ETHICAL CONSIDERATIONS IN SERVING AS OR REPRESENTING EXECUTORS, TRUSTEES, AND OTHER FIDUCIARIES

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I. LAWYERS AND OTHER PROFESSIONALS SERVING AS FIDUCIARIES

A. Introduction

It is not unusual and, in some states (e.g., Massachusetts & Pennsylvania), fairly common for a lawyer or other professional (e.g., the client's personal accountant) to serve as the executor of a client's estate or trustee of the client's trust.

1) These professionals may be the logical choice as fiduciaries due to their close work with the testator or settlor in devising the estate plan and their comprehensive knowledge of the client's financial assets and desires concerning those assets.
2) "Often, the lawyer who drafts the will or trust is the one best-suited to serve as personal representative or trustee. For example, he may be familiar with the family circumstances and the client's wishes regarding multiple family beneficiaries who may have widely different financial needs and goals. *See generally*, Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 Fordham L. Rev. 1357, 1378-79 (1994)." ABA Formal Ethics Op. 02-426 (May 31, 2002).
3) Lawyers serving as executors or trustees are still bound to follow the Rules of Professional Conduct of their states.
    a. VA Legal Ethics Op. 1515 (1994): "[W]hen an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the [Virginia] Code of Professional Responsibility."

b. Layton v. State Bar of CA, 50 Cal. 3d 889, 904 (1990): "[W]here an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them."

c. CA. Disciplinary Proceeding 13-O-136237 (March 1, 2015): Attorney disbarred after misappropriating funds while serving as executor of his father's estate, failing to file inventory and appraisal, and failing to file tax returns for the estate.

d. ABA Model Rule of Professional Conduct (MRPC) 8.4, Comment 5: "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

B. **Agreeing to Serve as Fiduciary**

1) Competence Issues: Handling an estate or trust may require skills for which a lawyer or other professional is not necessarily trained (e.g., investment advising) or the performance of tasks which the professional's office may not be set up to perform (e.g., custody and management of assets). Additional staff support may be needed. Finally, the professional's insurance policy should be examined to see whether it covers the professional acting as a fiduciary.

a. MRPC 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

b. New Hampshire Ethics Committee Adv. Op. 2008-09/1 (2009): "No matter how a client may initiate the request, before the attorney can begin drafting a document that names the attorney as a fiduciary, the attorney must first have

the requisite knowledge and experience to be able to satisfy the Competence requirements of Rule 1.1(b). Given the increasing complexity of the rules and procedures involved in estate and trust practice and administration, this initial ethical inquiry should not be taken lightly by the attorney."

c. Layton v. State Bar of CA, 50 Cal. 3d 889 (1990): Lawyer drafted will and named himself as executor and trustee. During the five years before he was removed as executor, he failed to have a house (the major asset of the estate) appraised; failed to rent or consider selling the house; let the insurance policy on the house lapse; failed to file a change of address form and thus missed several notices sent to the estate; failed to file tax forms; and failed to file an accounting. He was removed as executor, suspended from the practice of law for 30 days and put on probation for three years.

d. Lewis v. State Bar of CA, 28 Cal.3d 683 (1981): Lawyer agreed to help a prison inmate in the administration of the inmate's wife's estate. The lawyer was appointed administrator. He had no probate administration experience so he initially consulted a probate lawyer, but then sought no further advice from that lawyer throughout the estate administration. The inmate's lawyer made an arrangement with the inmate to help him get out on parole. The inmate told him that he had no money to pay the lawyer's $20,000 fee, but that he could take the funds from the wife's estate, of which the inmate was the sole heir. The lawyer then, without revealing his motive to the probate court, obtained permission to sell $38,000 worth of securities in the estate. He deposited the proceeds in his firm's trust account, disbursed $20,000 to himself for the fee and the rest to the inmate. When the inmate sought to have the lawyer removed as administrator it was discovered that the lawyer had never filed an inventory and failed to file any of the required tax returns. The lawyer was suspended from the practice of law for 30 days because he "negligently and improperly conducted the administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney."

2) Statutory Issues: Some states have statutes that restrict who can serve as a fiduciary in that state (e.g., non-residents may not be able to serve; entities, such as law firms, accounting firms, may not be able to act as fiduciaries in the state, etc.)

C. **Drafting Lawyer Naming Himself or Herself as Fiduciary or Including a Direction that the Lawyer be Hired to Represent the Fiduciary**

1) Some state statutes (e.g., New York McKinney's SPCA § 2307-a, Cal. Proc. Code § 15642(b)(6)) prohibit an individual who drafts a will or trust to serve as a fiduciary under that will or trust unless certain conditions are met.

a. NY SPCA §2307-a: 1. Disclosure. When an attorney prepares a will to be proved in the courts of this state and such attorney, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney is therein an executor-designee, the testator shall be informed prior to the execution of the will that:

(a) subject to limited statutory exceptions, any person, including the testator's spouse, child, friend or associate, or an attorney, is eligible to serve as an executor;

(b) absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive an executor's statutory commissions;

(c) absent execution of a disclosure acknowledgment, the attorney who prepared the will, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive; and

(d) if such attorney or an affiliated attorney renders legal services in connection with the executor's official duties, such attorney or a then affiliated attorney is entitled to receive just and reasonable compensation for such legal services, in addition to the executor's statutory commissions.

2) Additionally, ABA Formal Ethics Op. 02-426 (May 31, 2002), as well as formal ethics opinions from several state bar associations, set forth the conditions under which a lawyer may be appointed executor or fiduciary.

See, e.g., S.C. Op. 91-07 (1991), Ga. Formal Advisory Op. 91-1 (September 31, 1991), Va. Legal Ethics Op. 1515 (1994), New Jersey, Eth. Op. 683 (1996), Pa. Bar Ass'n

Comm. on Legal Ethics & Professional Responsibility Informal Op. 96-36 (March 5, 1996), N.H. Ethics Committee Adv. Op. 2008-09/1 (2009).

3) MRPC 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

4) MRPC 1.7(b) prohibits a lawyer from representing a client absent informed consent, confirmed in writing, if the representation of that client "will be materially limited by ... a personal interest of the lawyer."

a. "Informed consent" is defined in MRPC 1.0(e) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

5) MRPC 1.8 restricts the circumstances under which a lawyer may enter into a business transaction with a client or solicit a substantial gift from a client.

a. MRPC 1.8, cmt. 8: "This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position."

i. But see: New Hampshire Ethics Committee Adv. Op. 2008-09/1 (2009): "In the event the drafting attorney actively advertises and solicits clients to continue using the attorney as a nominated fiduciary in documents drafted by the attorney, the relationship that results from such advertisement and solicitation may constitute a "business transaction with the client" and thereby requires compliance with the more stringent Rule 1.8(a)."

b. ABA Formal Ethics Op. 02-426 provides that because the fiduciary performs services for compensation, accepting appointment as a client's fiduciary does not constitute accepting a gift from a client.

6) *Ethical Issue #1*: No Self-Promotion or Conscious Influence

a. The Model Code of Professional Responsibility (1969; replaced by MRPC in 1983, amended by Ethics 2000 Commission) contained the following Ethical Consideration (EC-6): "[A] lawyer should not consciously influence a client to name him as executor, trustee or lawyer in such instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety." This provision does not appear in the current ABA Model Rules.

i. In fact, Cmt. 8 to MRPC 1.8 (quoted above) indicates that a lawyer is allowed to "seek[] to have the lawyer … named as executor of the client's estate." However, some state bar rules and cases have retained the EC-6 prohibition of "conscious influence."

ii. ABA Formal Ethics Op. 02-426 (May 31, 2002) finessed the issue by saying: "In the Committee's opinion, a lawyer may accept appointment as fiduciary under a will or trust that the lawyer is preparing for a client, so long as the lawyer discusses with the client information reasonably necessary to enable the client to make an informed decision in selecting the fiduciary." Also, "When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary."

b. The lawyer must "not promote himself or herself or consciously influence the client in the decision…." Ga. Formal Advisory Op. 91-1 (September 31, 1991).

c. "Although the issue of whether or not undue influence was exerted upon the testator/grantor by the attorney requires a factual determination, on a case-by-case basis, which is beyond the purview of the committee, the committee is of the opinion that the total lack of any pre-existing attorney/client relationship greatly enhances the potential for a finding of undue influence. The existence, duration, and nature of any earlier relationship would obviously mitigate such a finding because, clearly, an attorney with

knowledge of the testator's/grantor's affairs, values, and estate would be in a position to best serve the client's needs." Va. Legal Ethics Op. (LEO) 1515 (1994).

d. NAELA Aspirational Standard D(5) (Comment): "The attorney should not promote his/her appointment as fiduciary. The attorney must determine that the appointment is in the best interests of the client and justify how his/her appointment furthers the client's best interests."

e. ACTEC Commentary to MRPC 1.7: *Appointment of Scrivener as Fiduciary*: "…. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, 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 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer."

f. MRPC 7.3(b): "(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain…." In Op. RI-291 (1997), the Michigan Standing Committee on Professional and Judicial Ethics held that "a suggestion by the lawyer that the lawyer be appointed to serve as the personal representative or trustee would constitute solicitation, and is therefore prohibited by" former (but substantially similar) MRPC 7.3.

7) *Ethical Issue #2*: Adequate Disclosure and Discussion of Options

a. "The lawyer is required by Rule 1.4(b) to discuss frankly with the client her options in selecting an individual to serve as fiduciary. This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs…. When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self-interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries." ABA Formal Ethics Op. 02-426 (May 31, 2002).

b. “Furthermore, when the attorney/draftsman or a member of his firm is being named executor or trustee, the committee also believes that the attorney has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services.” Va. LEO 1515.

c. “An attorney's full disclosure is essential to the client's informed decision and consent. Disclosure requires notification of the attorney's potential interest in the arrangement; i.e., the ability to collect an executor's or trustee's fee and possibly attorney’s fees…. In the light of the above, full disclosure in this context should include an explanation of the following:

1. All potential choices of executor or trustee, their relative abilities, competence, safety and integrity, and their fee structure;

2. The nature of the representation and service that will result if the client wishes to name the attorney as executor or trustee (i.e., what the exact role of the lawyer as fiduciary will be, what the lawyer's fee structure will be as a lawyer/fiduciary, etc.);

3. The potential for the attorney executor or trustee hiring him or herself or his or her firm to represent the estate or trust, and the fee arrangement anticipated; and

4. An explanation of the potential advantages to the client of seeking independent legal advice.” Ga. Formal Advisory Op. 91-1 (September 31, 1991).

d. “When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision.” ABA Formal Ethics Op. 02-426 (May 31, 2002).

e. NAELA Aspirational Standard D(5) (Comment): “…. Before obtaining client consent, the attorney should explain to the client the fiduciary role, any conflicts of interest, the

options to using the attorney as fiduciary, and the pros and cons of alternatives. The client's decision should be made in light of all the facts and circumstances of the particular case."

8) *Ethical Issue #3:* Client Consent

a. "When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing." ABA Formal Ethics Op. 02-426 (May 31, 2002).

b. "Written confirmation of the client's informed consent of a concurrent conflict of interest under Rule 1.7(b)(4) is not required under all circumstances when documents name the drafting attorney as a fiduciary. Clearly, however, the better practice would be for the drafting attorney to always provide such written confirmation of the client's decision." N.H. Ethics Committee Adv. Op. 2008-09/1 (2009).

c. Ga. Formal Advisory Op. 91-1 (September 31, 1991) requires either the lawyer's disclosure or the client's consent to be in writing if the lawyer is being named as a fiduciary. In In re Estate of Peterson, 255 Ga. App. 303, 565 S.E.2d 524 (2002), the lawyer had an oral discussion with the client but failed to have that discussion memorialized in writing. The Georgia Court of Appeals upheld his disqualification to serve as executor.

9) *Ethical Issue #4*: Inclusion of an Exculpatory Clause

a. MRPC 1.8(h): "(h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement…."

b. ACTEC Commentary to MRPC 1.8: "***Exculpatory Clauses.*** Under some circumstances and at the client's request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office. (An exculpatory provision is one that exonerates a fiduciary from liability for certain acts and omissions affecting the fiduciary estate.) The lawyer should not include

an exculpatory clause without the informed consent of an unrelated client. An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary."

i. Petty v. Privette, 818 S.W.2d 743 (Tenn. App. 1989): Attorney drafted a will naming himself as executor and his son and law partner as alternate executor. The will included this clause:

> "No trustee or executor serving hereunder shall be liable or responsible for any act or omission unless such act or omission shall have been done or omitted in bad faith and any act or omission done or omitted by any executor or trustee serving hereunder upon the advice of legal counsel shall be conclusively presumed to have been done in good faith."

The son ended up serving as executor. The court held that "an attorney may benefit from a clause limiting his liability for ordinary negligence in the course of his duties as executor when the will was drafted by himself or another member of his firm if the attorney proves there was no overreaching, undue influence or abuse of the fiduciary relationship."

ii. Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 980 (Wash. 1987): The attorney who drafted a trust that named himself as co-trustee included this clause:

> "Any and every action taken in good faith by my trustees in the exercise of any power, authority, judgment or discretion conferred upon it hereunder, shall be conclusive and binding upon all persons interested in the assets of any trust."

The attorney charged fees that the court found were excessive. Further, the court stated, "As the attorney engaged to write the testator's will, he is precluded from reliance on this clause to limit his liability when the testator did not receive independent advice as to its meaning and effect."

c. Uniform Trust Code § 1008(b): "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 disclosed to the settlor."

> (i) The Comment to UTC § 1008 goes on to say: "To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. *See* Restatement (Second) of Trusts Section 222 cmt. d (1959)…. The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel."

d. Rutanen v. Ballard, 678 N.E.2d 133 (Mass. 1997): Citing the Restatement (Second) of Trusts, §222, the court held that an exculpatory clause was ineffective to protect the trustee/lawyer who had drafted the trust instrument. The court noted that the lawyer "was retained as the settlor's attorney to write the trust instrument, the settlor received no independent advice, and the settlor was seventy years old, had had a stroke and was 'in questionable health.'"

e. "Since the original premise that lawyers may serve as fiduciaries is built around a higher level of knowledge, training, competency, and the fact that lawyers are bound by the Model Rules, a lawyer who chooses to serve in the dual roles shall not be excused from accountability or competency governing the fiduciary role. This level of accountability should be applicable to all paid professionals serving in the dual roles of draftsperson and fiduciary. Every working group member agreed that all paid professionals who provide fiduciary services should be prohibited from including exculpatory language when the professional is also the draftsperson." *Proceedings of the Conference on Ethical Issues in Representing Older Clients, Report of Working Group on Lawyer as Fiduciary*, 62 Fordham Law Rev. 1005, 1058 (1994).

10) *Ethical Issues #5*: Relief from Accounting, Inventory, Bond

a. "Waiver of State law fiduciary requirements in the document is permissible as long as waiver is ordinary and customary in similar documents for similar clients that do not name the attorney as fiduciary." Ga. Formal Advisory Op. 91-1 (September 31, 1991)

b. The ABA Section of Real Property, Probate and Trust Law, in 1992, issued "Principles for Lawyers Acting in Other Fiduciary Roles" in which it was suggested that an attorney acting as a fiduciary should "carry a fiduciary bond or liability insurance in an appropriate amount for purposes of protecting the estate, trust, or other account and its beneficiaries from any misappropriation or misapplication of fiduciary funds or other insurable loss."

11) *Ethical Issue #6*: Clause Directing the Fiduciary to Hire the Drafting Lawyer to Represent the Estate

a. State v. Gulbankian, 196 N.W.2d 733 (Wis. 1972): Court was concerned that 94% of the wills drafted by the lawyer and his firm directed the executor to employ the lawyer and/or his firm to represent the estate. (The lawyer spoke the same language as the clients and shared a common ethnic background with them.) The Court did not prohibit a lawyer from drafting such a clause so long as "that is the unprompted intent of his client; but the number of times this will occur will be few and the percentage in total of such wills drawn low." The Court stated:

> "This problem must be discussed by the attorney and his client objectively and uninfluenced by any desire of the attorney to eventually probate the estate. An attorney should not use a will form which provides for a designation of an attorney for the probate of the estate or executor for submission to the testator on the theory it is properly a part of a standard form of a will; no such form of suggestion may be used. An attorney, merely because he drafts a will, has no preferential claim to probate it."

Many years later, the Wisconsin Supreme Court cited the *Gulbankian* case when it suspended a lawyer from practice for three years because, among other things, he targeted three elderly, unmarried women (through a financial planning seminar) and positioned himself in various fiduciary capacities that allowed him control over their personal finances and access to their assets.

b. ACTEC Commentary to MRPC 1.7: "*Designation of Scrivener as Attorney for Fiduciary.* The ethical propriety of a lawyer drawing a document that directs a fiduciary to retain the lawyer as his or her counsel involves essentially the same issues as does the appointment of the scrivener as fiduciary. However, although the appointment of a named fiduciary is generally necessary and desirable, it is usually unnecessary to designate any particular lawyer to serve as counsel to the fiduciary or to direct the fiduciary to retain a particular lawyer. Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm … as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction."

c. One state, North Dakota, in its Rule of Professional Conduct 1.8, prohibits a lawyer who is serving as a personal representative, trustee, or conservator from also serving as legal counsel for the fiduciary in most circumstances. Comment [22] to this Rule provides as follows:

> "Situations in which a lawyer serves in both capacities represent a conflict of interest and present, whether by design or default, opportunities for overreaching, misappropriation, or other exploitation of the dual capacity relationship. The relationship of trust and confidence between lawyer and client and with respect to the lawyer as fiduciary generally requires that a lawyer not serve in both capacities. The prohibition in paragraph (1) would not apply to those situations in which there is a familial relationship between the lawyer and the decedent, trustor,

beneficiary, or protected person or in United States Bankruptcy Court proceedings."

12) *Ethical Issue #7*: Drafting Lawyer Suggesting the Naming of a Fiduciary Who Will Probably Hire the Lawyer to Represent the Estate

a. ACTEC Commentary to MRPC 1.7: "*Selection of Fiduciaries:* The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer's independent professional judgment in the selection of a fiduciary would be materially limited by the lawyer's self interest or any other factor, the lawyer must obtain the client's informed consent, confirmed in writing. If the client is selecting a fiduciary that is affiliated with the lawyer, such as a trust company owned by the lawyer's firm, the lawyer must obtain the client's informed consent, confirmed in writing."

b. Savu v. SunTrust Bank, 293 Ga. App. 683, 668 S.E.2d 276 (2008): The bank had longtime relationship with a wealthy Atlanta family. The bank wrote a younger family member to suggest that she engage in estate planning. At the customer's request, the bank provided her with "with a list of SunTrust-recommended attorneys who specialized in large, complex estates." The list included lawyers from different law firms. The customer chose one lawyer, who put together an estate plan for the customer and her spouse which included wills that named the spouses and SunTrust as co-executors. When the customer died, the bank employed the drafting attorney to represent her estate. The children of the customer argued that SunTrust had put itself in a conflict of interest position by "obligating" itself to hire the lawyer and then paying him allegedly unreasonable fees. The Georgia Court of Appeals opined:

"SunTrust's standard practice of employing the attorney who drafted a will to provide legal services in administration of the estate is supported by numerous practical considerations, e.g., such attorney has familiarity with the estate and is presumably the attorney whom the testator would select. Therefore, this is a pervasive practice endorsed by a "Statement of General Policies" adopted by the Trust Division of the American Bankers Association and the American Bar Association. It is not prohibited by any ethics rule in Georgia. We do not, however, disagree that the practice raises ethical concerns where it is part of a reciprocal arrangement through which the will draftsman names the bank as estate executor and the bank then names the will draftsman as estate attorney at a higher fee than that obtainable through negotiation with other qualified lawyers." [The Court of Appeals found no evidence of such an agreement in this case.]

13) *Ethical Issue #8*: Conflict of Interest Restraints

a. Disciplinary Bd. v. Allen, 900 N.W.2d 240 (N.D. 2017): The North Dakota Supreme Court suspended the attorney from the practice of law for violation of N. D. Rules of Professional Conduct 1.7, 1.9, and 8.4. The attorney (an only child) acted as his mother's attorney-in-fact and then, after her death, as the personal representative of her estate. While his mother was alive (but terminally ill), the attorney, purportedly at his mother's direction, changed some of her bank accounts to name himself as joint holder with right of survivorship. After his mother died, he filed for an informal probate of her will. He was also listed on the probate court documents as the attorney for the personal representative. The mother's will left the bulk of her estate to her granddaughter, who was the attorney's adult daughter. After his mother died, the attorney remarried and fathered a son and decided that the son should share in the attorney's mother's estate. He tried to negotiate this with his daughter and also to negotiate gifts from the estate to himself for $100,000. Some of these proposals were submitted to the daughter by the attorney's law firm. The daughter hired her own attorney, the attorney stepped down as personal representative, the successor personal representative took office and hired another law firm to represent the estate. The attorney then filed a petition for an

adjudication that the mother's will was "fatally flawed" and invalid and that she had thus died intestate. The probate court dismissed the petition. A petition for discipline was filed and the Board found that the attorney, when he was serving as the attorney for the personal representative (who was, of course, himself), had the duty to advance the interest of the estate. When he decided that his son should share in the estate, his own personal interests came into conflict with the interest of the estate, but he continued to serve as the estate's lawyer, in violation of Rule 1.7. After he resigned as personal representative, he violated Rule 1.9 by advancing interests that were adverse to those of his former client (the estate) without that client's consent. The Supreme Court also confirmed the Board's finding that the attorney had violated Rule 8.4, which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." The Disciplinary Board did not find credible the attorney's testimony that his mother had directed him to add him on to her bank accounts. A concurring opinion emphasized that the Court's decision made it clear that attorneys who agree to serve in a fiduciary capacity are exposed to possible disciplinary sanction and potential limitations on their future ability to assert personal claims. The concurring justice concluded, "In light of our ruling, lawyers should advisedly and cautiously accept representational positions in family-related matters where they might have a personal interest that is or might be adverse to the estate."

b. Restatement (3d) of the Law Governing Lawyers, §135, cmt. c points out that a lawyer who is serving as a personal representative or trustee may have conflicts between the lawyer's duty as a fiduciary and the lawyer's duties to other clients. The illustration given is that of a lawyer who represents a company and is also the executor of the estate of the company's former president. In the course of administering the estate the lawyer discovers that the former president may have used company assets for personal use.

D. Fees

1) Legal Fees:

a. MRPC 1.5: "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent."

b. ABA Formal Ethics Op. 02-426 (May 31, 2002): "Rule 1.5(a), which sets standards for determining the reasonableness of lawyers' fees, does not in specific terms cover compensation that a lawyer may receive as a fiduciary. Nevertheless, the fiduciary compensation the lawyer and his firm receive for his time and labor is relevant in determining what amount of legal fees is reasonable under Rule 1.5(a)."

c. "The fees would be subject to Rule 1.5. This Rule dictates that a lawyer's fee shall be reasonable. If he is already charging his legal rate because of his providing legal services, then he would be precluded from adding on further statutory fees as the personal representative." S.C. Op. 92-12 (1992).

d. Estate of Amundson, 870 N.W.2d 208 (N.D. 2015): Attorney who represented executor forced to disgorge $95,000 in fees he collected for the probate and administration of what the court viewed as a relatively simple estate.

e. Some states have statutes that govern the fees that attorneys for personal representatives may charge. See, e.g., CA. Prob. Code § 10810 (statutory fee based on value of estate); Fla. Stat. § 733.6171 ("reasonable compensation;" presumed

"reasonable" if computed according to statutory schedule); Wisc. Stat. Ann. § 851.40 ("just and reasonable compensation").

f. ABA Formal Ethics Op. 02-426 (May 31, 2002): "In some jurisdictions, the compensation of lawyers for trustees and personal representatives is either prescribed by statute or subject to court approval or regulation. Applicable statutory compensation rates as approved by a court after informed judicial scrutiny should be conclusive in determining the amount customarily charged in the jurisdiction for similar legal services and also should be persuasive in establishing the reasonableness of the compensation that the lawyer and his firm receive for legal and fiduciary services. Approval of the amount of compensation of the lawyer by an informed co-fiduciary or by the beneficiaries of the estate or trust or their representatives also would be persuasive in establishing the reasonableness of the legal fees under Rule 1.5(a)."

2) Fiduciary Fees:

a. Most states defer to an agreement between the fiduciary and the settlor/testator (or an agreement between the fiduciary and the beneficiaries) as to the amount of the fiduciary's fees. (The reasonableness of the fees charged may still be an issue if a court is asked to approve a fiduciary's accounting.)

b. Absent such agreement, some states set as the maximum amount of a fiduciary's compensation an amount that is based on a percentage of the value of the assets under management.

c. Although, as noted above, some states still provide a fee based on a percentage of the assets, the statutes of most states allow a fiduciary to collect "reasonable fees" and to be reimbursed for expenses necessarily incurred in the administration of the estate or trust.

d. In Matter of Painter's Estate, 567 P.2d 820, 822-23 (Colo. App. 1977), the following were listed as some of the factors that would determine the reasonableness of the fee charged by a personal representative: "location and form of assets; the existence and nature of encumbrances against these assets; claims against the estate; the number and age of heirs or devisees, and whether or not they can be located; the presence of legal issues which invite, or necessitate, litigation; and the complexity of the litigation itself."

(i) For commercial fiduciaries, some state statutes defer to the fiduciary's "published fee schedule," provided the fees are reasonable. See, e.g., O.C.G.A. § 53-12-210(c)(1): "With respect to a corporate trustee, [the trustee is entitled to] its published fee schedule, provided such fees are reasonable under the circumstances," Va. Code Ann. § 64-2.1208(b): "[W]here the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard published fee schedule, the commissioner of accounts shall not reduce the compensation below the amount specified unless there is sufficient proof that (i) the settlor or testator was not competent when the trust instrument or will was executed or (ii) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations."

d. What fee should the lawyer or other professional hire for actions he or she performs as a fiduciary? His or her usual hourly rate? A reduced rate under the theory that many of these actions do not require the same knowledge, skill, and training as actions performed in the lawyer's or other professional's capacity as a professional?

(i) When assessing the reasonableness of these fees, should the court compare the fees to: i) the normal fees charged by non-commercial fiduciaries? ii) the fees charged by commercial fiduciaries? iii) other professionals' fees?

(ii) Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 980 (Wash. 1987): The attorney who drafted a trust that named himself as co-trustee with an institutional co-trustee. The will provided that the co-trustees would be paid "normal compensation." The lawyer co-trustee charged a flat annual fee of .85% of the value of the trust assets. The court found his co-trustee fee to be unreasonable. The custom and practice in the community was that an individual co-trustee would receive 50% of the corporate co-trustee's fee as the corporate co-trustee usually engaged in all of the trust administration. The lawyer's claim that he and his associates spent 7 hours per day on the trust business was found by the court to be excessive and not required. The court also pointed out that the co-trustee's exposure to risk was substantially less than that of a sole trustee. The court concluded that the co-trustee's fee was "abnormal, excessive, and

unjustified." In the course of the trust administration, the lawyer co-trustee gave and relied upon his own legal opinion as to the appropriateness of his fees. The court found that it was imporper for him to have charged the trusts for this opinion and, further, as the drafter of the will, to have relied on his own opinion.

e. No "double dipping"

(i) ACTEC Commentary to MRPC 1.5: "Most states allow a lawyer who serves as a fiduciary and as the lawyer for the fiduciary to be compensated for work done in both capacities. However, it is inappropriate for the lawyer to receive double compensation for the same work."

(ii) Ga. Formal Advisory Op. 91-1 (September 31, 1991): "The lawyer acting in his or her capacity as an executor or trustee is performing a different function altogether. It is the lawyer's task as executor or trustee to effectively implement the integrated plan for disposition and distribution of the testator's or settlor's property. Not only is the lawyer's function different, the tasks are different. The lawyer should still be appropriately and reasonably compensated whether the compensation is provided in the instrument or by statute, but an attorney acting as a fiduciary should not double dip fees charged to the client or estate."

(iii) In re Jeffrey S. Entin, No. BD-2016-014 (2016): Massachusetts Supreme Judicial Court imposed an indefinite suspension for charging excessive fees while serving as the executor under a will that the lawyer drafted. The lawyer understated the amount he had collected for the estate from the decedent's guardian and overstated the expenses of the estate. The lawyer charged the estate (for a routine probate of an estate worth about $500,000) $117,214.50. This included $72,750 for legal fee for a reported 286.25 hours of legal work. He charged $27,400 for his work as executor even though he had performed no work as executor for which he did not charge a fee for legal services. He charged the estate an additional $17,062.50 for legal services that had no relation to his work on behalf of the estate.

(iv) Matter of Estate of Thron, 530 N.Y.S.2d 951 (Surr. Ct. 1988): Two lawyers, the sole partners in their firm, served as co-executors of the estate, which would

result in double commissions. The co-executors would have received in excess of $25,000 in fees, while the two beneficiaries of the estate would receive about $21,000. The court pointed out: "The appointment of two or more members from the same law firm as co-executors in double commission cases, in almost every instance, can only be the product of gratitude, greed or ignorance. If it flows from gratitude and the client was fully apprised of the ramifications, the attorneys undoubtedly earned the gratitude of their client and they are entitled to the applicable commissions and counsel fees. If it flows from greed, … it might not be too harsh to hold that the greedy should receive nothing for their legal and executorial services, even though no objection was raised until the accounting proceeding."

E. **Lawyer or Other Professional Hiring Her Own Firm to Represent the Estate or Trust**

1) ABA Formal Ethics Op. 02-426 (May 31, 2002): "[T]he Model Rules do not prohibit the fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of the estate or trust because the dual roles do not involve a conflict of interest. The obligations of the lawyer or his firm as counsel to the fiduciary do not differ materially from the obligations of the lawyer as fiduciary. The principal responsibility of the lawyer for a fiduciary is to give advice to assist the fiduciary in properly performing his fiduciary duties. The lawyer for a personal representative or trustee may owe a limited duty of care to the legatees and creditors of the estate or to the beneficiaries of the trust the fiduciary serves…. This duty, however, is no greater than the duty that the personal representative or trustee himself owes beneficiaries of the estate or trust."
2) ABA Formal Ethics Op. 02-426 (May 31, 2002): "Rule 1.5(a), which sets standards for determining the reasonableness of lawyers' fees, does not in specific terms cover compensation that a lawyer may receive as a fiduciary. Nevertheless, the fiduciary compensation the lawyer and his firm receive for his time and labor is relevant in determining what amount of legal fees is reasonable under Rule 1.5(a)…."
3) Beware of Potential Conflicts of Interest:

   a. In re Estate of McCool, 553 A.2d 761 (N.H. 1988): Lawyer was named as executor in the will of McCool. McCool, McCool's live-in companion, and their two children were

all killed in the crash of a plane that McCool was piloting. The lawyer qualified as executor and hired his law firm to represent the estate. The lawyer and his firm also represented the estates of the other three decedents, who had wrongful death claims against McCool's estate and the lawyer actually drafted insurance claim letters against himself as executor. The lawyer also represented the company whose stock was the major asset of McCool's estate. He failed to get an appraisal of the stock and to engage in meaningful negotiations for the sale of the stock to the other major shareholder (who also had been his client at one point). The court held that "an attorney who violates our rules of professional conduct by engaging in clear conflicts of interest, of whose existence he either knew or should have known, may receive neither executor's nor legal fees for services he renders an estate."

b. AICPA Code of Professional Conduct Interpretation 102-2: "Conflicts of interest. A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member's objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service."

c. ACTEC Commentary to MRPC 1.2:

"Lawyer Serving as Fiduciary and Counsel to Fiduciary. Some states permit a lawyer who serves as a fiduciary to serve also as lawyer for the fiduciary. Such dual service may be appropriate where the lawyer previously represented the decedent or (where permitted) is a primary beneficiary under the estate plan…. It may also be appropriate where there was a long-standing relationship (personal or professional) between the lawyer and the decedent. The client may request the lawyer to serve in both capacities during the estate planning process, or the beneficiaries might request this post-mortem. Regardless of when the request is made and by whom, the lawyer should explain the costs of such dual service, the financial implications for the lawyer and the estate, and the

alternatives to dual service. A lawyer undertaking to serve in both capacities should attempt to ameliorate any disadvantages that may come from dual service, including the potential loss of the benefits that are obtained by having a separate fiduciary and lawyer, such as the checks and balances that a separate fiduciary might provide upon the amount of fees sought by the lawyer and vice versa. A lawyer serving in such a dual capacity must ensure that he or she complies with the relevant conflict of interests rules…."

II. REPRESENTING A FIDUCIARY

A. Who is the Client? Courts, state statutes, the ABA, and other Bar Associations have taken differing approaches as to who is the true client when a lawyer represents a fiduciary.

1) APPROACH #1 (Majority/"Traditional Theory"): Lawyer only represents the fiduciary:

a. *STATE STATUTES:*

South Carolina Stat. § 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

> "Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created."
>
> See also New Hampshire Rev. Stat. Ann. §§ 564-B:2-205 (trusts) and 556:31 (wills) (attorney-client privilege applies to communications between the fiduciary and the lawyer for the fiduciary); Ohio Rev. Code § 5815.16 (2019); Nev. Rev. Stat. Ann. § 162.310 (2015) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal." "Principal" is "any person to whom a fiduciary as such owes an obligation.")

b. *BAR OPINIONS*

ABA Formal Opinion 94-380: Lawyer for the fiduciary only represents the fiduciary. Lawyer must maintain confidentiality and may not disclose breaches of duty by the fiduciary.

> "The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties."

Kentucky Ethics Op. KBAE-401 (1997) adopts the view of the ABA Opinion. See also, Fla. Stat. Ann. Bar Rule 4-1.7, cmt. ("In Florida, the personal representative is the client rather than the estate or the beneficiaries."); Mich, Prob. Ct. Rule 5.117(A) ("An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.")

c. *STATE CASES:*

See, e.g., Goldberg v. Frey, 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990), Linth v. Gay, 190 Wn. App. 331, 360 P.3d 844 (2015) (citing Trask v. Butler, 872 P.2d 1080 (1994)): "[A] duty is not owed from an attorney hired by the personal representative of an estate to the estate or the estate beneficiaries."); Roberts v. Feary, 986 P.2d 690 (Ore. 1999); Audette v. Poulin, 127 A.3d 908 (R.I. 2015).

2) APPROACH #2: Beneficiaries are also clients (or the "real client") of the lawyer who represents the fiduciary ("joint client theory" or "real client"):

a. Torian's Estate v. Smith, 564 S.W.2d 521 (Ark. 1978): Citing Francis v. Turner, 67 S.W.2d 211 (Ark. 1933) (overruled on other grounds, Morris v. Cullipher, 816 S.W.2d 878 (Ark. 1991)) for the proposition that "an attorney for an estate represents the heirs and distributees and legatees to the extent that it becomes his duty, where the value of the estate is material to those interested in dealing between themselves or others, not only to refrain from making any misrepresentation or concealment, but to also fully disclose the value of the estate and its probable assets so that all interested may exercise an informed judgment," the Torian's Estate court held that the attorney-

client privilege did not apply to conversations between the estate's attorney and the executor because the executor and the beneficiaries were "joint clients" of the attorney.

b. Morales v. Field, Degoff, Huppert & Macgowan, 99 Cal. App.3d 307, 160 Cal. Rptr. 239, 244 (1979): "An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary."

c. Charleson v. Hardesty, 839 P.2d 1303, 1306-07 (Nev. 1992): "We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law." (But see, Nev. Rev. Stat. Ann. § 162.310, enacted in 2015 to overturn this holding).

d. Elam v. Hyatt Legal Services, 541 NE.2d 616 (Ohio 1989): "A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."

e. Branham v. Stewart, 307 S.W.3d 94 (Ky. 2010): Lawyer represented guardian of a minor child who dissipated the child's funds. When sued for malpractice by the child, the lawyer argued that there was no privity because his client was the guardian, not the minor child. The court disagreed: "The attorney retained by an individual in the capacity as a minor's next friend or guardian establishes an attorney-client relationship with the minor and owes the same professional duties to the minor that the attorney would owe to any other client." The court distinguished the guardian-minor relationship from other fiduciary relationships (such as executor-beneficiaries and trustee-beneficiaries) in which there might be multiple beneficiaries with multiple interests who are capable of watching out for their own interests. See also, In re the Guardianship of Karan, 38 P.3d 396 (Wn. App. 2002)

3) APPROACH #3: Lawyer for the fiduciary may owe certain duties to the beneficiaries:

a. ABA MRPC Rule 1.2, Comment: [11]: "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."

b. ABA MRPC Rule 1.14 Comment: (4): "…. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct."

c. ACTEC Commentary to MRPC 1.2: *Duties to Beneficiaries*. The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.

d. Fla. A.G. Op. 96-94 (1996): "… [A]s the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian."

e. Saadeh v. Conners, 166 So.3d 969 (Fla. 2015): "Ward was an intended third-party beneficiary of the services provided by attorney for court-appointed emergency temporary guardian, and thus attorney owed ward a duty of care sufficient to support assertion by ward of a legal malpractice claim against attorney after the guardianship terminated; temporary guardian was ward's fiduciary, and ward was thus the apparent intended beneficiary of attorney's services, as it would be antithetical to suggest that guardian, who was appointed to protect ward and at ward's expense, could take any

action knowingly adverse to ward." "Even though there is no lawyer-client relationship between the alleged incapacitated person who is a temporary ward and the lawyer for the emergency temporary guardian, counsel for the emergency temporary guardian owes a duty of care to the temporary ward." "…[The ward] and everything associated with his well-being is the very essence i.e. the exact point, of our guardianship statutes. As a matter of law, the ward in situations as this, is both the primary *and* intended beneficiary of *his* estate. To tolerate anything less would be nonsensical and would strip the ward of the dignity to which the ward is wholly entitled."

f. Hawai'i Probate Court Rule 42(a) provides: "An attorney for an estate, guardianship, or trust does not have an attorney-client relationship with the beneficiaries of the estate or trust or the ward of the guardianship, but shall owe a duty to notify such beneficiaries or ward of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets under administration or the interests of the beneficiaries."

4) APPROACH #4: Balancing Test:

a. Biakanja v. Irving, 320 P2d 16 (CA 1958): This decision established a frequently-used balancing test used to determine whether a lawyer is liable to an individual who is not in privity of contract with the lawyer. The elements of the test include:

i. The foreseeability of harm to the plaintiff;

ii. Whether the plaintiff in fact suffered harm;

iii. The closeness of the connection between the negligent act and the harm;

iv. The public policy in preventing future harm.

b. Fickett v. Superior Court of Pima County, AZ, 558 P.2d 988 (AZ. Div. 2 1976): Applying the ***Biakanja*** test: "We are of the opinion that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If, as is contended here, petitioners knew or should have known that the guardian was acting adversely to his ward's interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward. In fact, we conceive that the ward's interests overshadow those of the guardian."

B. Ethical Challenges in Representing Fiduciaries

RESOURCE: Roberta K. Flowers & Rebecca C. Morgan, ETHICS IN THE PRACTICE OF ELDER LAW (ABA 2013)

1) In what *capacity* is the attorney representing the fiduciary?

a. ACTEC Commentary to MRPC 1.2: Two types of representation of the fiduciary: *"General and Individual Representation Distinguished.* A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate. A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact."

Representation of Fiduciary in Representative Not Individual Capacity. If a lawyer is retained to represent a fiduciary generally with respect to an estate, the lawyer's services are in furtherance of the fulfillment of the client's fiduciary responsibilities and not the client's individual goals. The ultimate objective of the engagement is to assist the client in properly administering the fiduciary estate for the benefit of the beneficiaries. Confirmation of the fiduciary capacity in which the client is engaging the lawyer is appropriate because of the priority of the client's duties to the beneficiaries. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is

acceptable for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate, subject to the fiduciary client's overriding fiduciary obligations."

b. Moeller v. Superior Court, 69 Cal.Rptr.2d 317, 947 P.2d 279 (1997) distinguished the legal advice sought for guidance in the administration of the trust from the legal guidance sought for the trustee's own protection but recognized that this distinction may not always be clear. Citing this case, the court in Stewart v. Kono, 2012 WL 4427096 (Cal. App., 2d Dist.) (unpublished/noncitable) examined a situation in which a former trustee filed a professional negligence action against the lawyer he had hired to represent him as trustee. The former trustee claimed the lawyer had not protected his "personal interests." The court found that the former trustee did not offer sufficient facts to state a cause of action. However, the court made some interesting observations. When representing a trustee, "the attorney may have to respond to two potentially conflicting duties: 1) to represent the trustee in his or her official capacity, and 2) to protect the trustee individually." The court noted that the attorney for the trustee "may have a duty to inform" the client of the available options when these interests seem to overlap, including the option for the trustee to hire and pay out of his own funds separate counsel for advice that is personal in nature.

2) *Privilege*: Beneficiaries of an estate or trust or the ward under a guardianship or conservatorship requests information from the attorney for the fiduciary. The "Who is my client?" question in this context raises issues relating to the attorney-client privilege.

a. Some courts recognize a "fiduciary exception" to the attorney-client privilege under the theory that the beneficiary is the "real client":

(i) Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976): Trustee asked his lawyer to prepare a legal opinion memorandum about a pending petition for instructions in anticipation of potential tax litigation. A year later, the beneficiaries filed a surcharge claim against the trustee and requested a copy of the memorandum. The trustee and lawyer refused to deliver the memorandum, citing attorney-client privilege.

"As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust…The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees. In effect, the beneficiaries were the clients of Mr. Workman as much as the trustees were, and perhaps more so."

(ii) In U.S. v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2332, 180 L. Ed. 2d 187 (2011), Justice Sotomayor stated, "The fiduciary exception [to the attorney-client privilege] is now well recognized in the jurisprudence of both federal and state courts, and has been applied in a wide variety of contexts, including in litigation involving common-law trusts."

(iii) Although not naming it as such, the fiduciary exception is described in Restatement (2d) of Trusts, §173. cmt. b and Restatement (3d) of Trusts, §82, cmt. f.

b. Other states resolutely refuse to recognize this exception:

(i) See, e.g., Wells Fargo Bank v. Superior Court, 22 Cal.4th 201, 990 P.2d 591 (2000); Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996);. Hubbell v. Ratcliffe, 50 Conn. L. Rptr. 856, 2010 WL 4885631 (Conn. Super. Ct. 2010). The *Hubbell* court focused on the "potential chilling effects" on essential attorney-client communications, noting that "[w]ithout the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-

guessing the trustee's actions [or] feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience." In 2014, the Superior Court of Connecticut was asked to reconsider the fiduciary exception following the United States Supreme Court's decision in *Jicarilla*. In Heisenger v. Cleary, 58 Conn. L. Rptr. 658, 2014 WL 4413515 (Conn. Super. Ct. 2014), the court again refused to recognize the fiduciary exception and rejected the plaintiff's argument "that the dicta in *United States v. Jicarilla Apache Nation* represents a definitive and conclusive (and somehow binding) statement of 'the common law' [of Connecticut]."

c. Florida originally recognized this exception in Jacob v. Barton, 877 So. 2d 935 (Fla. Dist. Ct. App. 2004) but in 2011 enacted Fla. Stat. 90.5021, which provides in part:

> (2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer. (The Florida statute retained the crime/fraud exception to the lawyer-client privilege.)

d. South Carolina recognized the fiduciary exception in Floyd v. Floyd, 615 S.E.2d 465 (S.C. Ct. App. 2005) but in 2008 enacted S.C. §62-1-110:

> Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

e. New York originally recognized this exception in Hoopes v. Carota, 531 N.Y.S.2d 407, 142 A.D.2d 906 (1988) but in 2002 enacted N.Y. C.P.L.R. § 4503(a)(2)(A), which abolished the fiduciary exception when the lawyer is representing a "personal representative." This statute was amended in 2019 to include trustees.

f. Even if the fiduciary exception is applied (and note that it is not recognized in every state), consultations between the lawyer and the client pertaining solely to a lawsuit against the fiduciary remain protected.

3) Representing *Co-Fiduciaries*:

> ACTEC Commentary to MRPC 1.2
>
> "*Multiple Fiduciaries*. A lawyer may represent co-fiduciaries in connection with the administration of a fiduciary estate subject to the requirements of the MRPC, particularly MRPC 1.7 (Conflict of Interest: Current Clients). Before accepting the representation, the lawyer should explain to the co-fiduciaries the implications of the joint representation, including the extent to which the lawyer will maintain confidences as between the co-fiduciaries…. If the co-fiduciaries become adversaries with respect to matters related to the representation, the lawyer may be permitted to continue the representation of one co-fiduciary with the informed consent and conflict waiver of the other co-fiduciary. Without such consent and waiver, or if the conflict cannot be waived, the lawyer must withdraw from the representation. Because of the risk of a later determination that informed consent was required, it is advisable to obtain informed consent in all representations of cofiduciaries."

4) Representing an Individual Who is Both the Fiduciary and a Beneficiary:

a. Some states take the approach that the individual beneficiary must have a different lawyer than the lawyer for herself as fiduciary. Other states allows the same lawyer to represent the client in both roles. See cases cited in Karen E. Boxx, Philip N. Jones, *Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate*, 44 ACTEC L. JNL. 223 (2019). The ACTEC Commentaries take a compromise approach.

b. ACTEC Commentary to MRPC 1.7:

Example 1.7.4 X dies leaving a will in which *X* left his entire estate in trust to his spouse *A* for life, remainder to daughter *B*, and appointed *A* as executor. *A* asked *L* to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. *L* explained to

A the duties *A* would have as personal representative, including the duty of impartiality toward the beneficiaries. *L* also described to *A* the implications of the common representation, to which *A* consented, including an informed agreement to forego any right to have the L advocate for A's personal interest insofar as it conflicts with A's duties as executor. *L* may properly represent *A* in both capacities. However, *L* should inform *B* of the dual representation and indicate that *B* may, at his or her own expense, retain independent counsel. In addition, *L* should maintain separate records with respect to the individual representation of *A*, who should be charged a separate fee (payable by *A* individually) for that representation. *L* may properly counsel *A* with respect to her interests as beneficiary. However, *L* may not assert *A*'s individual rights on *A*'s behalf in a way that conflicts with A's duties as personal representative. If a conflict develops that materially limits *L*'s ability to function as *A*'s lawyer in both capacities, *L* should withdraw from representing *A* in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

5) Representing a Fiduciary Who Has Breached His or Her or Its Fiduciary Duty:

a. MRPC 1.6(b): "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: …(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;….

b. Comment 8 to MRPC 1.6: "Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup

their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense."

c. Washington RPC §1.6(b) contains an exception to the confidentiality rule not found in other jurisdictions:

> "(b) A lawyer to the extent the lawyer reasonably believes necessary:… (7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver."

d. Pa. Eth. Op. 96-13 (1996): Lawyer for executor learns that, while the decedent was alive, the executor (the decedent's daughter) engaged in actions that constituted "overreaching" by the daughter. The opinion, citing cases in the Montgomery County Orphans' Court, states that the lawyer is obliged to reveal these actions to the other beneficiaries of the estate.

e. ACTEC Commentary to MRPC 1.2: *"Disclosure of Acts or Omissions by Fiduciary Client*. In some jurisdictions a lawyer who represents a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty. In deciding whether to make such a disclosure, the lawyer should consider MRPCs 1.6 (Confidentiality) and 1.8(b) (Use of Confidences to Disadvantage of Client) along with the ACTEC Commentaries to these rules. In jurisdictions that do not require or permit such disclosures, a lawyer engaged by a fiduciary may condition the representation upon the fiduciary's agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty. The lawyer may wish to propose that such an agreement be entered into in order better to assure that the intentions of the creator of the fiduciary estate to benefit the beneficiaries will be fulfilled. Whether or not such an agreement is made, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. The nature and extent of the duties of the lawyer for the fiduciary are

shaped by the nature of the fiduciary estate and by the nature and extent of the lawyer's representation."

f. NAELA Aspirational Standard C(1)(h) states that the attorney in the engagement letter should **"**[c]onfirm, when representing a fiduciary, the fiduciary's obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not take timely corrective action."

g. Restatement of the Law Governing Lawyers, § 51(4) provides that a lawyer owes a duty of care to certain "nonclients" if: 1) the lawyer is representing a trustee, guardian, executor or other fiduciary; 2) "the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;" 3) "the nonclient is not reasonably able to protect its own rights;" and 4) the duty "would not significantly impair the performance of the lawyer's obligations to the client." In an example given in the comment to this Section, a lawyer for a trustee is liable to the beneficiaries if the lawyer knows that the trustee is going to embezzle the trust funds and "takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting."

i. Pederson v. Barnes, 139 P.2d 552 (Alaska 2006): Lawyer represented a man who was his niece's guardian. One year into the guardianship, the niece's therapist wrote the court that there were indications that the guardian was spending the niece's money on himself. The guardian told the lawyer that his high standard of living was due to investments made by an investment company that eventually was proved to be a sham. The guardian was convicted to theft and, in a civil action, the lawyer was charged with 40% of the damages caused to the guardianship estate. The appellate court adopted the approach of the Restatement § 51(4) and upheld the denial of summary judgment to the lawyer. The appellate court interpreted the language of element #2 not as requiring that

the lawyer have actual knowledge but as meaning that "the lawyer knows or has reason to know" that action is necessary. The court stated that there was ample evidence that the lawyer had "reason to know" of the thefts given the "incredibly high" rates of return on the purported investments, the suspicious appearance of the account statements that the lawyer had received from the sham investment company, and the fact that, according to a supplemental report filed by the lawyer for the guardian, the guardian had "forgotten" to report one asset of the estate that comprised one-half of the guardianship funds.

g. When the Fiduciary is Sued, Who Pays the Attorney Fees?

(i) If the beneficiaries are justified in bringing the action against the trustee, the trustee cannot charge the trust estate with fees for defending its maladministration or mismanagement of the trust. Melson v. Travis, 133 Ga. 710, 66, 66 S.E. 936 (1910); Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 (1985). In Snook v. Trust Co. of Georgia Bank of Savannah, N.A., 909 F.2d 480, 486 (11th Cir. 1990), the trustee was paying for its defense out of the trust. The court refused to grant a preliminary injunction but noted that, assuming the trustee was unsuccessful in its defense, the trustee would be forced to reimburse the trust for the amount of the funds expended plus interest. The court pointed out that even if the beneficiaries were not "completely successful" in the litigation, they still might be able to force the trustee to return some of the funds used to pay its attorney's fees if a court were to find that some of the amounts paid were not "reasonably necessary and proper" for its defense.

(ii) If a trustee is involved in litigation over its own actions, although the trustee is authorized to pay the expenses of the litigation directly from the trust, "the better practice may be for the trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining counsel with personal funds." Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 231, 91 Cal. Rptr. 2d 716, 990 P.2d 591, 599 (2000). In In re Baylis, 313 F.3d 9 (1st Cir. 2002), the court characterized the action of a trustee who paid litigation fees directly from the trust in litigation that was instigated by his own actions as "an extremely reckless thing

to do in light of his duty of loyalty." The court opined that the trustee should have sought judicial authorization before paying the litigation fees from the trust assets.

h. Continuing Representation When the Fiduciary is Sued: Conflict of Interest?

i. Cincinnati Bar Ass'n v. Robertson,145 Ohio St. 3d 302, 49 N.E.2d 284 (2015): Executor retained lawyer to represent her as Executor of her father's estate. Other beneficiaries sued to remove her and lawyer agreed to represent her individually. Lawyer failed to explain to executor the potential for a conflict of interest. "Specifically, the board found that "[t]o the extent the claims of the Lewallen's [sic] other family members implicate[d] potential wrongdoing that would diminish the estate, Respondent [could] not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer." Accordingly, the parties stipulated and the board found that Robertson's dual representation of Lewallen in her individual capacity and in her role as fiduciary of the estate violated Prof.Cond.R. 1.7(b) (prohibiting a lawyer from accepting or continuing representation of a client if a conflict of interest would be created, unless the affected client gives informed consent in writing)."

(a) The *Robertson* court did not mention then-existing Ohio St. 5815.17(a), which states: "Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations." Ohio practitioners feared that the *Robertson* holding opened the door to the adoption of the "fiduciary exception" in Ohio because the implication of the holding was that the estate, not the fiduciary, was the lawyer's client. In response to this case, and at the behest of the Ohio State Bar Association Estate Planning, Trust and Probate Law ("EPTPL") Section Council, in 2019, Ohio St. 5817.01 was amended to add the following subsection (b): "Any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes

fiduciary duties to the same extent as if the client was not acting as a fiduciary."