# Estates with Multiple Fiduciaries Pose Ethical and Practical Issues For Attorneys and Clients Alike

*The following is the first of two articles devoted to the conflicts that can arise when an attorney represents multiple fiduciaries, the difficulties faced when fiduciaries serve in more than one capacity, the practical implications of the duty of impartiality and the need to avoid any appearance of self-dealing. This article examines these issues from the attorney's perspective. An article next month will consider these issues from the fiduciary's perspective.*

*No one can serve two masters, for either he will hate the one and love the other, or he will hold to one and despise the other.* Matthew 6:24

BY JOHN R. MORKEN AND GARY B. FREIDMAN

The conflicts that can arise in the representation of estate or trust fiduciaries are limited only by the imagination of creative counsel. Sometimes the conflicts are obvious, sometimes subtle, sometimes apparent from the inception of the relationship, and sometimes they develop over time.

A typical example: You, the estates practitioner, are asked to attend a meeting with the named co-executors and co-trustees under the decedent's will. They want to retain you to handle the probate and administration. However, it soon becomes apparent that there are actual conflicts of interest between the estate and some of them in their individual capacities. It also becomes clear that potential conflicts may arise in their fiduciary capacities. Can you represent them as a group; and, if so, how?

One of the individuals is already your client, and you also represent the closely held corporation of which he is president. One of the assets of the estate is an interest in that corporation. How do you advise this client regarding his respective responsibilities to the corporation and to the estate?

Another of these potential clients is the decedent's widow, who is the income beneficiary of a Q-TIP trust created under the will. At least some of the decedent's interest in the corporation will very likely end up in the Q-TIP trust. During the course of the meeting, she asks her brother-in-law, the president of the corporation, when she can expect "distributions" from the corporation. He does not respond. You know for a fact that the corporation is a "C corporation" that has never declared dividends. There are also potential conflicts with respect to funding, allocation and valuation. What do you do?

The fiduciary's task of being both faithful and sensible in his stewardship can be very difficult in the face of conflicting loyalties. Representation by the estate attorney in such a case presents similar problems.

## Multiple Representation

Because co-fiduciaries have a common duty to the estate, there is no reason to presume adversity. An attorney counseling multiple fiduciaries may hear different opinions about how they expect to handle estate matters, but to suggest that such differences necessarily rise to the level of a conflict that would bar the attorney's representation under the ethical rules is not supportable.1 There is no statutory ground of ineligibility of a fiduciary based solely on a potential conflict of interest.2 As Surrogate Michael H. Feinberg of Brooklyn has ex-

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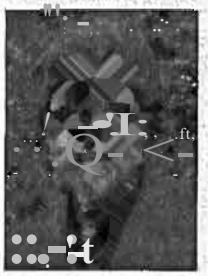

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pressed it, "Where adverse interests are *not* involved, counsel is free to represent multiple clients."[3]

Indeed, although each fiduciary may hire her/his own attorney in the administration, the principle that lawyers, as a whole, will share one reasonable legal fee certainly provides a financial incentive for having one lawyer represent all fiduciaries, upon their consent.[4] Such benefits, in the words of Surrogate Feinberg, are "especially important considerations in the field of trusts and estates, where clients may be better served by retaining counsel to represent the family as a unit, including possible family-controlled entities in the context of estate planning, administration, and even litigation."[5]

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The lack of an obvious conflict between co-fiduciaries convinced the Appellate Division, Third Department, to deny a motion for disqualification in *In re Dix.*[6] There, the co-fiduciaries "consulted the attorneys for their mutual benefit as prospective co-executors and it is difficult to visualize what could possibly have transpired between the parties to create a confidential relationship, one to the other, sufficient in character to call upon the attorneys now to withdraw because of such relationship."

The issue of disqualification in *Dix* came up in the context of a probate proceeding. The New York State Bar Association's Committee on Professional Ethics was asked in 1979 to answer the following questions related to an accounting proceeding:

> A lawyer represents two co-executors, one is a bank and the other is a principal beneficiary of the estate. The bank has allegedly extended the administration long past that period within which it should have been settled and has failed to account. Under the circumstances: (1) May the lawyer institute a proceeding on behalf of the executor-beneficiary to compel the bank to perform its duties? (2) If the executor-beneficiary retains other counsel to institute such a proceeding, may the lawyer represent the bank in connection thee with? (3) May the lawyer continue to represent the executors in connection with any matters relating to the estate?[7]

In answering these questions, the Committee on Professional Ethics reviewed Canons 5, 7 and 9 of the Code of Professional Responsibility. It then concluded that the first two questions had to be answered in the negative and that the third could be answered in the affirmative, provided such representation was limited to matters "as to which there is no conflict between the executors." The committee labeled the prospect of the attorney litigating against either of his former clients as "turncoat" representation, "even where there may be no misuse of confidential information."

Both *Dix* and Of.inion No. **512** were pivotal to the decision in *In re Hof* There, the decedent's wife and a son from a previous marriage were appointed co-administrators. A falling-out occurred, and the attorney took the son's side against his stepmother in the accounting proceeding. The stepmother moved to disqualify the attorney. Following the Third Department's decision in *Dix,* the Surrogate denied the motion. The Second Department reversed and disqualified the attorney, relying in part on Opinion **512,** and emphasized "the mere appearance of impropriety" as well as conflict of interest. In holding that the attorney could not continue to represent either fiduciary, the court stated: "The critical issue here, moreover, is not the actual or probable betrayal of confidence, but the mere appearance of impropriety and conflicts of interest (Code of Professional Responsibility, Canon 9)."[9]

## Who Is the Client?

There is no general prohibition against an attorney representing an executor who has a potentially adverse individual interest against the estate.[10] However, in such a circumstance, the attorney must be careful to represent the client in her/his fiduciary capacity alone.[11] This is but an instance of the general proposition that an attorney may not represent two clients with conflicting interests.12 For example, an attorney representing one co-administrator may not also represent that co-administrator's spouse with respect to a claim against the estate.13

The responsibilities of an estate attorney are somewhat muddied by the confusion over whether the client is the executor of the estate or its beneficiary. Although attorneys may euphemistically say they represent an estate, it is well-settled that they represent the estate's fiduciaries.[14] "Only persons, natural or legal, can retain an attorney. An estate is a *res.* An estate cannot enter into a retainer contract with counsel. A lawyer cannot communicate with an estate."15 This is hardly a distinction without a difference, and it can lead to some troublesome problems. As Ordover and Gibbs point out, one area of confusion caused by the lack of clarity about whether the executor or the estate is the client, concerns the attorney-client privilege. Several decisions have held that there is no privilege between the fiduciary and her/his attorney, at least as to beneficiaries, before any litigation takes place.[16] As Ordover and Gibbs note, in

effect this results in the beneficiary being treated as the client, which "erodes the key relationship between the fiduciary and counsel."17

Regardless of the existence of the attorney-client privilege in this context,[18] the lawyer representing the executor still has a duty to serve the best interest of the estate to which the executor owes fiduciary responsibilities.19 Both the New York State Bar Association Committee on Professional Ethics and the Bar Association of Nassau County Committee on Professional Ethics have issued opinions on similar questions concerning the duty of the executor's lawyer when the lawyer learns that the executor may be engaged in wrongdoing or even fraud.20 The conclusion of the State Bar Committee's opinion is very significant, particularly in light of the current trend in the case law holding that there is no privilege between the executor and her/his attorney, except in the context of litigation. The questions posed to the committee were as follows: (1) What are the responsibilities of the attorney for the executor upon learning that the executor plans to breach its fiduciary duties? (2) Does the attorney for an executor have a duty to disclose to the beneficiaries or the court supervising the estate that the executor has taken action in breach of its fiduciary obligations? The committee concluded:

> For the reasons stated above, we conclude with respect to the first question that in such circumstances the executor's lawyer must request that the executor refrain from breaching its fiduciary duties, decline to assist such misconduct in any way, and consider whether withdrawal as counsel is required or advisable if the executor does not accept counsel's advice.
>
> With respect to the second question, we conclude that the lawyer should disclose the executor's past misconduct unless such disclosure is prohibited because the information qualifies as privileged or secret; determination of whether the information so qualifies turns on issue of law. In addition, counsel should request the executor to rectify the misconduct, withdraw from the representation of the executor if the executor declines to do so, and not assist in any conduct or communication that is false or misleading.

## Self-Dealing

The prohibition against self-dealing by the fiduciary has been extended to the attorney for the fiduciary. In *In re Kellogg,21* the fiduciary's attorney was also retained as a broker for the sale of the estate's Greenwich Village townhouse. The attorney found a buyer for the property, the sale closed and the broker/attorney received a standard 6 percent brokerage commission. On the fiduciary's final accounting, a residuary beneficiary objected to the payment. There was no claim made that the property was not sold at fair market value or that the commission was more than a standard commission. Instead, the beneficiary contended that payment of the commission should be disallowed because, as attorney for the fiduciary, the attorney engaged in an impermissible conflict of interest when he acted as broker for the sale of an estate asset.

The Surrogate sustained the objection holding that the payment of the commission to the attorney was "self-dealing," the same as if the fiduciary had been the broker and been paid a commission. Although the court could have simply based its decision on the line of ethics opinions holding that an attorney may act a broker in a transaction only where he does not participate in the transaction as an attorney or give legal advice to any of the parties,22 it went further and held that the attorney for a fiduciary has the same obligation as the fiduciary to refrain from self-dealing with trust property:

> Having found that the attorney in this case engaged in self-dealing without the consent of all the beneficiaries the Court need not inquire whether he acted in bad faith or whether the estate incurred damages as a result of his conduct. The attorney was not entitled to a commission for his services as real estate broker.
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> This rule, although harsh, is based upon the strong policy of this state that attorneys not place themselves in a position that might interfere with their ability to exercise their professional judgment freely or might adversely affect their ability to render legal advice. The facts of this case underscore the importance and value of this policy.
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> It is evident from the record that [the attorney] failed to give [the fiduciary] appropriate legal advice concerning his obligations in selling the real estate. Petitioner's assertion that his fiduciary duty required him to sell the property for "fair market value or more" is not entirely correct. In a case involving self-dealing, an estate fiduciary was found to have the duty to "obtain the best price possible for the sale of decedent's real property." *In re Stabe,* 130 Misc. 2d 725,729 (N.Y. Sur. Ct., N.Y. Co. 1985).
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> Here, the conflict of interest is plain. Petitioner had an obligation to sell the property within a reasonable period of time at the highest possible price. It was not in the attorney's interest for the sale to be made to any purchaser other than his own, at any price. Petitioner had a need for maximum exposure to assist him in fulfilling his obligation. The attorney stood to gain only if other brokers were excluded, which he took active steps to ensure.

The decision in *Kellogg* is in accord with established Court of Appeals precedent holding that an attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself.23

## Advice, Direction and Full Disclosure

These cases and bar association opinions lead to the conclusion that the estate practitioner must balance three underlying principles in any case of multiple representation. This balancing is often difficult, because the three different principles may be at odds with each other in any given case:

*First:* Multiple representation is frequently requested of the estate attorney because such may be advantageous to the fiduciaries, the estate and the beneficiaries, all of whom are frequently parts of a single family.

*Second:* The attorney must avoid any appearance of "turncoat" representation and maintain an undivided loyalty to the client or clients.

*Third* As counsel for the estate fiduciary or, fiduciaries, the attorney also has fiduciary duties to the beneficiaries and to the estate.

These demands all converged in the estate of Dr. four children, his first wife and an attorney as executors. From inception it was apparent that there was a multitude of conflicts. On virtually every issue at least some executors, in their individual capacities or through entities which they controlled, had claims at odds with either other executors or with the estate generally. Various law firms were retained to represent the executors in their individual and fiduciary capacities. While each executor had her/his own attorney in both individual and fiduciary capacities, they all recognized the benefit of having a "general counsel" to collectively represent them, solely in their representative capacity, and they therefore retained one firm for this purpose. Wisely, that firm obtained from each individual executor a written agreement that the firm would not face a conflict in defending the estate's position and representing other executors against any claim the executor brought against the estate in an individual capacity. Such agreement was consistent with the principle that clients generally may waive their right to conflict-free representation upon full disclosure. Even with full disclosure and informed consents, however, the firm was concerned, and therefore an application was made to the Surrogate for advice and direction regarding the firm's role.

That concern was well-placed. Even upon full disclosure and consent, conflicts of interest may be such that a disqualification is still required.[26] A case in point is the estate of Milford E. Abel. There, co-trustees had a difference of opinion about how to treat the income beneficiary, the decedent's widow. One co-trustee, who had taken a more passive role with regard to administration, sided with objections filed by the income beneficiary. Accordingly, the law firm representing the widow filed a notice of appearance on behalf of the income beneficiary and the co-trustees after full disclosure and, after written consents were obtained from both. Despite such consent and disclosure, the Surrogate disqualified the firm from representing the co-trustee "on the ground of a conflict of interest." The court went on to hold that because the firm should have been aware of the conflict of interest "prior to accepting the retainer, no fee can be awarded."[27] Several appellate decisions have likewise held that a firm may not recover legal fees in circumstances where its representation violated the Code of Professional Responsibilities because of particularly egregious conflicts.[28]

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Accordingly, to avoid just this kind of dilemma, the law firm in *Sadder* sought advice and direction. In its application any party against any of the other six executors in their capacities as executors, thus distinguishing *In re Hof* The Surrogate approved the application, holding that the firm's representation, which was limited to representing the executors in their fiduciary capacity against the personal claims of the individual executors, would not give rise to an appearance of impropriety and would not result in it representing conflicting interests. The court cautioned, however, that its "mantle of approval" was not "carte blanche" and said it would remain sensitive to the need for the firm to retain an uncompromising loyalty to the estate.[29]

The focus of the Surrogate in *Sack/er* on the undivided loyalty of the firm was consistent with Disciplinary Rule **5-105** (DR), which is the most important ethical rule governing conflicts of interest. In particular, subdivision C of the rule provides that a lawyer "may represent multiple clients. if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." The requirement that the lawyer can "competently represent" the "interest" of each client is clearly what prompted the Surrogate in his decision in *Sack/er* to caution that it was not providing "carte blanche" approval **for** multiple representation. Presumably, it is this requirement that also prompted the Surrogate to disqualify the attorneys in *In re Abel;* the primary distinction being that in *Abel* the attorneys were repre-

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senting a claimant individually, as well as a co-trustee, whereas in *Sack/er* the law firm stated that in no event would it ever represent an executor individually in a claim against the estate.[30]

In *In re Roccesano,*[31] a law firm that had represented seven objectants in a probate contest moved for leave to withdraw from the representation of one when it learned of a potential conflict among the seven in the event that the probate contest was successful. A cross-motion was made to disqualify the law firm based on an allegation that one objectant had imparted confidential information. Because there was no proof that any such information had been imparted, the court rejected this claim and held that because the cross-movant was an attorney who was aware of the potential conflict from the outset of the representation, there was no basis for disqualification of the firm. It cited DR 5-IOS(C), which permits representation of multiple clients where the clients consent to a waiver of the conflict.

Presumably, written consent for multiple representation would be contained in the retainer letters signed by the clients.[32] What should the informed consent for multiple representation of co-fiduciaries contain? The following suggestions from *Simon's NY Code of Professional Responsibility* are helpful:

The disclosure [signed by each of the common clients] should include such considerations as:

• the advantages and risks of multiple representation;

• the situations that might cause the interests of one client to diverge from the interest of another client and how likely those situations are to occur;

• the harm it may cause to the various clients if the lawyer is forced to withdraw from the representation (including delay, increased expense, and the probable lack of any attorney-client privilege among the clients in the prior, joint representation);

• the effect on the attorney-client privilege if the clients get into a dispute with each other in the future.[33]

To implement these principles, some or all of the following subjects should be covered in a consent/disclosure letter when multiple fiduciaries are to be represented:

• Inform each potential client of her/his right to separate counsel in both individual and fiduciary capacities. In certain instances, the estate attorney might insist that before signing a retainer letter the potential client be represented individually.

• Specify in the retainer letter the capacity of representation, *i.e.,* as a fiduciary, not as a beneficiary or individually. Emphasize in this regard that counsel will not represent the client individually against the estate.

• Include a waiver by the clients of any future claims of conflict arising from the multiple representation, including a statement that the lawyer would not be conflicted out in defending the estate against any claim that the client might bring against the estate in his/her own individual capacity. In the event that one of the clients determines in the future to retain separate counsel in his/her fiduciary capacity, the consents could also include a waiver of any claim at that point that counsel cannot continue to represent the other fiduciaries.

• Spell out with specificity all potential areas of potential conflict.

• Describe the advantages and risks of multiple representation, emphasizing the latter, particularly if disqualification is necessary in the future, resulting in the need to hire new attorneys.

• Include a provision indicating that where litigation is brought by one client in her/his individual capacity against the others in their fiduciary capacities, the attorney's communication with the latter regarding the same will be privileged and not subject to disclosure, as will the attorney's work product.

• Have a provision explaining that the attorney-client privilege will not apply generally between the co-clients, nor will it apply to beneficiaries, at least when there is no litigation.

• Consider a provision stating that in the event the court determines that there is a conflict and disqualifies the attorney, while also holding that the estate is not obligated for the attorney's services, the clients will be individually responsible for fees.34

Some of these provisions might seem onerous, possibly causing the clients not to hire the attorney. However, that is precisely the point-the estate attorney should approach any multiple representation with a great deal of caution. Further, multiple representation where there are actual conflicts of interest should be avoided assiduously. In addition, when these issues have both been discussed and put in writing in the retainer letter, the clients can make an educated decision whether to proceed with one attorney or seek separate counsel.

## Apply the Principles

Returning then to the hyp othetical at the beginning of this article, the attorney can be in a position to represent all the individuals as co-executors, provided that no actual conflicts are apparent and that the decedent's widow is separately represented.

A retainer letter should include the provisions suggested above, with written consents and full disclosures being obtained from each client.

Full disclosure should also be made to the board of directors of the corporation in which the estate has an interest, and in no event should the attorney participate in any litigation between the estate and the corporation; for that they must retain separate counsel. Full disclosure should be made regarding the varying interests and decisions that the fiduciaries will have to make, with respect to matters such as allocation, funding, evaluation and distribution. For that reason, the attorney should insist that the decedent's widow have independent counsel representing her as a co-executor and individually, albeit with the understanding that the consulted attorney can still represent her in fiduciary matters unrelated to the Q-TIP.

Finally, as an extra caution, an application to the Surrogate might be considered.

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1. *See, e.g.,* In *re Flasterstein,* 27 Misc. 2d 326, 210 N.Y.S.2d 307 (Sur. Ct., Kings Co. 1960).
2. *In re Marsh,* 179 A.D.2d 578, 578 N.Y.S.2d 911 (1st Dep't 1992); *see generally,* Warren's Weed, Heaton on Surrogates' Courts § 33.02(5)[1].
3. In *re Brandman,* N.Y.L.J., Nov. 15, 1999, p. 29, col. 3 (Sur. Ct., Kings Co.).
4. *See, e.g., /11re Mergentime,* 155 Misc. 2d 502, 503, 588 N.Y.S.2d 736 (Sur. Ct., Westchester Co. 1992).
5. *In re Brandman,* N.Y.L.J., Nov. 15, 1999, p. 29, col. 3 (Sur. Ct., Kings Co. 1999). NYSSA Comm. on Professional Ethics, Op. No. 512, 1979 (hereinafter "NYSSA Op.").
6. 11 A.D.2d 555, 199 N.Y.S.2d 958 (3d Dep't 1960).
7. NYSBA Op. 512.
8. *In re Hof,* 102 A.D.2d 591, 478 N.Y.S.2d 39 (2d Dep't 1984).
9. *Id.*
10. *In re Flasterstein,* 27 Misc. 2d 326,210 N.Y.S.2d 307 (Sur. Ct., Kings Co. 1960).
11. *See In re Birnbaum,* 118 Misc. 2d 267, 460 N.Y.S.2d 706 (Sur. Ct., Monroe Co. 1983).
12. *See Green v. Green,* 47 N.Y.2d 447,418 N.Y.S.2d 379 (1979).
13. *In re Be/fer,* N.Y.L.J., Mar. 12, 1985 (Sur. Ct., Nassau Co.).
14. *See Ill re Schrauth,* 249 A.O. 847, 292 N.Y.S. 925 (2d Dep't 1937) ("there can be no such retainer as an attorney for an estate"); *In re Scanlon,* 2 Misc. 2d 65, 69, 150 N.Y.S.2d 511 (Sur. Ct., Kings Co. 1956).
15. Ordover and Gibbs, *Fiduciaries, Attorneys and Duty to Beneficiaries,* N.Y.L.J., Feb. 25, 1999, p. 3, col. 1.
16. *See, e.g., In re Community Sero. Soc'y,* N.Y.L.J., Nov. 14, 1997, p. 26, col. 2 (Sur. Ct., N.Y. Co.); *see also In re Baker,* 139 Misc. 2d 573, 528 N.Y.S.2d 470 (Sur. Ct., Nassau Co. 1988).
17. Commentaries on the Model Rules of Professional Conduct 57 (3d ed. 1999) (which provides: "The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them.... Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary").
18. Abolition of the so-called attorney-fiduciary exception to the attorney-client privilege is the subject of proposed legislation, sponsored by, among others, the New York State Bar Association.
19. *See* NYSBA Op. No. 512.
20. NYSBA Op. No. 649 (1993); Bar Ass'n of Nassau County Comm. on Professional Ethics, Op. No. 97-10. (hereinafter "Nassau Bar Ethics Op.").
21. N.Y.L.J., Dec. 30, 1999, p. 25, col. 4 (Sur. Ct., N.Y. Co.).
22. *See, e.g.,* Nassau Bar Ethics Op. 92-18, N.Y.L.J., Aug. 12, 1992, p. 2, col. 1.
23. *In re Clarke,* 12 N.Y.2d 183, 237 N.Y.S.2d 694 (1962); *In re Bond & Mortgage Guarantee Co.,* 303 N.Y. 423 (1951). For an excellent discussion of *Kellogg* and its antecedents, see Ordover and Gibbs, *Duty of Fiduciary's Attorney to Beneficiaries,* N.Y.L.J., Feb. 28, 2000, p. 3.
24. In *re Sack/er,* N.Y.L.J., May 16, 1989 (Sur. Ct., Nassau Co.).
25. *In re Abrams,* 62 N.Y.2d 183, 199, 476 N.Y.S.2d 494 (1984).
26. *See In re Kelly,* 23 N.Y.2d 368,378,296 N.Y.S.2d 937 (1968).
27. *In re Abel,* N.Y.L.J., Oct. 23, 1992, p. 26, col. 3 (Sur. Ct., Nassau Co.).
28. *See In re Winston,* 214 A.D.2d 677, 625 N.Y.S.2d 927 (2d Dep't 1995) ("An attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered"); *In re Klenk,* 204 A.D.2d 640, 612 N.Y.S.2d 220 (2d Dep't 1994).
29. *In re Sack/er,* N.Y.L.J., May 16, 1989 (Sur. Ct., Nassau Co.).
30. *See* In *re Brandman,* N.Y.L.J., Nov. 15, 1999, p. 29, col. 3 (Sur. Ct., Kings Co.) (which held that if a conflict is actual and not just potential, and if it is of a substantial nature, "dual representation is prohibited even il the parties consent").
31. N.Y.L.J., June 11, 2001, p. 34, col. 1 (Sur. Ct., Nassau Co.).
32. *See* ACfEC, Engagement Letters; A Guide for Practitioners (1st ed. 1999).
33. Simon's NY Code of Professional Responsibility Annotated (1998 ed.), DR 5-105.
34. This particular recommendation is problematic, as is the second recommendation in item 3. The authors believe that such should be enforceable, at least in most cases.

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