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Ethics for Estate Planners

Michael Downey

June 2026

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Who Is the Client?

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Joint Estate Plan

- Ann and Bill approach you to prepare a joint estate plan

- *Who are your clients?*

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Joint Estate Plan

- Ann and Bill approach you to prepare a joint estate plan
- Estate plan includes creating LLC

- *Who are your clients?*

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Deceased Client

- Ann asks you to prepare an estate plan
- Ann dies

- *Who is your client?*

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Deceased Client

- Ann asks you to prepare an estate plan
- Ann dies
- Chris is named personal representative

- *Who is your client?*

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Deceased Client

- Ann asks you to prepare an estate plan
- All Ann's assets are placed in a trust
- Ann is trustee but dies
- Chris becomes successor trustee

- *Who is your client?*

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Prospective Client

- Pat contacts you about preparing an estate plan
- Pat meets with you for an hour and shares information about assets and desires
- Pat leaves, and you never hear from Pat again
- Chris contacts you about challenging Pat's estate

- *Can you represent Chris? What can you tell Chris about your meetings with Pat?*

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Rule 4-1.9

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

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

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

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Estate Plan for Another

- Pat brings Chris to your office and asks you to prepare an estate plan for Chris

- *How do you deal with Chris? With Pat?*
- *Does it matter who is paying for work?*

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Rule 4-1.8(f)

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

(1) "the client gives informed consent;

(2) "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) "information relating to representation of a client is protected as required by Rule 4-1.6.

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Rule 4-5.4(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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Power of Attorney

- You are contacted and asked to send Pat a financial power of attorney for Chris to execute, naming Pat as POA

- *What concerns should you have?*

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Client Capacity

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Client With Diminished Capacity

- Ann approaches you to prepare estate plan
- You become concerned Ann has diminished capacity

- *What should you do?*

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Rule 4-1.14

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

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

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6. When taking protective action pursuant to Rule 4-14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Rule 4-1.14(b)

When the lawyer reasonably believes that

- the client has diminished capacity;
- is at risk of substantial physical, financial or other harm unless action is taken; and
- cannot adequately act in the client's own interest,

the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a next friend, guardian ad litem, conservator or guardian.

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Confidentiality and Privilege

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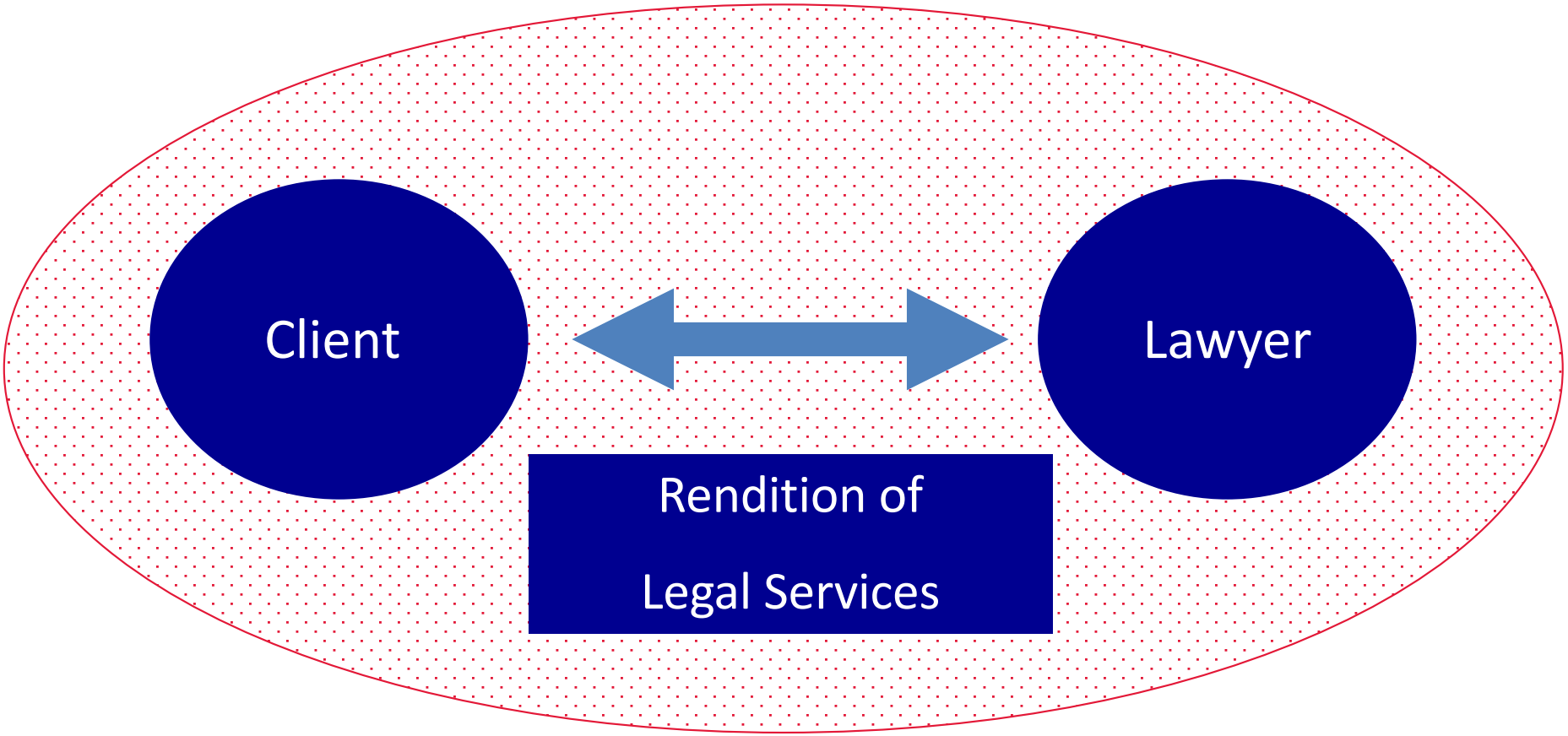
Joint Estate Plan - Privilege

- Ann and Bill approach you to prepare a joint estate plan

- *What is confidential? What is privileged?*

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Attorney-Client Privilege



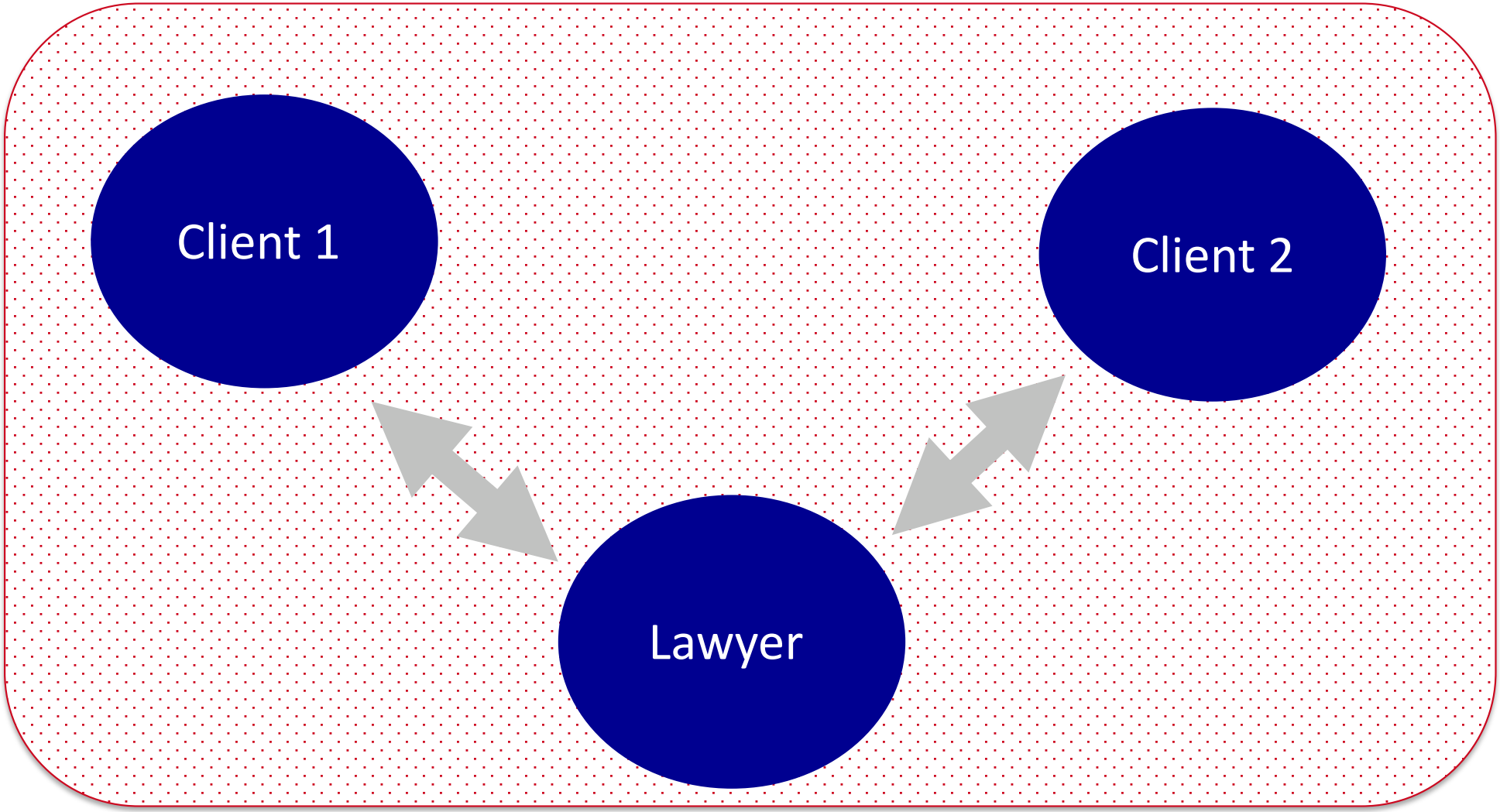
Work-Product Protection



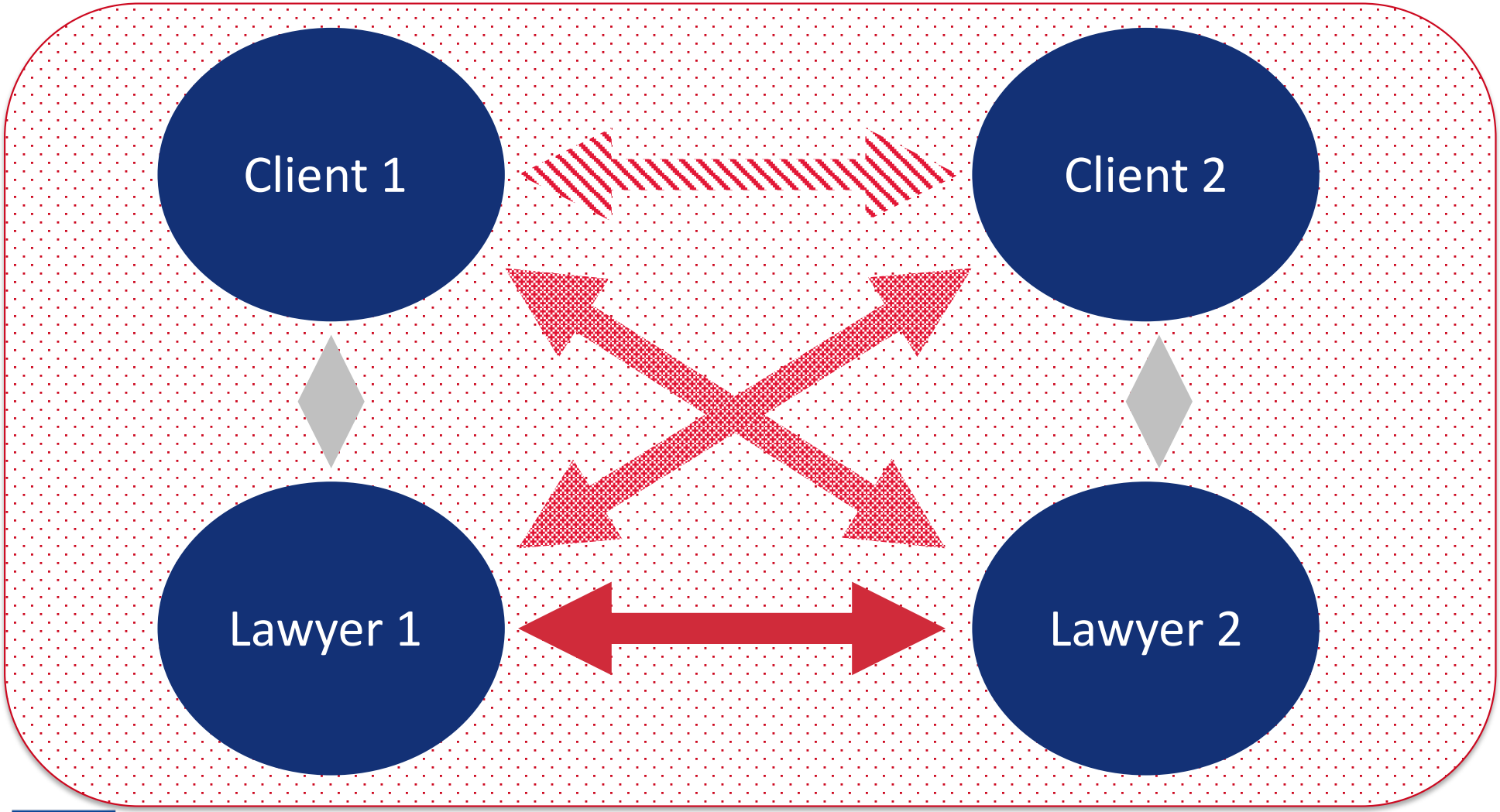
A lawyer's involvement is not required



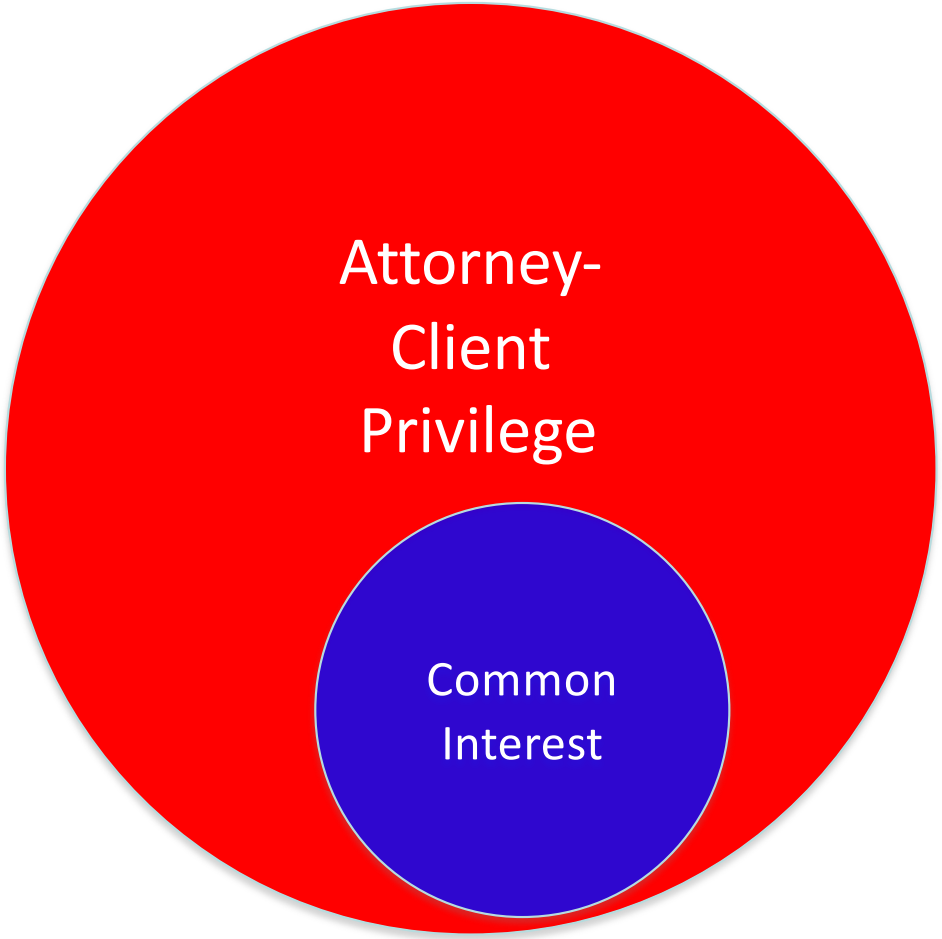
Joint Representation



Joint Defense/Common Interest Privilege



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Joint Estate Plan – Dishonest Clients

- Ann and Bill approach you to prepare a joint estate plan
- Ann and Bill tell you to omit Chris from plan
- Later Chris asks you whether Chris is really beneficiary as Ann and Bill have said

- *What do you tell Chris?*
- *Does it matter if Chris has Ann and Bill's promise in writing?*

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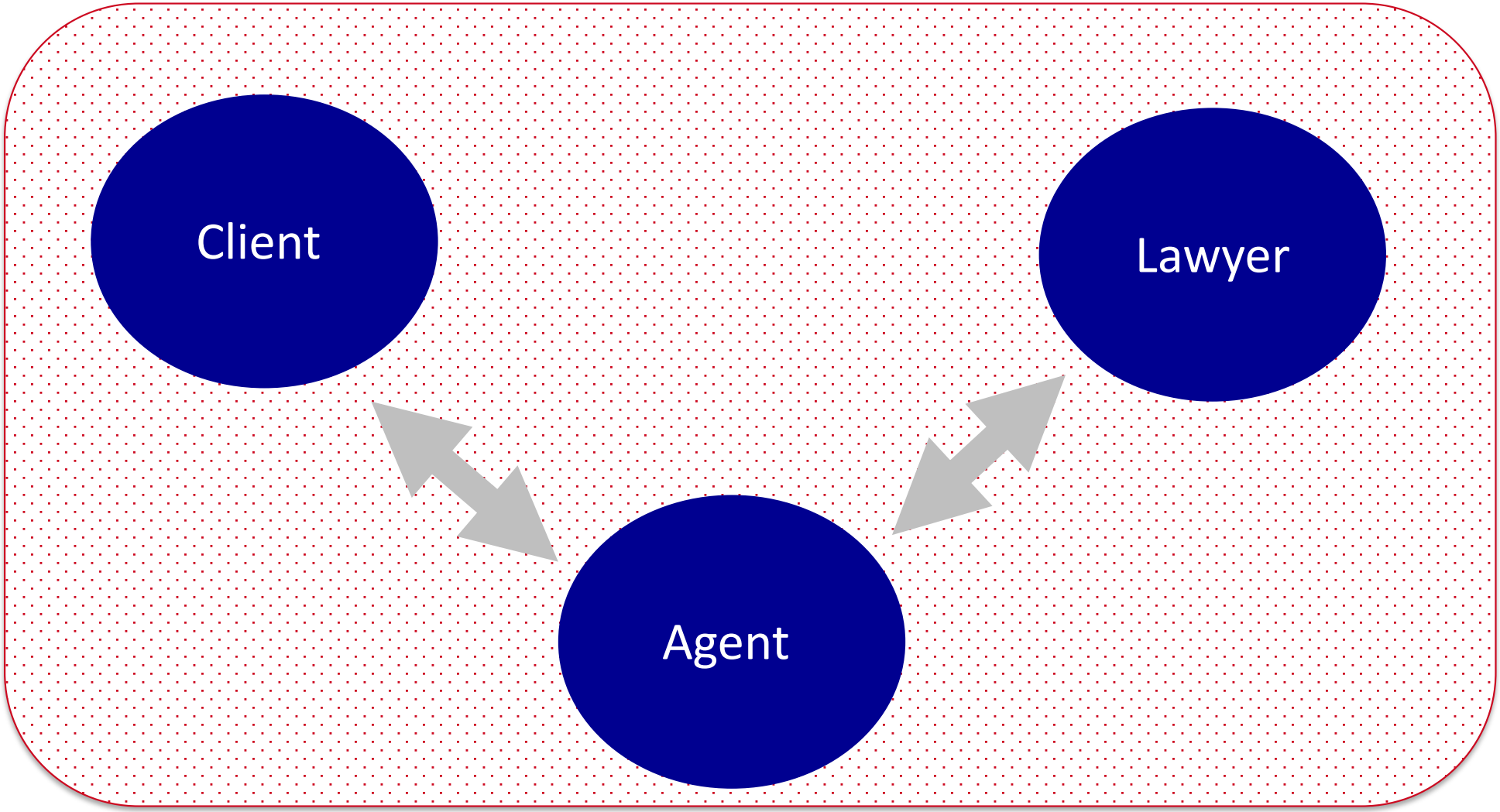
“Helper” at Meeting

- Ann approaches you to prepare Estate Plan
- Ann wants Chris (a relative or friend) present at the meeting

- *How does Chris’s presence impact confidentiality? Privilege?*

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"Necessary" Agents – *Kovel*



Request for Information

- Ann has you prepare estate plan
- Later Dawn requests information from you about Ann's estate plan

- *What information can you provide to Dawn?*
- *Does it matter if Ann is dead or incapacitated?*
- *Does it matter if Chris is a lawyer, representative, or beneficiary?*

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Request for Information (Part 2)

- Ann has you prepare prepare estate plan
- Later Dawn requests information about Ann's estate plan

- *What information can you provide to Dawn?*
- *Does it matter if you believe Ann was not competent when the estate plan was prepared?*

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Request for Information (Part 3)

- Ann has you prepare prepare estate plan
- Later the Department of Health & Senior Services requests information about Ann's estate plan and health

- *What information can you provide to DHS?*
- *Does it matter if you believe Ann was not competent when the estate plan was prepared?*

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Subpoena for Information

- Ann has you prepare prepare estate plan
- Later you receive a subpoena seeking information about Ann's estate plan

- *What do you do?*
- *Does it matter if Ann is alive or dead?*
- *Does it matter what type of subpoena it is?*

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“Hacked” Information

- Ann has you prepare prepare estate plan
- Later you learn someone has without authorization accessed your computer system and gained access to Ann’s account

- *What do you do?*

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What Are "Reasonable" Precautions







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Evaluation of Safeguards

- Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to,
  - the sensitivity of the information
  - the likelihood of disclosure if additional safeguards are not employed
  - the cost of employing additional safeguards
  - the difficulty of implementing the safeguards (and)
  - the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)

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Paying for an Estate Plan

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Estate Planning Fee

- Ann asks you to prepare estate plan
- You charge Ann:
  - $350 per hour
  - $2500 flat fee
  - 1% of assets in plan
- *Which types of fee are allowed?*

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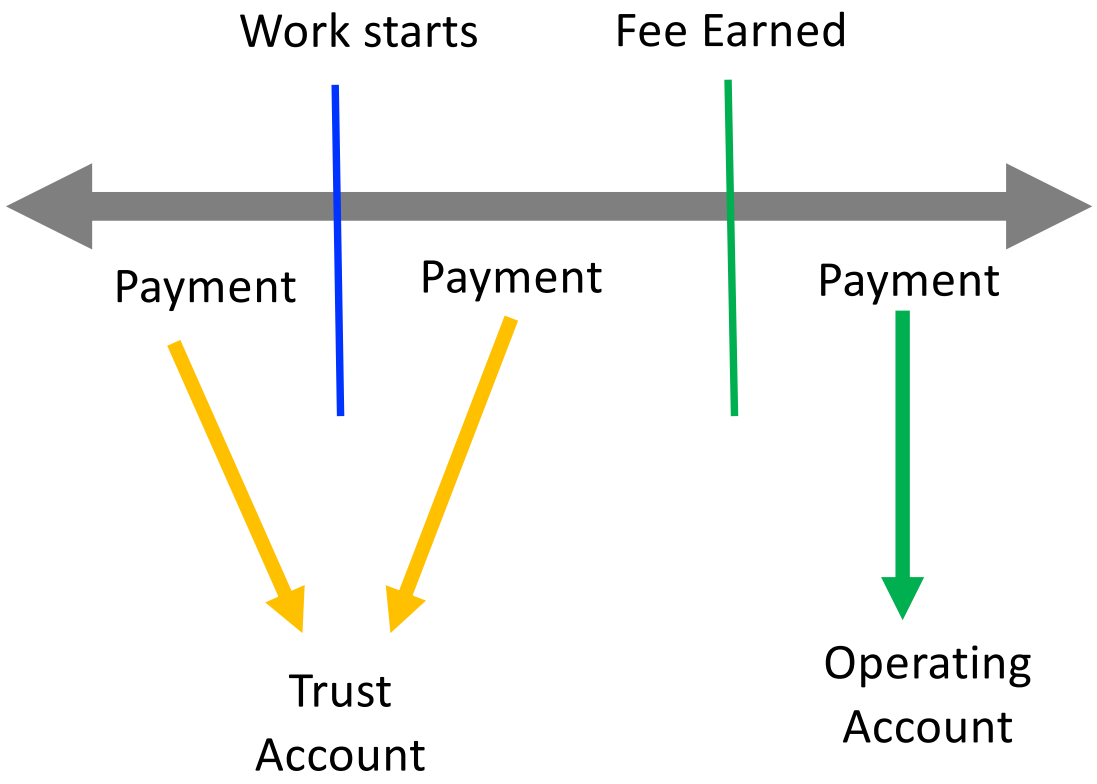
Estate Planning – Fixed Fee

- Ann asks you to prepare estate plan
- You charge Ann a $2500 fixed fee

- *Where do you put the money?*
- *If Ann discharges you prior to completion of the plan and asks for a refund, what do you do?*

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Basic Rule on Handling Funds Paid for Legal Services



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Receiving Funds

Method of Payment	Actual Receipt of Funds	Risk of Unilateral Cancelation or Withdrawal	Amount received
Cash	Immediate	None	Amount paid
Check	Minimum of several days and up to two weeks,* presuming no attempt to "stop payment"	None (after funds are received)	Amount paid
Credit Card	Several days	Considerable – often for six months (or more)	Amount paid less fees
Electronic Fund Transfer	Immediate	None	Amount paid

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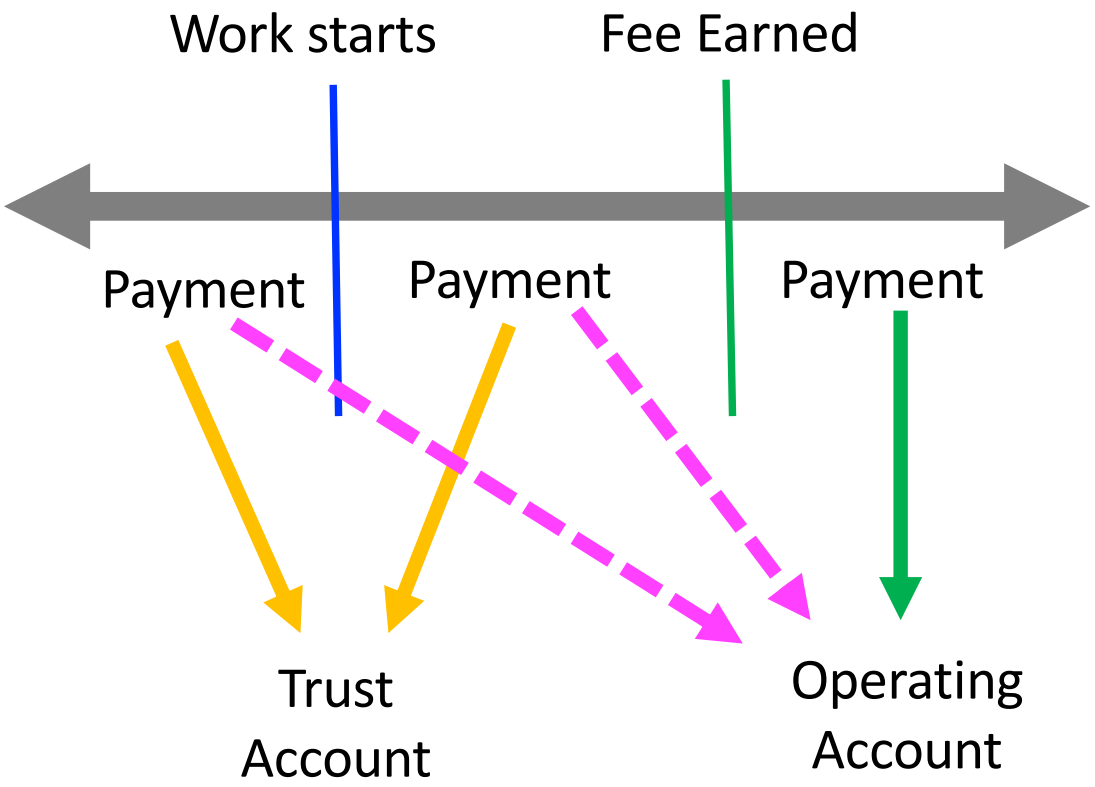
Exception to Trust Account Rule

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that an advanced flat fee which does not exceed $2,000 is exempted from this requirement and may be deposited into another account.

Rule 4-1.15(c) (effective January 1, 2019)

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$2,000 or less FLAT/FIXED FEE exception



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How Long Must Funds Be Held?

- Until the funds are actually received by the bank – they are "good funds"
  - Presumption – 10 days
  - "Available" is not "good"

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Trustee Misconduct

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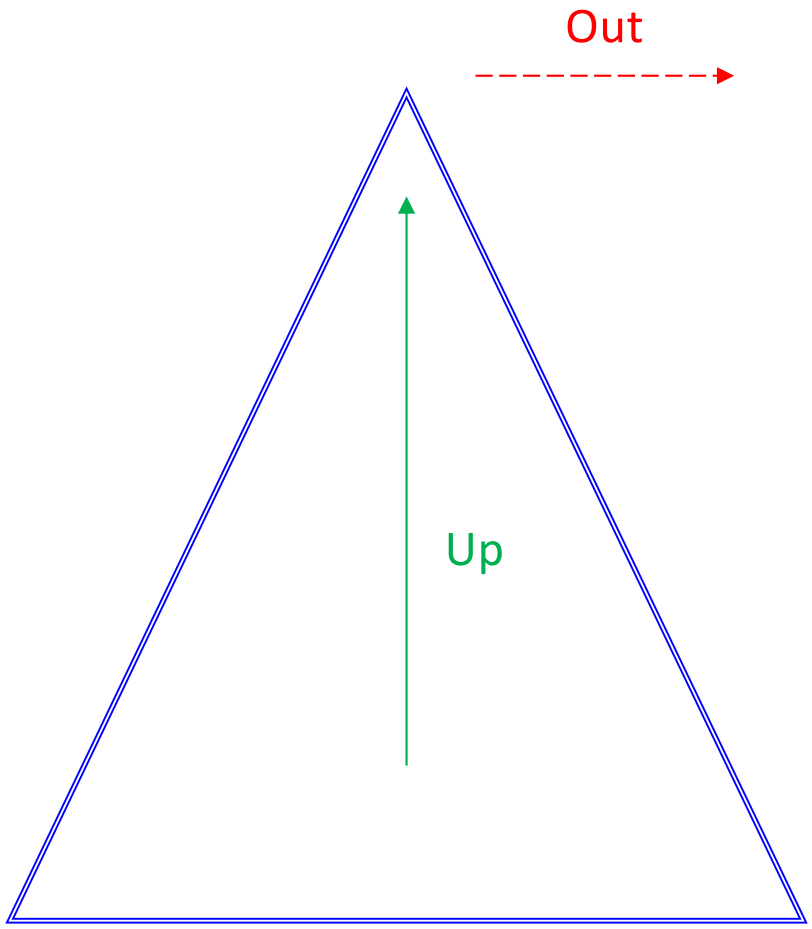
Trustee Misconduct

- You are advising Trustee in administration of Ann's trust
- You believe Trustee has engaged in misconduct

- *Whom can you tell about Trustee's misconduct?*
- *What should you do?*

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Reporting Up (and Out?)



Missouri Lawyers – NO general ability to report out

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Missouri Informal Opinion 20060053

QUESTION: Attorney has reason to believe that a Trustee misappropriated, and perhaps stole, funds from a Trust. Since Attorney represented the Trustee, is Attorney permitted to notify and inform the other beneficiaries of the Trustee's management of the Trust and of Attorney's suspicions? To Attorney's knowledge, the other beneficiaries have received no information regarding the Trust, and they have not contacted Attorney.

ANSWER: Attorney may not disclose the information to the other beneficiaries, unless Attorney has the consent of the Trustee. If the Trustee will come forward with the necessary information, Attorney may continue to represent the Trustee in attempting to resolve any problems. It is permissible for Attorney to advise the Trustee that Attorney will withdraw if the Trustee is unwilling to take the steps Attorney believes to be necessary, including consenting to disclosure to the other beneficiaries. It is also permissible for Attorney to withdraw, at this point, regardless of the steps the Trustee is willing to take. If the Trustee is not willing to take the steps necessary to resolve the problem and Attorney believes that the Trustee's conduct is fraudulent or criminal, Attorney must withdraw if Attorney's representation would assist the fraudulent or criminal activity.

Protecting Your Practice

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Malpractice Insurance

- "Claims-made" policies

- Most insurance is "occurrence" insurance

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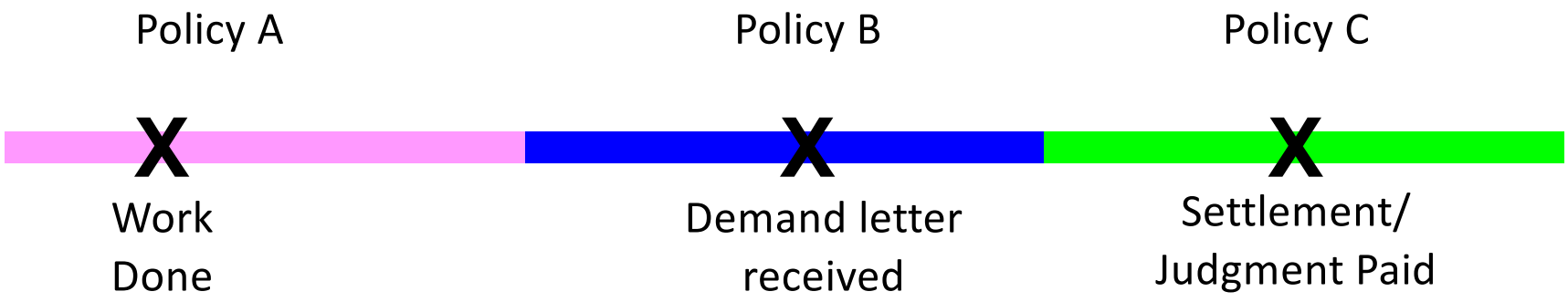
Have Insurance – and Report Claims

- Malpractice insurance can be purchased for about $100 per month

- "Claims made" policies – when claim is made, not when malpractice occurs
  - "Claim" is very broad
    - Demand letter
    - Lawsuit
  - "Pre-claim" coverage varies greatly by policy
    - Many policies $0
    - Some policies $25,000 or more

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"Claims"-Made Policies



- If you leave your firm (coverage source), you may lose coverage for subsequent claims
- A "tail" policy may be available

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News Release

LAW FIRMS FACE UNRELENTING CHALLENGES OF LATERAL MOVEMENT, CYBER THREATS, AI RISKS AND FRAUD

New Survey Finds Legal Malpractice Claim Severity at All-Time High

WASHINGTON, DC, May 15, 2024 – In their efforts to sustain and grow their business

Notably, 11 of the 13 insurers polled have participated in a claim payout in excess of $100 million in the past two years and the same number has paid two claims of that size. Meanwhile, five insurers surveyed paid a claim between $150 million and $300 million and four paid a claim over $300 million.

Conflicts of interest remain the single largest cause of legal malpractice claims with nine of the insurers polled ranking it first or second most common error. Next was scrivener or clerical errors, which ranked first or second by four of the insurers.

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For multiple years, the survey has found the same three practice areas generating the largest number of legal malpractice claims. Among insurers polled this year, 62 percent identified Trust & Estate, while Business Transactions was identified by the same percentage, followed by Corporate & Securities (46 percent). In the current survey, however, two additional practice areas – Insurance Defense and Personal Injury Plaintiff's work – saw continued growth in claims activity.

Who Can Bring Claims

- Clients
- (Alleged) clients
- Beneficiaries – *Donahue v. Shugart Thompson & Kilroy PC* (Mo. 1995)

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Nature of Claims

- Legal malpractice
- Breach of fiduciary duty – potential separate cause of action – *Klemme v. Best* (Mo. 1997)
- Cyber-related claims

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Most Common Claims

- Conflicts of Interest
- Case management errors
  - Failure to gather sufficient information
  - Believing client without verification
  - Neglecting communications with clients
  - Undue influence by potential beneficiaries

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Drafting Errors

- Over-reliance on standard forms
- Using/intermingling imprecise terms
- Not discussing contingencies
- Omitting provision desired from former plan
- Not addressing changes in law that may result from client moves
- Unmarried couples, etc.
- Failing to coordinate/conform documents
- Failing to properly effect testator's intent

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Other Errors

- Problems in will execution
  - Lack of/problems with execution “ceremony”
  - Capacity issues
- Errors of/change in law
- Fraud, overreach, self-dealing

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Managing Risk – Engagement Letters

- Who is the client
- What will be done for the client
- Joint representation – conflict waivers
  - "Zeal"
  - Confidences
- Implementation of estate plan

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Documenting of File

- What are main purposes of the plan
- What strategies has the client rejected – and why
- Why has client chosen unusual strategies
- *"Memo to file" may never reach client*

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Continuation of Representation

What are lawyers' duties after plan is executed?

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Protecting Yourself

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Something Unexpected Happens

If something unexpected happens to you today, what happens to your clients?

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Protections to Consider

- Emergency plan for practice
  - Access to computer, phone, bank account, etc.
- Emergency plan for office

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Mental Health

- What are you doing to maintain good mental health?

- Missouri Lawyers Assistance Program

  (800) 688-7859

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Rule 4-5.4(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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Marital Planning

- Pat and Chris are married
- Pat and Chris ask you to prepare estate plan
- Do you need a conflict waiver?

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Rule 4-1.7(a)

Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

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

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Notice of an Error

- You realize that Pat's estate plan has an error
- Do you need to notify
  - Pat if still a client
  - Pat if a former client
  - Others if Pat has died

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Rule 4-1.4

(a) A lawyer shall:

(1) keep the client reasonably informed about the status of the matter;

(2) promptly comply with reasonable requests for information; and

(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Rule 4-1.7(a)

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

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Deceased Client (continued)

- Pat was your estate-planning client
- Pat dies
- You receive a subpoena for Pat's file

- *What do you do to respond to the subpoena?*

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Rule 4-1.6(b)

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

(1) to prevent death or substantial bodily harm that is reasonably certain to occur;

(2) to secure legal advice about the lawyer's compliance with these Rules;

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

(4) to comply with other law or a court order;

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

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Trustee Misconduct

- You create a Trust for Pat
- Chris becomes the trustee of the Trust
- You advise Chris on matters relating to the Trust

- *You become concerned with Chris's conduct. What can/should you do?*

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Rule 4-1.6(b)

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(2) to secure legal advice about the lawyer's compliance with these Rules;

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(4) to comply with other law or a court order;

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

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Rule 4-1.2(f)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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Rule 4-1.16(a)

Except as stated in Rule 4-1.16(c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

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“Hacked” Information

- You learn someone has gained unauthorized access to your client work files, including files for current client Pat and former client Chris

- *What do you do?*

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Rule 4-1.6(c)

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

Thank you

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