

How Trust Administrators Can Avoid the Unauthorized Practice of Law: Practical Tips for Administrators and their Counsel

By Megan Brand and Susie Germany, Esq.

The impetus of this topic stemmed from research conducted for a subcommittee of the Colorado Bar Association on the best practices for fiduciaries to follow in order to avoid the unauthorized practice of law. The committee requested assistance from Professor Bobbi Flowers who helped coordinate the services of Stetson law students to conduct research from across the country on how courts and other regulatory bodies treat fiduciaries who file documents in court in their respective states. Some of the information contained in this presentation was obtained from this study. We would like to thank Prof. Bobbi Flowers and several Stetson Law students for their contributions and research.

I. What Is the Unauthorized Practice of Law and Why Do Pooled Trust Administrators Care?

Pooled Special Needs Trusts (PSNTs) are essential tools that assist individuals with disabilities to maintain access to government benefits while preserving funds for their supplemental needs. These trusts are managed by nonprofit organizations that serve as pooled trust administrators. While administrators provide vital services, they walk a fine line between providing legal information in the performance of their duties as fiduciaries versus providing legal advice—especially in a heavily regulated area like public benefits and trust administration.

To avoid crossing into the **unauthorized practice of law (hereafter, “UPL”)**—which carries serious civil and criminal risks—administrators must understand their role's limitations and know when to engage qualified legal counsel.

A. Legal Definition of UPL

A general definition of UPL is *“offering legal services without being licensed as an attorney”*¹.

So, **UPL** occurs when a person who is not licensed to practice law provides legal services or

¹ National Notary Association. 2025, August 11. *Notary Basics: Avoiding the Unauthorized Practice of Law*.

advice. Individual state statutes vary slightly in their definitions of UPL, but common indicators include:

- Giving specific legal advice tailored to an individual's situation.
- Drafting or interpreting legal documents with binding consequences.
- Representing someone in legal proceedings without a law license.

For trust administrators, the risk of crossing the line emerges regularly, given the legal complexities of trust management, Medicaid, and SSI rules. **Trust administrators are “fiduciaries”**. A fiduciary, derived from the Latin term for “trust”, is a person owing a fiduciary duty to another. When someone has a fiduciary duty to someone else, the person with the duty must act in a way that will benefit someone else financially. Owing a fiduciary duty to a party creates a fiduciary relationship, which then involves greater opportunity for a fiduciary to confuse their role.

B. Risks and Penalties for Engaging in UPL

- Civil and criminal penalties could be incurred.
- Organizational liability increases.
- Potential threats to organization’s reputation
- Regulatory Investigations and/or Mandatory Reporting
- Beneficiary’s loss of Public Benefits

C. Common Triggers for UPL in Trust Administration

- Giving tailored advice on Medicaid/SSI.
- Drafting or interpreting legal documents.
- Negotiating Settlements or Legal Agreements

- Representing individuals (i.e. beneficiaries or family members) before agencies or in court.

D. How Fiduciaries Often Fall into a UPL Trap

UPL traps for fiduciaries happen when various types of fiduciaries, while fulfilling their responsibilities, engage in activities which extend beyond the scope of their fiduciary duties. They then delve into areas traditionally reserved for licensed attorneys.

Here's why and how this can happen:

- **Representing others in court:** While a fiduciary can represent themselves in a legal matter, they generally cannot represent others, even in situations where they are managing assets on someone else's behalf. Appearing in court on behalf of another individual or entity without being a licensed attorney can be seen as the unauthorized practice of law.
- **Providing legal advice:** Offering legal advice falls under the definition of practicing law. If a fiduciary, while managing assets, offers such advice without a license, it can be considered the unauthorized practice of law.
- **Drafting legal documents:** In many jurisdictions, selecting legal documents or guiding the drafting of documents for others, such as wills, trusts, and other legal documents, is considered the practice of law. Fiduciaries who undertake these tasks without proper authorization may face accusations of unauthorized practice of law.
- **Corporate Fiduciaries:** Cases involving corporate fiduciaries like banks or trust companies highlight the challenges of delineating their role. For example, a bank's trust department was sued by the Ohio State Bar Association for offering estate planning services that included drafting legal instruments. Similarly, an Arkansas bank was enjoined

from probating estates and trusts, even though it used licensed attorneys, because the court considered the bank itself to be engaging in the practice of law.

II. Where the Line Is: Education vs. Advice

Administrators are often asked by beneficiaries, family members, or case managers for help understanding how the trust interacts with public benefits. Here's some common activities and what may or may not be acceptable through the lens of UPL:

A. Acceptable Activities:

- Explaining general trust policies and procedures.
- Providing publicly available legal information (e.g., SSA or Medicaid rules).
- Referring clients to state resources or legal aid clinics.
- Sharing how the administrator typically handles disbursement requests under trust guidelines.

B. Potential UPL Activities:

- Advising whether a specific disbursement will affect SSI or Medicaid.
- Suggesting how a client should structure their finances or care arrangements that may have significant legal consequences.
- Drafting spend-down plans to meet Medicaid eligibility.
- Interpreting complex regulations for individual clients.

C. Case Study

Jane Johnson was 82 years old, and the mother of Jack, age 53, and Ginger, age 47. Jack was an IT professional and Ginger, who had a developmental disability, volunteered at a local animal shelter and lived with Jane. Ginger received SSI, Medicaid Home and Community Based Waiver services.

Jane, who was very frugal, owned a home which was paid off and worth \$2 million, and an investment portfolio worth \$1.4 million. Jane had worked with Mac, her financial advisor, for about 10 years. Mac worked for a large investment firm and over the years, he had charged fees which were commensurate with most firms for managing her assets. Jane trusted Mac, so when she was diagnosed with cancer, she shared this information with him along with her concerns about caring for Ginger after she was gone.

Initially, Mac recommended that Jane seek counsel to prepare her estate plan, as she had nothing in place. Jane did not like lawyers, and according to Mac, she refused to seek counsel, despite his insistence. Seeing no other option, shortly before her death, Mac decided to take matters into his own hands, downloaded a form off the internet, and drafted a will with a testamentary special needs trust in it for the benefit of Ginger. The will would leave 50% of the estate outright to Jack and the remaining 50% to the trust for Ginger. After all, how difficult could this be? All the forms were right there on the internet for public use, Mac later testified. The trust Mac created using this form contained mandatory payment provisions, which would make the testamentary trust a countable resource that would impact Ginger's eligibility for public benefits.

Jane signed the will before a notary and two witnesses at her bank. Jane died a few weeks after the will was signed.

Jack, Jane's son, contacted counsel to assist him when he discovered the will as he had concerns about the fact that the financial advisor had prepared it. He was very worried about protecting his sister's benefits. Counsel, upon reviewing the will and trust, as a mandatory reporter, contacted their states Office of Attorney Regulation to report the advisor for the Unauthorized Practice of Law. Further, counsel contacted Mac to attempt to obtain some clarity on how this had occurred. After several weeks of calls, letters, and emails with no response, counsel began receiving late-

night emails from Mac that appeared like they were written while he was under the influence. After Jane's death, Mac had sold his house and moved out of state. Counsel then also filed a petition to reform or decant the trust. Counsel also notified the advisor's employer and made a report to FNRA, which regulates financial planners, where an investigator was assigned.

The Office of Attorney Regulation pursued the matter. Counsel also contacted FNRA and the company the advisor worked for in order to seek compensation for damages.

Eventually, the court approved the reformation of the trust and the deposit of the funds into the a third party trust. However, the trust was not considered third party funds because the trust was defective, so the funds ended up being required to be placed into a first party trust. The damages to Ginger included loss of benefits for a period of time and the beneficial right to the trust without any payback requirement to the state.

In the end, Mac the advisor lost his license to work as a financial advisor and was responsible for payment of all the legal fees incurred to resolve the matter. His former employer also was responsible for payment of damages. He was also investigated for elder fraud and exploitation, but the matter was not pursued by law enforcement.

When are these matters are pursued?

When there are actual damages and victims willing to pursue the matter.

III. Various Examples in Several States: Do any states require a fiduciary to be represented by counsel to file documents in court?

- Generally, no, individuals acting as fiduciaries are not required to be represented by an attorney when filing documents in court, unless they are acting on behalf of a corporation or other legal entity

- However, depending on the specific state and the nature of the fiduciary role, there can be nuances and factors that might make attorney representation highly advisable or necessary in certain circumstances:
- **Fiduciary as an individual vs. entity:** Individuals can represent themselves in court and file documents on their own behalf. However, if the fiduciary is representing a corporation or other legal entity (such as a trust or estate), then the entity usually must be represented by a licensed attorney.
- While not always mandated, the intricacies of fiduciary duties, probate laws, and potential disputes can make legal representation invaluable. While we will not cover all fifty states in this presentation, we will review the guidelines in Florida, Texas, Colorado, and Ohio, as these states are robust in their statutes regarding the unauthorized practice of law, and they also provide some examples of case law in this area.
- Specific state examples:

A. Florida

In Florida, the general rule is that individuals are allowed to represent themselves in court (**pro se**). However, there are significant limitations and specific rules that apply to fiduciaries, such as trustees, personal representatives, and guardians, particularly when they are acting in their official capacity rather than in their own individual interests. A guardian or personal representative who is also a Florida-licensed attorney can represent themselves in that capacity. Regarding trustees, the situation is a bit more nuanced.

- A trustee **can** appear in court without an attorney to represent their *own legal interests* in their individual capacity.

- However, a trustee generally **cannot** represent the legal interests of the **trust or the beneficiaries** in their representative, fiduciary capacity without a licensed attorney.

Doing so can be considered the unauthorized practice of law.²

B. Texas

In probate and guardianship cases, Texas law **requires a licensed attorney** if the fiduciary is seeking letters testamentary, letters of administration, determinations of heirship, or guardianships (for person or estate). A fiduciary who is not an attorney **cannot represent the interests of others** in these proceedings, and doing so would be considered unauthorized practice of law—and thus **not permitted**.³

C. Colorado

Fiduciaries are subject to all of the rights and responsibilities imposed on fiduciaries by the Colorado Probate Code. A fiduciary has an obligation to act in the Protected Person or estate's best interests and as such is held to a very high standard which means placing the Protected Person's or estate's needs above the needs and interests of others, including their own personal interests, when making decisions on their behalf. A fiduciary must always act in the best interest of and with undivided loyalty to the estate or Protected Person and avoid transactions that cause a conflict of interest.

Koscove v. Bolte, 30 P.3d 784 (Colo.App. 2001). While acknowledging the difficulty of giving an all-inclusive definition of the practice of law, the supreme court has defined it as follows: We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in

² See, *Appendix C* #2, for Florida's Rule 5.030.

See, *Appendix C*, #2 to 8, for Florida Case Law.

³ Grimes County Court At Law, Grimes County, Texas. 2025. *Self Represented Litigants/Pro Se*. Retrieved from: www.grimesccl.org/self-represented-litigant-1.

connection with these rights and duties is engaged in the practice of law (Denver Bar Ass'n v. Public Utilities Commission, 391 P.2d 467 (Colo. 1964).). See also C.R.C.P. 201.3(2).)⁴

D. Ohio

A key example of a fiduciary being accused of the unauthorized practice of law is the Ohio Supreme Court case, *Green v. Huntington National Bank* (1965), which centered on estate planning services. The case clarified that while fiduciaries, such as bank trust officers, can perform certain administrative functions, they cross the line into unauthorized law practice when they offer specific, individualized legal advice.

Background of the case:

- The Ohio State Bar Association filed a lawsuit to stop the Huntington National Bank from providing legal services through its trust department.
- The bank advertised that its trust officers were qualified to assist customers with estate planning. When a customer expressed interest, trust officers would collect confidential information about the customer's assets, insurance, and will.
- The officers would then create an "estate analysis," which summarized the customer's current situation and provided suggestions.
- The Ohio Supreme Court held that the bank's "estate analysis" and suggestions constituted the unauthorized practice of law, drawing a distinction between permissible financial advice and impermissible legal counsel:
- **Permissible actions:**
 - Fiduciaries can discuss the financial and business aspects of estate planning with a client.

⁴ See, **Appendix C**, #16 for Colorado's Rules Governing Admission to the Bar.

- They can also perform clerical tasks.
- **Impermissible actions:**
 - The bank's "Comments or Suggestions" section in the estate analysis involved giving specific, tailored legal advice to the client.
 - Providing such specific legal information and preparing documents based on a client's desires goes beyond the administrative duties of a fiduciary and enters the realm of legal practice.

Significance of the ruling:

The *Green v. Huntington National Bank* case and similar rulings established an important principle: *a non-lawyer or corporate fiduciary cannot use a position of trust to offer specific legal advice*. This is intended to protect the public from receiving legal counsel from individuals who are not licensed, trained, or regulated as attorneys. The ruling demonstrates that even when hiring licensed attorneys to assist with legal work, the corporate fiduciary itself can still be found liable for engaging in the unauthorized practice of law.

IV. Best Practices for A Trust Administrator to Avoid UPL

- A. Create Clear Boundaries:** Train staff on what constitutes legal advice and when to escalate to legal counsel.
- B. Maintain Clear Role Definitions**

1. Trust Administrator Responsibilities (Non-Legal)

- Educating beneficiaries and families on trust procedures.
- Processing disbursement requests.
- Managing trust records and compliance.

- Coordinating with financial institutions.
- **2. Legal Counsel Responsibilities**
 - Interpreting and applying public benefits law.
 - Drafting and updating trust documents and Joinder Agreements.
 - Responding to government agency subpoenas or court audits.
 - Advising on inter-state compliance issues. (Example: Transferring a PSNT sub-account to a new state and dealing with an annuity assignment)
 - Representing the trust in litigation or disputes.
- C. Use Disclaimers:** Clarify to beneficiaries that the administrator cannot provide legal advice.
- D. Partner with Law Firms:** Develop relationships with attorneys who specialize in public benefits law and special needs planning.
- E. Document Legal Referrals:** Keep records when you refer beneficiaries to outside counsel, to show due diligence.
- F. Regular Legal Audits:** Periodically review internal practices with legal counsel to ensure ongoing compliance.
- G. Attorney Board and Committee Members:** Utilizing attorneys as board or committee members is beneficial to the PSNT for many reasons. They can help with decisions, policy making, etc through their legal lens. Further, they may be able to more easily identify when seeking counsel is necessary and often have a broad network of other attorneys to refer to. (Ex: You are in need of a referral to a bankruptcy attorney for one of your beneficiaries, etc.)

V. Communication Protocols Between Trust Administrator and Legal Counsel

A. Hold Regular Consultations (e.g., Monthly or Quarterly Legal Reviews).

B. Create Escalation Procedures for Legal Questions.

C. Ensure Trustee Retains Documentation of Legal Advice and Referrals.

D. Protect Confidentiality and Privileged Communication.

E. Develop Best Practices for Working with Counsel as a Trust Administrator

- i. Develop good working relationships with Counsel before you even engage them.
- ii. Retain Counsel with Public Benefits & Trust Law Expertise
- iii. Create Written Engagement Agreements
- iv. Maintain Separate Files for Legal vs. Administrative Matters
- v. Conduct Joint Training Sessions (Staff + Legal Counsel)
- vi. Collaborate on Updating Policies with Law Change
- vii. Understand that attorneys can then be referral sources for a Trustee.
- viii. Consider hiring several different attorneys who have varying areas of expertise. This broadens the skill set and experience available to the Trust Administrator as well as the referral sources for the PSNT. It further solves for potential conflicts of interest.
- ix. Negotiate a fee that may be lower than market rate.

F. Implement Trust Administration Staff Training and Compliance

Infrastructure

- i. Create Internal Policies on Legal vs. Administrative Boundaries.
- ii. Conduct Annual UPL Risk Training for All Staff.

- iii. Enforce the Use of Disclaimers in Written and Verbal Communication.
- iv. Utilize Sample Scripts for Handling Legal Questions from Beneficiaries
- v. Maintain a Trusted Legal Referral List

VI. Issues Attorneys Serving as Fiduciaries May Encounter

A. Role Conflicts - Dual Capacity Issues

- Serving as both attorney and fiduciary can blur roles.
- Risk of confusion between legal advice and fiduciary decision-making.

B. Attorney-Client Privilege Concerns

- Determining when privilege applies if the attorney is also a fiduciary.
- Potential waiver issues when representing the estate/trust vs. themselves as fiduciary.

C. Potential for Self-Dealing

- Using law firm services to assist the fiduciary role.
- Charging both fiduciary fees and attorney fees (risk of excessive compensation claims).

D. Ethical and Professional Responsibility Issues

i. Conflicts of Interest

- Beneficiaries may perceive attorney-fiduciary as favoring their own interests.
- Duty of loyalty to beneficiaries vs. duty to client (if also representing estate/trust).

ii. Disclosure Requirements

- Need to disclose dual roles and obtain informed consent.

- Full transparency on compensation arrangements.
- iii. **Compliance with Rules of Professional Conduct**
 - ABA Model Rules 1.7 (Conflict of Interest), 1.8 (Transactions with Clients), and 1.9 (Duties to Former Clients).
- iv. **Compensation & Fee Disputes**
 - i. **Double Compensation Claims**
 - Charging fiduciary commissions plus legal fees may be challenged.
 - Courts often scrutinize “reasonable compensation” more closely for attorneys.
 - ii. **Billing Transparency**
 - Requirement to distinguish between legal work and fiduciary work.
 - Need for accurate recordkeeping to avoid surcharge.
 - Effective delegation to lower billers
- E. Liability & Litigation Risks**
 - i. **Increased Exposure to Claims**
 - Beneficiaries may sue for breach of fiduciary duty, malpractice, or both.
 - Higher standard of care expected because of legal training.
 - Important for attorney to recognize when they are or are not competent to handle legal matters
 - ii. **Negligence Claims**
 - Courts may hold attorney-fiduciaries to a higher level of skill/diligence.

iii. Contested Matters

- Allegations of undue influence if attorney drafted documents naming themselves fiduciary.
- Will/trust contests citing conflict in attorney's dual role.

F. Practical & Administrative Issues

i. Recordkeeping Burden

- Must maintain clear separation between fiduciary and attorney files.
- Accounting must distinguish fiduciary actions from legal representation.

ii. Time Management

- Balancing fiduciary duties with law practice obligations.

iii. Malpractice Coverage

- Standard attorney malpractice insurance may not cover fiduciary services.
- Need for fiduciary liability coverage.

G. Best Practices to Mitigate Risk

i. Written Disclosures & Consents

- Obtain informed consent from clients/beneficiaries about dual roles.
- Clearly define scope of services and fees in writing.

ii. Separation of Roles

- Use independent professionals when possible (e.g., accountants, co-trustees).
- Avoid self-dealing transactions.

iii. Reasonable Compensation Practices

- Charge either fiduciary or attorney fees, not both, unless justified and disclosed.

- Ensure billing is transparent and defensible.

iv. **Insurance & Risk Management**

- Obtain fiduciary liability insurance.
- Conduct regular training on ethics and fiduciary responsibilities.

VII. When A Trust Administrator Should Involve Legal Counsel: Practical Examples

To protect the organization and ensure proper guidance, pooled trust administrators should retain legal counsel in the following scenarios:

A. Routine matters:

- i. The trust (or pooled trust) is named as a beneficiary that is part of an estate that is in probate.
- ii. You need to petition the court for guardianship for one of your trust beneficiaries because of health/safety concerns
- iii. You need to ask for a Guardian Ad Litem to be appointed on behalf of your beneficiary related to your trust administration
- iv. Your beneficiary's family member petitions to be conservator for assets owned only in the trust
- v. You are making a disbursement for a house or car or other exempt asset of great value that you believe should be in a conservatorship
- vi. Your beneficiary brings you into an existing conservatorship or guardianship matter
- vii. You need to bring in an attorney to navigate Medicaid or Social Security issues either on behalf of one or many beneficiaries

- viii. Annuities, spousal or child support needs to be assigned to the trust through a court order
- ix. Drafting:
 - 1. Care agreements
 - 2. Vehicle agreements
 - 3. Rental agreements
 - 4. Resignation and release documents
 - 5. Acceptance documents (more for individual trusts)
 - 6. Revisions to the Master Trust or individual trusts you administer
- x. Decanting from a stand alone trust into your pooled trust

B. Not so routine:

- i. A beneficiary or their representative brings an action against you in court
- ii. Trust beneficiary runs away or is abducted
- iii. You need an attorney to write a stern letter to a vendor, your beneficiary, etc.
- iv. You need to evict a beneficiary from a trust owned property
- v. Annuities assigned to the trust are re-routed by your beneficiary or their representative
- vi. You are in disagreement with your beneficiary, or their court appointed guardian over a significant distribution decision, such as:
 - 1. Assistance with Pregnancy, Abortion, or birth control
 - 2. Residential placement
 - 3. End of Life Medication

4. Gender Affirming Care

VIII. How To Decide Between In-House Counsel or Outside Counsel

The **difference between in-house counsel and outside counsel** primarily lies in their **relationship to the organization, scope of responsibilities, and how they are engaged and compensated**. The following is a clear breakdown for pooled trust administrators—or any organization—on how each legal role functions and when to use them.

The Association of Corporate Counsel (ACC), formerly known as the American Corporate Counsel Association (ACCA), provides guidelines and resources for in-house counsel, emphasizing a balanced approach to managing legal work.

A. What in-house counsel can handle:

1. **Broad scope of activities:** In-house counsel are equipped to handle a wide range of legal activities, including negotiations, counseling, transactional representation, and internal investigations.
2. **Routine matters:** They are ideal for managing consistent and integral legal needs of the company, building lasting relationships and providing stability.
3. **Risk management and compliance:** In-house counsel play a crucial role in enterprise risk management (ERM), according to Diligent⁵, and are often involved in ensuring corporate compliance initiatives.
4. **Understanding the business:** A key aspect of effective in-house counsel is understanding the business they serve, its industry, market challenges, and strategic

⁵ *Diligent*. Dunphy, Kathleen. 2024, December 10. *The Role of in-house legal in enterprise risk management*. Retrieved from: <https://www.diligent.com/resources/blog/the-role-of-in-house-legal-in-enterprise-risk-management>

goals. This enables them to provide tailored legal advice aligned with the overall business strategy.

5. **Communication and collaboration:** They serve as a vital link between the trust company and its business partners and clients, translating complex legal issues into clear, understandable business terms.
6. **Cost-effectiveness:** Keeping work in-house can often be the most cost-effective approach. In-house counsel salaries are predictable compared to the potentially fluctuating costs of outside counsel.

B. When in-house counsel should outsource:

1. **Specialized expertise:** When a matter requires specialized legal expertise not present within the in-house team, outsourcing to a specialized law firm with deeper expertise and resources may be necessary, particularly for litigation or high-stakes matters.
2. **Workload and capacity:** If in-house teams are overwhelmed or stretched thin, outsourcing can help ensure that legal responses are timely and effective.
3. **Budgetary considerations:** For companies with inconsistent or limited legal needs, or those without the budget for a full-time experienced internal General Counsel, outsourcing can provide cost-effective access to legal services.
4. **Strategic goals:** Companies prioritizing flexibility, cost control, and scalability, as opposed to deep, ongoing legal integration, might opt for outsourcing.
5. **High-risk, high-complexity matters:** Best practices suggest assigning a risk and complexity score to all matters and likely outsourcing those that score high in both areas.

6. **Managing outside counsel:** When external counsel is retained, in-house counsel are responsible for coordinating and directing the external team, including potentially requesting budgets or project plans.

In-House Counsel vs. Outside Counsel: Key Differences

Aspect	In-House Counsel	Outside Counsel
Employment Status	Employee of the organization	Independent contractor or law firm
Payment Model	Paid salary (and benefits)	Paid hourly, by project, or on retainer
Primary Loyalty	The employing organization	The client (organization), but works independently
Accessibility	Readily available for day-to-day consultation	Engaged as needed; often scheduled
Institutional Knowledge	Deep, continuous understanding of the organization	May lack context unless long-standing relationship
Scope of Work	Broad, often includes risk management, contracts, HR, compliance	Specific matters: litigation, regulatory filings, etc.
Cost Control	Predictable cost	Can be expensive if not managed properly
Confidentiality	Privileged, like outside counsel	Privileged

Typical Responsibilities Between In-House Counsel Versus Outside Counsel

In-House Counsel

1. Daily legal advice to executives and staff
2. Risk management and policy review
3. Drafting and reviewing contracts and internal documents
4. Overseeing regulatory compliance
5. Coordinating with outside counsel
6. Legal training for staff

7. Institutional memory of legal decisions

Outside Counsel

1. Complex legal research and formal opinions
2. Litigation or administrative hearings
3. Medicaid/SSI appeals or audits
4. Amending trust documents and Joinder Agreements
5. Multi-state regulatory advice
6. Handling disputes, demand letters, or negotiations
7. Specialized areas (e.g., tax, employment law, nonprofit governance)

When to Use Each

Use In-House Counsel When:

- You need legal input embedded in daily operations.
- You're reviewing recurring legal risk or developing policies.
- You're creating routine training for staff on UPL and compliance.
- You want rapid internal responses to administrative questions.

Use Outside Counsel When:

- You are facing complex or high-risk legal issues (e.g., government investigations).
- You need representation in court or before agencies.
- You're dealing with issues outside your in-house counsel's expertise.
- You require the drafting or revising complex trust documents.
- There's a conflict of interest that in-house counsel cannot manage.

Working Together Effectively

Many organizations benefit from a **hybrid model**:

- **In-house counsel** handles the day-to-day and strategic alignment
- **Outside counsel** provides depth, specialization, and litigation support

Example in Pooled Trust Context

Scenario	Counsel Needed
Staff training on UPL	In-house (with outside input)
Medicaid audit appeal	Outside counsel
Disbursement policy updates	In-house with review by outside counsel
Beneficiary litigation threat	Outside counsel
Routine legal questions from admin staff	In-house

IXX. Conclusion

Trust administrators are stewards, not legal advisors. They will protect their organization and the beneficiaries by staying within the scope of their role. Strategically partnering with legal counsel protects trust compliance and integrity. It is important to carefully evaluate how and when to use counsel. From there, determine whether in-house or outside counsel makes the most sense for your organization.



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CFPD Policy: Attorney Involvement in Conservator and Individual Trust Matters Policy

Policy Category: Conservator and Private Services

Drafted by: Megan Brand, Executive Director

Approval date: 12.6.2017

Amended by: Emily Brager, COO

Amended Date: 5.27.2020

When CFPD is serving as Conservator for individuals or as trustee on individual trusts, there are certain circumstances which will require the input of an attorney. If the staff members serving as Conservator designee or Trust Administrator believe an attorney is needed due to anything new or controversial, the designee should first consult with the Executive Director and then they will decide together if the attorney input is needed.

An attorney will always be consulted for the following circumstances, and the Executive Director shall be notified in advance:

Conservator Matters:

1. Real estate held in conservatorship is under foreclosure
2. Settlement agreement or personal injury award through trial
3. Divorce or Post Decree issues or changes involving financial matters
4. Sale of Home or other real estate
5. Any Litigation with regard to the Protected Person (the Conservator is the only legal entity that can act)
6. Bankruptcy
7. A new conservatorship for an adult that does not include a guardianship.
8. Any objection filed with regard to any action on behalf of the Conservator. (Any other general complaint to be brought to the attention of the Executive Director).
9. Any new or existing investment accounts
10. All transactions listed in C.R.S. §15-14-411

Individual Trust Matters:

1. The purchase of real estate to be held in Trust.
2. The sale of real estate which is held in Trust.
3. Any litigation with regard to the Trust.
4. Review of the Trust prior to CFPD's acceptance when serving as sole trustee.
5. Divorce or Post Decree issues in which the Trust is named as a "marital asset".
6. Final estate management/distribution issues for deceased beneficiaries.
7. Any other circumstance in which the Executive Director or Private Services Committee determines counsel is necessary (including HCPF's review of trust, annual accountings or distributions).

The staff member consulting with the attorney will do an initial consultation and then they will determine together if the attorney needs to make an entry of appearance in the case. Whenever possible (in full consideration of any conflicts of interest), CFPD will utilize the attorney services of those who have an



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agreement with CFPD to provide services at a reduced rate. Unless CFPD deems otherwise, the attorney fees and expenses will be paid from the protected person's estate or Trust.

Step-by-Step: Cost-Benefit Analysis

1. Track Current Legal Spending on Outside Counsel

Gather data over the past 12–24 months:

- Hourly rates by firm and by matter type (e.g., \$300/hr–\$600/hr)
- Total legal fees paid annually (e.g., \$120,000/year)
- Common legal matters (e.g., trust revisions, Medicaid audits, dispute resolution)
- Number of hours billed per month
- If you spend **\$10,000/month** on legal fees (~20–30 hours), that's **\$120,000/year**.

2. Estimate the Cost of Hiring In-House Counsel

Include full compensation and overhead:

Cost Component	Estimated Annual Cost
Salary	\$100,000–\$150,000+
Benefits (25–30%)	\$25,000–\$45,000
Office space, IT, tools	\$5,000–\$10,000
Training, insurance, CLEs	\$2,000–\$5,000

Estimated Total: \$140,000–\$210,000/year

3. Compare Break-Even Point

Determine how much outside legal work you would need to break even.

Break-even formula:

Annual cost of in-house counsel ÷ average outside hourly rate = break-even hours

Example: \$160,000 ÷ \$400/hr = **400 hours/year** → That's ~**33 hours/month** of legal work needed to justify an in-house hire.

4. Consider Strategic Value (Qualitative Benefits)

Advantages of In-House Counsel:

- Faster response times and internal alignment.
- Better organizational knowledge and continuity.
- Risk reduction through proactive compliance.
- Lower marginal cost per hour (especially with frequent questions).

Advantages of Outside Counsel:

- Deep subject-matter expertise.
- Scalable (you pay only when needed).
- No fixed overhead or HR obligations.
- Multiple attorneys = broader knowledge base.

5. Hybrid Strategy Option

Many midsize nonprofits or pooled trust administrators use a hybrid model:

- Hire **in-house counsel** at 0.5–1.0 FTE for routine and compliance work.
- Retain **outside counsel** for litigation, trust drafting, Medicaid appeals, or multi-state matters.

Example Hybrid Approach:

- In-house: \$90,000/year for 0.6 FTE
- Outside: \$30,000/year for complex issues → **Total = \$120,000/year**, but with more control and efficiency

6. Build a Decision Matrix

Score or rank each option by category:

Category	In-House	Outside Counsel
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Category	In-House	Outside Counsel
Cost predictability	✓ ✓ ✓	✓
Response time	✓ ✓ ✓	✓
Specialized expertise	✓	✓ ✓ ✓
Compliance management	✓ ✓ ✓	✓
Flexibility	✓	✓ ✓ ✓
Organizational knowledge	✓ ✓ ✓	✓

When It Makes Sense to Hire In-House:

- You spend more than **\$125,000–\$150,000/year** in outside legal fees.
- Legal questions arise **frequently or daily**.
- Your organization is **growing**, facing increasing complexity, or dealing with **multi-jurisdictional issues**.
- You need **faster turnarounds** and embedded compliance support.

Appendix C

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