

HOW TRUST ADMINISTRATORS CAN BEST AVOID THE UNAUTHORIZED PRACTICE OF LAW

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INTRODUCTIONS



Megan is the executive director of a non-profit PSNT in Colorado, CFPD. She is not an attorney; she just plays one on TV.

Susie is an attorney practicing in Colorado and Alaska (ask her for AK stories and you'll be entertained all night). Susie served on the board of CFPD for years. Her favorite line during that time... "you need to hire counsel".

Impetus of this Topic, Megan and Susie's work on the UPL committee in Colorado, and the great input from the Stetson Law Students

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BUT FIRST, A STORY OF FRUGAL JANE AND HER RESOURCEFUL FINANCIAL PLANNER MAC



Family Background

- Jane Johnson (82), mother of Jack (53) and Ginger (47)
- Ginger: developmental disability, received SSI & Medicaid Waiver services
- Jane: frugal, owned \$2M home + \$1.4M portfolio

🚩 The Mistake

- Financial advisor Mac drafted Jane's will using online forms
- Included a defective testamentary special needs trust
- Mandatory payment provisions jeopardized Ginger's benefits

🚩 Legal Fallout

- Counsel reported Mac for Unauthorized Practice of Law
- Trust required reformation → funds placed in a first-party trust
- Ginger lost benefits temporarily and forfeited payback-free status

🚩 Consequences

- Mac lost his license, paid legal fees, and was investigated for elder fraud
- His employer was held financially responsible
- Case triggered FNRA investigation and regulatory action

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WHAT IS UPL AND WHY DO PSNT ADMINISTRATORS CARE?

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

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

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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

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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.

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WHERE THE LINE IS—EDUCATION V. ADVICE

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 disbursement requests are typically handled under trust guidelines

Potential UPL Activities:

- Suggesting how a client should structure finances or care arrangements
- Drafting spend-down plans to meet Medicaid eligibility
- Interpreting complex regulations for individual clients
- Drafting documents with legal implications such as ownership agreements, etc.

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VARIOUS EXAMPLES IN SEVERAL STATES

Florida, Texas, Colorado and Ohio

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AN OVERVIEW OF STATES

General Rule:

- Individuals acting as fiduciaries are **not typically required** to have attorney representation when filing documents in court.
- **Exception:** When representing a **corporation or legal entity** (e.g., trust or estate), attorney representation is usually required.

Key Considerations:

- **Individual vs. Entity Representation:**
 - Individuals may represent themselves.
 - Entities must be represented by a licensed attorney.
- **State-Specific Nuances:**
 - Laws vary by jurisdiction.
 - Legal representation may be **advisable or necessary** depending on fiduciary role and complexity.



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FLORIDA

General Rule:

- Individuals may represent themselves in court (pro se). However, fiduciaries acting in an official capacity face specific limitations.

Fiduciary Roles & Representation:

- Guardians/Personal Representatives
May represent themselves only if they are Florida-licensed attorneys.
- Trustees
 - Can appear pro se to represent their own legal interests.
 - Cannot represent the trust or beneficiaries without a licensed attorney.
 - Doing so may constitute Unauthorized Practice of Law (UPL).

See Endnotes #1 for Florida's Rule 5.030
See, Endnotes, #2, for Florida Case Law and references regarding UPL.



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TEXAS



In Texas, fiduciaries **must be represented by a licensed attorney** when seeking:

- Letters Testamentary
- Letters of Administration
- Determinations of Heirship
- Guardianships (of 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**.

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

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COLORADO



Fiduciary Standards Under Colorado Probate Code

- Fiduciaries must act in the **best interest** of the Protected Person or estate.
- Held to a **high standard of loyalty**, placing the beneficiary's needs above all others—including their own.
- Must **avoid conflicts of interest** and act with **undivided loyalty**.

UPL Definition in Colorado Case Law

- "One who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another... is engaged in the practice of law."
— *Denver Bar Ass'n v. Public Utilities Commission*, 154 Colo. 273 (1964)
- Reinforced in *Koscove v. Bolte*, 30 P.3d 784 (Colo.App. 2001)
- See also: **C.R.C.P. 201.3(2)**

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OHIO



Case Study — Green v. Huntington National Bank (Ohio, 1965)

Background

- Ohio State Bar Association sued Huntington National Bank for offering legal services through its trust department.
- Trust officers collected confidential estate data and produced an "estate analysis" with tailored suggestions.
- Ohio Supreme Court ruled this constituted **Unauthorized Practice of Law (UPL)**.

Permissible Actions

- Discussing financial/business aspects of estate planning
- Performing clerical or administrative tasks

Impermissible Actions

- Giving specific, individualized legal advice
- Preparing legal documents based on client desires

Significance of the Ruling

- Clarified that **non-lawyers and corporate fiduciaries** cannot offer legal counsel—even with licensed attorneys involved.
- Reinforced the boundary between **financial guidance** and **legal advice** to protect the public.

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BEST PRACTICES
FOR A TRUST
ADMINISTRATOR
TO AVOID UPL

Sample Policy (*in materials)

Create Clear Boundaries

Maintain Clear Role Definitions

Use Disclaimers

Partner with a Law Firm(s)

Document Legal Referrals

Regular Legal Audits

Attorney Board and Committee Members and/or Staff

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COMMUNICATION
PROTOCOLS
BETWEEN TRUST
ADMINISTRATOR
AND LEGAL
COUNSEL

Hold	Hold Regular Consultations
Create	Create Escalation Procedures for Legal Questions
Ensure	Ensure Trustee Retains Documentation of Legal Advice and Referrals
Protect	Protect Confidentiality and Privileged Communication
Develop	Develop Best Practices for working with Counsel as a Trust Administrator
Implement	Implement trust Administration Staff Training and Compliance Infrastructure

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WHEN A TRUST ADMINISTRATOR SHOULD INVOLVE LEGAL COUNSEL: PRACTICAL EXAMPLES



Routine Matters:

1. The trust (or pooled trust) is named as a beneficiary that is part of an estate that is in probate.
2. You need to petition the court for guardianship for one of your trust beneficiaries because of health/safety concerns
3. You need to ask for a Guardian Ad Litem to be appointed on behalf of your beneficiary related to your trust administration
4. Your beneficiary's family member petitions to be conservator for assets owned only in the trust
5. 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
6. Your beneficiary brings you into an existing trust, conservatorship or guardianship matter
7. You need to bring in an attorney to navigate Medicaid or Social Security issues either on behalf of one or many beneficiaries
8. Annuities, spousal or child support needs to be assigned to the trust through a court order
9. Drafting:
 - i. Care agreements
 - ii. Vehicle agreements
 - iii. Rental agreements
 - iv. Resignation and release documents
 - v. Acceptance documents (more for individual trusts)
 - vi. Revisions to the Master Trust or individual trusts you administer
10. Decanting from a stand alone trust into your pooled trust

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WHEN A TRUST ADMINISTRATOR SHOULD INVOLVE LEGAL COUNSEL: PRACTICAL EXAMPLES



Not so Routine Matters:

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

**Shameless plug for tomorrow's session: Sex, Drugs and Rock 'n Roll

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CHOOSING BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

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CHOOSING BETWEEN IN-HOUSE AND OUTSIDE COUNSEL



Key Distinction:

- The difference lies in relationship to the organization, scope of responsibilities, and engagement model.

Guiding Resources:

- The Association of Corporate Counsel (ACC) offers best practices for managing legal work through in-house counsel.
- Asking other PSNTs for **job descriptions**, interviews, etc. to best inform your decision in our work
- Determine-who is your client?
 - counsel for the trust and also for the beneficiaries (Ex: SSA and Master Trust Document for SSI Beneficiaries)
- Various Models/hybrid approaches

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IN-HOUSE COUNSEL

- Broad legal activities: negotiations, counseling, transactions, investigations
- Routine matters and ongoing legal needs
- Risk management and corporate compliance (ERM)
- Deep understanding of business strategy and operations
- Clear communication with internal and community partners
- Cost-effective and predictable cost

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WHEN IN-HOUSE COUNSEL SHOULD OUTSOURCE

- Specialized legal expertise (e.g., litigation, Medicaid audits)
- Overwhelmed internal capacity
- Budget constraints or limited legal needs
- Strategic goals requiring flexibility or scalability
- High-risk, high-complexity matters
- Coordination and oversight of external legal teams
- When Conflicts of Interest Arise

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IN-HOUSE 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

**See Appendix B: Cost Benefit Analysis of hiring in-house counsel

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TYPICAL RESPONSIBILITIES

In-House Counsel

- Daily legal advice to organization
- Risk and policy review
- Contract drafting
- Regulatory compliance
- Staff training
- Coordination with outside counsel
- Institutional memory

Outside Counsel

- Complex legal research
- Litigation and hearings
- Medicaid/SSI appeals
- Trust amendments
- Multi-state regulatory advice
- Dispute resolution
- Specialized legal areas

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WHEN TO USE EACH

Use In-House Counsel When:

- Legal input is needed in daily operations
- Reviewing recurring risks or policies
- Training staff on UPL and compliance
- Rapid internal responses are required

Use Outside Counsel When:

- Facing high-risk or complex legal issues
- Need representation before agencies or courts
- Require specialized expertise
- Drafting complex trust documents
- Managing conflicts of interest

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WORKING TOGETHER EFFECTIVELY

Hybrid Model Benefits:

- In-house counsel ensures strategic alignment and continuity
- Outside counsel provides depth, specialization, and litigation support
- Together, they create a responsive, scalable legal framework



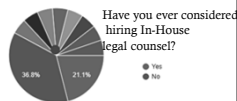
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CONSIDERATIONS FROM OTHER PSNTS...A SURVEY

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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION

- 20 Organizations responded to the survey
- 100% of responding organizations use outside counsel
- About 40% of those responding have in-house counsel (typically part-time or shared roles)
- Common Legal Needs include:
 - Trust document drafting and amendments
 - Medicaid/SSI eligibility and appeals
 - Joinder Agreement Review
 - Multi-State Compliance
 - UPL Risk Assessment and Training



**Note: Summary of Survey Provided with Assistance from Microsoft Co-Pilot

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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION, CONT.

Challenges Identified:

- **Cost of legal services** is a major concern, especially for smaller organizations.
- **Timeliness and responsiveness** of outside counsel varies widely.
- **Lack of pooled trust-specific expertise** among general counsel or local attorneys.
- **Difficulty managing multi-state legal issues** without specialized support

Best Practices Shared:

- In-house counsel has **one client-the non-profit**.
- Use **outside counsel with deep pooled trust experience**.
- Maintain **written protocols** for when staff must refer legal questions.
- Provide **UPL training** for all staff interacting with beneficiaries or families.
- Assign **risk scores** to legal matters to guide outsourcing decisions.

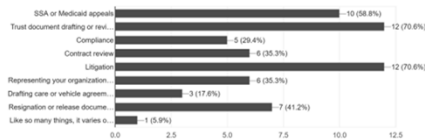
**Note: Summary of Survey Provided with Assistance from Microsoft Co-Pilot

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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION, CONT.

What types of legal matters do you currently outsource to attorneys?

17 responses

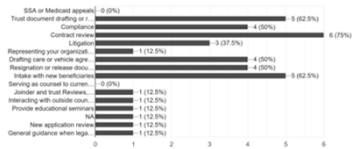


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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION, CONT.

What types of legal matters does your in-house counsel perform?

8 responses



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RABBIT HOLES...



- 1st Issues Attorneys Serving as Fiduciaries May Encounter
- 2nd Cost Benefit Analysis of hiring in-house counsel
- 3rd Research on UPL across 50 states (Available upon request)

See full materials for this additional information

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PSNTS AND COUNSEL... FINAL CONSIDERATIONS

- Exploring Different Models
- Considering Referral Sources
- How to best utilize your board and committee members
- Fee Allocation for Advocacy or Legal Representation from the Guidelines for Pooled Trust Organizations*:
 "Legal fees incurred by the organization should not be paid by a beneficiary's account if the expense is not related to that account. A decision that legal fees are related to individual trust accounts should be approved by the organization's Board of Directors. A particular matter might impact just a group within a pooled trust or just one person, or all the pooled trust beneficiaries."

*The Guidelines were developed, and recently revised, by an independent committee and have been adopted by the National PLAN Alliance and are located on their website: <https://nationalplanalliance.org/resources/>

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