A. Introduction

1. Chronology Of ACTEC Commentaries On Model Rules of Professional Conduct

a. In October 1993, after four years of intensive study and debate, the Board of Regents of the American College of Trust and Estate Counsel (“ACTEC”) unanimously adopted the ACTEC Commentaries on the Model Rules of Professional Conduct (the “Commentaries”). Originally authored by Professor John R. Price of the University of Washington School of Law pursuant to a grant from the nonprofit ACTEC Foundation, the Commentaries are designed to give “particularized guidance” to ACTEC fellows, estates and trusts lawyers generally, and others on the professional responsibilities of lawyers engaged in trusts and estates practice. The Commentaries reflect a concerted and thoughtful effort on the part of experienced probate practitioners to harmonize the “black letter” restrictions of the Model Rules of Professional Conduct (“MRPC”) and
the comments thereto with the ethical dictates of a generally nonadversarial and family-oriented trusts and estates practice.

b. In March 1995 the ACTEC Board of Regents adopted the second edition of the Commentaries, which among other things dramatically expanded the annotations to relevant case law and ethics opinions. In March 1999 the ACTEC Board of Regents approved the third edition of the Commentaries (published in October 1999). Unlike the second edition, which included numerous substantive additions and editorial changes from the first, the third edition reflected far fewer departures from the prior edition. The two main editorial additions in 1999 were new commentaries on Rule 1.16 (Declining or Terminating Representation) and Rule 3.7 (Lawyer as Witness). The third edition also included many new annotations to recent cases and ethics opinions and some very modest editorial changes from the second edition. In addition, to make the Commentaries even more user-friendly, the third edition added a table of authorities with citations organized by state to all relevant Rules of Professional Conduct, cases, and ethics opinions cited. Simultaneously with the publication of the third edition, the ACTEC Foundation published Engagement Letters: A Guide to Practitioners, a practice guide filled with engagement letter forms designed to be used in conjunction with the Commentaries.

c. The fourth edition of the ACTEC Commentaries was published in March 2006. This reflects all recent changes made to the MRPC relevant to trusts and estates practitioners (covering modifications implemented as a result of Ethics 2000, discussed below). It includes many important cases, ethics opinions, and other developments post-dating the previous edition. The fourth edition includes commentaries on new MRPCs 1.0 (Terminology), 1.18 (Duties to Prospective Clients), and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

2. Ethics 2000


b. According to Justice Veasey, the principal reasons driving the ABA’s decision to revisit the MRPC were the growing disparity in state ethics codes and concerns about “some substantive shortcomings and lack of clarity in particular Rules, both exemplified and aggravated by dissonance between Rule text and Comment.” Ethics 2000 nevertheless retained the basic architecture of the MRPC including “the primary disciplinary function of the Rules, resisting the temptation to preach aspirationally about ‘best practices’ or professionalism concepts.” Chair’s Introduction and Executive Summary.

c. Following additional public comment and discussion, the Ethics 2000 report was presented for debate to the ABA House of Delegates at its annual meeting in Chicago in August 2001. Following debate, most of the report was adopted as presented. The House of Delegates, however, voted down two significant proposed changes to MRPC 1.6 (Confidentiality of Information), discussed below.
d. Since the House of Delegates was unable to conclude its work at the August 2001 meeting, the report came up for final discussion, debate, and approval at the ABA mid-year meeting in Philadelphia in February 2002. At this meeting the House of Delegates adopted the Ethics 2000 report, as revised. Therefore, for the first time since the early 1980s the ABA has adopted revised Model Rules of Professional Conduct. It is now up to individual states to consider whether to adopt the revised MRPC.


e. A review of many of the MRPC discussed by the ACTEC Commentaries follows. After discussion of each selected rule and commentary is a summary of changes to the applicable MPRC recommended by Ethics 2000 and adopted by the ABA that may be relevant to estates and trusts lawyers.

f. The ABA has adopted several new MRPCs, including new MRPC 1.0, entitled “Terminology,” which elevates the definitions of certain key terms to the status of a formal rule. New MRPC 1.0 includes definitions of “confirmed in writing,” “informed consent,” and other important terms. The concept of “informed consent” replaces the current “consent after consultation.” This change is discussed below.

B. Themes And Structure Of ACTEC Commentaries

1. As stated in the reporter’s note preceding the Commentaries, authored by Professor Price and this author as chair of ACTEC’s Professional Standards (now Professional Responsibility) Committee:

   Basic Themes of Commentaries. The main themes of the Commentaries are: (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally non-adversarial nature of the trusts and estate practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC.


2. As the preface notes, “While the Commentaries are intended to provide general guidance, ACTEC recognizes and respects the wide variation in the rules, decisions, and ethics opinions adopted by the several jurisdictions with respect to many of these subjects.” Reporter’s Note to First Edition, Commentaries.

3. The structure of the Commentaries follows that of the MPRC and the comments thereto: each MPRC with respect to which ACTEC has offered a commentary is quoted in full, followed by the commentary thereon, extensive annotations to relevant case law, ethics opinions from many jurisdictions, and other secondary authorities. “The Annotations that follow each Commentary include references to a broad range of the cases, ethics opinions and articles that deal with the professional responsibility of
trusts and estates lawyers.... Reflecting various approaches taken in different jurisdictions, the cases and ethics opinions are often inconsistent and cannot be harmonized. The summaries of the cases and ethics opinions are not part of the [ACTEC] Commentaries. They are included for illustrative purposes only and do not necessarily reflect the judgment of the Reporter or ACTEC regarding the issues involved.” Commentaries at 3.

C. Commentaries On Selected Model Rules

1. Commentary On MRPC 1.0: Terminology

The revised MRPC now contains an entire rule, 1.0 (Terminology), devoted to key terms and terminology referenced throughout the MRPC. Definitions particularly helpful to trusts and estates lawyers include “confirmed in writing,” “fraud” and “fraudulent,” “informed consent,” and “writing” and “written.” Generally, where the MRPC requires a lawyer to obtain a client’s informed consent confirmed in writing that consent may be confirmed in a writing sent by the client to the lawyer, or by the lawyer to the client. The ACTEC Commentary on MRPC 1.0 observes, “[t]he lawyer must make reasonable efforts to ensure that the client possesses information as to the law and the facts reasonably adequate to make an informed decision.” Commentaries at 13.

2. Commentary On MRPC 1.1: Competence

a. The most important contribution of the Commentaries on MRPC 1.1, dealing with competence, is the principle that an estate planning lawyer “is generally entitled to rely upon information supplied by the client unless the circumstances indicate that the information should be verified.” Id. at 15. Furthermore, although the Commentaries emphasize that the estate planning lawyer should generally supervise the execution of all estate planning documents, if such supervision is not practical then the lawyer may arrange for the documents to be delivered to the client with written instructions regarding the manner in which they should be executed. Of course, this principle presupposes a client’s ability to understand the instructions given.

b. The annotations to this commentary include numerous decisions addressing lawyer discipline for failure to act competently and the issue of a disappointed beneficiary’s standing to sue the decedent’s lawyer for negligence in drafting the testamentary instrument. To date, at least 32 jurisdictions have ruled in one form or another that the lack of contractual privity between the attorney-drafter of a testamentary instrument and the instrument’s intended beneficiaries is no bar to an action for legal malpractice by the beneficiary against the attorney. These jurisdictions are: Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, and Wisconsin.

c. This principle has perhaps been best enunciated in an English case, *Ross v. Caunters*, 3 All E.R. 580 (1979). In holding that the lack of privity of contract of a will’s beneficiaries with the attorney-drafter of the will was no bar to an action for negligence, the English court observed:

In broad terms, the question is whether solicitors who prepare a will are liable to a beneficiary under it if, through their negligence, the gift to the beneficiary is void. The solicitors are liable, of course, to the testator or his estate for a breach