The Ethical Alligators in Fiduciary Representation: How to Avoid Being Bit by One

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I. GOALS OF THE SESSION

Elder Law and Special Need practitioners may represent clients who are acting as fiduciaries more often than attorneys who practice in other areas of law. Fiduciary representation is a natural extension of the direct representation of elderly clients and clients with disabilities. Any discussion of fiduciary representation must begin with a firm understanding of what is a fiduciary generally and what are the duties of the fiduciary. More importantly any fiduciary representation must begin with the client understanding what he[1] is being asked and required to do.

A special needs practice can present a variety of ethical issues and considerations when interacting with and representing fiduciaries. This presentation is designed to increase awareness of the issues involved in such a practice and to provide some framework to address the issues as they arise. In a special needs practice, the attorney will be interacting with trustees and other fiduciaries daily. When the trustee is familiar with their duties and are intentionally working within those duties ethical issues can be avoided. It is imperative that both the attorney and the trustee understand their obligation to the beneficiaries and how failure to consider those obligations can cause ethical issues. Additionally, when the trustee does not understand their responsibilities or goes astray, both the trustee and the attorney can be bit by the ethical alligator.

II. RESOURCES

This outline refers to the Model Rules of Professional Conduct promulgated by the American Bar Association[2] that were adopted, with some amendments in every State but California, and the predecessor rules to the Model Rules, the Model Code of Professional Conduct (which includes the Disciplinary Rules and the Ethical Considerations).

[1] For simplicity, the client throughout this paper will be referred to using a male pronoun and the practitioner will be referred to using a female pronoun.

[2] A component of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules"), originally promulgated in 1983 and revised on several occasions, most recently in 2005. The Model Rules have been adopted by all states, except California, and by the District of Columbia and four territories.

One helpful source for this field is the Aspirational Standards for Professionalism and Ethical Behavior for Elder and Special Needs Law published by the National Academy of Elder Law Attorneys, Inc. (NAELA). They can be found here: www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf. Another helpful resource in this area is the American College of Trust and Estate Counsel (ACTEC) Commentaries on the Model Rules of Professional Responsibility that were written with regard to the traditional role of trust and estate lawyers as family counselor and the generally non-adversarial nature of this area of practice. You can find the most current addition of the ACTEC Commentaries at www.actec.org/publications/commentaries Representation of a Fiduciary and Resulting Relationship with Beneficiaries.

III. DUTIES OF THE TRUSTEE

A. An Attorney who is representing a fiduciary must understand the duties of the trustee

1. The Trustee as a Fiduciary

Black's Law Dictionary defines a fiduciary as:

> [a] person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. . . One who must exercise a high standard of care in managing another's money or property [3]

The definition suggests three important concepts of the fiduciary relationship that inform both the fiduciary and the practitioner as to the general duties of the fiduciary. These concepts may be helpful as a starting point for any initial conversation with a fiduciary client.

a. Act for the benefit of another—the fiduciary is taking actions that should benefit the principal. The concept is that the fiduciary must consider the benefit to the principal before taking any action within the scope of the fiduciary relationship. The idea of self-dealing and use of the principal's property for the benefit of a third person are totally contrary to the definition of a fiduciary. Many of the provision of the Uniform Power of Attorney Act (UPAA) are based on this concept.

b. Exercise duties of good faith, trust, confidence, and candor—These concepts sound particularly familiar to the practitioner, as they represent the duties practitioners owe to their clients. They recognize that the fiduciary when dealing with the principal should keep the principal's secrets, should not hide what the fiduciary is doing from the principal, and that the fiduciary should do his best to operate for the best interest of the principal. NAELA Aspirational Standard B-5 instructs the practitioner who represents a fiduciary to "ensure that the client understands that the duties of the fiduciary and attorney are governed by the known wishes

[3] BLACK'S LAW DICTIONARY (Bryan A. Garner ed.,9th ed., West 2009)(available on Westlaw).

and best interest of the principal."[4] The UPAA suggests in § 114 that the agent must act in accordance with the principals "reasonable expectations" to the extent they are known and if not know than in the "best interests" of the principal.

c. High standard of care in managing another's money and property—The fiduciary is also called to use care in managing the money and property of the principal. This part of the definition is the bases of the Uniform Prudent Investor Act (UPIA), which will be discussed below.

1. Duties found in the Uniform Trust Act

The Uniform Trust Act applies to Special Needs Trusts and therefore an attorney should be aware of the duties that is sets forth for trustees. Those duties include

1. Duty to administer the trust
2. Duty of loyalty
3. Impartiality
4. Prudent administration
5. Delegation by trustee
6. Control and protection of trust property
7. Recordkeeping and identification of trust property
8. Enforcement and defense of claims
9. Collecting trust property
10. Duty to inform and report
11. Distribution upon termination

B. The Attorney must educate the trustee clients as to his responsibilities.

Some clients who are thrust into the role of trustee may say "I've never done this before! What do I do?" The truth of the matter is that most of them have not and most of them never will again. Further, depending on the particular fiduciary role the client is undertaking, while some of the duties (money management, bill paying, budgeting, etc.) may be activities the client does for herself on a daily basis, the level of responsibility the client owes to others in the context of being of fiduciary is quite different from the duty one may or may not owe oneself. Thus a "confusion of similarity" often presents itself - it is not uncommon for the client to say "but, I don't worry about balancing my checkbook to the penny each month. I just hit the "adjust to balance" button in Quicken and it's done. The attorney needs to educate the client that in the world of fiduciary obligations, accounts must balance to the penny.

The best way to do this is not only in face-to-face meetings but in writing. Over and over again. At each step of the process, the attorney should remind the client of her duties and obligations as they affect each particular transaction. Attorneys might consider preparing

[4] NAELA ASPIRATIONAL STANDARDS FOR THE PRACTICE OF ELDER LAW WITH COMMENTARIES (NOV. 21, 2005) *available at* http://www.naela.org/About/Media/NAELA_Aspirational_Standards/Public/About_NAELA/Media/Aspirational_Standards.pdf.

"overview letters" (titled "(Almost) Everything You Wanted to Know About Probate/Trust Administration But Were Afraid to Ask") for each type of fiduciary representation handled by the office. The client receives this letter shortly after the representation begins and initial information regarding the matter has been collected. Thereafter, as matters and situations arise, the client can be reminded of the letter and attempt to reinforce particular aspects of the fiduciary's obligations as they occur.

Advising the Trustee of a Special Needs Trust ("SNT") adds an additional layer of complexity to the representation. All SNTs are, by definition, discretionary trusts. Generally speaking, under the terms of the trust the Trustee can make distributions for the benefit of the beneficiary (but rarely to the beneficiary directly), but those distributions most often can only be for items or services that will not adversely impact the beneficiary's eligibility for public benefits. Thus, not only does the attorney need to be conversant in trust law governing discretionary distributions by trustees, she must also be conversant in the laws and regulations governing public benefit entitlements. Most importantly (again), the attorney needs to be able to communicate this information to the trustee in a manner that the trustee understands. The more information that can be communicated to the trustee in writing and often, the better.

IV. WHO IS THE CLIENT?

The most important element of the attorney-client relationship is the duty of loyalty. As many of our other duties arise under this umbrella of loyalty, it is essential to identify your client before undertaking any legal work. This seemingly simple task is often complicated when dealing with SNTs.

The issue of who the client is when an attorney represents a trust has not conclusively been resolved in all States. Model Rule 1.7 provides the general rule regarding conflicts of interests among clients an attorney represents. It also addresses when a client must consent for the attorney to represent conflicting clients. The rules do not contain a definition of the term "client." Thus, the question remains as to who the client is when an attorney represents a trust.

Comment 27 of Model Rule 1.7 provides that "[c]onflict questions may also arise in estate planning and estate administration. . . . In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved."

There are three primary lines of authority on who the client is when an attorney represents a trust or an estate. The first holds that because a fiduciary is acting on behalf of his beneficiaries, when an attorney represents a fiduciary (a personal representative or a trustee), the lawyer is acting on behalf of the beneficiaries and is the attorney for the beneficiaries. Riggs National Bank v. Zimmer, 355 A.2d 709, 713-714 (Del. Ch. 1976); Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354 (1984). These cases suggest the creation of a direct fiduciary relationship between the lawyer and the beneficiaries of the estate or trust. Morales v. Field, DeGoff, Happert & MacGowan, 99 Cal.App.3d 307, 316 (1979).

The second line of authority holds that the attorney-client relationship exists only between the fiduciary and the attorney but that the attorney may owe fiduciary-like duties to the beneficiaries and must protect the beneficiaries from being harmed, for example, by improper conduct by the fiduciary. Estate of Gory, 570 So.2d 1381 (Fla.App. 1990); Charleston v. Hardesty, 108 Nev. 878, 839 P.2d 1303 (1992). Courts have found that a derivative duty of loyalty to the estate and its beneficiaries exists. See Estate of Clark, 188 N.E.2d 128 (N.Y. 1962). However, this derivative duty of loyalty serves to bar certain conduct by the lawyer, not to impose affirmative duties to advocate or otherwise to represent actively the interests of the beneficiaries. Counseling the Fiduciary, 28 Real Property, Probate and Trust Journal 825, 833-835 (1994). (Emphasis added.)

The third line of authority holds that the fiduciary is the client, and not the estate or trust, and, accordingly, not the beneficiaries. Trask v. Butler, 123 Wash. 2d 835, 872 P.2d 1080 (1994); Hopkins v. Atkins, 637 A.2d 424 (D.C.App. 1993). Under this view, the attorney-client relationship is clearly between the fiduciary alone and the attorney. This is the majority opinion and the opinion of the American Bar Association. ABA Formal Ethics Opinion No. 94-380. The ABA Opinion states that this majority view "would not necessarily be applicable in a jurisdiction where the controlling case law reflects one of these minority positions."

V. DUTIES OF THE ATTORNEY TO A NON-CLIENT BENEFICIARY

A. Duties under Model Rule 4.3

As a starting point Model Rule 4.3 prohibits a lawyer from implying that the lawyer is disinterested when speaking with unrepresented persons on behalf of a client, including beneficiaries. The Rule requires that the lawyer make reasonable efforts to correct a misunderstanding when the lawyer knows or should know that an unrepresented person misunderstands the lawyer's role. This is because, as the ABA comments point out, individuals not frequently involved with legal matters may assume that the lawyer is a disinterested authority on the law even when the lawyer is representing a client. See Model Rule 4.3, ABA Comment 1. This can be especially true of beneficiaries. The ACTEC Commentaries on the Model Rules of Professional Conduct (the "ACTEC Commentaries") expand on this idea. ACTEC Commentary to Rule 4.3 reads:

> The lawyer for a fiduciary is required to comply with Model Rule 4.3 in communicating with the beneficiaries of the fiduciary estate, or with the protected person in the case of guardianships and conservatorships, when such persons are not represented by counsel. In dealing with unrepresented beneficiaries or the protected person, the lawyer for the fiduciary may not suggest that he or she is disinterested. As indicated in the ACTEC Commentary on Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer should inform the beneficiaries of the fiduciary estate regarding various matters, including the fact that the lawyer does not represent them and that they may wish to obtain independent counsel. If the lawyer knows, or reasonably should know, that an unrepresented beneficiary, or another unrepresented person, misunderstands the lawyer's role in the matter, the lawyer should make

> reasonable efforts to correct the misunderstanding. The lawyer should not permit the beneficiaries to believe that the lawyer is the lawyer for the parties interested in the matter if the lawyer is serving only as lawyer for the fiduciary. If the lawyer for the fiduciary believes that the interests of an unrepresented person are adverse to the interests of the fiduciary, the lawyer must refrain from giving the unrepresented person any advice. In such cases the lawyer should suggest that the unrepresented person consult with independent counsel.

Additionally, the Rule prohibits a lawyer from giving legal advice to an unrepresented person, other than recommending separate counsel, if the lawyer knows or should know that such person's interests conflict or could conflict with the client's interests.

B. Lawyer's Duties to Communicate with Non-Client Beneficiaries

A lawyer who represents a Trustee may at times be ethically compelled to disclose information to the beneficiaries. With the client's informed consent, a lawyer may limit the representation if the limitation is reasonable. The ACTEC Commentaries on Model Rule 1.2 ("Scope of Representation and Allocation of Authority Between Client and Lawyer") state that, although the Trustee is primarily responsible for communicating with the beneficiaries, the Trustee's lawyer may communicate directly with the beneficiaries regarding the nature of the relationship between the lawyer and the beneficiaries. The ACTEC Commentaries on Model Rule 1.4 ("Communication") states that the Trustee's lawyer "should make reasonable efforts" to ensure that the beneficiaries are informed of decisions that may substantially affect them.

Specifically, the ACTEC Commentaries on Model Rule 1.2 ("Scope of Representation and Allocation of Authority Between Client and Lawyer") suggests that the lawyer should explain to the beneficiaries the role that the lawyer for the Trustee usually plays in the administration of a trust, including the possibility that the Trustee's lawyer may owe duties to the beneficiaries. Additionally, the ACTEC Commentaries state that the lawyer should provide information to the beneficiaries regarding the trust but should also warn the beneficiaries that the lawyer does not represent them and that the beneficiaries may wish to retain independent counsel.

The ACTEC Commentaries on Model Rule 1.6 ("Confidentiality of Information") explains that these duties to the beneficiaries, although limited, may qualify the lawyer's duty of confidentiality with respect to the Trustee. Model Rule 1.6 itself states, in pertinent part, that a lawyer shall not reveal information relating to the representation of a client unless informed consent is given, the disclosure is impliedly authorized or the disclosure is permitted by one of several exceptions listed in 1.6(b), including a disclosure that is required to comply with a law or court order. With regard to situations in which the lawyer believes that his or her services are being used by the trustee to commit a fraud resulting in substantial injury to a beneficiary's financial interests, the ACTEC Commentaries suggest that the lawyer may disclose confidential information to the extent necessary to protect such beneficiary's interest.

One special problem related to the extent of the trustee's duty to beneficiaries and the effect on the trustee's attorney is when and to what extent the trustee must disclose to the beneficiaries the Trustee's communications with the Trustee's lawyer concerning trust matters. Restatement (Third) of Trusts ("Restatement Third") § 82 cmt. f states that:

> The trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation (*e.g.*, for surcharge or removal). This situation is to be distinguished from legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust.

The attorney-client privilege in this context does not necessarily protect the information. States differ as to whether beneficiaries are entitled to access to communications between the Trustee and the Trustee's attorney. In California, for example, such communications are protected. *See, Wells Fargo Bank v. Superior Court*, 990 P.2d 591 (Cal. 2000). Furthermore, in *Jacob v. Barton*, 877 So.2d 935 (Fla. Dist. Ct. App. 2004), a beneficiary sued a trustee over alleged mismanagement of a trust's funds. The Florida district court upheld the attorney-client privilege with respect to the trustee's attorney's billing records. The court reasoned that the trustee hired the attorney to defend her in the dispute with the beneficiary. Therefore, the attorney-privilege would ban disclosure as the trustee, and not the beneficiary, was the client.

However. courts in other states have carved out exceptions to the attorney-client privilege for beneficiaries and have required disclosure of otherwise privileged communications between the trustee and the trustee's lawyer. These courts believe that the professional responsibilities of the trustee's lawyer run through to the beneficiaries. A Pennsylvania court in *Follansbee v. Gerlach*, 56 Pa. D. & C. 4th 483 (2002), held that there was no attorney-client privilege with respect to communications regarding the management of the trust. The court reasoned that trust law imposes a duty on trustees to share with the beneficiaries information relating to the trust, including opinions of attorneys that guide the trustee in his or her administration of the trust. The decision however distinguished, consistent with the Restatement Third, the situation where a conflict arose between a beneficiary and a trustee, and the trustee hired his or her own independent counsel, paid for by his own funds.

An Arizona court in *Hammerman v. The Northern Trust Company*, 329 P.3d 1055 (Ariz. App. 2014) recognized the limits on the attorney-client depending on the scope of the representation. The former Trustee refused to provide email messages between the trustee and his outside counsel claiming the messages were protected by the attorney-client privilege. The trial court ordered disclosure, based primarily on the fact that the legal advice was paid for by trust funds.

On appeal, the Arizona Court of Appeals noted that the fiduciary exception to the attorney-client privilege, generally, "requires a trustee comply with a beneficiary's request to produce all legal advice that the trustee has obtained on matters concerning administration of the trust." *Wachtel v. Health Net, Inc*., 482 F.3d 225 (3d Cir. 2007). The Court of Appeals relied on

Arizona's version of the Uniform Trust Code, which states that a trustee has a duty to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests." Additionally, it cited the Restatement Third § 82, cmt. f, which asserts that legal advice obtained in the trustee's fiduciary capacity is subject to the general rule requiring disclosure of "information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights." The Court of Appeals was persuaded that disclosure of otherwise privileged communications between a Trustee and counsel would promote the beneficiaries' involvement in trust affairs and the enforcement of their rights. Therefore, the Court of Appeals adopted the rule of Restatement Third § 82, stating that a Trustee has a duty to disclose "legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust."

The Court of Appeals, relying on *Riggs Nat'l Bank of Wash. D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), set out three factors to determine if the legal consultations were in the trustee's fiduciary capacity by analyzing:

1. The Trustees had sought legal advice that would only benefit the trust, not the Trustees personally (*i.e.*, in defense of claims against beneficiaries);

2. The Trustees had paid for that advice with trust funds, not the Trustees' personal funds; and
3. There was no adversarial proceeding pending against the Trustees, which means that there was no need for the Trustees to seek advice in a personal capacity.

The Court of Appeals stated that the fiduciary exception to the attorney-client privilege does not apply "when a trustee seeks legal advice in a personal capacity on matters not of trust administration, as opposed to in a fiduciary capacity on matters of trust administration," relying on *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999), and Restatement Third § 82, cmt. f. The Court of Appeals therefore reversed and remanded the trial court's decision to consider whether the legal advice was obtained by Northern in its corporate or fiduciary capacity. The Court of Appeals instructed the trial court to conduct an *in camera* review of the electronic mail messages at issue to determine whether they consisted of trustee's communications made in its fiduciary or corporate capacity.

In a footnote, the Court of Appeals discussed the ethical duties of a lawyer who represents a Trustee in both a personal capacity and in matters of trust administration, stating that a lawyer "quickly may be faced with a conflict of interest between the trustee's individual interests and the interests of the trust." This conflict is the reason representation of a fiduciary in both capacities maybe ill advised.

Whether or not communications between the Trustee and the Trustee's lawyer are privileged, the trustee is generally still bound by his fiduciary duty to disclose material facts regarding the administration of the trust to the beneficiaries. Thus, the Trustee or the Trustee's lawyer must consider whether this duty will be met if the Trustee and the lawyer do not disclose certain communications.

The Uniform Trust Code also recognized this complicated issue.

> The drafters of the Uniform Trust Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." . . . On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances.[5]

C. Other Duties to Non-Client Beneficiaries

The ACTEC Commentaries explain the duties that the lawyer owes to the beneficiaries as "largely restrictive in nature," and "prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries." However, the ACTEC Commentaries recognize that in "some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries." The nature of these duties depends upon the scope of the representation of the trustee. In addition, a lawyer should not enter into an agreement with the trustee that attempts to limit the lawyer's duties to the beneficiaries, unless written notice is provided to those beneficiaries. Although, some courts have held that the trust attorney has no duties to the trust beneficiaries. *Sullivan v. Dorsa*, 27 Cal. Rptr. 3d 547 (Cal. Ct. App. 2005); *Wells Fargo Bank v. Superior Court*, 990 P.2d 591 (Cal. 2000).

The nature of the lawyer's duties to the beneficiaries is further illustrated by the ACTEC Commentaries on Model Rule 4.1 ("Truthfulness in Statements to Others"), which states that, "if a fiduciary is not subject to court supervision and is therefore not required to render an accounting to the court but chooses to render an accounting to the beneficiaries, the lawyer for the fiduciary must exercise the same candor toward the beneficiaries that the lawyer would exercise toward any court having jurisdiction over the fiduciary accounting."

V. POTENTIAL LIABILITY TO NON-CLIENT BENEFICIARIES

Under some circumstances, a lawyer may be held liable to non-client, third-party beneficiaries. Liability to third parties in this context depends on whether the jurisdiction in which the lawyer rendered legal services adheres to the strict privity doctrine or whether it allows third parties to proceed against the lawyer under either a negligence theory, a third-party beneficiary contract claim or a combination of the two.

[5] UNIF. TRUST CODE § 813 cmts. (citations omitted).

A. Strict Privity Doctrine

At one time the prevailing view was that of strict privity. Under the privity rule, a lawyer is held liable only to the client and not to beneficiaries or intended beneficiaries. The jurisdictions adhering to this doctrine have refused to grant standing to non-client beneficiaries under either a negligence or third-party beneficiary contract theory. The primary reasons given to justify this doctrine have been:

- Absent strict privity, clients would lose control over attorney-client relationships, and lawyers would be subject to almost unlimited liability.
- Allowing a broad cause of action against a lawyer would create a conflict of interest between the client and third-party beneficiaries during the estate planning process, thereby limiting the lawyer's ability zealously to represent his or her clients.
- Suits by disappointed beneficiaries could cast doubt on the deceased testator's intentions.

A few states still adhere to the strict privity rule, including Colorado, Nebraska, New York, Ohio and Alabama. *See, e.g., Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872 (Col. 2016); *Swanson v. Ptak*, 682 N.W.2d 225 (Neb. 2004); *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002); *Matter of Estate of Pascale*, 644 N.Y.S.2d 887 (1996); *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993); *Deeb v. Johnson*, 566 N.Y.S.2d 688 (1991); *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987) (but see below regarding third-party claims in trust and estate administration); *see, also, Golden v. Cook*, 293 F.Supp.2d 546 (W.D. Pa. 2003) (finding that a lawyer did not owe a duty to the beneficiaries under Pennsylvania law, notwithstanding the absence of the strict privity doctrine). Texas generally adheres to the strict privity doctrine, *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), but allows an executor to bring a malpractice claim against a decedent's estate planning lawyer on the estate's behalf. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

B. ***Lack of Privity No Defense***

Courts in other states have held that the lack of privity between an estate or trust beneficiary and the lawyer for the fiduciary is generally not a defense to a legal malpractice claim against the fiduciary's lawyer. In Ohio, where privity is an effective defense in the estate planning context, it usually is not a defense in an action brought by an estate's beneficiaries against the fiduciary's lawyer. *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993); *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989). Arizona, California, Florida, Illinois, Maryland, Michigan, Minnesota, Nevada, North Carolina, Oklahoma, Pennsylvania, Rhode Island and Washington are among the other states whose laws refuse to apply the privity defense in this circumstance. See, *e.g.*, *Steinway v. Bolden*, 460 N.W.2d 306 (Mich. App. 1990); *In re Estate of Halas*, 568 N.E.2d 170 (Ill.App. 1991); cases cited *infra*; *but see Jewish Hosp. v. Boatman's Nat'l Bank*, 633 N.E.2d 1267 (Ill.App. 1994) (lawyer owes professional obligations to estate and not to the beneficiaries in handling probate administration due to the potentially adversarial relationship between the interests of the estate and the interests of the beneficiaries). Nevertheless, courts consistently find that no duty is owed by a fiduciary's lawyer to the beneficiaries of an estate or trust under these circumstances.

The most common tests used to determine whether a lawyer who renders services at the request of a fiduciary owes a duty to a non-client beneficiary are the "multi factor balancing" test and the "third-party beneficiary" test. Cases illustrating these tests are discussed below.

Multi-Factor Balancing Test

In *Goldberger v. Kaplan, Strangis and Kaplan*, 534 N.W.2d 734 (Minn.App. 1995), the court applied the multi-factor balancing test to determine if the lawyer for the executor owed a duty to non-client beneficiaries. In this case the court concluded: (a) the appellants were merely incidental beneficiaries of the lawyer's services; (b) that, until an estate closes, injury to an estate beneficiary is uncertain; (c) an incentive to bring a malpractice suit against the lawyer rests with the executor; and (d) allowing the beneficiaries' claim would place an undue burden on the legal profession because such claims could subject the lawyer to a conflict of interest. The conflict of interest would arise whenever the interests of the executor, acting on behalf of the estate, were to conflict with the interests of the suing beneficiary.

In *Goldberg v. Frye*, 266 Cal. Rptr. 483 (Cal.App. 1990), the court denied the estate beneficiaries' claim because the estate administrator and the lawyer did not enter their relationship intending to affect the estate beneficiaries. Furthermore, the court stated that "it would be very dangerous to conclude that the lawyer, through performance of his service to the administrator...subjects himself to claims of negligence from the beneficiaries." The court also stated that the beneficiaries are entitled to a fair administration by the fiduciary, but the fiduciary's lawyer does not owe them a duty.

In *Trask v. Butler*, 872 P.2d 1080 (Wash. en banc 1994), the court utilized a modified multi-factor balancing test to conclude that a lawyer representing a former executor did not owe a duty either to the estate or to the estate's beneficiaries. This modified approach initially determines whether the plaintiff is an "intended beneficiary of the transaction to which the advice pertained" and then analyzes the factors under the balancing test. The court found no duty existed for the following reasons: (a) the beneficiaries and the estate itself were not intended to benefit from the relationship between the executor and the lawyer but, rather, were incidental beneficiaries; (b) the heirs of the estate could institute an action against the executor for breach of fiduciary duty; and (c) the conflict of interest a lawyer would encounter in deciding whether to represent the executor, the estate or the beneficiaries would unduly burden the legal profession.

2. Third Party Beneficiary Test

In *Ferguson v. Cramer*, 709 A.2d 1279 (Md. 1997), the court applied the third-party beneficiary test and held that no duty was owing by an estate's lawyer to the beneficiaries because the beneficiaries could not establish an attorney-client relationship. The court found that the benefit to the beneficiaries from the executor's lawyer was only incidental. The court concluded that, where the executor's conduct falls below the applicable standard of care, the beneficiaries might sue the executor but not the executor's lawyer. This remains true even where the executor hires a lawyer and relies on his or her advice. *See, also, Neal v. Baker*, 551 N.E.2d 704 (Ill.App. 1990) (dismissing an estate beneficiary's claim because the scope of the lawyer's representation involved matters that were adversarial as to the beneficiary in that she was

contesting the lawyer's decision to require her to pay inheritance taxes. Also, the contract between the executor and the lawyer was intended primarily to benefit the executor and the estate and not the beneficiaries).

3. Willful Misconduct

The majority rule is different, however, when the fiduciary's lawyer has engaged in conduct that is more intentional than negligent. Thus, in *Pierce v. Lyman*, 1 Cal.App.4th 1093 (1991), superseded by statute on other grounds, 85 Cal.App.4th 382 (2000), the court held that trust beneficiaries may bring an action against the lawyers for the former trustees where the lawyers intentionally aided and abetted the trustees in the trustees' breach of their fiduciary duties. Such activities allegedly included "active concealment, misrepresentations to the court, and self-dealing for personal financial gain." *See, also, Weingarten v. Warren*, 753 F.Supp. 491 (S.D.N.Y. 1990) (applying New York law, the federal district court held that a trust's remainder beneficiaries stated a cause of action against the trustee's lawyer individually for breach of fiduciary duty and as executor of the trustee's estate for alleged conversion of trust assets. However, the court held that the beneficiaries could not assert a cause of action for malpractice against the lawyer). Sometimes, a negligent representation action is an alternative theory available to third parties. *See, e.g., Riggs Nat'l Bank v. Freeman*, 682 F.Supp. 519 (S.D. Fla. 1988).

VI CONCLUSION

The foregoing represents an overview of issues which may arise in a special needs trust practice. It is hoped that the information imparted has raised the attorney's consciousness and awareness of the issues involved and their potential impact on the management of the client's legal needs and expectations. Further, it is hoped that the information imparted has provided practical approaches and considerations for handling such issues. By having a knowledgeable framework within which to analyze the client's capacity status, the attorney will be better prepared to service the client's needs.