

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

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Topics for Today

I) Ethical Considerations when Serving as a Fiduciary

II) Ethical Considerations when Representing a Fiduciary

Serving as a Fiduciary: Introduction

I) Why You?

2) ABA Model Rules of Professional Conduct
MRPC 8.4, cmt. 5

Serving as a
Fiduciary:
Agreeing to
Serve

- 1) Competence
MRPC 1.1
- 2) Statutory Issues

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Serving as a
Fiduciary: **Drafting
Lawyer Naming
Self as Fiduciary
or Including a
Direction that the
Lawyer be Hired
to Represent the
Fiduciary**

- 1) ABA Formal Ethics
Op. 02-426 (May 31,
2002)
- 2) ABA MRPC 1.4(b)
- 3) ABA MRPC 1.7(b)
- 4) ABA MRPC 1.8

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Serving as a
Fiduciary: **Drafting
Lawyer Naming
Self as Fiduciary
or Including a
Direction that the
Lawyer be Hired
to Represent the
Fiduciary**

- Ethical Issue #1: No Self-Promotion or Conscious Influence*
- Ethical Issue #2: Adequate Disclosure and Discussion of Options*
- Ethical Issue #3: Client Consent*
- Ethical Issue #4: Inclusion of an Exculpatory Clause*
- Ethical Issue #5: Relief from Accounting, Inventory, Bond*
- Ethical Issue #6: Clause Directing the Fiduciary to Hire the Drafting Lawyer to Represent the Estate*
- Ethical Issue #7: Drafting Lawyer Suggesting the Naming of a Fiduciary Who Will Probably Hire the Lawyer to Represent the Estate*
- Ethical Issue #8: Conflict of Interest Restraints*

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Serving as a
Fiduciary:
Fees

- 1) Legal Fees
ABA MRPC 1.5
- 2) Fiduciary Fees

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Serving as a
Fiduciary:
Hiring Own
Firm to
Represent
Estate or Trust

- 1) ABA Formal Ethics
Op. 02-426 (May 31,
2002)
- 2) ACTEC Commentary
to ABA MRPC 1.2

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Representing a
Fiduciary:
Who is the
Client?

- 1) Traditional Theory (Majority)
ABA Formal Opinion 94-380
- 2) "Joint Client"/"Real Client" Theory
- 3) Some Duties/Obligations to
Beneficiaries
ABA MRPC Rule 1.2, cmt. 11
ABA MRPC Rule 1.14, cmt. 4
ACTEC Commentary to
MRPC 1.2
- 4) Balancing Test

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**Representing a
Fiduciary:
Ethical
Challenges**

- 1) In what capacity is lawyer representing the fiduciary?
- 2) Privilege
- 3) Representing Co-Fiduciaries
- 4) Representing Individual Who is Both the Fiduciary and the Client
- 5) Representing Fiduciary Who Has Breached Fiduciary Duty
- 6) When the Fiduciary is Sued, Who Pays the Attorney Fees?
- 7) Continuing Representation When Fiduciary is Sued: Conflict of Interest?

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