

Ethics Session:

Multidisciplinary Liability and Defining the Trustee's Role

PRESENTED BY:

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Presenter's Bio

Roberta K. Flowers is a Professor of Law at Stetson University
Director of The Center for Excellence in Elder Law

Subjects: Ethics in an Elder Law Practice; Evidence; Criminal Procedure; Professional Responsibility

- Awards include:
 - Excellence in Teaching Award
 - Most Inspirational Teacher Award
 - Homer and Dolly Hand Award for Excellence in Scholarship
 - Florida Supreme Court Faculty Professionalism Award
 - Telly Award for Excellence in Educational Films
- Designed the nation's first "elder friendly courtroom," which now serves as a model for courtrooms of the future

Prior to Stetson:

- Deputy District Attorney for 18th Judicial District of Colorado
- U.S. Attorney for Southern District of Florida
 - Appellate
 - Major Crimes
 - Public Corruption

Published articles in:

- *Fordham Law Review*
- *Boston College Law Review*
- *Missouri Law Review*
- *Nebraska Law Review*
- *Ohio State Journal of Criminal Law*
- *Hastings Constitutional Law Quarterly*
- *Stetson Law Review*
- *NAELA Journal*

Service of note:

- Florida Bar Association
 - Professional Ethics Committee
 - Evidence Committee
 - Standing Committee on Professionalism
- American Bar Association
 - Chair of the Professionalism Sub-Committee of the Litigation Section's Ethics and Professionalism Committee

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Presenter's Bio

Peter J. Wall is the Director of Fiduciary Services for True Link Financial

19+ years of trust administration • Focus in the Elder Law arena • Known for special needs trust administration planning

Prior to joining True Link Financial:

- National Oversight Manager for the Colorado State Bank and Trust Disability and Elder Trust Solutions division
- President of the Centennial Estate Planning Council
- President of the Denver Trust Officers Association
- President of VSA Access Gallery Board of Directors
- Member of the Board of Directors for Easter Seals

Special needs trusts, estate planning, taxation, and trust administration faculty member and presentations include:

- 2012, 2014, 2015 & 2017 CBA Elder Law Retreat
- 2013 National Down Syndrome Congress
- 2015 46th Annual Autism Society National Conference
- 2016 CBA Estate Planning Retreat
- 2017 National Conference for the National Guardianship Association
- 2016, 2018, 2019 & 2020 Stetson National Conference on Special Needs Planning and Special Needs Trusts
- 2019 & 2020 National Academy of Elder Law Attorneys (NAELA) National Conference
- 2020 Professional Fiduciaries Association of California

Mr. Wall is also a published author, most notably in the *Elder Law in Colorado Red Book, Fourth Edition*.

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“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.

Overview

Trustee regulatory oversight

FIDUCIARY TYPE	OVERSIGHT AGENCY
Private Professional Fiduciaries fiduciary	<ul style="list-style-type: none"> • Sometimes State Department of Regulatory Agencies or via state statute • Often, none
National or State-chartered Trust Companies	<ul style="list-style-type: none"> • Office of the Comptroller of the Currency (OCC) • State-specific trust/bank regulatory agency
Pooled Special Needs Trusts (PSNT)	<ul style="list-style-type: none"> • None (some exceptions)
Financial Advisors	<ul style="list-style-type: none"> • SEC, FINRA, OCC, etc. • Investment Advisers Act of 1940 (15 U.S.C. § 80b-1, et. al.)
Accountants	<ul style="list-style-type: none"> • American Institute of CPAs (AICPA) • FINRA • NASBA
Life Insurance Agents	<ul style="list-style-type: none"> • NAIC • FINRA • State-specific insurance regulatory agency
Public Administrators/Public Guardians	<ul style="list-style-type: none"> • State-specific statute or audits
Attorneys	<ul style="list-style-type: none"> • ABA, local Bar Association • Model Rules of Professional Conduct

Overview



“advance excellence in fiduciary standards and practices”

- Promote high standards of ethics & practice
- Maintain high qualifications for membership
- Require & promote CEs
- Contribute to effective regulation, legislation & licensing
- Promote member communication
- Mentor new members



“service to a vulnerable population of beneficiaries”

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



“beneficiary rights and empowerment”

- Treating beneficiary with dignity
- Beneficiary decision-making process involvement
- Beneficiary advocacy
- Confidentiality
- Financial prudence

Overview

fi-du-ci-ary (fi-dōō-shē-ēr-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"

Duty of Loyalty

- Act in the best interest of the beneficiaries — period

Duty of Care/Prudence

- Act reasonably as any prudent person would
- **Note:** When a trustee has held themselves out as a professional in certain areas, a higher standard of care applies (esp. in litigation).
 - Consider delegation of certain duties.
 - Uniform Prudent Investor Act § 9 — prudent delegation of investment management

Duty to Account

- Accountings/reportings to beneficiaries, remainderpersons, interested parties, courts, public benefits agencies, etc.
- Model Rules - "full disclosure of material facts"



Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A., 914 S.W.2d 384, 387 (Mo.App. W.D.1996) —

Trustees are fiduciaries "of the highest order" and are required to exercise "a high standard of conduct and loyalty in administration of [a] trust." The duty of loyalty "precludes self-dealing," which in most cases would be considered a "breach of fiduciary duty."

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Case Study



FACT PATTERN:

Attorney-trustee

- Appointed by settlor
- Tax attorney
- Did not draft trust
- No public benefits knowledge
- Administers a handful of other traditional trusts

Third-party SNT for 36-year-old son of settlor

- Receives SSI and Medicaid

Few discretionary distributions are made.

- Attorney-trustee is unfamiliar with public benefits.
- Concerned about hyper-litigious SNT environment
- Makes liberal distributions from traditional trusts
- Routinely denies distributions for SNT beneficiary as the trustee morally disagrees with the beneficiary's lifestyle

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Case Study

Conflict of Interest

- Occurs when any person (e.g., a fiduciary) is in a position to personally benefit from their actions made in their appointed capacity
- Favoring one beneficiary over another (duty of impartiality)
- Putting own needs/desires ahead of beneficiary
- Self-dealing

Duty of Impartiality

- Treat all beneficiaries the same.
- Disregard race, sex, sexual orientation, age, religion, country of origin, political views, morals, etc.

Duty of Loyalty

- Trustees are not surrogate parents or a beneficiary's moral compass.

ABA Model Rules of Conduct - Rule 1.7

"Materially limited" advice requires full disclosure and client's informed consent in writing.



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Attorney — Trustee

May serve per ABA Model Rules of Conduct (Model Rules)

- Rule 5.7 (b)(9) - Services performed by attorneys such as “title insurance, financial planning, accounting, [and] trust **services...**” [emphasis added] are “law-related services.”
 - Not the practice of law
 - Immediate appointment, testamentary, co-trustee, successor trustee

Requires full disclosure in writing

- Materially limited representation (Rule 1.7)
- **TIP:** Document and disclose client capacity and undue influence particulars.

Inherent conflict of interest:

Rule 1.7

“A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”

- Representation of one client is directly adverse to another client
- Materially limited representation by the attorney’s responsibilities to another client, third person, or personal interest of the attorney

Rule 1.7(b)

Notwithstanding the conflict-of-interest provisions “the lawyer may represent a client if”:

- they provide competent and diligent representation to each affected client
- not prohibited by law
- free of claims in the same litigation or proceeding
- informed consent confirmed in writing

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Case Study

Parents have testamentary third-party SNT for their daughter drafted:

- Daughter is on the autism spectrum and is non-verbal.
- Concerned about future public benefits regulations changes
- Concerned a professional/corporate trustee will not properly provide for their daughter
- Very large trust corpus
- Ask drafting attorney to serve as trustee or co-trustee upon their death
 - Drafting attorney is long-time friend of the family.
 - Knows daughter’s needs and preferences well
 - Firm will NOT let attorney serve as trustee (attorney doesn’t really want to anyway due to time commitment)



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Case Study - Trust Protector/Trust Advisor

Trust Protector/Trust Advisor

- Long been a popular option for offshore trusts and high net worth estate planning
- Increasingly seen in SNT vehicles
- Function:
 - Address changes in law, tax, public benefits regulations
 - Protect settlor intent
 - Provide long-term flexibility
 - Protect beneficiaries
 - Advise on trust objectives (precatory or otherwise)

Model Rule 2.1

“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.”



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Case Study - Trust Protector/Trust Advisor

Trust Protector/Trust Advisor

- Other common powers:
 - Removal or replacement of trustee (with or without cause)
 - Trust amendment
 - Mediating agent between trustees and beneficiaries
 - Amend distribution provisions
 - Add beneficiaries in the event of additional descendants
 - Receive/review statements
 - Direct and delegate investment decisions
 - Hiring and dismissing agents of the trust
 - Authority over business decisions for companies owned by the trust

TIP: Consider provisions to allow Trust Protector to add co-trustee

- Advisory capacity
 - Rights vs. duties
 - Indemnify for acts or omissions to act on the part of trustee
- Not a general power of appointment - IRC § 2041, 2514

TIP: Review liability, E&O, malpractice insurance!



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Case Study - Co-Trustee



In the Matter of the Accounting of J.P. Morgan Chase Bank, N.A., and H.J.P. as Co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H., 956 N.Y.S.2d 856 (N.Y. Surr. Ct., 2012)

- Third-party discretionary trust for the benefit of young man on the autism spectrum living in a group home
- Neither co-trustee (corporate co-trustee and attorney co-trustee) had visited beneficiary in five years.
- Court determined that Mark lacked any type of advocacy for his ongoing needs, save \$3,525 expended from the trust for a care manager. The vast majority of the distributions from Mark's trust were fees for the trustee and their counsel.
- Trustee's "excuse for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled...young man."
- Trustee's "failure to fulfill their obligations should result in denial or reduction of their commissions for the period of inaction."
- Highly publicized in *The Village Voice*

Trustee's affirmative duty to be proactive in researching, documenting and providing for SNT beneficiary's needs

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Who's on First?

Guardian of the Person

- Aka "personal guardian," "conservator of the person"
- Court appointed for minor child (expires at state-specific age of majority) or incapacitated adult
- Makes decisions on ward's living arrangements, health care, education, and other personal matters

Natural Guardian

- Parent of minor child
- Expires at state-specific age of majority

Guardian Ad Litem (GAL)

- Court-appointed guardian during pendency of case
- Represents minor child's or incapacitated adult's interests in settlement matters, contested proceedings, divorce proceedings, etc.



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Who's on First?

Conservator

- Aka "guardian of the estate," "property guardian," "financial guardian," "conservator of the estate"
- Court appointed for minor child (expires at state-specific age of majority) or incapacitated adult
- Makes financial and property-related decisions for protected person

Agent under Power of Attorney

- Appointed by principal to act on their behalf
- Medical, financial
- Immediate vs. durable
- General vs. limited
- State-specific powers



Protective Arrangements

- Established to protect vulnerable individuals or minors from abuse, fraud, exploitation and neglect
- One of the most restrictive legal arrangements available



TX Estate Code, Title 3, Sec. 1001.001 —

"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."

Alternatives to guardianship/conservatorship:

- Agent under power of attorney
- Living wills
- *Inter vivos* trusts
- Supported decision making (state-specific)

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Case Study



Jim is an adult (60) with a disability — receives SSI, Medicaid and HCBS.

- Third-party trust
- Resides in trust-owned home
- Requires full-time care over and above what HCBS/Medicaid will provide
 - Additional care services paid for by trust
- Wasting trust — rapidly depleting

Parties:

TRUSTEE:

reviewing alternative housing solutions to protect Jim's long-term financial interests (e.g., ALF)

FAMILY MEMBER GUARDIAN

(non-professional): adamant Jim remains in his home for as long as possible to protect Jim's health and safety

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Case Study

- Petition to Court for instruction
- Alternative Dispute Resolution (ADR)
- Non-judicial Settlement Agreement
- Attorney engagement
 - Note: HIPAA concerns, discovery, privilege, etc.



Outside resources to consider:

- Medical professional
- Social worker
- Mental health provider
- Case/Care manager
- Trust protector/advisor
- Family member
- Pooled trust administrator
- Public benefits advisor

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Trusts for Minors

- Age of majority
- Parental Duty of Support
 - food
 - clothing
 - shelter
 - basic care
 - education



McElrath v. Citizens & Southern National Bank, 229 Ga. 20, 189 S.E.2d 49 (1972): —

Trustee “shall use a sufficient amount of the income to provide for the support, maintenance and education...”

Mandate to the trustee to use the income for the support, maintenance and education of the minor children **regardless of parental obligation of support**



- Restatement (Third) §50 e(3): “Trustee should take into account 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.”
- POMS § SI 01120.201.F.3.a - “incidental” or “collateral” benefit

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Who Is the Client?

- Attorney-trustee may not represent a beneficiary of a trust they are administering in a claim against the trust.

Model Rule 1.7(a) — “materially limited” representation

- Representation of TRUSTEE not TRUST
- Multiple trust beneficiaries (e.g., pot trust, family trust, etc.)
 - Representation of multiple beneficiaries
 - Beneficiary conflict?

Model Rule 1.7(4) — 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, 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.”

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Who Is the Client?

- Representation of large corporate trustees may be more challenging.
 - Deep pockets
 - Conservative discretionary distribution provisions
 - Settlement proceedings
- Esoteric trust provisions
 - “Comfort,” “happiness,” “beneficiary’s accustomed manner of living,” “best interest”
 - Duty of loyalty
 - **TIP:** Research common law.

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Privilege

Elder Law inherently involves multidisciplinary focus across social work, finance, criminal justice, psychology, fiduciary administration, public benefits, etc., to include consultations with:

- Social workers
- Geriatric care managers
- Case managers
- Discharge planners
- Financial advisors
- CPAs
- Agents under POA
- Doctors

Model Rule 1.6

- a) “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”
- b) Lawyers may “reveal information relating to the 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

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Privilege

Confidentiality

Model Rule 1.6(c) states:

“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.”

- Does the beneficiary know?
- HIPAA release



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Case Study

- **Attorney-trustee serving for irrevocable trust**
- **Trust owns unique assets.**
 - Closely-held stock
 - Apartment building
- **Delegations**
 - CPA
 - Investment advisor
 - Property manager
- **SEC files inquiry for all communications in re: closely-held stock**
 - Requests all attorney-trustee and beneficiary communications
 - Requests all attorney-trustee and investment advisor communications



- **IRS files inquiry for all communications in re: apartment building**
 - Requests all attorney-trustee and CPA communications
 - Requests all attorney-trustee and property manager communications
- **Attorney-trustee denies requests, claiming attorney-client privilege.**

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Case Study

Rule 5.7 (b)(9)

Services performed by attorneys such as “title insurance, financial planning, accounting, [and] trust services...” are “law-related services.”

- Not the practice of law



Attorney-client privilege does not necessarily apply to communications between attorney-trustee and beneficiary.

- Regardless of internal/email disclaimers otherwise

Privilege does not extend to non-lawyer communications with agents of the trust.

- *LL's Magnetic Clay, Inc. v. Safer Med. of Montana, Inc.*, 2018 WL 5733178 (W.D. Tex. Aug. 2, 2018)

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Case Study

- PSNT acting as trustee
- PSNT beneficiary moves out of state; trust share transferred to successor trustee.
- Successor PSNT trustee notes concerns in accountings/discretionary distributions process and retains counsel on behalf of the beneficiary's trust share.
- Original PSNT had previously retained counsel for this beneficiary's trust share in re:
 - Advice on trust administration
 - Advice on ethics of discretionary distributions
- Retains said counsel for current representation in litigation
- Counsel for successor PSNT trustee requests all communications between original PSNT and counsel.
- Original PSNT counsel denies request, claiming privilege.



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Case Study

Privilege only vests in the office of the trustee.

- Successor trustee may obtain any confidential communication between a previous trustee and their attorney.

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.
- Varies state-to-state



Jicarilla Apache Nation v United States, 112 Fed.Cl. 274 (2013)

- No definitive conclusion
- Discusses conflicting decisions of lower courts

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Releases and Disclosures

- No exculpatory clauses relieve breaches of trust committed in bad faith.
- Uniform Trust Code (UTC) § 1008 specifically states that some exculpatory clauses are fully unenforceable.

Example: Pennsylvania Code § 7788 Exculpation of trustee - UTC 1008 - "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."
- Exculpatory terms "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."

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Releases and Disclosures

- Drafting attorney recommending themselves as trustee is an inherent conflict of interest:
 - "Lifetime annuity stream of income"
 - Mitigation: provide for removal of trustee
 - Full disclosure
 - Potential current and future conflicts of interest
 - "Materially limited" representation
 - Fees
- Multidisciplinary Law Firms
 - May have non-attorney employees (financial planners, CPAs, etc.)
 - Unauthorized practice of law concerns
 - Disclose "double-dipping"
 - Legal services vs. trust administration
- Fees for attorney-trustee
 - Must be "reasonable and appropriate"
 - Commensurate with other local trustees
 - State statute
 - Court approval/regulation

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THANK YOU!



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Disclosures

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Disclosures

Risks Inherent in Investing

Investing in fixed income securities involves interest rate risk, credit risk, and inflation risk. Interest rate risk is the possibility that bond prices will decrease because of an interest rate increase. When interest rates rise, bond prices and the values of fixed income securities fall. When interest rates fall, bond prices and the values of fixed income securities rise. Credit risk is the risk that a company will not be able to pay its debts, including the interest on its bonds. Inflation risk is the possibility that the interest paid on an investment in bonds will be lower than the inflation rate, decreasing purchasing power.

Cash alternatives typically include money market securities and U.S. treasury bills. Investing in such cash alternatives involves inflation risk. In addition, investments in money market securities may involve credit risk and a risk of principal loss. Because money market securities are neither insured nor guaranteed by the Federal Deposit Insurance Corporation or any other government agency, there is no guarantee the value of your investment will be maintained at \$1.00 per share. U.S. Treasury bills are subject to market risk if sold prior to maturity. Market risk is the possibility that the value, when sold, might be less than the purchase price.

Investing in stock securities involves volatility risk, market risk, business risk, and industry risk. The prices of most stocks fluctuate. Volatility risk is the chance that the value of a stock will fall. Market risk is the chance that the prices of all stocks will fall due to conditions in the economic environment. Business risk is the chance that a specific company's stock will fall because of issues affecting it. Industry risk is the chance that a set of factors particular to an industry group will adversely affect stock prices within the industry.

Our online tools provide a snapshot of your current financial position and can help you to focus on your financial resources and goals, and to create a plan of action. Because the results are calculated over many years, small changes can create large differences in future results. You should use this to help you focus on the factors that are most important to you. These tools and plans do not provide legal, tax, or accounting advice. Before making decisions with legal, tax, or accounting ramifications, you should consult appropriate professionals for advice that is specific to your situation.

Disclosures

Target Income Amount

The Target Income Amount is the amount you would expect to spend, or the amount you would like to spend, for each financial goal. The target income does not reflect the deduction of applicable taxes.

Historical Testing

The Results Using Historical Test are calculated by using the actual historical returns and inflation rates, in sequence, from a starting year to the present, and assumes that you would receive those returns and inflation rates, in sequence, from this year through the end of your Plan. If the historical sequence is shorter than your Plan, the average return for the historical period is used for the balance of the Plan. The historical returns used are those of the broad-based asset class indices listed in this Important Disclosure Information.

Average Returns

The Results Using Average Returns are calculated using one average return for your pre-retirement period and one average return for your post-retirement period. Average Returns are a simplifying assumption. In the real world, investment returns can (and often do) vary widely from year to year and vary widely from a long-term average return.

Additional Disclosures

Neither Asset Allocation nor Diversification guarantee a profit or protect against a loss in a declining market. They are methods used to help manage investment risk. Rebalancing can entail transaction costs and tax consequences that should be considered when determining a rebalancing strategy. Summary allocations are subject to change without notice, are not intended as individual investment advice and should not be considered as a solicitation to buy or sell any security. Guarantees apply to certain insurance and annuity products and are subject to product terms, exclusions and limitations, and the insurer's claims-paying ability and financial strength.

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