The Case of the Faithless Fiduciary: Dealing with Clients Who Don't or Won't Do What They're Supposed To Do

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by

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Law Offices Of

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Attorneys & Counselors At Law

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Dealing with Clients Who Don't or Won't Do What They're Supposed To Do

1. Introduction

A. In theory, this article focuses on one specific type of client - the fiduciary. However, as in some many other areas affecting Special Needs and Elder Law, the reality is not as simple as it may appear. To think that all clients who may be categorized as "fiduciaries" are the same as thinking that all automobiles are the same. And, from a certain point of view, that may be accurate 4 wheels, a transmission, doors - they are the same. But a Rolls Royce is not a Yugo (remember those?).

As a result, this article will examine the attorney's relationship with a number of different types of fiduciaries. In each case, the focus will be on how the attorney can and should respond to situations where the fiduciary/client is not acting in an "appropriate manner" (whatever that may mean in the context of the representation).

2. Definitions

A. Black's Law Dictionary provides the following definitions:

Fiduciary: "The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. Thus, a person Is a fiduciary who is invested with rights and powers to be exercised for the benefit of another person. Svanoe v. Jurgens, 144 111.507, 33 N. E. 955; Stoll v. King, 8 How. Prac. (N. Y.) 299.As an adjective it means of the nature of a trust; having the characteristics of a a trust; analogous to a trust; relating to or founded upon a trust or confidence."
"Fiduciary relationship" is defined as: The trust between the agent and the principal. Care and responsibility must be taken for the best interest of the principal;" and

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> "Fiduciary duty" is defined as: "When one party must act for another. They are entrusted with the care of property or funds."[1]

It is interesting to note, especially in the context of Special Needs Trusts, where a Trustee may have duties directly relating to the physical care of the Beneficiary, that the focus of the definitions above (to the extent there is one) is on property or funds, rather than on the individual well-being of the Principal.

B. Types of Fiduciaries

In the usual course of our practices we will encounter the following fiduciaries:

1. Trustees
2. Guardians or Conservators (person and/or estate)
3. Agents under Powers of Attorney (property or health)
4. Spouses/Domestic Partners

At the "basic" level, each of these fiduciaries carry the same obligations towards their principals in terms of loyalty, honesty and good faith, the specific relationship, *i.e.* Trustee, Agent, Spouse or Guardian will usually have specific, additional responsibilities attached. In addition, the fiduciary's own qualifications, expertise, education or professional licensing may also impact the level of responsibility the fiduciary owes to the principal.

For example, under Section 806 of the Uniform Trust Code, "A Trustee who has special skills or expertise, and is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise shall use those special skills or expertise." This is in addition to the Section 804 of the Uniform Trust Code which provides "A trustee shall administer the trust as a

[1] *Black's Law Dictionary, 2nd Ed.* online edition www.lawdictionary.org

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prudent person would, but considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution."[2]

Spouses may have specific fiduciary obligations to each other. Consider for example California's Family Code §721:

> (b) Except as provided in Sections 143, 144, 146, 16040, 16047, and 21385 of the Probate Code, in transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:
> (1) Providing each spouse access at all times to any books kept regarding atransaction for the purposes of inspection and copying.
> (2) Rendering upon request, true and full information of all things affectingany transaction that concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.
> (3) Accounting to the spouse, and holding as a trustee, any benefit or profitderived from any transaction by one spouse without the consent of the other spouse that concerns the community property.[3]

Compare these standards with those applicable to an Agent under a Durable Power of Attorney as set forth in Section 114 of the Uniform Power of Attorney Act:

> (a) Notwithstanding provisions in the power of attorney, an agent that hasaccepted appointment shall:
> (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
> (2) act in good faith; and

[2] Uniform Trust Code (2010 Revision & Amendment) §§804, 806. www.uniformlaws.org.

[3] Cal. Fam. Code §721(b). This seems a far cry from "love, honor and cherish," not to mention "obey" which may well have gone the way of the Dodo.

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(3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent thathas accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines..."[4]

[4] Uniform Power of Attorney Act (2006) §114, www.Uniformlaws.org

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It would appear that the Agent's responsibility to the Principal is similar to, but does not rise to the same level care as either a Trustee or a Spouse.

The Attorney's Role

C. Who Is the Client?

In every representation the first question every attorney must ask herself or himself is "who is my client?" In many, if not most situations, the answer may be obvious - "the person standing in front of me." However when representing fiduciaries, the answers may not be so clear-cut.

If the fiduciary is an Executor/Personal Representative in a probate matter, a Guardian or Conservator in a Guardianship or Conservatorship matter or a Trustee in a trust matter the correct answer is "the person standing in front of me."

But what about an Agent under a Durable Power of Attorney for Asset Management? If that person is seeking representation in her capacity as Agent on behalf of her Principal, isn't the client really the Principal? Think about how a document properly executed by the Agent reads: "Jane Doe by Mary Roe, her Attorney-in-Fact."[5] In this situation it is submitted that the "client" is actually the Principal, represented by the Agent who is the person standing in front of the attorney.

A similar conundrum may present itself if the person standing in front of the attorney is the spouse seeking representation on behalf of both herself and her spouse.

D. Best Practices

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[5] See for example the instructions regarding proper execution of documents by an Agent contained in the "Important Information for Agent" section of the Statutory Form Power of Attorney, §301 of the Uniform Power of Attorney Act.

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Step one in any representation is for the attorney to clarify to herself "who is my client?" and step two is for the attorney to solidify in her mind the nature of this client-attorney relationship, *i.e.* "This person is the Trustee of her deceased mother's trust and I am representing her as Trustee of that Trust." Step three is to communicate that to the client as early as possible and to do so in writing, first in the written Retainer Agreement (and there should **always** be a written Retainer Agreement!), and subsequently at every appropriate opportunity.

This is particularly critical where the client wears multiple "hats," *i.e.* she is not only the Trustee of her mother's Trust, but one of the Beneficiaries. Boundaries as to what the attorney's ethical or professional responsibilities are to the client depend on the purpose for which the attorney has been retained.

For example, is it appropriate for the attorney representing the child as Trustee of the mother's Trust to respond to questions from the client regarding what the client should do regarding an IRA she's inheriting in the context of the client's personal estate plan especially if the attorney knows that the client is represented by other counsel in connection with that estate plan? [6]

E. Prophylaxis

All of this is prologue to the premise that best way to avoid having a "problem" with a client who is a fiduciary is to clearly and frequently communicate with the client regarding what

[6] For an excellent discussion (and extremely useful citations) of conflicts of interest and clients with "conflicting roles" see Roberta K. Flowers and Rebecca Morgan, *Ethics in the Practice of Elder Law*, Chapter 7, Section VIII (ABA 2013) (hereafter "Flowers Morgan"; See also MRPC 1.7 and NAELA Aspirational Standard (2nd Ed.) B.2 and D.

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her job is, how she is to perform that job and to establish clear, open and candid lines of communication that will hopefully avoid or at least minimize issues down the road.

This starts with the Retainer Agreement which should clearly set forth the scope of the representation. A sample form of the Retainer Agreement used by the author for Trustee representation is attached as Appendix 1.[7]

Second, the attorney should consider providing the client with a detailed letter explaining the process and what the law expects of the client. A sample of the form used by the author in probate matters is attached as Appendix 2.

Special Needs Trusts of course have a particularly unique set of issues especially where attention must be paid to limiting distributions that may have an adverse impact on the Beneficiary. As a result, the attorney should pay particular attention to giving the Trustee of a Special Needs Trust appropriate guidance. The Special Needs Alliance has made available a free, downloadable Trustee Manual (in both English and Spanish) which is an excellent tool for educating clients who are Trustees of SNTs.[8]

3. **Into The Breach & How to Get Out**

However, notwithstanding the attorney's best efforts to apply the maxim "an ounce of prevention is worth a pound of cure," clients sometimes (frequently?) do not read the impressive, carefully crafted missives we send or ignore our advice and instructions.

[7] ACTEC''s Engagement Letters - A Guide for Practitioners (2017 ed.) Is an invaluable source of forms and suggested language for many situations. Available at ACTEC.org

[8] Go to specialneedsalliance.org and click on "Special Needs 101" to find the Trustee Manual.

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In these situations the attorney frequently doesn't find out about it until well after the fact and often in an "oh, by the way, did I tell you that I [fill in the blank as to what the client did or didn't do]" as an aside or afterthought.

In addition, the event may have occurred some period of time before the attorney finds out about it. For example, in California, a Court supervised Special Needs Trust is required to file an annual Report and Accounting on the first anniversary of the Trust coming under Court supervision and every two years thereafter. It is not uncommon for the attorney not to have contact with the client until it's time for the next accounting and the problematic act may have occurred over a year prior. Now what? The balance of this article will attempt to answer that question in the context of a breach of trust by the Trustee of a Special Needs Trust. However, the discussion is equally applicable to other fiduciary relationships as well.

A. Is There Really a Problem?

Step one is to remain calm. Seriously. Regardless of the nature of the problem, it is the attorney's job to remain objective, calm and focused. Step two is to determine precisely what the client did or didn't do. Step three is to objectively analyze the nature of the act:

!. Was it a breach of fiduciary duty?

! A violation of the Trust Code, *i.e.* making a distribution or investment that requires prior Court approval?

! An impermissible distribution under the terms of the Trust, *i.e.* a distribution for food or shelter out of a First Party SNT?

! An improvident investment or distribution;

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! Embezzlement?

! Was it negligent or intentional?

B. Counseling & Correcting

The next step is to educate the client regarding the breach to ensure that it will not occur again (hopefully). Point out to the client where, in past communications, conversations, court Orders etc., the type of action in question was discussed (either directly or by inference) and explain the underlying reason for the rule/order that was violated.

Next, explore with the client what steps can be taken to correct the situation or at least mitigate the negative effects caused by the breach. If an improvident investment was made, can it be unwound? If the action taken required prior Court approval, is it appropriate to seek retroactive approval from the Court (a subject for another paper is the concept of "sometimes it's better to ask for forgiveness than permission")?

Always explain to the client what effect her acts are going to have on the Beneficiary both short term and long term. Especially in the world of Special Needs Trusts, there continues to be a great deal of misinformation. A client may believe (because she read it on the internet and knows it to be true) that because she bought groceries for the Beneficiary this month, the Beneficiary will now be disqualified from ever receiving SSI again.

There will be those cases where the breach cannot be corrected, the Beneficiary may well suffer some consequences and the client will be held to account. The attorney should be candid with the client regarding the possible outcomes and use her best efforts to mitigate those consequences within the confines of the attorney's ethical obligations, *i.e.* the attorney cannot simply fail to disclose to a Court in an Accounting improper activity. Under MRPC 3.3

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"(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[9]

She can explain the situation in a light most positive to her client, but she can't ignore it. In the author's opinion this means that even in a situation where funds were distributed for an improper purpose and then restored, the transactions should (must?) be disclosed even if ultimately no economic harm was done to the Trust or the Beneficiary.

[9] MRPC 3.3. See also Flowers & Morgan, Supra, Chapter 7, Section VI.A.

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But what if it turns out the client is the proverbial "Client From Hell?" Consider this scenario: Your Paralegal comes to you with a concerned look on his face and says "I think we have a problem with the Jones Guardianship Accounting. The client shows a distribution of $25,000 for a Caribbean Cruise and first class airfare for himself. I asked the client about this and he told me that the Ward was driving him nuts with his incessant demands and he needed a break."

You call the client and tell him this is not a proper expenditure of Guardianship funds and he needs to restore it to the account. His response is "no way. If you think the Court won't approve it, just delete it or describe it as something else, but I'm not giving it back. I needed that vacation." You say, "I can't falsify the Accounting and you are signing it under penalty of perjury." He responds "so what - you're my lawyer. Do what I tell you to do."

C. The Options

1. Resigning/Withdrawing

The attorney can always resign or petition to withdraw from the representation. MRPC 1.16 provides:

Rule 1.16: Declining or Terminating Representation

Client-Lawyer Relationship
(a) Except as stated in paragraph (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 conductor 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.
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

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(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.[10]

This may be the best way to handle the situation because, as discussed below, while the attorney is probably prohibited from disclosing the client's malfeasance since it is covered by client-attorney privilege at this point, the mere fact that the attorney is resigning or petitioning to withdraw may serve to alert third parties or the Court that something may be awry an inquiry may ensue. This is frequently described as a "noisy withdrawal."

D. Reporting?

In addition, depending on the state of case law in the attorney's jurisdiction, the Rules of

[10] MRPC 1.16

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Professional Conduct and whether or not the attorney is a "mandated reporter" under her State's Elder Abuse Act, the attorney may have the ability or even the obligation to report the malfeasance to the authorities or the Court.[11]

4. **Liability**

In all cases where the attorney represents a fiduciary, the attorney must keep in mind that the work that is being performed and the advice that is being given is not only for the benefit of the client but for a third party. Does the attorney have a "duty" to that third party, the beneficiary or Ward? This is an expanding and developing area of the law, well beyond the scope of this article, but depending on the jurisdiction in which the attorney is practicing and the nature of fiduciary relationship between the client and the person on whose behalf the client is acting the answer is "maybe."[12] Especially where serious economic damage is done to the beneficiary or ward by the action or inaction of the fiduciary, the attorney should (unfortunately) assume that, with 20/20 hindsight fingers will probably be pointed to the attorney.

5. **Conclusion**

All that said, the happy fact is that there really is no more fulfilling area of the law than assisting a client help another. Are there risks? Sure, but if proper steps are taken at the outset, the risks can be managed and the rewards can be great.

[11] MRPC 1.14, and Flowers and Morgan,Supra, Chapter 3.

[12] The issue of an attorney's liability to a non-client beneficiary is an active, expanding area of the law. See for example *Biakanja v. Irving,* 320 P.2nd 16 (Cal 1958), *Heyer v. Flaig,* 449 P.2d 1621 (Cal. 1969) and their progeny around the country.

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Appendix A

~Mr. and Mrs. _________

Re: Special Needs Trust/Trust Administration

Dear ~___________:

Thank you for choosing us to assist you with the administration of the ~_______________ SPECIAL NEEDS TRUST.

This letter outlines the terms of our professional relationship, so that we and you will both understand the scope of the services we will provide, the fees we will charge, and the other terms and conditions of our engagement. We look forward to working with you. If you ever have any questions regarding our engagement or the services we are providing, please contact me immediately.

Scope of Services to be Performed:

We will provide the following services:

1. Advise you regarding your legal duties as trustee.

2. Assist with obtaining professional appraisals of real property and any other property for which a professional appraisal is necessary, including communication with appraisers regarding actions that should be considered in valuing the property.

3. Prepare documents necessary to bring assets held outside the trust into the trust, if necessary.

4. Represent you as trustee in connection with the administration of the trust. This representation will not include litigation services of any kind. Should litigation services become necessary, we will enter into a separate attorney-client agreement defining the scope of, and the fee for, those services.
5. Prepare periodic accountings and reports which, under California law, may be required by courts or beneficiaries, if not waived.

6. Generally respond to your questions and requests for advice.

Additional Legal Services:

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Should you wish us to perform additional legal services for you, we will be happy do so if we are able. Unless we agree in writing otherwise, any such services will be billed to you at our regular hourly rates then in effect.

The following services are not included within the scope of this Agreement:

1. Litigation services involving the trust or its assets.

2. Court proceedings concerning the internal affairs of the trust.

3. Preparation of estate tax, final individual income tax, and fiduciary income tax returns for the trust (IRS form 1041, California form 541).

4. Procuring property or other insurance on trust assets.

5. Evaluating investments or providing investment advice.

Attorney-Client Obligations:

So that we can do our best in assisting you, you must keep us fully informed of any facts that involve any of the matters discussed in this letter. It is particularly important that we be informed about any trust assets or liabilities which may have been overlooked, any tax authority that disputes or questions any tax return that has been filed, or any person who is concerned or unhappy concerning the disposition and administration of the Trusts. On a more general level, you must be completely truthful and cooperate with us, pay our statements in a timely manner and, of course, always keep us apprised of your current address and telephone.

We will provide those legal services reasonably required to represent you in this engagement. We will take reasonable steps to keep you informed of significant developments and to respond to your inquiries.

Basic Fee Understandings:

Our fees will be based on the amount of time our attorneys and legal assistants spend on your matter. Each attorney and legal assistant has an hourly billing rate based generally on his or her experience, any special expertise and market considerations. The billing rate multiplied by the time spent, measured in tenths of an hour, will be the fee charged.

The current hourly billing rate for the senior attorneys is $XXX.00 per hour. The current billing rates for associate attorneys range between $XXX.00 and $XXX.00 per hour. The current billing rate for paraprofessionals range between $XXX.00 and $XXX.00 per hour. We will assign the attorney or paraprofessional who can most competently and efficiently complete the tasks in your matter. Personnel may change, depending on timing and other factors. Currently, the Senior

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Attorney for the firm is Stuart D. Zimring. Our Associate is M. Justin McDermott. Billing rates are adjusted periodically (typically at the beginning of each calendar year) to reflect increased experience and special expertise of our attorneys and paraprofessionals and market considerations affecting our practice. The adjusted rates will apply to all services performed from that time forward.

If it is determined that we need to transfer real property to the Trust, we will transfer such real property for the cost of $XXX per set of transfer documents, plus recording costs.

Our policy is to charge for all telephone calls relating to your matter, including calls from you. When the professionals and staff working on your matter confer among themselves or attend meetings concerning your matter, each will keep track of his or her time; generally, however, we will charge for only one person's time. We will also charge for waiting time and for travel time, both local and out of town.

In addition to the above, we may charge a reasonable fee for the use of our inventory of legal forms adapted for your matter.

If we believe the services of an attorney or other professional outside our firm are appropriate or required, we will let you know and obtain your consent before associating him or her on your behalf. Before that person commences work on your behalf, you agree to engage that person's services directly, and not through our firm. He or she will bill you directly, and you will be responsible for the fees and costs he or she incurs. You agree to indemnify us for any amounts due to, or claims made against us by, such third parties relating to this engagement.

If we need to travel out of town in connection with your work, you agree to pay all the costs of such travel and lodging in addition to the fee described above. Further, if it is necessary to utilize messengers or other expedited delivery services such as Federal Express, these costs will be added to your fee.

You will also be billed for out-of-pocket costs and expenses as described below.

Deposit:

This Agreement will become effective upon receipt from you of an initial deposit of $________. This will be applied to fees and out-of-pocket expenses which we anticipate may be required and you authorize us to withdraw these sums from any portion of the deposit placed into our Client Trust Account. If the deposit is not fully utilized, you will be entitled to a refund of the balance. In addition to the payment of billings, as described in the next paragraph, if we need to advance costs, you agree that you will first advance such costs, upon request. Whenever your deposit falls below $________, we may request additional deposits from you, each in an amount not to exceed $________. If you do not pay this requested amount promptly (or make arrangements

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satisfactory to us), we will have the right to cease performing work and to terminate this Agreement.

Billings:

You, as Trustee, will receive billing statements from us monthly. Payment in full will be due within thirty (30) days after the date of your statement. Our statements will indicate what portion of the sums due were paid from the retainer and what portion remains due and owing from the Trust.

In addition to charges for legal services, we will be charging for (and you, as Trustee, agree to pay) actual costs and expenses which we directly advance or incur, such as long distance telephone calls, messenger and expedited delivery fees, and postage in excess of $5.00 per item; photocopying at 25 cents per page, and facsimile transmissions at $5.00 per transmission. We will itemize all costs incurred on each periodic statement.

Interest is charged on the principal balance (fees, costs and disbursements) owed for more than thirty (30) days after the date of your statement. That unpaid balance will be multiplied by the FINANCE CHARGE periodic rate of .883% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE) and will bear interest until paid. All payments will be applied first to interest, next to costs and disbursements, and last to fees. Within each of these three categories, payments will be applied to the oldest balance first.

We will provide you with copies of prior statements upon request, no later than ten (10) days after your request. You may request such statements at intervals of not less than thirty (30) days.

As a reminder, these statements are economic obligations of the Trust. You, as Trustee, are obligated to pay all bills of the Trust, including our statement for services rendered on behalf of the Trust from assets of the Trust . You, personally, have no liability for payment of these services rendered to the Trust.

Major Costs:

For your protection, although you authorize us to incur reasonable costs as necessary to pursue this matter, we will not incur costs for any item in excess of $350.00 without your prior consent. We will not retain outside consultants or experts without your consent.

General Provisions:

a. Either of us may terminate this Agreement at any time by mailing written notice of termination to the other at the address shown below, or to such other addresses as may be designated by either of us for mailing purposes. Termination will operate prospectively, and will not affect any accrued balances due us.

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b. Although _______________ Trust may have been designed to achieve certain goals, such as tax savings or planning for a beneficiary's special needs, we cannot guarantee that third parties will not attack the trust or transfers made under it. A party with legal standing such as a trust beneficiary can object to your actions as Trustee. If any objections are successful and a court determines that the trust cannot pay our fees, you agree you nevertheless will be personally responsible for payment of our fees and costs, rather than the trust (_______) ~(_______).

c. If any action or proceeding is commenced for the collection of fees and expenses due pursuant to this Agreement, the prevailing party shall be entitled to all costs, including reasonable attorney's fees.

Termination/Destruction of Files:

At the termination of our representation hereunder, your files may be deposited in storage and maintained for at least five (5) years, unless we agree otherwise in writing. After five (5) years from the termination of representation, you agree that we can destroy all remaining records, files, and exhibits in connection with this representation, without further notice. This does not include any original estate planning documents we may hold for safekeeping under a separate authorization. You are, of course, entitled to your files at any time. Also, since our practice is to provide copies of correspondence and documents on an ongoing basis, you are likely not to need our files, as a practical matter.

Privacy Policy:

We, as attorneys, are bound by professional standards of confidentiality. In the course of providing our clients with income tax, estate tax, and gift tax advice, we receive significant personal and financial information from our clients. As our clients, you should know that all information we receive from you is held in confidence and is not released to persons outside the office except as agreed to by you, or as required under applicable law.

We retain records relating to our professional services so that we are better able to assist you with your professional needs and, in some cases, to comply with professional guidelines. In order to guard your non-public personal information, we maintain physical, electronic and procedural safeguards that comply with our professional standards.

Commencement of Services:

We will commence our services upon receipt of a signed copy of this letter and the agreed upon deposit of $___________. If you have any questions, feel free to call me.

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We look forward to working with you.

Sincerely,

~CLIENT, Trustee

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Appendix B

INTRODUCTION

The Court has now entered its Order appointing you as the **~**_____ of ~_____'s Estate. Enclosed are copies of **Letters of Administration**. Please retain these **Letters** as you will most likely be required to present copies in order to establish an Estate bank account as well as for any other property transfers that you may wish to make.

Although we discussed in general terms your duties as **Representative** and the Probate process during our meeting, there are many details we did not cover. I also know that you have and will have many questions over the course of the Probate proceedings. To assist you, we have prepared this Overview not only to amplify on the matters we discussed, but also hopefully to provide answers to questions you will have in the future.

EVERYTHING (ALMOST) YOU EVER WANTED TO KNOW ABOUT THE PROBATE PROCESS AND YOUR DUTIES AS PERSONAL REPRESENTATIVE

PROBATE TIME LINE

d. The ordinary course of a Probate proceeding can take anywhere from eight (8) months to several years depending on numerous factors such as:

  a. Whether or not a Testamentary Trust is involved;

  b. Disputes requiring litigation by or against the Estate;

  c. Whether a Federal Estate Tax Return is required along with its attendant audit;

  d. Whether assets need to be liquidated (either to facilitate distribution or to generate needed cash);

  e. Difficulty in locating heirs or descendants of heirs;

Obviously, not every Estate encounters all or even some of these potential problems. In a "simple" Estate with no Estate Tax liability the average time line is eight (8) months to one (1) year.

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e. The process begins with the filing of the **Petition for Probate**. When the **Petition** has been filed, it is set for Hearing approximately one (1) month later. Usually, the Petition is granted as a matter of course and **Letters of Administration (also known as Letters Testamentary)** are issued. **Letters** are your authority to act on behalf of the Estate. Your appointment as the Estate's **Representative** (often referred to as the **Executor** or **Administrator**), also starts the four (4) month **Creditor Claim period** discussed below.

f. During this time, we will begin obtaining valuations of the Estate's assets, assess other needs regarding the Estate and begin planning for distribution.

g. In most instances, once the four (4) month **Creditor Claim period** has expired and assuming there is sufficient liquidity to pay the debts and expenses of the Estate, we are ready to begin assembling the information necessary to prepare the **Accounting and Petition for Distribution** and close the Estate.

YOUR GENERAL RESPONSIBILITIES

h. The entire Estate administration process is directed towards three goals:

a. Collection, valuing and managing assets;

b. Ascertaining and paying debts, taxes and administrative expenses; and

c. Distributing the balance of the Estate as provided in the decedent's Will or by the laws of Intestate Succession if there is no Will.

i. As the **Representative**, you **MUST NOT** do any of the following things without consulting us first:

a. Carry on the decedent's business;

b. Perform the decedent's contracts;

c. Make any contract binding the Estate;

d. Borrow money, execute notes, deeds of trust or other lien agreements involving the Estate's property;

e. Sell any Estate property;

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f. Give away any Estate property;

g. Lease any Estate property;

h. Distribute Estate property to a legatee or devisee;

i. Deposit Estate funds into your personal account;

j. Pay or compromise any debts or claims against the Estate.

k. Sell stocks or bonds, exercise subscription rights or buy stocks or bonds for the Estate.

j. This does not mean that you cannot, in the course of the administration of the Estate, perform any of these tasks. However, you **MUST** consult with us prior to doing so in order that all transactions comply with the law.

BANKING

k. An **Estate checking account** should be set up as soon as possible. **Note: All estate funds need to be held in California Banks (Probate Code Section 9700).** Take a certified copy of the **Letters** to the bank of your choice and open an Estate account with you as the **Representative** (*i.e.*, "~_____, ~_____ of the Estate of ~_____, Deceased"). Likewise, you should always sign checks in your representative capacity (*i.e.,* "~_____, ~_____"). We will be happy to assist you with this if you wish. The Estate account must either be **INTEREST BEARING**, or you may maintain a small non-interest bearing checking account **AND** an **INTEREST BEARING** savings account from which you transfer funds to the checking account when needed. The Estate account must be **INSURED**. This means that you may never maintain more than $100,000.00 in any one bank or savings and loan institution. Also , should the Estate's funds exceed $100,000.00, you may wish to consider investment accounts such as Certificates of Deposit.

COLLECTION AND MANAGEMENT OF ASSETS

l. As the Estate **Representative**, it is your duty to take possession of all of the decedent's property.

Safekeeping of Personal Property

m. Securities, jewelry and other items of substantial value should be kept in a safe deposit box. You should **NOT** place any of the Estate's assets in you OWN safe

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deposit box. Please let us know if there are any items that should be placed, or that remain, in the possession of another person.

Bank and Savings and Loan Accounts

n. The decedent's bank, savings and loan and other cash accounts should receive your early attention.

a. All joint tenancy, "As Trustee for" or "Pay on Death" accounts can be transferred to the survivor named on the account. However, you need to keep accurate records of the date of death values (showing both the date of death balance and accrued interest to the date of death), for all such accounts. This is necessary for both Income and Estate Tax purposes. Even though these assets are not technically part of the Probate Estate, they are part of the **Taxable Estate** and must be reflected on the appropriate tax returns.

b. All funds in accounts that were held in the decedent's name alone should be transferred to the Estate account(s);

o. You must maintain detailed, complete and accurate records of account activities. At the very least you must:

a. Enter each deposit and describe its source, (*i.e.* a balance transferred from another account, insurance refunds, proceeds from insurance death benefits, proceeds from the sale of assets, medical insurance reimbursements, interest, etc.);

b. Keep an accurate account of each check written including a description of what each check was for.

c. Aside from being one of your **fiduciary duties**, this record keeping will save us both time and expense when it is time to prepare the **Accounting** for the Court.

Record of Decedent's Property

p. The formal schedule of the Estate's assets is called the **Inventory and Appraisement**. In order to prepare the **Inventory**, you must prepare a complete list of **all** of the decedent's property. You should attach to your list copies of deeds and the most recent property tax bills, bank statements, life insurance policies, stock brokerage statements, stock certificates, leases and rental agreements, promissory notes and any other documentation you think may be important or relevant. If you

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have already provided us with these documents, please be sure to inform us if you discover any other assets in the future.

q. In connection with your search for assets, you should review the decedent's tax returns for the last few years. This may assist you in identifying assets, such as bank accounts, stocks, safe deposit boxes, etc., that may not be readily apparent. In addition, copies of these tax returns should be sent to us for our review.

r. Once a complete list of assets has been compiled, we will prepare an **Inventory and Appraisement**. The value of the non-cash assets listed on the "**Inventory**" will be determined by a **Probate Referee** appointed by the Court. This process is required by law even though you may already have a good sense of the values. In most cases the values determined by the **Probate Referee** will remain fixed throughout the Probate process and will be used in determining such items as fees, taxes and basis.

If it appears that the value of the assets may exceed $650,000, we will also require a list of all non-probate assets such as joint tenancies. Although these types of assets are not subject to the Probate process, they are includable in the **Taxable Estate** for Federal Estate Tax calculations.

Life Insurance Policies

s. If you have not already done so, you should prepare a list of all policies of insurance on the decedent's life. It would be helpful if we had a copy of each policy so we can determine the beneficiaries and the requirements for claiming the proceeds. We are always available to assist you in completing and filing the necessary forms.

t. Unless an insurance policy either has no named beneficiary, or names the Estate as the beneficiary, the proceeds may be claimed by the beneficiary immediately, and are not subject to the Probate process. If the policy does name the Estate, or has no named beneficiary, the proceeds become part of the Estate's assets.

u. Please inform us if the decedent qualifies for any Armed Forces Death Benefits.

Insurance Coverage on the Decedent's Property

v. As the **Administrator**, YOU MUST maintain insurance on the Estate's property, such as the homeowners insurance and automobile insurance. Once the Estate's assets have been appraised, you should review the policies to make sure the coverages are adequate. Insurance coverage is ESSENTIAL because you are personally responsible if Estate property is under insured.

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SALES, INVESTMENTS & PROPERTY MANAGEMENT

Sales of Real Property

w. Should you choose to sell the decedent's real property during the course of the Probate or should it become necessary to sell the property in order to pay the debts of the Estate, you MUST CONSULT WITH US prior to entering into any listing agreement for the property since Probate sales are subject to many technical rules.

Sales of Personal Property

x. If it becomes necessary or convenient to sell items such as stock, the decedent's automobile, furniture or personal effects, YOU SHOULD DISCUSS SUCH A SALE WITH US FIRST. In some instances, we may need to send all of the beneficiaries a **Notice of Proposed Action.** Whether or not this is necessary depends on the type of asset involved. If you do sell personal property, **BE SURE** to make a note of the deposit in the Estate check book since it will be necessary for us to calculate the gain or loss on each sale later. Should you sell **STOCK**, please be sure to provide us with copies of all sale statements from the broker. The costs of each transaction must be accounted for.

Investments

y. You may only make certain kinds of investments with the Estate's funds. You may deposit Estate funds at banks or **insured** savings and loans **in California,** or in direct obligations of the **United States** maturing in one year or less. Under certain circumstances, excess Estate funds may be invested in other ways, but generally only with prior Court approval. Contact us if you feel this may be appropriate.

Employment of Experts

z. You may employ accountants and other experts to assist you but you should discuss the subject with us first. Depending on the nature of the services the expert is to render, you may need prior Court approval. Otherwise, you may be personally responsible for paying the expert's fees.

Cash Requirements of the Estate

aa. As early as possible, we should make a determination of the amount needed to pay debts, expenses and taxes and determine when these monies will be required. If it

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appears necessary to sell assets to produce the necessary funds, we will have to determine what should be sold and when.

DEBTS OF THE DECEDENT & CREDITOR'S CLAIMS

bb. As indicated above, the entry of the Order appointing you as **Representative** starts the four (4) month **Creditor Claims period**. During this period, you must notify all of the decedent's potential creditors that Probate proceedings have been commenced so they can present their claims. Once this four month period has expired, creditors who have received Notice and have failed to file claims are barred from seeking payment. Please provide us with a list of the names, addresses and account numbers for **all** creditors existing at the date of death, whether there were any sums currently due them or not. It is your duty to investigate all possible creditors of the decedent. To do this, you will want to review the decedent's paid bills, check register(s), cancelled checks and monitor the decedent's mail. You may also want to contact any doctors or hospitals who treated the decedent prior to death. This list should include medical bills submitted to insurance carriers or Medicare even though it appears the carriers or Medicare may pay the entire bill. Failure to provide a creditor with Notice can result in delays in distributing the Estate. If a creditor is discovered after the four (4) month period, Notice is sent to that creditor and he or she has an additional thirty (30) days within which to file a claim, even if the four (4) month period has already expired. For you own protection, you should not pay **ANY** claims without checking with us FIRST.

cc. The **Creditor Claim** procedures described above apply to claims arising BEFORE the date of death and any funeral expenses. You may, however, pay expenses arising AFTER DEATH such as utilities, gardening, telephone or mortgage. **BUT** no claims or expenses of administration should be paid if there is any question as to the Estate's ability to pay **ALL** of its obligations in full;

State Medi-Cal Benefits

dd. Please let us know if the decedent or the decedent's predeceased spouse ever received Medi-Cal benefits or State Disability benefits. In such situations, the State **must** receive notice of the Probate and is entitled (in many cases) to file a claim similar to a Creditor's Claim.

TAXES

Federal & State Estate Taxes

If the total value of the decedent's assets (both Probate and non-Probate) exceed $650,000, it will be necessary to prepare and file a Federal Estate Tax Return Form 706 as well as a California Estate Tax Return Form ET-1. This does not necessarily mean Estate Taxes will be due, since there are various deductions that can reduce the **Taxable Estate**

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below the $650,000 level. If Estate Tax Returns are required, we are available to assist you in preparing them, or the Estate's accountant can do them too. If Estate Tax Returns are required, they are due **nine (9) months** after the date of death. We will review this in greater detail when the size of the Estate becomes known.

Income Tax Returns

ee. It will be necessary to prepare and file Federal and State Income tax returns on behalf of the decedent for the period ending with the death. Additionally, if the income to the Estate is large enough, you will be required to file income tax returns for each calendar year the Estate is open unless we are able to close the Estate within the first calendar year. I strongly recommend that an accountant be employed for this purpose. Should you require a referral, I will be happy to provide several. In this regard, the Estate will need to apply for a Taxpayer Identification Number. Your accountant will take care of this.

ACCOUNTING FOR ASSETS

ff. As indicated above, **IT IS YOUR DUTY** to keep the Estate account in such form that anyone can readily understand, from looking at the entries, the exact amount of all disbursements, the source and amount of all income, and any other facts necessary to properly account for the economic activity of the Estate. This includes all details as to the sales of assets, including stocks and bonds. Keeping records on check stubs, slips of paper and the like WILL NOT DO. If, for any reason, you believe you need assistance in this regard, let us know. We will be happy to assist you.

DISTRIBUTION OF THE ASSETS

Preliminary Distribution

gg. Any time two months or more after the first **Publication of Notice to Creditors**, you have the right to petition the Court for a partial distribution of assets. If the cash assets of the Estate are sufficient to protect the creditors, tax liabilities and the costs of administration, the Court will generally grant such petitions.

In Estates that produce a large amount of income, such distributions may result in tax savings both to the Estate and the beneficiaries. However, they do increase the administrative costs of the Probate.

Final Distribution

hh. Final distribution can usually be made either after the Estate Taxes (if any) have been paid and the Returns audited **or** when all debts and taxes have been paid and a **Final Accounting and Petition for Distribution** has been prepared and submitted to the Court for approval.

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REPRESENTATIVE'S COMMISSIONS AND ATTORNEY'S FEES

Under the California Probate Code, you are entitled to receive a **statutory commission** based upon the value of the Estate. In most cases, this amount is 4% of the first $15,000, 3% of the next $85,000 and 2% of any remaining value. Additional rules apply to very large estates. This formula is also used to determine the **statutory attorney's fees**. In addition to these "statutory" fees, there may be "**extra-ordinary**" fees and commissions to compensate the **Representative** and the attorney for duties not considered part of the "ordinary" services covered by the statutory commissions and fees. These "**extra-ordinary**" fees and commissions apply to services such as sales of real property, the preparation of Federal and State Estate Tax Returns and Petitions for Preliminary Distributions.

CONCLUSION

While there are many myths and "old wives' tales" surrounding the Probate process, I believe the Probate process in California is among the fairest and most economical in the nation. We have tried to provide as much information as possible in this Overview, but I am sure that you will have specific questions and that unique situations involving this Estate may well arise. Never forget that we are always here to assist. Remember, there is no such thing as a "silly" question; when in doubt, call - we are here to help.

GOOD LUCK!

Sincerely,

STUART D. ZIMRING

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