THIRD-PARTY AND SELF-CREATED TRUSTS

A Modern Look

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CHAPTER 2

Ethical Issues and Fiduciary Representation[1]

I. Introduction

There are at least five typical scenarios to consider in drafting special needs trusts (SNTs) as part of planning for the clients who are elders or who have a disability. Is the attorney:

1. Only the drafter of the documents?
2. Representing the trustee or other fiduciary?
3. Hired by, and representing, the beneficiary?
4. Expected to draft the documents and represent one of the parties?
5. Drafting the documents and serving as a fiduciary once the drafting is finalized?

Whichever scenario applies, there will typically be ethical issues that an attorney may face in these discrete roles. Sometimes those issues will result from multiple roles—or at least multiple expectations—affecting the representation.

II. Who Is the Client?

The first step in any representation is to always, always determine who the attorney represents and make it clear to all concerned. In the creation of an SNT, the answer to the question may not be quite clear initially.

For example, with a first-party SNT, when only hired to draft the documents, the attorney may be hired by the personal injury attorney,

1. This chapter assumes the reader has a working knowledge of the applicable state Rules of Professional Conduct, and of the attorney's ethical duties.

court-appointed guardian ad litem, or another to draft the SNT. In such instances, does the drafting attorney have any duty to the SNT beneficiary or another, such as the parents when the beneficiary is a minor? Is the SNT court-created and the drafting attorney's fees will be approved by the court? Who is signing the drafting attorney's engagement agreement?[2] In other cases, the client might be the beneficiary whose money will be used to establish the trust. In other instances, the client may be the parents, guardian, or grandparents[3] who act for the beneficiary. Although a court can "establish" the first-party SNT,[4] the attorney will not represent the court. Instead, the attorney may represent those who petitioned the court for approval of the SNT, who hired the attorney for the creation of the SNT, or who was appointed by the court to create the SNT. Keep in mind that with the first-party SNT, the settlor may not be the client, but instead the individual who has provided the money to fund the SNT.[5] Even if everyone understands that the client is the person who will sign the trust, or the person or entity that will fund it, the attorney's obligation to the beneficiary will often be both clearer and more complicated.[6] Although the attorney's duty to the nonclient beneficiary is going to be state specific, guidance may be taken from the Life Passages PSNT Best Practices Guidelines[7] for pooled trust administrators regarding when and how to best communicate with beneficiaries.[8]

When the attorney is hired to draft a third-party trust, it may be easier to identify the client. There is no scenario as in the first-party SNT where the beneficiary's money is used to fund the trust. The beneficiary is not the client.

The creation of the client-attorney relationship is critical for the imposition of duties on the attorney. The Restatement (Third) of the Law Governing

2. Who signs the engagement agreement is one factor to be considered when identifying who is the client. *See generally* Model Rules of Pro. Conduct scope [17] (Am. Bar Ass'n 1983).

3. 42 U.S.C. § 1396p(d)(4)(a).

4. *Id.*

5. *In re* Hertsberg Inter Vivos Tr., 578 N.W.2d 289, 291–92, 292 (Mich. 1998) (mother created trust and funded trust pursuant to court order for benefit of daughter; court held the money was that of the daughter) ("settlor is the one who provides consideration for a trust").

6. See, for example, Model Rules of Professional Conduct Rule 1.14 comment 2, which states: "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." See also comment 4, which states:

> If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

7. Stetson L., Life Passages PSNT Best Practices Guidelines (2020), https://www.stetson.edu/law/academics/elder/home/media/Best_Practices_Guidelines_Final_42022.pdf.

8. *Id.* at 13.

Lawyers section 14, Formation of a Client-Lawyer Relationship, explains how a client-attorney relationship is typically created:

> A relationship of client and lawyer arises when:
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> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
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> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.[9]

A. First-Party Trusts: Is the Question, "Who Is the Client?" More Complicated?

It is possible that the attorney is hired by another just to draft the trust. The attorney first must determine who the attorney represents. Typically, the attorney represents the individual who will sign the documents, such as a will, revocable or irrevocable inter vivos trust, testamentary trust, and so on.[10] In situations of third-party SNTs, the client is not the beneficiary.

The money is that of the beneficiary, but who does the attorney represent? Remember as noted earlier, 42 U.S.C. § 1396p(d)(4)(a) provides that the trust

9. Restatement (Third) of the Law Governing Lawyers § 14 (Am. L. Inst. 2000).

10. *See*, *e.g.*, S.D. State Bar Ethics Op. 2007-3 (A niece, agent under power of attorney, demanded client's estate planning documents, claiming status as "co-client" who stands in client's shoes. Committee determined "who is the client" is question answered by substantive law and circumstances may be relevant, and decision may be question of fact, communications, and circumstances.). *See also* Pa. Bar Ass'n Comm. on Legal Ethics Op. 2004-7 (2004), 2004 WL 5333296 (attorney represented a guardian in capacity as guardian; discusses duties to nonclient beneficiaries, quoting with approval American College of Trust and Estate Counsel (ACTEC) Commentaries to Model Rules 1.2 and 1.6); Ky. Bar Ass'n Ethics Op. KBA E-401 (amended 2019), which states:

> This Committee adopts the ACTEC Commentaries because the Commentaries properly set forth a lawyer's ethical obligations. Further, this Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view; that is, that a lawyer who represents a fiduciary does not also represent the beneficiaries. We reject the view that a lawyer who represents a fiduciary also owes fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality. We also reject the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but is the trust estate. We adopt the following comments made in the ABA's Formal Opinion. . . .
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> Further, "[t]he fact that a 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 under the Rules of Professional Conduct, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties."

may be established by the beneficiary, the beneficiary's parents, grandparents, guardian, or the court. So, it is possible the attorney is hired by another—not the beneficiary—to draft the trust that will benefit the beneficiary, and the beneficiary is not the client, even though it is the beneficiary's money that is used to fund the trust. The party hiring the attorney to draft the trust for the beneficiary has, in some way, a relationship to the beneficiary and is acting in that capacity to the beneficiary.[11] The client may be an official or unofficial representative of the beneficiary; an unofficial representative by virtue of the relationship to the beneficiary, such as the parent or grandparent, or official, such as the agent under a durable power of attorney[12] or a court-appointed guardian.

There will be occasion where the beneficiary hires the attorney and thus is the client. Although as a result of the Special Needs Trust Fairness Act[13] the individual can establish the trust for his or her own benefit, it may be more common that someone else is establishing the first-party trust for the individual. However, when the beneficiary is the client, consider whether the client is an adult[14] and has capacity both to hire the attorney and to create the trust. In those situations, the attorney's ethical duties are much clearer. The beneficiary is the client and although the client will have been determined to be disabled by the Social Security Administration (SSA),[15] that determination does not mean the client lacks capacity to hire the attorney.[16] The client may have a physical disability and have the needed capacity to hire the attorney as well as the capacity to create the SNT.[17] This analysis would hold true if the agent under

See also Ala. Ethics Op. 2010-03, Representation of an Estate and Client Identity (2010), https://www.alabar.org/assets/2019/02/2010-03-1.pdf (when attorney hired by personal representative for the estate, attorney's only client is the personal representative); Legal Ethics Comm. Ind. State Bar Ass'n Op. 2 (2001).

11. For example, the individual contacting the attorney may be the parent or grandparent. *See* 42 U.S.C. § 1396p(d)(4)(a).

12. *See*, *e.g.*, Draper v. Colvin, 779 F.3d 556 (8th Cir. 2015) (discussing whether the parents, also agents under a power of attorney, could establish the SNT for the beneficiary). The *Draper* case was decided prior to the amendment to 42 U.S.C. § 1396p(d)(4)(a), which added the provision to allow the beneficiary to establish his or her own SNT.

13. 42 U.S.C. § 1396p(d)(4)(a) provides:

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

14. An SNT can be established for a minor, so if the beneficiary is a minor, an authorized representative of the beneficiary would have to hire the attorney and direct the attorney to draft the SNT.

15. 42 U.S.C. § 1382c(a)(3)(c).

16. *See also* Model Rules of Pro. Conduct r. 1.14 cmt. 6 (Am. Bar Ass'n 1983).

17. *See*, *e.g.*, *id.* r. 1.14.

a durable power of attorney hires the attorney to create the SNT on behalf of the beneficiary.

In some instances, the beneficiary is an unemancipated minor. In this case, the client would either be a parent, since the parent is typically the natural guardian of the minor,[18] the grandparent (likely through some grant of authority), or the court-appointed guardian because the beneficiary has a legal incapacity of age. Consider whether the attorney will have any duty to the beneficiary.[19]

In this area of practice, it is possible that the beneficiary is an adult with a disability that results in the beneficiary lacking legal capacity. In this case, the beneficiary would not be the client, and the client would either be a parent, grandparent, or the court-appointed guardian or guardian ad litem, and the money will still be that of the beneficiary. Even though the parents have the authority under 42 U.S.C. § 1396p(d)(4)(A), the parents may not have legal authority beyond creating the SNT. The more traditional view of client representation would be that the client is the parent or the court-appointed guardian. When the court orders the creation of the SNT, the court is not assuming the role of client, but instead is either appointing a representative such as a guardian or guardian ad litem to hire the attorney to create the trust or directing the petitioner's attorney to submit an order to the court for the court's signature directing the creation of the SNT. In the first scenario, the fiduciary will be the client and, in the latter, the attorney for the petitioner (if the court order directs the petitioner's attorney to hire the drafting attorney), or the petitioner, depending on the exact language of the order.

B. Third-Party SNTs: Is the Question, "Who Is the Client?" Easier to Answer?

Here, the situation is much clearer. The client hires the attorney to create the trust and the client provides the assets to fund the trust. The SNT can either be inter vivos or testamentary. The client is not the beneficiary, but a third party, the settlor of the trust for the benefit of another. The client is not creating and funding the trust in a representative capacity to the beneficiary. The client signs the documents. Although the client may be related to the beneficiary,

18. *See*, *e.g.*, Unif. Tr. Code § 303(6) (Unif. L. Comm'n 2022).

19. Think of this in terms of whether an attorney who drafts any trust has any duties to beneficiaries of the trust. *See* Model Rules of Pro. Conduct r. 1.14 cmt. 4 (Am. Bar Ass'n 1983) ("In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.").

for example the grandparent, sibling, or parent of the individual with special needs, there is nothing in trust law[20] that requires such a family relationship.

III. When an Attorney Represents the Trustee: The Ethical Issues

In many instances the attorney may be hired by the trustee to be the drafter only, or to be the drafter and represent the trustee—or is it the trust? With the question of fiduciary representation, there is a split amongst the jurisdictions as to whom the attorney represents.[21] In fiduciary representation, the question of who is the client is not easily answered. There are three prevailing views of the answer to the question.[22] The first, the majority view, is that the client is the fiduciary, with the position that the trust or estate is a thing, not a client.[23] The second view is that the attorney represents the entity.[24] The third

20. *See*, *e.g.*, Unif. Tr. Code § 103(15) (Unif. L. Comm'n 2022) (defining "settlor" as "a person, including a testator, who creates, or contributes property to, a trust").

21. *See*, *e.g.*, Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469 (2011) (discussing the three most common approaches: traditional, joint-client, and entity.)

22. *See*, *e.g.*, Ala. Ethics Op. 2010-03, *supra* note 10. J. Anthony McLain, *Representation of an Estate and Client Identity*, 72 Ala. Law. 149, 151 (2011) explains:

> There are three theories regarding the identity of the client when a lawyer handles an estate. The American Bar Association, in Formal Opinion 94-380, recognized that the majority view is that the lawyer represents only the personal representative or fiduciary of the estate and not the beneficiaries of the estate, either jointly or individually. In reaching a similar conclusion, a number of other state bars have relied, in part, on state law that indicated that an estate is not a separate legal entity. In Ethics Opinion No. 91-2, the Alaska State Bar noted that an estate is "for probate purposes a collection of assets rather than an organization, and is not an entity involved in the probate proceedings." In Formal Opinion 1989-4, the Delaware State Bar also concluded that under state law, the term "estate" only referred to the actual property of the decedent and did not have an independent legal existence. As such, the Delaware State Bar concluded that the estate could not be a "client" under their rules of professional conduct (citations omitted).

23. *See*, *e.g.*, *In re* Est. of Gory, 570 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 1980). "In Florida, the personal representative is the client rather than the estate or the beneficiaries." *Id.* at 1383 (citing Rules Regulating the Florida Bar r. 4-1.7 (comment)). The comment specifically states that "[i]n estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved." *See also* Roberts v. Fearey, 986 P.2d 690 (Or. Ct. App. 1999) (attorney for trustee represents trustee, citing to Or. State Bar Ethics Op. 1991-119). *See also* Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996) (trustee who hires attorney is the client, citing to Tex. R. Civ. Evid. 503(a)(1)).

24. McLain, *supra* note 22, at 152 explains:

> The second approach to client identity in estate representation holds that the client is the estate itself. This view is identical to the entity theory of representation most commonly employed under Rule 1.13, *Ala. R. Prof. C.*, when representing businesses and corporations. Under this approach, the lawyer represents the "estate" as a freestanding legal entity. The lawyer does not have a lawyer-client relationship with either the fiduciary or beneficiaries of the estate. One argument in favor of this position is that estates and trusts are treated as separate legal entities for taxation purposes and,

view, espoused by Geoffrey C. Hazard, Jr. and W. William Hodes, is the joint-representation model.[25]

The attorney may find himself or herself in this situation when either (1) hired by the settlor to create the SNT and then hired by the trustee to represent the trustee or (2) when the attorney, although not hired to draft the trust, was hired by the trustee after the trust was established.

Beyond determining who is the client, the attorney will be faced with issues surrounding conflicts of interest[26] and confidentiality.[27] Further consideration must be given to the question of whether the attorney owes any duties to the beneficiary of the SNT.[28]

The American Bar Association (ABA) issued a seminal ethics opinion in 1994 (under the older version of the Model Rules), ABA Formal Ethics Opinion 94-380, Counseling a Fiduciary:

> When the fiduciary is the lawyer's client, all of the Model Rules prescribing a lawyer's duties to a client apply. The scope of the lawyer's representation is defined by and limited by Model Rule 1.2. The lawyer must diligently

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therefore, an estate or trust is a recognizable legal entity. Under this approach, the fiduciary of the estate is merely an agent of the entity (citations omitted).

25. *Id.* at 152–53 explains:

The third view holds that the lawyer jointly represents the fiduciary and beneficiaries of the estate. This view of estate representation has been most prominently advocated by Geoffrey C. Hazard, Jr. and W. William Hodes in *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005), in which the authors argue the following:

> Where the lawyer's client is a fiduciary, however, there is a third party in the picture (namely the beneficiary) who does not stand at arm's length from the client; as a consequence, the lawyer also cannot stand at arm's length from the beneficiary. Clients with such responsibilities include trustees, partners, vis-à-vis other partners, spouses, corporate directors and officers vis-à-vis their corporations, and many others, including parents. In the situations posited, because the lawyer is hired to represent the fiduciary and because the fiduciary is legally required to serve the beneficiary, the lawyer must be deemed employed to further that service as well.
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> It is only a small additional semantic step, and not a large analytic one, to say that in such situations the fiduciary is not the only client, but merely the "primary" client. [Footnote omitted] In this view, the beneficiary is the "derivative" client. The beneficiary, strictly speaking a non-client, may be entitled to the loyalty of the lawyer almost as if he were a client. [Footnote omitted]
>
> A number of consequences follow from adopting the derivative client approach to representation of a fiduciary. First, the lawyer's obligation to avoid participating in a client's fraud . . . is engaged by a more sensitive trigger. The fiduciary is subject to a high standard of fair dealing as regards the beneficiary, but may face temptation to engage in improper overreaching. The lawyer therefore faces a correspondingly greater risk of being implicated in the fiduciary's misconduct, and also has a greater duty to ensure that the purpose of the representation is not subverted.

26. Lee, *supra* note 21, at 470.

27. *See* Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 1983).

28. Lee, *supra* note 21, at 470–71. *See also In re* Est. of Fogleman, 3 P.3d 1172, 1177 (Ariz. Ct. App. 2000) (in discussing whether the beneficiaries of an estate were the "clients" of the personal representative, the court noted that the "personal representative owes a beneficiary the lesser duty of fairness, rather than the duty of undivided loyalty, demonstrates that the beneficiary is not the . . . client").

> represent the fiduciary, see Model Rule 1.3, preserve in confidence communications between the lawyer and the fiduciary, see Model Rule 1.6, and be truthful in statements to others, see Model Rule 4.1(a). The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct.
>
> A lawyer's duty of confidentiality to a client is not lessened by the fact that the client is a fiduciary. Although the Model Rules prohibit the lawyer from actively participating in criminal or fraudulent activity or active concealment of a client's wrongdoing, they do not authorize the lawyer to breach confidences to prevent such wrongdoing.
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> ***
>
> The Model Rules provide important guidelines for defining a lawyer's duties to a client. These guidelines contain no exceptions when the client owes duties, fiduciary or otherwise, to third parties. So long as a fiduciary is the lawyer's only client in the matter, that client is entitled to the same protections under the Model Rules as any nonfiduciary client, including, most importantly, the duty of confidentiality set forth in Model Rule 1.6.[29]

The scope of representation under Rule 1.2 becomes critical to the analysis regarding whom the attorney represents, for example, as noted in the American College of Trust and Estate Counsel (ACTEC) Commentaries on the Model Rules of Professional Conduct:

> The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. . . . The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary.

29. ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-380, Counseling a Fiduciary (1994) (citations omitted).

> See MRPC [Model Rules of Professional Conduct] 4.2 (Communications with Persons Represented by Counsel). . . . [E]ven though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary.[30]

According to the ACTEC Commentaries on Rule 1.2:

> As a general rule, the lawyer for the fiduciary should consider informing the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests. As indicated in MRPC 2.3 (Evaluation for Use by Third Persons), the lawyer may, at the request of a client, evaluate a matter affecting a client for the use of others.[31]

Comment f to the Restatement (Third) of the Law Governing Lawyers section 14 offers this caution:

> In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. In the absence of clarification the inference to be drawn may depend on the circumstances and on the law of the jurisdiction. Similar issues may arise when a lawyer represents other fiduciaries with respect to their fiduciary responsibilities, for example a pension-fund trustee or another lawyer.[32]

The Delaware State Bar Association Committee on Professional Ethics in Opinion 1989-4[33] concluded that an attorney who represents "an estate" actually represents the personal representative:[34]

> [W]e are of the view an "estate" has no legal existence, but instead describes the property and debts of a decedent. Given that conclusion, we do not believe an estate can be a "client" as that term is used under Rule 1.7, and

30. ACTEC, Commentaries on the Model Rules of Professional Conduct 40 (5th ed. 2016), https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf?hssc=1.

31. *Id.* at 37.

32. Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (Am. L. Inst. 2000).

33. Del. State Bar Ass'n Comm. on Pro. Ethics Op'n 1989-4 (1989), https://media1.dsba.org/public/media/ethics/pdfs/1989-4.pdf (discussing attorney's representation of personal representative in that capacity and in the person's individual capacity).

34. *Id.*

> the commonly used phrase "attorney for the estate" incorrectly describes the relationship existing between a lawyer and the executor. An attorney does not serve as an attorney for the estate; rather he or she serves as an attorney for the executor or other personal representative in that person's dealings concerning the estate of the decedent.[35]

The Alabama Bar General Counsel issued an ethics opinion on fiduciary representation in 2011.[36] Two questions were discussed, the first considering who the attorney represents in an estate administration:[37]

> Generally, the lawyer represents the individual who hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the personal representative, the lawyer represents the personal representative individually, unless the personal representative and lawyer agree otherwise. The lawyer must be careful not to give the impression, either by affirmative action or omission, that he also represents the beneficiaries of the estate. As a result, if the client is the personal representative only, the lawyer must advise the heirs and devisees ("beneficiaries") and other interested parties in the estate known to the lawyer that the lawyer's only client is the personal representative in order to avoid violating Rule 4.3. A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate.[38]

Prior to the issuance of the formal opinion, the opinion references earlier informal opinions on the topic:

> The Disciplinary Commission is also aware that the Office of General Counsel has given recent informal opinions concerning this issue. In their informal opinions, the Office of General Counsel has opined that the client is the estate. The lawyer represents the estate by acting for and through the fiduciary of the estate for the ultimate benefit of the beneficiaries of the estate. Because the lawyer is retained by the personal representative to represent the estate and because the personal representative is legally required to serve the beneficiaries, the lawyer also has an obligation to the beneficiaries. This relationship has been characterized as one where the fiduciary is not the only

35. *Id.*
36. McLain, *supra* note 22.
37. *Id.*
38. *Id.* (citations omitted).

client, but merely the "primary client," while the beneficiary is the "derivative client." In some situations where there is a sole beneficiary of the estate, that beneficiary (ostensibly a non-client) may be entitled to the loyalty of the lawyer to much the same extent as the fiduciary.[39]

IV. When the Attorney Is the Trustee (or Other Fiduciary)

Occasionally an attorney or law firm may act as trustee, or in some other fiduciary capacity. The practice is permissible, but fraught with potential dangers. The fiduciary/attorney should pay particular attention to the following:

1. The possibility of conflicts of interest, particularly in moving from attorney/counselor/advocate to fiduciary. In any case in which an attorney prepares documents for a client naming the attorney, his or her firm or others in a business relationship as fiduciary, the attorney should pay particular attention to the requirements of full disclosure to the client.[40] With some variation in the language of Model Rule 1.4 as adopted by various states, and as a good practice in any event, the drafting attorney should usually spell out the terms under which the attorney (or his or her firm or associated business) would act, what costs would be associated with that fiduciary action, and what effect the fiduciary role would have on the continued attorney-client relationship.
2. The costs for preparation of documents naming the attorney as fiduciary. While there is no requirement that the attorney charge less for preparation of such documents, there may be an expectation that "reasonableness" of the attorney's fee might be affected by the prospect of future compensation for fiduciary services.[41]
3. The potential for future conflicts of interest arising from the change in roles.[42] What, for example, would the attorney's role be if the client sought to remove him or her as fiduciary at a time when the attorney believed the client was incapacitated, or subject to undue influence—perhaps even the exact problem that led to the client initially naming the attorney as fiduciary?[43] And what are the ethical concerns inherent

39. *Id.* at 151.
40. Model Rules of Pro. Conduct r. 1.4(b) (Am. Bar Ass'n 1983).
41. *Id.* r. 1.5(a); *see also* Colo. Formal Op. 02-426 (2002).
42. Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n 1983).
43. For an illustration of how easy it is for the lawyer's competing roles to raise problems, consider *In re Disciplinary Proceeding against Eugster*, 209 P.3d 435 (Wash. 2009).

in an attorney/trustee having to initiate proceedings (which might not be judicial proceedings) to determine capacity of the lawyer's former client or otherwise handle the fiduciary responsibility?[44]

4. The need for the attorney to have appropriate staff, training, and mechanisms to effectively act as fiduciary.[45]

Of course, there are other fiduciary roles that an attorney might fulfill, including trust protector or trust advisory committee member. While the possibilities for conflict might be lowered in such roles (as compared to the role as trustee), the same considerations should be kept in mind.

V. Does the Attorney for the Trustee Have Any Duty or Liability to the Trust Beneficiary?

The answer is some instances is yes. But that answer is qualified by "it depends." The Restatement (Third) of Law Governing Lawyers section 51, Duty of Care to Certain Non-Clients, provides:

> For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:
>
> (1) . . .
>
> (2) to a nonclient when and to the extent that:
>
> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
>
> (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
>
> (3) to a nonclient when and to the extent that:
>
> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

44. *See* Model Rules of Pro. Conduct r. 1.14 (Am. Bar Ass'n 1983) (and especially comment 5 to that rule). And consider for a moment whether the same logic might apply to, say, an administrative proceeding initiated by an attorney to remove the attorney's former client's ability to drive a vehicle—as just one illustrative example.

45. *Id.* r. 1.1.

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) 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;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.[46]

The attorney may have "special obligations" to a beneficiary when the client is the fiduciary.[47] With the erosion of privity,[48] even though the beneficiary is not the client, the attorney for the trustee may have a duty to the beneficiary.[49] For example, in *Spinner v. Nutt*,[50] the court was concerned with whether the attorneys for the trustees owed the "duty of care" to the beneficiaries who were not clients.[51] The court considered several theories of liability

46. Restatement (Third) of the Law Governing Lawyers § 51 (Am. L. Inst. 2000). The comments to this Restatement explain the differences between (3) and (4) as follows:

Subsections (3) and (4), although related in their justifications, differ in application. In situations falling under Subsection (3), the client need not owe any preexisting duty to the intended beneficiary. The scope of the intended benefit depends on the client's intent and the lawyer's undertaking. On the other hand, the duty under Subsection (4) typically arises when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law.

47. Model Rules of Pro. Conduct r. 1.2 cmt. 11 (Am. Bar Ass'n 1983).

48. Restatement (Third) of the Law Governing Lawyers § 51 cmt. h (Am. L. Inst. 2000) ("A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules (see § 54(1)). The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. . . . The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries—trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions.").

49. *See*, *e.g.*, Est. of Treadwell v. Wright, 61 P.3d 1214 (Wash. Ct. App. 2003) (in guardianship case, discussing test to determine whether attorney has duty to nonclient).

50. 631 N.E.2d 542 (Mass. 1994).

51. *Id.* at 544.

and concluded that the attorneys had no duty to the beneficiaries; the duty was only to the client trustee.[52]

In the California case of *Goldberg v. Frye*,[53] the court held that the attorney for the personal representative of the estate represents the personal representative, not the estate.[54] Although the actions of the attorney and the attorney's services may benefit the beneficiaries of the estate, the attorney does not represent the beneficiaries.[55] The court identified six factors that must be found to impose a duty.[56] "The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants."[57] In explaining the rationale for determining the client is the fiduciary, the court observed:

> It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.[58]

The engagement agreement plays an important role in structuring the client-attorney relationship. Under Rule 1.2, Scope of Representation, the attorney delineates the parameters of the representation. An ambiguous or insufficient description of the scope of representation in the engagement agreement can lead subsequently to issues regarding whom the attorney represents and the services the attorney is to perform. For example, in *Svaldi v.*

52. *Id.* at 547. The court considered when a duty to a beneficiary of a trust might be imposed and noted the potential of creating conflicting loyalties if the attorney owed a duty to the trustee and to the beneficiaries, which would impinge on the attorney's ability to effectively represent the trustee. *Id.* at 544–45. As well, it would be counter to the Massachusetts ethics rule, referencing Supreme Judicial Court Rule 3.07, Cannon 4, DR 4-101. *Id.* at 545. The court also considered and rejected the application of the third-party beneficiary theory of recovery. *Id.* at 546. *See also* Roberts v. Fearey, 986 P.2d 690, 691 (Or. Ct. App. 1999) (attorney did not have a duty to beneficiaries).

53. 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990).

54. *Id.* at 1267.

55. *Id.* (opinion discusses duty and liability in cases where there is no privity).

56. *Id.* at 1268. The six factors are:

> [The] extent to which transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.

(citations omitted).

57. *Id.* at 1269 (citations omitted).

58. *Id.* (citations omitted).

Holmes,[59] the attorney drafting the power of attorney included two safeguard clauses that required an initial inventory and annual accountings.[60] In a malpractice suit against the attorney, the court considered whether the inclusion of these paragraphs created a duty that the attorney owed to the client to provide oversight of the actions of the agents.[61] The court concluded that the inclusion of the safeguard clauses "expanded the scope of [the attorney's] representation of [the client] beyond the mere drafting of the legal documents" and the attorney had undertaken "a responsibility to make [the inventory and accounting] work."[62] Although the attorney had an expanded representation of the client, the attorney did not have the duty to supervise the agents.[63]

The ACTEC Commentaries address this issue as follows:

> *Representation of Client in Fiduciary, 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. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and Example 1.7-2.
>
> *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

59. 986 N.E.2d 442, 447 (Ohio Ct. App. 2012) (discussing the duty of the lawyer to the client comes from the scope of the representation) (citations omitted).

60. *Id.* at 445.

61. *Id.* at 447–48.

62. *Id.* at 448 (attorney had duty to contact agents regarding requirement of inventory and accounting).

63. *Id.* at 449.

> 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.[64]

As far as the attorney's duties to beneficiaries, if any, according to the ACTEC Commentaries, the scope and nature of the attorney's duties to beneficiaries are not static and in fact

> 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.[65]

The Commentaries describe these duties owed as limiting the actions of the attorney; thus, the attorney may not "[take] advantage of [the attorney's] position to the disadvantage of the fiduciary estate or the beneficiaries."[66] Additionally there may be some situations where the attorney has to affirmatively act to safeguard the beneficiaries' interests.[67]

VI. Ability to Share Information with Nonclient Beneficiary

The ACTEC Commentaries caution that "the [attorney's] communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them."[68]

Consider the use of the engagement agreement to make clear who is represented and who is not.[69] Provide a copy to both the trustee and the

64. ACTEC, *supra* note 30, at 39.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 40.
69. *See*, *e.g.*, Lee, *supra* note 21, at 488–89. *See also* Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (Am. L. Inst. 2000) (regarding inadvertent representation: "[u]nder Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know

beneficiary,[70] or if the trustee prefers that the attorney not provide the engagement agreement to the beneficiary, then the attorney could write a letter to the beneficiary noting that the attorney has been hired by the trustee and represents the trustee, not the beneficiary, and including a copy of the trust agreement for the beneficiary's file, if the beneficiary does not already have one.

Train staff on how to respond if a beneficiary contacts the office either requesting action or complaining about a trustee. A desire to be helpful might create an obligation, or even liability. Although it is hard to say no, make sure staff know how to handle these scenarios.

What obligation does the attorney have to notify beneficiaries of the bad acts of the trustee? ACTEC Commentaries suggest the need in some jurisdictions to notify the beneficiaries of the trustee's bad acts.[71] The Commentaries direct the attorney to consult Rules 1.6 and 1.8(b) in determining whether to make the disclosures.[72] But what about jurisdictions where disclosure is not allowed? The Commentaries suggest adding a provision to the engagement agreement that allows the attorney to make the disclosures.[73] Even in jurisdictions that permit disclosure, this provision in the engagement agreement has advantages. It cautions the trustee to realize that there are ramifications to the trustee's bad acts. Further, it adds weight to achieving the "intentions of the creator of the fiduciary estate to benefit the beneficiaries."[74]

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that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity." (citations omitted)).

70. Lee, *supra* note 21, at 488–89. *See also* Ala. Ethics Op. 2010-03, *supra* note 10 (discussing the three theories); McLain, *supra* note 22, at 154–55 explains: "Upon commencement of representation, the lawyer should clarify with the personal representative the role of the lawyer, the scope of representation and the personal representative's responsibilities toward the lawyer, the court, the beneficiaries and other interested third parties." McLain also states:

> First and foremost, upon being hired by a personal representative to assist in the administration of an estate or trust, the lawyer should explain to the beneficiaries or other interested parties that the lawyer's sole client in the matter is the Personal Representative, individually. A lawyer who fails to do so could be in violation of Rule 4.3, *Ala. R. Prof. C.* . . .

Id. at 155.

71. ACTEC, *supra* note 30, at 38. The commentary offers: "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."

72. *Id.*

73. *Id.* ("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").

74. *Id.*

A. What about Privileged Information? Is That Protected from Disclosure?

Some, but not all, jurisdictions have recognized a fiduciary exception to attorney-client privilege.[75] This exception prevents "a fiduciary, such as a trustee of a trust, . . . from asserting the attorney-client privilege against beneficiaries on matters of trust administration."[76] The exception is recognized on two grounds, that the trustee is not the sole client, but instead is serving as a "proxy for the beneficiary," and that the trustee has a "duty to disclose all information related to trust management to the beneficiary."[77] The second ground has been viewed as "an instance of the attorney-client privilege giving way in the face of a competing legal principle, . . . the duty to disclose."[78] In *Murphy v. Gorman*,[79] a case of first impression in New Mexico, the question[80] of the fiduciary exception and attorney-client privilege was discussed in the context of a revocable trust.[81] The federal court noted that the trustee retained the attorney to represent himself, not himself *and* the beneficiary, concerning the dispute between the beneficiary and the trustee over the trust terms and trust administration.[82]

Canarelli v. Eighth Judicial District Court of Nevada[83] also considered whether Nevada would recognize the fiduciary exception to attorney-client privilege.[84] The Nevada Supreme Court noted that the Nevada legislature had previously adopted five exceptions to the attorney-client privilege but did not adopt the fiduciary exception.[85] The Nevada Supreme Court as a result specifically decided to not approve the fiduciary exception.[86] In discussing various arguments raised, the court recognized that a beneficiary typically can review the records and "books" of the trust, but if a beneficiary could see the

75. *See*, *e.g.*, Murphy v. Gorman, 271 F.R.D. 296, 305–09, 314–15 (D.N.M. 2010) (discussing, among other things the fiduciary exception). *See also* Huie v. DeShazo, 922 S.W.2d 920, 925 (Tex. 1996) (rejecting the "fiduciary exception" because it is not in the evidence code) ("trustee must fully disclose material facts regarding the administration of the trust, the attorney-client privilege protects confidential communications between the trustee and . . . attorney under Rule 503").

76. *Murphy*, 271 F.R.D. at 305–06 (citations omitted).

77. *Id.* at 306 (citations omitted).

78. *Id.* (citations omitted)

79. 271 F.R.D. 296.

80. *Id.*

81. *Id.* at 300–02, 308.

82. *Id.* at 317, 318.

83. 464 P.3d 114 (Nev. 2020).

84. *Id.* at 117. Two sets of documents were under consideration. The first were the prior trustee's notes from a conversation with the attorney and the second, the same trustee's notes from a meeting with the attorney, other trustees, opponents, and an appraiser.

85. *Id.*

86. *Id.*

attorney and trustee communications for situations where the trustee is in an adverse position with the beneficiary, it would cause the trustee to be reluctant to obtain legal advice[87] and attorneys may be hesitant to give "transparent advice."[88]

The Restatement (Third) of the Law Governing Lawyers section 84 provides an exception:

> In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication:
>
> (a) is relevant to the claimed breach; and
>
> (b) was between the trustee and a lawyer (or other privileged person within the meaning of § 70) who was retained to advise the trustee concerning the administration of the trust.[89]

In *Barnett Banks Trust Co. v. Compson*,[90] the trustee sued the brokerage firm and the widow of the settlor. The attorney for the trustee inquired whether privilege protects the documents. Although beneficiaries have to be kept reasonably informed by a trustee under Florida law, the court held that the "statute does not require disclosure of privileged materials concerning a pending lawsuit in which an individual, who happens to be a beneficiary, seeks to deplete, rather than return, trust assts."[91] The court determined that the widow, who counterclaimed, and, as such, "does not stand to benefit from the trustee's actions" in the litigation, as a result "is not the real client of the trustee's attorneys. The real client of the law firms is the trustee . . . [and the court found] that the attorney-client privilege, belonging to the trustee as client,

87. *Id.* at 122. The court was discussing the application of the common interest exception.

88. *Id.*

89. Restatement (Third) of the Law Governing Lawyers section 84 comment b explains:

Rationale. In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties. The exception applies in suits brought directly by a beneficiary or by a representative of the beneficiary. It does not apply to communications between the trustee and a lawyer specifically retained by the trustee to represent, not the trust or the trustee with respect to executing trust duties, but the trustee in the trustee's personal capacity, such as to assist the trustee in a dispute with a beneficiary or to assert a right against the beneficiary.

The exception does not require the beneficiary to show good cause (compare § 85 [fiduciary within organization]). Nonetheless, the tribunal might enter a protective order to safeguard the interests of other beneficiaries or the trust against unnecessary disclosure.

90. 629 So. 2d 849 (Fla. Dist. Ct. App. 1993).

91. *Id.* at 851 (citations omitted).

prohibits disclosure of communications . . . absent any waiver."[92] Even though the law firm and the trustee had shared information with "aligned beneficiaries," that was not waiver of privilege since their "interests coincide with the trustees. The 'common interest' or 'joint defense' exception applies among the entities sharing common interests and their attorneys."[93]

VII. Always an Attorney Must Be Competent

Regardless of which of the five scenarios face the attorney, the attorney must always be competent. Model Rule 1.1 requires that the attorney be competent to handle the legal matter; "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [1] to Rule 1.1 is particularly applicable in the context of SNT practice. The comment provides:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. *Expertise in a particular field of law may be required in some circumstances*.[94]

We point this out because of the complexity of the practice of special needs planning. In drafting the trust, the attorney must be cognizant of the trust law in the jurisdiction (both in drafting, funding, and even choice of law), as well as public benefits laws and regulations (federal and state), the Social Security Program Operations Manual System (POMS),[95] any applicable SSA regional pronouncements, and more. In our view, SNT practice is not for the faint of heart or the novice practitioner.

92. *Id.*

93. *Id.* For an excellent discussion on fiduciary representation, see Renée C. Lovelace, *Representing Fiduciaries: Guidance from NAELA's Aspirational Standards*, NAELA J. (Special Edition) 119 (2018).

94. Model Rules of Pro. Conduct r. 1.1 cmt. 1 (Am. Bar Ass'n 1983) (emphasis added).

95. The POMS is available at https://secure.ssa.gov/apps10/poms.nsf/Home?readform (last visited Nov. 25, 2022). As SSA describes them, the purpose of the POMS is to be the "primary source of information used by Social Security employees to process claims for Social Security benefits. The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions." *Id.*

Illustrative of this is *Redies v. Attorneys Liability Protection Society (ALPS)*,[96] a first-party SNT case. The beneficiary, injured in a bicycle accident, had a permanent conservator and a guardian.[97] The conservator sought advice from an attorney about the beneficiary's property in light of the beneficiary's mounting bills.[98] The attorney hired by the conservator had suggested selling off the beneficiary's assets, rather than recommending an SNT.[99] As the attorney for the beneficiary noted in a demand letter:

> Lawyers in particular, are obligated to know about the laws which are relevant to their client's case. . . . To diligently represent Ms. Redies, . . . [the attorney] had a duty to do sufficient research to learn about the Montana Self Sufficiency Trust statutes . . . [and the] failure to do so [resulted in] Redies' estate [being] quickly depleted [with her] now [living] in poverty.[100]

VIII. Conclusion

Fiduciary representation, just like a special needs planning practice, is not for the faint of heart. The takeaways from this chapter might be summarized as follows:

1. Review your state's rules of professional conduct and ethics opinions.
2. Download and read carefully the ACTEC Commentaries and the National Academy of Elder Law Attorneys (NAELA) Aspirational Standards.
3. Determine the scope of your practice—what are you willing to do?
4. Consider whether you are competent to handle the matter.
5. Determine whom you represent.
6. Make it clear to everyone whom you represent.
7. Be sure to use an engagement agreement that identifies whom you represent and the scope of representation. Take care to not alter the scope of representation accidentally.
8. In cases where you represent the trustee, include a proviso in the engagement agreement that if the trustee breaches the duty to beneficiaries, you will advise the beneficiaries, the court, and withdraw if the trustee does not remedy the breach within (x days).

96. 150 P.3d 930 (Mont. 2007).
97. *Id.* at 932.
98. *Id.* at 933.
99. *Id.*
100. *Id.* at 934. The suit was eventually settled. *Id.* at 935. The rest of the opinion is devoted to the beneficiary's claim against the ALPS. *Id.* at 935 *et seq*.

9. In cases where you represent the trustee, communicate with beneficiaries that you represent the trustee, not them, and what that means.
10. Document, document, document.
11. Train your staff so they do not inadvertently cause problems when trying to be helpful.

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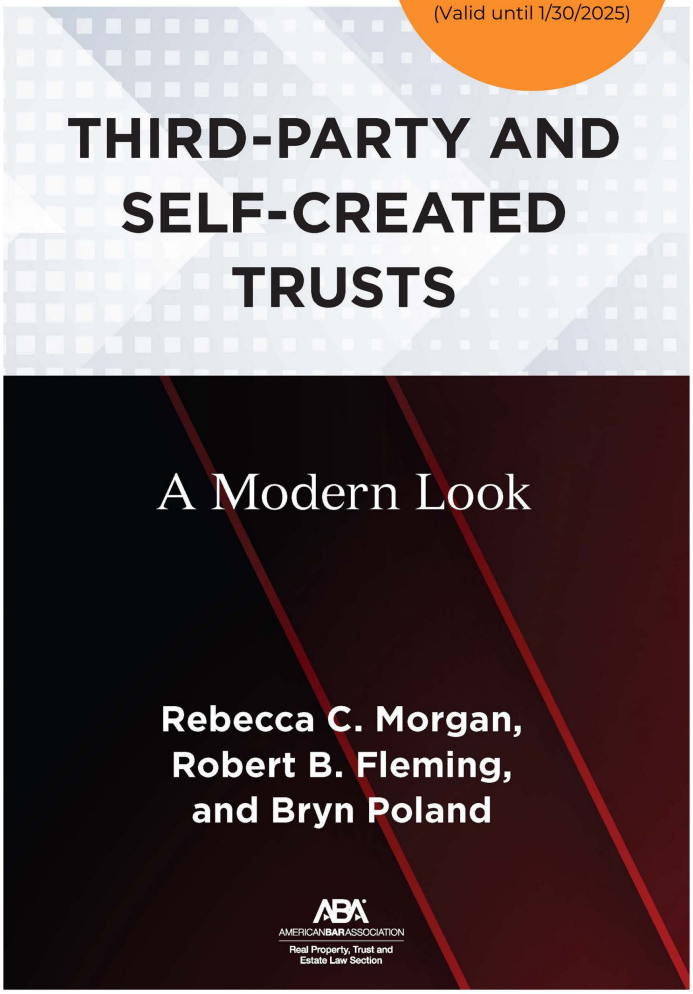

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