** Inventory Counsel should deposit original wills with the Probate Court in the county in which the decedent resided or was domiciled at death for lodging in the records of that court. C.R.S. § 15-11-516.

**KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC**  
MEMORANDUM

**TO:** Council of the CBA Trust and Estate Section

**FROM:** Chad Rounds

**RE:** Summary of 11/19/19 CBA Real Estate Section Council Meeting

**DATE:** 11/22/19

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I attended the CBA Real Estate Section Council ("RESC") meeting on 11/19/19. The following is my report on matters discussed which CBA Trust and Estate Section Council ("TESC") might find of interest:

**#1) CBA Staff News:**

CBA's Amy Larson announced to the RESC that Andrew White will be the new CBA Director of Legislative Relations. He will start the job in December. Also, the current CBA Executive Director will be stepping down effective January 2, 2020 and Amy Larson will become the temporary replacement while a new search is commenced.

**#2) Appointment of Access to Justice Liaison:**

At the encouragement of the CBA to help implement its access to justice initiative, the RESC has approved the appointment of an access to justice liaison to represent the Real Estate Section.

**#3) Uniform Partition of Heirs Property Act Update:**

Chuck Calvin, the RESC's LPC representative, provided his thoughts on the ULC's Partition of Heirs Property Act. This act provides procedural safeguards to those heirs of real estate held in tenancy in common which become subject to a partition and sale action. The Colorado Commission on Uniform State Laws is considering pushing this bill forward during the upcoming legislative session and will discuss its plans at its next meeting on December 9<sup>th</sup>. The ULC approved this act back in 2010. Over a dozen states have adopted it in some form and there have been high profile news articles about the abuse which such law is designed to combat. It is my understanding that the Trust and Estate Section has decided not to get directly involved in weighing in on this matter, but will defer to the Real Estate Section.

Two major concerns were raised at the RESC meeting regarding the adoption of this uniform law. First, there is a question of how it would overlay and fit into the existing partition law and procedures in Colorado. Will it cause ambiguity and confusion?

Second, some questioned the pervasiveness of this type of abuse in Colorado and wondered if it was merely an exercise in over legislating here in Colorado.

**#4) Trust and Estate Deeds Subcommittee Update:**

The Deeds Subcommittee has shared its drafts of trust and estate related real estate forms with three premier Colorado real estate attorneys: Peter Griffiths of Land Title, Chuck Calvin, and Greg Notarianni. They have provided invaluable input and comments which the Deeds Subcommittee is incorporating into the drafts.

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the December 4, 2019, Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: *Wednesday, December 4, 2019, 3:00 p.m.\**  
Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the November 6, 2019, meeting of the Council
2. Financial spreadsheets as of November 30, 2019
3. Memorandum from Real Estate Section meeting on November 19, 2019.
4. Proposed amendments to Colorado Rules of Professional Conduct for implementation of the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act.

**Trust and Estate Section Council Agenda  
December 4, 2019**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the November 6, 2019, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
3. Secretary/Treasurer's report (Tim Bounds)
4. Tax Section Liaison (Georgine M. Kryda)
5. Elder Law Section Liaison (Patrick Thiessen)
6. Real Estate Section Liaison (Chad Rounds)
7. Family Law Section Liaison (Kim Willoughby)
8. Statutory Revisions Committee (Molly Zwerdlinger)
9. Legislative Liaison (Darla Daniel)
10. Council Notes (Kristin Dittus)
11. CLE/Estate Planning Retreat (Spencer Crona)
12. Orange Book Forms Committee (Heidi Gassman)
13. Rules and Forms Committee (Gordon Williams)
14. Civic and Community Affairs Joint Committee of the Elder Law Section (Sandra Sigler)
15. Diversity & Inclusivity Committee (Melissa Schwartz)
16. Probate Trial and Procedures Committee (Kathy Seidel & Norv Brasch)
17. Colorado Estate Planning Handbook (David Johns)
18. Green Book (David Johns)
19. New T&E Lawyers Committee (Jessica Johnson)

20. The Colorado Lawyer (Emily Bowman)
21. Communications Representative (Mark Masters)
22. Communications Representative/Ambassador Program (Lindsey Andrew)
23. Board of Governors Representative (Jonathan Haskell)
24. Miscellaneous/FYI
25. Adjournment

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the February 5, 2020 Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, February 5, 2020, 3:00 p.m.\****  
Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the December 4, 2019, meeting of the Council
2. Financial spreadsheets as of February 1, 2020
3. Memorandum from Real Estate Section meeting on January 21, 2020.
4. Proposed amendments to Colorado Rules of Probate Procedure Rule 40.



**Trust and Estate Section Council Agenda**  
**February 5, 2020**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the December 4, 2019, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
3. CBA Representative will address the Council on the 2020 EP retreat donation.
4. Secretary/Treasurer's report (Tim Bounds)
5. Tax Section Liaison (Georgine M. Kryda)
6. Elder Law Section Liaison (Patrick Thiessen)
7. Real Estate Section Liaison (Chad Rounds)
8. Family Law Section Liaison (Kim Willoughby)
9. Statutory Revisions Committee (Molly Zwerdinger)
10. Legislative Liaison (Darla Daniel)
11. Council Notes (Kristin Dittus)
12. CLE/Estate Planning Retreat (Spencer Crona)
13. Orange Book Forms Committee (Heidi Gassman)
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21. The Colorado Lawyer (Emily Bowman)
22. Communications Representative (Mark Masters)
23. Communications Representative/Ambassador Program (Lindsey Andrew)
24. Board of Governors Representative (Jonathan Haskell)
25. Miscellaneous/FYI
26. Adjournment

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of December 4, 2019, Meeting**

Council met on Wednesday, December 4, 2019, at the Colorado Bar Association offices, 1290 Broadway, Suite 1700, Denver, Colorado. The meeting was called to order at approximately 3:00 p.m. by Josie Faix, Chair.

The following members of Council were present or participated by phone and constituted a quorum:

Josie Faix, Chair  
Spencer Crona, Vice Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Elizabeth Meck (2<sup>nd</sup> year member)  
Lauren Da Cunha (2<sup>nd</sup> year member)  
Louisa Ritsick (1<sup>st</sup> year member)\*  
Kristin Dittus (1<sup>st</sup> year member)

Also in attendance were:

Katie Roberts (CBA Staff)  
Steve Brainerd (Legislative liaison)  
Chad Rounds (Real Estate Section liaison)  
Kayla Nelson (Co-Chair, Civic & Community Affairs Committee)  
Sandra Sigler (Co-Chair, Civic & Community Affairs Committee)  
David Kirch (the *Colorado Lawyer*)  
Molly Zwerdinger (Chair, Statutory Revisions Committee)  
Patrick Theissen (Elder Law Section liaison)\*  
Herb Tucker  
Joseph Hodges

\*denotes attendance via telephone

**1. Approval of Minutes of Prior Meeting**

The Minutes of the November 6, 2019, Council meeting were approved unanimously.

**2. Chair's Report (Josie Faix)**

Joseph Hodges participated by phone for a discussion about the future of the T&E Listserv archives. Mr. Hodges recommended a proposal which would maintain the current T&E Listserv archives, and any conversations on Community would become part of the T&E Listserv archives. The cost to maintain the T&E archives is \$300/year, plus a fee of \$2.50 for every 1,000 e-mails sent or bounced back. **A motion was made and seconded to fund the T&E archives through 2020 and to survey T&E section members on their use of the archives. The motion passed with no opposition.**

**3. Secretary/Treasurer Report (Tim Bounds)**

Tim reviewed financial statements through November and year-to-date for the Section. Council discussed the grant from the CBA for the 2020 Estate Planning retreat.

**4. Tax Section Liaison (Georgine M. Kryda)**

There was no report from the Tax Section.

**5. Elder Law Section Liaison (Patrick Thiessen)**

The Colorado Department of Health Care Policy and Financing withdrew proposed regulations regarding eligibility for the "pooled trust" for individuals over the age of sixty-five.

**6. Real Estate Section Liaison (Chad Rounds)**

The executive council of the Real Estate Section met on November 19, 2019 and approved the appointment of "access to justice" liaison. The Section also addressed the *Uniform Partition of Heirs Act*. The Deeds subcommittee of the T&E Section has provided drafts to real estate lawyers for comments, and has asked for an expedited review so that comments may be reviewed and discussed by T&E.

**7. Family Law Section Liaison (Kim Willoughby)**

The Section met on November 5, 2019 and discussed the *Uniform Parentage Act*. The Section voted not to support the Act in its current form. The Section is also considering revisions to the Uniform Law Commissions Acts on assisted reproductive technology and surrogacy.

**8. Statutory Revisions Committee (Molly Zwerdinger)**

Andy White was introduced as the new director of legislative relations for the CBA. Andy and Amy Screen, the acting Executive Director of the CBA, summarized upcoming items for the 2020 legislative session. Molly also reported that conforming amendments to ethical rules to allow implementation of *Colorado Electronic Preservation of Abandoned Estate Planning Documents Act* were approved by SRC. **A motion to approve the proposed amendments was made, seconded, and passed without opposition.**

**9. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)**

Darla will be speaking with the Uniform Law Commission on December 9, 2019 regarding the *Colorado Uniform Trust Code* part 5, the *Uniform Fiduciary Income and Principal Act* parts 1-5, and the proposed changes to the *Uniform Probate Code*. Proposed statutory provisions for the *Colorado Uniform Trust Code* part 5 and *Uniform Fiduciary Income and Principal Act* will be submitted to the CO legislature in the 2021 session. Darla reports that any proposed changes to the *Uniform Probate Code* will likely not be ready to submit until at least 2021.

**10. Legislative Update**

The Legislature is not currently in session.

**11. Council Notes (Josie Faix/Kristin Dittus)**

The December issue of *Council Notes* will feature an article on practice wellness. There will also be information in the December issue about the *Senior Law Handbook*.

**12. Continuing Legal Education & Estate Planning Retreat (Spencer Crona)**

The agenda for the 2020 Estate Planning Retreat is almost final. The agenda will include a panel discussion on alternative dispute resolution and ADR provisions for estate planning documents. There will also be sessions on estate planning & estate litigation for incapacity; closely-held assets in trust; dealing with old “family trusts” in an era of increased exemptions for gift and estate taxes; practical issues in trust & estate practice; and, estate planning for retirement assets. The plenary session of the retreat will feature a speaker from BNY Mellon.

The agenda for the “Lunch & Learn” sessions are filled for next several months. There will be a CLE program on estate planning basics in January, and a CLE program on protected proceedings & decedent’s estates in February.

**13. Orange Book Forms Committee (Heidi Gassman)**

The Committee has completed their review of the Retirement Assets Subcommittee and is now reviewing the work of the Engagement Letters Subcommittee.

**14. Rules & Forms Committee (Gordon Williams)**

The Committee is reviewing the Statement of Authority form. The committee will attempt to meet by phone in January 2020 to review the Petition for Appointment of Conservator form.

**15. Civic & Community Affairs (Sandra Sigler)**

Please contact Sandra or Kayla Nelson if you are interested in placing an advertisement in the *Senior Law Handbook*. Kayla Nelson presented the brochure on joint tenancy to Council. **A motion to approve the joint tenancy brochure was made, seconded, and passed without opposition.**

**16. Diversity & Inclusivity Committee (Melissa Schwartz)**

Melissa is working with CBA/DBA Diversity & Inclusivity Steering Committee on implementation of the Diversity and Inclusivity Action Plan. There will be a Diversity and Inclusivity Summit in either January or February 2020.

**17. Probate Trial & Procedures Committee (Kathy Seidel):**

The Committee approved the proposed changes to Rule 40 of the *Colorado Rules of Probate Procedure*.

**18. Colorado Estate Planning Handbook (David Johns)**

Chapters for the upcoming edition of the *Estate Planning Handbook* have been submitted and David is working on finalizing.

**19. Green Book (David Johns)**

Josie Faix will be the incoming chair of the Green Book Committee.

**20. New T&E Lawyers Committee (Jessica Johnson)**

The Committee will be hosting a happy hour at Fire Restaurant in the Art Hotel immediately following the Council meeting.

**21. The Colorado Lawyer (Emily Bowman & David Kirch)**

An article by Jennifer Spitz on the life cycle of a revocable trust will be featured in the February edition. An article by Carol Warnick on non-judicial settlement agreements under Colorado Uniform Trust Code will be featured in the March edition. Rebecca Schroer and Morgan Weiner are working on an article discussing closely-held assets in trusts.

**22. Communications Representative (Mark Masters)**

There was no report.

**23. Ambassador Coordinator (Lindsey Andrew)**

There was no report.

**24. Board of Governors Representative (Jonathan Haskell)**

The Board of Governors meets on Friday, December 6, 2019. Jonathan will give an update to Council at the February meeting.

**25. Other Business**

There was no new business.

**ADJOURNMENT**

The meeting was adjourned at 4:50 p.m. The next Council meeting will be held on February 5, 2019. **Council will not meet in January 2020 due to First Wednesday falling on New Year's Day.**

Respectfully submitted

/s/ Timothy Bounds, Secretary

**KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC**  
MEMORANDUM

**TO:** Council of the CBA Trust and Estate Section

**FROM:** Chad Rounds

**RE:** Summary of 01/21/20 CBA Real Estate Section Council Meeting

**DATE:** 01/22/20

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I attended the CBA Real Estate Section Council ("RESC") meeting on 01/21/20. The following is my report on matters discussed which CBA Trust and Estate Section Council ("TESC") might find of interest:

**#1) Proposed Changes to CRPC for the CO Electronic Preservation of Abandoned Estate Planning Docs Act:**

I updated the RESC on the Trust and Estate Section's efforts to revise the CRPC to comply with the CO Electronic Preservation of Abandoned Estate Planning Docs Act. I explained how an attorney currently could be in violation of CRPC 15.A if the attorney utilized the act as it involves the destruction of client property. I reminded the RESC that the planned effective date of this program is 1/01/21.

**#2) Update to CRS 38-35-101 - Acknowledgments:**

CRS 38-35-101 on acknowledgments needs to be tweaked to conform to the notary law passed a few years ago. The RESC is hoping to work with Andy White to try to attach the needed revisions to another bill this legislative session. However, expectations are low for this to happen this year. This is of particular interest to the Trust and Estate Section as the beneficiary deed statute cites this acknowledgement statute.

**#3) Uniform Partition of Heirs Property Act Update:**

It was announced that Jean Arnold, current Vice President of the RESC, helped to convince the Colorado Commission on Uniform State Laws not to pursue enactment of this uniform law this legislative session. A RESC task force will look into the pervasiveness of this problem in Colorado, especially in rural communities. More analysis on how well this act could be integrated into existing Colorado law on partition actions also needs to be done first.



#### **#4) Access to Justice Liaison:**

The Real Estate Section is the only section so far to appoint officially an Access to Justice Liaison. It was commended for doing so. The emphasis will be to promote pro bono or low cost work in the area of evictions.

#### **#5) Section Membership Fees:**

The RESC decided not to raise the section's membership fees for the upcoming year, but instead to keep them at \$30. While there is some concern that the increase in the share of the fee paid to the CBA for administrative purposes will reduce the section's reserve, the RESC felt they could afford to defer for now any membership fee increase because of the current healthy reserve amount being carried forward each year.

### Rule 33. Bond and Surety

A fiduciary must file any required bond, or complete other arrangements for security before letters are issued. If there is a substantial deviation in the value of assets under protection or administration the fiduciary must petition the court for a review of the bond.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

### Rule 34. Reserved

### Rule 35. Reserved

### Rule 36. Reserved

### Rule 37. Reserved

### Rule 38. Reserved

### Rule 39. Reserved

## PART 5. CONTESTED PROCEEDINGS

### Rule 40. Discovery

(a) This rule establishes the provisions and structure for discovery in all proceedings seeking relief under Title 15, C.R.S. Nothing in this rule will alter the court's authority and ability to direct proportional limitations on discovery or to impose a case management structure or enter other discovery orders. Upon appropriate motion or sua sponte, the court may apply the Colorado Rules of Civil Procedure in whole or in part, may fashion discovery rules applicable to specific proceedings, and may apply different discovery rules to different parts of the proceeding.

(b) Unless otherwise ordered by the court, the parties may engage in the discovery provided by C.R.C.P. 27 through 36. Any discovery conducted in Title 15 proceedings prior to the issuance of a case management or other discovery order will be subject to C.R.C.P. 26(a)(2)(A), 26(a)(2)(B), 26(a)(4) and (5), and 26(b) through (g). However, due to the unique, expedited and often exigent circumstances in

which probate proceedings take place, C.R.C.P. 16, 16.1, 16.2, and 26(a)(1) do not apply to probate proceedings unless ordered by the court or stipulated to by the parties.

(c) C.R.C.P. 37, 45, and 121 § 1-12 are applicable to proceedings under Title 15.

(d) Notwithstanding subsections (a) through (c) of this rule, subpoenas and discovery directed to a respondent in proceedings under Title 15, Article 14, Part 3, must not be permitted without leave of court, or until a petition for appointment of a guardian has been granted under § 15-14-311, C.R.S.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

### Rule 41. Jury Trial – Demand and Waiver

If a jury trial is permitted by law, any jury demand must be filed with the court, and the requisite fee paid, before the matter is first set for trial. The demanding party must pay the requisite jury fee upon the filing of the demand. Failure of a party to file and serve a demand for jury trial and pay the requisite fee as provided in this rule will constitute a waiver of trial by jury as provided in C.R.C.P. 38(e).

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

### Rule 42. Objections to Accounting, Final Settlement, Distribution or Discharge

(a) If any interested person desires to object to any accounting, the final settlement or distribution of an estate, the discharge of a fiduciary, or any other matter, the interested person must file specific written objections at or before the hearing thereon, and shall serve all interested persons with copies of the objections.

(b) If the matter is uncontested and set for a hearing without appearance, any interested person wishing to object must file specific written objections with the court at or before the hearing, and must serve all interested persons with copies of the specific written objections. An objector must set an appearance hearing in accordance with Rule 24.

## C.R.P.P. 40:

### **Rule 40. Discovery and Disclosures.**

- (a) This rule establishes the provisions and structure for discovery and disclosures in all proceedings seeking relief under Title 15, C.R.S. Nothing in this rule will alter the court's authority and ability to direct proportional limitations on discovery or to impose a case management structure or enter other discovery orders. Upon appropriate motion or sua sponte, the court may apply the Colorado Rules of Civil Procedure in whole or in part, may fashion discovery and disclosure rules applicable to specific proceedings, and may apply different discovery and disclosure rules to different parts of the proceeding.
- (b) Unless otherwise ordered by the court or stipulated by the parties, the expert disclosure provisions of C.R.C.P. 26(a)(2)(A) and 26(a)(2)(B) apply to proceedings seeking relief under Title 15, C.R.S. The timing of expert disclosures shall be established by order of the court or stipulation of the parties. The disclosure requirements of C.R.C.P. 26(a)(1) do not apply to probate proceedings unless ordered by the court or stipulated by the parties.
- (c) Unless otherwise ordered by the court, the parties may engage in the discovery provided by C.R.C.P. 27 through 36. Any discovery conducted in Title 15 proceedings prior to the issuance of a case management or other discovery order will be subject to 26(a)(4) and (5), and 26(b) through (g). However, due to the unique, expedited and often exigent circumstances in which probate proceedings take place, C.R.C.P. 16, 16.1, and 16.2 do not apply to probate proceedings unless ordered by the court or stipulated to by the parties.
- (d) C.R.C.P. 37, 45, and 121 § 1-12 are applicable to proceedings under Title 15.
- (e) Notwithstanding subsections (a) through (c) of this rule, subpoenas and discovery propounded ~~directed~~ to a respondent in proceedings under Title 15, Article 14, Part 3, are prohibited without leave of court, or until a petition for appointment of a guardian has been granted under § 15-14-311, C.R.S. The limits in this subsection do not apply to subpoenas or discovery propounded to a respondent's agent under medical or financial powers of attorney.
- (f) Notwithstanding subsections (a) through (d) of this rule, subpoenas and discovery propounded ~~directed~~ to a respondent in proceedings under Title 15, Article 14, Part 4, are prohibited without leave of court, or until a petition for appointment of a conservator has been granted under § 15-14-409, C.R.S. The limits in this subsection do not apply to subpoenas or discovery propounded to a respondent's agent under medical or financial powers of attorney.

## Colorado Bar Association Ethics Committee

### Practice Area Ethics Advisory – Trusts & Estates

#### *Introduction*

As the reporters for The American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct (MRPC), 5<sup>th</sup> Ed. (2016) (ACTEC Commentaries) recognize, the “duties of trusts and estates lawyers are defined in many states by opinions rendered in malpractice actions, which provide incomplete and insufficient guidance regarding the ethical duties of lawyers.” (ACTEC Commentaries, Reporter’s Note, First Ed., p. 1). Federal Judge Stanley Sporkin has noted that, “The existing ethics codes merely espouse certain general principles that apply to all lawyers, such as you don’t co-mingle a client’s funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties.” *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 Geo. J. Legal Ethics 149 (1993), quoted in ACTEC Commentaries, Reporter’s Note, Second Ed., p.4.

As a separate set of rules of professional conduct for practitioners in the trust & estates area has not emerged thus far and is unlikely to do so in the foreseeable future, this Practice Area Ethics Advisory provides guidance on a number of ethical issues that may be encountered by lawyers practicing in the areas of trusts and estates. The eight advisories in Section I (each an Advisory) were written by members of the Ethics Committee of the Colorado Bar Association (Committee). Section II contains numbered summaries of opinions (Op. Summary) in this practice area issued by the ethics bodies of other states or the American Bar Association (ABA). As these are summaries only, readers are urged to read the full opinions related to summaries of interest. The full opinions are available as a resource to Colorado Bar Association (CBA) members through the Ethics button under the For Members tab on the CBA website at [www.cobar.org](http://www.cobar.org).

32           The Committee encourages you to refer to the ACTEC Commentaries in reviewing  
33 ethical questions specifically related to trust and estates practice. The ACTEC  
34 Commentaries are available for download without charge at  
35 <https://www.actec.org/publications/commentaries/> . However, the Committee does not  
36 necessarily endorse all of positions taken in the ACTEC Commentaries.

37  
38           The Committee has issued formal ethics opinions relevant to the trusts, estates and  
39 elder law practice, including the following:

40  
41           CBA Formal Op. 135 “Ethical Considerations in the Joint Representation of Clients  
42 in the Same Matter or Proceeding” (2018)

43  
44           CBA Formal Op. 132 “Duties of Confidentiality of Will Drafter Upon Death of  
45 Testator” (2017) [reproduced in Advisory 2]

46  
47           CBA Formal Op. 131 “Representing Clients With Diminished Capacity Where the  
48 Subject of the Representation is the Client’s Diminished Capacity” (2017)

49  
50           CBA Formal Op. 129 “Ethical Duties of Lawyer Paid by One Other than the Client”  
51 (2017)

52  
53           CBA Formal Op. 113 “Ethical Duty of Attorney to Disclose Errors to Client” (2005,  
54 Rev. 2008)

55  
56           CBA Formal Op. 87 “Collaboration with Non-lawyers in Preparation and Marketing  
57 of Estate Planning Documents” (1990, Rev. 1991, Addendum 1995)

58  
59           Inclusion of summaries of ethics opinions from other states or the ABA does not  
60 imply that the Committee has adopted or approved the positions or reasoning in those  
61 opinions. This Practice Area Ethics Advisory should be used only as an ethics guide and  
62 should not be viewed as the formal opinion of the Committee on the matters treated.

63  
64 The Committee encourages lawyers seeking further guidance on a particular ethical  
65 issue with which they are faced, involving their own conduct, to call the CBA Ethics Hotline  
66 at 303.860.1115 to obtain the name and phone number of a member of the Committee  
67 who has volunteered to provide informal ethics advice to Colorado lawyers.

68

## 69 I. Committee Advisories

70

71 In these Advisories, Rule refers to the Colorado Rules of Professional Conduct.

72

73 1. Whom Are You Representing, the Estate or the Personal Representative; the Trust  
74 or the Trustee? [p. 4.]

75

76 2. When Your Client is the Fiduciary of an Estate or Trust: Attorney-Client Privilege  
77 Compared to Duty of Confidentiality Under Rule 1.6 and Duty of Disclosure to the  
78 Tribunal Under Rule 3.3. [p. 6.]

79

80 3. Representing Co-Personal Representatives or Co-Trustees. [p. 18.]

81

82 4. Representing a Fiduciary Who also is a Beneficiary. [p. 22.]

83

84 5. Engagement Letter Considerations in Representing a Fiduciary. [p. 28.]

85

86 6. Lawyer's Duties if the Fiduciary Client Fails to Properly Perform Fiduciary Duties. [p.  
87 31.]

88

89 7. Responsibilities of a Lawyer for a Fiduciary Client to an Unrepresented Beneficiary.  
90 [p. 36.]

91

92 8. Representing Spouses with His and Hers Children in Estate Planning: What Do You  
93 Do When the Agreement on Distribution Falls Apart? [p. 39.]

94

95 **Advisory 1. Whom Are You Representing, the Estate or the Personal**  
96 **Representative; the Trust or the Trustee?**

97

98 One of the quickest ways to find yourself in ethical troubles as a lawyer practicing  
99 probate, trust and estates, and elder law, is to fail to identify who is your client from the  
100 very outset of the representation. Often this occurs because multiple persons come to you  
101 at the same time to request legal representation. But equally problematic is whether you  
102 are representing an individual or the entity (or presumed entity) for which that individual is  
103 a fiduciary. It can be further complicated if the fiduciary is also a beneficiary of the estate  
104 or trust for which the individual is acting in a fiduciary capacity (see Advisory 4,  
105 “Representing a Fiduciary Who also is a Beneficiary”, p. 22). Failure to identify from the  
106 beginning of the representation whom you represent can quickly result in inadvertent  
107 ethical problems.

108

109 It is not unusual for a lawyer to state, verbally or in writing, “I represent the estate of  
110 John Doe.” But is that really the case? Surprisingly, nowhere in the Rules is the term  
111 “client” defined to help us identify who is the client. In addition, the laws and ethics rulings  
112 concerning the lawyer’s duty to the client vary widely from state to state, often leaving the  
113 lawyer in a quandary. The majority view in the United States is that in a trust or estate  
114 setting the lawyer-client relationship is between the lawyer and the fiduciary in the  
115 fiduciary’s representative capacity and not between the lawyer and the estate or the  
116 beneficiaries. (ACTEC Commentaries, Reporter’s Note, First Ed. *Lawyer for Fiduciary*, p.  
117 2). In Colorado, an estate is not considered to be a legal entity. “The ‘estate of Alta Blue’ is  
118 the property she owned at death; it is not a legal entity, though in common speech it  
119 seems such, and no judgment can be rendered for or against it. The statutes, in referring  
120 to claims ‘against the estate’ (C. L. 1921, §§ 5330-5343), mean merely ‘payable out of the  
121 estate.’” *Heushel v. Wagner*, 73 Colo. 327, 215 P. 476, 477 (1923). The Colorado Probate  
122 Code defines the estate as “the property of the decedent.” C.R.S. § 15-10-201(17). Thus,  
123 in Colorado, the probate lawyer is properly viewed as representing the personal  
124 representative of the estate, who has the responsibility to settle and distribute the estate in

125 accordance with the terms of an effective will and the Probate Code. C.R.S. § 15-12-  
126 703(1).<sup>1</sup> The lawyer’s duty is to advise the fiduciary on meanings and legal interpretation  
127 of the estate or trust documents, not to “stand in the shoes” of the estate. The purpose of  
128 the representation is to “assist the client (the fiduciary) in properly administering the  
129 fiduciary estate for the benefit of the beneficiaries.” (ACTEC Commentaries on MRPC 1.2:  
130 Scope of Representation and Allocation of Authority Between Client and Lawyer,  
131 subheading “*Representation of Client in Fiduciary, Not Individual, Capacity*, p. 39)  
132

133 Because the lawyer is representing the fiduciary in the role of fiduciary, this can be  
134 complicated if there is more than one fiduciary, such as co-personal representatives or co-  
135 trustees. If the lawyer is representing all the co-fiduciaries, the lawyer should seek a joint  
136 representation agreement and have the co-fiduciaries acknowledge in writing how conflicts  
137 of interest and confidentiality are to be handled as between the co-fiduciaries. (ACTEC  
138 Commentaries on MRCP 1.2, subheading *Multiple Fiduciaries*, p. 36; ACTEC  
139 Commentaries on MRCP 1.7: Conflict of Interest: Current Clients, p. 101; *See also* CBA  
140 Formal Op. 135 “Ethical Considerations in the Joint Representation of Clients in the Same  
141 Matter or Proceeding” (2018) and Advisory 3, “Representing Co-Personal Representatives  
142 or Co-Trustees”, p. 18). Where the lawyer is representing only one of multiple co-  
143 fiduciaries, the lawyer maintains a normal lawyer-client relationship with that co-fiduciary  
144 but must ensure that any other co-fiduciary understands that the lawyer does not represent  
145 that other co-fiduciary and as such cannot provide legal advice to him or her. The same  
146 can be said for lawyer’s discussions with beneficiaries. The lawyer must make clear that  
147 the lawyer does not represent the beneficiary and cannot provide legal advice to the  
148 beneficiary. This presumes the beneficiary is unrepresented, which is often the case.  
149 (See Rule 4.3. Communications with Unrepresented Persons) If the beneficiary is  
150 represented, the lawyer must comply with Rule 4.2. Communications with Persons  
151 Represented by Counsel.  
152

---

<sup>1</sup> The IRS requires the estate’s personal representative to obtain a taxpayer identification number for the estate before filing a tax return on behalf of the estate or before filing an estate tax return. However, that does not make the estate a legal entity under Colorado law.





184 (b) An attorney shall not be examined without the consent of his client as to any  
185 communication made by the client to him or his advice given thereon in the course  
186 of professional employment; nor shall an attorney's secretary, paralegal, legal  
187 assistant, stenographer, or clerk be examined without the consent of his employer  
188 concerning any fact, the knowledge of which he has acquired in such capacity.  
189

190 You should not confuse attorney-client privilege with confidentiality of your  
191 communications with clients. Compare the attorney-client privilege statutory language with  
192 Rule 1.6, Confidentiality of Information:  
193

194 Rule 1.6. Confidentiality of Information

195 (a) A lawyer shall not reveal information relating to the representation of a client  
196 unless the client gives informed consent, the disclosure is impliedly authorized in  
197 order to carry out the representation, or the disclosure is permitted by paragraph  
198

198 (b).

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

201 (1) to prevent reasonably certain death or substantial bodily harm;

202 (2) to reveal the client's intention to commit a crime and the information  
203 necessary to prevent the crime;

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

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

211 (5) to secure legal advice about the lawyer's compliance with these Rules,  
212 other law or a court order;

213 (6) to establish a claim or defense on behalf of the lawyer in a controversy  
214 between the lawyer and the client, to establish a defense to a criminal charge

215 or civil claim against the lawyer based upon conduct in which the client was  
216 involved, or to respond to allegations in any proceeding concerning the  
217 lawyer's representation of the client;  
218 (7) to detect and resolve conflicts of interest arising from the lawyer's change  
219 of employment or from changes in the composition or ownership of a firm,  
220 but only if the revealed information is not protected by the attorney-client  
221 privilege and its revelation is not reasonably likely to otherwise materially  
222 prejudice the client; or  
223 (8) to comply with other law or a court order.

224 (c) A lawyer shall make reasonable efforts to prevent the inadvertent or  
225 unauthorized disclosure of, or unauthorized access to, information relating to the  
226 representation of a client.

227  
228 Section IV of CBA Formal Op. 123, "Candor to the Tribunal and Remedial Measures  
229 in Civil Proceedings" (2011) provides a thorough discussion of the distinctions between  
230 confidentiality and the attorney-client privilege and is printed in its entirety in the following  
231 paragraphs.

232

#### 233 IV. Distinctions Between Confidentiality and the Attorney–Client Privilege

234

235 The ethical duty of confidentiality is set forth in Colo. RPC 1.6. The scope of  
236 the duty of confidentiality is extremely broad, encompassing "information relating to  
237 the representation of a client...." Colo. RPC 1.6(a). Included within this broad scope  
238 of confidentiality under Colo. RPC 1.6 is information that is subject to the attorney–  
239 client privilege. See Colo. RPC 1.6, cmt. [3]. The attorney–client privilege is a  
240 matter of the substantive law of evidence, not legal ethics. In Colorado, the  
241 attorney–client privilege is codified by statute.<sup>12</sup> Under federal law, the attorney–  
242 client privilege is governed by federal common law when the underlying dispute  
243 involves federal law and is governed by state law if jurisdiction is based on diversity  
244 of citizenship.<sup>13</sup>

245

246 Comment [3] to Colo. RPC 1.6 explains this distinction as follows:

247  
248 The principle of client–lawyer confidentiality is given effect by related bodies  
249 of law: the attorney–client privilege, the work-product doctrine and the rule of  
250 confidentiality established in professional ethics. The attorney–client  
251 privilege and work-product doctrine apply in judicial and other proceedings in  
252 which a lawyer may be called as a witness or otherwise required to produce  
253 evidence concerning a client. The rule of client–lawyer confidentiality applies  
254 in situations other than those where evidence is sought from the lawyer  
255 through compulsion of law. The confidentiality rule, for example, applies not  
256 only to matters communicated in confidence by the client but also to all  
257 information relating to the representation, whatever its source. A lawyer may  
258 not disclose such information except as authorized or required by the Rules  
259 of Professional Conduct or other law. *See also* Scope.

260  
261 The duty of disclosure under Colo. RPC 3.3 is, on its face, unqualified. In  
262 particular, Colo. RPC 3.3 does not by its own terms exclude from the lawyer’s duty  
263 of disclosure information that is or may be protected by the attorney–client privilege.  
264 Rather a lawyer’s disclosure to the tribunal under Colo. RPC 3.3 is a matter  
265 separate and apart from any determination about whether and how that information  
266 might be used as evidence in a proceeding. Comment [10] to Colo. RPC 3.3 states,  
267 in relevant part, that where the lawyer knows that evidence already offered or  
268 admitted is false and remonstrated with the client to correct the false evidence has  
269 failed,

270  
271 the advocate must take further remedial action. If withdrawal from the  
272 representation is not permitted or will not undo the effect of the false  
273 evidence, the advocate must make such disclosures to the tribunal as is [*sic*]  
274 reasonably necessary to remedy this situation even if doing so requires the  
275 lawyer to reveal information that otherwise would be protected by Rule 1.6. *It*  
276 *is for the tribunal to then determine what should be done*—making a

277 statement about the matter to the trier of fact, ordering a mistrial or perhaps  
278 nothing.

279  
280 Colo. RPC 3.3, cmt. [10] (emphasis added). Because information protected by  
281 Colo. RPC 1.6 includes privileged information, a lawyer's duty to disclose under  
282 Colo. RPC 3.3 includes the duty, in some cases, to disclose privileged information.  
283

284 The Colorado Supreme Court has not expressly addressed whether the duty  
285 of disclosure under Colo. RPC 3.3(a)(3) includes information that may be subject to  
286 the attorney–client privilege or whether that information is somehow exempt from  
287 disclosure. However, in *In re Petition for Disciplinary Action Against John E.*  
288 *Mack*,<sup>14</sup> the respondent lawyer was disciplined for violating Minnesota version of  
289 Colo. RPC 3.3 by failing to take reasonable remedial measures after the  
290 introduction of evidence he knew to be false. Mack defended the disciplinary  
291 charge on the ground that he could not make the disclosure contemplated under  
292 Minnesota Rule 3.3 because the information was privileged. The Minnesota  
293 Supreme Court rejected this defense without distinguishing between privileged and  
294 other information relating to the representation that is protected under Minnesota  
295 Rule 1.6.<sup>15</sup>  
296

297 The Colorado Supreme Court's decision in *People v. Casey*<sup>16</sup> supports the  
298 conclusion that the disclosure duty under Colo. RPC 3.3 extends to privileged  
299 information, even though *Casey* did not address this precise issue. In *Casey*, a  
300 disciplinary case, the Supreme Court addressed the interplay between a lawyer's  
301 duty to be truthful to the court and the lawyer's duty to competently represent the  
302 client. Casey represented a defendant in a criminal case who was an imposter; the  
303 actual defendant was another individual. Nevertheless, Casey appeared before the  
304 court and expressly and implicitly represented to the court that his client was the  
305 defendant when Casey knew that was not the case. According to the Court, Casey  
306 "portray[ed] his situation as involving a close question between the loyalty he owed

307 his client and his duty to the court.”<sup>17</sup> The Court emphatically rejected Casey’s  
308 argument:

309  
310 Colo. RPC 3.3 (b) clearly resolves the respondent’s claimed dilemma in that  
311 it provides that the duty to be truthful to the court applies even if to do so  
312 requires disclosure of [otherwise confidential information]. It is not “arguable”  
313 that the respondent’s duty to his client prevented him from fulfilling his duty to  
314 be truthful to the court.<sup>18</sup>

315  
316 While the Supreme Court did not specifically refer to the attorney–client  
317 privilege in *Casey*, the case is noteworthy in that, like *Mack*, it placed no limit on the  
318 type of confidential information that must be disclosed to discharge the attorney’s  
319 obligations under Colo. RPC 3.3. Similarly, in *In re Hill*,<sup>19</sup> a federal bankruptcy court  
320 stated:

321  
322 Firm attorneys who had knowledge, in light of privileged e-mails of which  
323 they were aware, of misleading nature of testimony of member of firm in  
324 proceedings in bankruptcy court had duty to take some remedial action, even  
325 though it could potentially require divulging attorney–client privileged  
326 material.<sup>20</sup>

327  
328 Outside of Colorado, several authorities have attempted to reconcile the duty  
329 of disclosure under other states’ version of Colo. RPC 3.3(a)(3) with the attorney–  
330 client privilege, by distinguishing between non-evidentiary disclosures on the one  
331 hand and evidentiary submissions on the other hand.

332  
333 This reconciliation finds support in a recent Ethics Opinion of the New York  
334 State Bar Association.<sup>21</sup> The New York Committee determined that while New  
335 York’s statutory attorney–client privilege limited the available remedial measures  
336 under New York’s version of Colo. RPC 3.3, that limitation applied only to the  
337 *introduction* of protected information *into evidence* and did not prohibit non-

338 evidentiary disclosures in compliance with New York Rule 3.3. Moreover, at least  
339 one commentator supports this approach:

340  
341           When an exception to confidentiality stated in the ethics rules does not align  
342 with an exception to the attorney–client privilege, the lawyer’s duty of  
343 disclosure is limited to extra-evidentiary form, namely sharing the information  
344 with the appropriate person or authority. In sum, the exception to  
345 confidentiality in Rule 3.3 does not permit introduction of attorney-client  
346 communications into evidence through lawyer testimony or permit inquiry  
347 about those communications as part of the presentation of evidence before  
348 any tribunal, absent a recognized exception to the privilege itself.<sup>22</sup>

349  
350           Two state appellate court decisions also support this approach; they address  
351 permissive disclosures under those states’ versions of Colo. RPC 1.6(b), rather than  
352 mandatory disclosures under their versions of Colo. RPC 3.3. In *Purcell v. District*  
353 *Attorney*,<sup>23</sup> Purcell’s client had received a court order requiring his eviction from his  
354 apartment, which was located in the same building where the client had recently  
355 been discharged as a maintenance man. The client made statements to Purcell  
356 that Purcell believed constituted threats of criminal activity by the client. Purcell  
357 deemed the threats to be serious and, acting in reliance on Massachusetts’s version  
358 of Colo. RPC 1.6(b), exercised his professional discretion to make disclosure to law  
359 enforcement authorities. Acting on that disclosure, constables (accompanied by the  
360 police) went to the apartment to evict the client, found incendiary devices, and  
361 arrested the client for attempted arson. At the client’s trial, the district attorney  
362 subpoenaed Purcell to testify against his former client regarding the statements  
363 made by the client to Purcell. The trial court rejected the client’s assertion of the  
364 attorney–client privilege and ordered Purcell to testify against his former client. The  
365 Massachusetts Supreme Judicial Court reversed, holding that “the fact that the  
366 disciplinary code permitted Purcell to make the disclosure tells us nothing about the  
367 admissibility of the information that Purcell disclosed....”<sup>24</sup>

368

369 A similar result was reached in *Kleinfeld v. State*<sup>25</sup> where the defendant in a  
370 murder case made inculpatory statements to his lawyer in connection with a  
371 separate civil case. At the murder trial, the statements were admitted over  
372 objection, and the client was convicted of murder. The Florida appellate court held  
373 that because the requirements of the attorney–client privilege had been met, it was  
374 error to admit the lawyer’s testimony. The court went on to note that the existence  
375 of an ethical rule that permits a lawyer to reveal a confidence under certain  
376 circumstances does not modify the evidence code, which governs the admissibility  
377 of evidence at trial.<sup>26</sup>

378  
379 For all of these reasons, the Committee concludes that, if reasonable  
380 remedial measures necessitate disclosure, Colo. RPC 3.3 requires a lawyer to  
381 make disclosure to the tribunal, even if such disclosure includes information that is  
382 or may be protected by the attorney-client privilege and even if the client does not  
383 consent to the disclosure. However, the Committee again emphasizes that  
384 disclosure of privileged information always must be limited to that information which  
385 is reasonably necessary to apprise the tribunal of the problem.<sup>27</sup> There are few, if  
386 any, circumstances in which the lawyer properly would be required or permitted to  
387 expressly disclose the source of the privileged information or any other details of the  
388 privileged communication. Once the required disclosure is made to the tribunal, the  
389 lawyer should take appropriate efforts to resist further efforts by the tribunal to  
390 compel additional disclosures. In addition, the lawyer has a continuing duty to  
391 object, in all testimonial or evidentiary contexts, to the introduction or disclosure of  
392 privileged information, including information previously disclosed pursuant to Colo.  
393 RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of  
394 privileged communications.<sup>28</sup> <sup>2</sup>

---

<sup>2</sup> Footnotes corresponding to quoted portion of CBA Formal Opinion 123:

12. CRS § 13-90-107(1)(b) (2010).

13. Fed. R. Evid. 501.

14. *In re Petition for Disciplinary Action Against John E. Mack*, 519 N.W.2d 900 (Minn. 1994).

15. *Id.* at 902.

16. *People v. Casey*, 948 P.2d 1014 (Colo. 1997).



395

396 A lawyer's duty of confidentiality continues after the death of a client. CBA Formal  
397 Op. 132, "Duties of Confidentiality of Will Drafter Upon Death of Testator" (2017),  
398 succinctly discusses a lawyer's ongoing obligations to a deceased client. That Formal  
399 Opinion is reproduced in its entirety in the following paragraphs.

400

401 A lawyer's duty of confidentiality continues after the death of a client. Cf.  
402 Colo. RPC 1.6(b) (listing exceptions to requirement of confidentiality, and "death of  
403 client" not listed); Colo. RPC 1.6, cmt. [20] (duty of confidentiality continues after the  
404 client-lawyer relationship has terminated); Colo. RPC 1.9(c)(2) (lawyer may not  
405 reveal information related to representation of former client); see also *Wesp v.*  
406 *Everson*, 33 P.3d 191, 200 (Colo. 2001) (attorney-client privilege continues after  
407 death of client).

408

409 Accordingly, a lawyer ordinarily should not disclose client information  
410 following a client's death. For example, if a family member is disappointed with the  
411 gift provided under a will and asks the drafting lawyer questions about the testator's  
412 intentions, the lawyer usually may not respond without violating Rule 1.6. See also  
413 American College of Trust and Estate Counsel, ACTEC Commentaries on the  
414 Model Rules of Professional Conduct, R. 1.6, at p. 80 (5th ed. 2016) ("ACTEC  
415 Commentaries") (lawyer's duty of confidentiality continues after death of client).

416

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17. *Id.* at 1016.

18. *Id.*

19. *In re Hill*, 437 B.R. 503 (Bankr.W.D.Pa. 2010).

20. *Id.* at 545.

21. N.Y. State Bar Ass'n Committee on Professional Ethics Op. 837 (March 16, 2010).

22. Sisk, "Rule 3.3 Candor Toward the Tribunal," 16 *Iowa Prac., Lawyer and Judicial Ethics* § 5.6(d)(4)(c) (2009 ed.).

23. *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997).

24. *Id.* Although *Purcell* involved the permissive disclosure of information under Massachusetts Rule 1.6, as opposed to the mandatory disclosure under Massachusetts Rule 3.3, the court's discussion of the differences between the Rules of Professional Conduct and the attorney-client privilege is instructive.

25. *Kleinfeld v. State*, 568 So.2d 937, 939-40 (Fla.App. 1990).

26. *Id.* at 939-40.

27. See Arizona Ethics Op. 05-05, *supra* note 9.

417           If the decedent had authorized the drafting lawyer to make such disclosures  
418           or if the deceased client's Personal Representative (who holds the rights to the  
419           client information) gives consent, then the lawyer may provide an interested party,  
420           including a potential litigant, with client information regarding a deceased client's  
421           dispositive instruments and intent. See *id.* This could include prior instruments and  
422           communications relevant to those instruments. *Id.* The disclosure should be no  
423           broader than necessary to carry out the decedent's wishes. *Id.*

424  
425           If neither the client nor the Personal Representative has authorized the  
426           disclosure, however, there is a split of authority as to whether the lawyer may  
427           disclose client information as a matter of ethics. Some authorities contend that  
428           such a disclosure would have been "impliedly authorized" by the testator's mere  
429           retention of counsel, under the rationale that the testator presumably wanted his or  
430           her wishes followed. *Id.* at 88-91 (collecting conflicting ethics opinions from around  
431           the country, including Iowa Op. 98-11 (1998), which concludes that questions  
432           related to the decedent's potential implied authorization turn on individual facts, and  
433           thus a lawyer should not make such disclosures without a court order). Other  
434           authorities reject this analysis. See ACTEC Commentaries at 88-91 (citing North  
435           Carolina 2002 Op. 7 (2003), which concludes that the lawyer may make such  
436           disclosures if consistent with the attorney-client privilege).

437  
438           There is no case authority in Colorado on this ethical point, as *Wesp*  
439           addresses only the privilege question, not the ethical issue. While some other  
440           states have held that the act of communicating with a drafting lawyer itself may  
441           constitute implied consent under Rule 1.6 to disclosure of client information (to  
442           enhance the chances of the testator's wishes being carried out), no Colorado  
443           decision so holds. The Colorado Bar Association Ethics Committee is of the  
444           opinion that simply retaining a lawyer to draft estate documents, without more, is not  
445           sufficient to constitute implied consent for the lawyer to voluntarily provide  
446           information protected by Rule 1.6.

447

448                   Therefore, the safer course of action is for the drafter not to provide such  
449 information voluntarily without the consent of either the testator or the Personal  
450 Representative. If a court orders the drafting lawyer to disclose information,  
451 however, then the lawyer may reveal the information without violating Rule 1.6. See  
452 Colo. RPC 1.6(b)(8) (lawyer excused from requirement of confidentiality to comply  
453 with court order).

454  
455                   In conclusion, a drafting lawyer may ethically provide client information  
456 relating to a deceased client's testamentary wishes as necessary to carry out those  
457 wishes where: (a) the decedent authorized such disclosure; (b) the Personal  
458 Representative authorizes such disclosure; or (c) a court orders such disclosure. If  
459 none of those circumstances are present (and no other exception in Rule 1.6  
460 applies), no Colorado authority would allow the drafting attorney to provide client  
461 information to third parties, including beneficiaries under the will and other  
462 documents.

463  
464                   The court in *Wesp*, supra, however, recognized a testamentary exception to the  
465 attorney-client privilege. "The testamentary exception permits an attorney to reveal certain  
466 types of communications in special circumstances. Specifically, the attorney who drafted  
467 the will of a deceased client may disclose attorney-client communications concerning the  
468 will and transactions leading to its execution in a suit between the testator's heirs,  
469 devisees, or other parties who claim by succession from the testator. McCormick, supra, §  
470 94; Wigmore, supra, § 2314; 81 Am.Jur.2d, Witnesses § 389 (2000). The rationale for this  
471 exception is that it furthers the client's testamentary intent. Swidler [& Berlin v. U.S.], 524  
472 U.S. at 405, 118 S.Ct. 2081 (citing *Glover v. Patten*, 165 U.S. 394, 407-408, 17 S.Ct. 411,  
473 41 L.Ed. 760 (1897)); Wigmore, supra, § 2314.

474  
475 "Colorado recognizes the testamentary exception. See *Denver Nat'l Bank v. McLagan*, 133  
476 Colo. 487, 491, 298 P.2d 386, 388 (1956); *In re Estate of Shapter*, 35 Colo. 578, 587, 85  
477 P. 688, 691 (1905). In *Shapter*, we rejected an argument that an attorney could not testify  
478 about client communications relating to the deceased client's will, stating that "after [the

479 client's] death, and when the will is presented for probate, we see no reason why ... the  
480 attorney should not be allowed to testify as to directions given to him by the testator so that  
481 it may appear whether the instrument presented for probate is or is not the will of the  
482 alleged testator." Shapter, 35 Colo. at 587, 85 P. at 691 (internal quotation omitted). In  
483 Denver National Bank, we stated that numerous decisions hold that the testamentary  
484 exception permits an attorney who writes a will to testify, after the testator's death, about  
485 attorney-client communications related to the execution and validity of the will. Denver  
486 Nat'l Bank, 133 Colo. at 491, 298 P.2d at 388."  
487 The court did not, however, address the application of Rule 1.6.  
488

489 In a case involving a lawyer's refusal to deliver to a deceased client's personal  
490 representative files related to the lawyer's representation of the decedent, the Colorado  
491 Court of Appeals in *In Re Estate of Rabin*, 2018 COA 183 (December 27, 2018) confirmed  
492 that, "A personal representative ... 'succeeds to the rights and obligations of the Estate's  
493 decedent, effectively 'stepping into the shoes' of the decedent. Colo. Nat'l Bank of Denver  
494 v. Friedman, 846 P.2d 159, 163 (Colo. 1993). In other words, the right to claim the  
495 attorney-client privilege passes to the personal representative, who becomes the holder of  
496 the privilege. Thus, disclosing the privileged communications to the holder of the privilege  
497 does not itself violate the privilege." The court also seemed to apply the same reasoning  
498 to the lawyer's duties of confidentiality under Rule 1.6 but did not specifically rule on the  
499 issue.

500  
501 In *In re Perini's Estate*, 526 P.2d 313 (Colo. App. 1974) the Colorado Court of  
502 Appeals held that a successor estate fiduciary is in privity with the fiduciary's predecessor.  
503 Thus, it would seem that the successor fiduciary has the authority to waive both attorney-  
504 client privilege and confidentiality regarding representation of the decedent and regarding  
505 representation of the initial fiduciary in the fiduciary's capacity as such.

506  
507 The reasoning in CBA Formal Op. 132 would seem to apply equally to a lawyer  
508 whose client was the deceased grantor of a revocable or irrevocable trust, that is, that Rule  
509 1.6 requires the lawyer to keep confidential information relating to the representation of the

510 deceased grantor in preparing the trust absent advance waiver from the grantor. While it is  
511 clear that a Personal Representative steps into the shoes of the deceased for purposes of  
512 being able to consent to disclosure of confidential information, it is not at all clear whether  
513 the trustee of a trust the grantor of which is deceased has the same authority. Until settled  
514 law appears on the subject, a prudent lawyer would be well advised to consider the matter  
515 carefully before disclosing confidential information related to representation of the  
516 deceased grantor relating to preparation of the trust.

517  
518         The Committee notes that the guidance in CBA Formal Op. 132 and this Advisory  
519 on the subject of Rule 1.6 confidentiality run contrary to the ACTEC Commentaries on  
520 MRPC 1.6: Confidentiality of Information, subheading *Obligation After Death of Client*,  
521 which states in part, “A lawyer may be impliedly authorized to make appropriate disclosure  
522 of client confidential information that would promote the client’s estate plan, forestall  
523 litigation, preserve assets, and further family understanding of the decedent’s intention.  
524 Disclosures should ordinarily be limited to information that the lawyer would be required to  
525 reveal as a witness.” Lawyers faced with this situation should be aware that the Colorado  
526 Supreme Court has not, either in case law or the Rules, specifically addressed this  
527 situation under Rule 1.6 and aware of the conflict between the guidance in CBA Formal  
528 Op. 132 and the ACTEC Commentaries on MRPC 1.6.

529

530

531 **Advisory 3. Representing Co-Personal Representatives or Co-Trustees.**

532

533         It is not at all unusual for a lawyer to be asked to represent co-fiduciaries in an  
534 estate or trust situation in which no litigation is involved. The ACTEC Commentaries  
535 points out that not only is multiple representation of co-fiduciaries common, “(i)n some  
536 instances the clients may actually be better served by such representation, which can  
537 result in more economical and better coordinated estates plans....” (ACTEC Commentaries  
538 on MRPC 1.7: Conflict of Interest: Current Clients, subheading *General Nonadversary*  
539 *Character of Estates and Trusts Practice; Representation of Multiple Clients*, p. 101)

540

541           The lawyer must at the outset, in considering whether to take the co-representation,  
542 obtain sufficient information to determine whether an actual conflict of interest between or  
543 among the potential fiduciary clients exists and whether the facts and circumstances  
544 indicate more than a theoretical potential conflict. Where there is litigation between the co-  
545 fiduciaries, the general admonition that a lawyer cannot represent adverse parties in  
546 litigation applies. But even where there is no litigation and the co-fiduciaries at least  
547 present themselves as being of one mind, the lawyer has duties that must be complied  
548 with beyond the general duties that any lawyer has to his or her client.

549  
550           The first question that arises in these types of situations is “whom do you  
551 represent?” See Advisory 1. “Whom are You Representing, the Estate or the Personal  
552 Representative, the Trust or the Trustee?”, p. 4. Comment [27] to Rule 1.7. Conflict of  
553 Interest: Current Client seems to indicate that an estate can be the client. However, under  
554 Colorado case law, the lawyer represents the co-fiduciaries in their capacity as co-  
555 fiduciaries, and not the estate. *Heushel v. Wagner*, 73 Colo. 327, 215 P. 476, 377 (1923).  
556 As such, you cannot take the position that you are acting on behalf of the estate in  
557 advising the co-fiduciaries. Rather, you are representing multiple clients in the form of  
558 each of the co-fiduciaries, in their capacity as co-fiduciaries. Your purpose is to “assist the  
559 client [the fiduciary] in properly administering the fiduciary estate for the benefit of the  
560 beneficiaries.” (ACTEC Commentaries on MRPC 1.2: Scope of Representation and  
561 Allocation of Authority Between Client and Lawyer, subheading *Representation of Client in*  
562 *Fiduciary, Not Individual, Capacity*, p. 39) This is the majority position in the United States  
563 on this subject.

564  
565           When entering into representation of multiple clients it is imperative that the lawyer  
566 explain the issues in joint representation of the fiduciaries. See CBA Formal Op. 135,  
567 “Ethical Considerations in the Joint Representation of Clients in the Same Matter or  
568 Proceeding,” for a detailed discussion of the ethical implications of such representation of  
569 co-fiduciaries. While CBA Formal Op. 135 is written from the perspective of joint  
570 representation in a litigated matter, the principles contained in the opinion apply to

571 uncontested matters such as the probate of an estate or the administration of a trust, as  
572 well.

573  
574 To undertake such joint representation the lawyer should explain in writing to the  
575 would-be clients the potential dangers of joint representation. While specifics of what  
576 issues the lawyer must explain to the clients will vary depending on the specifics of the  
577 matter, at a minimum it must include a discussion of the lack of confidentiality as between  
578 the co-fiduciaries, which requires the informed consent of the clients, and that if a conflict  
579 develops that cannot be resolved, the lawyer must withdraw from representation of each of  
580 the co-fiduciaries. (Comment [31] to Rule 1.7) See also ACTEC Commentaries on MRPC  
581 1.2, subheading *Multiple Fiduciaries*, p. 36. While co-fiduciary clients may be able to  
582 waive certain prospective conflicts that are clearly explained to them and to which they  
583 give informed consent in writing, a purported waiver to other prospective conflicts will not  
584 be valid, as discussed below.

585  
586 The interests of the co-fiduciaries do not have to completely align. (“...[I]f the actual  
587 or potential conflicts between competent, independent parties are not substantial, their  
588 common interests predominate, and it otherwise appears appropriate to do so, the lawyer  
589 and the parties may agree that the lawyer will represent them jointly...” ACTEC  
590 Commentaries at p. 104) However, the lawyer undertaking the joint representation must  
591 reasonably believe that any conflicts that exist between the co-fiduciaries are relatively  
592 minor and are capable of being resolved. (Restatement (3d) Law Governing Lawyers  
593 (Rest.), § 130, vol. 2, p. 359) If conflicts are discovered (that is, there is a significant risk  
594 that the representation of one client will be materially limited by the lawyer's responsibilities  
595 to the other client), the lawyer must determine whether the conflicts may be consented to  
596 by the clients and even if they are, whether it is prudent for the lawyer to proceed in the  
597 face of such conflicts. If the lawyer reasonably believes that she or he will be able to  
598 provide competent and diligent representation to each affected client and determines to  
599 proceed with the joint representation, Rule 1.7 requires that each affected client give  
600 informed consent, confirmed in writing (Rule 1.7(b)(4)).

601

602           Where there are multiple co-fiduciaries and the lawyer represents some, but not all,  
603 of the co-fiduciaries, not only must the lawyer proceed as stated above with respect to  
604 each of the co-fiduciaries he or she represents, but, with respect to any other co-fiduciary  
605 that is not represented by another lawyer, because the lawyer will likely be dealing with  
606 that other co-fiduciary, the lawyer must also inform that co-fiduciary that the lawyer does  
607 not represent that co-fiduciary and is only providing legal counsel for the represented co-  
608 fiduciaries and not for any co-fiduciary the lawyer does not represent. (Rule 4.3. Dealing  
609 With Unrepresented Person)

610  
611           The question is still open as to the point at which prospective informed consent  
612 obtained by the lawyer no longer covers a situation that later arises between the co-  
613 fiduciaries where the co-fiduciaries find themselves in conflict. See CBA Formal Op. 135  
614 on this subject and ABA Formal Op. 05-436 “Informed Consent to Future Conflicts of  
615 Interest.” ABA Formal Op. 05-436 points out that the understanding of the client governs  
616 what is covered by the prospective waiver through informed consent.

617           “Thus, if the client agrees to consent to a particular type of conflict with which the  
618 client is already familiar, then the consent ordinarily will be effective with regard to  
619 that type of conflict. If the consent is general and open-ended, then the consent  
620 ordinarily will be ineffective, because it is not reasonably likely that the client will  
621 have understood the material risks involved.”

622 ABA Formal Opinion 05-436 at p. 2

623  
624           As a result, not only is the scope and effectiveness of the informed consent subject  
625 to the discussion and understanding of the client, but also the familiarity of the client with  
626 the subject matter at issue concerning the effectiveness of the prospective informed  
627 consent. Even if the client is a relatively sophisticated client, if the nature of the estate  
628 proceeding is one with which the client is unfamiliar, the lawyer likely will have to discuss  
629 the conflict as it later develops to obtain informed consent from the client to that conflict.

630  
631           Where the co-fiduciaries develop conflicts after the beginning of representation,  
632 those conflicts may reach the level that the lawyer must withdraw from representation of



633 both clients, such as when litigation ensues between co-fiduciaries. (Cmt [4], Rule 1.7(b))  
634 If, however, the conflict is likely resolvable, the lawyer may serve as informal mediator,  
635 proposing a variety of solutions to the conflict, with the co-fiduciaries determining the final  
636 outcome of the conflict. The lawyer may not advance the interests of one client over the  
637 other, even if the lawyer believes this to be in the best interests of the parties. (Rest. §  
638 130, vol. 2, p. 361) While it may be advisable, the lawyer is not required to “encourage  
639 each client to obtain independent advice....” (*Id.*)

640

#### 641 **Advisory 4. Representing a Fiduciary Who also is a Beneficiary.**

642

643 As stated in Advisory 1, “Whom Are You Representing, the Estate or the Personal  
644 Representative; the Trust or the Trustee?”, in Colorado the lawyer represents the fiduciary,  
645 not the estate or the trust. Often a personal representative or trustee, a fiduciary, also is a  
646 beneficiary under the will or trust.

647

648 In summary you can and, in the interest of providing economic legal services in the  
649 trusts and estates practice area, it will be beneficial to the client to, represent in both  
650 capacities a person who is both a fiduciary and a sole beneficiary. However, you should  
651 prepare an engagement letter that adequately advises the client of the potential conflict  
652 issues and specifies, to the extent possible, what will happen regarding representation if  
653 an actual conflict arises. You should also give careful attention to developments in the  
654 representation that could or do give rise to a conflict and address them appropriately.

655

656 Notwithstanding the possibility that a lawyer under certain circumstances may  
657 represent both a fiduciary and one or more multiple beneficiaries, doing so generally is not  
658 advisable. See K. Millard, “Estate Planning and Administration in Colorado after *Baker v.*  
659 *Wood, Ris & Hames, PC*,” 45 *The Colorado Lawyer* 10, p. 43 (Oct. 2016) (“It is advisable  
660 not to take on the role of lawyer for the client both as fiduciary and individually as  
661 beneficiary, and the lawyer’s engagement letter should be clear on that point.”). If a  
662 beneficiary needs legal representation regarding administration of an estate or trust, the

663 conflict of interest regarding representation of the fiduciary and representation of the  
664 beneficiary likely will not be waivable.

665  
666 In any event, a well-drafted engagement letter which clarifies the scope of the  
667 lawyer's representation is important. See Advisory 5, "Engagement Letter Considerations  
668 in Representing a Fiduciary", p. 28.

669  
670 *Fiduciary as Sole Beneficiary.*

671  
672 If the fiduciary is the sole beneficiary, it is unlikely that you will encounter ethical  
673 issues in representing the fiduciary/beneficiary based on that dual status, unless the  
674 fiduciary/beneficiary decides to disregard or impermissibly deviate from the terms of the  
675 will or trust. In that event, if the instrument is a will only (not containing a trust), the lawyer  
676 should be alert to conduct by the fiduciary/beneficiary that could result in fraud on creditors  
677 of the estate or that may cause the lawyer to violate Rule 3.3. Candor to the Tribunal, in a  
678 probate proceeding. The lawyer also should take note of her or his responsibilities under  
679 paragraph (b) of Rule 4.1. Truthfulness in Statements to Others, which requires that a  
680 lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure  
681 is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is  
682 prohibited by Rule 1.6. Confidentiality of Information.

683  
684 Rule 1.6(b)(3) and (4) permit (but do not require) a lawyer to disclose confidential  
685 information to prevent the client from committing a fraud that is reasonably certain to result  
686 in substantial injury to the financial interests or property of another, or to prevent, mitigate  
687 or rectify such injury, which has been or will be furthered by the client's use of the lawyer's  
688 services. See also Advisory 6, "Lawyer's Duties if the Fiduciary Client Fails to Properly  
689 Perform Fiduciary Duties", p. 31.

690  
691 Rule 1.2. Scope of Representation and Allocation of Authority Between Client and  
692 Lawyer, paragraph (d) provides that, "[a] lawyer shall not counsel a client to engage, or  
693 assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

694 discuss the legal consequences of any proposed course of conduct with a client and may  
695 counsel or assist a client to make a good faith effort to determine the validity, scope,  
696 meaning or application of the law.”

697

698         Let us suppose the instrument is a trust and the client, Kylie, age 27, is the sole  
699 beneficiary. She is your client in another matter, and she has asked you to represent her  
700 with respect to the trust by explaining to her the terms of the trust and her rights under it.  
701 The prior trustee has resigned and under a power contained in the trust has named Kylie  
702 the successor trustee. Kylie now asks you to represent her as trustee, as well.

703

704         The trust contains restrictive terms, as most trusts do. These terms provide that  
705 assets in the trust may be used only for Kylie’s education and health until she reaches 35  
706 years of age or obtains a master’s degree from an accredited university, whichever occurs  
707 first. There are no individuals left living who would benefit if Kylie died before receiving a  
708 final distribution under the trust. Kylie decides she wants to use the money to travel the  
709 world. She consults you as the lawyer for the trustee to be sure that if she does so, she  
710 won’t get into trouble. What are your obligations?

711

712         There is a conflict of interest between Kylie/trustee who, if she were to properly  
713 perform her fiduciary duties, would not consent to the premature distribution, and  
714 Kylie/beneficiary, who requests it. You should advise Kylie/trustee that she would be  
715 breaching the terms of the trust and failing to fulfill her fiduciary duties by disbursing the  
716 trust assets for that purpose, and you should review the provisions of C.R.S. §15-1-1401,  
717 “Restrictions on exercise of certain fiduciary powers,” and advise her accordingly.

718

719         Her response is, “so what; will I get into trouble?” You may advise her that it is  
720 unlikely she will get into trouble because of the absence of any other party in interest, but  
721 after doing so, the prudent course of action would be to withdraw as lawyer for  
722 Kylie/trustee. See Advisory 6. However, you may continue to represent Kylie/beneficiary,  
723 despite her alter ego breaching the terms of the trust and using the funds to travel the  
724 world.

725

726 In a situation like this, be sure your client truly is the only party in interest. If there  
727 are others who could benefit from the trust assets that are being distributed prematurely,  
728 for example, if the beneficiary died before the conditions of distribution of the assets were  
729 fulfilled, then the discussion of Rule 4.1(b) and Rule 1.2, above, would apply. Analysis of  
730 criminal aspects of the fiduciary's conduct in that event are beyond the scope of this  
731 Advisory, but you should consider whether the fiduciary's actions may result in a crime  
732 being committed.

733

734 *Multiple Beneficiaries.*

735

736 If there are multiple beneficiaries of an estate or trust, one of whom is your client in  
737 her or his capacity as personal representative or trustee, you may also represent that client  
738 in her or his capacity as a beneficiary, subject to analysis under the conflict of interest  
739 rules, Rules 1.7 through 1.9, if one or more of the other beneficiaries is your client or  
740 former client. However, as stated in the *Millard* article, supra, such representation may be  
741 unwise. See Advisory 7, "Responsibilities of a Lawyer for a Fiduciary Client to an  
742 Unrepresented Beneficiary", p. 36, if one or more beneficiaries are unrepresented.

743

744 As noted in Advisory 1, "Whom are You Representing, the Estate or the Fiduciary;  
745 the Trust or the Trustee?", p. 4, where your client is both a fiduciary and a beneficiary of  
746 the estate or trust, you must make clear to the client in what capacity or capacities you are  
747 representing the client. (See Rule 1.2(c) and [Cmt 7], which permit a lawyer to limit the  
748 scope or objectives, or both, of the representation if reasonable under the circumstances  
749 and the client gives informed consent, and Rule 1.7, Conflicts of Interest: Current Clients.)  
750 The ACTEC Commentaries acknowledge that in many cases estates and trusts are non-  
751 adversarial, and that representation of more than one client, or the same client in multiple  
752 capacities, is not only not uncommon but might actually lead to legal efficiencies. That the  
753 client's multiple interests do not align completely does not eliminate the ability to represent  
754 the client in multiple capacities, so long as those interests do not become adverse. There  
755 is no problem so long as the interests of the client as an individual do not compromise the

756 actions of the client as fiduciary or vice versa. (ACTEC Commentaries to MRCP 1.7, pp.  
757 101-102, and 107.)

758

759         You should inform the client of the potential conflicts and difficulties which could  
760 develop in your dual representation of the client as fiduciary and as beneficiary. The  
761 ACTEC Commentaries also recommend you have the client sign an informed consent  
762 waiver concerning your inability to advocate for the client as an individual in ways which  
763 would be inconsistent with the client's duties as fiduciary. (*Id.*, p. 107.)

764

765         If a dispute arises between the fiduciary/beneficiary and another beneficiary and the  
766 fiduciary is properly exercising her or his fiduciary duties, the dispute itself does not give  
767 rise to an ethical issue. See Advisory 6 for a discussion of the situation in which the  
768 fiduciary fails to properly perform her or his fiduciary duties.

769

770         However, in a trust situation, if a dispute arises involving a conflict between the  
771 interests of your beneficiary client and the interests of another beneficiary which requires  
772 or involves a discretionary action by your trustee client, you may be faced with a conflict of  
773 interest under Rule 1.7, unless your trustee client determines, with the consent of your  
774 alter ego beneficiary client, that the proper resolution of the dispute is in favor of the other  
775 beneficiary's interests. Absent such determination and consent, you must conduct a  
776 careful analysis of whether the client/trustee's proposed course of conduct under the trust  
777 is proper and whether you would be required to withdraw from representation of your  
778 trustee client. Whether you could continue to represent your beneficiary client would  
779 depend on the facts of the dispute and the nature of your engagement letter with each  
780 client. See Advisory 5.

781

782         Maryland State Bar Assn. Ethics Op. 2000-44 (2000) (Op. Summary 40 in Part II of  
783 this Practice Area Ethics Advisory) presents an interesting set of facts in which Lawyer  
784 represented a trustee who was both trustee and lifetime beneficiary of a testamentary  
785 trust. Two of the contingent beneficiaries of the trust were the trustee's daughters X and

786 Y. While administering the trust, trustee was involved in acrimonious litigation in which  
787 Lawyer represented trustee and X against Y.

788

789 During the litigation, the trustee resigned due to ill health, and X became the  
790 successor trustee, as well as a contingent beneficiary. Lawyer represented X in both  
791 capacities. The original trustee/lifetime beneficiary then died, and the contingent  
792 beneficiaries became vested beneficiaries. Under its terms, the trust terminated and the  
793 property in the trust was subject to distribution to the beneficiaries. Notwithstanding the  
794 terms of the trust, X as trustee took possession of the trust assets and continued to  
795 expend trust income, borrowed money, and renovated the trust property without  
796 consultation with or permission from any of the other beneficiaries, including Y.

797

798 Lawyer was asked by Y to discontinue representation of X due to a conflict of  
799 interest, particularly in light of the multiple adverse actions taken by Lawyer against Y in  
800 the litigation. Lawyer declined to terminate representation of X as trustee but did claim to  
801 have ceased to represent X individually. Y continued to press a conflict of interest claim,  
802 as well as claiming that X and Lawyer were not acting in the best interest of the trust.

803

804 Analyzing the facts under Maryland Attorneys' Rules of Professional Conduct 1.7,  
805 the Maryland ethics committee did not accept that Lawyer no longer represented X  
806 individually and cited a conflict between X as successor trustee and X as beneficiary, in  
807 that any advice Lawyer gives to X as successor trustee may materially limit Lawyer in his  
808 representation of X as an individual and vice versa. The committee cited a comment to  
809 that rule, which states,

810

811 Loyalty to a client is also impaired when a lawyer cannot consider, recommend or  
812 carry out an appropriate course of action for the client because of the lawyer's other  
813 responsibilities or interests. The conflict in effect forecloses alternatives that would  
814 otherwise be available to the client.... The critical questions are the likelihood that a  
815 conflict will eventuate and, if it does, whether it will materially interfere with the

816 lawyer's independent professional judgment in considering alternatives or foreclose  
817 courses of action that reasonably should be pursued on behalf of the client.

818  
819 The committee concluded that Lawyer has a conflict representing X in her dual capacities  
820 and should withdraw from the representation of X as trustee. It did not address continued  
821 representation of X as beneficiary, by implication condoned that continuing representation.

822

823

824 **Advisory 5. Engagement Letter Considerations in Representing a Fiduciary.**

825

826 The primary goal in drafting an engagement letter is to describe clearly the nature of  
827 the representation and the rights and obligations of the lawyer and the client. The  
828 engagement letter also can serve to minimize later misunderstandings by clarifying  
829 potential issues at the start of the representation. In addition to covering subjects typical to  
830 all engagement letters - such as fees, billing practices, and retention of files - the lawyer  
831 representing a fiduciary should consider including additional provisions to address issues  
832 which may arise in the fiduciary context.

833

834 When a lawyer is representing a fiduciary, the engagement letter should specifically  
835 identify the client whom the lawyer will be representing and the capacity in which the client  
836 will be represented. See Advisory 1, "Whom Are You Representing, the Estate or the  
837 Personal Representative; the Trust or the Trustee?", p. 4. The engagement letter in the  
838 trusts and estates setting should make it clear that the lawyer will be representing only the  
839 personal representative or trustee, if that is the case, and only in that person's fiduciary  
840 capacity, not as an individual, unless a dual representation is intended by both the lawyer  
841 and the client, e.g., a personal representative who also is the sole beneficiary who the  
842 lawyer is to represent in both capacities. See *Boatright v. Derr*, 919 P.2d 221, 228-29  
843 (Colo. 1996) (plaintiff permitted to recover noneconomic damages in legal malpractice  
844 action where the plaintiff argued that lawyers represented her individually as well as in her  
845 capacity as personal representative) for an illustration of the importance of clarifying the  
846 capacity in which a probate or trust client is being represented.

847

848

The engagement letter should also address the scope of the engagement.

849

Paragraph (c) of Rule 1.2. Scope of Representation and Allocation of Authority Between

850

Client and Lawyer allows the lawyer to limit the scope of a representation if the limitation is

851

reasonable under the circumstances and the client gives informed consent. There are

852

numerous instances in which a lawyer representing a fiduciary may want to limit the scope

853

of the representation. While Rule 1.2(c) does not require such informed consent to be in

854

writing, the best and simplest way to document the client's informed consent to the limited

855

scope of the representation is to include it in the engagement letter signed by the client.

856

*Accord*, CBA Formal Op. 101 "Unbundling/Limited Scope Representation" (updated 2016),

857

p. 4.

858

859

If the lawyer will be representing co-fiduciaries, a fiduciary who is also a beneficiary,

860

or a combination of a fiduciary and one or more beneficiaries, it is particularly important to

861

delineate the lawyer's role in the representation. See Rule 1.7. Conflict of Interest: Current

862

Clients, cmt. [27] ("In estate administration the identity of the client may be unclear under

863

the law of a particular jurisdiction. Under one view [including Colorado], the client is the

864

fiduciary; under another view the client is the estate or trust, including its beneficiaries. In

865

order to comply with conflict of interest rules, the lawyer should make clear the lawyer's

866

relationship to the parties involved."). See Advisory 3, "Representation of Co-Personal

867

Representatives or Co-Trustees", p. 18, and Advisory 4, "Representing a Fiduciary Who

868

also is a Beneficiary", p. 22.

869

870

In the case of a joint representation, the lawyer should also consider using

871

the engagement letter to address the sharing of confidential information between or among

872

the clients. Confidentiality of information relating to the representation is governed by Rule

873

1.6. Confidentiality of Information, which provides that a lawyer generally may not reveal

874

information relating to the representation of a client unless the client gives informed

875

consent. Thus, for example, while it would be expected in representing co-personal

876

representatives that the lawyer will share all information with both of them, the lawyer

877

would be well advised to explain to the clients that all information will be shared as among



878 them and the risks and benefits of such sharing of information, document the explanation,  
879 and provide for the clients' informed consent to the practice in the engagement letter.

880  
881         Additionally, the engagement letter can be used to document the lawyer's  
882 explanation to the clients of actual conflicts of interest between the clients, if any, and the  
883 potential conflicts that may arise between them in the course of the representation and,  
884 where possible and appropriate, documenting the informed consent of the clients to  
885 proceeding with the representation in the face of those waivable potential conflicts that are  
886 foreseeable at the outset of the representation. See C. Eyster, "Trust and Estate Law  
887 Engagement Letters and Common Conflict of Interest in Joint Representation," 38 *The*  
888 *Colorado Lawyer* 2, p. 43 (Feb. 2009). See also CBA Formal Op. 135 "Ethical  
889 Considerations in the Joint Representation of Clients in the Same Matter or Proceeding"  
890 (2018)

891  
892         A thorny question that can arise in a lawyer's representation of a fiduciary is what  
893 the lawyer may or must do if the lawyer has reason to believe that the fiduciary is acting  
894 improperly. At the start of the representation, the lawyer can help prevent inadvertent  
895 misconduct by carefully informing the client in advance of his or her duties as fiduciary.  
896 For example, most individuals appointed as personal representatives are lay persons not  
897 experienced in serving as fiduciaries, so it is helpful practice to include with the fee  
898 agreement an explanation of the fiduciary relationship and a list of the fiduciary duties of a  
899 personal representative.

900  
901         The engagement letter may also ask the client to commit to complying with these  
902 fiduciary duties and inform the client that if the client violates the fiduciary duties, the  
903 lawyer may be entitled or required to disclose information to the court or the beneficiaries  
904 and/or withdraw from the representation, subject to court approval where required. See  
905 Advisory 6, "Lawyer's Duties if the Fiduciary Client Fails to Properly Perform Fiduciary  
906 Duties", p. 31. The ACTEC Commentaries suggest that the letter could provide, for  
907 example, that the lawyer's representation is conditioned upon the fiduciary's agreement  
908 that the creation of a lawyer-client relationship between them will not preclude the lawyer

909 from disclosing to the beneficiaries or to the court any actions of the fiduciary that might  
910 constitute a breach of fiduciary duty. See ACTEC Commentary on MRPC 1.2, subheading  
911 *Disclosure of Acts or Omissions by Fiduciary Client*, p. 38, and on MRPC 1.6, *supra*. In  
912 that case, the engagement letter should contain the client’s informed consent to such  
913 disclosure.

914  
915 As noted above, Rule 1.6 provides that a lawyer generally may not reveal  
916 information relating to the representation of a client unless the client gives informed  
917 consent, subject to the exceptions in Rule 1.6(b). Rule 1.0. Terminology, paragraph (e),  
918 states, “‘Informed consent’ denotes the agreement by a person to a proposed course of  
919 conduct after the lawyer has communicated adequate information and explanation about  
920 the material risks of and reasonably available alternatives to the proposed course of  
921 conduct.” Therefore, the lawyer must ensure that she or he has complied with this  
922 requirement in order for the client’s consent in the engagement letter to such disclosure to  
923 be effective. In the absence of such informed consent, the lawyer must rely on the  
924 exceptions in Rule 1.6(b) or on Rule 3.3. Candor Toward the Tribunal to support  
925 disclosure.

926

927

928 **Advisory 6. Lawyer’s Duties if the Fiduciary Client Fails to Properly Perform**  
929 **Fiduciary Duties.**

930

931 While most fiduciary clients will try to perform their duties conscientiously, the  
932 lawyer may become aware that a fiduciary client is not performing the fiduciary’s duties as  
933 required, whether through negligence, fraud, or even criminal conduct. In all cases, the  
934 lawyer’s first duty is to advise the client candidly and straightforwardly regarding the  
935 fiduciary’s responsibilities. See Rule 2.1. Advisor (lawyer’s duty to exercise independent  
936 professional judgment and render candid advice).

937

938 Because of the high standards to which fiduciaries are held, the lawyer should not  
939 hesitate to offer advice even when the fiduciary has not sought it. See Rule 2.1, cmt. [5]

940 (“a lawyer may initiate advice to a client when doing so appears to be in the client’s  
941 interest”). Such advice may include reminding the client of the court’s powers under  
942 C.R.S. §§ 15-10-501 through -505 to supervise estate administration and address fiduciary  
943 misconduct. See M. Mihm, ed., *Lawyers’ Professional Liability in Colorado: Preventing*  
944 *Legal Malpractice and Disciplinary Actions*, Vol. 2, §37.21 (T. Conover, “Addressing  
945 Fiduciary Misconduct”). The lawyer may also discuss with the client the lawyer’s potential  
946 ethical duties to disclose the misconduct to the beneficiaries and/or the court, as well as  
947 the lawyer’s right or duty to withdraw from the representation. Philadelphia Bar Ass’n  
948 Ethics Op. 2008-9 [See Op. Summary 16]. See paragraph (d) of Rule 1.6. Confidentiality  
949 of Information, Rule 1.16. Declining or Terminating Representation, and Rule 3.3. Candor  
950 Toward the Tribunal. If the fiduciary client insists upon acting in a way with which the  
951 lawyer has a fundamental disagreement, the lawyer may withdraw from the representation,  
952 subject to court approval, if applicable. Rule 1.16(b)(4).

953  
954         The lawyer must be particularly careful if the fiduciary has engaged in conduct that  
955 the lawyer reasonably believes is criminal or fraudulent. For example, assume that a  
956 lawyer learns that the client—the personal representative of an estate—has wrongfully and  
957 secretly taken possession of a valuable piece of jewelry that belongs to the estate. When  
958 the lawyer confronts the client, the client says that she will return it to the estate. In  
959 determining the best course of action, the lawyer should consider the circumstances of the  
960 misappropriation, *e.g.*, whether it was intentional or inadvertent. If the lawyer is concerned  
961 that the misappropriation was intentional, the lawyer may not help hide the misconduct  
962 without risking a violation of paragraph (d) of Rule 1.2. Scope of Representation and  
963 Allocation of Authority Between Client and Lawyer (prohibition against assisting client fraud  
964 or criminal activity). One commentator has suggested that the best course of action may  
965 be to try to persuade the fiduciary client to resign and return the item to the estate through  
966 a successor personal representative. See H. Sterling, “Some Problems Arising in the  
967 Representation of a Fiduciary,” 32 *The Colorado Lawyer* 11 (June 2003), for an excellent  
968 discussion of the dishonest fiduciary scenario.

969

970           If the fiduciary’s misconduct has caused material representations to be made to the  
971 court, such as false statements made in an estate inventory, the lawyer also has a duty  
972 under Rule 3.3 to take reasonable remedial measures, including, if necessary, disclosure  
973 to the tribunal. See CBA Formal Op. 123 “Candor to the Tribunal and Remedial Measures  
974 in Civil Proceedings” (2011). Depending upon the seriousness of the infraction, the  
975 required remedial measure may be as simple as having the fiduciary submit a corrected  
976 inventory, but remediation also may require the lawyer to seek court approval to withdraw  
977 from the representation, request that the court order an accounting of the estate, and even  
978 disclose the misconduct to the court. *Id.* Also see Alabama State Bar Formal Op. 2010-03,  
979 “Representation of an Estate and Client Identity.”

980

981           The lawyer faces a serious predicament if she or he knows or suspects that the  
982 fiduciary’s criminal or fraudulent course of conduct is continuing or that the known  
983 misappropriation is only the “tip of the iceberg.” In some circumstances, the lawyer’s  
984 withdrawal from the representation, subject to any required court approval, is mandatory.  
985 Rule 1.2(d) expressly prohibits a lawyer from counseling a client to engage, or assisting a  
986 client, in conduct that the lawyer knows is criminal or fraudulent, and Rule 1.16(a)(1)  
987 mandates withdrawal if the lawyer’s representation of the client “will result in violation of  
988 the Rules of Professional Conduct or other law” as explained in Rule 1.2, cmt. [10]:

989

990           When the client’s course of action has already begun and is continuing, the lawyer  
991 must carefully weigh her or his responsibility. The lawyer is required to avoid  
992 assisting the client, for example, by drafting or delivering documents that the lawyer  
993 knows are fraudulent or by suggesting how the wrongdoing might be concealed. A  
994 lawyer may not continue assisting a client in conduct that the lawyer originally  
995 supposed was legally proper but then discovers is criminal or fraudulent. The  
996 lawyer must, therefore, withdraw from the representation of the client in the matter.  
997 See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be  
998 necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any  
999 opinion, document, affirmation or the like. See Rule 4.1.

1000

1001 Even if withdrawal is not mandated under Rule 1.16(a), the lawyer is permitted to  
1002 seek court permission to withdraw in these circumstances under Rule 1.16(b). See Rule  
1003 1.16(b)(2) (permitting withdrawal when the client persists in a course of action involving the  
1004 lawyer's services that the lawyer reasonably believes is criminal or fraudulent) and  
1005 1.16(b)(4) (permitting withdrawal when the client insists upon taking action that the lawyer  
1006 considers repugnant or with which the lawyer has a fundamental disagreement). Note that  
1007 in the case of limited scope representation, court permission to withdraw will not be  
1008 required if, pursuant to C.R.C.P. 121, § 1-1(5), the lawyer has filed a notice of completion  
1009 of limited scope representation.

1010  
1011 The lawyer may also face the dilemma of what the lawyer may or must disclose to  
1012 the beneficiaries regarding the fiduciary's past or ongoing misconduct. Under Rule 1.6, a  
1013 lawyer may generally not reveal information related to the representation to third parties  
1014 (beneficiaries) without the informed consent of the client (the personal representative).  
1015 However, under the exceptions provided by Rule 1.6(b), a lawyer may (but is not required  
1016 to) reveal information to the extent the lawyer reasonably believes necessary:

- 1017
- 1018 (2) to reveal the client's intention to commit a crime and the information  
1019 necessary to prevent the crime;
  - 1020 (3) to prevent the client from committing a fraud that is reasonably certain to  
1021 result in substantial injury to the financial interests or property of another and in  
1022 furtherance of which the client has used or is using the lawyer's services;
  - 1023 (4) to prevent, mitigate or rectify substantial injury to the financial interests or  
1024 property of another that is reasonably certain to result or has resulted from the  
1025 client's commission of a crime or fraud in furtherance of which the client has used  
1026 the lawyer's services.

1027  
1028 Note that Rule 1.6(b)(3) and (4) refer to the client's commission of a crime or fraud "in  
1029 furtherance of which the client has used the lawyer's services". If the client has not used  
1030 the lawyer's services in furtherance of the crime or fraud, these exceptions to the

1031 requirement of Rule 1.6 that the lawyer not disclose information relating to the  
1032 representation are not applicable.

1033  
1034         If the circumstances fall within the exceptions of Rule 1.6(b), Rule 4.1. Truthfulness  
1035 in Statements to Others, paragraph (b) requires that the lawyer “must not knowingly fail to  
1036 disclose a material fact to a third person when disclosure is necessary to avoid assisting a  
1037 criminal or fraudulent act by a client.” See Rule 1.2, cmt. [10] (“In some cases, withdrawal  
1038 alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of  
1039 withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.”)  
1040 Whether or not disclosure is required, the lawyer is well advised to withdraw from the  
1041 representation, subject to any required court approval, and should notify all parties in  
1042 interest that the lawyer will no longer represent the fiduciary. See H. Sterling, “Some  
1043 Problems Arising in the Representation of a Fiduciary,” 32 *The Colorado Lawyer* 11 (June  
1044 2003). See also ACTEC Commentaries to MRPC 1.6, subheading *Disclosure of a*  
1045 *Fiduciary’s Commission of, or Intent to Commit, A Fraud or Crime* and other topics, pp. 81-  
1046 85.

1047  
1048         In addition to the lawyer’s ethical obligations, another reason the lawyer may want  
1049 to disclose fiduciary misconduct to the beneficiaries is to dispel any inference that the  
1050 lawyer was aware of or participated in the misconduct. While Colorado law is clear that  
1051 the lawyer representing a personal representative does not have an attorney-client  
1052 relationship with the beneficiaries of the estate, the lawyer can still be held liable to the  
1053 beneficiaries for the lawyer’s own tortious or criminal conduct. See *Allen v. Steele*, 252  
1054 P.3d 476, 482 (Colo. 2011) (where non-clients are concerned, a lawyer’s liability is  
1055 generally limited to circumstances in which the lawyer has committed fraud or a malicious  
1056 or tortious act, including negligent misrepresentation), citing *Mehaffy, Rider, Windholz &*  
1057 *Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995); accord *Baker v.*  
1058 *Wood, Ris & Hames, Professional Corp.*, 364 P.3d 872, 879 (Colo. 2016) (reiterating *Allen*  
1059 rule); see also *In re Estate of Brooks*, 596 P.2d 1220 (Colo. App. 1970) (trustee’s lawyer  
1060 not liable to alleged beneficiary for breach of trust absent fraud or malice). The Colorado  
1061 Supreme Court has left open the question of whether a lawyer can be held liable to third

1062 parties for aiding and abetting a client’s breach of fiduciary duty. *See Alexander v.*  
1063 *Anstine*, 152 P.3d 497, 503 (Colo. 2007).

1064

1065 To address the question of whether the lawyer is acting properly in disclosing  
1066 fiduciary misconduct to the beneficiaries or the court, the lawyer may want to include a  
1067 provision in the engagement letter authorizing such disclosure. *See Advisory 5,*  
1068 *“Engagement Letter Considerations in Representing a Fiduciary”*, p. 28

1069 .

1070 Op. Summary 59- PA Opinion 2017-100 (2017) also contains a thorough discussion  
1071 of a lawyer’s ethical duties in representing a fiduciary client whose conduct may harm or  
1072 has harmed beneficiaries.

1073

1074

1075 **Advisory 7. Responsibilities of a Lawyer for a Fiduciary Client to an**  
1076 **Unrepresented Beneficiary.**

1077

1078 A lawyer representing a trustee or personal representative is likely to be in  
1079 communication with one or more beneficiaries of the trust or estate who are not  
1080 represented by counsel. A beneficiary may ask questions of the lawyer the answers to  
1081 which may be simply factual or may involve actual or perceived legal advice. “As a  
1082 general rule, the lawyer for the fiduciary should consider informing the beneficiaries that  
1083 the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the  
1084 fiduciary is the lawyer’s client; that while the fiduciary and the lawyer will, from time to time,  
1085 provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not  
1086 represent them; and that the beneficiaries may wish to retain independent counsel to  
1087 represent their interests.” ACTEC Commentaries to MRPC 1.2. Scope of Representation  
1088 and Allocation of Authority between Client and Lawyer, p.37

1089

1090 Colorado courts have held that the lawyer drafting the will or trust or the lawyer for  
1091 the fiduciary does not owe a specific duty to the beneficiaries. (*Baker v. Wood Ris &*  
1092 *Hames*, 364 P.3d 872 (Colo. 2016); *Glover v. Southard*, 804 P.2d, 21, (Colo. App. 1994);

1093 *Shriners Hosp. For Crippled Children, Inc. V. Southard*, 892 P.2d 417 (Colo. App. 1994))  
1094 “The fact that the fiduciary client has obligations toward the beneficiaries does not impose  
1095 parallel obligations on the lawyer, or otherwise expand or supersede the lawyer’s  
1096 responsibilities under the Model Rules of Professional Conduct.” “Specifically, the lawyer’s  
1097 obligation to preserve the client’s confidences under Rule 1.6 is not altered by the  
1098 circumstance that the client is a fiduciary.” ABA Comm. on Ethics and Prof. Resp., Formal  
1099 Op. 94-380 “Counselling a Fiduciary” (1994), p.1 [Op. Summary 30]

1100  
1101 In communicating with unrepresented beneficiaries, the lawyer should be governed  
1102 by Rule 4.3. Dealing with Unrepresented Person, which states:

1103  
1104 In dealing on behalf of a client with a person who is not represented by counsel, a  
1105 lawyer shall not state or imply that the lawyer is disinterested. When the lawyer  
1106 knows or reasonably should know that the unrepresented person misunderstands  
1107 the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct  
1108 the misunderstanding. The lawyer shall not give legal advice to an unrepresented  
1109 person, other than the advice to secure counsel, if the lawyer knows or reasonably  
1110 should know that the interests of such a person are or have a reasonable possibility  
1111 of being in conflict with the interests of the client.

1112  
1113 Comments 1 and 2 provide further guidance:

1114 [1] An unrepresented person, particularly one not experienced in dealing with legal  
1115 matters, might assume that a lawyer is disinterested in loyalties or is a disinterested  
1116 authority on the law even when the lawyer represents a client. In order to avoid a  
1117 misunderstanding, a lawyer will typically need to identify the lawyer’s client and,  
1118 where necessary, explain that the client has interests opposed to those of the  
1119 unrepresented person. For misunderstandings that sometimes arise when a lawyer  
1120 for an organization deals with an unrepresented constituent, see Rule 1.13(f).

1121  
1122 [2] The Rule distinguishes between situations involving unrepresented persons  
1123 whose interests may be adverse to those of the lawyer’s client and those in which



1124 the person's interests are not in conflict with the client's. In the former situation, the  
1125 possibility that the lawyer will compromise the unrepresented person's interests is  
1126 so great that the Rule prohibits the giving of any advice, apart from the advice to  
1127 obtain counsel. Whether a lawyer is giving impermissible advice may depend on the  
1128 experience and sophistication of the unrepresented person, as well as the setting in  
1129 which the behavior and comments occur. This Rule does not prohibit a lawyer from  
1130 negotiating the terms of a transaction or settling a dispute with an unrepresented  
1131 person. So long as the lawyer has explained that the lawyer represents an adverse  
1132 party and is not representing the person, the lawyer may inform the person of the  
1133 terms on which the lawyer's client will enter into an agreement or settle a matter,  
1134 prepare documents that require the person's signature and explain the lawyer's own  
1135 view of the meaning of the document or the lawyer's view of the underlying legal  
1136 obligations.

1137  
1138 The last sentence of Rule 4.3 suggests that if the estate or trust is one in which  
1139 there is no question about who is to get what, the lawyer might properly advise a  
1140 beneficiary on general matters, such as whether the beneficiary will have taxable income  
1141 from receipt of distributions. On the other hand, if the lawyer is representing the trustee of  
1142 a trust that places discretion in the trustee to decide when distributions will be made and in  
1143 what amounts to particular beneficiaries, the lawyer should limit his or her advice as the  
1144 last sentence of Rule 4.3 requires.

1145  
1146 See *also* Op. Summary 7, Prof. Ethics of the FL Bar, Op. 10-3 [untitled] (2011); Op.  
1147 Summary 19, PA Bar Assn. Op. 2009-072 [untitled] (2009); Op. Summary 29, ABA Comm.  
1148 on Ethics and Prof. Resp., Formal Op. 05-434 "Lawyer Retained by Testator to Disinherit  
1149 Beneficiary that Lawyer Represents on Unrelated Matters" (2004); and Op. Summary 37,  
1150 KY Bar Assn. Ethics Op. KBA E-401 [untitled] (1997).

1151  
1152  
1153

1154 **Advisory 8. Representing Spouses with His and Hers Children in Estate Planning:**  
1155 **What Do You Do When the Agreement on Distribution Falls Apart?**

1156  
1157 Lawyers often are asked to represent both parties of a couple for estate planning.  
1158 Estate planning is fundamentally nonadversarial in nature and such representation is often  
1159 appropriate and may better serve the client both economically and with better-coordinated  
1160 estate plans. ACTEC Commentary on MRPC 1.7 Conflict of Interest: Current Clients, p.  
1161 101.

1162  
1163 Prior to undertaking such joint representation, the lawyer should explain in writing to  
1164 the would-be clients the potential issues in joint representation, and it is wise to include  
1165 that explanation, as well as the clients' informed consent to the joint representation, in the  
1166 engagement letter (see C. Eyster, "Trust and Estate Law Engagement Letters and  
1167 Common Conflict of Interest in Joint Representation," 38 *The Colorado Lawyer* 2, p. 43  
1168 (Feb. 2009)).

1169 While specifics of what issues the lawyer must explain to the clients will vary  
1170 depending on the specifics of the matter, at a minimum it must include a discussion of  
1171 what information is to be shared with both clients and that if a conflict develops that cannot  
1172 be resolved, the lawyer may be required to withdraw from representation of each of the  
1173 clients. (Comments [29] through [31] to Rule 1.7; ACTEC Commentaries on MRPC 1.7,  
1174 subheadings *Disclosures to Multiple Clients*, and *Joint or Separate Representation*, p. 102.  
1175 In addition, if the situation involves a second marriage for one or both clients, especially if  
1176 there are one or more children from a prior marriage, at the outset of the engagement the  
1177 lawyer should provide the clients with a thorough explanation of estate planning tools for a  
1178 second marriage situation.

1179  
1180 Despite the best efforts of the lawyer, on occasion a spouse who has stated  
1181 agreement to an estate plan will have a change of heart. Take, for example, the following  
1182 situation:  
1183 Lawyer represents Spouse A, who has children of her or his own, and Spouse B, who also  
1184 has children of her or his own. Spouse A has the bulk of the assets as between A and B.

1185 Both Spouses tell Lawyer they want the assets to be disposed of on death mostly to A's  
1186 children (approximately in proportion to the assets held by A and B). Lawyer drafts the  
1187 appropriate disposition documents. Later Spouse B tells Lawyer that B has changed her  
1188 or his mind and insists on a 50-50 split of assets between their respective children. What  
1189 should/must Lawyer do?

1190  
1191 Under these facts, Lawyer has a concurrent conflict of interest. Rule 1.7. Conflict of  
1192 Interest: Current Clients states:

1193 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the  
1194 representation involves a concurrent conflict of interest. A concurrent conflict of  
1195 interest exists if:

1196 (1) the representation of one client will be directly adverse to another client;  
1197 or  
1198 (2) there is a significant risk that the representation of one or more clients will  
1199 be materially limited by the lawyer's responsibilities to another client, a  
1200 former client or a third person or by a personal interest of the lawyer.

1201  
1202 (b) Notwithstanding the existence of a concurrent conflict of interest under  
1203 paragraph (a), a lawyer may represent a client if:

1204 (1) the lawyer reasonably believes that the lawyer will be able to provide  
1205 competent and diligent representation to each affected client;  
1206 (2) the representation is not prohibited by law;  
1207 (3) the representation does not involve the assertion of a claim by one client  
1208 against another client represented by the lawyer in the same litigation or  
1209 other proceeding before a tribunal; and  
1210 (4) each affected client gives informed consent, confirmed in writing.

1211 It appears unlikely in this instance that the requirements of (b)(1) could be satisfied.  
1212 Lawyer should consider carefully whether she or he can give unbiased and effective  
1213 advice or whether Lawyer might unconsciously try to steer the clients toward what Lawyer  
1214 believes would be a good compromise.

1215

1216           These facts also raise the question of whether, without Spouse B’s permission  
1217 (given either specifically in this instance or at the beginning of the representation by  
1218 agreement that all communications with one client can or will be disclosed to the other; see  
1219 Advisory 5. “Engagement Letter Considerations in Representing a Fiduciary” p. 28),  
1220 Lawyer may even request the consent of Spouse A to the change, as to do so may involve  
1221 disclosing confidential information of B. See the discussion of joint representation of co-  
1222 fiduciaries in Advisory 3. “Representing Co-Fiduciaries, e.g., Co-Personal Representatives  
1223 or Co-Trustees”, p. 18. See also CBA Formal Op. 135, “Ethical Considerations in the Joint  
1224 Representation of Clients in the Same Matter or Proceeding” (2018).

1225  
1226           The question, then, is may Lawyer continue representing either Spouse A or  
1227 Spouse B? Technically, Lawyer could continue representing either A or B if Lawyer  
1228 complies with Rule 1.7(b)(1), and the client that Lawyer will not be representing gives  
1229 informed consent, confirmed in writing.<sup>3</sup> However, under the circumstances, it is unlikely  
1230 that informed consent could be obtained. Even if technical compliance is possible, Lawyer  
1231 should consider carefully whether such representation is prudent and whether the wisest  
1232 course of action would be to withdraw from representing either A or B. Here, A and B are  
1233 unlikely to be able to do effective joint estate planning until they, independently or with the  
1234 help of a third party other than Lawyer, reach agreement on common objectives.

1235

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<sup>3</sup> “Informed consent” and “confirmed in writing” are defined in Colo. RPC 1.0. “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. The communication necessary will vary according to the circumstances. The lawyer ordinarily must

- 1) Disclose the facts and circumstances giving rise to the conflict;
- 2) Explain the advantages and disadvantages of the proposed course of conduct;
- 3) Discuss other options or alternatives; and
- 4) In some circumstances, advise the client to seek advice from independent counsel before commencing the representation.

1236 Each party of a couple may adopt a separate estate plan, and that does not *per se*  
1237 make their respective interests adversarial or constitute a conflict of interest for the lawyer.  
1238 However, the lawyer must be careful in addressing at the outset the sharing of information  
1239 and remain alert for a developing adversarial situation and resulting conflict of interest that  
1240 may require the lawyer’s withdrawal from representing one or both clients.

1241  
1242 See also Op. Summary 43, NC State Bar RPC 229 “Joint Representation of Husband  
1243 and Wife in Estate Planning” (1996); Op. Summary 45, Prof. Ethics of the FL Bar, Op. 95-4  
1244 [untitled] (1997); Op. Summary 46, State Bar of MT Ethics Op. 960731 [untitled] (1996);  
1245 and Op. Summary 47, RI Sup. Ct. Ethics Advisory Panel Op. 96-07 [untitled] (1996).

1246

1247

## 1248 II. Summaries of Other State and ABA Ethics Opinions

1249

1250 *Reference to a “Rule” in each summary is to that Rule of Professional Conduct in effect*  
1251 *in that state, or in the case of ABA Opinions the MRPC Rule in effect, at the date of the*  
1252 *opinion summarized. We have attempted to note significant differences between the*  
1253 *cited rule and the corresponding Rule currently in effect in Colorado, but we cannot*  
1254 *guarantee that we have noted all such differences and so we recommend you compare*  
1255 *cited rules with current Colorado Rules in summaries and opinions of interest.*

1256

### 1257 1-PA Opinion 2012-024 (2012)

1258 **Facts**—Lawyer represented X as administrator of the estate of X’s spouse, who died  
1259 intestate. Child A filed an action to compel accounting, and when an accounting was filed,  
1260 Child A filed objections alleging that X, during the lifetime of X’s spouse, abandoned the  
1261 spouse and was therefore not entitled to the family exemption and the spousal intestate  
1262 share of the estate. X then died intestate, and A was appointed successor administrator of  
1263 X’s spouse’s estate. Children B, C, and D have asked Lawyer to represent them as  
1264 intestate heirs of X and X’s spouse in their dispute with sibling A. Counsel for A has  
1265 threatened to file a complaint with the Disciplinary Board against Lawyer if Lawyer  
1266 represents B, C, and D.

1267 **Analysis and Conclusion**—The proposed representation is not prohibited and does not  
1268 require informed consent. No concurrent conflict of interest exists under **Rule 1.7, Conflict**  
1269 **of Interest: Current Clients**, because A is not a client and there is no indication that the  
1270 representation of Children B, C, and D would be materially limited by Lawyer’s  
1271 responsibility to either another client, a former client, a third person, or by a personal  
1272 interest of Lawyer. Although X was a former client of Lawyer [see **Rule 1.9, Duties to**  
1273 **Former Clients**, Lawyer’s proposed engagement would not violate Rule 1.9(a), as the  
1274 interests of B, C and D would not be materially adverse to X. However, Lawyer must abide  
1275 by Rule 1.9(c) (use of confidential information) if Lawyer decides to represent B, C, and D.  
1276 Lawyer should also consider potentially divergent or inconsistent interests among the  
1277 potential clients because the proposed engagement will involve a common representation.  
1278

## 1279 **2-Phil Bar Association Opinion 2013-6 (2013)**

1280 **Facts**—Lawyer represents an elderly woman (‘Client’). Lawyer prepared and Client signed  
1281 a power of attorney and a new will, leaving a \$50,000 gift to a cousin of Client and the  
1282 remainder of the estate to charitable institutions. The will names Lawyer as alternate  
1283 executor. The executor has died, making Lawyer the acting executor of the will. At the  
1284 same time testator made her will, she executed a power of attorney naming S, the  
1285 daughter of a friend of Client, as attorney-in-fact. Client felt S would be helpful in managing  
1286 her affairs. Client is now in hospice and in a coma. Lawyer recently learned that within  
1287 three months of Client signing the will and power of attorney, Client, her financial advisor,  
1288 and S met to sign papers placing Client’s individual accounts into joint survivorship  
1289 accounts with S, which would make assets in such accounts the property of S upon  
1290 Client’s death. S says that the purpose of the joint survivorship accounts was to allow S to  
1291 more readily manage Client’s bills. Lawyer strongly suspects that even if Client consented  
1292 to naming S as a co-owner on the accounts for convenience purposes only, that Client had  
1293 no idea of the dispositive effect of doing so. Lawyer informed S that the power of attorney  
1294 gave her the authority to readily manage Client’s bills and moving the assets into joint  
1295 accounts was unnecessary. While S is willing to make some concessions, she apparently  
1296 is unwilling to reconvey the accounts to Client’s name alone. Does Lawyer have a duty to  
1297 notify the Lawyer General’s office about the transfer of the assets into joint accounts?

1298  
1299 **Analysis and Conclusion**—Pursuant to **Rule 1.4, Communication**, Lawyer normally  
1300 must first attempt to communicate with Client to determine whether she understands the  
1301 consequences of the transfer of her accounts into joint tenancy with S. However, since  
1302 Client is in a coma, such action would be futile. Pursuant to **Rule 1.2, Scope of**  
1303 **Representation and Allocation of Authority between Client and Lawyer**, and **Rule**  
1304 **1.14, Client with Diminished Capacity**, Lawyer may act on Client’s behalf without Client’s  
1305 consent to protect Client’s financial interests and to effect the intent manifested in Client’s  
1306 will. Contacting the Lawyer General is one way to meet Lawyer’s obligations. If Lawyer  
1307 decides to report to the Lawyer General, Lawyer must abide by **Rule 1.6, Confidentiality**  
1308 **of Information**, and may only reveal information about Client to the extent reasonably  
1309 necessary to protect Client’s interest. If Client dies before Lawyer makes the disclosures,  
1310 pursuant to past opinion 2003-11, Lawyer, as executor of Client’s estate may make  
1311 decisions on behalf of the estate and is authorized to disclose confidential information  
1312 relating to the representation of Client.

1313  
1314 **3-NY Ethics Opinion 865 (2011)**  
1315 **Facts**—Lawyer prepared an estate plan for his client and supervised the execution of a will  
1316 in furtherance of the plan. The will named the client’s nephew executor of the estate. The  
1317 client died and the estate is ready for administration. The nephew has asked the Lawyer to  
1318 represent him in connection with the estate’s administration, but Lawyer is concerned  
1319 because executors may sue estate planners for malpractice, and both the estate plan and  
1320 the will were prepared within any period of limitations possibly applicable to Lawyer’s  
1321 conduct. [Note: NY Court of Appeals had recently overruled a longstanding line of cases  
1322 under which an executor, lacking privity with the estate planning lawyer, could not sue the  
1323 lawyer for malpractice.]

1324  
1325 **Analysis and Conclusion**—Rule 1.7, Conflict of Interest: Current Clients, provides that a  
1326 lawyer shall not represent a client if, among other things, there is a significant risk that the  
1327 representation will be materially limited by a personal interest of the lawyer, unless one of  
1328 the exceptions in Rule 1.7(b) is present. Three situations arise under these facts. Situation

1329 (a)- the lawyer who prepared the estate realizes at the outset, before commencing  
1330 representation of the executor in the administration of the estate, that he may have  
1331 committed legal malpractice and that the executor would have a prima facie malpractice  
1332 case against him. Here a nonconsentable conflict of interest exists. Moreover, a lawyer in  
1333 situation (a) has an affirmative duty to report to Client (formerly the decedent, but is now  
1334 the executor) that the lawyer's preparation of the estate plan has given rise to a prima facie  
1335 malpractice case. However, there is no duty to report insignificant errors or omissions.  
1336 Situation (b)- the lawyer at the outset does not perceive any basis for claiming that he  
1337 committed malpractice, and does not believe the executor would have a prima facie  
1338 malpractice case against him. In situation (b) the lawyer may represent Client and does not  
1339 need to obtain consent under Rule 1.7(b). Situation (c)- the lawyer did not initially perceive  
1340 any basis for a malpractice claim against him, but has realized during the course of  
1341 representation of the executor that he may have committed malpractice and that the  
1342 executor would have a prima facie malpractice claim against him. In situation (c) the  
1343 conflict is nonconsentable and pursuant to **Rule 1.16(b)(1)**, the lawyer must withdraw to  
1344 avoid a violation of the Rules, and after withdrawal must take steps to the extent  
1345 reasonably practicable to avoid foreseeable prejudice to the rights of the client.

1346

1347 [CBA Ethics Committee Note: See CBA Formal Opinion 113, *Ethical Duty of Lawyer to*  
1348 *Disclose Errors to Client* (2005; modified 2015), which differs from this opinion regarding  
1349 the duty of the lawyer to advise the client of a potential malpractice claim.]

1350

#### 1351 **4-PA Opinion 2011-22 (2011)**

1352 **Facts**—Lawyer represented Client in connection with estate planning and long-term  
1353 planning. Client requested assistance in making changes to the beneficiary designation  
1354 forms for his life insurance policy, Lawyer obtained the necessary forms and helped Client  
1355 revoke a prior designated beneficiary and nominated two other beneficiaries. Client signed  
1356 the forms but died before the forms were mailed to the insurance company. The executor  
1357 of the estate has contacted Lawyer and has asked for information about the life insurance  
1358 policy. (1) does Lawyer have a duty to disclose the information about the life insurance  
1359 policy; (2) if a duty to disclose exists, must Lawyer disclose this information to the



1360 executor; (3) does Lawyer have a duty to disclose this information to the either or both of  
1361 the beneficiary of the life insurance policy or the new beneficiaries named by Client; and  
1362 (4) does Lawyer have a duty to try to enforce deceased Client's intent and place a claim  
1363 against the life insurance proceeds to stop them from paying out to the beneficiary.

1364  
1365 **Analysis and Conclusion**—Under **Rule 1.6, Confidentiality of Information**, Lawyer  
1366 does not have a duty to disclose information surrounding deceased Client's life insurance  
1367 policy to anyone. However, Lawyer may under Rule 1.6(a), make the disclosure if Lawyer  
1368 is given informed consent or if Lawyer is impliedly authorized to do so in order to carry out  
1369 the representation. Informed consent can no longer be obtained because Client is  
1370 deceased. However, a legal representative has been appointed for Client and Lawyer  
1371 should look to the representative for decisions on behalf of Client. As to implied  
1372 authorization, Lawyer may be impliedly authorized to make appropriate disclosure of client  
1373 confidential information that would promote Client's estate plan, forestall litigation,  
1374 preserve assets, and further family understanding of the decedent's intention. If Lawyer  
1375 determines that Client impliedly authorized Lawyer to disclose that he made changes to  
1376 the beneficiary designation forms for his life insurance policy, and the disclosure would  
1377 likely promote the estate plan, forestall litigation, preserve assets, and further third parties'  
1378 understanding of the Lawyer's client's intentions, then disclosure would be permissible.  
1379 Finally, Lawyer has no duty to try to enforce the decedent's intent and place a claim on the  
1380 life insurance proceeds to stop them from paying out to the beneficiary. Lawyer does not  
1381 have a client to authorize him to take action on Client's behalf. According to agency law, a  
1382 lawyer's authority to act for a client automatically terminates when Client dies.

1383

#### 1384 **5-SC Opinion 12-10**

1385 **Facts**—Lawyer represented Client in actions brought against her by her estranged  
1386 spouse. After Client's death, her spouse was appointed executor of her estate and  
1387 requested Client's file from Lawyer.

1388

1389 **Analysis and Conclusion**—Pursuant to **Rule 1.6, Confidentiality of Information**,  
1390 Lawyer may not turn over any items from Client’s file without an order from the probate  
1391 court unless disclosure had been specifically authorized by Client.

1392  
1393 **6-NH Opinion 2014-15/10 (2015)**  
1394 **Facts**—Lawyer i meets with Client A and Client B, a married couple, to discuss preparing  
1395 estate planning documents. Clients want to create a joint revocable trust that benefits each  
1396 other during life, followed by their mutual children after the second spouse’s death. During  
1397 the joint meeting, Client A discloses that she wants a financial asset owned by her  
1398 individually to be made payable on her death to a charity. Nothing during the initial meeting  
1399 with Clients raises a concern for Lawyer that the interests of either spouse may limit  
1400 Lawyer’s ability to prepare a joint estate plan for the couple. At the end of the meeting,  
1401 Clients want to engage Lawyer to draft their documents.

1402  
1403 **Analysis and Conclusion**—Given these facts, there is no direct adversity or significant  
1404 risk of material limitation under **Rule 1.7, Conflict of Interest: Current Clients**. Pursuant  
1405 to **Rule 1.16, Declining or Terminating Representation**, should Client A and Client B’s  
1406 interests significantly diverge at a later time in Lawyer’s representation of Clients, Lawyer  
1407 may need to terminate the representation of both Clients if effective informed consent is  
1408 not feasible under **Rule 1.7(b)** (permissible representation of a current client despite a  
1409 conflict of interest). However, informed consent regarding mutual disclosure of information  
1410 should be obtained under **Rule 1.6, Confidentiality of Information**, before Lawyer  
1411 proceeds because although Clients would be involved in a common representation, the  
1412 mere fact of common representation does not mean that Clients impliedly relinquish their  
1413 confidentiality protections under Rule 1.6. Under **Rule 1.4, Communications**, Lawyer  
1414 must keep both Clients reasonably informed about the representation.

1415  
1416 **7-FL Ethics Opinion 10-3 (2011)**

1417 **Facts**—A personal representative, beneficiaries or heirs-at-law of a decedent Client’s  
1418 estate, or their counsel, asks Lawyer for confidential information relating to Lawyer’s  
1419 deceased Client.

1420  
1421 **Analysis and Conclusion**—Whether and what information Lawyer may disclose is fact  
1422 intensive and doubt should be resolved in favor of nondisclosure Pursuant to **Rule 1.6,**  
1423 **Confidentiality of Information**, confidentiality continues after Client’s death, but Lawyer  
1424 may reveal confidential information to serve Client’s interest unless it is information Client  
1425 specifically requires not to be disclosed. Moreover, if Lawyer is asked to disclose  
1426 information via subpoena, Lawyer must disclose all information sought that is not  
1427 privileged and raise privilege as to any information for which there is a good faith basis to  
1428 do so.

1429  
1430 **8-Massachusetts Bar Association Opinion 11-04 (2011)**  
1431 **Facts**—Lawyer was contacted by the Son of Decedent, seeking her assistance in  
1432 probating Decedent’s will. Son is Decedent’s next of kin and the residuary beneficiary  
1433 under a will that Lawyer had prepared a few years earlier for Decedent. Son stated that  
1434 Financial Advisor, who had been named executor of the will, had declined to serve or to  
1435 offer the will for probate due to the relatively small amount of assets in Decedent’s estate.  
1436 Son represented to Financial Advisor that Lawyer was the lawyer for Decedent’s estate,  
1437 and Financial Advisor therefore revealed to Lawyer confidential information that the value  
1438 of Decedent’s estate was less than the total of the specific bequests named to Legatees.  
1439 After Son learned he would not benefit under Decedent’s estate, he lost interest in  
1440 pursuing further action. Lawyer inquires whether she has a right or duty to advise Legatees  
1441 of information concerning Decedent’s estate. Son has not responded to Lawyer’s requests  
1442 for permission to disclose this information to Legatees.

1443  
1444 **Analysis and Conclusion**—The scenario above contains several facts that Lawyer  
1445 possesses that would be of interest to Legatees: (1) Decedent died, (2) the Financial  
1446 Advisor has declined to act, (3) no probate proceedings have been undertaken, and (4)  
1447 Legatees are beneficiaries under Decedent’s estate planning documents. Lawyer learned  
1448 of fact (1) in connection with the representation of Son. Pursuant to **Rule 1.6,**  
1449 **Confidentiality of Information**, Lawyer must protect even public information  
1450 communicated in the course of representation unless that information is widely available or

1451 generally known. In this case, the Decedent's obituary appeared in the newspaper and is  
1452 easily findable online, therefore Lawyer may disclose to Legatees fact (1) without Son's  
1453 consent. Similarly, fact (3) is easily obtainable through public records and disclosure is  
1454 permissible without Son's consent. However, fact (2) is confidential information that  
1455 Lawyer learned solely in the course of representation of Son and cannot be disclosed to  
1456 Legatees without Son's consent. With regards to fact (4), Lawyer presumably knew this  
1457 fact prior to establishing an attorney client relationship with Son, as Lawyer drafted the  
1458 documents for Decedent. Lawyer is impliedly authorized to reveal fact (4) to Legatees  
1459 because Decedent asked Lawyer for assistance in connection with the preparation of his  
1460 estate planning documents. Pursuant to **Rule 1.9, Duties to Former Clients**, absent  
1461 Son's consent, Lawyer may not represent Legatees in connection with the probate of  
1462 Decedent's will or the settlement of the estate because the representation of Legatees  
1463 would be in the same or substantially related matter to the one in which Son initially sought  
1464 Lawyer's assistance.

1465

#### 1466 **09-MO Opinion 2010-0052 (2010)**

1467 **Facts**—Lawyer drafted a will for now deceased Client. The original, signed will cannot be  
1468 located. Lawyer now represents an heir, and Lawyer is unsure whether he may disclose  
1469 the contents of the now missing will.

1470

1471 **Analysis and Conclusion**—Lawyer may not disclose information, other than an actual  
1472 will, that Lawyer considers still valid, without a court order. The court order must be issued  
1473 after the issue of confidentiality, under **Rule 1.6, Confidentiality of Information**, has been  
1474 fully presented.

1475

#### 1476 **10-RI Opinion 2013-05 (2013)**

1477 **Facts**—Client signed a revocable living trust and other estate planning documents. The  
1478 trust has since been amended several times. The original trust provided that all assets in  
1479 the trust be left to Daughter. Client bequeathed tangible personal property to Daughter in a  
1480 pourover will. The trust named Daughter as successor trustee. Client divorced, and  
1481 recently asked Lawyer to amend the trust to leave Client's home to a female friend. Lawyer

1482 determined at the time of execution of that trust amendment that Client was competent.  
1483 Client died and Daughter has asked Lawyer for assistance in settling Client's estate.  
1484 Daughter is disturbed that Client left Client's home to the female friend. Lawyer advised  
1485 Daughter about the grounds for settling aside provisions of the trust, and Daughter has  
1486 retained another lawyer to represent her and the trust. Lawyer wants to know his ethical  
1487 obligations regarding communications with the successor counsel and with the  
1488 Daughter/trustee, as well as regarding testimony at trial or at a deposition.

1489  
1490 **Analysis and Conclusion**—Pursuant to **Rule 3.7, Lawyer as a Witness**, Lawyer may not  
1491 serve as an advocate in a challenge to the trust because Lawyer will likely be a witness.  
1492 Lawyer must assert both the obligation of confidentiality under **Rule 1.6, Confidentiality**  
1493 **of Information**, and the attorney-client privilege if he is called as a witness or if he is  
1494 contacted by successor counsel or the trustee. If a court orders Lawyer to disclose  
1495 information relating to the representation of Client, disclosure would be permissible, but  
1496 Lawyer must seek to limit disclosure.

1497  
1498 **11-PA Opinion 2015-023 (2015)**

1499 **Facts**—Lawyer modified Husband and Wife's wills, which provided for division of items of  
1500 a sentimental nature between Wife's children and Husband's children. Husband died, and  
1501 because Lawyer was on vacation, Wife called another lawyer to make changes to her will.  
1502 Wife signed the new will, which provided that unless she provides a signed memorandum  
1503 that is kept with the will, her tangible property goes to her children. The new will named  
1504 one of Wife's children as executor and her new lawyer as alternate executor. Wife  
1505 subsequently scratched out the name of her new lawyer and substituted Lawyer's name.  
1506 Within two months, Wife died. Lawyer states that there is conflicting evidence as to  
1507 whether there was a memorandum, what the memorandum may have said, and whether it  
1508 was signed. Husband's children have retained Lawyer to determine the existence of a  
1509 memorandum. Their intent is to see that Wife's wishes are followed. Lawyer does not plan  
1510 to testify because Lawyer has no personal knowledge of whether there was a written  
1511 memorandum prepared and/or signed by Wife prior to her death. Lawyer is unsure  
1512 whether there is a conflict of interest if Lawyer continues to represent Husband's children.

1513  
1514 **Analysis and Conclusion**—There is no conflict of interest under **Rule 1.9, Duties to**  
1515 **Former Clients**, because although this representation is substantially related to Lawyer’s  
1516 representation of Wife, the interests of the current clients are not materially adverse to  
1517 those of Wife. The interests of the current clients are to determine whether the  
1518 memorandum referred to in Wife’s will exists and what effect, if any, that memorandum has  
1519 on the will. The interests of the current clients are to promote Wife’s estate plan, therefore  
1520 there is no conflict under **Rule 1.9** in continuing to represent them.

1521  
1522 **12-PA Opinion 2014-009 (2014)**

1523 **Facts**—Son asked Lawyer to prepare a will for Mother that would divide her estate equally  
1524 among her three children. Lawyer sent a fee agreement to Son and prepared the  
1525 requested draft documents for Mother’s review. Before Mother could review the draft  
1526 documents, Son informed Lawyer that Mother was ill and in the hospital. Lawyer has not  
1527 heard back from Son or Mother regarding rescheduling the appointment. One month after  
1528 Lawyer’s communication with Son, Lawyer was contacted by Daughter A who informed  
1529 Lawyer that Father had passed away and that she was named executrix of Father’s estate.  
1530 During Lawyer’s initial consultation with Daughter A, Lawyer learned that Mother and  
1531 Father divorced several years ago and that Mother and Father had three children,  
1532 Daughter A, Daughter B, and Son. Daughter A produced a copy of Father’s will, which  
1533 provided that the entire estate be distributed between Daughter A and Daughter B. Son  
1534 was specifically excluded from the will. Father’s original will cannot be located. Lawyer  
1535 advised Daughter A that when admitting a copy of a will for probate a hearing is necessary  
1536 and any interested party may raise objections. Lawyer believes Son will likely file an  
1537 objection to probating a copy of Father’s will. Lawyer is unsure whether there is a conflict  
1538 in representing Daughter A in the administration of Father’s will given the contact Lawyer  
1539 has had with Son in preparing estate planning documents for Mother.

1540  
1541 **Analysis and Conclusion**—No conflict of interest exists under **Rule 1.7, Conflict of**  
1542 **Interest: Current Clients**, because Lawyer does not have an attorney-client relationship  
1543 with Son. Lawyer has an attorney-client relationship with Mother because Lawyer prepared

1544 estate planning documents for Mother. Lawyer has an attorney-client relationship with  
1545 Daughter A in her capacity as executrix for Father's estate. At this time, the interests  
1546 between Mother and Daughter A are not directly adverse, and Lawyer's representation of  
1547 either client does not appear to be materially limited by the responsibilities to the other  
1548 client.

1549

1550

1551

1552 **13-TN Opinion 2014-F-158 (2014)**

1553 **Facts**—Lawyer represented Client in connection with preparing estate planning  
1554 documents at a time Client was competent. Lawyer has been ordered by the court or  
1555 subpoena to disclose, prior to Client's death and when Client apparently is no longer  
1556 competent, a will or other testamentary document executed when Client was competent.

1557

1558 **Analysis and Conclusion**—Lawyer must comply with the court's orders, but only after  
1559 Lawyer raises all non-frivolous claims that the will or other testamentary document is  
1560 protected against disclosure by the attorney-client privilege or is protected by client  
1561 confidentiality, under **Rule 1.6, Confidentiality of Information**. However, if Lawyer has  
1562 informed consent or if Lawyer believes the disclosure is impliedly authorized to carry out  
1563 the representation, then Lawyer may produce the document under **Rule 1.6** or **Rule 1.9,**  
1564 **Duties to Former Clients**.

1565

1566 **14-NE Opinion 12-08 (2012)**

1567 **Facts**—Lawyer was employed by Husband and Wife to create trusts for each of them. The  
1568 trusts name their children as beneficiaries upon their deaths. After Wife's death, Husband  
1569 employed a different lawyer to amend his trust. The amendment reduced the shares of the  
1570 trust estate that would go to two of the children named as beneficiaries. The other two  
1571 children, whose shares were not reduced, were named as successor trustees upon the  
1572 death of Husband. The trustees have employed Lawyer to provide legal services to them  
1573 in their capacities as trustees. Daughter A, whose share was reduced by the trust  
1574 amendment disputes the validity of the amendment. Daughter A asserts that Lawyer

1575 cannot represent the trustees in an adversary action regarding the validity of the trust  
1576 amendment because of an asserted conflict of interest that the trustees have as both  
1577 trustees and beneficiaries. Lawyer has never provided legal services to the trustees  
1578 personally and has never provided legal services to Daughter A in any capacity.

1579

1580 **Analysis and Conclusion—Rule 1.9, Duties to Former Clients**, is not applicable  
1581 because Daughter A has never been a client of Lawyer. There is no conflict of interest  
1582 under **Rule 1.7, Conflict of Interest: Current Clients** because there is no suggestion of  
1583 adversity between the trustees themselves or between them and any of Lawyer’s clients,  
1584 and nothing indicates that a material limitation would exist.

1585

#### 1586 **15-Philadelphia Bar Opinion 2008-10 (2008)**

1587 **Facts**—In 1996, Lawyer’s partner met with B and prepared a will, power of attorney, and  
1588 living will for her. Lawyer and Lawyer’s secretary witnessed the will which was not  
1589 notarized. In 2007, B’s stepdaughter, C, and C’s son, D, came to Lawyer’s office and  
1590 advised that B wanted to change her will to include C’s two sons as beneficiaries. C and D  
1591 made significant statements to Lawyer and his partner which would likely be relevant in a  
1592 will contest. Lawyer and his partner, along with C and D, visited B in the nursing home.  
1593 Lawyer and his partner determined that B no longer had testamentary capacity and  
1594 advised C and D that they were free to seek a second opinion on the issue of B’s  
1595 testamentary capacity. B died and her will was submitted for probate and is now the  
1596 subject of a will contest. Allegations in the proceeding are that B’s signature was either a  
1597 forgery or that the will was not otherwise properly witnessed and acknowledged. Lawyer  
1598 and his former secretary have been contacted by counsel for the executrix about the  
1599 procedures followed in executing the will, and Lawyer and Lawyer’s secretary and partner  
1600 need to know what they may reveal to counsel about the execution of the will and the  
1601 content of the Lawyer and his partner’s conversations with C and D.

1602

1603 **Analysis and Conclusion**—Neither an actual nor prospective attorney-client relationship  
1604 ever existed between Lawyer, or his partner, and C and D. Thus, the discussions with C  
1605 and D are not confidential and can be revealed to whomever the Lawyer and his partner



1606 wish. Generally, Lawyer's duty not to disclose confidential information, pursuant to **Rule**  
1607 **1.6, Confidentiality of Information**, continues after death. However, **Rule 1.14, Client**  
1608 **with Diminished Capacity**, would allow the executrix of the will, who stands in the place  
1609 of deceased B, to give her consent waiving confidentiality and allow such disclosures.  
1610 There is implied consent under **Rule 1.6(a)** giving Lawyer the authority to disclose  
1611 whatever may further the testamentary intent of B's original will. Moreover, because the  
1612 petition challenging the validity of B's will makes allegations regarding the execution of the  
1613 will and the conduct of the Lawyer, his partner, and their secretary, disclosure would be  
1614 permitted under **Rule 1.6(b)(5)**.

1615

#### 1616 **16-Philadelphia Bar Opinion 2008-9 (2008)**

1617 **Facts**—Lawyer represents Executrix of a decedent's estate. The decedent's assets were  
1618 ultimately settled in Orphan's Court. A few years later, Lawyer learned about the existence  
1619 of bonds in the decedent's name and accompanied Executrix to collect the bonds.  
1620 Executrix left with the bonds saying she would contact Lawyer the next day. Lawyer has  
1621 since called and written to Executrix urging her to administer the additional bond assets in  
1622 accordance with the law and the settlement agreement. Executrix has not responded to  
1623 Lawyer.

1624

1625 **Analysis and Conclusion**—Lawyer may disclose Executrix's failure to administer the  
1626 additional assets under **Rule 1.6, Confidentiality of Information. Rule 1.6(c)(2)** and **Rule**  
1627 **1.6(c)(3)** specifically allow disclosure, as Executrix's ongoing failure to respond is sufficient  
1628 for Lawyer to infer that Executrix intends to retain those assets illegally. **Rule 3.3, Candor**  
1629 **toward the Tribunal**, requires Lawyer to take action if any of the following has occurred—  
1630 (1) the filing of an Inventory with the Register of Wills; (2) the filing of a Status Report with  
1631 the Register of Wills indicating that the estate administration is complete; or (3) the filing of  
1632 accounting or any other document with the Orphan's Court, wherein the executrix set forth  
1633 the assets and value of the estate. Lawyer is required to disclose under **Rule 3.3** under  
1634 any of the three scenarios because the listed actions involve substantive representations  
1635 regarding the value and/or estate to either the Register of Wills or the Orphan's Court.  
1636 Prior to disclosure, Lawyer should urge Executrix to come forward with the bonds so they

1637 may be properly administered. If Executrix refuses to come forward, Lawyer will be  
1638 required to withdraw as her counsel, pursuant to **Rule 1.16(a)(1)** (mandatory withdrawal  
1639 when representation would violate the rules of professional conduct or other law).

1640

1641

1642

1643

1644 **17-ME Opinion 192 (2007)**

1645 **Facts**—Lawyer is asked to disclose confidential information of Client, now deceased, to  
1646 Client’s court-appointed Personal Representative in circumstances where Personal  
1647 Representative has requested the information, citing a rule of evidence as the authority for  
1648 waiving the attorney-client privilege on behalf of Client.

1649

1650 **Analysis and Conclusion**—Pursuant to **Rule 1.6, Confidentiality of Information**,  
1651 Lawyer may disclose the information if the request would further Client’s interests.  
1652 However, if Lawyer believes the information sought would not further Client’s purpose or  
1653 would be detrimental to Client, Lawyer may waive the privilege only as required by law or  
1654 by court order.

1655

1656 **18-MD Opinion 2009-05 (2009)**

1657 **Facts**—Law Firm provided *pro bono* will drafting services for elderly Client. Law Firm  
1658 discovered Client had significant assets and Client directed Law Firm to locate 35  
1659 proposed beneficiaries. Client died before executing the final draft of the will. Law Firm  
1660 sought advice from Bar Counsel, who advised them to seal their files, that attorney-client  
1661 privilege survives Client’s death, and that Law Firm can no longer discuss their  
1662 representation of Client with anyone. Personal Representatives possessing Letters of  
1663 Administration for Client’s estate seek a copy of the unexecuted will.

1664

1665 **Analysis and Conclusion**—Personal Representatives have all the rights and privileges of  
1666 Client. Thus, Personal Representatives are entitled to possess anything belonging to  
1667 Client, including the unexecuted copy of the will. Because Personal Representatives are,

1668 for legal purposes, Client, giving the unexecuted will to Personal Representatives does not  
1669 amount to a disclosure and does not trigger **Rule 1.6, Confidentiality of Information**.  
1670 Even if giving the will to Personal Representatives amounted to a disclosure, **Rule**  
1671 **1.6(b)(6)** permits disclosure to comply with a court order. The Letters of Administration  
1672 presented to Law Firm by Personal Representatives are a court order. Moreover, **Rule**  
1673 **1.15, Safekeeping Property**, requires a lawyer to promptly deliver to Personal  
1674 Representatives Client's property, including the unexecuted will.

1675

1676 **19-PA Opinion 2009-072 (2009)**

1677 **Facts**—Lawyer represented Husband and Wife jointly for a number of years and prepared  
1678 numerous revisions of their wills. Wife died and an issue was raised by Husband, claiming  
1679 Wife closed a joint certificate of deposit and placed the proceeds in an account in her sole  
1680 name, contrary to their estate plan. Husband filed a claim for the funds against Wife's  
1681 estate and wants Lawyer to disclose information relating to his representation of Wife.

1682

1683 **Analysis and Conclusion**—Given these facts, it is assumed that Husband and Wife  
1684 waived confidentiality with respect to Lawyer's joint representation of them in their estate  
1685 planning. Even if there was no express waiver of confidentiality, confidentiality in joint  
1686 representation is generally presumed waived, unless contrary intention is shown. Because  
1687 Wife waived confidentiality with respect to Husband in connection with their estate  
1688 planning, Lawyer may not refuse to disclose information relating to the joint representation  
1689 of Husband and Wife on the basis of **Rule 1.6, Confidentiality of Information**.

1690

1691 **20-NH Opinion 2008-09/1 (2008)**

1692 **Facts**— (1) Lawyer is drafting a will or other estate planning documents for Client and at  
1693 the request of Client identifies himself as the named executor or other fiduciary in the  
1694 documents; (2) Lawyer identifies himself, by default, as executor or other fiduciary in  
1695 Client's estate planning documents; and (3) Lawyer solicits and/or requires Client to  
1696 identify Lawyer as fiduciary in estate planning documents being prepared by Lawyer.

1697

1698 **Analysis and Conclusion**—Situation (1): before Lawyer can begin drafting a document  
1699 naming Lawyer as fiduciary, Lawyer must have the requisite knowledge and experience to  
1700 satisfy the competence requirements of **Rule 1.1, Competence**, to perform the fiduciary  
1701 role. Lawyer must make adequate disclosures to comply with **Rule 1.4(a)(2)** (consult with  
1702 client regarding means of achieving client objectives) and **Rule 1.4(b)** (explain matters to  
1703 allow client to make informed decisions), and in doing so should disclose Lawyer’s  
1704 availability to serve as the fiduciary, discuss whether Client’s goals will be best served by  
1705 Lawyer serving as fiduciary, discuss that the professional fiduciary is typically fully bonded  
1706 and whether or not a lawyer who will act as a fiduciary will be covered by errors and  
1707 omissions insurance, discuss specifically the relative costs of having Lawyer or others  
1708 serve as fiduciary, discuss the option of appointing Lawyer as co-trustee along with a  
1709 family member to assist with the complexities of trust administration, and discuss the fact  
1710 that if Client appoints someone else as fiduciary they may retain a lawyer to advise and  
1711 assist them as needed.

1712  
1713 Pursuant to **Rule 2.1, Advisor** Lawyer must not allow his potential self-interest in serving  
1714 as a fiduciary interfere with his exercise of independent professional judgment in  
1715 recommending to Client the best choices for fiduciary. Moreover, Lawyer must consider  
1716 whether serving as a fiduciary for Client would violate **Rule 1.7, Conflict of Interest:**  
1717 **Current Client**. Although being named fiduciary does not always trigger the **Rule 1.7(b)**  
1718 (representation notwithstanding conflict) requirement of confirming Client’s informed  
1719 consent in writing, it would be the best practice for Lawyer to obtain Client’s informed  
1720 consent in writing. Finally, Lawyer should advise Client the effect that **Rule 1.6,**  
1721 **Confidentiality of Communications**, may have on Lawyer while acting in a fiduciary  
1722 capacity. Lawyer may be the primary witness in a will contest, which could complicate the  
1723 fiduciary’s role, and the fiduciary has the authority to waive attorney-client privilege,  
1724 thereby giving Lawyer/fiduciary the power to waive the privilege with respect to Client’s  
1725 communications with Lawyer.

1726

1727 Situation (2) is ethically prohibited by the Rules and could not be properly cured by  
1728 subsequent client discussions and disclosure. Situation (3) may create a business interest  
1729 that would trigger disclosures under **Rule 1.8(a)** (business transactions with clients).

1730

1731 **21-AL Opinion 2010-03 (2010)**

1732 **Facts**—Lawyer is retained to assist in the administration or probate of an estate and  
1733 discovers that Personal Representative has misappropriated the estate funds or property.

1734

1735 **Analysis and Conclusion**—The general rule is that Lawyer represents the individual who  
1736 hired him to assist in the administration or probate of the estate. If that person has only  
1737 one role and is not a fiduciary, Lawyer represents only that person, unless Lawyer and  
1738 client agree otherwise. If the person who retained Lawyer is Personal Representative, then  
1739 Lawyer represents Personal Representative individually, unless Personal Representative  
1740 and Lawyer agree otherwise. Lawyer must be careful not to give the impression that he  
1741 also represents the beneficiaries of the estate. To avoid violating **Rule 4.3, Dealing with**  
1742 **Unrepresented Persons**, Lawyer must advise the beneficiaries and other interested  
1743 parties in the estate known to Lawyer that Lawyer's only client is Personal Representative.  
1744 Pursuant to **Rule 1.6, Confidentiality of Information** and **Rule 3.3, Candor Toward the**  
1745 **Tribunal**, if Lawyer has actual knowledge that Personal Representative misappropriated  
1746 funds or property, Lawyer must attempt to convince Personal Representative to either  
1747 replace the misappropriated funds or to inform the court of the misappropriation. If  
1748 Personal Representative refuses to do so, Lawyer should withdrawal from the matter and  
1749 upon withdrawal ask the court to order an accounting of the estate.

1750

1751 **22-WA Opinion 2107 (2006)**

1752 **Facts**—Lawyer is guardian for Incapacitated and also serves as lawyer for the  
1753 guardianship. In Lawyer's capacity as guardian, Lawyer has concluded that a special  
1754 needs trust should be established for the benefit of Incapacitated. Lawyer is unsure  
1755 whether Lawyer, as guardian, can appoint himself to be the trustee of the special needs  
1756 trust.

1757

1758 **Analysis and Conclusion**—Lawyer’s duties in his role as guardian and trustee do not  
1759 necessarily coincide, and the establishment of the special needs trust does not necessarily  
1760 result in termination of the guardianship. Thus, it would be a conflict for Lawyer to seek  
1761 appointment as trustee under **Rule 1.7, Conflict of Interest: Current Clients**.  
1762 Furthermore, appointment of the Lawyer/guardian as trustee would violate **Rule 1.8:**  
1763 **Conflict of Interest: Current Clients: Specific Rules**.

1764

1765 **23-NC Opinion 2006-11 (2006)**

1766 **Facts**—Lawyer is asked by Third Party to prepare estate planning documents for Client.

1767

1768 **Analysis and Conclusion**—Pursuant to **Rule 5.4(c)** (maintaining professional judgment)  
1769 Lawyer may not allow Third Party to direct or regulate Lawyer’s professional judgment in  
1770 rendering legal services for Client. Similarly, **Rule 1.8(f)** (fee paid by party other than the  
1771 client) provides that when Lawyer’s services are paid for by someone other than Client,  
1772 Lawyer may not accept the compensation unless Client gives informed consent, there is  
1773 no interference with Lawyer’s independent professional judgment or with the client-lawyer  
1774 relationship, and confidential information relating to representation of Client is protected.  
1775 Thus, Lawyer may not at the request of Third Party prepare estate planning documents for  
1776 Client that purport to speak solely for Client without consulting with, exercising  
1777 independent professional judgment on behalf of, and obtaining consent from Client.

1778

1779 **24-MA Opinion 06-01 (2006)**

1780 **Facts**—Lawyer is unsure whether she may draft Client’s will naming Lawyer as executrix  
1781 and whether as executrix Lawyer can retain herself as counsel.

1782

1783 **Analysis and Conclusion**—Pursuant to **Rule 2.1, Advisor** Lawyer must exercise  
1784 independent professional judgment and render candid advice. Lawyer’s interest in being  
1785 named and getting fees as an executrix and counsel to the executrix are personal interests  
1786 of Lawyer that may, depending on the qualifications of Lawyer, not be in the best interest  
1787 of Client. However, Lawyer may name herself as executrix and retain herself as counsel to  
1788 the executrix if she reasonably believes the representation will not be adversely affected

1789 and she obtains Client’s consent, pursuant to **Rule 1.7, Conflict of Interest: Current**  
1790 **Clients.**

1791

1792

1793 **25-VA Opinion 1811 (2005)**

1794 **Facts**—A and B are co-executors of an estate. Lawyer represented A. B has separate  
1795 counsel. Lawyer’s representation of A has recently ended and A has new counsel. Lawyer  
1796 has transferred A’s file to the new lawyer but has retained a copy of the materials. During  
1797 the course of Lawyer’s representation of A, A and B entered into an agreement that each  
1798 would fully disclose financial information for purposes of administering the estate. Counsel  
1799 for B has now contacted Lawyer asking for financial information from A’s file as tax filing is  
1800 due at the end of the month. The requested documents come within the terms of the  
1801 agreement. A will not consent to Lawyer’s release of the documents. Lawyer declined to  
1802 provide his copy of the documents and instead referred B’s counsel to A’s new counsel.

1803

1804 **Analysis and Conclusion**— Lawyer’s duty of confidentiality continues after the client-  
1805 lawyer relationship has terminated. The contents of A’s file are protected by **Rule 1.6,**  
1806 **Confidentiality of Information**, and Lawyer is prohibited from disclosing the contents of  
1807 A’s file unless one of the exceptions to **Rule 1.6** applies. Given these facts, the disclosure  
1808 requested by B’s counsel does not fall within any exception to **Rule 1.6**. The agreement  
1809 between A and B is not “law,” which would permit disclosure under **Rule 1.6(b)(6)** [Note: in  
1810 Colo. RPC, this is Rule 1.6(b)(7)] (disclosure to comply with other law or court order).  
1811 Therefore, Lawyer must not disclose the information until he is required to do so by a court  
1812 order. Although there is a tenuous argument that **Rule 1.15, Safekeeping Property**, as it  
1813 requires prompt delivery of funds to client or third party, would require Lawyer to give the  
1814 information to B’s counsel, **Rule 1.6** is the proper authority for resolving the present issue  
1815 and should prevail over this uncertain extension of **Rule 1.15**.

1816

1817 **26-NC Opinion 2002-7 (2002)**

1818 **Facts**—Lawyer for deceased Client is asked to testify in a will contest or other litigation  
1819 about the distribution of Client’s estate. Such testimony will require Lawyer to disclose  
1820 Client’s confidences.

1821  
1822 **Analysis and Conclusion**—Lawyer may reveal confidential information of a deceased  
1823 client if disclosure was impliedly authorized by the client during client’s lifetime as  
1824 necessary to carry out the goals of the representation. See **Rule 1.6(d)(2)** [Note: the  
1825 equivalent in Colo. RPC is Rule 1.6(a)]. It is assumed that a client impliedly authorized  
1826 release of confidential information to the personal representative of client’s estate after  
1827 client’s death in order that the estate might be properly and thoroughly administered.  
1828 Lawyer may testify in the will contest or other litigation if the Personal Representative  
1829 consents to the disclosure. Moreover, **Rule 1.6(b)(6)** [Note: the equivalent in Colo. RPC is  
1830 Rule 1.6(b)(7)] permits Lawyer to disclose client confidences if required by law or court  
1831 order. If someone other than the Personal Representative calls Lawyer as a witness,  
1832 Lawyer may testify to relevant confidential information of Client if Lawyer determines that  
1833 attorney-client privilege does not apply as a matter of law or the court orders Lawyer to  
1834 testify on this basis.

1835  
1836 **27-ABA Formal Opinion 02-426 (2002)**  
1837 **Facts**—(1) Client asks Lawyer to serve as a fiduciary under a will or trust that the lawyer is  
1838 preparing for Client; (2) while serving as fiduciary of an estate or trust, Lawyer wishes to  
1839 appoint himself or herself or a member of Lawyer’s firm to represent Lawyer in Lawyer’s  
1840 capacity as fiduciary; or (3) while serving as fiduciary, Lawyer or Lawyer’s firm is asked to  
1841 represent either a beneficiary of a creditor of the estate or trust.

1842  
1843 **Analysis and Conclusion**—Situation (1), Lawyer, having satisfied Lawyer’s obligations  
1844 arising under **Rule 1.4(b)** (informed decisions of the client) or **Rule 1.7(b)** (permissible  
1845 representation of a current client despite a conflict of interest), if applicable, may serve as  
1846 a fiduciary under a will or trust that Lawyer is preparing for Client. Situation (2), there is no  
1847 inherent conflict of interest under **Rule 1.7** when Lawyer, serving as fiduciary, appoints  
1848 Lawyer or Lawyer’s law firm to serve as legal counsel for Lawyer as fiduciary, absent



1849 special circumstances such as when, pursuant to law of the jurisdiction or by agreement,  
1850 the lawyer for the fiduciary also represents the estate as an entity or the beneficiaries of  
1851 the trust. When serving as fiduciary and as lawyer for the fiduciary, however, the amount of  
1852 compensation paid Lawyer and Lawyer's firm for services in each capacity must be  
1853 reasonable. Situation (3), Rule 1.7 will ordinarily prohibit Lawyer or Lawyer's law firm from  
1854 representing a beneficiary or creditor in a matter directly adverse to an estate or trust for  
1855 which Lawyer is serving as fiduciary. Lawyer and Lawyer's firm may, however, represent a  
1856 creditor or beneficiary in unrelated matters upon compliance with Rule 1.7(b), including  
1857 obtaining the informed consent of each affected client, confirmed in writing.

1858

1859

1860

#### 1861 **28-ABA Formal Opinion 02-428 (2002)**

1862 **Facts**—Lawyer is already providing estate planning services for Client. Client asks if she  
1863 may recommend Lawyer to Testator to help him plan his estate. Testator is a widower  
1864 whom Lawyer has not met before. Testator's nearest relatives are several nephews and  
1865 nieces. One of the nieces is Client, a potential beneficiary under Testator's will. Client says  
1866 she will pay Lawyer any part of the fee Testator does not pay.

1867

1868 **Analysis and Conclusion**—Lawyer may represent Testator as long as Lawyer does not  
1869 permit Client to direct or regulate Lawyer's professional judgement pursuant to **Rule 5.4(c)**  
1870 (maintaining professional judgement). If Client agrees to pay or assure Lawyer's fee,  
1871 Testator's informed consent to the arrangement must be obtained, and the other  
1872 requirements of **Rule 1.8(f)** (fee paid by party other than the client). must be satisfied.

1873 Pursuant to **Rule 1.6, Confidentiality of Information**, Lawyer must obtain clear guidance  
1874 from Client as to the extent to which Lawyer may use or reveal Client's protected  
1875 information in representing the Testator. Lawyer should advise Testator that he is  
1876 concurrently performing estate planning services for Client. No conflict of interest arises  
1877 under **Rule 1.7, Conflict of Interest: Current Clients**, because in this situation there is  
1878 ordinarily no significant risk that Lawyer's representation of either client will be materially  
1879 limited by Lawyer's representation of the other client.

1880

1881 **29-ABA Opinion 05-434 (2005)**

1882 **Facts**—Lawyer is retained by Testator to prepare instruments disinheriting Beneficiary,  
1883 who Lawyer represents on unrelated matters.

1884

1885 **Analysis and Conclusion**—Ordinarily there is no conflict of interest under **Rule 1.7,**  
1886 **Conflict of Interest: Current Clients**, when Lawyer undertakes an engagement by  
1887 Testator to disinherit Beneficiary, who Lawyer represents on unrelated matters. However, if  
1888 Testator is restricted by a contractual or quasi-contractual legal obligation from  
1889 disinheriting Beneficiary or if there is a significant risk that Lawyer’s responsibilities to  
1890 Testator will be materially limited by Lawyer’s responsibilities to Beneficiary, as may be the  
1891 case if Lawyer finds herself advising Testator whether to proceed with the disinheritance,  
1892 there will likely be a conflict of interest under **Rule 1.7**.

1893

1894 **30-ABA Formal Opinion 94-380 (1994)**

1895 **Facts**—Lawyer represents Client who is the fiduciary in a trust or estate matter and is  
1896 unsure how this affects his obligations under the Rules.

1897

1898 **Analysis and Conclusion**—All the Rules prescribing Lawyer’s duties to a client apply.  
1899 The fact that Client is a fiduciary and has obligations toward the beneficiaries does not in  
1900 itself either expand or limit Lawyer’s obligations to Client under the Rules, nor impose on  
1901 Lawyer obligations toward the beneficiaries that Lawyer would not have toward other third  
1902 parties. Specifically, Lawyer’s obligation to preserve Client’s confidences under **Rule 1.6,**  
1903 **Confidentiality of Information**, is not altered by the circumstance that Client is a  
1904 fiduciary.

1905

1906 **31-NY Opinion 775 (2004)**

1907 **Facts**—Lawyer drafted a will for an elderly former Client and maintained the original will for  
1908 safekeeping. Sometime later, Client signed a letter, evidently prepared by someone else,  
1909 requesting the return of the original will. Lawyer has reason to believe that Client is not

1910 competent and may be acting under the influence of a family member who would benefit if  
1911 the will is destroyed and Client's estate passes through intestacy.

1912  
1913 **Analysis and Conclusion**—Generally Lawyer must return the will to Client upon Client's  
1914 request. Nothing in the Rules bars Lawyer from contacting Client directly in order to  
1915 ascertain his genuine wishes regarding the disposition of the original will or to make a  
1916 judgment about competence. If, after conducting whatever inquiry Lawyer deems  
1917 appropriate, Lawyer still believes Client is not or may not be competent, Lawyer may seek  
1918 judicial guidance on how to proceed.

1919  
1920  
1921  
1922 **32-PA Opinion 2005-107 (2005)**  
1923 **Facts**—Lawyer is unsure whether he may represent deceased Client's  
1924 children/beneficiaries with regard to the administration of Client's estate where he provided  
1925 estate planning advice, served as scrivener of Client's will, and initially counseled Client  
1926 with regard to an anticipated purchase of an interest in Client's family's business prior to  
1927 Client's hiring of another law firm to handle that matter. Client and Client's Wife were  
1928 divorced, and no lawyer at Lawyer's firm represented either Client or Wife with regard to  
1929 the divorce and property settlement agreement. Lawyer prepared to meet with the  
1930 executor of Client's estate, but the meeting never took place and Lawyer was informed by  
1931 Client's father that another law firm would be handling the administration of the estate.  
1932 Lawyer does not anticipate any beneficiary or other interested person will challenge  
1933 Client's will. Lawyer also does not anticipate the initiation of any litigation regarding his  
1934 representation of Client. Moreover, it is assumed that the interests of Client's children are  
1935 equal and not adverse.

1936  
1937 **Analysis and Conclusion**—**Rule 3.7, Lawyer as a Witness** does not prohibit Lawyer's  
1938 representation of Client's children/beneficiaries because Lawyer does not anticipate the  
1939 initiation of any litigation which would require him to be called as a witness regarding his  
1940 representation of Client. Should circumstances change and it becomes apparent that

1941 Lawyer will be called as a witness, it may be appropriate for Lawyer to withdraw from the  
1942 representation unless one of the exceptions listed in **Rule 3.7(a)** (exceptions to lawyer as a  
1943 witness) is present. It appears that the interests of Client's children/beneficiaries are not  
1944 adverse to those of Client, therefore **Rule 1.9, Duties to Former Clients** does not prohibit  
1945 the representation. Moreover, **Rule 1.7, Conflict of Interest: Current Clients** does not  
1946 preclude Lawyer's representation of Client's children/beneficiaries because it does not  
1947 appear that there is a significant risk that his representation of children/beneficiaries will be  
1948 materially limited by his responsibilities to Client.

1949

### 1950 **33-KS Opinion 99-3 (1999)**

1951 **Facts**—Lawyer represents Decedent's intestate estate in which Widow is the  
1952 administrator. The two heirs are Widow and Decedent's Son from a prior marriage. There  
1953 is no question of heirship, and each heir has the right to inherit one half of any property  
1954 listed in the name of Decedent only. Widow lives on an improved quarter section and  
1955 appears to have the right to have the section set aside as her homestead. Widow has the  
1956 right to household goods set aside to her, as well as a statutory allowance. Substantial  
1957 joint tenancy property is passing to Widow. The intestate estate in Decedent's name is  
1958 also substantial. There is considerable grain in storage, some of which is passing through  
1959 joint tenancy and some of which is in Decedent's name only. Lawyer is unsure whether he  
1960 may represent Widow in her personal capacity as heir and in her capacity as administratrix  
1961 of the estate.

1962

### 1963 **Analysis and Conclusion**—Pursuant to **Rule 1.7, Conflict of Interest: Current Clients**

1964 Lawyer may not represent Widow in her personal capacity as heir and in her capacity as  
1965 administratrix of the estate. Widow has a personal conflict in roles she cannot personally  
1966 reconcile, thus the conflict is nonconsentable. The only exception is if all the heirs in the  
1967 estate agree to Widow's position, which is unlikely under these circumstances.

1968

### 1969 **34-VT Opinion 2000-12 (2000)**

1970 **Facts**—Firm A in VT was retained by out of state Firm B to review deeds and other real  
1971 estate documents drafted by Firm B to effect an estate tax planning transaction for Firm

1972 B's clients, Husband and Wife. Firm A's role was limited to the review and approval of the  
1973 deeds and other transfer documents. No significant financial information was provided to  
1974 Firm A. Firm A did not participate in meetings with Husband and Wife and Firm B. The  
1975 transfer documents were completed and recorded. Husband died a year later. .  
1976 Proceedings to open an ancillary administration of Husband's estate were commenced in  
1977 VT. Firm B retained Firm A to represent Personal Representative and Husband's estate in  
1978 the ancillary proceedings. Wife, through other counsel, is contesting the ancillary  
1979 proceeding and the appointment of Personal Representative in the ancillary proceeding  
1980 and asserts that Firm A has a conflict of interest.

1981  
1982 **Analysis and Conclusion**—Husband and Wife were the clients of both Firm A and Firm  
1983 B. Firm A and Firm B should be treated as co-counsel in a single matter with regard to the  
1984 estate planning. It is assumed that Wife is no longer a present client of Firm A or firm B  
1985 based on her having obtained other counsel. Pursuant to **Rule 1.9, Duties to Former**  
1986 **Clients**, Firm A is prohibited from undertaking this representation because the interest of  
1987 Husband's estate and Personal Representative are adverse to those of Wife and are of the  
1988 same or substantially related matter. Moreover, the fact that Wife is contesting the  
1989 representation is evidence that Firm A does not have consent and will not be able to obtain  
1990 Wife's consent.

1991  
1992 **35-MA Opinion 97-3 (1997)**

1993 **Facts**—Lawyer assisted in drafting a will for Husband's First Wife. First Wife's will  
1994 established a trust with life benefits to Husband, who was given a power of appointment  
1995 over the corpus of the trust. If the power was not exercised, the corpus would go to the  
1996 children of Husband's first marriage. First Wife died and Husband married Second Wife.  
1997 Before Husband's death, he revised his will to exercise the power of appointment granted  
1998 by First Wife in favor of Second Wife. After Husband's death, Children (from Husband's  
1999 first marriage) sued the executor of Husband's estate and Second Wife, contending their  
2000 mother intended the corpus to go to Children and that Husband agreed with First Wife not  
2001 to exercise the power of appointment. In the litigation to date, Children have presented  
2002 some evidence supporting their contention, but other evidence has indicated that First Wife

2003 intended Husband should be free to exercise the power according to his responsibilities at  
2004 the time. Lawyer is unsure whether he is barred from defending Husband's estate in the  
2005 suit because he assisted First Wife in preparing her will.

2006  
2007 **Analysis and Conclusion**—Lawyer should not represent Husband's estate in a lawsuit  
2008 brought by Children, who would have received the corpus had Husband not revised his will  
2009 to exercise the power of appointment. Such a representation would violate **Rule 1.9,**  
2010 **Duties to Former Clients** because Lawyer's participation in drafting First Wife's will is  
2011 substantially related to the matter of the lawsuit and Children's allegations are sufficient to  
2012 show representing Husband's estate in this matter would be materially adverse to the  
2013 interests of First Wife.

2014  
2015 **36-NC Opinion 99-4 (1999)**

2016 **Facts**—Mother loaned money to Son A. Subsequently, Mother signed a statement  
2017 indicating the loan had been settled. Mother died testate, leaving a will devising the  
2018 majority of her estate to her five children equally and naming her three Sons, A, B, and C,  
2019 co-executors. Letters testamentary were granted to Sons A, B, and C. Son B hired Lawyer  
2020 to assist with the administration of the estate. Sons B and C believe the money loaned to  
2021 Son A by Mother during her lifetime should be collected by the estate as debt or treated as  
2022 an advance to Son A. Lawyer filed a motion to have Son A's letters testamentary revoked  
2023 and wrote a letter to Son A requesting repayment of the debt. Lawyer is unsure whether he  
2024 may make a motion to remove Son A as a co-executor and pursue a claim against him.

2025  
2026 **Analysis and Conclusion**—When Lawyer accepted employment in regard to the estate,  
2027 Lawyer undertook to represent the personal representatives their official capacity and the  
2028 estate as an entity. After undertaking to represent all the co-executors, Lawyer may not  
2029 take action to have one co-executor removed.

2030  
2031 **37-KY Opinion E-401 (1997)**

2032 **Facts**—Lawyer represents Client, who is a fiduciary of a decedent's estate or trust. [Note:  
2033 this Opinion is not in response to a specific set of facts, but is an exposition of a lawyer's

2034 obligations under the Rules when representing a fiduciary. The Opinion cites extensively  
2035 from ABA Formal Op. 94-380 (1994) and the ACTEC Commentaries on the Model Rules of  
2036 Professional Conduct.]

2037

2038 **Analysis and Conclusion**—Lawyer who represents a Client who is a fiduciary of an  
2039 estate or trust does not represent the estate or trust. Lawyer’s obligation to Client is not  
2040 expanded or limited by the Rules, and Lawyer does not have obligations to the  
2041 beneficiaries of the decedent’s trust or estate that Lawyer would not have toward third  
2042 parties. Lawyer’s obligations to preserve client confidences under **Rule 1.6,**  
2043 **Confidentiality of Information,** is not altered by the fact that Client is a fiduciary.  
2044 Pursuant to **Rule 1.7, Conflicts of Interest: Current Clients,** Lawyer may represent the  
2045 beneficiaries of decedent’s estate or trust if Lawyer explains the limitations on Lawyer’s  
2046 actions in the event a conflict arises and the consequences if a conflict occurs and obtains  
2047 consent from the multiple clients.

2048

#### 2049 **38-AZ Opinion 96-07 (1996)**

2050 **Facts**—Lawyer represents Client who has requested that Lawyer draft a revocable living  
2051 trust with a pour over will. Client has requested that Lawyer be named as the personal  
2052 representative and as successor trustee. Lawyer has advised Client that Lawyer would  
2053 prefer that Client name a family member, a trusted friend or a corporate fiduciary such as a  
2054 bank as personal representative and successor trustee. Client has rejected the option of a  
2055 corporate fiduciary and the only family member Client trusts to serve in such a capacity  
2056 has declined.

2057

2058 **Analysis and Conclusion**—Lawyer is not prohibited by the Rules from writing a will or  
2059 trust that names Lawyer as personal representative or as successor trustee. Such a  
2060 representation does not constitute a gift under **Rule 1.8(c)** (soliciting gifts from clients), but  
2061 Lawyer may not recover trustee fees in addition to legal fees for the same work. Moreover,  
2062 pursuant to **Rule 2.1, Advisor** Lawyer must exercise independent professional judgment  
2063 when acting as both trustee and counsel to the estate.

2064

2065 **39-MT Opinion 951231 (1995)**

2066 **Facts**—Lawyer is frequently asked by Clients to serve as either primary or successor  
2067 trustee and/or as personal representative in his will.

2068  
2069 **Analysis and Conclusion**— Neither **Rule 1.8(c)** (soliciting gifts from clients) nor any other  
2070 Rule prohibits Lawyer from being named personal representative or trustee in Client’s will.

2071  
2072 **40-MD Opinion 2000-44 (2000)**

2073 **Facts**—Lawyer represented Trustee of a testamentary trust who was also a lifetime  
2074 beneficiary of that trust. Trustee was mother and grandmother of the contingent  
2075 beneficiaries of the trust. Two of the contingent beneficiaries were daughters X and Y. In  
2076 litigation that concluded a year ago, Lawyer represented Trustee and X in litigation against  
2077 Y. Information regarding the trust was withheld by Lawyer, Trustee, and X from Y. During  
2078 the course of litigation, Trustee resigned her position of Trustee. X then became the  
2079 successor trustee/contingent beneficiary. Lawyer continued to represent X as successor  
2080 trustee and in an individual capacity. Trustee died after conclusion of the litigation.  
2081 Under the terms of the trust, the trust was to be terminated and the property in the trust  
2082 was subject to distribution to the beneficiaries upon Trustee’s death. Nevertheless, X, in  
2083 her capacity as successor trustee, took control of the assets and income of the trust to  
2084 complete renovations of the trust property. Following the advice of Lawyer, X expended  
2085 trust income, borrowed money, and performed renovations to trust property without  
2086 consulting or getting permission from the other vested beneficiaries, including Y. Lawyer  
2087 indicates that X was relying in part on an exculpatory clause in the trust that would appear  
2088 to insulate her from a number of the categories of claims which might be brought against  
2089 her. Y asked Lawyer to discontinue representation of X due to a conflict of interest arising  
2090 out of the fact that Y is now a one-third owner of the trust property and does not want  
2091 Lawyer who had previously been against her in litigation to represent her interests. Lawyer  
2092 stated he was not at present representing X in her individual capacity, but rather only in  
2093 her capacity as trustee. Lawyer has attempted to avoid problems relating to the claims of  
2094 impermissible conflict by requesting that X’s estate and trust related matters be addressed  
2095 to him in separate capacity and billed separately from X in her individual capacity.



2096  
2097 **Analysis and Conclusion**—There are potential conflicts between Lawyer’s client X as an  
2098 individual and client X as trustee. Pursuant to **Rule 1.7, Conflicts of Interest: Current**  
2099 **Clients**, Lawyer should withdraw from representing X in her capacity as trustee. Given  
2100 these facts, it is evident that there would be adverse effects resulting from representing X  
2101 in her dual capacities, therefore consent will not resolve this issue under **Rule 1.7**.

2102  
2103 **41-PA Opinion 96-036 (1996)**  
2104 **Facts**—Lawyer recommended Client establish a trust during Client’s lifetime. Client has  
2105 asked Lawyer to draft the trust document and serve as trustee.  
2106  
2107 **Analysis and Conclusion**—The Rules do not prohibit Lawyer from naming himself as  
2108 trustee of Client’s trust that Lawyer is drafting, when asked to do so by Client, provided  
2109 that Lawyer complies with the relevant provisions of the Rules and has not unduly  
2110 influenced or improperly solicited Client to name Lawyer as trustee. Moreover, to comply  
2111 with **Rule 1.4, Communications**, Lawyer must advise Client of the duties of a trustee,  
2112 Lawyer’s abilities to perform those duties, the availability and ability of others to perform  
2113 those duties, the compensation payable to a trustee, the potential conflicts of interest, as  
2114 well as any other factors relevant to the particular circumstances of Client. Pursuant to  
2115 **Rule 1.1, Competence**, Lawyer must also determine whether he is able to perform the  
2116 duties of trustee competently. Moreover, Lawyer should discuss possible material limitation  
2117 on Lawyer’s ability to give independent with respect to serving as trustee in light of his own  
2118 interests to comply with **Rule 1.7, Conflicts of Interest: Current Clients**.

2119  
2120 **42-PA Opinion 96-74 (1996)**  
2121 **Facts**—Client asks Lawyer to act as trustee under what had been an inter vivos revocable  
2122 trust, the grantor of which has recently died. A principal asset of the trust is shares in a  
2123 family-owned corporation, which are the subject of a buy-sell agreement with other family  
2124 members, and a dispute is in the offing as to the price to be paid for those shares.

2125

2126 **Analysis and Conclusion**—Given these facts, if Lawyer acts as trustee, Lawyer would be  
2127 in the position of seeking the highest price for the trust, while the family members would be  
2128 seeking to acquire the shares at the lowest price. This would create a conflict of interest  
2129 contrary to **Rule 1.7, Conflicts of Interest: Current Clients**, prohibiting Lawyer from  
2130 acting on behalf of the trust, unless Lawyer obtains informed consent. [Note: this Opinion  
2131 is unclear regarding in what capacity Client is requesting Lawyer to assume the duties of  
2132 trustee.]

2133

### 2134 **43-NC Opinion RCP 229 (1996)**

2135 **Facts**—(1) Husband and Wife asked Lawyer to assist them with estate planning. Husband  
2136 and Wife agreed that all the property of the first to die would be left to the surviving spouse  
2137 with the exception of a small trust that would be established at Husband's death for the  
2138 benefit of the couple's minor children. The trust would be funded prior to the distribution of  
2139 the residuary estate to Wife. Husband has a terminal interest and the couple anticipates  
2140 that Husband will be the first to die. The wills were drafted and signed. Husband  
2141 subsequently called Lawyer and expressed concern about Wife's ability to manage her  
2142 funds and asked Lawyer to draft a codicil to his will increasing the amount put in trust for  
2143 the minor children, thereby reducing the residuary bequest to Wife.

2144 (2) In matter unrelated to Situation (1), different Husband X meets with Lawyer regarding  
2145 his personal estate plan. Husband X wants to minimize Wife X's share of his estate  
2146 because he believes she suffers from dementia. It is Husband X's second marriage, there  
2147 are no children, and Wife X has her own assets.

2148

2149 **Analysis and Conclusion**—Situation (1): Pursuant to **Rule 5.1(a)** [Note: this Rule, since  
2150 superseded, is comparable to **Rule 1.7, Conflict of Interest: Current Clients** of Colo.  
2151 RPC] Lawyer may only prepare the codicil without informing Wife if there was no clearly  
2152 expressed intent by Husband and Wife, at the time of the preparation of the original estate  
2153 planning documents, that neither spouse would change the estate plan without informing  
2154 the other spouse and if the provisions of the codicil are consistent with the best interests of  
2155 Wife.

2156

2157 Situation (2): **Rule 7.1(a)(1)** [Note: this Rule, since superseded, is comparable to **Rule 1.2**,  
2158 **Scope of Representation and Allocation of Authority Between Client and Lawyer**, of  
2159 Colo. RPC] permits Lawyer to seek the lawful objectives of Husband X, which includes  
2160 assisting Husband X in preparing an estate plan that will minimize Wife X's share of  
2161 Husband X's estate, through reasonably available means permitted by the laws and the  
2162 Rules.

2163  
2164 **44-PA Opinion 98-44 (1998)**  
2165 **Facts**—Client asks Lawyer to prepare a new will. At the conference, Client was  
2166 accompanied by Friend, whom Client specifically requested sit in with him during the  
2167 conference. Certain changes from Client's previous will were made, including an increase  
2168 in the bequest to Client's Daughter and a minor increase in a gift to Friend. Inquirer felt  
2169 there was no aspect of improper influence on Client or other untoward conduct on the part  
2170 of Friend. Lawyer set about preparation of the new will, but Client died before the will could  
2171 be signed. Daughter has requested Lawyer disclose to her the proposed changes Client  
2172 would have made to his will.

2173  
2174 **Analysis and Conclusion**—Pursuant to **Rule 1.6(a)** (implied authorization to disclose  
2175 information) Lawyer has implied authority to take appropriate action on Client's behalf,  
2176 which would include disclosing Client's proposed changes to his will. Failure to take such  
2177 action in some circumstances would be a violation of **Rule 8.4(d)** (conduct prejudicial to  
2178 the administration of justice).

2179  
2180 **45-FL Opinion 95-4 (1995)**  
2181 **Facts**—Lawyer represents Husband and Wife in connection with estate planning services.  
2182 Husband and Wife have substantial individual assets and they also own substantial jointly-  
2183 held property. Lawyer prepared updated wills that Husband and Wife signed. Like their  
2184 previous wills, the updated wills primarily benefit the survivor of them for his or her life, with  
2185 beneficial disposition of the survivor being made equally to their children. Husband, Wife,  
2186 and Lawyer have always shared all relevant asset and financial information. Several  
2187 months after the execution of the updated wills, Husband confers separately with Lawyer

2188 and reveals he has just executed a codicil (prepared by another law firm) that makes a  
2189 substantial beneficial disposition to a woman with whom Husband has been having an  
2190 extra-marital relationship. Husband tells Lawyer that Wife does not know about the extra-  
2191 marital relationship or the new codicil, and Husband asks Lawyer to advise him regarding  
2192 Wife's rights of election in the event she survives Husband.

2193  
2194 **Analysis and Conclusion**—Lawyer is not required to discuss issues regarding  
2195 confidentiality at the outset of representation of Husband and Wife. Pursuant to **Rule 1.6,**  
2196 **Confidentiality of Information**, Lawyer may not reveal confidential information of  
2197 Husband to Wife. Given these facts, Lawyer must withdraw from the representation of both  
2198 Husband and Wife because a conflict of interest in violation of **Rule 1.7, Conflicts of**  
2199 **Interest: Current Clients**, arises when Lawyer must maintain Husband's separate  
2200 confidences regarding the joint representation, and Lawyer is unable to obtain consent  
2201 from Wife without disclosing Husband's confidential information protected by **Rule 1.6.**

2202  
2203 **46-MT Opinion 960731 (1996)**

2204 **Facts**—Husband and Wife jointly retain Lawyer for estate planning services.

2205  
2206 **Analysis and Conclusion**—Unless there is evidence of conflict between Husband and  
2207 Wife, **Rule 1.7, Conflicts of Interest: Current Clients**, does not require that Lawyer  
2208 communicate the potential for conflict. However, if a conflict becomes evident or if  
2209 Lawyer's independent judgment is restricted, then the lawyer must obtain consent under  
2210 **Rule 1.7(b)** (permissible representation of a current client despite a conflict of interest).

2211  
2212 **47-RI Opinion 96-07 (1996)**

2213 **Facts**—Lawyer prepared an estate plan including trusts and wills for Husband and Wife.  
2214 Years later, Wife asked Lawyer to redesign her estate plan to exclude Husband because  
2215 she is divorcing Husband. Both Husband and Wife have other counsel for the divorce.

2216

2217 **Analysis and Conclusion**—Pursuant to **Rule 1.9, Duties to Former Clients Lawyer**, if  
2218 Wife’s modification of her estate becomes materially adverse to Husband’s interest,  
2219 Lawyer may not redesign Wife’s estate plan absent Husband’s consent.

2220

2221 **48-MO Opinion 20030016 (2003)**

2222 **Facts**—Client came to Lawyer with a rough draft of a trust. Client provided Lawyer with  
2223 information Lawyer needed to complete the trust document and some other estate  
2224 planning. Client died before Lawyer could prepare the documents. Lawyer has received a  
2225 request to produce all documents related to estate planning for Client to Client’s family.

2226

2227 **Analysis and Conclusion**—Lawyer may not disclose any documents or information  
2228 unless Lawyer is ordered to do so by a court after the issue of confidentiality under **Rule**  
2229 **1.6, Confidentiality of Information**, has been fully presented. It is not necessary for  
2230 Lawyer to appeal such an order. Lawyer, in the absence of prior express consent from the  
2231 decedent, may only disclose information or documents clearly necessary to effectuate  
2232 decedent’s intent, such as an executed will or similar documents.

2233

2234 **49-VA Opinion 1778 (2003)**

2235 **Facts**—Lawyer represents administrator of an estate. Administrator is Husband of  
2236 deceased Wife. Husband presented to Lawyer that there was no will. However, other  
2237 family members locate a will, which is then admitted to probate. The will did not specify an  
2238 executor, and Husband remains administrator of the estate. The will leaves nothing to  
2239 Husband. Husband chooses to take his statutory elective share of the estate. Litigation  
2240 ensues between Husband and the beneficiaries regarding whether certain real estate  
2241 belongs in the augmented estate.

2242

2243 **Analysis and Conclusion**— Lawyer’s client is Husband, not the beneficiaries of the  
2244 estate. There is no conflict under **Rule 1.7, Conflicts of Interest: Current Clients**, that  
2245 would prohibit Lawyer from representing Husband individually in the litigation and in his  
2246 capacity as administrator of the estate. Lawyer should be mindful of Husband’s fiduciary  
2247 duty to the beneficiaries. If Lawyer advises or assists Husband in actions that breach

2248 Husband's fiduciary duty, Lawyer could be in violation of **Rule 1.2(d)** (prohibition against  
2249 assisting client fraud or criminal activity).

2250

2251 **50-NH Opinion 2014-15/5 (2014)**

2252 **Facts**—Lawyer represents elderly Client who is threatened by ongoing elder abuse or  
2253 other forms of substantial bodily injury. Lawyer wants to disclose confidential information  
2254 relating to Client, over the objection of Client, to protect Client from the abuse.

2255

2256 **Analysis and Conclusion**—If Lawyer determines that Client has diminished capacity  
2257 under **Rule 1.14, Client with Diminished Capacity**, then **Rule 1.14(c)** (implied  
2258 authorization to reveal otherwise confidential information to protect client with diminished  
2259 capacity) impliedly authorizes Lawyer under **Rule 1.6(a)** (implied authorization to disclose  
2260 client information) to disclose confidential Client information, without Client's consent, to  
2261 the extent reasonably necessary to protect Client from elder abuse or other threatened  
2262 substantial bodily injury. Even if Lawyer does not determine that Client has diminished  
2263 capacity, Lawyer may disclose information pursuant to **Rule 1.6(b)(1)** (disclosure to  
2264 prevent death or substantial bodily injury) if Lawyer determines that death or substantial  
2265 bodily injury is reasonably certain to occur. Mere suspicion that elder abuse or other forms  
2266 of harm might be occurring is not adequate to trigger **Rule 1.6(b)(1)**. There must be  
2267 sufficient evidence to lead to an actual supposition that Client is being abused physically or  
2268 psychologically or threatened with such abuse. Moreover, Lawyer should seek consent  
2269 from Client directly before taking action.

2270

2271 **51-CO Opinion 132 (2017)**

2272 **Facts** – What are the duties of confidentiality of a lawyer who drafted a will for Client  
2273 following death of Client?

2274

2275 **Analysis and Conclusion** - Unless Client had authorized Lawyer to disclose information  
2276 regarding Client's testamentary intentions or deceased Client's Personal Representative  
2277 gives consent, Lawyer's duty of confidentiality under **Rule 1.6, Confidentiality of**  
2278 **Information** continues after Client's death and prohibits Lawyer from disclosing

2279 confidential information regarding the representation, including information on Client's  
2280 intentions. [The opinion rejects the concept of implied authorization of Lawyer to disclose  
2281 confidential information to ensure Client's wishes are followed adopted in ethics opinions  
2282 from certain other states. *See*, ACTEC Commentaries, pp. 88-91.]

2283

2284 **52-MA Opinion 2017-3 (2017)**

2285 **Facts** - May Lawyer release file regarding execution of the will of deceased Client to the  
2286 lawyer seeking to probate the will of deceased Client when there is a pending will contest.  
2287 No personal representative or other fiduciary has been appointed.

2288

2289 **Analysis and Conclusion - Rule 1.6, Confidentiality of Information** prohibits Lawyer  
2290 from disclosing confidential information regarding the representation, including information  
2291 from Lawyer's file regarding execution of deceased Client's will, in the absence of consent  
2292 of an appointed personal representative. However, Lawyer may have a limited ability to  
2293 give information when called to testify regarding the circumstances surrounding the  
2294 execution of the will.

2295

2296 **53- NY Opinion 1125 (2017)**

2297 **Facts** - Lawyer drafted a will in which Client disinherited a son. Client died. Disinherited  
2298 son, who has a copy of the will with Lawyer's signature on it, asks Lawyer to confirm  
2299 Lawyer drafted the will.

2300

2301 **Analysis and Conclusion** - As son is neither a beneficiary nor executor, Lawyer has no  
2302 obligation to communicate with him. **Rule 1.9, Duties to Former Clients** in paragraph (c)  
2303 provides that Lawyer may not reveal information relating to the representation of a former  
2304 client [by definition a deceased client is a former client] except as **Rule 1.6,**  
2305 **Confidentiality of Information** would permit with respect to a current client, and Rule 1.6  
2306 protects the information sought. Although information that is generally known in the local  
2307 community is not protected as confidential information, information is not generally known  
2308 simply because it is in the public domain or available in a public file.

2309

2310 **54-NY Opinion 1126 (2017)**

2311 **Facts** - Lawyer represented husband and wife in drafting a joint revocable trust. The  
2312 engagement letter signed by both provides that Lawyer may not withhold information from  
2313 either. Trust agreement provides that upon wife's death, her share of the trust estate would  
2314 be distributed to a credit shelter trust for the benefit of husband during his lifetime and  
2315 upon husband's death, be distributed to wife's children from a prior marriage. Wife died  
2316 and husband met with Lawyer to inquire about administration of the trust but did not retain  
2317 Lawyer to advise him. Husband died and husband's sister, named in trust instrument as  
2318 husband's successor trustee, contacted Lawyer and advised that husband failed to fund  
2319 the credit shelter trust upon wife's death, but put those assets in his own name for the  
2320 benefit of the sister, effectively disinheriting wife's children. Lawyer declined to represent  
2321 the sister in administering the trust estate. Lawyer asks if Lawyer must advise wife's  
2322 children of the failure to administer the trust estate properly.

2323  
2324 **Analysis and Conclusion** - Under **Rule 1.18, Duties to Prospective Client** the sister is  
2325 presumed to be a prospective client to whom Lawyer owes duties of confidentiality as if the  
2326 sister was a former client. **Rule 1.9, Duties to Former Clients** prohibits use or disclosure  
2327 of confidential information protected by **Rule 1.6, Confidentiality of Information** to the  
2328 disadvantage of the former client. The information regarding the improper administration of  
2329 the trust is confidential information under Rule 1.6. Since the sister did not disclose how  
2330 she intends to proceed with administration of the estate, the exception in Rule 1.6(b)  
2331 regarding disclosure of confidential information to prevent commission of a crime does not  
2332 apply, and Lawyer does not have the sister's consent to disclosure. Thus, Lawyer may not  
2333 disclose information regarding husband's improper administration of the trust to wife's  
2334 children.

2335  
2336 **55-NY Opinion 1133 (2017)**

2337 **Facts** - Lawyer, by arrangement (not involving compensation) with another lawyer who is  
2338 closing the lawyer's practice, received approximately 800 files containing executed wills  
2339 and trust documents. The transferring lawyer notified all clients of the transfer and the  
2340 name and contact information for Lawyer, that the files could be retrieved by the client or



2341 sent to another lawyer of the client's choice, and that failure to retrieve the files or request  
2342 further transfer within approximately four months would be deemed consent to transfer of  
2343 the file to Lawyer. Lawyer wants to send letters to all clients whose files Lawyer received,  
2344 offering legal assistance in reviewing the files and recommending updates to the wills and  
2345 trust documents if appropriate.

2346  
2347 **Analysis and Conclusion** - Mere transfer and possession of the files does not create a  
2348 lawyer-client relationship with the clients, and Lawyer may not ethically examine the  
2349 confidential information in the files more than reasonably necessary to identify the clients'  
2350 contact information. Lawyer may contact the clients to offer Lawyer's legal services with  
2351 respect to the wills and trust documents in the files, provided Lawyer complies with **Rule**  
2352 **1.15(c) [CO Rule 1.15A], General Duties of Lawyers Regarding Property of Clients**  
2353 **and Third Parties** in maintaining the files and **Rule 7.1, Communications Regarding a**  
2354 **Lawyer's Services** and **Rule 7.3, Direct Contact with Prospective Clients**. The opinion  
2355 also analyses whether this was the sale of law practice subject to **Rule 1.17, Sale of Law**  
2356 **Practice** and concluded that it was not.

2357  
2358 **56-OR Opinion 2018-194 (2018)**

2359 **Facts** - A married couple approaches Lawyer and asks Lawyer to represent them in estate  
2360 planning. They have been married for 15 years, both have children from prior marriages,  
2361 and there are no children of their current marriage. They own their home as tenants by the  
2362 entirety but have kept most of their assets separate. Spouse A has substantially more  
2363 assets than Spouse B. They want to have their separate assets go to their respective  
2364 children and their joint assets pass to the surviving spouse by right of survivorship. Spouse  
2365 B would be entitled to an elective share claim if Spouse A were to die first, which would  
2366 defeat their joint intent for their estate plan. There is no prenuptial agreement.

2367  
2368 **Analysis and Conclusion** - Under **Rule 1.7, Conflicts of Interest: Current Clients**,  
2369 (a) Lawyer may provide information to both spouses about the elective share and its  
2370 potential waiver. Each spouse has a fiduciary obligation to the other requiring full  
2371 disclosure and fairness. Providing that information is consistent with their duties to each

2372 other; (b) Lawyer may not advise Spouse B whether or not to waive the elective share due  
2373 to the conflict of interest between the spouses in that issue and may not draft such a  
2374 waiver, absent waiver of the conflict with informed consent of both spouses; such a waiver  
2375 may be possible, but is likely to be non-consentable given the facts, and such a course  
2376 would be perilous for Lawyer; (c) if both spouses take independent legal advice on the  
2377 issue of the elective share waiver and execute an agreement to waive or not to waive the  
2378 elective share, Lawyer may represent the spouses jointly in preparation of their estate  
2379 planning absent other circumstances that would create a conflict of interest under Rule 1.7.  
2380

2381 **57-PA Opinion 2017-025 (2017)**

2382 **Facts** - Lawyer states that Lawyer represents estate of individual who died intestate, and  
2383 Lawyer's firm has entered an appearance in Orphans' Court. The administrator of the  
2384 estate has admitted improperly withdrawing money from the estate. Lawyer advised the  
2385 administrator that he must immediately return the money and that the report to the court  
2386 must accurately reflect the withdrawal and return of the money. Lawyer assumes the  
2387 administrator will not return the money.  
2388

2389 **Analysis and Conclusion** - Regarding who it's the client, the opinion does not determine  
2390 whether a lawyer may represent an estate, citing conflicting PA cases on the subject. **Rule**  
2391 **1.6, Confidentiality of Information**, paragraph (b), requires Lawyer to disclose  
2392 information regarding the administrator's improper actions in connection with complying  
2393 with **Rule 3.3, Candor Toward the Tribunal** if the estate is subject to an adjudicative  
2394 proceeding. If the administrator is the client, paragraph (c) of Rule 1.6 permits, but does  
2395 not require, Lawyer to disclose that information, including to the beneficiaries of the estate,  
2396 if Lawyer reasonably believes it necessary to prevent the client from committing a criminal  
2397 act (here, embezzlement) that Lawyer reasonably believes is likely to result in substantial  
2398 injury to the financial interests or property of another. If the administrator does not return  
2399 the money, Lawyer should withdraw from the representation, seeking court approval if  
2400 required. In the motion to withdraw, Lawyer may disclose the administrator's conduct after  
2401 advising the administrator of Lawyer's intent to do so.  
2402

2403 **58-PA Opinion 2017-100 (2017)**

2404 **Facts** - This opinion is an analysis of a lawyer's ethical duties in representing a fiduciary  
2405 Client whose conduct may harm or has harmed beneficiaries.

2406

2407 **Analysis and Conclusion** - Lawyer must avoid assisting Client in conduct that Lawyer  
2408 knows is criminal or fraudulent. (**Rule 1.0, Terminology**, defining "fraud" and "fraudulent";  
2409 **Rule 1.2, Scope of Representation and allocation of Authority Between Client and**  
2410 **Lawyer**, paragraph (d) prohibiting Lawyer from assisting Client in conduct Lawyer knows is  
2411 criminal or fraudulent). If Client refuses to cease engaging in such conduct, Lawyer must  
2412 withdraw from the representation. (**Rule 1.16 Declining or Terminating Representation**)  
2413 Lawyer may, but is not required, to inform the beneficiaries of the fiduciary's conduct to  
2414 prevent the client from committing a criminal act that Lawyer believes is likely to result in  
2415 substantial financial injury to the financial interests of the beneficiaries, or to prevent,  
2416 mitigate or rectify the consequences of Client's criminal or fraudulent act in the commission  
2417 of which the lawyer's service are being or have been used. (**Rule 1.6, Confidentiality of**  
2418 **Information**) If the matter is before a tribunal, Lawyer must consider whether Lawyer has  
2419 an affirmative duty to inform the tribunal of past, present, or future criminal or fraudulent  
2420 conduct by the fiduciary Client. (**Rule 3.3, Candor Toward the Tribunal**)

2421

2422 **59-NC Opinion 2017-2 (2017)**

2423 What are Lawyer's obligations under **Rule 1.15, Safekeeping Property** in the following  
2424 circumstances? [The comparable CO Rule is 1.15, but there are many substantive  
2425 differences between the two rules. The reader is advised to refer to the language of NC  
2426 Rule 1.15 at [https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-](https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-115-3-records-and-accountings/)  
2427 [115-3-records-and-accountings/](https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-115-3-records-and-accountings/).]

2428 (1) Lawyer is named executor in a will. Testator dies and Lawyer begins serving as  
2429 personal representative of the estate. Lawyer intends to seek compensation for  
2430 services. Lawyer opens a checking account for the estate, is a signatory on the  
2431 account, and manages the account.

2432 Opinion- Under Rule 1.15 the checking account must be established as a lawyer's  
2433 fiduciary account, and the lawyer will be providing professional fiduciary services. In

2434 managing the account and providing fiduciary services, Lawyer must comply with  
2435 the requirements of Rule 1.15.

2436 (2) Lawyer represents the estate of B and the personal representative of the estate  
2437 (PR). Lawyer opens a checking account and designates PR as signatory. PR will  
2438 receive bank statements, but Lawyer intends to retain possession of the checkbook,  
2439 prepare checks for PR's signature as needed, and deposit estate funds into the  
2440 account as received.

2441 Opinion- Rule 1.15 applies only to the extent Lawyer has control over the account.  
2442 Here, Lawyer is not a signatory on the account and so is not responsible for, among  
2443 other things, review and reconciliation of the account. However, Lawyer is  
2444 responsible under Rule 1.15 for items in Lawyer's possession or control, such as  
2445 properly safeguarding the checkbook, safeguarding and depositing (or promptly  
2446 informing PR to deposit) checks received that are estate assets. Lawyer must  
2447 provide competent and diligent representation under **Rule 1.1, Competence** and  
2448 **Rule 1.3, Diligence**. These require Lawyer to properly advise PR of PR's duties  
2449 with respect to the estate and the account. If Lawyer prepares checks for PR's  
2450 signature, Lawyer must periodically review the balance of the account to ensure  
2451 against preparation of a check in amount exceeding that balance.

2452 (3) Lawyer represents the estate of C and the personal representative of the estate  
2453 (PR). Lawyer opens a checking account and designates both Lawyer and PR as  
2454 signatories. Lawyer has the checkbook and receives bank statements.

2455 Opinion- Lawyer has control over the account and therefore must comply with Rule  
2456 1.15 regarding the account. The account must be opened as Lawyer's fiduciary  
2457 account, and Lawyer must review it as required by the Rule. Lawyer must properly  
2458 advise PR of PR's duties with respect to the estate and the account.

2459 (4) Lawyer represents the estate of D and the personal representative of the estate  
2460 (PR). PR opens a checking account and manages the account. PR has the  
2461 checkbook and prepares checks at lawyer's direction.

2462 Opinion- Lawyer has no obligations with respect to the account under Rule 1.15.  
2463 See (2), above.

2464 (5) The facts are the same as (4), with PR the sole signatory on the account, but PR  
2465 asks Lawyer's paralegal to take possession of the checkbook. Monthly, PR goes to  
2466 Lawyer's office, writes checks, and gives the bills and checks to the paralegal, who  
2467 mails the checks.

2468 Opinion- See (2), above. Lawyer must make reasonable efforts to ensure that the  
2469 paralegal's conduct is compatible with the professional obligations of Lawyer,  
2470 including safeguarding the checkbook.

2471 (6) [This question and opinion deal with 2016 amendments to NC Rule 1.15 and are not  
2472 addressed in this summary.]

2473 (7) In (1) and (2), above, may Lawyer management of the fiduciary account to a  
2474 nonlawyer assistant?

2475 Opinion- Yes, but responsibility for periodic account reviews required by Rule 1.15  
2476 may not be delegated. Lawyer remains professionally responsible for compliance  
2477 with Rule 1.15. Therefore, the assistant must be appropriately instructed, trained,  
2478 and supervised concerning the requirements of Rule 1.15.

2479 (8) In the circumstances of (7), above, may the nonlawyer assistant be a signatory on  
2480 the checking account?

2481 Opinion- Yes, but it increases the risk of internal fraud. Lawyer should not permit  
2482 this unless Lawyer's firm has established fraud prevention procedures that will  
2483 protect the fiduciary funds from internal theft.

2484

#### 2485 **60-TX Opinion 678 (2018)**

2486 **Facts** - Parent of Lawyer died and the parent's will named Lawyer and executor of  
2487 deceased's estate and Lawyer and Lawyer's siblings as beneficiaries. Lawyer did not draft  
2488 the will. Lawyer intends to represent Lawyer as executor, and if Lawyer cannot, intends to  
2489 retain another lawyer in Lawyer's firm to do so.

2490

2491 **Analysis and Conclusion** - The opinion discusses in detail the various duties of an  
2492 executor. Lawyer must analyze the potential for conflict of interest both before and during  
2493 the representation under **Rule 1.06, Conflict of Interest: General Rule** [the comparable  
2494 CO Rule is 1.7, Conflict of Interest: Current Clients]. Lawyer may represent Lawyer as

2495 executor if Lawyer reasonably believes the representation will not be materially affected by  
2496 Lawyer's or Lawyer's firm's own interests. If Lawyer may not represent Lawyer as  
2497 executor, neither may another lawyer in Lawyer's firm. Lawyer should be aware of the  
2498 additional limitations that may arise under **Rule 3.08, Lawyer as Witness** [the comparable  
2499 CO Rule is 3.7, Lawyer as Witness].

2500  
2501 [This Practice Area Ethics Advisory was prepared by Committee members Douglas Foote, Robbi Jackson,  
2502 Michael Kirtland, Allen Sparkman, and Julie Williamson. The authors gratefully acknowledge the assistance  
2503 of Laura Jacobi, then a 2L at SMU Dedman School of Law (who we happily note has now graduated, passed  
2504 the Texas bar, and is in private practice), in preparing most of these summaries. The conciseness and  
2505 accuracy of the summaries are hers; any errors are solely ours. We also are grateful to the CBA Trust &  
2506 Estate Section for their input to initial topics for consideration as Advisories and for their review and very  
2507 helpful comments on the draft that resulted in this Practice Area Advisory. We note that the Section's review  
2508 and input does not necessarily constitute its endorsement of all of the positions taken in this Practice Area  
2509 Advisory, in particular the position taken in CBA Formal Op. 132 regarding the duties of confidentiality of a  
2510 lawyer for a deceased testator regarding disclosure of circumstances surrounding the drafting of the  
2511 testator's will.]

2512  
2513 *Index*  
2514 [*“Op. Summary”* refers to the number given in this Practice Area Ethics Advisory to each of  
2515 the state and ABA opinion summaries in Section II.]

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- 2691 **Disabled Client**
- 2692 Committee Advisory 6
- 2693 CBA Formal Op. 126 (2015)
- 2694 Op. Summary 2 – Phila. Bar Op. 2013-6 (2013)
- 2695 Op. Summary 13 – TN Op. 2014-F-158 (2014)
- 2696 Op. Summary 15 – Phila. Bar Op. 2008-10 (2008)
- 2697 Op. Summary 22 – WA Op. 2107 (2006)
- 2698 Op. Summary 31 – NY Op. 775 (2004)
- 2699
- 2700 **Disclosure**
- 2701 Committee Advisory 6
- 2702 Op. Summary 2 – Phila. Bar Op. 2013-6 (2013)
- 2703 Op. Summary 4 – PA Op. 22011-22 (2011)
- 2704 Op. Summary 7 – FL Op. 10-3 (2011)
- 2705 Op. Summary 9 – MO Op. 2010-0052 (2010)
- 2706 Op. Summary 10 – RI Op. 2013-05 (2013)
- 2707 Op. Summary 13 – TN Op. 2014-F-158 (2014)
- 2708 Op. Summary 16 - Phila. Bar Op. 2008-9 (2008)
- 2709 Op. Summary 17 – ME Op. 192 (2007)
- 2710 Op. Summary 21 – AL Op. 2010-03 (2010)
- 2711 Op. Summary 44 – PA Op. 98-44 (1998)
- 2712 Op. Summary 50 – NH Op. 2014-15/5 (2014)
- 2713 Op. Summary 54 – NY Opinion 1126 (2017)

- 2714 Op. Summary 56 – OR Op. 2018-194 (2018)
- 2715 Op. Summary 58 – PA Op. 2017-100 (2017)
- 2716
- 2717 **Drafting Will to Disinherit Beneficiary Who is also a Client**
- 2718 Op. Summary 29 – ABA Formal Op. 05-434 (2004)
- 2719
- 2720 **Drafting Will on Recommendation of Potential Beneficiary Who is also a Client**
- 2721 Op. Summary 28 – ABA Formal Op. 02-428 (2002)
- 2722
- 2723 **Duties of Lawyer to Disclose Error to Client**
- 2724 CBA Formal Op. 113 (2005; Rev. 2015)
- 2725
- 2726 **Duties of Lawyer for a Fiduciary to an Unrepresented Beneficiary**
- 2727 Committee Advisory 7
- 2728 Op. Summary 58 – PA Opinion 2017-100 (2017)
- 2729
- 2730 **Estates and Estate Planning**
- 2731 Committee Advisory 1
- 2732 Committee Advisory 2
- 2733 Committee Advisory 3
- 2734 Committee Advisory 4
- 2735 Committee Advisory 5
- 2736 Committee Advisory 6
- 2737 Committee Advisory 7
- 2738 Committee Advisory 8
- 2739 CBA Formal Op. 87 (1990; Rev. 1991; addendum 1995)
- 2740 Op. Summary 1 – PA Op. 2012-024 (2012)
- 2741 Op. Summary 2 – Phila. Bar Op. 2013-6 (2013)
- 2742 Op. Summary 3 – NY Op. 865 (2011)
- 2743 Op. Summary 4 – PA Op. 22011-22 (2011)
- 2744 Op. Summary 5 – SC Op. 12-10 (2012)

- 2745 Op. Summary 6 – NH Op. 2014-15/10 (2014)
- 2746 Op. Summary 7 – FL Op. 10-3 (2011)
- 2747 Op. Summary 9 – MO Op. 2010-0052 (2010)
- 2748 Op. Summary 10 – RI Op. 2013-05 (2013)
- 2749 Op. Summary 15 – Phila. Bar Op. 2008-10 (2008)
- 2750 Op. Summary 16 - Phila. Bar Op. 2008-9 (2008)
- 2751 Op. Summary 17 – ME Op. 192 (2007)
- 2752 Op. Summary 18 – MD Op. 2009-05 (2008)
- 2753 Op. Summary 19 – PA Op. 2009-072 (2009)
- 2754 Op. Summary 20 – NH Op. 2008-09/1 (2009)
- 2755 Op. Summary 21 – AL Op. 2010-03 (2010)
- 2756 Op. Summary 24 – MA Op. 06-01 (2006)
- 2757 Op. Summary 25 – VA Op. 1811 (2005)
- 2758 Op. Summary 26 – NC Op. 2002-7 (2003)
- 2759 Op. Summary 27 – ABA Formal Op. 02-426 (2002)
- 2760 Op. Summary 32 – PA Op. 2005-107 (2005)
- 2761 Op. Summary 33 – KS Op. 99-3 (1999)
- 2762 Op. Summary 34 – VT Op. 2000-12 (2000)
- 2763 Op. Summary 35 – MA Op. 97-3 (1997)
- 2764 Op. Summary 36 – NC Op. 99-4 (Rev.) (1999)
- 2765 Op. Summary 37 – KY Op. E-401 (1997)
- 2766 Op. Summary 38 – AZ Op. 96-07 (1996)
- 2767 Op. Summary 39 – MT Op. 951231 (1995)
- 2768 Op. Summary 43 – NC Op. 229 (1996)
- 2769 Op. Summary 45 – FL Op. 95-4 (1997)
- 2770 Op. Summary 46 – MT Op. 960731 (1996)
- 2771 Op. Summary 47 – RI Op. 96-07 (1996)
- 2772 Op. Summary 49 – VA Op. 1778 (2003)
- 2773 Op. Summary 56 – OR Op. 2018-194 (2018)
- 2774 Op. Summary 59 – NC Op. 2017-2 (2017)
- 2775 Op. Summary 60 – TX Op. 678 (2018)

2776

2777 **Executor**

2778 Committee Advisory 2

2779 Committee Advisory 3

2780 Committee Advisory 4

2781 Committee Advisory 5

2782 Committee Advisory 6

2783 Op. Summary 2 – Phila. Bar Op. 2013-6 (2013)

2784 Op. Summary 3 – NY Op. 865 (2011)

2785 Op. Summary 5 – SC Op. 12-10 (2012)

2786 Op. Summary 27 – ABA Formal Op. 02-426 (2002)

2787 Op. Summary 30 – ABA Formal Op. 94-380 (1994)

2788 Op. Summary 38 – AZ Op. 96-07 (1996)

2789 Op. Summary 49 – VA Op. 1778 (2003)

2790 Op. Summary 60 – TX Op. 678 (2018)

2791

2792 **Fiduciary Duties**

2793 Committee Advisory 4

2794 Committee Advisory 6

2795 Op. Summary 37 – KY Op. E-401 (1997)

2796 Op. Summary 56 – OR Op. 2018-194 (2018)

2797 Op. Summary 59 – NC Op. 2017-2 (2017)

2798

2799 **Financial Planning**

2800 Op. Summary 6 – NH Op. 2014-15/10 (2014)

2801

2802 **Former Client**

2803 Op. Summary 1 – PA Op. 2012-024 (2012)

2804 Op. Summary 8 – MA Op. 11-04 (2011)

2805 Op. Summary 11 – PA Op. 2015-023 (2015)

2806 Op. Summary 25 – VA Op. 1811 (2005)

- 2807 Op. Summary 31 – NY Op. 775 (2004)
- 2808 Op. Summary 32 – PA Op. 2005-107 (2005)
- 2809 Op. Summary 34 – VT Op. 2000-12 (2000)
- 2810 Op. Summary 35 – MA Op. 97-3 (1997)
- 2811 Op. Summary 47 – RI Op. 96-07 (1996)
- 2812 Op. Summary 54– NY Opinion 1125 (2017)
- 2813
- 2814 **Fraud**
- 2815 Committee Advisory 6
- 2816 Op. Summary 21 – AL Op. 2010-03 (2010)
- 2817 Op. Summary 57 - PA Opinion 2017-025 (2017)
- 2818 Op. Summary 59 – NC Op. 2017-2 (2017)
- 2819
- 2820 **Funds of Missing Client**
- 2821 CBA Formal Op. 95 (1993)
- 2822
- 2823 **Guardian**
- 2824 CBA Formal Op. 23 (1962; addendum 1995)
- 2825 Op. Summary 13 – TN Op. 2014-F-158 (2014)
- 2826 Op. Summary 22 – WA Op. 2107 (2006)
- 2827
- 2828 **Lawyer-Client Relationship**
- 2829 Committee Advisory 1
- 2830 Committee Advisory 3
- 2831 Committee Advisory 4
- 2832 Committee Advisory 5
- 2833 Op. Summary 12 – PA Op. 2014-009 (2014)
- 2834 Op. Summary 14 – NE Op 12-08 (2012)
- 2835 Op. Summary 15 – Phila. Bar Op. 2008-10 (2008)
- 2836 Op. Summary 18 – MD Op. 2009-05 (2008)
- 2837 Op. Summary 21 – AL Op. 2010-03 2010)



- 2838 Op. Summary 23 – NC Op. 2006-11 (2006)
- 2839 Op. Summary 30 – ABA Formal Op. 94-380 (1994)
- 2840 Op. Summary 36 – NC Op. 99-4 (Rev.) (1999)
- 2841 Op. Summary 40 – MD Op. 2000-44 (2000)
- 2842
- 2843 **Lawyer as Fiduciary for Estate or Trust**
- 2844 Committee Advisory 5
- 2845 Committee Advisory 7
- 2846 Op. Summary 27 – ABA Formal Op. 02-426 (2002)
- 2847 Op. Summary 60 – TX Op. 678 (2018)
- 2848
- 2849 **Lawyer as Witness**
- 2850 Op. Summary 26 – NC Op. 2002-7 (2003)
- 2851 Op. Summary 60 – TX Op. 678 (2018)
- 2852
- 2853 **Malpractice**
- 2854 Op. Summary 3 – NY Op. 865 (2011)
- 2855
- 2856 **Multiple Representation**
- 2857 Committee Advisory 3
- 2858 Committee Advisory 5
- 2859 Committee Advisory 8
- 2860 CBA Formal Op. 68 (1985; addendum 1995)
- 2861 Op. Summary 6 – NH Op. 2014-15/10 (2014)
- 2862 Op. Summary 19 – PA Op. 2009-072 (2009)
- 2863 Op. Summary 28 – ABA Formal Op. 02-428 (2002)
- 2864 Op. Summary 37 – KY Op. E-401 (1997)
- 2865 Op. Summary 42 – PA Op. 96-74 (1996)
- 2866 Op. Summary 43 – NC Op. 229 (1996)
- 2867 Op. Summary 45 – FL Op. 95-4 (1997)
- 2868 Op. Summary 46 – MT Op. 960731 (1996)

2869 Op. Summary 56 – OR Op. 2018-194 (2018)

2870

2871 **Payment of Fees by a Third Party, such as a Beneficiary**

2872 Op. Summary 28 – ABA Formal Op. 02-428 (2002)

2873

2874 **Probate Practice**

2875 Committee Advisory 1

2876 Committee Advisory 2

2877 Committee Advisory 3

2878 Committee Advisory 4

2879 Committee Advisory 5

2880 Committee Advisory 6

2881 Committee Advisory 7

2882 Op. Summary 8 – MA Op. 11-04 (2011)

2883 Op. Summary 11 – PA Op. 2015-023 (2015)

2884 Op. Summary 12 – PA Op. 2014-009 (2014)

2885 Op. Summary 16 - Phila. Bar Op. 2008-9 (2008)

2886 Op. Summary 21 – AL Op. 2010-03 (2010)

2887 Op. Summary 57 - PA Opinion 2017-025 (2017)

2888 Op. Summary 58 – PA Opinion 2017-100 (2017)

2889 Op. Summary 59 – NC Op. 2017-2 (2017)

2890 Op. Summary 60 – TX Op. 678 (2018)

2891

2892 **Prospective Client**

2893 Op. Summary 15 – Phila. Bar Op. 2008-10 (2008)

2894 Op. Summary 54 – NY Op. 1126 (2017)

2895 Op. Summary 55 – NY Op. 1133 (2017)

2896 Op. Summary 56 – OR Op. 2018-194 (2018)

2897

2898 **Relative**

2899 Committee Advisory 7

- 2900 Op. Summary 14 – NE Op 12-08 (2012)
- 2901
- 2902 **Representing a Fiduciary**
- 2903 Committee Advisory 1
- 2904 Committee Advisory 2
- 2905 Committee Advisory 3
- 2906 Committee Advisory 4
- 2907 Committee Advisory 5
- 2908 Committee Advisory 6
- 2909 Committee Advisory 7
- 2910 Op. Summary 30 – ABA Formal Op. 94-380 (1994)
- 2911 Op. Summary 58 – PA Opinion 2017-100 (2017)
- 2912 Op. Summary 59 – NC Op. 2017-2 (2017)
- 2913 Op. Summary 60 – TX Op. 678 (2018)
- 2914
- 2915 **Soliciting Clients**
- 2916 Op. Summary 55 – NY Op. 1133 (2017)
- 2917
- 2918 **Spouse**
- 2919 Committee Advisory 8
- 2920 Op. Summary 6 – NH Op. 2014-15/10 (2014)
- 2921 Op. Summary 11 – PA Op. 2015-023 (2015)
- 2922 Op. Summary 19 – PA Op. 2009-072 (2009)
- 2923 Op. Summary 43 – NC Op. 229 (1996)
- 2924 Op. Summary 45 – FL Op. 95-4 (1997)
- 2925 Op. Summary 46 – MT Op. 960731 (1996)
- 2926 Op. Summary 49 – VA Op. 1778 (2003)
- 2927 Op. Summary 56 – OR Op. 2018-194 (2018)
- 2928
- 2929 **Transfer of Client Files**
- 2930 Op. Summary 55 – NY Op. 1133 (2017)

2931

2932 **Trust / Trustee**

2933 Committee Advisory 1

2934 Committee Advisory 2

2935 Committee Advisory 3

2936 Committee Advisory 4

2937 Committee Advisory 5

2938 Committee Advisory 6

2939 Committee Advisory 7

2940 Op. Summary 10 – RI Op. 2013-05 (2013)

2941 Op. Summary 14 – NE Op. 12-08 (2012)

2942 Op. Summary 22 – WA Op. 2107 (2006)

2943 Op. Summary 23 – NC Op. 2006-11 (2006)

2944 Op. Summary 27 – ABA Formal Op. 02-426 (2002)

2945 Op. Summary 30 – ABA Formal Op. 94-380 (1994)

2946 Op. Summary 37 – KY Op. E-401 (1997)

2947 Op. Summary 38 – AZ Op. 96-07 (1996)

2948 Op. Summary 39 – MT Op. 951231 (1995)

2949 Op. Summary 40 – MD Op. 2000-44 (2000)

2950 Op. Summary 41 – PA Op. 96-36 (1996)

2951 Op. Summary 42 – PA Op. 96-74 (1996)

2952 Op. Summary 54 – NY Op. 1126 (2017)

2953

2954 **Waiver**

2955 Committee Advisory 3

2956 Committee Advisory 5

2957 Op. Summary 4 – PA Op. 22011-22 (2011)

2958 Op. Summary 6 – NH Op. 2014-15/10 (2014)

2959 Op. Summary 17 – ME Op. 192 (2007)

2960 Op. Summary 19 – PA Op. 2009-072 (2009)

2961 Op. Summary 20 – NH Op. 2008-09/1 (2009)

- 2962 Op. Summary 56 – OR Op. 2018-194 (2018)
- 2963
- 2964 **Will**
- 2965 Committee Advisory 8
- 2966 Op. Summary 2 – Phila. Bar Op. 2013-6 (2013)
- 2967 Op. Summary 3 – NY Op. 865 (2011)
- 2968 Op. Summary 8 – MA Op. 11-04 (2011)
- 2969 Op. Summary 9 – MO Op. 2010-0052 (2010)
- 2970 Op. Summary 11 – PA Op. 2015-023 (2015)
- 2971 Op. Summary 12 – PA Op. 2014-009 (2014)
- 2972 Op. Summary 13 – TN Op. 2014-F-158 (2014)
- 2973 Op. Summary 18 – MD Op. 2009-05 (2008)
- 2974 Op. Summary 20 – NH Op. 2008-09/1 (2009)
- 2975 Op. Summary 23 – NC Op. 2006-11 (2006)
- 2976 Op. Summary 24 – MA Op. 06-01 (2006)
- 2977 Op. Summary 26 – NC Op. 2002-7 (2003)
- 2978 Op. Summary 27 – ABA Formal Op. 02-426 (2002)
- 2979 Op. Summary 28 – ABA Formal Op. 02-428 (2002)
- 2980 Op. Summary 31 – NY Op. 775 (2004)
- 2981 Op. Summary 32 – PA Op. 2005-107 (2005)
- 2982 Op. Summary 37 – KY Op. E-401 (1997)
- 2983 Op. Summary 38 – AZ Op. 96-07 (1996)
- 2984 Op. Summary 39 – MT Op. 951231 (1995)
- 2985 Op. Summary 43 – NC Op. 229 (1996)
- 2986 Op. Summary 44 – PA Op. 98-44 (1998)
- 2987 Op. Summary 49 – VA Op. 1778 (2003)
- 2988 Op. Summary 51 – CO Op. 132 (2017)
- 2989 Op. Summary 52 – MA Op. 2017-3 (2017)
- 2990 Op. Summary 53 – NY Opinion 1125 (2017)
- 2991 Op. Summary 60 – TX Op. 678 (2018)
- 2992

- 2993 **Withdrawal from Representation**
- 2994 Committee Advisory 3
- 2995 Committee Advisory 6
- 2996 Committee Advisory 8
- 2997 Op. Summary 6 – NH Op. 2014-15/10 (2014)
- 2998 Op. Summary 21 – AL Op. 2010-03 (2010)
- 2999 Op. Summary 34 – VT Op. 2000-12 (2000)
- 3000 Op. Summary 57 - PA Opinion 2017-025 (2017)
- 3001 Op. Summary 58 – PA Opinion 2017-100 (2017)
- 3002

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of February 27, 2020 Special Meeting**

Council met on Thursday, February 27, 2020 via telephone. The meeting was called to order by Vice-Chair Spencer Crona at 4:30 p.m.

The following members of Council participated by phone and constituted a quorum:

Spencer Crona, Vice-Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Elizabeth Meck (2<sup>nd</sup> year member)  
Peggy Gardner (2<sup>nd</sup> year member)  
Charles Spence (1<sup>st</sup> year member)

**1. Request for Amicus Brief from the Colorado Court of Appeals**

The Colorado Court of Appeals has sent a request to the Trust & Estates Section to submit an amicus brief in the *Trevino* case. **A motion to submit a brief was made, seconded and passed unanimously.** John Dunn, chair of the CBA Amicus Committee, will notify the Court of Appeals of the Section's intent to file a brief. The brief is due on or before April 28, 2020.

The meeting was adjourned at 5:10 p.m.

Respectfully submitted

/s/ Timothy Bounds, Secretary

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the March 4, 2020 Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, March 4, 2020, 3:00 p.m.\****  
Place: Colorado Bar Association  
1290 Broadway, Suite 1700  
Denver, Colorado 80203

\*or as close as possible to 15 minutes after the end of the Statutory Revisions Committee meeting, if that meeting runs past 3:00 p.m.

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**Call-In Instructions**

Call-in instructions are as follows: 1.855.392.2520  
Access Code: 2627690#

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the February 5, 2019, meeting of the Council
2. Minutes of February 27, 2020 special meeting of Council
3. Financial spreadsheets as of March 1, 2020
4. Amicus Brief request from CO Court of Appeals and Memorandum from CBA Amicus Briefs Committee.
5. CBA Ethics Committee Practice Advisory.





**Trust and Estate Section Council Agenda**  
**March 5, 2020**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the February 5, 2020, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
3. Secretary/Treasurer's report (Tim Bounds)
4. Tax Section Liaison (Georgine M. Kryda)
5. Elder Law Section Liaison (Patrick Thiessen)
6. Real Estate Section Liaison (Chad Rounds)
7. Family Law Section Liaison (Kim Willoughby)
8. Statutory Revisions Committee (Molly Zwerdinger)
9. Legislative Liaison (Darla Daniel)
10. Council Notes (Kristin Dittus)
11. CLE/Estate Planning Retreat (Spencer Crona)
12. Orange Book Forms Committee (Heidi Gassman)
13. Rules and Forms Committee (Gordon Williams)
14. Civic and Community Affairs Joint Committee of the Elder Law Section (Sandra Sigler)
15. Diversity & Inclusivity Committee (Melissa Schwartz)
16. Probate Trial and Procedures Committee (Kathy Seidel & Norv Brasch)
17. Colorado Estate Planning Handbook (David Johns)
18. Green Book (Josie Faix)
19. New T&E Lawyers Committee (Jessica Johnson)
20. The Colorado Lawyer (Emily Bowman)

21. Communications Representative/Ambassador Program (Lindsey Andrew)

22. Board of Governors Representative (Jonathan Haskell)

23. Miscellaneous/FYI

24. Adjournment

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of February 5, 2020, Meeting**

Council met on Wednesday, February 5, 2020, at the Colorado Bar Association offices, 1290 Broadway, Suite 1700, Denver, Colorado. The meeting was called to order at approximately 2:50 p.m. by Josie Faix, Chair.

The following members of Council were present or participated by phone and constituted a quorum:

Josie Faix, Chair  
Spencer Crona, Vice Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Elizabeth Meck (2<sup>nd</sup> year member)\*  
Lauren Da Cunha (2<sup>nd</sup> year member)  
Peggy Gardner (2<sup>nd</sup> year member)  
Louisa Ritsick (1<sup>st</sup> year member)  
Kristin Dittus (1<sup>st</sup> year member)  
Charles Spence (1<sup>st</sup> year member)\*

Also in attendance were:

Katie Roberts (CBA Staff)  
Steve Brainerd (Legislative liaison)  
Chad Rounds (Real Estate Section liaison)  
Sandra Sigler (Co-Chair, Civic & Community Affairs Committee)  
Molly Zwerdinger (Chair, Statutory Revisions Committee)  
Andy White (CBA liaison)  
Amy Larson (CBA Exec. Director)  
Kim Willoughby (Family Law Section liaison)  
Georgine Kryda (Tax Law Section liaison)  
Bridgett Moore (CBA staff)  
Vincent O-Brien (CBA staff)  
\*denotes attendance via telephone

**1. Approval of Minutes of Prior Meeting**

The Minutes of the December 4, 2019, Council meeting were approved unanimously. There was no meeting in January 2020, as the first Wednesday of the month fell on New Year's Day.

**2. Chair's Report (Josie Faix)**

New members of the CBA staff were in attendance and recognized. Amy Larson will serve as the executive director. Amy spoke to Council about her role as executive director and the agenda for the upcoming year. Bridgett Shephard presented on the Estate Planning Retreat. The presentation included statistics regarding attendee demographics, revenue and expenses, and past contributions from T&E Section. The T&E Section will vote on contributions for the 2020 retreat at the March 5, 2020 meeting of Council.

The Colorado Court of Appeals has extended an invitation to the T&E Section to submit an amicus brief in the *Trevino* case. The case involves a question of a personal representative pledging a pay-on-death account as collateral for a loan. Council discussed the issue as well as the process for submitting a brief. Josie will discuss these and other issues with chair of the CBA Amicus Briefs Committee and co-chairs of the Probate Trial & Procedure Subcommittee.

**3. Secretary/Treasurer Report (Tim Bounds)**

Tim reviewed the financial statements through January 31, 2020.

**4. Tax Section Liaison (Georgine M. Kryda)**

The Tax Law Section will present a CLE on the SECURE Act on March 11, 2020. Georgine will also be presenting on the SECURE Act at the legislative update CLE in June 2020.

**5. Elder Law Section Liaison (Patrick Thiessen)**

ELS executive council voted to approve a dues increase by \$5/member (\$35 total) in December 2019. The Medicaid subcommittee is reviewing proposed regulations on disability trusts submitted by the Colorado Dept. of Health Care Policy and Financing. The Section also discussed Senate Bill 129 regarding pretrial conferences for potential protected persons at their meeting earlier this morning. Patrick also reported that the Section is currently accepting nominations for executive council members.

**6. Real Estate Section Liaison (Chad Rounds)**

Real Estate Council met in January and discussed proposed rule changes to implement the *Colorado Electronic Preservation of Abandoned Estate Planning Documents Act*. The RE Council also discussed possible statutory revisions to the acknowledgment statute to conform with current notary law. The Uniform Law Commission will not run the *Uniform Partition of Heirs Act* this legislative session. Chad reported that the

Section will keep member dues at \$30/member for 2020. The Deeds subcommittee of RE Section has sent draft documents to Orange Book Forms Committee for review and comment.

**7. Family Law Section Liaison (Kim Willoughby)**

The Section met in January and voted to table the *Uniform Parentage Act* until a future legislative session. The Section also discussed proposed changes to common law marriage in Colorado.

**8. Statutory Revisions Committee (Molly Zwerdinger)**

Statutory Revisions reviewed and approved proposed changes to Rule 40 of the Colorado Rules of Probate Procedure. **A motion was made, seconded, and the proposed changes were unanimously approved by Council.** SRC also discussed Senate Bill 129 regarding pre-filing conference for emergency protective proceedings. Andy White (T&E Legislative Liaison) reported that LPC has opposed the Bill. **A motion to oppose SB 129 was made, seconded, and passed unanimously.** Statutory Revisions also voted on a draft bill of the proposed Remote Notary Act regarding disclosure of personal information of an individual who receives notarial services without disclosing the person's name. SRC also discussed the provisions of the proposed remote notary bill that deal with third party information and indemnification agreement that the person receive notarial services must sign. **A motion to oppose the draft bill was made, seconded and passed unanimously.**

**9. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)**

Part 5 of the *Colorado Uniform Trust Code* and the *Colorado Uniform Fiduciary Income and Principal Act* will be on the legislative agenda in the 2021 session.

**10. Legislative Update**

There was no report.

**11. Council Notes (Josie Faix/Kristin Dittus)**

Articles for February and March editions of Council Notes have been submitted. If anyone has a topic of idea for an article please contact Kristin.

**12. Continuing Legal Education & Estate Planning Retreat (Spencer Crona)**

The agenda for the 2020 Estate Planning Retreat is almost complete and the brochure has been sent to press. There was a discussion among Council about the potential recipients of silent auction proceeds at this year's retreat. Council members were asked to provide three items for the auction and submit by the April council meeting. **A motion requiring Council members to provide an item for the silent auction was made, seconded, and passed unanimously. A motion to permit the Chair of the EP Retreat to select the beneficiary(ies) of the silent auction was made, seconded, and passed unanimously.** The continuing legal education (i.e. "brown bag lunch") agenda for the rest of this year is completed.

**13. Orange Book Forms Committee (Heidi Gassman)**

Orange Book is still reviewing engagement letter forms.

**14. Rules & Forms Committee (Gordon Williams)**

Rules & Forms did not meet today.

**15. Civic & Community Affairs (Sandra Sigler)**

Sponsorship opportunities for Senior Law Handbook are still available, please contact Sandra or Kayla Nelson if interested. The committee continues to work on brochures for additional senior law topics. Upcoming Senior Law Day dates & locations: Jefferson County – June 13, 2020; Adams County – June 13, 2020; Denver County – July 18, 2020.

**16. Diversity & Inclusivity Committee (Melissa Schwartz)**

Spencer Crona reported that the Committee is working on the upcoming Diversity & Inclusivity Summit. Melissa (Chair) will present a status report to Council at the March 2020 meeting.

**17. Probate Trial & Procedures Committee (Kathy Seidel & Norv Brasch):**

There was no report for this subcommittee.

**18. Colorado Estate Planning Handbook (David Johns)**

There was no report for this subcommittee.

**19. Green Book (Josie Faix)**

There was no report for this subcommittee.

**20. New T&E Lawyers Committee (Jessica Johnson)**

There was no report for this subcommittee.

**21. The Colorado Lawyer (Emily Bowman & David Kirch)**

There was no report for this subcommittee.

**22. Communications Representative & Ambassador Coordinator (Lindsey Andrew)**

There was no report for this subcommittee.

**23. Board of Governors Representative (Jonathan Haskell)**

The Bd. of Governors met on December 16, 2019. Jonathan will give a full report to Council at the March 2020 meeting.

**24. Other Business**

There was no new business.

**ADJOURNMENT**

The meeting was adjourned at 5:10 p.m. The next Council meeting will be held on March 5, 2020.

Respectfully submitted

/s/ Timothy Bounds, Secretary



Colorado Court of Appeals  
2 East 14th Avenue  
Denver CO 80203 United States



COLORADO BAR ASSOCTRUST ESTATE  
1290 BROADWAY  
SUITE 1700  
DENVER CO 80203

127-1014

To: Colorado Bar AssocTrust Estate

Subject: Service of documents in 2019CA199.

You are being served with documents filed electronically through the Colorado Courts E-Filing system. Please review the following details concerning this service.

- Court Location: Court of Appeals
- Case Number: 2019CA199
  
- Filing ID: N/A
- Filed Document Title(s):
  - INVITATION FOR AMICUS BRIEF
  - Attachments to Pleading
- Submitted on Date/Time: Mon Jan 27 18:30:09 MST 2020
- Submitted by Authorizing Organization:
- Submitted by Authorizing Attorney: Colorado Court of Appeals

If you have a question about the above listed case, please contact the court. Information for all Colorado court locations is listed on the Colorado Judicial Branch website <http://www.courts.state.co.us/Index.cfm>.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 27, 2020
Fremont County 2017PR30084	
<b>In the Matter of the Estate of</b>  Gerardo Trevino, Deceased,  <b>Appellant:</b>  Esteban Trevino,  v.  <b>Appellee:</b>  Victoria Trevino, in her capacity as personal representative.	Court of Appeals Case Number: 2019CA199
INVITATION FOR AMICUS BRIEF	

This case presents the following uncontroverted facts:

- During his life, the decedent opened a certificate of deposit account that was payable on death (POD) to his son, the named beneficiary.
- Also during his life, the decedent and his wife obtained a loan from a bank. As collateral for the loan, the decedent pledged his POD account. The wife did not own or have any rights in this account, which was the only collateral given for the loan.
- The pledge agreement stipulated that no beneficiary “gets any rights in the Collateral in the event of Debtor’s death or incapacity until the obligations secured hereby are paid in full.” The pledge agreement did not list death of either co-obligor as an event of default.
- Upon decedent’s death, the wife was appointed as the personal representative (PR) of the Estate.

- The wife, as PR, then directed the bank to use the POD account to pay off the loan.
- At no point was the loan in default.

Given this factual background, the issue presented for appeal is one of first impression in Colorado: Did the trial court err in finding that the PR's direction to the bank to use the POD account to pay off the loan was proper and reasonable? The son, as the appellant, is the only party to file a brief in this Court.

The Court on its own motion invites the following organizations to file an amicus curiae brief in compliance with C.A.R. 29 on or before April 28, 2020:

The Colorado Bar Association Amicus Brief Committee  
1290 Broadway  
Suite 1700  
Denver, CO 80203

The Colorado Bar Association Trust & Estate Section  
1290 Broadway  
Suite 1700  
Denver, CO 80203

If these organizations intend to file an amicus brief, the Court respectfully requests that it file notice of their intent on or before February 28, 2020. Upon notification that amici will submit a brief, the Clerk of Court must facilitate access to the electronic record.

If an amicus brief is filed, the appellant may file a response within twenty-one days of that filing. The trial court's order is attached as an Appendix to this Invitation.

BY THE COURT:

Fox , J.

Berger, J.

Lipinsky, J.

DISTRICT COURT, COUNTY OF FREMONT, STATE OF COLORADO 136 JUSTICE CENTER ROAD, SUITE 103 CANON CITY, CO 81212 (719) 269-0100	DATE FILED: January 27, 2020  DATE FILED: December 13, 2018 CASE NUMBER: 2017PR30084
In the Matter of the Estate of:  <b>GERARDO TREVINO</b>  Deceased	Δ COURT USE ONLY Δ  Case Number: 17PR30084
<b>FINDINGS, CONCLUSIONS AND ORDERS</b>	

This case comes before the District Court for the 11th Judicial District pursuant to a Petition for Formal Probate of Will, Removal of Personal Representative and Formal Appointment of Successor filed by Esteban ("Tony") Trevino, son of the decedent. A hearing on the Petition was held on December 12, 2018. The spouse of the decedent, Victoria Trevino appeared pro se. Tony Trevino appeared and was represented by Holder & Associates. This Court has considered the petition, the evidence presented during the hearing, and pertinent portions of the Court file. The Court hereby enters the following findings, conclusions and orders.

**FACTS**

The decedent died on April 7, 2017 domiciled in Fremont County, Colorado. The decedent's spouse was appointed as the Personal Representative of the Estate on August 10, 2018. The decedent's will dated October 4, 2016 was admitted into probate by the spouse. A notice to creditors was published indicating a deadline of December 18, 2017 for creditors to file any claims against the Estate.

On March 15, 2018, Tony Trevino filed the subject Petition, which alleged that

the decedent's spouse had unduly influenced the decedent into making a new will replacing his will signed in 2010. In addition, a day prior to the hearing, his attorneys filed a trial brief with new allegations regarding the alleged misuse of a Wells Fargo Certificate of Deposit ("CD") to pay off a personal loan taken out from Wells Fargo by the decedent and his spouse on September 27, 2016. The Wells Fargo CD was held in the decedent's name and collateralized the personal loan in a pledge agreement with Wells Fargo. Tony was listed as the beneficiary of the CD upon the decedent's death. Tony is seeking damages in the amount of \$71,711.81 plus interest under a theory of breach of fiduciary duty by the Personal Representative. He contends that she breached her duty by authorizing Wells Fargo to use \$71,711.81 of the proceeds of the CD to pay off the personal loan rather than using assets of the estate to do so.

During the hearing it was apparent that there exists a great deal of animosity between the decedent's adult children and his spouse.

#### **VALIDITY OF THE DECEDENT'S OCTOBER 4, 2016 WILL**

The decedent's October 4, 2016 Will was prepared by his law firm Fredrickson Johnson & Belveal, LLC. During the hearing the only evidence presented on the issue of undue influence consisted of the testimony of Tony and his sister Ann. Both testified that their father was unduly influenced by his spouse and that he was afraid of her. Ann testified that her father had a "clear mind to make decisions except when it came to Victoria." There was no other creditable evidence presented to establish that the decedent was unduly influenced or otherwise incompetent to sign the Will, which had been prepared at his direction by his attorneys.

The Court finds and concludes that the Petitioner (Tony) has failed to meet his

burden of proof. The October 4, 2016 Will is declared valid.

**USE OF THE PROCEEDS OF THE CD TO PAY OFF THE LOAN**

The facts are undisputed that the decedent opened in his name a Certificate of Deposit with Wells Fargo with the decedent's son Tony listed as the beneficiary with survivor benefits; that on September 27, 2016 the decedent and his spouse took out a \$80,000 personal loan from Wells Fargo and signed a pledge agreement pledging the decedent's CD as collateral for the personal loan; that the language of the pledge agreement stated in paragraph 4(b)(vii) **"that no joint owner, beneficiary, surviving spouse or representative of Debtor's estate gets any rights in the Collateral in the event of Debtor's death or incapacity until the obligations secured hereby are paid in full."**

It is also undisputed that on February 28, 2018 a letter was sent to Wells Fargo by the Personal Representative's law firm directing them to use the proceeds of the CD to pay off the personal loan and send the balance of the proceeds (\$27,246.52) to Tony, which they did; that the amended inventory of the estate indicated the gross value of the estate was \$69,516.61 with only \$2,415.61 in liquid assets (cash); that the balance due on the Wells Fargo loan was \$77,212.03.

The Court finds and concludes that the estate did not have the ability to pay off the Wells Fargo loan using estate funds. The Court also finds and concludes that the Personal Representative acted reasonably, after advice of counsel, to instruct Wells Fargo to take the action they did, which was clearly authorized by the language of the pledge agreement.

The Court also notes that there is a question whether Tony's 'claim' against the

Personal Representative was timely filed since it was filed several months after the expiration in the notice to creditors. However, this issue was not raised by the parties, so is not necessary to deal with it at this time.

CONCLUSION

The Court finds in favor of the Personal Representative and against Tony. The Court DENIES the Petition for Formal Probate of Will, Removal of Personal Representative and Formal Appointment of Successor filed by Esteban ('Tony') Trevino.

Entered this 13<sup>th</sup> day of December 2018.

BY THE COURT: .

*Stephen A. Groome*

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Stephen A. Groome  
District Court Judge



Colorado Court of Appeals  
2 East 14th Avenue  
Denver CO 80203 United States



COLORADO BAR ASSOC AMICUS BRIEF  
1290 BROADWAY  
SUITE 1700  
DENVER CO 80203

126-1014

To: Colorado Bar Assoc Amicus Brief

Subject: Service of documents in 2019CA199.

You are being served with documents filed electronically through the Colorado Courts E-Filing system. Please review the following details concerning this service.

- Court Location: Court of Appeals
- Case Number: 2019CA199
  
- Filing ID: N/A
- Filed Document Title(s):
  - INVITATION FOR AMICUS BRIEF
  - Attachments to Pleading
- Submitted on Date/Time: Mon Jan 27 18:30:09 MST 2020
- Submitted by Authorizing Organization:
- Submitted by Authorizing Attorney: Colorado Court of Appeals

If you have a question about the above listed case, please contact the court.  
Information for all Colorado court locations is listed on the Colorado Judicial Branch website <http://www.courts.state.co.us/Index.cfm>.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 27, 2020
Fremont County 2017PR30084	
<b>In the Matter of the Estate of</b>  Gerardo Trevino, Deceased,  <b>Appellant:</b>  Esteban Trevino,  v.  <b>Appellee:</b>  Victoria Trevino, in her capacity as personal representative.	Court of Appeals Case Number: 2019CA199
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This case presents the following uncontroverted facts:

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- The pledge agreement stipulated that no beneficiary “gets any rights in the Collateral in the event of Debtor’s death or incapacity until the obligations secured hereby are paid in full.” The pledge agreement did not list death of either co-obligor as an event of default.
- Upon decedent’s death, the wife was appointed as the personal representative (PR) of the Estate.

- The wife, as PR, then directed the bank to use the POD account to pay off the loan.
- At no point was the loan in default.

Given this factual background, the issue presented for appeal is one of first impression in Colorado: Did the trial court err in finding that the PR's direction to the bank to use the POD account to pay off the loan was proper and reasonable? The son, as the appellant, is the only party to file a brief in this Court.

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BY THE COURT:

Fox , J.

Berger, J.

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DISTRICT COURT, COUNTY OF FREMONT, STATE OF COLORADO 136 JUSTICE CENTER ROAD, SUITE 103 CANON CITY, CO 81212 (719) 269-0100	DATE FILED: January 27, 2020  DATE FILED: December 12, 2018 CASE NUMBER: 2017PR30084  Δ COURT USE ONLY Δ  Case Number: 17PR30084
<b>FINDINGS, CONCLUSIONS AND ORDERS</b>	

This case comes before the District Court for the 11th Judicial District pursuant to a Petition for Formal Probate of Will, Removal of Personal Representative and Formal Appointment of Successor filed by Esteban ("Tony") Trevino, son of the decedent. A hearing on the Petition was held on December 12, 2018. The spouse of the decedent, Victoria Trevino appeared pro se. Tony Trevino appeared and was represented by Holder & Associates. This Court has considered the petition, the evidence presented during the hearing, and pertinent portions of the Court file. The Court hereby enters the following findings, conclusions and orders.

**FACTS**

The decedent died on April 7, 2017 domiciled in Fremont County, Colorado. The decedent's spouse was appointed as the Personal Representative of the Estate on August 10, 2018. The decedent's will dated October 4, 2016 was admitted into probate by the spouse. A notice to creditors was published indicating a deadline of December 18, 2017 for creditors to file any claims against the Estate.

On March 15, 2018, Tony Trevino filed the subject Petition, which alleged that

the decedent's spouse had unduly influenced the decedent into making a new will replacing his will signed in 2010. In addition, a day prior to the hearing, his attorneys filed a trial brief with new allegations regarding the alleged misuse of a Wells Fargo Certificate of Deposit ("CD") to pay off a personal loan taken out from Wells Fargo by the decedent and his spouse on September 27, 2016. The Wells Fargo CD was held in the decedent's name and collateralized the personal loan in a pledge agreement with Wells Fargo. Tony was listed as the beneficiary of the CD upon the decedent's death. Tony is seeking damages in the amount of \$71,711.81 plus interest under a theory of breach of fiduciary duty by the Personal Representative. He contends that she breached her duty by authorizing Wells Fargo to use \$71,711.81 of the proceeds of the CD to pay off the personal loan rather than using assets of the estate to do so.

During the hearing it was apparent that there exists a great deal of animosity between the decedent's adult children and his spouse.

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The decedent's October 4, 2016 Will was prepared by his law firm Fredrickson Johnson & Belveal, LLC. During the hearing the only evidence presented on the issue of undue influence consisted of the testimony of Tony and his sister Ann. Both testified that their father was unduly influenced by his spouse and that he was afraid of her. Ann testified that her father had a "clear mind to make decisions except when it came to Victoria." There was no other creditable evidence presented to establish that the decedent was unduly influenced or otherwise incompetent to sign the Will, which had been prepared at his direction by his attorneys.

The Court finds and concludes that the Petitioner (Tony) has failed to meet his

burden of proof. The October 4, 2016 Will is declared valid.

**USE OF THE PROCEEDS OF THE CD TO PAY OFF THE LOAN**

The facts are undisputed that the decedent opened in his name a Certificate of Deposit with Wells Fargo with the decedent's son Tony listed as the beneficiary with survivor benefits; that on September 27, 2016 the decedent and his spouse took out a \$80,000 personal loan from Wells Fargo and signed a pledge agreement pledging the decedent's CD as collateral for the personal loan; that the language of the pledge agreement stated in paragraph 4(b)(vii) "**that no joint owner, beneficiary, surviving spouse or representative of Debtor's estate gets any rights in the Collateral in the event of Debtor's death or incapacity until the obligations secured hereby are paid in full.**"

It is also undisputed that on February 28, 2018 a letter was sent to Wells Fargo by the Personal Representative's law firm directing them to use the proceeds of the CD to pay off the personal loan and send the balance of the proceeds (\$27,246.52) to Tony, which they did; that the amended inventory of the estate indicated the gross value of the estate was \$69,516.61 with only \$2,415.61 in liquid assets (cash); that the balance due on the Wells Fargo loan was \$77,212.03.

The Court finds and concludes that the estate did not have the ability to pay off the Wells Fargo loan using estate funds. The Court also finds and concludes that the Personal Representative acted reasonably, after advice of counsel, to instruct Wells Fargo to take the action they did, which was clearly authorized by the language of the pledge agreement.

The Court also notes that there is a question whether Tony's 'claim' against the

Personal Representative was timely filed since it was filed several months after the expiration in the notice to creditors. However, this issue was not raised by the parties, so is not necessary to deal with it at this time.

**CONCLUSION**

The Court finds in favor of the Personal Representative and against Tony. The Court DENIES the Petition for Formal Probate of Will, Removal of Personal Representative and Formal Appointment of Successor filed by Esteban ('Tony') Trevino.

Entered this 13<sup>th</sup> day of December 2018.

BY THE COURT:

*Stephen A. Groome*

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Stephen A. Groome  
District Court Judge



## MEMORANDUM

TO: Executive Council, CBA  
FROM: Amicus Briefs Committee  
RE: Matter of the Estate of Gerardo Trevino, Deceased  
DATED: February 17, 2020

The Trusts and Estates Section has asked for a recommendation in favor of the Section's filing an Amicus Brief in the above matter, as requested by a division of the court of appeals (Fox, Berger and Lipinsky, JJ). Its brief would not argue for affirmance or reversal of the decision of trial court but would address the criteria to be considered by a trial court in considering an exercise of direction by a personal representative. The Invitation for Amicus Brief of the division and the decision of the trial court follow.

The decedent died on April 7, 2017, and his surviving spouse, Victoria, was informally appointed as personal representative on August 10, 2018, pursuant to the terms of a will dated October 4, 2016. The decedent's son, Tony, petitioned for his formal appointment as personal representative and for formal probate of the will. The trial court denied Tony's petition although it made note of the fact that "there exists a great deal of animosity between the decedent's adult children and his spouse." Probate of the will therefore remained informal.

Relevant to the Section's request was the trial court's consideration of whether Victoria acted reasonably with respect to the decedent's and her indebtedness to Wells Fargo. The decedent had opened in his name a certificate of deposit with Wells. His son, Tony, was named as beneficiary. However, on September 27, 2016, the decedent and his spouse, Victoria, took out a personal loan in the amount of \$80,000 and pledged the certificate of deposit as

collateral. The pledge agreement included the language that “no . . . beneficiary . . . or representative of Debtor’s estate gets any rights to the collateral in the event of Debtor’s death . . . until the obligations secured hereby are paid in full.”

On February 28, 2018, after decedent’s death but before opening of the estate, Wells Fargo was instructed by Victoria’s attorneys to use the proceeds of the certificate of deposit to pay off the loan and send the balance of it to Tony. The inventory filed in the estate indicated a gross value of the estate of \$69,516.61 with only \$2,415.61 in liquid assets. Balance due on the loan was \$77,212.03. The trial court concluded that the estate did not have the funds to pay off the loan and that Victoria as personal representative acted reasonably. That decision was appealed by Tony, and Victoria has not filed a brief.

The Invitation for Amicus Brief essentially repeats those facts but also notes that death of a co-obligor was not an event of default, and at no point was the loan in default. The Invitation states the issue presented for appeal to be “did the trial court err in finding that the PR’s direction to the bank to use the POD account to pay off the loan was proper and reasonable.” As an aside, we read the trial court decision as finding that the direction was given before opening of the estate although one could say Victoria was “PR apparent” by the terms of the will. That in any event does not seem to be a matter of concern.

The Committee chair has talked with representatives of the Trust and Estates Section and is impressed by their desire to be responsive to the court and to address an issue of importance to the Section. In the experience of some of the Committee members it is not uncommon for divorced spouses to remarry and by their estate planning to create animosity with

their adult children. There appears to be a need to address the discretion of a personal representative in that and other circumstance.

The issue raised therefor appears to the Committee to be one of interest to the public and to the members of the CBA who practice trust and estates law. It is therefore recommended that the Executive Council authorize the Trust and Estates Section to file an amicus brief. It is emphasized that the Section will not support the position of either party but will only address the factors to be considered in determining whether the personal representative acted properly and reasonably.

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of March 5, 2020 Meeting**

Council met on Thursday, March 5, 2020 via telephone. The meeting was called to order by Chair Josie Faix at 10:05 a.m.

The following members of Council participated by phone and constituted a quorum:

Josie Faix, Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Elizabeth Meck (2<sup>nd</sup> year member)  
Peggy Gardner (2<sup>nd</sup> year member)  
Louisa Ritsick (1<sup>st</sup> year member)

**1. 2020-2021 Council Slate**

Council proposed the following candidates to be considered for first year membership for the 2020-2021 Council Year: Chad Rounds, Simon Tolbert, Georgine Kryda, Stan Kent, Matthew Trinidad, and Amy Simons. Molly Zwerdinger was nominated for Secretary/Treasurer. Further nominations can be submitted to Tim Bounds. Council will vote on all nominated candidates and applications on March 14<sup>th</sup>.

The meeting was adjourned at 11:00 a.m.

Respectfully submitted

/s/ Timothy Bounds, Secretary

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of March 13, 2020 Meeting**

Council met on Thursday, March 13, 2020 via telephone. The meeting was called to order by Chair Josie Faix at 8:05 a.m.

The following members of Council participated by phone and constituted a quorum:

Josie Faix, Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Peggy Gardner (2<sup>nd</sup> year member)  
Lauren Da Cunha (2<sup>nd</sup> year member)  
Elizabeth Meck (2<sup>nd</sup> year member)  
Kristin Dittus (1<sup>st</sup> year member)

**1. Secretary/Treasurer Role**

Molly Zwerdinger has submitted an application for the Secretary/Treasurer role for the 2020-2021 Council year. **A motion was made, seconded, and passed unanimously to nominate Molly as Secretary/Treasurer.**

**2. Nominations/Applications**

Council members discussed nominees/applicants. The applicants were Chad Rounds, Simon Tolbert, Georgine Kryda, Stan Kent, Matthew Trinidad, and Amy Simons. Members will e-mail votes to Tim Bounds. Tim will count votes and submit results on March 14, 2020.

The meeting was adjourned at 8:30 a.m.

Respectfully submitted

/s/ Timothy Bounds, Secretary

Colorado Bar Association  
**Trust & Estate Summary**  
 For the Eight Months Ending February 29, 2020

		February	YTD	Budget	Variance	%	Last FY
Beginning balance	01-3160-31600		\$22,262.87		\$22,262.87	0%	\$7,804.88
<b>Trust &amp; Estate Section- General</b>							
Revenue	01-4???-31600	60.00	32,130.00		32,130.00	0%	33,180.00
Expenses	01-5???-31600	(3,723.99)	(19,297.15)		(19,297.15)	0%	(14,604.45)
<b>Statutory Revisions Committee</b>							
<b>CLE</b>							
<b>Council Notes</b>							
<b>Community &amp; Civic Affairs</b>							
<b>Rules &amp; Forms Committee</b>							
<b>Orange Book Forms</b>							
<b>Local Liaison</b>							
<b>Uniform Trust Code</b>							
<b>Admin. Chair</b>							
<b>Estate Planning Handbook</b>							
<b>Admin Council Dinner</b>							
Revenue	01-4???-31612	(80.00)	1,560.00		1,560.00	0%	
Expenses	01-5???-31612		(5,198.20)		(5,198.20)	0%	
<b>Legislative Liaison</b>							
<b>Internet Editor</b>							
<b>Technology Committee</b>							
<b>Real Estate Liaison</b>							
<b>Green Book</b>							
<b>The Colorado Lawyer</b>							
<b>Diversity Committee</b>							
<b>Judicial Liaison</b>							
<b>Member Vouchers</b>							
<b>Uniform Trust Code</b>							
<b>Transfer Deposit</b>							
<b>Young Lawyer Society</b>							
Expenses	01-5???-31629	(371.30)	(371.30)		(371.30)	0%	(160.80)
Beginning Balance	01-3160-31600		22,262.87		22,262.87	0%	7,804.88
Total Revenue All Sources	01-4???-316??	(20.00)	33,690.00		33,690.00	0%	33,180.00
Total Expenses All Sources	01-5???-316??	(4,095.29)	(24,866.65)		(24,866.65)	0%	(14,765.25)
Ending Balance		(4,115.29)	31,086.22		31,086.22	0%	26,219.63

Colorado Bar Association  
**Trust & Estate**  
For the Eight Months Ending February 29, 2020

		February	YTD	Budget	Variance	%	Last FY
<b>Beginning balance</b>	<b>01-3160-31600</b>		<b>\$22,262.87</b>		<b>\$22,262.87</b>	<b>0%</b>	<b>\$7,804.88</b>
<b>Trust &amp; Estate Section</b>							
<b>Revenue</b>							
Dues Income Section	01-4050-31600	60.00	32,130.00		32,130.00	0%	32,140.00
Meal Income	01-4051-31600					0%	1,040.00
<b>Total Revenue Trust &amp; Estate Sect</b>		<b>60.00</b>	<b>32,130.00</b>		<b>32,130.00</b>	<b>0%</b>	<b>33,180.00</b>
<b>Expenses</b>							
Other Expense	01-5000-31600					0%	(25.80)
AWARDS	01-5007-31600		(338.94)		(338.94)	0%	(633.14)
Travel	01-5102-31600		(60.44)		(60.44)	0%	
Postage	01-5304-31600		(0.50)		(0.50)	0%	(11.32)
Telephone	01-5412-31600					0%	(518.99)
Internet/E-Mail Access	01-5413-31600		(544.99)		(544.99)	0%	(980.20)
Meals (Not travel related)	01-5491-31600	(719.82)	(4,318.92)		(4,318.92)	0%	(8,405.00)
Administration Fee	01-5494-31600	(504.17)	(4,033.36)		(4,033.36)	0%	(4,030.00)
Grants/Contributions	01-5500-31600	(2,500.00)	(10,000.00)		(10,000.00)	0%	
<b>Total Expenses Trust &amp; Estate Sec</b>		<b>(3,723.99)</b>	<b>(19,297.15)</b>		<b>(19,297.15)</b>	<b>0%</b>	<b>(14,604.45)</b>
<b>Statutory Revisions Committee</b>							
<b>Revenue</b>							
<b>Rev. Elderlaw Joint Task Force</b>							
<b>Rev. Uniform POA Act</b>							
<b>Rev. Uniform Trust Code</b>							
<b>Expenses</b>							
<b>Exp. Elderlaw Joint Task Force</b>							
<b>Exp. Uniform POA Act</b>							
<b>Exp. Uniform Trust Code</b>							
<b>CLE</b>							
<b>Revenue</b>							

Colorado Bar Association  
**Trust & Estate**  
 For the Eight Months Ending February 29, 2020

	February	YTD	Budget	Variance	%	Last FY
<b>Revenue Joint CLE</b>						
<b>Revenue CLE Retreat</b>						
<b>Revenue CLE Section Only</b>						
<b>Expenses</b>						
<b>Expenses Joint CLE</b>						
<b>Expenses CLE Retreat</b>						
<b>Expenses CLE Section Only</b>						
<b>Council Notes</b>						
<b>Revenue</b>						
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<b>Community &amp; Civic Affairs</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Rules &amp; Forms Committee</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Orange Book Forms</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Local Liaison</b>						
<b>Revenue</b>						
<b>Expenses</b>						
<b>Uniform Trust Code</b>						
<b>Revenue</b>						



Colorado Bar Association  
**Trust & Estate**  
 For the Eight Months Ending February 29, 2020

	February	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>						
<b>Transfer Deposits</b>						
Revenue						
Expenses						
<b>Admin. Chair</b>						
Revenue						
Expenses						
<b>Estate Planning Handbook</b>						
Revenue						
Expenses						
<b>Admin Council Dinner</b>						
Revenue						
Meal Income	01-4051-31612	(\$80.00)	\$1,560.00	\$1,560.00	0%	
<b>Total Revenue Admin Council Din</b>		<b>(80.00)</b>	<b>1,560.00</b>	<b>1,560.00</b>	<b>0%</b>	
Expenses						
Travel	01-5102-31612	(25.00)	(25.00)	(25.00)	0%	
Meals (Not travel related)	01-5491-31612	(5,173.20)	(5,173.20)	(5,173.20)	0%	
<b>Total Expenses Admin Council Di</b>		<b>(5,198.20)</b>	<b>(5,198.20)</b>	<b>(5,198.20)</b>	<b>0%</b>	
<b>Legislative Liaison</b>						
Revenue						
Expenses						
<b>Internet Editor</b>						
Revenue						
Expenses						
<b>Technology Committee</b>						
Revenue						

Colorado Bar Association  
**Trust & Estate**  
For the Eight Months Ending February 29, 2020

		February	YTD	Budget	Variance	%	Last FY
<b>Expenses</b>							
<b>Real Estate Liaison</b>							
Revenue							
<b>Expenses</b>							
<b>Green Book</b>							
Revenue							
<b>Expenses</b>							
<b>The Colorado Lawyer</b>							
Revenue							
<b>Expenses</b>							
<b>T&amp;E Diversity Committee</b>							
Revenue							
<b>Expenses</b>							
<b>Judicial Liaison</b>							
Revenue							
<b>Expenses</b>							
<b>Member Vouchers</b>							
<b>Expenses</b>							
<b>T&amp;E Young Lawyer Society</b>							
Revenue							
<b>Expenses</b>							
Meals (Not travel related)	01-5491-31629	(\$371.30)	(\$371.30)		(\$371.30)	0%	(\$160.80)
<b>Total Expenses T7E YLS</b>		<b>(371.30)</b>	<b>(371.30)</b>		<b>(371.30)</b>	<b>0%</b>	<b>(160.80)</b>
<b>Beginning Balance</b>	<b>01-3160-31600</b>		22,262.87		22,262.87	0%	7,804.88
<b>Total Revenue All Sources</b>	<b>01-4???-316??</b>	(20.00)	33,690.00		33,690.00	0%	33,180.00
<b>Total Expense All Sources</b>	<b>01-5???-316??</b>	<b>(4,095.29)</b>	<b>(24,866.65)</b>		<b>(24,866.65)</b>	<b>0%</b>	<b>(14,765.25)</b>
<b>Ending Balance</b>		<b>(4,115.29)</b>	<b>31,086.22</b>		<b>31,086.22</b>	<b>0%</b>	<b>26,219.63</b>

**KIRCH ROUNDS BOWMAN & DEFFENBAUGH PC**  
MEMORANDUM

**TO: CBA Council of the Trust and Estate Section**

**FROM: Charles Rounds**

**RE: Summary of 3/17/20 CBA Real Estate Section Council Meeting**

**DATE: 3/18/20**

---

I attended the CBA Real Estate Section Council ("RESC") meeting on 3/17/20. The following is my report on matters discussed which CBA Trust and Estate Section Council ("TESC") might find of interest:

**#1) COVID-19:**

The meeting was held completely remotely. Attendance was still good. Plans for an offsite meeting of the RESC for the spring has been postponed indefinitely. There was a discussion of using section funds, not spent on events and activities which have been cancelled, to support pro bono legal services. Many small business real estate clients are going to be hit very hard financially by this outbreak and will have increased legal problems including landlord and mortgage issues. The idea of buying tables at the next Barristers' Ball to support Metro Volunteer Lawyers was suggested.

**#2) Legislative Update:**

Andy White gave the RESC an update. Colorado legislature is temporary adjourned. Regular session can only pass laws for 121 days. A special session is always a possibility. The Colorado Supreme Court has been asked to decide if the regular legislative session can be extended. Likely there will be few new bills introduced. Significant cuts in the state's \$12 billion general fund budget is going to be a major focus of the legislature.

**#3) Document Recording Issues:**

The RESC is greatly concerned that other Colorado counties will follow the recent announcements by Jefferson and Adams Counties

that all recordings, including electronic recordings, will be stopped for the foreseeable future. This would grind real estate transactions to a halt. There was discussion to have the CBA contact the governor about this issue.

**#4) HB 20-1333 (HOA Transparency Bill):**

The RESC voted to oppose the HOA Transparency Bill. It was in response to complaints about the HOA legal structure under CCIOA expressed during recent stakeholder meetings. The concerns about the proposed amendments to CCIOA revolve around clouding title and increasing the cost of administering HOA's.

**Council of the Trust and Estate Section, Colorado Bar Association**

**Notice of and Agenda for the April 1, 2020 Meeting**

To: Council Members  
Trust and Estate Section of the Colorado Bar Association

From: Timothy D. Bounds  
Secretary/Treasurer  
1660 S. Albion St., Suite 1100  
Denver, CO 80222  
(303) 757-8300  
Bounds@evanscase.com

**Notice of Meeting**

The next monthly meeting of the 2019-2020 Council of the Trust and Estate Section of the Colorado Bar Association will be held:

Date and time: ***Wednesday, April 1, 2020, 3:15 p.m.***  
Place: ***THIS MEETING WILL BE CALL-IN ONLY DUE TO COVID 19***

---

**Call-In Instructions**

Call-in instructions are as follows: 1.425.436.6390  
Access Code: 420360

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**Minutes of Previous Meeting, Financial Reports & Attachments**

1. Minutes of the March 4, 2019, meeting of the Council
2. Minutes of March 5, 2020 and March 13, 2020 special meetings of Council
3. Financial spreadsheets as of April 1, 2020
4. Memo from March 2020 Real Estate Section Meeting.
5. Civic & Community Affairs Brochures on Wills in Colorado.

**Trust and Estate Section Council Agenda**  
**April 1, 2020**

In an attempt to adhere to the allotted meeting duration of one (1) hour and thirty (30) minutes, the Chair will exercise her prerogative to limit the time for any report or discussion on a topic to ten (10) minutes. This conforms to Robert's Rules of Order.

1. Review/approval of Minutes of the March 4, 2020, meeting of the Council
2. Chair's Report and Administrative Matters (Josie Faix)
3. Secretary/Treasurer's report (Tim Bounds)
4. Tax Section Liaison (Georgine M. Kryda)
5. Elder Law Section Liaison (Patrick Thiessen)
6. Real Estate Section Liaison (Chad Rounds)
7. Family Law Section Liaison (Kim Willoughby)
8. Statutory Revisions Committee (Molly Zwerdinger)
9. Legislative Liaison (Darla Daniel)
10. Council Notes (Kristin Dittus)
11. CLE/Estate Planning Retreat (Spencer Crona)
12. Orange Book Forms Committee (Heidi Gassman)
13. Rules and Forms Committee (Gordon Williams)
14. Civic and Community Affairs Joint Committee of the Elder Law Section (Sandra Sigler)
15. Diversity & Inclusivity Committee (Melissa Schwartz)
16. Probate Trial and Procedures Committee (Kathy Seidel & Norv Brasch)
17. Colorado Estate Planning Handbook (David Johns)
18. Green Book (Josie Faix)
19. Trust & Estate Practice Support Committee (Jessica Johnson)
20. The Colorado Lawyer (Emily Bowman)

21. Communications Representative/Ambassador Program (Lindsey Andrew)

22. Board of Governors Representative (Jonathan Haskell)

23. Miscellaneous/FYI

24. Adjournment

**Council of the Trust and Estate Section of the Colorado Bar Association  
Minutes of March 4, 2020, Meeting**

Council met on Wednesday, March 4, 2020, at the Colorado Bar Association offices, 1290 Broadway, Suite 1700, Denver, Colorado. The meeting was called to order at approximately 3:00 p.m. by Josie Faix, Chair.

The following members of Council were present or participated by phone and constituted a quorum:

Josie Faix, Chair  
Spencer Crona, Vice Chair  
Tim Bounds, Secretary  
Leia Ursery, Chair Pro-Tem  
Elizabeth Meck (2<sup>nd</sup> year member)  
Lauren Da Cunha (2<sup>nd</sup> year member)  
Peggy Gardner (2<sup>nd</sup> year member)  
Louisa Ritsick (1<sup>st</sup> year member)  
Kristin Dittus (1<sup>st</sup> year member)

Also in attendance were:

Katie Roberts (CBA Staff)  
Chad Rounds (Real Estate Section liaison)  
Sandra Sigler (Co-Chair, Civic & Community Affairs Committee)  
Kim Willoughby (Family Law Section liaison)  
Georgine Kryda (Tax Law Section liaison)  
Jonathan Haskell (Board of Governors liaison)  
David Kirch (CO lawyer)  
Melissa Schwartz (Diversity & Inclusivity Committee)  
Kathy Seidel (Probate Trial & Procedure Committee)  
Kayla Nelson (Co-Chair, Civic & Community Affairs Committee)

\*denotes attendance via telephone

**1. Approval of Minutes of Prior Meeting**

The Minutes of the February 5, 2020, Council meeting were approved unanimously.



**2. Chair's Report (Josie Faix)**

The CBA recently sent out a survey about the old T&E Listserv and the migration to the CBA Community platform. Council will discuss the results of the survey at the April meeting.

Council will also be discussing the new slate of first year members; voting will take place on or before March 15, 2020 and the results will be distributed to Council and the CBA at that time. Please e-mail nominations and/or applications to Josie Faix or Tim Bounds.

The committee charged with drafting the amicus brief for the *Trevino* case in the Colorado Court of Appeals will be co-chaired by Leia Ursery and Spencer Crona. The committee hopes to review and vote on the draft brief at the April meeting. The deadline for submitting the brief of the Court of Appeals is April 28, 2020. **A motion to establish a subcommittee of Council to draft the amicus brief was made, seconded, and passed unanimously.**

Council had a discussion about the contribution from the Section for the 2020 Estate Planning Retreat. **A motion to approve a contribution of \$6,250 was made, seconded, and passed.** Council is also seeking donations for the silent auction; please send all donations to Leia Ursery.

**3. Secretary/Treasurer Report (Tim Bounds)**

Tim reviewed the financials from February 2020 and also reminded everyone to submit nominations/applications for the *Sterling Ambler Award* to be presented in the fall.

**4. Tax Section Liaison (Georgine M. Kryda)**

Klaralee Charlton will be teaching a CLE on the SECURE Act at the CBA on March 11, 2020.

**5. Elder Law Section Liaison (Patrick Thiessen)**

The 2020 Elder Law Retreat will be held from August 27-29, 2020 at the Grand Hyatt in Vail. Patrick also reported that the Section is currently discussing a case involving a disability trust and decanting. The subcommittee has also completed proposed regulations for professional fiduciaries; comments are being taken through the month of March.

**6. Real Estate Section Liaison (Chad Rounds)**

Chad has received comments from the Real Estate Section on trust & estates forms, and is still waiting on a few more stakeholders to chime in. The Section meeting in February did not address the forms.

**7. Family Law Section Liaison (Kim Willoughby)**

There was no report from the Family Law Section.

**8. Statutory Revisions Committee (Molly Zwerdinger)**

Senate Bill 129 (Re. Pre-trial conferences in Title 15 protected proceedings) is currently being reviewed. Proposed amendments from SRC and ELS were accepted. LPC will be voting on the bill at their next meeting.

**9. Legislative Liaison (Stephen M. Brainerd & Darla Daniel)**

There was no report.

**10. Legislative Update (Andy White)**

Andy reported that the sponsor of the proposed changes to the Uniform Parentage Act is going to withdraw the bill in its current form and work on amendments after receiving feedback from various stakeholders.

House Bill 1316 (dealing with surrogacy provisions of the Uniform Parentage Act) may be run as standalone legislation. At this time, the Family Law Section has not submitted an opinion on the bill itself nor on the idea of running it as standalone legislation.

Darla Daniel noted that the committee in charge of reviewing proposed changes to the Uniform Probate Code is also reviewing proposed changes to the Uniform Parentage Act and what provisions, if any, would need to be incorporated into the proposed changes to the UPC.

**11. Council Notes (Kristin Dittus)**

Please submit any ideas or topics for upcoming editions of Council Notes to Kristin.

**12. Continuing Legal Education & Estate Planning Retreat (Spencer Crona)**

The agenda for the 2020 EP Retreat is complete and brochures have been mailed out to Section members. The “brown bag lunch” CLE series is booked through November 2020.

**13. Orange Book Forms Committee (Heidi Gassman)**

The Committee is still review the engagement letter forms and will likely do so through the end of this year. The Retirement Assets subcommittee will be reconvening to address changes to their forms due to the passing of the SECURE Act.

**14. Rules & Forms Committee (Gordon Williams)**

The Committee has completed its review of the petition for conservatorship form and has moved on to reviewing various real estate forms.

**15. Civic & Community Affairs (Sandra Sigler)**

Sandra mentioned that there are still slots available for ads in the upcoming *Senior Law Handbook*. Upcoming senior law days are as follows: Adams County (June 13<sup>th</sup>); Jefferson County (June 13<sup>th</sup>); Denver (July 18<sup>th</sup>); El Paso County (September 12<sup>th</sup>). Kayla Nelson will circulate the brochures regarding Wills so that Council can discuss at the April meeting.

**16. Diversity & Inclusivity Committee (Melissa Schwartz)**

The Diversity & Inclusivity Steering Committee is currently working on implementing their Action Plan, with the goal of increasing D&I in leadership roles throughout the Bar. The Plan contains goals for implementing for each Section; there was a discussion amongst Council as to how to best implement the goals for T&E Section. Council will discuss further at the April meeting.

Melissa received a request to include the D&I Practice Advisory on the T&E Section webpage. **A motion to post the advisory on the T&E page was made, seconded, and passed.**

**17. Probate Trial & Procedures Committee (Kathy Seidel & Norv Brasch):**

The Committee formed a subcommittee to examine proposed changes to the cost and compensation recovery Act in Article 10 of Title 15.

**18. Colorado Estate Planning Handbook (David Johns)**

There was no report.

**19. Green Book (Josie Faix)**

There was no report.

**20. New T&E Lawyers Committee (Jessica Johnson)**

The Committee voted to change its name to “Trust & Estate Practice Support Committee.”

**21. The Colorado Lawyer (Emily Bowman & David Kirch)**

The March issue will feature an article by Emily Bowman on the SECURE Act. The May issue will include an article by Carol Warnick on non-judicial settlement agreements under the CO Uniform Trust Code.

**22. Communications Representative & Ambassador Coordinator (Lindsey Andrew)**

The Estate Planning Retreat will include an ambassador event with new attendees. Please contact Lindsay with more information.

**23. Board of Governors Representative (Jonathan Haskell)**

Jonathan reported on the December 16, 2019 meeting. The BOG passed a resolution to develop broadband for rural areas of the State. The BOG is undertaking a “law school transparency project” designed to improve reporting of employment figures. The BOG will have its next meeting on June 14, 2020. Please contact Jonathan if you want to submit questions for the upcoming meeting.

**24. Other Business**

There was no new business.

**ADJOURNMENT**

The meeting was adjourned at 4:25 p.m. The next Council meeting will be held on April 1, 2020.

Respectfully submitted

/s/ Timothy Bounds, Secretary

from a current or prior partner. If a decedent does not have children or a surviving spouse, generally his probate assets would be inherited first by his parents, if living, and then siblings and other relatives. If you want your assets to be inherited differently than stated in Colorado's intestacy laws, your estate planning documents can designate different wishes.

### **Can I change my will?**

A will can be amended or revoked by a testator. An amendment to a will is called a codicil. In order to revoke your will or create a codicil, a testator must meet the same requirements as if he were creating a will. Specifically, a codicil must be in writing and signed by the testator. In order to revoke his will or create a codicil, a testator must understand the significance of his action and must not be unduly influenced or forced to do so by another person.

If you wish to make changes to your current will, do not write directly on your will. Writing in new clauses or scratching out parts of your will creates confusion about what you intended and may result in increased court involvement or fighting between your family members. It is clearer for your devisees and the court if you sign a codicil or an entirely new will in order to change your wishes.

### **When should I update my will?**

Review your will and other estate planning documents every few years in case changes in your life, in the lives of your devisees or nominated personal representatives, or in the law necessitate changes to your current documents.

Colorado does recognize wills signed in other states. However if you recently moved to Colorado, you should consider speaking with a Colorado attorney to make sure the language of your will is supported by the laws of Colorado.

This brochure is published as a public service by the Colorado Bar Association and was authored and is reviewed and updated as needed by the Civic and Community Affairs Committee, a Subcommittee of the Trusts and Estates Section. Its purpose is to provide general information about the topic contained herein, which is a common legal issue that may come up in estate planning, probate, and/or elder law cases. The information in this brochure is current as of March 2020. You should ensure that there have not been any changes in the law that may affect your matter, which may require consulting with an attorney.

# Wills in Colorado

*Last Will and*

Smithson, an adult residing at 123/456 North  
and mind, declare this to be my Last Will  
made by me.

I appoint Johnson Smithson as my Personal  
Representative, to be permitted to serve without Court  
approval, that he/she be per-  
sonally and jointly liable for the costs of the estate, and  
posting bond.

Sponsored by the

**CBAK**<sup>®</sup>  
Colorado Bar Association

A will is a document often created in an estate plan. It can be titled as “Last Will and Testament of John Doe” or “Will of John Doe.” A will is made and signed by a testator (male) or testatrix (female) and provides instruction for what the testator wants to happen after his or her death.

### **Who can make a will?**

A testator must be 18 years or older and of sound mind. A testator must generally know:

- what his assets are,
- who his family members are,
- how his will affects who will inherit from him, and
- his will must represent his wishes.

In addition, a testator must sign a will voluntarily and not be under any constraint or undue influence by another person.

### **What does a will do?**

A will can accomplish multiple purposes:

- The most common purpose of a will is to designate who will inherit the testator’s assets after death. A person who is designated to receive an inheritance (“devise”) from a testator in a will is called a devisee.
- A testator can also nominate someone in his will to serve as his personal representative. A personal representative in Colorado is known as an executor in other states. A personal representative is the individual or entity who administers the estate of the person who died (“decedent”) after his death, pays debts of the decedent, and completes the decedent’s wishes for distribution of his assets to his devisees or heirs.
- A will can nominate someone to be a guardian for the testator’s minor or disabled child.
- Drafting a will includes consideration of applicable taxes after your death. You should consult with an attorney or tax professional if you have questions about taxes.

### **How is a will created?**

A will must be in writing and signed by the testator. If the testator is physically unable to sign his will, another person can sign the will on behalf of the testator, with the testator’s permission. Colorado law requires that if another person is signing for the testator, the person can only do so if the testator gives that person permission and the person signs the document in the physical and conscious presence of the testator.

An attorney often creates a typed will for a client, with two witnesses and/or a notary public to witness the testator’s signature. Colorado does recognize holographic wills, which are wills written and signed in the testator’s own handwriting. Holographic wills are not required to have the signature of witnesses or a notary public. However, you should be careful about creating your own will. Wills that are created without the advice of an attorney are frequently found to be confusing or insufficient, which may cause delay, expense or litigation. As explained below, not all assets can be controlled by a will. It is important to understand how your assets are titled and what your estate planning options are before you create a will on your own.

### **Does a will dispose of all of my assets?**

Some assets are not governed or distributed by the terms of a will. These assets are often called non-probate assets. An asset that has a beneficiary designation, payable-on-death (POD) designation, or transfer-on-death (TOD) designation is a contract with that financial institution and is not controlled by the terms of your will. In addition, if you own an asset with another person as a joint tenant or joint owner, that asset will pass to the other joint owner(s) after your death and is not controlled by your will.

If your assets do not have these designations, are owned as tenants-in-common, or are owned by you alone, they generally are considered probate assets and would be distributed under the terms of a will.

To better understand which of your assets would be governed by the terms of your will, seek the advice of an attorney, reference the Colorado Senior Law Handbook, or reference the following brochures: Joint Tenancy, Probate in Colorado, and Estate Planning.

### **What is a personal property memorandum?**

A personal property memorandum is a document that can direct who you want to inherit specific personal property items, such as household goods and jewelry. You cannot give away money through a personal property memorandum. If you create a personal property memorandum yourself, you should sign and date the document and make sure it can be found with your will. You can change your memorandum at any time, and it is easier for your heirs to understand your wishes if you create a whole new document instead of marking on the original version.

### **Do I have to include all my family in my will?**

You may give your assets to whomever you wish. However, Colorado law provides protections for surviving spouses who are left out of a will, and children who were born after the will was executed when no provisions were made for them. If you have questions about your estate planning options, you should consider speaking with an attorney.

### **What if I don’t have a will?**

A person who does not have a will is termed to have died intestate. Colorado has laws that designate how a decedent’s probate assets would pass upon his death if he dies intestate. Colorado’s intestacy laws assume that a decedent would want his probate assets to pass first to his spouse and children. If a decedent has a blended family, Colorado’s intestacy laws contain very specific terms to provide amounts to the surviving spouse or the decedent’s children

# Wills in Colorado

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