ETHICAL GUIDELINES FOR THE ESTATES AND TRUSTS LAWYER:  
THE ACTEC COMMENTARIES ON THE MODEL RULES  
OF PROFESSIONAL CONDUCT AND NOTES ON ETHICS 2000

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I. INTRODUCTION

A. The ACTEC Commentaries on the Model Rules of Professional Conduct

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 regarding the professional responsibilities of lawyers engaged in a 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 (and the Comments thereto) with the ethical dictates of a generally non-adversarial and family oriented trusts and estates practice.

In March 1995 the ACTEC Board of Regents adopted the Second Edition of the ACTEC 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 Edition, the new Third Edition reflects far fewer departures from the prior Edition. The two main editorial additions are new Commentaries on Rule 1.16 (Declining or Terminating Representation) and Rule 3.7 (Lawyer as Witness). The Third Edition also includes many new Annotations to recent cases and ethics opinions and some very modest editorial changes from the Second Edition. In addition to the foregoing, to make the Commentaries even more user-friendly, the Third Edition includes a Table of Authorities, with citations, organized by state, to all relevant Rules of Professional Conduct, cases and ethics opinions cited in the ACTEC Commentaries. Simultaneously with the publication of the ACTEC Commentaries, 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 ACTEC Commentaries.

B. Ethics 2000

the Model Rules of Professional Conduct (hereinafter “MRPC”) and related materials are available on the Internet at http://www.abanet.org/cpr/e2k. The complete Commission Report is available for $40 from the Center for Professional Responsibility of the American Bar Association. (To order by phone call the ABA Service Center at (800) 285-2221 and ask for PC No. 5610159.)

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.” The Commission 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.)

Following additional public comment and discussion, the Ethics 2000 Commission's Report was presented for debate to the American Bar Association House of Delegates at its Annual Meeting in Chicago, Illinois in August, 2001. Following debate most of the Report was adopted as presented. However, the House of Delegates voted down two significant proposed changes to MRPC 1.6 (Confidentiality of Information), discussed later in this paper. Since the House of Delegates was unable to conclude its work on the Report at the August, 2001, Meeting, the Report came up for final discussion, debate and approval at the ABA's Mid-Year Meeting in Philadelphia in February, 2002. At this meeting the House of Delegates adopted the Ethics 2000 Commission Report, as revised. Therefore, subject to possible revisiting of one or more issues at the ABA's Annual Meeting in Washington D.C. in August, 2002, for the first time since the early 1980's the ABA has adopted revised Model Rules of Professional Conduct. It is now up to the individual states to consider whether or not to adopt the revised MRPC. (The author has been informed that the Supreme Court of Tennessee is expected to adopt the revised MRPC in their entirety in the very near future, in which event Tennessee would become the first state with the revised MRPC.)

The following Article selectively discusses and focuses upon the most important of the MRPC discussed by the ACTEC Commentaries. Following the discussion of each selected Commentary is appended a brief summary of any changes to the applicable Model Rule adopted by the ABA that appear to be directly relevant to the estates and trusts lawyer.

It is worth noting here that the ABA has adopted several new MRPC, including a new MRPC 1.0, entitled “Terminology”, which will elevate the definitions of certain key terms to the status of a formal Rule. Proposed new MRPC 1.0 includes definitions of “confirmed in writing,” “informed consent,” and other important terms. The concept of “informed consent” replaces the current concept of “consent after consultation”. This proposed change is further discussed infra at the conclusion of the discussion of the ACTEC Commentary to MRPC 1.4.

ACTEC expects to publish a Fourth Edition of the Commentaries in 2003. This next edition of the Commentaries will reflect all of the changes made to the MRPC and will include cases, ethics opinions and other developments post-dating the Third Edition.
II. OVERVIEW: THE COMMENTARIES' BASIC THEMES AND STRUCTURE

As stated in the Reporter's Note preceding the ACTEC 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."

As the Preface to the ACTEC Commentaries 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 the subjects."

The structure of the ACTEC Commentaries follows that of the Model Rules and the comments thereto: Each Model Rule with respect to which ACTEC has offered a Commentary is quoted in full, followed by the Commentary thereon, extensive annotations to relevant case law and 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."

III. COMMENTARIES ON SELECTED MODEL RULES

A. Commentary to MRPC 1.1: Competence

The most important contribution of the ACTEC Commentaries on Model Rule 1.1, dealing with competence, is the principle that the estate planning lawyer "is generally entitled to rely upon information supplied by the client unless the circumstances indicate that the information should be verified." Furthermore, although the ACTEC 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 the client's ability to understand the instructions given.)
B. Commentary to MRPC 1.2: Scope of Representation

In General

The Commentaries emphasize that the client and the lawyer, "working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client."

Representing Fiduciaries

While recognizing that the lawyer for the fiduciary retained to assist the fiduciary in the administration of an estate or trust generally represents only the fiduciary, the Commentaries permit direct communication between the lawyer and the beneficiaries while noting that the fiduciary is primarily responsible for such communication.

"As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests."

The Commentary to MRPC 1.2 notes that it may be permissible for the lawyer to represent the fiduciary both in a representative capacity and as a beneficiary provided that such representation is not otherwise proscribed by the dictates of MRPC 1.7 (Conflict of Interest: General Rule).