Ethics Session:
Multidisciplinary Liability and Defining the Trustee's Role

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Serving as a trustee comes with a variety of responsibilities and tasks; but above all else, any fiduciary has the duties of loyalty and impartiality to their beneficiaries. This duty of loyalty to and advocacy for beneficiaries is especially crucial in the administration of a Special Needs Trust (SNT), also known as a Supplemental Needs Trust or Disability Trust. While SNT trustees are blessed to assist one of the most underserved but most deserving populations in our country, the complexity, diversity and liability risk of acting as a trustee can sometimes be daunting. Coupling these issues with highly prevalent litigation against SNT trustees, public benefits regulations prescribed by state and federal agencies, and the generally more intensive care and oversight needed for SNT beneficiaries than their traditional trust beneficiary counterparts, SNT trust administration requires a higher degree of ethical focus - especially when dealing with outside third parties.

This presentation will illustrate how a trustee may best work with an outside third party, such as a guardian, conservator, case manager, or agent under power of attorney. It will also cover privilege and privacy concerns while addressing the trustee's duty to avoid any potential conflict of interest. Exculpatory provisions, waivers and other common disclosures will be reviewed, along with general ethics considerations not only for a trustee, but also for planners and attorneys.

"A principles-based regime, more so than a rules-based one, can only work if administered by people with principles" and "a trusteeship brings with it 'no small degree of trouble and anxiety,' at least for the trustee who is conscientious." – Rounds, Jr., Charles E. and Rounds, III, Charles E. Loring and Rounds, 2014: A Trustee's Handbook: Wolters Kluwer Law and Business. 2014. Print.

I. Ethics Overview

In general, even if so shielded in a trust instrument or applicable statute, trustees and attorneys cannot be excused from their ethical duties of loyalty and fidelity to their client. Nor may exculpations relieve fiduciaries from liability related to conflict of interest or self-dealing. In addition to professional fiduciaries, national or state chartered trust companies and Pooled Special Needs Trust (PSNT) trustees, attorneys, accountants, life insurance agents and financial advisors may serve as trustees. When these entities serve as trustee, they are governed not only by fiduciary and civil malpractice laws, but also the prescribed ethics standards of their profession. For example, should a financial advisor serve as trustee, their fiduciary responsibilities are detailed in part in the Investment Advisers Act of 1940, codified at 15 U.S.C. § 80b-1 through 15 U.S.C. § 80b-21. Ethics and fiduciary responsibilities for nationally chartered trustees are governed through the oversight of the Office of the Comptroller of the Currency (OCC).

While attorneys are sometimes thought of as superb candidates for trusteeship, many firms discourage their employees from acting as such. The reasoning behind this prohibition typically stems from the firm's inherent risk aversion, which is exacerbated by the onerous challenges of trust administration in general, the expertise required for prudent administration, the ethical considerations discussed herein, and the sometimes convoluted definitions of who the actual client may be.

The American Bar Association Model Rules of Professional Conduct (2020) (the "Model Rules") outline the ethical and fiduciary responsibilities of attorneys acting as a trustee. Rule 5.7(b)(9) of the Model Rules indicates that services performed by attorneys such as "title insurance, financial planning, accounting, [and] ***trust services***…" [emphasis added] are considered to be "law-related services" and not necessarily the practice of law. That noted, many of the ethics considerations and best practices outlined the Model Rules should still be consulted by attorneys acting as trustee, as applicable. For reference, Rule 5.7 of the Model Rules may be found in its entirety in Appendix A.

Interestingly, there are not as stringent national or overriding guidelines for private professional fiduciaries. In fact, most states lack an oversight governing body for these professionals and do not even address their regulation in the state probate code. Thankfully, some organizations (including the Professional Fiduciary Association of California (PFAC), the Independent Trustee Alliance and the National Guardianship Association (NGA)) have issued ethical guidelines for their members.

The PFAC Mission Statement is to "advance excellence in fiduciary standards and practices". To achieve this goal, they list the following as some of their purposes:

- Promote high standards of ethics and practice
- Maintain high qualifications for membership
- Require and provide continuing education
- Contribute to the development and support of effective regulation, legislation and licensing
- Promote communication among members to share resources
- Mentor new members

Similarly, the Independent Trustee Alliance (ITA) acknowledges that fiduciaries serve a vulnerable population of beneficiaries and strive to educate all trustees (layperson or otherwise) as to how to prudently carry out the responsibilities and duties of trusteeship. The ITA Code of Ethics stresses, in part:

- The duty of loyalty
- Avoidance of conflict of interest
- Protection of beneficiary rights against manipulation by third parties

The National Guardianship Alliance truly focuses on the rights and empowerment of beneficiaries. Their ethical principles emphasize, in part:

- Treating the beneficiary with dignity
- Involvement of the beneficiary in the decision-making process

- Advocacy on behalf of the beneficiary
- Confidentiality
- Financial prudence

The bar for trustee ethics, prudence and loyalty to their beneficiary is set appropriately high. The entirety of the community of fiduciaries should strive to adhere to and even exceed these principals.

II. Trustee Duties

> **fi·du·ci·ar·y (fi-dōō-shē-ĕr-ē): n.** ***"One, such as an agent of a principal or a company director, that stands in a special relation of trust, confidence, or responsibility in certain obligations to others."***
>
> **Latin: fiduciarius, from fiducia –** ***'trust'***

As mentioned previously, the primary duty of a trustee is loyalty to their beneficiary. This is perhaps the most common tenet in all of trust law. The duty of loyalty is especially important when the trustee must coordinate their efforts with third parties. When multiple fiduciaries and their counsel work together harmoniously, a beneficiary may truly be best served with a high degree of financial and personal support that can lead to the highest quality of life possible and the empowerment to live full lives. Coordination between such multiple parties will be addressed later herein.

In common law, there are three generally agreed upon key elements to trustee fiduciary responsibility; namely, the duty of loyalty, the duty of care and the duty of full disclosure. At its core, the duty of loyalty requires any fiduciary to act in the best interest of the beneficiaries - period. A trustee should never act in their own self-interest or in the interests of parties other than their beneficiaries. For example, it is concluded quite concisely in *Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A.,* 914 S.W.2d 384, 387 (Mo.App. W.D.1996) that trustees are fiduciaries "of the highest order" and are required to exercise "a high standard of conduct and loyalty in administration of [a] trust." This case goes on to illustrate that this duty of loyalty "precludes self-dealing" which in most cases would be considered a "breach of fiduciary duty." For clarification, self-dealing is the conduct of a trustee or other fiduciary that takes advantage of their fiduciary position in a transaction in which they act in their own interests, oftentimes to the detriment of the beneficiary.

Self-dealing is a clear case of conflict of interest. A conflict of interest occurs when any person (e.g. fiduciary) can gain personal benefit from actions or decisions they make in their appointed capacity. Conflicts of interest could also involve favoring one beneficiary of a trust over another. In such cases, the duty of impartiality should be observed, and all beneficiaries must be treated equally. The duty of impartiality is simply the tenet that a trustee must treat all its beneficiaries similarly and fairly, without bias or preference for any one beneficiary. The duty of impartiality is especially important in the administration of Pooled Special Needs Trusts (PSNTs) given the multitude of beneficiaries served by such vehicles and each beneficiary's diverse needs and life circumstances.

The duty of care is oftentimes referred to as the duty of prudence. Essentially, this duty requires all trustees to act reasonably, as any prudent person would when managing a trust. When a

trustee is notably skilled in certain areas of trust administration or has held themselves out to be a professional in that area, they will be held to a higher standard of care or prudence when it relates to those areas. When a trustee is not skilled in certain areas of trust administration, it is recommended that, when appropriate, a trustee delegate those duties to an experienced professional.

The duty of full disclosure requires the trustee to appropriately inform beneficiaries on decisions made on behalf of the trust. The Model Rules require "full disclosure of material facts." Most states have their own specific requirements regarding clear and accurate accountings of the trust's administration. The frequency of such accountings varies from state to state, as does the expiration of liability after such accountings are provided to the beneficiaries.

Financial accountings are especially relevant when dealing with the assets of the trust (investable or otherwise). Trustees may sometimes be titled as legal owners of certain trust assets. Additionally, a trustee has the duty to act in good faith and invest trust assets prudently. The Uniform Prudent Investor Act (UPIA) is widely considered the industry standard for investing fiduciary assets. Drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association on February 14, 1995, the UPIA replaced the Prudent Man Rule found in the *Restatement (Second) of Trusts* (*Restatement of the Law Second, Trusts,* American Law Institute © 1959). Part of the UPIA updates the Prudent Man Rule regarding the advantages of delegation of trust asset management. The Prudent Man Rule previously forbade trustees from delegating investment and management functions to third parties. In UPIA § 9, these restrictions are lifted, and delegating these responsibilities is, in fact, encouraged. The duty of loyalty is also contemplated in UPIA § 5, which states that "a trustee shall invest and manage the trust assets solely in the interest of the beneficiaries."

Some trustees are hyper focused on avoiding liability and potential litigation. This fear may manifest itself in ultraconservative discretionary distribution policies and procedures. Understandably, an inexperienced SNT trustee may be so afraid of negatively affecting a beneficiary's public benefits that they make little to no distributions on behalf of the beneficiary. Taking such a stance may indeed be interpreted as a conflict of interest or self-dealing as the trustee has seemingly put their own personal goals and motivations ahead of the needs of the beneficiary. Moreover, from a relationship perspective, beneficiaries often find it disconcerting when they perceive their trustee as more concerned with self-protection than with administering the trust.

It is always imperative for every trustee to remember to set aside its own personal viewpoints, values and biases when administering a trust. A trustee is not employed to be a beneficiary's moral compass. A trustee is not hired as a substitute mother or father for the beneficiary. Every trustee should strive to provide administration services with respect for the beneficiary's uniqueness. Beneficiary discrimination based on race, sex, sexual orientation, age, religion, origin or any other factor is not only deplorable, it is also a gross violation of a trustee's duty of loyalty.

III. The Attorney Trustee

Under the Model Rules, attorneys may seek appointment as a trustee, but should not allow their own self-interest to cloud their judgement regarding the recommendation of a trustee. Additionally, should the attorney believe that their own advice may be "materially limited" (Rule

1.7), they must disclose as such to the client and obtain the client's informed consent in writing to act as the trustee.

When an attorney drafts a trust or legal vehicle, they may also serve as a fiduciary immediately, in a testamentary appointment, in a successor trustee capacity or otherwise. However, great care must be exercised by the attorney to ensure the client is properly informed of all particulars of such appointment. It is highly recommended that such information be relayed in writing with the appropriate accompanying disclosures, including detailed information on how the fees for trust administration will be calculated.

Additionally, in such cases wherein the drafting attorney may serve as trustee, great care must be taken and properly documented so as to prove that the appointment does not result from undue influence or improper solicitation by the attorney. There is also an inherent conflict of interest when an attorney recommends themselves as trustee. Accordingly, attorneys should adhere to the conflict of interest directives outlined in Rule 1.7 of the Model Rules. Specifically, Rule 1.7 states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a) goes on to state that a "concurrent conflict of interest exists if:

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

As is evident from the above, a conflict of interest may be perceived by beneficiaries of the trust if the drafting attorney represented the settlor of a trust vehicle. However, recall that trust administration is a "law-related" service. This allows drafting attorneys to serve as trustee of the trusts they draft in appropriate, well-disclosed circumstances. Rule 1.7(b) affirms this by stating that, notwithstanding the conflict interest provisions, "the lawyer may represent a client if:

1. the lawyer reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client.
2. the representation is not prohibited by law.
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and
4. each affected client gives informed consent, ***confirmed in writing***." [emphasis added]

The ACTEC COMMENTARIES, *Commentaries on the Model Rules,* The American College of Trust and Estate Counsel (ACTEC Foundation), 5th Edition, p. 106 © 2016 confirms this position by stating that "a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC [Model Rules of Professional Conduct] 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer."

The American Bar Association Commission on Multidisciplinary Practice has defined a multi-disciplinary practice as a "partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) . . . or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other

professional firms to provide services, . . . and there is a direct or indirect sharing of profits as part of the arrangement." (American Bar Association, Commission on Multidisciplinary Practice, Report to the House of Delegates, Recommendation, 2014). As such, attorneys in a multidisciplinary practice that may include in-house financial planning, or other such services not related to the practice of law should be cautious in many areas. Ethical issues related to such an arrangement could easily be tied to the unauthorized practice of law, whether or not trust administration is considered a "law-related" service. Additionally, the prohibition of fee sharing with non-lawyers in such a situation must be properly addressed and disclosed.

IV. Trust Advisor/Trust Protector

To avoid some of the potential quagmires, a drafting attorney whose client wants them involved in their trust's administration may wish to consider being appointed as a trust advisor or trust protector. Trust protectors have long been a popular option in offshore trusts and used in many high net worth estate planning vehicles. However, they are becoming an increasingly more common tool in all trust drafting and may be especially useful in SNT vehicles. The difference between a trust protector and a trust advisor is usually nominal. For this section, the terms "trust protector" and "trust advisor" will be considered synonymous and simply be referred to as "trust protector."

A trust protector is an appointed position within a trust document whose powers typically include the ability to protect the trust and its beneficiaries from improper administration. The function of a trust protector is also to assist, if needed, in protecting the interests of the beneficiaries and advise in achieving the objectives of the trust provisions found throughout the trust agreement (precatory or otherwise). Guidance for trust protector advice may be found in Model Rule 2.1 which provides that when providing advice, "a lawyer shall exercise independent professional judgement and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Trust protectors are also usually afforded the ability to amend the trust so that it is not adversely affected by any changes in the law, tax code or public benefits regulations. Naming a trust protector allows for long-term flexibility in trust administration and may assist in the event of conflict among the beneficiaries of the trust and the trustee.

Some of the powers more commonly provided to trust protectors:

- Removal and replacement of the trustee (with or without cause)
- Allowances to amend the trust should there be changes to the law, tax code or public benefits regulations
- Act as a mediating agent between trustees and beneficiaries
- Amend distribution provisions
- Add beneficiaries to the trust in the event of additional descendants
- Receive and review statements
- Direct or delegate investment decisions
- Removal and replacement of agents of the trust
- Authority over business decisions for companies owned by a trust

It is curious that many trust protector provisions do not allow for the appointment of co-trustees. Because many states do not allow for such co-trustee appointment within their statutes, it is suggested that this power be considered by the drafting attorney. Appointment of a PSNT or private trustee well-versed in public benefits as a co-trustee allows for proper oversight of an SNT and may be cheaper than hiring such agents on an hourly basis.

The authority of a trust protector is typically conferred in an advisory capacity only, and usually such appointment indicates that the trust protector shall not be liable for any action taken in good faith. When considering the appointment of a trust protector, a drafting attorney will usually choose to give them rights and not duties as the trust protector will not be involved in the day-to-day administration of the trust. In such cases, the drafting attorney should consider adding language to indicating that the trust advisor will not be liable for any act or omission to act on behalf of the trustee or of the trust protector. Additionally, drafters should carefully craft the appointment of a trust protector to ensure that the trust protector does not have a general power of appointment as defined by Sections 2041 and 2514 of the IRC.

Finally, the attorney who wishes to act as trustee or trust protector is encouraged to review their liability and malpractice insurance coverages. Oftentimes, acting as a fiduciary is not contemplated nor covered by their insurance provider. Even if such coverage is available, it may not fully protect the attorney-trustee to their desired levels. As such, it may be most appropriate to investigate the effectiveness of a rider to their current malpractice policy or invest in supplemental coverage altogether.

V. Who's on First?

The interplay between attorneys, conservators, guardians, trustees, and other fiduciaries can be challenging. For purposes of brevity, this presentation will not make a distinction between "protected person", "ward," or "principal" in every instance. Instead, the terms "beneficiary" or "beneficiaries" are used in their place. Please note that the case law and statutory authority pertaining to a request by a beneficiary, protected person, ward, or principal may differ slightly or greatly depending on the fiduciary relationship of Trustee/Beneficiary, Guardian/Protected Person/Ward, and Principal/Agent.

Conflict will inevitably arise when a guardian and trustee for the same beneficiary disagree. In these situations, addressing the discretion and responsibilities of each party is critical. The lines between each of these may become blurry in atypical instances in which both fiduciaries may have access to the same funds at different times (e.g. Qualified Income Trusts, Miller Trusts, trusts with mandatory net income distribution provisions, etc.). Outside of these instances, however, the lines of duty and responsibility are fairly clear in that the trustee has dominion over all assets titled in the name of the trust, while the guardian has authority over the person of the beneficiary, and a conservator controls the beneficiary's financial assets outside of the trust.

Explaining how well delineated each role is to a non-professional or family member trustee or guardian may prove difficult, especially when conflict arises. Consider this fact pattern:

- Disabled adult beneficiary resides in trust-owned home
- Beneficiary requires care over and above what their Medicaid and waiver programs will furnish, which is paid for by the trust

- Trust is being rapidly depleted (wasting)
- Professional trustee is forced to look at alternative housing solutions for the beneficiary and must sell the home to protect the beneficiary's long-term financial interests
- Family member guardian is adamant that beneficiary remains in the home in consideration of the beneficiary's health, comfort and well-being

The trustee in this fact pattern is stuck in an untenable position even while properly advocating for the beneficiary's long-term financial stability. While the trustee's position over the trust's longevity is justifiable, the family member guardian's position to maintain the beneficiary at home in a safe, known environment is valid as well.

To solve this issue, both fiduciaries have several options at their disposal. The first and most obvious answer would be to simply petition the court for instruction. While this method best protects each party from future liability, it is the costliest and, quite frankly, the laziest way to proceed. Alternative Dispute Resolution ("ADR") through a qualified arbitrator could also assist in achieving an agreeable outcome. ADR is any means of settling disputes outside of court and typically includes outside, unbiased initial evaluations which help facilitate further negotiations between the two parties. Lastly, the use of other outside professionals throughout the discussions can be a crucial tool in achieving the best outcome for the beneficiary. Either party in this scenario would benefit from an opinion letter or recommendation from any of the following:

- Medical professional
- Long Term Care placement advisor
- Social Worker
- Case or Care Manager
- Trust Protector or Trust Advisor
- Investment Advisor (via a Monte Carlo simulation/trust longevity projection)
- PSNT trustee who inherently has an unparalleled breadth of experience in such matters spread over thousands of beneficiaries over time

Of course, each party can engage counsel to represent them and their position. Here again, the waters can get muddied very quickly in terms of representation. For example - can an attorney-trustee hire someone within their firm to represent the trustee's position? Can the original drafting attorney be engaged by the family member? All such scenarios are fraught with ethical considerations and all potential conflicts of interest must be highly analyzed.

Much of the misunderstanding about the roles and duties may be assuaged early in the relationship with proper expectation setting by the professional fiduciary. Building a working collaborative relationship between the trustee and the beneficiary's guardian is truly the foundation to a manageable and efficient administration. Cooperative relationships between the trustee and guardian also significantly reduce the trustee's risk of litigation. Above all else, it is imperative that both the trustee and the guardian never lose sight of the fact that the population they serve desperately needs the oversight and attention of diligent fiduciaries.

In initial meetings, fiduciaries should strive to engage each other in all aspects of the joint administration. The initial intake meeting should also focus on the beneficiary's passions, spare time activities and their goals. The input of the drafting attorney may be invaluable in these meetings to explain settlor intent when the trust was established in a testamentary capacity.

The most common non-trustee fiduciaries and their respective duties include:

A. Guardianship

Guardians advocate for their wards and may select where the ward will live, determine the ward's medical procedures and treatments, and choose who may visit the ward. In some other states, this is typically referred to as "guardianship of the person" or simply "guardianship." Above all else, guardianship is established to protect vulnerable individuals or minors from abuse, exploitation, fraud, and neglect. Many state's statutes outline the onerous restrictive nature of guardianship and encourage guardians to work collaboratively with their beneficiary. Perhaps TX Estate Code, Title 3, Sec. 1001.001 illustrates this best when it states that "the court shall design the guardianship to ***encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person***, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence." [emphasis added]

Appointment of a guardian is achieved via court proceeding. The age at which a guardianship for a minor expires may differ from state to state but is typically at the age of majority. Of note, there are alternatives to guardianship. Proper estate planning with appropriate agent under power of attorney appointments (i.e. medical and financial), living wills and *inter vivos* trusts may all obviate the need for a guardianship. Additionally, many states have adopted supported decision-making agreements as an informal, and much less restrictive, variant of guardianship. The supportive decision maker, or "supporter," does not actually make the decisions; rather, they provide support and assistance to the person in need by making sure the wishes of the person are known. The supported decision-making agreement need not be completed by an attorney.

Natural guardians are the parents or adopted parents of a minor child. A guardian ad litem (GAL) is a person the court appoints to investigate what solutions would be in the best interests of a child. Typically, GALs are appointed in divorce proceedings, parental rights cases and settlement (personal injury, medical malpractice, etc.) determinations.

B. Conservatorship

Conservators also advocate for their conservatees but their oversight and powers are limited to their beneficiary's finances. In some other states, conservatorship is also referred to as "guardianship of the estate" or "property guardian" Appointment of a conservator is achieved via court proceeding. The age at which a conservatorship for a minor expires differs from state to state. For example, some states' conservatorships end when the beneficiary attains the age of majority (usually 18 years of age), while other states extend the conservatorship to age 21 or beyond. Again, the alternatives to guardianship also apply to conservatorship.

C. Agents under power of attorney

Agents under power of attorney are appointed by the principal to act on their behalf. Such actions may be financial or medical in nature. Immediate appointment of an agent under power attorney indicates that said agent may begin acting on behalf of the principal once the power of attorney is executed. A durable power of attorney indicates that the agent may only begin acting on behalf of the principal under certain circumstances (e.g. the incapacity of the principal). Powers of attorney may be general or limited in scope. The powers that are available to be given to an agent under power of attorney may differ from state-to-state.

D. Minors Administration

In cases where the trustee administers a trust for a minor child, the trustee must rely on the input and information provided by the child's parent or guardian when considering discretionary distributions. A prudent trustee will always exercise an abundance of caution before making a distribution for the support or maintenance of a minor child, especially if there could be an appearance that such distribution may not be for the sole benefit of the beneficiary. Much care must be taken by the trustee to not supplant the parental duty of support of a minor child lest they run afoul of case law or, more commonly, other beneficiaries or remainder beneficiaries (e.g. Medicaid). Typically, a trustee or court will define parental support obligations as providing food, clothing, shelter, basic care, and education. Parental obligations generally end once the child attains the age of majority.

Whenever the guardian of a minor child requests a distribution from a trust for that child, Restatement (Third) of Trusts Am. Law Inst. (2003) §50, comment e(3) states that "the presumption is that the trustee should take into account the parental duty to support the child under state law. If the trustee makes a distribution for the benefit of the child, it is really benefiting the parent. The trustee may exercise discretion to distribute for benefits that fall outside the parental obligations." Here again, though, the trustee may (and typically, must) rely on the advice and information provided by the parent of the child for the appropriateness of the distribution. No one knows that child's needs or desires more than the child's parents. That does not mean, however, that a trustee for a minor's trust is beholden to approve every discretionary distribution request made by the parent(s). Ethical considerations may become blurry in such situations, especially if an attorney-trustee drafted the trust in question with the parents as settlors.

When not executed appropriately, the roles and responsibilities of the other fiduciaries versus the trustee for any beneficiary can cause problems for all parties. For example, it is not unreasonable nor unlikely to imagine a scenario where a financial institution employee or county clerk may accidentally give access to the wrong fiduciary on certain accounts or assets. As such, it is imperative for each fiduciary and their counsel to provide full transparency to the other fiduciary for proper oversight and audits. As noted above, such accountings are also required per the Model Rules. While this information will usually surface in the annual court reportings for guardianships and conservatorships, coordination between the trustee and outside fiduciaries of all the beneficiary's assets via monthly or quarterly statements is critical to addressing issues before they arise.

The method of changing beneficiary designations on certain types of accounts should always be reviewed by all fiduciaries and will also most likely necessitate the review of outside counsel (separate from the attorney-trustee). Additionally, the process of <u>who</u> can fund certain types of financial and asset protection vehicles and the mechanisms for doing so should be reviewed by outside counsel as applicable. This conundrum permeates *Draper v. Colvin,* (U.S. Dist. Ct., D. S.D., No. 12-4091-KES July 10, 2013) wherein a U.S. District Court held that a Special Needs Trust ("SNT") was not valid due to the finding that the parents (who were also guardians) of the beneficiary created the trust while acting in their capacity as agents under power of attorney.

The beneficiary's parents created an SNT for her benefit and funded the SNT with the proceeds from a personal injury settlement. Upon funding of the SNT, the beneficiary's application for

Supplemental Security Income was denied due to excess resources (the funds in the SNT). The Social Security Administration claimed that the beneficiary's parents acted as her agents under power of attorney, which gave them the power to create the SNT, claiming that the parents could not have statutorily exercised control over Ms. Draper's funds otherwise. At the time of funding (before the enaction of the Special Needs Trust Fairness Act of 2016), an SNT could not be legally funded by the individual beneficiary (or, in this case, by her parents acting as agents under power of attorney). As a matter of law, this case is quite interesting, but it must have been a nightmare of a process for the beneficiary and her parents. While an SNT for this beneficiary was later properly funded from the dissolution proceeds of the SNT in question, forethought and proper legal guidance into fiduciary capacity could have saved the family a tremendous amount of grief and legal costs.

VI. Who Is Your Client?

The attorney-trustee faces potential ethical conflicts between exercising their fiduciary duty to the beneficiaries of a trust versus the interests of potential representation of clients in the same matter. For example, if the attorney-trustee also represented a beneficiary in a claim against the trust itself, and they, as trustee, were obligated to oppose the claim and defend the trust, such representation would be "materially limited" under Model Rule 1.7(a). In such a case, the attorney could not possibly provide competent and diligent representation to the beneficiary while simultaneously attempting to protect the trust and would have to withdraw their representation.

When determining the scope of representation, it is crucial to examine the basics of the case at hand. Trust beneficiary representation is straightforward, but it does come with its own complexities. When representing the trustee of a trust, it is always important to remember that the attorney is representing the trustee, not the trust itself. This distinction becomes more complex when the attorney is acting as trustee or previously represented the settlor.

Representing the beneficiary of a trust becomes more complicated when the trust is established for the benefit of a class of beneficiaries (e.g. a pot trust, family trust, etc.). In such cases, the attorney must adhere to the Model Rules of representing multiple parties. When representing multiple trust beneficiaries, there is certainly the opportunity for conflict to arise between the parties. Model Rule 1.7(4) states that if "a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client…." However, Model Rule 1.7(4) continues on to state that when "more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client." It may behoove the representing attorney to limit the scope of their representation from the onset in these cases per Rule 1.2(c) ("a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.") Again, such consent must be provided in writing.

Representation of a trustee can be more complex and present multiple ethical challenges. This can be exacerbated by the language within the trust instrument itself. Representation of a corporate trustee (e.g. bank or trust company) provides distinct

challenges. Most corporate trustees have strict policies and procedures in place that ensure all discretionary distribution procedures are uniform in order to properly document the fiduciary duty of impartiality. This can be challenging for the representing attorney, especially in the cases of SNT litigation. SNT beneficiaries are all inherently unique and have different, and usually more complex needs, than their traditional trust beneficiary counterparts. However, it is generally acknowledged that corporate trustees (as opposed to private trustees or attorney-trustees) have very deep pockets to pay for judgements or settlements, which further heightens the stakes in potential litigation.

A corporate trustee who may be unfamiliar with the beneficiary's public benefits, living arrangements, safety, and the like should always consider the appointment of a case or care manager for a beneficiary. An abundance of case law suggests that an SNT trustee has an affirmative obligation to be proactive in researching, documenting and providing for an SNT beneficiary's needs specific to their disability. In *In re JP Morgan Chase Bank, N.A*., 38 Misc. 3d 363, 956 N.Y.S.2d 856 (Sur. 2012), the New York County Surrogate's Court found that the "trustees…were affirmatively charged with applying trust assets to [the beneficiary's] benefit."

In this case (administered by a corporate trustee and an attorney co-trustee), the trust in question was a third party discretionary trust for the benefit of Mark, a young man on the Autism Spectrum living in a group home that provided the assistance and constant supervision he needed for all Activities of Daily Living ("ADLs"). Through the court proceedings, it was discovered that neither professional co-trustees or the co-trustees' duly acting agents (e.g. case or care managers) had visited Mark in five years. While Mark did receive Medicaid-funded residential program benefits, the residential provider was never tasked with determining how Mark's private funds would be best spent to improve his quality of life through day programs, educational expenses, additional caregiver or companion services, vacation expenditures, and the like. As such, it was determined that Mark lacked any type of advocacy for his ongoing needs, save $3,525 expended from the trust for a care manager. Many of the distributions from Mark's trust were fees for the trustee and the trustee's counsel. Of note, Mark's trust had a multi-million-dollar corpus.

The decision in this case includes a remark from the judge stating that when she asked the corporate co-trustee about the trust's lack of activity, the trustee's "excuse for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled…young man." The judge found that "it was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets. [...] Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of Mark's condition, needs, and quality of life, and to utilize trust assets for his actual benefit…" and that the trustee's "failure to fulfill their obligations should result in denial or reduction of their commissions for the period of inaction."

Assisting any trustee in navigating their ethical responsibilities can be further hampered by irregularities and variances between the many trust documents to which trustees must adhere. Esoteric discretionary distribution language outside of the standard "health, education, maintenance and support" provisions can complicate administration. That said, common law has an abundance of rulings that define discretionary distribution standards such as "happiness", "in the beneficiary's accustomed manner of living", "best interest", and "comfort". Regardless of such provisions, the trustee has the duty of loyalty to their beneficiary coupled with a responsibility to objectively evaluate each request and determine its prudence.

VII. Privilege/Privacy

In the Elder Law arena, the interplay between trustees, attorneys and outside fiduciaries is especially focused in relation to the needs of the senior and disabled communities. Specialized knowledge across multiple disciplines such as social work, finance, criminal justice, psychology, and fiduciary administration is crucial to properly serve these individuals. Fiduciaries and their attorneys often become involved when there are issues pertaining to capacity, undue influence, Medicaid, Medicare, or Social Security; when there are additional public benefits concerns; or when fraud or exploitation has already occurred.

When assisting a person with a disability, trustees will inevitably have to plan, educate, and advocate for their beneficiaries and, to do so, may require the combined services of several professionals. This will most likely involve interaction by the fiduciary with geriatric care managers, case managers, discharge planners, financial advisors, CPAs, agents under power of attorney, physicians, home health care or respite providers, and the family members and friends of the beneficiary. Both attorneys and fiduciaries in these situations must be aware of ethical issues such as the unauthorized practice of law and beneficiary/client confidentiality.

Ethical rules provide in relevant part that an attorney may not reveal a client's information without that client's consent. The same practice should also be observed by fiduciaries. Model Rule 1.6 addresses the Client-Lawyer relationship and, in subsection (a) states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." However, subsection (b) does make some allowances for lawyers to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary":

- To prevent reasonably certain death or substantial bodily harm
- To prevent the client from committing a crime or fraud
- To secure legal advice for the lawyer in terms of compliance with the Model Rules
- To comply with other law or court order

Recall again that when an attorney is engaged to represent a trustee, the basics of attorney-client privilege only vests in the office of the trustee and not in the individual serving as trustee. In other words, a successor trustee can always obtain any confidential communication between a previous trustee and their attorney. Additionally, because an attorney-trustee is acting in a "law-related service", attorney-client privilege does not necessarily apply to communications between the attorney-trustee and the beneficiaries or other agents of the trust. Additionally, privilege does not extend to non-lawyer communications with agents of the trustee (e.g. CPAs, investment advisors, etc.). This principle is very well outlined and discussed in the recent case of *LL's Magnetic Clay, Inc. v. Safer Med. of Montana, Inc.*, 2018 WL 5733178 (W.D. Tex. Aug. 2, 2018).

The recent *Jicarilla Apache Nation v United States,* 112 Fed.Cl. 274 (2013) case provides United State Supreme Court guidance on the critical, but rarely discussed, aspect of attorney-client privilege in the context of fiduciary litigation. In certain states, this "fiduciary exception" to privilege prevents any fiduciary from asserting attorney-client privilege against beneficiaries seeking to obtain communications between the trustee and their counsel as it relates to trust administration advice. In fact, the fiduciary exception to attorney-client privilege requires

disclosure to beneficiaries of any communication wherein the fiduciary sought counsel on their fiduciary duties. While the Court's decision in *Jicarilla* did not ultimately rule on this privilege exception, it did bring to light the conflicting decisions of lower courts on this matter. As a result, trustees and their counsel must proceed cautiously when determining whether their communications will receive the protection of privilege.

Confidentiality may be lost for any information conveyed by the beneficiary/client to the fiduciary/attorney in the presence of any third person not connected with the representation or issue at hand. In fact, Model Rule 1.6(c) states that "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Whether the beneficiary will know when the confidentiality privilege applies is an area of concern - especially where multiple professionals are providing a beneficiary with information on legal, tax or investment matters. The beneficiary may believe his or her communications with persons in these processes are protected when, in fact, they are not. In these situations, the highest standard of fiduciary care, prudence, and oversight must be practiced. It is crucial to always obtain beneficiary/client consent before divulging private or protected information to third parties, especially Health Insurance Portability and Accountability Act ("HIPAA") protected information.

VIII. Releases and Disclosures

Exculpatory clauses will not relieve a trustee or attorney of liability for breaches of trust committed intentionally or in bad faith. No amount of disclosure drafting is bullet proof or will fully protect the trustee or their representation from all liability. For the attorney-trustee, this liability may be magnified if their potentially bifurcated capacities are not fully delineated.

Even if the terms of the trust attempt to completely absolve liability for the trustee's acts (or failure to act), the trustee must always act in good faith with regard to the purposes of the trust and interests of the beneficiaries. The Uniform Trust Code (UTC) § 1008 specifically states that some exculpatory clauses are fully unenforceable. As an example, the Pennsylvania Code § 7788 Exculpation of trustee - UTC 1008 states that "a provision of a trust instrument relieving a trustee of liability for breach of trust is unenforceable" when it:

- Relieves the trustee for breach of trust when the breach was "committed in bad faith with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or"
- Was "inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor."

Additionally, this section of the Pennsylvania Code continues on to state that an exculpatory term "drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor."

The crux of an attorney recommending themselves to act as trustee is that they are essentially promoting their own future stream of revenue via trustee fees. As such, all aspects of this relationship must be fully discussed in great detail with the settlor and confirmed in writing. Such confirmation must include language acknowledging that the

client is aware of such additional fees. Potential future or current conflicts of interest must be disclosed as well as any other pertinent facts surrounding the representation. These recommendations apply not only to situations wherein the attorney may begin serving as trustee immediately, but also to situations where such appointment may occur in a testamentary situation or as a successor trustee.

In the case of a multidisciplinary law firm where some attorneys may only perform trust administration while others provide legal services, it should be specifically noted within the trust agreement that the attorney-trustee may hire their own firm in conjunction with the trustee appointment. Additionally, great care must be exercised to avoid "double dipping", or the congruent charging of multiple fee schedules to the trust depending on the work performed (e.g. legal services vs. trust administration).

Drafting attorneys seeking to act as trustee for trusts they have drafted may appear to be seeking a lifetime annuity for trust administration from their clients. This negative perception may be assuaged by including provisions for their removal as trustee in the trust instrument or through the use of a trust protector.

In terms of attorney-trustee compensation, generally if the trust terms do not specify otherwise, the trustee fees must be "reasonable and appropriate". Such fees should be commensurate with what other similar trustees charge in that area. An attorney-trustee, just like a private fiduciary or corporate trustee, should properly fully disclose their fee schedule from the onset. Some state statutes prescribe appropriate fiduciary compensation levels; other state courts approve or regulate the same.

IX. Conclusion

The duty of loyalty permeates trust administration and counsel representation. Great care should be exercised in identifying and addressing all ethical considerations related to trusteeship and trust representation to best serve the beneficiaries and not inadvertently violate their confidentiality or trust. The complexity, uniqueness, and liability of serving as fiduciary may be daunting. That said, practitioners in this area are truly blessed to assist one of the most underserved, but most deserving populations in this country.

Please note that the views and opinions expressed herein are not necessarily those of Stetson University College of Law, True Link Financial, or any of their subsidiaries.

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APPENDIX A

Ethics Session: Multidisciplinary Liability and Defining the Trustee's Role

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Stetson University

American Bar Association Model Rules of Professional Conduct (2020)

Rule 5.7:

Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Commentary

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).