

Checkpoint Contents

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Articles

Perils and Potential Profit of a Lawyer Serving as Trustee, Estate Planning Journal, Feb 2014

LAWYER-TRUSTEE

Perils and Potential Profit of a Lawyer Serving as Trustee

While serving as a trustee can provide a source of income, lawyers should consider the administrative, ethical, and other aspects of assuming the role of trustee.

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One of an estate planning lawyer's important responsibilities is educating clients about the administration of the entities created as part of the estate plan. In particular, the attorney must advise each client of the need to name a trustee of any trusts the client creates. In some instances, the client may be able to serve as trustee (e.g., with respect to a revocable trust intended to serve as will substitute), but the client must select a successor trustee who will serve after the client's death or incapacity. The client also must name an initial (and successor) trustee for those trusts of which the client cannot serve as trustee during life (e.g., an irrevocable trust intended to remove assets from the client's estate for estate tax purposes). Absent the lawyer's explanation, a client may have little understanding of the role and functions of a trustee.

Rule 1.4(b) of the American Bar Association's Model Rules of Professional Conduct **1** (the "Model Rules") requires the lawyer to discuss frankly with the client his or her options in selecting a fiduciary. **2** This discussion should cover information reasonably adequate to permit the client to understand:

- The tasks to be performed by the trustee.

- The trustee's desired skills.
- The kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members.
- The benefits and detriments of using each, including relative costs. **3**

Historically, clients often looked to family members to serve as trustee. However, as our society becomes increasingly geographically mobile and socially fragmented, and as the traditional family structure continues to evolve, clients have fewer family members they can look to confidently for fiduciary services. As a result, clients often consider using a nonfamily member, professional trustee. A client's decision to name an independent, professional trustee usually results from one of the following considerations:

- (1) The client is reluctant to decide in advance the size of trust distributions to the client's descendants or the ages at which they should occur, not knowing what the future holds.
- (2) The client is reluctant to use the "health, education, support, or maintenance" standard of the Internal Revenue Code, under which a trustee who is also a discretionary beneficiary of the trust is relieved of gift and estate tax concerns.

That "ascertainable standard" language (found in Section 2514(c)(1)) could fuel a beneficiary's claim that the beneficiary is entitled to certain distributions from the trust. Also, an "interested" trustee may be drawn into unpleasant conflicts with relatives. What the client wants is someone to take the client's place after death, applying objective and informed judgment to unforeseen circumstances. **4**

This article reviews some of the common problems associated with a lawyer serving as trustee, and also discusses some practical ways lawyers can avoid traps for the unwary. Rather than providing a state-by-state survey of the rules in each jurisdiction, this article covers the general rules, as set forth in the Model Rules, the Uniform Trust Code, and the Restatements, and provides general guidance. Lawyers should be particularly careful to review the specific rules of the jurisdiction in which they practice, because local law can differ significantly from the general rules. In addition, they should review the ABA Opinion (see footnote 3), which gives important insight into the ethical norms in this area.

Finally, lawyers should become familiar with Model Rules 1.7 ("Conflict of Interest: Current Clients") and 1.8 ("Conflict of Interest: Current Clients: Specific Rules"). These rules, which may be modified in a particular jurisdiction, are the primary ones dealing with the ethical issues that arise when lawyers serve as trustees.

Selecting the drafting attorney as the trustee

Lawyers generally are good candidates to provide fiduciary services, because they have specialized skills, knowledge, and ethical training that provide value to their clients. **5** In addition, the drafting attorney usually is familiar with the client's family circumstances and financial affairs, and with the client's wishes regarding multiple family beneficiaries who may have widely different financial needs and goals. **6** Although lawyers may lack expertise in certain areas of trust administration, such as investment

management, they can obtain further education in these areas or hire specialists as needed. (See the discussion below regarding a trustee's delegation of fiduciary duties.)

There are no ethical or legal prohibitions against an attorney serving as fiduciary, although the lawyer must take into account a host of ethical considerations when assuming a fiduciary role (see below). The practice of lawyers serving as trustees or other fiduciaries is very common in certain areas of the country, primarily Boston and Philadelphia. In those cities, several large law firms have sizeable in-house trust departments (and sometimes investment management affiliates), and individual lawyers have served families as trustees for generations.

When exploring the options with a client, the lawyer may disclose his or her own availability to serve as a fiduciary. The lawyer must not, however, allow this potential self-interest to interfere with exercising independent professional judgment in recommending to the client the best choices for fiduciaries. [7](#) In addition, the lawyer must be mindful of the ethical rules that surround solicitation and entering into a business relationship with clients. [8](#)

Competence to serve as fiduciary

Any fiduciary is subject to potential civil liability for breach of a fiduciary duty, including the duty of care, to the trusting person. However, a *lawyer* serving in fiduciary roles may be governed not only by fiduciary and civil malpractice law, but also by the ethical standards of the rules of the profession. [9](#)

Thus, even if the drafting attorney is willing to serve as the trustee, and the client requests or consents to the attorney serving as trustee, the attorney must, before drafting the document, have the requisite knowledge and experience to be able to satisfy the competence requirements of the applicable professional rules of responsibility. [10](#) Given the increasing complexity of the rules and procedures involved in estate and trust practice and administration, this initial inquiry should not be taken lightly by the attorney. [11](#)

Assuming that the attorney is competent to serve, before accepting the office of fiduciary, the attorney should consider whether he or she has adequate support staff to permit the attorney to perform fiduciary services efficiently and cost effectively, and whether his or her professional liability policy includes or excludes lawyers serving as trustee. [12](#) Without adequate administrative support and insurance coverage, serving as fiduciary is bound to become a losing proposition. During the discussion of whether the attorney is the appropriate choice of fiduciary, the attorney should disclose to the client whether he or she is bonded and has insurance for providing fiduciary services.

Ethical considerations

Naming the drafting attorney as the fiduciary raises ethical concerns that implicate the rules governing solicitation of clients and the provision of independent legal advice (i.e., conflicts of interest). These issues

may be avoided or mitigated if the *client*, rather than the lawyer, initiates the appointment of the lawyer as the trustee. But in many cases, the client may not even know his or her options for selecting the fiduciary, and the burden will fall to the lawyer. In that case, the lawyer will, by necessity, inform the client that the attorney provides fiduciary services and is among the client's options for trustee. In that instance, the lawyer may run the risk of unduly influencing the client or overreaching, simply because a client-lawyer relationship already exists, and the client inherently believes in and trusts the lawyer. **13**

Historically, the ethics rules have discouraged a lawyer from asking a client to name the lawyer as trustee. The Model Rules, however, specifically allow a lawyer to seek appointment as a fiduciary. **14** The lawyer must not, however, allow the potential self-interest to interfere with his or her exercise of independent professional judgment in recommending to the client the best choices for fiduciaries. **15** When there is a "significant risk" that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be "materially limited" because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing. **16**

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. **17**

Practice tips. Even when the lawyer reasonably believes that appropriate advice has been provided to a client regarding the selection of a fiduciary, in some circumstances, before accepting the position, the lawyer should confirm the client's decision in writing or urge the client to obtain independent advice from other trusted advisors or family members. These or similar measures would be desirable if, for example, the lawyer is appointed sole trustee of a trust that grants him or her broad powers to distribute selectively among beneficiaries who are estranged from each other, or whose interests are in substantial conflict, or when the lawyer has had no prior contact with the client. **18**

ACTEC Commentaries. The American College of Trust and Estate Counsel (ACTEC) has developed Commentaries on some of the Model Rules, to provide particularized guidance to ACTEC Fellows and others regarding their professional responsibilities. With respect to the issue of the drafting attorney serving as fiduciary, the Commentaries recognize that none of the provisions of the Model Rules deals explicitly with the propriety of a lawyer preparing for a client a document that appoints the lawyer to a fiduciary office.

The Commentaries provide: "As a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of [Model Rule] 1.7 (Conflict of Interest: General Rule), and the appointment is not the product of undue influence or improper solicitation by the lawyer." **19**

State rules. Each state is free to make its own modifications to the Model Rules. Some states have very specific rules regarding consent and disclosure with respect to the drafting attorney serving as fiduciary.

For instance, Georgia requires the client to consent in writing to the appointment of the lawyer as fiduciary, and prescribes a form notification and consent letter. Among other things, the Georgia form recites that the decision to name the lawyer as fiduciary must originate with the client; lists family members, banks, and others who might be alternatives to the lawyer as fiduciary; discusses conflicts that may arise between the lawyer as fiduciary and the lawyer as counsel to the fiduciary; and recites the need for the total fees in both capacities to be reasonable. **20**

Most states, however, do not require written confirmation of the client's informed consent in every circumstance where the document names the drafting attorney as the fiduciary. For instance, New Hampshire guidance states, "Written confirmation of the client's informed consent of a concurrent conflict of interest under Rule 1.7(b)(4) is not required under all circumstances when documents name the drafting attorney as a fiduciary. Clearly, however, the better practice would be for the drafting attorney to always provide such written confirmation of the client's decision." **21**

Practice tips. It is far easier for the drafting attorney to adopt a "best practice" of *always* obtaining the client's written, informed consent to naming the drafting attorney as fiduciary, than to figure out (in hindsight and after a problem has arisen) whether such consent should have been obtained at the outset of the fiduciary relationship. This best practice eliminates the need to determine, on a case-by-case basis, whether such consent is required, and begins the fiduciary relationship on the right foot, by establishing with certainty the services the attorney/fiduciary will provide, and the fees for those services. The client's consent should document the disclosures and discussions mandated under Model Rule 1.4. (communication) and Rule 1.7.

Another practice the drafting attorney should consider adopting is the inclusion of a trustee removal and replacement provision in each trust agreement in which the attorney is named as the fiduciary. If the attorney is named as trustee, but someone (the client, a beneficiary, a trust protector, etc.) is authorized to remove and replace the attorney, concerns regarding the attorney's ability to take advantage of the fiduciary relationship can be greatly relieved. A removal provision also will avoid the appearance that the drafting attorney is guaranteeing life employment for himself or herself. The client may be far more comfortable naming the attorney as the trustee if the client is confident that the attorney can be replaced without difficulty, if future circumstances render the fiduciary relationship undesirable.

The drafting attorney should discuss the trustee removal and replacement clause with the client in detail. That discussion should include the following topics:

- Who can remove the trustee at various times (e.g., during the client's life, after the client's incapacity or death, etc.)?
- If the trustee is removed, who selects the successor trustee, if the trust agreement does not specifically name a successor?

- Can the trustee be removed for any reason, or only under certain, specified circumstances?

Placing restrictions on removal can prevent a dissident beneficiary from using the threat of involuntary removal to effectively extort distributions that the settlor would not have desired. In particular, limiting the removal power in some fashion might be appropriate where the settlor wants the trustee to serve as a gatekeeper for one or more spendthrift or substance-abusing beneficiaries. To avoid adverse estate tax consequences, the drafting attorney should keep in mind that if the person who removes the trustee is also the person who appoints a successor trustee, the successor trustee should not, in some cases, be "related or subordinate" to the person who is removing and replacing the trustee. [22](#)

Conflict issues related to representing interested parties

A lawyer's service as trustee of a trust can create conflicts between the duties of the lawyer as fiduciary and the interests of clients whom the lawyer represents. When a lawyer serves as the trustee and concurrently represents a beneficiary or creditor of the trust, he or she must, in accordance with Model Rule 1.7, resolve any conflicts of interest that may arise. For example, if the lawyer/trustee also represented a beneficiary or creditor in a claim against the trust, and recognized that he or she would be obligated as trustee to oppose the beneficiary or creditor's claim, the representation would be materially limited under Model Rule 1.7(a). The lawyer/trustee's representation of the beneficiary or creditor would not be permissible even with the consent of the client, because it would be unreasonable for the lawyer to conclude that he or she could provide competent and diligent representation to the beneficiary or creditor (i.e., the client), when opposing the interests of a trust for which the lawyer is a fiduciary. [23](#)

An attorney who engages in activities constituting a conflict of interest when holding these dual positions may be barred from collecting both attorney's and fiduciary fees. For instance, the court in *In re Estate of McCool*, [24](#) stated that "[a]n attorney who is also executor of an estate and who engages in conflicts of interest can never be found to have waived the estate's objection to his own conflict of interest and thus is absolutely barred from compensation in such a situation."

In *McCool*, the decedent was killed when the airplane he was piloting crashed. The decedent's live-in companion and their two children also died. The executor of the decedent's estate, an attorney, hired his law firm to act as the estate's legal counsel. The law firm represented the estates of the companion and children as well. Shortly after the crash, it became evident that the probable cause of that accident had been the decedent's negligence. In light of this, the attorney/executor and his firm recognized that wrongful death actions should be brought against the decedent's estate on behalf of the estates of the decedent's companion and each of the two children.

In pursuit of these claims, the attorney/executor and members of his firm shared information among themselves and on behalf of the several estates regarding the nature and extent of available insurance coverage and other issues relevant to the various wrongful death actions. The attorney/executor drafted insurance claim letters against himself as executor of the decedent's estate for execution by the executor of the companion's estate and by the administrator of the children's estates.

The New Hampshire Supreme Court held that because the attorney/executor was both the executor and the attorney for the decedent's estate, he could not waive the estate's objections to his own conflicts of interest. Because representation of the estate was fraught with conflicts of interest from its inception, the court held that the attorney/executor and his firm were entitled to no fiduciary fees or legal fees from the decedent's estate.

Representing other interested parties. Representation of creditors of a trust in unrelated matters also requires the client's informed consent, and, depending on the jurisdiction, the consent of the beneficiaries. **25** Although the Model Rules permit the fiduciary to represent one of several beneficiaries in unrelated matters with consent of the client, in some circumstances, the lawyer should not do so (e.g., representing a beneficiary of a trust from which the attorney/fiduciary makes unequal discretionary distributions). **26**

Solicitation of fiduciary services

Model Rule 1.8(c) prohibits an attorney from accepting gifts from clients who are not related to the attorney. Because a fiduciary performs services for compensation, accepting an appointment as a fiduciary is not accepting a gift from a client.

Model Rule 1.8(a) prohibits an attorney from entering into a business transaction with a client unless, *inter alia*, the client consents to the transaction in writing. According to the ABA Opinion, appointing a fiduciary is not a "business transaction with a client," so Rule 1.8(a) does not apply to require the client to give signed, informed consent to the essential terms of the arrangement after receiving the lawyer's written advice to seek independent legal advice. **27** Note, however, that individual jurisdictions may find that a business transaction, requiring compliance with Rule 1.8(a), does exist. **28**

Dual representation

Additional ethical and legal considerations arise when a lawyer serves in the dual capacity of both fiduciary and lawyer for himself as fiduciary. The risks and abuses that may arise when the lawyer serves in this dual capacity involve fiduciary fees and the attorney's compensation, whether the lawyer is serving in the client's best interests, and the lawyer's duty to use independent judgment in representing the client. **29** The benefits of dual representation include providing efficient and cost-effective administration of the trust, and fulfilling the client's expectations of what the lawyer's role should be. Although the client may understand the need for a trustee, the client may not be aware of the need for a lawyer for the trustee, and may expect that the lawyer/trustee will fulfill both of those roles.

Absent special circumstances, the Model Rules permit a lawyer who is serving as the trustee of a trust to appoint himself or herself or other lawyers in his or her firm to represent the lawyer in the fiduciary capacity. The lawyer should discuss with the client the fact that the lawyer, acting as fiduciary, may select himself or herself or the law firm to serve as the lawyer for the trust or estate, with the result that

additional fees may be received by the lawyer. The compensation for the legal services must be reasonable (under Model Rule 1.5(a) (Fees)), taking into account the compensation for fiduciary services. **30** Rule 1.5(a), which sets standards for determining the reasonableness of lawyers' fees, does not specifically cover compensation that a lawyer may receive as a fiduciary.

Uniform Trust Code **31** (UTC) section 708 addresses the compensation of the trustee. The Comment to section 708 of the Model UTC provides that the UTC "does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable."

In some jurisdictions, the compensation of lawyers for trustees is either prescribed by statute or subject to court approval or regulation. Applicable statutory compensation rates that are approved by a court after informed judicial scrutiny should be conclusive in determining the amount customarily charged in the jurisdiction for similar legal services, and also should be persuasive in establishing the reasonableness of the compensation that the lawyer and his or her firm receive for legal and fiduciary services. **32** Approval of the lawyer's compensation by an informed co-fiduciary or by the trust beneficiaries also would be persuasive in establishing the reasonableness of the legal fees. **33**

ACTEC has published sample engagement letters, including a letter regarding the appointment of the attorney as a fiduciary. That sample letter covers, *inter alia*, compensation to the attorney who is appointed as a fiduciary, and retention of the attorney's law firm as counsel for the attorney in his or her fiduciary capacity. These letters are available on both the public and private sides of the ACTEC website (www.actec.org) for no charge.

When a lawyer serves in the dual roles of fiduciary and counsel, courts generally have held that their overcharging and other improprieties violate excessive fee, conflicts, and other rules of professional conduct, in addition to Model Rule 8.4 (Misconduct). When lawyers serve solely as fiduciaries, courts usually limit infractions to those under Model Rule 8.4. **34**

Fiduciary fees

The subject of fees is critical, even if the attorney/fiduciary does not hire himself or herself (or someone in his or her firm) to serve as his or her attorney. If the terms of a trust do not specify the trustee's compensation, the trustee is entitled to compensation that is reasonable under the circumstances. **35** Most states do not provide a statutory schedule regarding what is a "reasonable" fee.

When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. **36** The lawyer also should inform the client what skills the lawyer will bring to the job, as well as what skills and services the lawyer expects to pay others to provide, including investment management, custody of assets, bookkeeping, and accounting. **37** A downward adjustment of fees may be appropriate if a trustee

has delegated significant duties to agents, such as the delegation of investment authority to outside managers. On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that the fiduciary ordinarily would delegate. **38**

Usually, fees for fully integrated trusteeships are around 100 basis points (but may range from 50 to 120 basis points), depending on the value of the trust assets. Historically, these fees have been adequate to cover a corporate trustee's extensive overhead and provide a profit margin to supplement the bank's other income from its commercial and retail operations. **39** Some lawyers who serve as trustees choose to charge on an hourly basis for work performed, rather than charging on a percentage basis.

Fiduciaries who or which provide only "directed" trustee services, as opposed to comprehensive trust services, generally charge a relatively modest annual fee for services, commensurate with the directed trustee's correspondingly lower levels of risk, responsibility, and overhead; the other empowered fiduciaries of the directed trust, who are handling more labor-intensive, higher risk investment and distribution functions, will charge a separate fee for their services. The total fees paid to the trustee of the directed trust and to the other compensated participants should be comparable to the single annual fee paid to a traditional bundled fiduciary services provider. **40** Directed trusts are discussed in further detail below.

Ideally, the fees and scope of the fiduciary services are spelled out in a written engagement letter provided to and signed by the client.

Exculpation of the fiduciary

An exculpatory provision exonerates a trustee from liability for certain acts and omissions affecting the trust estate. **41** An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary. The lawyer should not include an exculpatory clause without the informed consent of an unrelated client. **42**

A presumption of abuse exists when an attorney both designates himself as trustee and drafts the exculpatory clause. Under Model UTC section 1008, an exculpatory clause is unenforceable to the extent that it "was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor." An exculpatory clause drafted by the trustee also is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory clause is fair under the circumstances and that its existence and contents were adequately communicated to the settlor. **43**

A court may consider the following factors in determining whether the exculpatory clause was fair:

- (1) The extent of the prior relationship between the settlor and trustee.
- (2) Whether the settlor received independent advice.
- (3) The sophistication of the settlor with respect to business and fiduciary matters.
- (4) The trustee's reasons for inserting the clause.

(5) The scope of the particular provision inserted. **44**

The requirements of Model UTC section 1008(b) are satisfied if the settlor was represented by independent counsel. **45**

Accordingly, if the drafting attorney is serving as fiduciary, the attorney should fully disclose any exculpation provision, and insist that the settlor seek independent and competent advice regarding it. If the client declines to seek separate representation, he or she should sign a written acknowledgment that he or she understands the exculpatory clause, and had the opportunity to seek independent legal counsel (and, if applicable, willingly chose not to do so and to proceed anyway). The ACTEC sample engagement letter regarding the appointment of the lawyer as a fiduciary addresses the possible inclusion of exculpatory language in the trust agreement.

Fiduciary exception to attorney-client privilege

The attorney-client privilege protects confidential communications between a client and attorney made for the purpose of facilitating the rendition of professional legal services to the client. The privilege is intended to encourage clients to seek, and attorneys to give, full and frank legal counsel. In some jurisdictions, however, a "fiduciary exception" applies to the attorney-client privilege and bars a fiduciary from asserting the attorney-client privilege against beneficiaries of a trust where the fiduciary has sought legal advice regarding the administration of the trust.

This fiduciary exception has been based on two principles:

- (1) The attorney's "real client" is the trust beneficiary, not the trustee, and the trustee's duty to administer the trust solely for the benefit of the beneficiary takes precedence over the attorney-client privilege.
- (2) The trustee has a duty of full disclosure to the beneficiary, and allowing a trustee to hide information behind a privilege may encourage and conceal fraudulent activity. **46**

Who is the client? This raises the question, then, of the identity of the client. Is it the fiduciary? Or is it the trust (as an entity), and its beneficiaries? The answer may be unclear under the law of a particular jurisdiction. This lack of clarity regarding the identity of the client in the administration of a trust heightens the importance of the lawyer clarifying his or her relationship to the parties involved, especially if the lawyer is representing himself or herself as the fiduciary. **47** In particular, the lawyer should clarify with those involved whether a trust, a trustee, its beneficiaries, or groupings of some or all of them are clients. **48** The lawyer's failure to clarify whom the lawyer represents might result in the lawyer entering into unintended client-lawyer relationships, and the identity of the clients may depend on the circumstances and on the law of the jurisdiction. **49**

The ACTEC Commentaries provide that when a lawyer represents a trustee, the lawyer generally represents only the fiduciary (and not the beneficiaries). The Commentaries also allow direct communication between the lawyer and the beneficiaries of the estate or trust. The comment to Model

Rule 1.2 states: "As a general rule, the lawyer for the fiduciary should inform 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."

Although some states recognize the fiduciary exception to the attorney-client privilege, others reject it. **50** In the jurisdictions that do not recognize the fiduciary exception to the attorney-client privilege, courts have concluded that the fiduciary (not the trust estate or its beneficiaries) is the attorney's "real client." Some states have rejected the fiduciary exception by statute. **51** Even if the trustee is confident that the trustee (and not the trust estate or the beneficiaries) is the lawyer's client, the trustee must proceed cautiously in determining the extent to which its communications with its attorney will be privileged from disclosure to beneficiaries.

If the jurisdiction in question has no statute or controlling common law regarding the applicability of the fiduciary exception to the attorney-client privilege, a trustee will be operating in an uncertain environment in the event of a dispute with the beneficiaries. If litigation is foreseeable, and the trustee wishes to achieve greater certainty with respect to the application of the privilege (and the communication otherwise satisfies the criteria for the attorney-client privilege), the fiduciary should consider: (1) independently retaining counsel via an engagement letter that specifies that the fiduciary, individually, is the client; and (2) paying for the legal services from the fiduciary's own resources (instead of from trust assets). An argument could be made that paying an attorney out of trust funds may convert trust beneficiaries into clients of the trustee's attorney.

Delegation of fiduciary duties

A trustee has a duty personally to perform the responsibilities of the trusteeship, except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee has a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances. **52**

The Model UTC specifically allows a trustee to delegate duties, powers, and investment and management functions to any person. **53** Whether a particular function is delegable depends on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative, reporting and investment duties might be prudent for a family trustee but unnecessary for a corporate trustee or a lawyer who is serving as the fiduciary.

Reasonable care. Under the Model UTC, if a trustee properly delegates a function, the agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation, and the trustee is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

In order to properly delegate a function, the trustee must exercise reasonable skill, care and caution in:

- (1) Selecting an agent.
- (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.
- (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

Consequently, delegating a function relieves the trustee of the obligation of performing the delegated task, but does *not* relieve the trustee of the obligation to monitor the agent and the agent's performance of the task delegated to it.

A trustee may abuse its authority to delegate by an imprudent failure to delegate or by making an imprudent decision to delegate. Abuse of discretion also may arise from failure to exercise prudence in the degree or manner of delegation. Prudence requires the exercise of care, skill, and caution in the selection of agents and in negotiating and establishing the terms of delegation. Significant terms of a delegation include those involving the compensation of the agent, the duration and conditions of the delegation, and arrangements for monitoring or supervising the activities of agents. [54](#)

Investment management. Although many fiduciary functions are delegable, the one most likely to be delegated by the attorney/fiduciary is probably the investment management of the trust assets, because the attorney is unlikely to be sufficiently qualified to perform investment duties himself or herself. (Even a corporate trustee that has in-house portfolio management capabilities may need to delegate the investment function if the trust holds assets that are outside of the trustee's investment experience. [55](#)) In deciding whether and the extent to which to delegate investment duties, the trustee must consider the language of the trust agreement and state law. Most states have adopted laws similar to section 9 of the Uniform Prudent Investor Act, which permits the trustee to delegate investment functions to agents. [56](#)

Directed trusts. In some states, it may be possible for a client to create a "directed" trust, [57](#) where the trustee follows the distribution and/or investment directions of some other participant (often called an investment or distribution trustee, a "trust protector," or a "trust advisor") who exercises those powers in a fiduciary capacity. In order to create a directed trust, the trust agreement must establish that structure (or be modified to establish it), and state law must allow it. [58](#)

Most states' trust codes include provisions authorizing multi-participant directed trust governance structures. However, not all directed trust statutes are created equal. The Model UTC's directed trust provisions (section 808), for example, do not protect a directed trustee from liabilities associated with a directing fiduciary's exercise of powers as extensively as the laws of several states, including Delaware, New Hampshire, and South Dakota. Under these more protective regimes, when a trustee is directed, he or she is insulated as an "excluded fiduciary" (or some similar title) from liabilities associated with the fiduciary functions exercisable by an empowered fiduciary. In contrast to a delegated trust structure, the trustee of a directed trust operating under these more robust directed trust statutes has no duty to monitor or supervise the other empowered fiduciary, or for following the directions of an empowered fiduciary.

However, in some states that allow directed trusts, such as those that follow Model UTC section 808 (including Florida, Massachusetts, and Vermont), the directed trustee may be liable for following the other fiduciary's directions if:

- (1) The direction is "manifestly contrary" to the terms of the trust.
- (2) The trustee knows the direction is a "serious breach" of the fiduciary duty of the directing person.

If the trustee is directed, he or she is relieved of delegating the fiduciary duties conferred on the other empowered fiduciary. However, the trustee must review applicable local law to determine whether-and the extent to, and the circumstances under, which-the trustee may be liable for the actions (or inactions) of the other empowered fiduciary.

Conclusion

A lawyer's service as trustee for a client's trust can provide the client and the beneficiaries with a level of expertise and insight that may be superior to the services available from a family member or corporate fiduciary. Providing fiduciary services also can generate an alternate source of income for the lawyer that supplements earnings from a law practice. However, the lawyer should not enter that fray without great forethought and planning. The lawyer must address compensation, administrative support, insurance protection, and ethical concerns before accepting the fiduciary office. With proper systems and planning, serving as a fiduciary can be a rewarding experience and good business decision.

1

The American Bar Association's (ABA) Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states. To date, California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct.

2

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

3

See ABA Formal Opinion 02-426, "Lawyer Serving as Fiduciary for an Estate or Trust" (5/31/2002) (the "ABA Opinion"). The ABA Opinion is based on the Model Rules. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions control over the ABA Opinion (and the Model Rules).

4

See Repetti, "Lawyer as Trustee," ALI-ABA Estate Planning Course Materials Journal (June 2008).

5

Monopoli, "Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest," 66 U. Pitt. L. Rev. 411 (2005).

6

See ABA Opinion, *supra* note 3.

7

Id.

8

Because a fiduciary performs services for compensation, a lawyer who accepts an appointment as a fiduciary is not accepting a gift from a client who is unrelated to the lawyer (which Model Rule 1.8(c) prohibits), as long as the compensation is "reasonable." ABA Opinion *supra* note 3.

9

Spurgeon and Ciccarello, "The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations," 62 Fordham L. Rev. 1357 (1994).

10

See Model Rule 1.1 ("Competence").

11

New Hampshire Bar Association Ethics Committee Opinion #2008-09/1, "Drafting Lawyer Acting as Fiduciary for Client" (5/13/2009) (the "New Hampshire Opinion").

12

The policy should include coverage for services performed by the insured as a trustee, or in any other fiduciary capacity, and also for investment advice given in connection with those services.

13

Spurgeon and Ciccarello, *supra* note 9.

14

See Model Rule 1.8 ("Conflict of Interest: Current Clients: Specific Rules"), comment [8], which provides in part: "This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary." Some commentators have opined that Comment 8 and the ABA Opinion, when read together, "yield ambiguity at best and contradiction at worst," and that "[t]he trigger for

disclosure under Comment [8] should not be a discretionary decision by the attorney that Rule 1.7 applies, and the entire situation should be the subject of a free-standing rule-not an adjunct to another rule which deals with a related, but distinct, situation: gifts to drafting attorneys." Monopoli, *supra* note 5.

15

ABA Opinion *supra* note 3.

16

ABA Opinion *supra* note 3. See also Model Rule 1.7 ("Conflict of Interest: Current Clients").

17

Model Rule 1.0(e) ("Terminology").

18

ABA Opinion *supra* note 3.

19

"Commentary on Model Rule 1.7," *ACTEC Commentaries on the Model Rules of Professional Conduct* (4th ed., 2006),

20

See Georgia Formal Advisory Opinion #91-1 (issued by the Supreme Court of Georgia, 9/13/1991).

21

The New Hampshire Opinion at 8.

22

See Rev. Rul. 95-58, 1995-2 CB 191 (grantor's reservation of unqualified power to remove trustee and appoint individual or corporate successor trustee that is not related or subordinate to grantor within the meaning of Section 672(c), is not considered reservation of the trustee's discretionary powers of distribution over the property transferred by the grantor to the trust), and Section 672(c). See also Ltr. Rul. 9735023 (trust beneficiary would not have the powers held by an independent trustee attributed to her where she had the power to remove and replace such trustee only with a successor trustee who was not related or subordinate to her within the meaning of Section 672(c)).

23

ABA Opinion, *supra* note 3. See also Restatement of the Law Governing Lawyers, §135 (2000), comment c (fiduciary duties that materially and adversely affect lawyer's representation of a client require withdrawal from either the representation or the fiduciary position) (the "Restatement, Lawyers").

24

553 A2d 761 (N.H., 1988).

25

ABA Opinion *supra* note 3.

26

Id.

27

ABA Opinion *supra* note 3 (*citing* Model Rule 1.8, comment 8 ("This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative position.")). Recall, however, that if the lawyer's interest in being named fiduciary "will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary," the appointment is subject to Rule 1.7, and the lawyer should confirm the client's decision in writing. ABA Opinion.

28

See, e.g., New Hampshire Opinion at 8-9 ("[I]f the lawyer (1) advertises fiduciary services, and (2) actively solicits its clients [to] consider selecting the lawyer as the fiduciary in the documents drafted by the lawyer, it would be difficult to argue that such solicitation does not transform the fiduciary selection by the client into a 'business transaction with a client.' If such practice is determined to involve a 'business transaction with a client', then compliance with Rule 1.8(a) would be required. The more stringent Rule 1.8(a) conflict compliance requires (1) informed consent in writing *that must be signed by the client*, and (2), that the client must be advised in writing by the attorney 'of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction.'") (Emphasis in the original.)

29

See Spurgeon and Ciccarello, *supra* note 9.

30

ABA Opinion, *supra* note 3.

31

About half of the states have enacted some version of the Uniform Trust Code.

32

ABA Opinion *supra* note 3, *citing* Spurgeon and Ciccarello, *supra* note 9 (providing an overview of statutes and case law regulating compensation when attorney serves as both trustee and lawyer for the trust).

33

ABA Opinion, *supra* note 3.

34

Id.

35

See Restatement (Second) of Trusts section 242 (1959) (the "Restatement, Trusts") and Model UTC section 708.

36

ABA Opinion *supra* note 3.

37

Id.

38

Comment to Model UTC section 708.

39

McDonald, "Emerging Directed Trust Company Model," 151 Tr. & Est. 49 (February 2012).

40

Id.

41

For a thorough discussion of this issue, see Hill, "Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows?" 45 U. Mich. J. L. Reform 829 (Summer 2012).

42

ACTEC Commentaries on Rule 1.8.

43

Model UTC section 1008(b). Note that section 1008(b) of the Model Code conflicts with *Marsman v. Nasca*, 573 NE2d 1025 (Mass. App. Ct., 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanen v. Ballard*, 678 NE2d 133 (Mass., 1997). Also note that section 1008(b) of the Massachusetts Uniform Trust Code provides that an exculpatory term drafted by the trustee "may be" (not "is") invalid.

44

See Restatement, Trusts section 222.

45

Comment to Model UTC section 1008.

46

See *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A2d 709 (Del. Ch., 1976). For a history of the fiduciary exception of the attorney-client privilege, see *United States v. Jicarilla Apache Nation*, 180 L Ed 2d 187 (2011) (fiduciary exception did not extend to the federal government in its capacity as trustee of funds held in trust for the benefit of the Apache Nation).

47

See Model Rule 1.7, comment 27.

48

See Restatement, Lawyers section 14, comment f.

49

Id.

50

For cases rejecting the fiduciary exception under state law, see, e.g., *Huie v. DeShazo*, 922 SW2d 920 (Texas, 1996); *Wells Fargo Bank v. Superior Court*, 990 P2d 591 (Calif., 2000); and *Murphy v. Gorman*, 271 FRD 296, 2010 WL 2977711 (DC N.M., 2010). For cases recognizing the exception, see *Riggs*, *supra* note 46, and *Floyd v. Floyd*, 615 SE2d 465 (S.Car., 2005). Note that in 2008 the South Carolina legislature expressly rejected the holding of *Riggs*, as applied in *Floyd*, when it enacted S.C. Code Ann. §62-1-110 (see note 51, *infra*).

51

See, e.g., Fla. Stat. Ann. §90.5021(2) and S.C. Code Ann. §62-1-110.

52

Restatement, Trusts section 171.

53

See Model UTC section 807.

54

Restatement, Trusts section 171, comment a.

55

Attorneys who serve as trustees as part of their law practice are not required to register with the Security and Exchange Commission as investment advisors, if their provision of investment services is "solely incidental" to their practice of law. See 15 U.S.C. section 80b-2(a)(11)(B) (Investment Adviser's Act of 1940) (a lawyer who, for compensation, engages in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, must register with the Securities and Exchange Commission, unless the lawyer's performance of those services is "solely

incidental" to his or her law practice).

56

See Repetti, *supra* note 4.

57

For an excellent primer on directed trusts, see Nenno, "Directed Trusts: Making Them Work," 38 Est. Gifts. & Tr. J. 159 (March 2013).

58

See, generally, McDonald, "Open Architecture Trust Designs under New Hampshire Law Provide Flexibility and Opportunities," 49 N.H. Bar J. 34 (Fall 2008); and McDonald, "Emerging Directed Trust Company Model," 151 Tr. & Est. 49 (February 2012).