

**WALKING THE PLANK WITHOUT FALLING IN THE MUCK:
Ethical, Malpractice, and Practical Issues
In Representing Trustees**

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I. INTRODUCTION

A. In General

Attorneys who represent trustees face a gamut of ethical, malpractice, and practical issues. The tangled kitten's yarn of issues arises because trustees are a peculiar kind of client: they are fiduciaries, subject to a host of duties toward beneficiaries. In addition to fulfilling the professional duties that the attorney has to the trustee-client, the attorney also must be well versed in the duties that the trustee has to the beneficiaries in order to be able to advise the trustee-client.

Adding to the challenge of representing trustees is that the trustees are subject to the highest standard of conduct:

“Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd.” (Cardozo, J.) *Meinhard v. Salmon* 249 NY 458, 164 NE 545 (1928).

This high standard of behavior for the trustee-client may spill over to the attorney. This “spill-over” may create a duty to a non-client in addition to those to the trustee-client for the attorney.

Representing trustees differs from representing other fiduciaries, such as corporate directors or partners. Representing business parties usually allows the attorney to identify the client more efficiently. That is, the attorney usually represents the directors or the corporation or the shareholders (or the partnership, the general partner, or the limited partners). In trust administration, it is easier to blur the line between the parties because they are often related and because the same individual may hold several roles: trustee, beneficiary, shareholder or partner in a family business entity.

Also adding to the complexity of representing trustees is the fact that more than one person may occupy the role of trustee, either concurrently as co-trustees, or consecutively as successor trustees.

Issues facing the attorney representing the trustee-client include:

- Knowing the ethical and fiduciary duties of the attorney, such as the duties of loyalty (duty to avoid conflict of interest), confidentiality, competence, and communication;
- Providing full disclosure and obtaining proper informed consents regarding representation;
- Determining the existence of the attorney-client privilege and protecting it as necessary;
- Counseling the trustee-client regarding the trustee's duties and responsibilities;
- Practicing "preventively" to avoid trust litigation;
- Practicing defensively to avoid malpractice claims from both clients and non-clients; and
- Being paid.

B. The Relationship Between Ethical, Malpractice and Practical Issues

Often, the ethical, malpractice, and practical issues are not discrete issues that can be parsed out but are more like interwoven threads in the cloth of representing trustees. At each stage of representation, the attorney's conduct and counsel is shaped by all three concerns.

1. Ethical and Fiduciary Duties of Attorneys

The attorney is a fiduciary and agent of the client. Accordingly, the attorney is subject to the general laws that apply to agents,¹ as well as the ethical rules and fiduciary duties applicable to attorneys in their relationship with clients.

The ethical and fiduciary duties to the client include the following:

- Duty of loyalty
- Duty to avoid conflicts of interest
- Duty of confidentiality

¹ California Civil Code § 2296 *et seq.* (Law of Agency). All code sections cited in this outline are California statutes, unless otherwise noted specifically.

- Duty of competence and diligence²
- Duty of communication³

The ethical standards applicable to attorneys are found in the local rules of professional conduct (e.g. California's Rules of Professional Conduct ("CRPC")).⁴ The fiduciary duties to clients applicable to attorneys are also addressed in the State Bar Act. California Business & Professions ("B&P") Code § 6000 *et seq.* The general principles in statutes and case law regarding fiduciary relationships also apply to attorneys. **David Welch Co. v. Erskine & Tulley** (1988, 1st Dist.) 203 Cal. App. 3d 884 [250 Cal. Rptr. 339] (Although This case has been criticized on this point); **Alkow v. State Bar of California** (1971) 3 Cal.3d 924 [92 Cal. Rptr. 278].

"It is well established that an attorney's duties to his client are governed by the [CRPC] rules. (Citations omitted) Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client. (Citations omitted)." **Mirabito v. Liccardo** (1992) 4 Cal. App. 4th 41, 46 [5 Cal. Rptr. 2d 571, 573].

"The relation between the attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity – *uberrima fides*." **Cox v. Delmas** (1893) 99 Cal. 104, 123, 33 P. 836.

"An attorney should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times and under all circumstances be held to the full measure of what he ought to be." **Sanguinetti v. Rossen** (1906) 12 Cal. App. 623, 107 P 560.

"The duty of loyalty forbids any act that would interfere with the dedication of a lawyer's entire energies to the client's interests." **Flatt v. Superior Court** (1994) 9 Cal. 4th 275, 289.

The fiduciary duty to a client includes the duty to represent the client with undivided loyalty. **Cal Pak Delivery, Inc. v. United Parcel Service, Inc.** (1997), 52 Cal. App. 4th 1; **Zador Corp. v. Kwan** (1995) 31 Cal. App. 4th 1285

² See CRPC Rule 3-110 Failing to Act Competently. This duty of competence means an attorney must use the diligence, learning and skill, and abilities reasonably required to perform the legal service; Rule 3-400 Limiting Liability to Client; See also ABA MRPC Rule 1.1, Rule 1.3 (in Appendix B of outline); See **Matter of Riley**, (Review Dept. 1994), 3 Cal. State Bar Ct. Rptr. 91; **In the Matter of Bouyer** (Review Dept.1991) 1 Cal. State Bar Ct.Rptr. 404, 415.

³ B&P Code section 6068(m); Rules Prof. Conduct, (CRPR) rule 3-500; See also ABA Model Rules Prof. Conduct (MRPC) Rule 1.4 (in Appendix B of outline); See **Matter of Nunez** (Review Dept.1992) 2 Cal. State Bar Ct. Rptr. 196, 200.

⁴ California Rules of Professional Conduct are State Bar rules adopted by the Board of Governors of the State Bar of California and approved by the California Supreme Court pursuant to B&P Code §§ 6076 and 6066.

Note that what is “ethical” in one state jurisdiction may differ significantly from what is “ethical” in another. The difference will be in the local rules of professional conduct. Resources for ethical issues are provided in **Appendix D**.

The duty to avoid conflicts of interests is discussed in section II; the duty of confidentiality, in section III; the duty of loyalty, in section V.

2. California Rules of Professional Conduct

California is the only state that has not adopted some version of the American Bar Association’s Model Code of Professional Responsibility (“Model Rule”). The California Rules of Professional Conduct were originally adopted in 1928, and substantially revised twice, in 1975 and in 1989. The Model Rule was first adopted in 1969, and the later American Bar Association’s Model Rules of Professional Conduct were adopted in 1983. Some form of the Model Rules has been adopted by 43 states and by the District of Columbia.

The Rules of Professional Conduct are “intended to regulate professional conduct of members of the State Bar through discipline... These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such duty.” CRPC Rule 1-100.

Despite this disclaimer, in California the violation of an ethical rule is closely tied to a cause of action for legal malpractice, either negligence or breach of fiduciary duty. Although the ethical rules may not in themselves create new civil causes of action, often alleged violations of these ethical rules are taken into account in actions for breach of fiduciary duty and legal malpractice against the attorney. That is, the trier of fact can consider these rules in determining whether there has been a breach of fiduciary duty or legal malpractice. **Mirabito v. Liccardo** (1992) 4 Cal. App. 4th 41 [5 Cal. Rptr. 2d 571]; **Day v. Rosenthal** (1985) 170 Cal. App. 3d 1125 [217 Cal. Rptr. 89], *cert. denied* (1986) 475 U.S. 1048; **David Welch Co. v. Erskine & Tulley** (1988) 203 Cal. App. 3d 884 [250 Cal. Rptr. 339].

In **Day v. Rosenthal**, the attorney was sued by Doris Day and her personal manager. The appellate court affirmed a \$27 million dollar judgment against the attorney for breach of fiduciary duty, legal malpractice, and fraud, stating:

“An attorney’s duty, *the breach of which amounts to negligence*, is not limited to his failure to use the skill required of lawyers. Rather, it is a wider obligation to exercise due care *to protect a client’s best interests in all ethical ways and in all circumstances*.

The standards governing an attorney’s ethical duties are *conclusively established by the Rules of Professional Conduct*. They cannot be changed by expert

testimony. If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded.” [citations omitted, italics added] *Day v. Rosenthal* (1985) 170 Cal.App. 3d 1125 [1147, 217 Cal. Rptr. 89, 103], cert. denied (1986) 475 U.S. 1048.

3. ABA’s Model Rules of Professional Conduct

The professional standard of conduct adopted by the American Bar Association has been the model for the standards of conduct in most of the states, other than California. Most of the states’ standards of conduct are based on the Model Rules of Professional Responsibility, originally adopted in 1983. Several states’ standards are based on the earlier Model Code of Professional Responsibility, originally adopted in 1969.

Each jurisdiction’s standards of conduct vary somewhat from the ABA standards due to modification during the enactment process to suit better the local needs. The discussion of the ABA Model Rules of Professional Responsibility (MRPR) supplements the discussion of the CRPC in this outline by providing a different perspective on selected issues.

4. Legal Malpractice

Legal malpractice is a term difficult to define and its definition varies according to jurisdiction.⁵ The prevailing view is that it encompasses professional misconduct broadly, including negligence and breach of fiduciary duty. *Kelly v. Foster* (1991) 62 Wash. App. 150 [813 P.2d 598], *review denied* 118 Wash.2d 1001 [822 P.2d 287] (legal malpractice includes breach of fiduciary duty).

One way to categorize legal malpractice cases is to differentiate between standard of care cases (*e.g.* mistakes, negligence) and standard of conduct cases (*e.g.* loyalty or confidentiality), also known as breach of fiduciary duty cases. The “standard of care” is the attorney’s duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by other lawyers similarly situated and as such, the standard is constantly changing and evolving. A very common failing in the standard of care is the attorney’s failure to develop the facts. In a trust administration, this duty often requires obtaining adequate information from the trustee-client. Receiving this information directly from the client can often reduce the possibility that the attorney “should have” known. As a suggested method of obtaining such information, a checklist/questionnaire for a trust administration is attached to this outline as Appendix F.

The “standard of conduct” cases are more serious than the “standard of care” cases. The “conduct” cases allege that the attorney committed a breach of fiduciary duty (*e.g.* loyalty, confidentiality, honesty), which implies greater moral blame, and often punitive damages are at stake. In the end there may not be

⁵ Mallen & Smith, *Legal Malpractice* (5th Ed. 2000) Section 1.1.

substantive difference between the two kinds of cases since providing reasonable care is also a fiduciary duty.

Attorneys representing trustee-clients have exposure to potential malpractice claims from at least two sources: their client-trustees and the beneficiaries who are not clients. The attorney representing trustee-clients may need to take affirmative steps to minimize this risk for liability to third parties who are not clients, at least in the attorney's view.

5. Relationship Between Ethical and Malpractice Issues

Ethical and malpractice concerns often overlap but are not identical. Violation of ethical duties provided under the local rules (*e.g.* California Rules of Professional Conduct) may result in disciplinary action by the State Bar. Malpractice or professional liability actions, on the other hand, are civil liability actions instituted by clients or third parties against the attorney.

Malpractice actions may allege breach of ethical duties as part of the cause of action; however, as with any other civil action, the breach itself is not sufficient. All the elements of the cause of action must be met for the plaintiff to prevail: the standard of care, duty, breach, proximate causation and damages. When a breach of ethical duties does not result in any actionable damages to the client, the client may nonetheless notify the state bar and the state bar may take disciplinary action. Clients may also take action to disqualify attorneys from representing other parties under the applicable ethical rules regarding conflict of interest rules.

Although ethical rules are not intended as basis of civil liability and thus the violation of the ethical rules do not create new causes of action, cases have held that the violation of these rules may constitute negligence. *See Charleson v. Hardesty* (1992) 108 Nev. 878; 839 P.2d 1303.

6. Common Situations: High Likelihood of Ethical Pitfalls and Practical Problems

Trust administration occurs because of the decedent's belief that there is a need to hold property in trust, for the benefit of the lifetime beneficiary and the remainder beneficiaries. This belief by a decedent donor is often not shared by the recipients of his largesse. This divergence in opinion often creates hostility by the donee against the (dead) donor. Since the donor is unavailable to hear the complaint of the beneficiary, however, the anger is usually displaced and redirected towards the fiduciary, and occasionally (derivatively) at the lawyer. Besides the purposes of probate avoidance and disability planning, both of which may serve everyone's benefit, a conflict of interest often exists, either potential or actual, among the trust beneficiaries. There may also be conflict among the co-trustees if they have different interpretations of the settlor's intent and the trust provisions, or different views regarding investment strategies and distributions.

There also may be potential for conflict between the attorney and the trustee or between the trustee's attorney and the beneficiaries.

When confronting these potential conflicts, the attorney faces multiple challenges. One challenge is discharging the legal duty to clarify the identity of the attorney's client; i.e. the trustee. The second challenge is often practical: maintaining an effective administration without needlessly antagonizing either the (nonclient) beneficiary, or the (client) trustee.

Each of the following common situations presents the attorney with the challenge of appropriately addressing the ethical, malpractice and practical issues at hand:

Case A: A married couple is your joint estate-planning client. They are the settlors and original trustees of the revocable trust. One of them dies and the surviving spouse is the sole remaining trustee. The marriage was enduring and successful. All of the property was community, or some fashion of joint ownership. The survivor has no understanding of the consequences of the multiple subtrusts established by the instrument. The survivor considers all the trust property to be subject the exclusive dominion and control of the survivor.

Case B. A married couple was the joint estate planning client. Their marriage is the second for both. Upon the first death the survivor is the sole trustee. The decedent is survived by the surviving spouse, a child of the marriage, deceased client's children from a prior marriage, and the surviving spouse's children from a prior marriage. The deceased's children from a prior marriage and the child of the marriage are beneficiaries of the bypass and QTIP trust.

Case C: Your client dies and the surviving spouse is the successor trustee. Your client with substantial separate property is survived by the much younger surviving spouse and the client's children from a prior marriage, who are the remainder beneficiaries of the bypass trust and the QTIP trust.

Case D: The surviving spouse of your married clients has died and only one of the beneficiary children is named as the successor trustee. The settlors named the child they believed to be the most responsible (because that child is the favorite) of their three children to be the trustee. One of the other children has financial difficulties and the other has a rocky marriage. Alternatively, all three are doing well but there are long-standing family tensions. In any event, the appointment of one in preference to the others itself becomes a source of tension. This strain is usually compounded by a plan that requires the bypass and survivor's trust to continue for the lifetime of the children and then to be distributed to the grandchildren.

Potential issues to address in the common scenarios above include the following:

- Clarifying the scope of representation with the surviving spouse trustee or any other successor trustee;
- Counseling the surviving spouse client about whether to serve as trustee;
- Providing proper disclosures and obtaining informed consents (waivers), depending on other members of the family previously or currently represented;
- Providing appropriate disclosures and notice of non-representation to relevant parties (e.g. other beneficiaries);
- Counseling the individual trustee regarding trust administration: funding the subtrusts, investment duties, duty to account and report, etc.; and
- Assessing the potential for trust litigation: will and trust contests, property disputes or claims by and against the trust estate, actions against the trust or trustee, claims of beneficiaries' creditors, determination of heirs and beneficiaries.

Knowing what the law requires does not guarantee results: often, the challenge is in not knowing what the law is, but in the implementation. How do you obtain the required informed consent? How can you most effectively guide your trustee-client to comply with what the law requires? How can you minimize the risk of liability to third parties? How to achieve the desired outcome you desire?

II. CREATING THE ATTORNEY-CLIENT RELATIONSHIP

A. In General

Under California law, the attorney-client relationship with all its attendant fiduciary duties may be created without a formal agreement or the payment of fees. The general rule is that the attorney-client relationship exists if the client has a reasonable basis for believing that it does. *Butler v. State Bar* (1986) 42 Cal.3d 323, 329; *Miller v. Metzinger* (1979) 91 Cal. App. 3d 31, 154 Cal. Rptr. 22.

When an attorney is approached by any party, the attorney should make certain to refrain from receiving confidential information until a conflicts check is completed. Having an effective and efficient conflicts-check program therefore is good self-protection. Providing material advice or receiving confidential information may create a basis for the argument that the attorney has engaged in a conflict of interest. The attorney therefore must determine the identity of potentially adverse parties before receiving confidential information. See *Flatt v. Superior Court* (1984) 9 Cal 4th 275.

Similarly, when multiple parties approach the attorney for joint representation, the attorney should discuss the ethical rules that govern the

attorney's conduct. The attorney may not be able to represent all of the various parties who have approached the attorney. A prudent attorney may not want to represent the various parties. In any event, the attorney should determine who is to be the client and what the scope of the representation will be.

Equally important is the need to *communicate* that decision to the interested persons. When an attorney declines a matter, the attorney should confirm this non-engagement in writing. Some particularly cautious practitioners believe that this non-engagement should be confirmed in writing if the client chooses not to retain the attorney.

B. Who Is the Client?

Anytime an attorney is requested to take on another matter or another party, remember that it is a **new engagement**. As with every new engagement, the attorney needs to consider the applicable ethical and practical issues.

Necessary questions for the attorney to ask:

1. Who is the current client: what is the scope of this representation, and what confidential information do I have because of this representation?

2. Who was the previous client: Who have I represented, what was the scope of that representation, and what confidential information do I have because of that representation?

3. Who is the prospective client: Do the ethical rules regarding loyalty, confidentiality, and competence allow me to take on this new client or participate in this new matter?

4. Is it practical or prudent, assuming that it is ethical, to represent this new client or new matter?

Applying the ethical rules should lead the attorney to make any required disclosures, to obtain the appropriate consents, or to decline taking on the new matter or client.

C. Potential Conflicts of Interest

Potential conflicts of interest include the following:

1. The potential client's interests in the matter may potentially or actually conflict with another potential client's interests in the matter (e.g. married couple, co-trustees);

2. The potential client's interest in an un-related matter whose interest in another matter is adverse to the interest of a present client (e.g. beneficiary of trust requests representation in a matter regarding a family

business dispute that may indirectly adversely affect, the current client-trustee's individual interest);

3. The past client's interest in the matter that may conflict with the potential client's interests in the matter (*e.g.* beneficiary of past client's trust, surviving spouse as successor trustee);

4. The attorney's own current or past legal, business, financial, professional, personal relationship with a party in the same matter (*e.g.* attorney appointment as fiduciary); and

5. Attorney's relationship with another party's attorney.

D. Duty to Avoid Conflict of Interest

This duty of loyalty includes the duty to avoid conflicts of interest and the duty of confidentiality. Thus, the analysis of rules regarding duty to avoid conflict of interest⁶ often relies on the duty of loyalty and the duty of confidentiality.

1. CRPC Rules Regarding Conflicts of Interest

The major ethical rules regarding conflict of interest relevant to the establishment of the attorney-client relationship as stated in the CRPC Rules is summarized below:⁷

Rule 3-300 Avoiding Interests Adverse to a Client

An attorney may not enter into a business transaction with the client that benefits the attorney unless the terms are fair and reasonable to the client and fully disclosed in writing. The disclosure must provide written advice that the client may seek independent legal advice regarding the matter, and give the client reasonable opportunity to seek that advice, and thereafter obtain the client's written consent.

Rule 3-310. Avoiding the Representation of Adverse Interests.

Generally, an attorney cannot represent parties having adverse interests, in the same or different matter; however, potential or even actual adverse interests may not preclude representation if the required written disclosure is provided or the required written consent is obtained.

Rule 3-320. Relationship With Other Party's Lawyer.

An attorney should inform in writing the attorney's client when the other party's attorney is someone related to or intimate with or a client of the attorney.

⁶ CRPC Rule 3-300 Avoiding Interests Adverse to a Client. CRPC Rule 3-310 Avoiding the Representation of Adverse Interests.

⁷ See Appendix A for full text of selected CRPC rules.

2. ABA MRPC Rules on Conflicts of Interest

The ABA MRPC rules on conflicts of interest are Rules 1.7 Conflict of Interest: Current Clients, 1.8 Conflict of Interest: Current Clients: Specific Rules, and 1.9 Duties to Former Clients.⁸

Differing from the CRPC's language of potential and actual conflict, Rule 1.7 addresses "directly adverse" interests and "material limitations" on representation. Rule 1.8 provides a list of transactions that are prohibited due to conflict of interest, unless the client provides written consent. Rule 1.9 addresses conflict of interest relating to former clients.

3. Case Law Regarding Conflict of Interest Between Attorney and Client

The fiduciary relationship between the attorney and client is of the highest character.⁹ Due to the nature of the relationship between the attorney and client, there is a presumption of undue influence in any transaction between the two parties after the initial employment agreement.¹⁰

In *Estate of Auen* (1994) 30 Cal. App. 4th 300 [35 Cal. Rptr. 2d 557], certain inter-vivos gifts and a will making bequests to an attorney and the attorney's family were invalidated because the attorney could not rebut the presumption of undue influence that arose because of the attorney-client relationship.

In the Matter of Hultman (Review Dept. 1995) 3 Cal. Stage Bar Ct. Rptr. 297, concerned an attorney with no prior record for discipline. While serving as trustee the attorney made loans to himself. In affirming the hearing judge's recommendation and adding a finding of moral turpitude, the review board stated "Based on the seriousness of the misconduct, which included repeated improper self-dealing by a fiduciary and grossly inadequate record keeping that prevents accurate accounting to this day, and comparable case law, we conclude that three years stayed suspension with three years probation and a 60-day period of actual suspension is warranted." For similar cases, see *Schneider v. State Bar of California* (1987) 43 Ca. 3d 784 [239 Cal. Rptr. 111], *Hunnecutt v. State Bar of California* (1988) 44 Cal. 3d 362 [243 Cal. Rptr. 699].

E. Applying the Duty to Avoid Conflicts of Interest

1. CRPC Rule 3-310 (C) and (E)

Anytime that the attorney represents more than one party regarding a single or related matter or the attorney is considering representing parties with

⁸ See Appendix B for full text of selected ABA Model Rules of Professional Conduct.

⁹ *Alkow v. State Bar of California* (1971) 3 Cal.3d 924 [92 Cal. Rptr. 278].

¹⁰ *Eschwig v. State Bar of California* (1969) 1 Cal. 3d 8 [81 Cal. Rptr. 352] (purchase of property by probate attorney during probate sale).

adverse interests in an unrelated matter, a waiver of conflict or consent to representation will probably be necessary.

The term “waiver” of conflict of interest is often used as synonymous with “consent” to multiple representations (whether separate or joint). The term “waiver,” however, is not used in the CRPC. The term “conflict waiver” or “waivers of conflict” should be interpreted as “written disclosure” or “informed written consent,” as appropriate.

“Informed” consent means that a simple “waiver of conflict” or “consent to the conflicts” reflected by a simple statement of waiver or consent is not sufficient. That is, the client must have an understanding of specific circumstances and examples of the conflicts of interest and its risks. Preferably, this information should be orally discussed and provided in writing.

Especially when joint representation of multiple clients in the same matter is involved, as is the case with estate planning and estate or trust administration, the informed written consent should explicitly describe where the areas of potential conflict are, giving as specific examples as possible.

A careful review of CRPC Rule 3-310(C) and (E) and any relevant case law is necessary to determine whether the attorney may represent more than one party in a matter, represent parties in unrelated matters, or take on a client with interests adverse to that of a former client.

Rule 3-310 (C) and (E) provides:

“(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.”

“(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.”

According to the language of these rules, “informed written consent” of each client is necessary when there are potential or actual conflicts of interests in the same matter. Informed written consent is also necessary when the potential client has interests adverse to the first client in a separate matter. In addition,

informed written consent of a current or former client is needed prior to accepting employment adverse to that current or former client, if the attorney has obtained confidential information material to the contemplated employment from the previous current or former client.

Note that if disclosure of the relevant information were precluded by an existing duty of confidentiality to a past or current client, then informed consent would also be unavailable.

Regardless of whether the parties are willing and able to waive the conflict of interest and consent to the multiple representation, the attorney must also scrupulously determine whether the attorney will be able to able practically to fulfill the attorney's duty of loyalty, competence, and confidentiality to each of the parties prior to accepting dual or multiple representation. That is, the duty to obtain consent and the other duties (loyalty and adequate representation) are both necessary requirements.

In California, when multiple parties are represented, it is presumed that the representation is joint, rather than "separate." While "separate" representation is sometimes undertaken in states outside of California, in California it is considered unusual and risky.¹¹

If a potential conflict becomes an actual conflict, it is advisable to obtain further informed written consents of the relevant parties. At this point, the attorney also has to reassess whether adequate representation of both parties is possible. See *Zador Corp. v. Kwan* (1993) 31 Cal.App.4th 1285 (A conflicts waiver of a potential conflict signed by a Client X prior to the conflict was sufficient to permit the attorney to continue to represent Client Y once the conflict became an actual conflict. Client X reaffirmed consent and obtained new counsel.)

2. ABA MRPC Rule 1.7

Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

¹¹ *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* (Estate Planning, Trust and Probate Law Section, State Bar of California 1997) p. 15 (lists articles and sources regarding this issue).

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The comment to Rule 1.7, the general rule regarding conflicts of interest, begins with “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client” and continues to expatiate on the ramifications of this duty of loyalty and the duty to avoid conflict of interest, including the general rules regarding representation of adverse interests.

The client consent for representation that would otherwise be prohibited must satisfy four requirements: (1) the lawyer must reasonably believe that the lawyer will be able to provide competent and diligent representation to each client; (2) the representation is not against the law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding; and (4) the client gives informed, written consent. “Informed consent” is defined by the Model Rules as an 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.” *Model Rules of Professional Conduct*, Terminology (2002).

3. Examples

a) Adverse Interests in Litigation

Even if the parties wish to give consent, an attorney cannot represent parties with adverse interests in contested matters. *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 288 [36 Cal. Rptr. 2d 537]; *GATX/Airlong Co. v. Evergreen Int’l Airlines, Inc.* (N.D. Cal. 1998) 8 F.Supp. 2d 1182; *Florida Bar v. Sofu* (Fla. 1996) 673 So. 2d 1.

b) Adverse Interests Broadly Construed

In *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal. App. 4th 1017 [117 Cal. Rptr. 2d 685]; an attorney was disqualified from serving as a deposition witness to another party. The court reasoned that the application of Rule 3-310(C) does not require representation of both clients as an attorney. The discussion section of Rule 3-310 states: "Subparagraphs (C) (1) and (C) (2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship."

Generally, a lawyer may not represent a client if representation would require cross-examination of current client as adverse witness. **ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-367.**

c) Adverse Interests in Unrelated Matter

In *Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 288 [36 Cal. Rptr. 2d 537], an attorney met with a prospective client during which confidential information and documents were discussed. Upon later discovering that the person against whom the prospective client was intending to file a lawsuit against was an existing client whom the attorney's firm represented in an unrelated matter, the attorney acted promptly to terminate the relationship with the prospective client, offering no advice. That prospective client postponed obtaining alternate counsel for a year and a half and by that time, the statute of limitations may have applied to bar his claim. He then filed a legal malpractice claim against the attorney. The issue was whether the attorney had any duty either to advise seeking alternative counsel or inform the prospective client regarding the applicable statute of limitations. The Supreme Court held that duty of loyalty to the existing client meant that the attorney had no duty to give the prospective client any advice. The Supreme Court stated that for evaluating conflict claims regarding simultaneous representations, as opposed to successive representations, the rule of disqualification applies almost per se or automatically. *Id.*, at 284. The rule of disqualification is not based on the obligations regarding client confidentiality since the matters are wholly unrelated; instead, it rests on the duty of loyalty. The court adds that the rule of disqualification in cases of dual representations involving unrelated matters is so self-evident, there are hardly any court opinions to cite in support of it, but that the few that exist "leave no doubt as to the rule and its operation," citing *Grievance Committee v. Rottner* (1964) 152 Conn. 59 [203 A.2d 82] and *Cinema 5 Ltd. v. Cinerama, Inc.* (2nd Cir. 1976) 528 F. 2d 1384, among others.

In *Harrison v. Fisons Corp.* (M.D. Fla.1993) 819 F. Supp. 1039, a law firm was disqualified from representing the defendant brought by a bank because the firm was representing the bank in an unrelated matter.

A lawyer who represents partnerships and individual partners, even on unrelated matters, may result in the lawyer possessing confidences of one client that may not be revealed to another, leading to requiring that the lawyer withdraw from one or both representations. ***ABA Comm. On Ethics and Professional Responsibility, Formal Op. 91-361.***

4. Establishing the Scope of Representation

The attorney should provide explicit description of the scope of representation. While it may be difficult to anticipate the various matters that will arise during trust administration, it may be better to state explicitly what the initial scope of representation is to be and add that any additional matters will be the subject of subsequent engagement letters.

An engagement letter with the trustee clearly delineating the scope of the attorney's responsibilities and the trustee's responsibilities will work to avoid many a dispute between the attorney and the trustee. Importantly, it will alert the trustee to the trustee's duties, making it more likely that the trustee will take action to complete them.

a) CRPC Rule 3-310(C)

CRPC does not have a separate rule regarding scope of representation; however, Rule 3-310 regarding joint representation of clients implies that a necessary element of obtaining the requisite written consent would be a clarification of the scope of representation.

When clients with potential or actual conflicts are involved, the clients and the lawyer may together define the scope and goal of the representation to make joint representation workable, if that is desired.

b) ABA MRPC Rule 1.2

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer (Excerpts)¹²

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), (e), and shall consult with the client as the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter...

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

c) Representing Trustee-Client Who Wears Many Hats

The attorney needs to examine the potential conflicts of interest carefully to define the scope of representation, even when there is only an individual client, if that client serves multiple roles.

¹² See Appendix B for full text of Rule 1.2.

For example, when the attorney represents an individual who is both a trustee for the benefit of a minor and the guardian of the estate of that minor, the trustee's own conflict of interest may result in the attorney not being able to provide adequate representation to one of the roles. That is, there may no Rule 3-310(C) problem when there is only one individual client, who is both the trustee and guardian (or trustee and general partner); nonetheless, the client's own potential of conflict of interest while serving in dual capacities may result in the attorney's participation in the trustee's possible breach of duty.

In *Potter v. Moran* (1966) 239 Cal. App. 2d 873 [49 Cal. Rptr. 229], an order settling the accounts of a trustee was not binding on the beneficiaries because the lawyer had violated his duty to inform the court that the lawyer represented both the trustee and the guardian for the beneficiaries, who were two different persons. The court remanded the case to have the accounts reexamined in light of the fact that the interests of the beneficiaries were not adequately protected, due to the trustee and guardian having the same attorney.

When a trustee, who is also guardian of a minor, obtains court orders that adversely affect the interests of the minor as a beneficiary, and the minor has no representation other than that of the trustee, the orders are invalid and may be vacated by the court. *Estate of Charters* (1956) 46 Cal.2d 227, 293 P.2d 778.

5. Waiver of Attorney-Client Privilege

When joint representation is involved, the attorney needs to explain that confidential communications by any one of them to the attorney are not privileged among the joint clients and may need to be disclosed by the attorney to other noncommunicating parties. See Evid. Code § 962.

6. Possibility of Withdrawal

In addition, when joint representation is involved, the attorney should discuss the possibility that the attorney must withdraw from representation. It may be possible for the parties to consent to the attorney continuing to represent one of the jointly represented parties if this option was discussed, disclosed and consented to. See *Los Angeles County Bar Association Formal Opinion No. 471* (1992); *Croce v. Superior Court* (1937) 21 Cal. App.2d 18 (authority questioned by *Industrial Indem Co. v. Great American Insurance Co.* (1977) 73 Cal. App. 3d 529 [140 Cal. Rptr. 806]; and *Goldstein v. Lees* (1975) 43 Cal. App. 3d 614.

7. Engagement Letters

It is essential to memorialize the discussions of the various elements discussed above: scope of representation, possibility of withdrawal, conflicts of interest, delineation of duties of respective parties.¹³

¹³ Samples of engagement letters can be found at Appendix E to this outline, and at ACTEC Engagement Letters: A Guide for Practitioners (ACTEC 1999) for use with the ACTEC

F. Representing Co-Trustees, Successor Trustee

The very fact that there is more than one trustee should alert the attorney that there might be differences in opinion, skill, and goals of the trustees.

Before representing co-trustees, the attorney should obtain the requisite informed written consent. Specify in the consent the areas of potential conflict, the waiver of confidentiality between the co-trustees, and the consequences of subsequent termination of joint representation, including whether the attorney may continue representation of one of the co-trustees.

Other than a change of trustee that occurs upon death, often the replacement of one trustee by another is due to an actual or threatened dispute between the trustee and beneficiaries. See discussion in section III below regarding the right of the successor trustee to confidential communication between the predecessor trustee and its attorney.

Whether it is possible or advisable to represent the subsequent trustee should be analyzed under the ethical rules. Keep in mind that informed written consents are not sufficient: it is only the threshold test. The other substantive test is whether the attorney will be able to fulfill the duties of confidentiality and competent representation. In a context when there is overt or latent hostility, it is unlikely that the attorney would be asked to serve, and unlikely that the attorney would want to serve.

Powers vested in two or more trustees must be exercised unanimously, unless the trust instrument provides otherwise. If unanimity cannot be achieved, one avenue open to the trustee is to petition the court under Probate Code § 17200 to resolve their dispute. To avoid awkward situations where the attorney is placed between disagreeing trustees, the attorney and cotrustees should discuss beforehand how disagreements, both minor and major, should be handled.

G. Representing A Trustee Who Is also a Beneficiary

Often, the individual trustee is also a beneficiary. A recent California Supreme Court case, *Borissoff v. Taylor & Faust* (2004) 33 Cal. 4th 523, implied in dicta that an attorney who undertakes to represent a fiduciary in the latter's personal and fiduciary capacities simultaneously, when that entails a conflict of interest" is analogous to a lawyer who represents a corporation and its officers simultaneously. *Id.* at 534. While some practitioners believe that concurrent representation of a trustee as both fiduciary and beneficiary does not usually present a conflict¹⁴, the author believes that it may be inadvisable to represent the trustee-beneficiary in that individual's capacity as trustee and also as beneficiary, especially when there are other beneficiaries. The author's preferred

Commentaries on the Model Rules of Professional Conduct (ACTEC 3d 1999); California Trust Practice (Matthew Bender, 2002).

¹⁴ See *The Fiduciary Conflict: One Lawyer or Two?* (California Trusts and Estates Quarterly, Vol. 12, Issue 2, Summer 2006).

practice is to encourage the trustee/beneficiary to obtain separate counsel to represent the individual as a beneficiary. The author's experience is that such trustees are reluctant to incur the additional cost except when a vigorous dispute over a great deal of money occurs.

Although the trustee may be faced with conflicts of interest, the attorney is not because there is only a single client. That is, CRPC Rule 3-310 does not apply because it deals with multiple clients. Nonetheless, despite the fact that there may not be an ethical barrier under CRPC Rule 3-310 to representing such trustee in the fiduciary capacity and as beneficiary and/or individually, other ethical, practical and liability concerns make it better to simply represent the trustee solely in the trustee capacity. Beyond the conflict rules of CRPC Rule 3-310, the general ethical duties of loyalty and adequate representation and the practical issues of dealing with other beneficiaries of the trust make it impractical for the attorney to represent the trustee in the trustee's beneficiary capacity.

Thus, in defining the scope of representation, the attorney and client should limit the representation to trust administration and not with respect to other matters, such as the trustee's beneficial interest in the trust. Limiting the representation in this manner may give attorney more credibility to the other beneficiaries by avoiding the concern that the attorney's duty of loyalty to the client will interfere with the attorney's role in trust administration.

When representation is strictly limited to the client's role as the trustee, it may even be appropriate for the attorney and client to agree that all information, including what would otherwise be protected by the duty of confidentiality, be made available to the beneficiaries. In addition, if the representation is to be limited in this way, it may be advisable for the attorney to inform the trustee that the trustee may wish to consult separate counsel regarding any concerns about disputes with the other beneficiaries.

When the trustee is also a beneficiary, the attorney should advise and frequently remind the trustee of the trustee's fiduciary duties, including the duty of impartiality under Probate Code §16003, toward the various beneficiaries. The attorney should also be aware that the attorney might also be liable for the trustee's breach of duty if the attorney participates in such breach. See discussion below in section VI. See Appendix E for a form of such letter.

H. Representing Trustee as Fiduciary and as Individual

The trustee-client may request the attorney to represent the trustee-client, not only as the trustee, but also individually, such as for trustee's own estate planning. Regardless of whether this type of multiple-role representation is advisable, it is quite common, especially when the representation is begun when there are no disputes pending. However, representing the trustee as the trustee and as an individual may lead to some practical, if not ethical conflicts. For example, unless the trustee fee is predetermined, the trustee would be acting in

his own interest in submitting a request for compensation or defending a challenge to the account or a claim of breach of fiduciary duty.

When the attorney represents the trustee in the trustee's fiduciary capacity and individually, the attorney should be conscientious in the billing and charge for such services separately. See section IV G.5 regarding attorney's fees.

In *Smith v. Jordan* (1904) 59 Atl. 507, 508, the Connecticut Supreme Court states in dicta, in a probate context, that sound policy forbids the practice of an attorney representing the administrator also to represent the administrator as claimant.

I. Representing the Trustee and a Beneficiary

Representing both the trustee and a beneficiary in the same matter is permissible if the informed written consents of both clients are obtained, as provided in CRPC 3-310(C)(1). The potential conflict of interest is present in the naturally possible adverse positions of the two parties regarding various issues, including trustee compensation, settlement of fiduciary's accounting, and breach of trustee's duties to the beneficiaries.

This is a situation where the attorney may be considering separate rather than joint representation, in order to avoid being required to disclose confidential information obtained from one client to the other. Since in general, separate representation is not favored in California, the attorney should think carefully whether the attorney can fulfill the other ethical duties of loyalty and competence and provide adequate representation for both parties before taking on separate or joint representation. It is probably unlikely that separate representation is possible. The attorney should also discuss whether the attorney may continue to represent one client if an actual conflict arises.

If the attorney will be representing only some of the beneficiaries, an issue to be examined is whether the trustee's duty of impartiality under Probate Code § 16003 is somehow compromised. To prevent any allegation of a violation of the trustee's duty of impartiality, it may be prudent to obtain the informed written consent of all beneficiaries or to obtain court approval, for any such selective representation of other beneficiaries, or for any other action by the trustee that may be construed as favoritism.

Representation of some but not all of the beneficiaries should be considered carefully since the attorney will face the practical challenge of convincing the other beneficiaries that the attorney is not somehow more "loyal" to his client-beneficiaries.

"Whether the attorney for an administrator of an estate may act for one of the heirs as against the other heirs in an adversary proceeding relating to the property of the estate depends on the circumstances of the particular case, and whether there is any conflict between the interests of the estate and those of the

heir in respect of the matter involved.” *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal. App. 3d 307, 318 [160 Cal. Rptr. 239], citing *McCabe v. Healy* (1902) 138 Cal. 81, 91 [72 P. 359], and *Fairchild v. Bank of America* (1961) 192 Cal.App.2d 252, 258 [13 Cal.Rptr. 491].

In re Estate of Healy (1902) 137 Cal. 474, 70 P. 455, involved a petitioner who was an heir unhappy with the administrator. The malcontent petitioned to remove the administrator, alleging that administrator violated his duty to the trust by retaining an attorney who also represented another heir in a dispute with the petitioner. The court held that the attorney for the administrator of an estate did not violate any duty to the administrator by at the same time serving as the attorney for an heir in a dispute with other heirs in which the administrator had no interest; and also that the administrator violated no duty by retaining such attorney. The court noted that the dispute “is in effect a suit to determine a controversy between different heirs as to their respective rights of inheritance, and in such a controversy it is well settled that the administrator has no interest, but is a mere officer of the court, holding the estate as a stakeholder, to be delivered to those whom the court shall decide to be entitled thereto.” (Citations omitted.) *Id.*, at 477.

Estate of Healy illustrates the point that while it may be legal and possible, it may not be a good idea to represent the trustee and a beneficiary.

Where the attorney does represent a fiduciary and a beneficiary, in related or unrelated matters, full disclosure to interested parties and the court is advisable.

“The failure to disclose to the court an attorney's dual representation in a probate proceeding was held to be extrinsic fraud in *Potter v. Moran* (1966) 239 Cal.App.2d 873 [49 Cal.Rptr. 229]. In *Potter* one law firm represented both the trustee of a testamentary trust and the guardian of the estates of two minors, life beneficiaries of the trust. The probate court was not informed of this dual representation before it approved certain accounts of the trustee, including payment of attorneys' fees. Some years later, the residuary beneficiary of the trust brought an action seeking inter alia an annulment of the orders approving the account and the restoration of fees. The complaint also alleged the trustee had been negligent in the sale of certain stocks. The court stated (at p. 877): “It is imperative that in matters of probate, and especially so in matters heard ex parte, that the court be fully informed as to all facts that might influence the decision to be made. There is an affirmative duty to furnish such information, and the court will properly assume that nothing material to the matter in hand has been concealed . . .,” and held the failure of the trustee and attorneys to disclose this dual representation to the court amounted to extrinsic fraud on the court. Therefore, the court vacated the orders and ordered a de novo reconsideration of the accounts, to determine whether fees were reasonable and whether the trustee was negligent.

Potter involved counsel's representation of a trustee and the guardian of the beneficiaries, while this case involves the dual representation of a trustee and a

third party involved in a transaction. Nevertheless, Potter implies that the failure to disclose this dual representation to the court amounts to extrinsic fraud. The failure in Potter to inform the court fully as to all facts that might influence its decision apparently had a substantial effect on the decision. We thus conclude that the court order of July 26, 1972, settling the first account does not preclude appellant by res judicata from now alleging that respondents breached their duty to her.” **Morales v. Field, DeGoff, Huppert & MacGowan** (1979) 99 Cal. App. 3d 307, 313-314 [160 Cal. Rptr. 239.]

III. CONFIDENTIALITY AND PRIVILEGE

A. Duty of Confidentiality

B & P Code § 6068 (e) is the statutory articulation of the attorney’s duty to keep client information confidential. It states:

“It is the duty of an attorney to do all of the following :...(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client...”

This duty of confidentiality is also reflected in CRPC Rule 3-310(E) which requires informed written consent of current or past client where attorney has obtained confidential information material to anticipated second employment.

The notion of client “confidence” and “secrets,” includes not only confidential communications protected by the attorney-client privilege but also other information known by the attorney regarding the client, regardless of source of such information, such as from a third-party or by observation.

The duty of confidentiality expressed in B & P Code § 6068(e) is modified by the exceptions to the attorney-client privilege contained in the Evidence Code. **Fox Searchlight Pictures, Inc. v. Paladino** (Cal.App.2d Dist. 2001) 89 Cal.App.4th 294, 314 [106 Cal.Rptr.2d 906], citing **In the Matter of Lilly** (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 478.

It is advisable to discuss the policies and rules regarding confidential and privileged information in the engagement letter. The attorney should explain that the attorney is acting the under the duties of loyalty and confidentiality toward the client and that the attorney-client privilege also protects confidential communications from discovery, unless the privilege is waived.

B. Attorney-Client Privilege: Evidence Code §§ 950-962.

The attorney-client privilege is an evidentiary rule that limits the disclosure of “confidential communication” between an attorney and client. The attorney-client privilege under the Evidence Code is narrower in scope than that of the duty of confidentiality under B & P Code § 6068(e).

Evidence Code § 952¹⁵ provides that a "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present *to further the interest of the client* in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or *the accomplishment of the purpose for which the lawyer is consulted*" [Italics added.]

The holder of the attorney-client privilege is the client, the guardian or conservator if the client has one, or the client's personal representative. Those who can claim the privilege include the holder of the privilege, someone authorized by the holder of the privilege and the client's attorney. **The attorney must claim the privilege if he can do so.** Evid. Code § 955.

1. Exceptions to the Attorney-Client Privilege

The attorney-client privilege is subject to certain exceptions:

- Services of the lawyer sought to enable or aid client's crime or fraud. Evid. Code § 956.
- Prevention of Criminal Act Likely to Result in Death or Serious Bodily Harm. Evid. Code § 956.5
- Parties claiming through deceased client. Evid. Code § 957.

Swidler & Berlin v. United States (1998) 524 U.S. 399 [118 S.Ct. 2081, 2085, 141 L.Ed.2d 379,385] (privilege survives death in other contexts, despite testamentary exception).

Fletcher v. Superior Court (1996) 44 Cal.App.4th 773, 778, 779, [52 Cal.Rptr.2d 65] (in trust litigation, exception did not apply to communications between trustee, who was sister of the deceased trustor, and her attorney).

- Claim for breach of duty by attorney. Evid. Code § 958.
- The intention or competence of a client when attorney is an attesting witness. Evid. Code § 959.

Estate of Kime (1983) 144 Cal. App. 3d 246 [193 Cal. Rptr. 718]. The exception to the privilege for an attesting attorney allows the attorney to divulge only the information obtained in the capacity as an attesting witness and *not* in his capacity as the attorney. Husband and wife made various arrangements for distribution of property upon dissolution of marriage, but prior to completion of such arrangements, wife was killed in automobile accident. Wife's

¹⁵ See Appendix B for full text of Evid. Code §§ 950-962.

self-prepared will was admitted to probate, but husband filed petition for revocation alleging that document did not qualify as will for failing to recite dispositive provisions. Over husband's objection, the trial court allowed husband's attorney to testify as to matters concerning transmutation of community property to separate property in accordance with property division stipulation. Trial court subsequently decided that executrix took under will, further denying petition for revocation of will, and husband appealed. The Court of Appeal held that: (1) questions put to husband's attorney invaded attorney-client privilege; (2) improper admission of attorney's testimony required reversal; (3) extrinsic evidence was admissible to prove what wife intended to mean by term "executrix" in will which failed to recite explicitly the dispositive provisions; and (4) wife's oral statements concerning disposition of property mentioned in will were admissible.

- The intention of deceased client with respect to writing executed by the client purporting to affect interest in property in issue. Evid. Code § 960.
- The validity of writing affecting interest in property executed by deceased client in issue. Evid. Code § 961.
- Joint clients. Evid. Code § 962.

Industrial Indem. Co. & Great Amer. Ins. Co (1977) 73 Cal. App.3d 529 [536, 140 Cal. Rptr. 806] (although joint clients generally cannot claim the privilege, the exception is not applicable where the joint representation of clients with conflicting interests was undertaken or continued without disclosure and written consent).

2. Case Law Regarding Attorney-Client Privilege

In ***Cooke v. Superior Court*** (1978) 83 Cal. App.3d 582 [147 Cal. Rptr. 915], the wife in marital dissolution proceedings sought disclosure of documents from her husband. The documents had been shared by the husband with his son and with third persons during a lawsuit that involved the family business. The attorney-client privilege was found not to be waived because disclosure was reasonably necessary to further the interests of the husband in the business litigation. *Id.* at p. 588.

In ***Raytheon Co. v. Superior Court*** (1989) 208 Cal. App. 3d 683 [256 Cal. Rptr. 425], a federal investigation was commenced regarding the toxic condition of certain property. Two unaffiliated corporations implicated in the investigation exchanged certain documents between themselves and their counsel. Several years later, both corporations, and others, were named as defendants in a lawsuit by private parties seeking damages for causing the toxic condition. When the plaintiffs sought production of the documents that the two corporations had shared between themselves and their respective counsel, the

corporations claimed the documents were protected by the attorney-client and work-product privilege. The court of appeal ordered the matter remanded for a determination pursuant to Evidence Code section 912 of whether the disclosure of the documents was reasonably necessary to accomplish the purpose for which the attorneys were consulted. *Id.* at p. 688.

Federal cases applying California law also support the reasoning of ***Raytheon*** and ***Cooke: Bank of the West v. Valley Nat. Bank of Arizona*** (N.D.Cal.1990) 132 F.R.D. 250; ***Great American Surplus Lines Ins. v. Ace Oil Co.*** (E.D.Cal.1988) 120 F.R.D. 533.

The privilege protects only the disclosure of communications between attorney and client. It does not protect disclosure of the underlying facts that were communicated. ***Upjohn Co. v. United States*** (1981) 449 U.S. 383, 395-396 [101 S.Ct. 677, 685-686, 66 L.Ed.2d 584]; ***Coy v. Superior Court*** (1962) 58 Cal.2d 210, 219-220 [23 Cal.Rptr. 393].

- Communications between the attorney and the trustee-client is protected by the attorney-client privilege from discovery by the beneficiaries.

Wells Fargo Bank v. Superior Court (Boltwood) (2000) 22 Cal 4th 201 [91 Cal.Rptr.2d 716]. The Supreme Court held that there is no "implied exception" to the attorney-client privilege under Evidence Code § 952 for communications involving trust administration. After some trust beneficiaries accused co-trustee of misconduct in administration of trust, trustee commenced action to settle its accounts and to approve its resignation. Beneficiaries filed objections to trustee's accounts, petitioned for removal of other co-trustee, petitioned for surcharge and for damages, and sought production of documents related to trust. Trustee asserted attorney-client and work product privileges as to some requested documents, and beneficiaries moved to compel production. The Superior Court granted the motion. Trustee petitioned for writ of mandate/prohibition. The Court of Appeal, vacated discovery order, and beneficiaries petitioned for review. The Supreme Court granted review. The Supreme Court held that: (1) there was no authority for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of whether communications dealt with trust administration or allegations of misconduct, and (2) work product of co-trustee's counsel was not subject to discovery by beneficiaries.

3. Case Law Regarding Attorney-Client Relationship and Successor Trustees

- The attorney should inform the trustee that the "holder" of the privilege regarding communications between the attorney and the trustee is generally not the trustee individually, but the trustee as fiduciary.

Moeller v. Superior Court (1997) 16 Cal.4th 1124 [69 Cal.Rptr.2d 317]. In **Moeller**, Sanwa Bank, the predecessor trustee resisted discovery requests from successor trustee, Moeller, arguing that the information requested was confidential communications protected by the attorney-client privilege. The Supreme Court sided with Moeller, stating that as successor trustee, he had right to the confidential communications between the predecessor trustee and its attorney. Nonetheless, the “successor trustee inherits the powers to assert the privilege only as to those confidential communications that occurred when the predecessor, *in its fiduciary capacity*, sought the attorney’s advice for guidance in *administering the trust*. If a predecessor trustee seeks legal advice in its personal capacity out of genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for advice out of its personal funds.” *Id.*, at 1134. The distinction between communication about trust administration and communication regarding potential liability was affirmed in *Wells Fargo Bank v. Superior Court (Boltwood)* (2000) 22 Cal. 4th 201. The Supreme Court noted that the holder of the privilege for the communication regarding trust administration is the current trustee. For the communication regarding potential liability, the Court stated that it is the individual who consulted the attorney. [This distinction supports the view that when the attorney represents the trustee in the fiduciary capacity and individually, the attorney should take meticulous care in billing and filing of documents to substantiate the claim of attorney-client privilege for the representation for the trustee as an individual.]

The California Supreme Court refused to extend **Moeller** in **Boltwood** to extend the trustee’s attorney-client privilege to trust beneficiaries. Nevertheless, in *Borisoff v. Taylor Faust*, the Court relied on **Moeller** in holding that a successor trustee had standing to bring a malpractice action against an attorney retained by the predecessor trustee. Accordingly, the court appears to treat differently the relationship between the attorney and the office of the trustee and the relationship of the trustee’s attorney to the beneficiaries. Other state courts appear to disagree with this reasoning. The Oregon Court of Appeals rejected the holding of **Moeller** in dicta in a negligence case: **Roberts v. Fearey** (1999) 162 Or. App. 546 [986 P.2d 690] (Successor trustee brought legal malpractice action, on behalf of the trust and trust beneficiaries, against former trustee’s attorney, relating to trust’s economic losses from questionable loans. The trial court granted summary judgment to attorney. Successor trustee appealed. The Court of Appeals held that the former trustee’s attorney owed no duty to protect the trust or the beneficiaries from economic losses from former trustee’s questionable loans).

- The work-product of the attorney representing a trustee-client is protected by the work-product privilege from disclosure to trust beneficiaries.

Lasky, Haas, Cohler & Munter v. Superior Court (1985 2d Dist.) 172 Cal. App.2d 264 [218 Cal. Rptr. 205]. Trustee’s attorneys sought writ of mandate to compel superior court to vacate its order requiring attorneys to disclose to trust

beneficiaries materials containing their impressions, conclusions, opinions, or legal research or theories generated while assisting trustee. The Court of Appeal held that: (1) attorney is exclusive holder of work-product privilege; (2) public policy underlying full disclosure by trust beneficiary did not overcome manifest legislative intention to create absolute work-product privilege; (3) beneficiaries were not clients of trustee's attorneys; and (4) all internal, oral communications between trustee's attorneys that were eventually reduced to written form by them and not communicated outside their law firm were privileged from discovery by trust beneficiaries who sought to remove trustee for mismanagement.

C. Communications with the Beneficiaries

Under California case law discussed above, the beneficiaries have no right to compel production of information protected by the attorney-client privilege or the work product doctrine. *Wells Fargo Bank v. Superior Court (Boltwood)* (2000) 22 Cal.4th 201 (communications between the trustee and its attorneys protected by the attorney-client privilege cannot be discovered by beneficiaries); *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal. App. 3d 264 (work product protected from discovery). These cases are in line with California law's general emphasis on importance of the duties of loyalty and confidentiality of the attorney to the client.

Nonetheless, the attorney's duty of confidentiality to the trustee would still allow the attorney to provide information to the beneficiaries to the extent that such information would not be protected from discovery in litigation between the fiduciary and the beneficiaries. For mutual clarity and convenience, the attorney and the client should agree on how the attorney is to communicate with the beneficiaries and what information is to be disclosed to them. See section VI for further discussion on communications and contact with the beneficiaries.

As an agent of the trustee, the attorney may, and in certain instances, may be required to, provide the information to the beneficiaries that the trustee must provide the beneficiaries pursuant to the trustee's obligations to report information and to account to the beneficiaries.

IV. COUNSELING THE TRUSTEE-CLIENT

A. In General

The attorney representing the trustee-client often faces the challenges of educating and guiding the individual trustee-client as to the trustee's duties as trustee. The attorney can play a crucial role in preventing trustee malfeasance and from preventing trust administration deteriorating into trust litigation.

B. Trustee's Duties

The Trustee's duties are provided in the trust instrument and by statute. A few of the applicable provisions from the California Probate Code are set forth below.

1. Duty to Administer the Trust

Prob. Code § 16000. Duty to Administer Trust. On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division [Prob. Code §15000-19403].

A simple point, often not fully appreciated until litigation, is the importance of the trustee's duty to carry out the settlor's intent as expressed in the trust instrument. The trustee may argue either or both that the trustee was acting in good faith and that a change in circumstances warranted actions unplanned for by the settlor's intent. The opposing side will argue that where the settlor's intent is clear, neither good faith nor change in circumstances justifies the trustee's actions. Such potential antagonism regarding "the settlor's intent" suggests that where the trustee's actions are not clearly within the realm of trustee discretion granted by the trust instrument, it may be worthwhile to obtain court guidance on the proper course of action.

2. Duty of Impartiality

Prob. Code § 16003. Duty to Deal Impartially With Beneficiaries. If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.

This duty of impartiality is especially important when the trustee is also a beneficiary. The trustee-beneficiary is especially vulnerable to the charge of partiality and self-dealing; the attorney should caution the trustee-client about the strictures against partiality and self-dealing.

3. Prudent Person Rule

Prob. Code §16040. Trustee's Standard of Care; modification by trust instrument . (a) The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument. (b) The settlor may expand or restrict the standard provided in subdivision (a) by express provisions in the instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions. (c) This section does not apply to investment and management functions government by the Uniform Prudent Investor Act.

All the actions of the trustee, other than those relating to investment, are subject to the prudent person rule. For discussion of the Prudent Investor Rule, please see section V.5. below.

4. Trustee's Discretionary Powers

The trustee must exercise any discretionary power reasonably, not arbitrarily. Prob. Code § 16081. The attorney should advise the trustee that even when the trust provides that the trustee have “absolute,” “sole,” or “uncontrolled” powers, the trustee must still act in accordance with fiduciary duties and must not act in bad faith or in disregard of the purposes of the trust. Prob. Code § 16081. Grants of absolute discretion are viewed as exculpatory and strictly construed. *Estate of Collins* (1977) 72 Cal. App. 3d 663 [139 Cal. Rptr. 644].

C. Prudent Investor Rule

1. Introduction

A new era in family trust asset management arrived with the codification of the California Uniform Prudent Investor Act (“the Act”), effective beginning January 1, 1996. Probate Code Section 16045 et seq. The substance of this Act suggests that the fiduciary/trustee needs to take certain steps in order to avoid liability -- including establishing written investment objectives and guidelines for decision-making.¹⁶

The cornerstone of this Act is found in Prob. Code §16047 –“Prudent Investment Rule” which established modern portfolio theory (“MPT”) was the preferred tool for management of trust investment. MPT’s fundamental idea is that the value and cost of an asset is a function of the rate of total return (anticipated income and appreciation) and the risk that the actual return will fall short of the anticipated return. The amount of acceptable risk that a particular asset will fall short of its expected return is not evaluated in isolation but in the context of an entire portfolio. MPT and the Prudent Investment Rule imposes on the trustee the duty to manage the portfolio as a whole, thus, the trustee must diversify efficiently.

The Uniform Prudent Investor Act is located at Prob. Code §§ 16045 – 16054. Except as the settlor has expanded or restricted the prudent investor rule by express provisions in the trust instrument, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule. Prob. Code §16046.

¹⁶ See John A. Hartog and Paul Sanderson, *Fiduciary Delegation of Investment Power Under the California Uniform Prudent Investor Act*, California Trusts and Estates Quarterly Vol. 5. No. 1. (Spring 1999); John A. Hartog and Paul Sanderson, *A Trustee's Crime and Punishment: Managing Fiduciary Liability Under the California Uniform Prudent Investor Act*, California Trusts and Estates Quarterly Vol. 4. No. 2. (Summer 1998); Jerold Horn, *Prudent Investor Rule, Modern Portfolio Theory, and Private Trusts*, 33 Real Property, Probate and Trust Journal 1 (Spring 1998).

2. Requirements Under Prudent Investor Rule

In order to satisfy the requirements of the Act, the trustee should establish objective portfolio standards utilizing MPT, in light of the purposes and terms of the trust instrument.

Looking at the arena of institutional trustees offers some guidelines as to what the Prudent Investor Rule may require:

- Investment Policy Statement – Institutional fiduciaries have written statement of objectives, policies and procedures;
- Prudent fiduciary investing is reflected in numerous and documented acts of investment decision making;
- Decision making process should encourage well-informed decisions, rather than just strict adherence to procedure;
- Proper delegation of decisions.

Often, the private trustee is not qualified to prepare an IPS. The services of an investment management consultant will be necessary to set up and implement an IPS. Concepts such as time weighted and dollar-weighted returns, customized benchmarks, and attribution analysis will play important roles in establishing the guidelines found in an IPS. The IPS should set forth realistic objectives/guidelines (not requirements but goals), terms and frequency of performance reviews, and definitions of success or failure.

Having an IPS provides protection for the trustee. For example, having clearly stated objectives will often limit any damages to such measure, rather than having the damages left wide open to the imagination of unhappy beneficiaries.

3. Delegation

The Act encourages trustees to delegate when appropriate. Prob. Code § 16052 specifically authorizes employment of agents. See *Estate of Talbot* (1956) 141 Cal. App. 2d 309 [296 P.2d 848] (The trustee may hire and rely upon the assistance of investment experts.)

The old rule that a trustee should not delegate what the trustee could do personally is reversed. Now, in the private trust setting, as has been in institutional trust setting, reliance on professional investment advice is encouraged. In fact, a trustee who fails to seek advice regarding matters about which the trustee lacks skill or knowledge can be liable for failure to exercise proper care in making an investment. Prob. Code §16006.

The general rule is that the trustee may delegate authority to make investment decisions, but the delegation must be prudent in terms of selecting the agent, establishing the scope of the delegation, and reviewing the performance of the agent. Proof of such prudence can be most easily shown

through the trustee's establishment and adherence to a written policy (as seen in the institutional trust setting).

Because of the need for the trustee to show that the selection of the investment advisors was made prudently, the trustee may need to hire an advisor for the task of selecting investment advisors. While the trustee may be reluctant to hire yet "another advisor," it may be a way to minimize the trustee's own potential liability for carrying out his duty to delegate prudently.

Proper delegation offers means to reduce potential liability for unsuccessful investment decisions. There are two major areas of delegations:

- total portfolio design, strategy, and procedures – usually an investment management consultant fills this responsibility
- day-to-day investing – usually a portfolio or money manager fills this responsibility.

The distinction between these two areas of responsibility must be clear, to prevent misunderstanding among parties as to who is responsible for what.

4. Advisors: Selection, Duties, Management

The Act shows pronounced bias toward using conceptual and methodological structures of MPT. The Act appears to impose specific training and experience in MPT as a prerequisite for proper investment management by the trustee or the trustee's agent. See Probate Code §16047.

Very few investment professionals have such required education, training, and experience to qualify as experts in MPT.

Some consulting associations have developed certification programs in MPT: E.g. "Certified Investment Management Analyst" designation ("CIMA") offered through the Investment Management Consultants Associations, "Certified Investment Management Consultant" designation (CIMC") offered through the Institute for Investment Management Consultants, "Certified Financial Analysts" designation ("CFA") offered through Association for Investment Management and Research.

General criteria applicable for selection of investment management consultants include:

- Understanding of macroeconomics and MPT; understanding of current and potential economic conditions and trends; access to research capability and reliance upon such;
- Experience;
- Performance.

The investment management consultant is the person who can design the strategic investment plan and develop and implement written investment policies and procedures for the trust.

What the consultant should do:

- Analyze the current and prospective needs of the trust beneficiaries with the trustee;
- Develop a customized asset allocation model that satisfies needs of the trust beneficiaries and trust terms;
- Prepare and maintain a written IPS;
- Review and evaluate portfolio management firms using measurements that is net of all expenses, on a risk-adjusted basis, and in relation to the purposes of the trust, and provide objective recommendations to the trustee (search for portfolio managers often referred to as “manager search”);
- Measure and evaluate portfolio manager performance, and total portfolio performance, and provide objective recommendations to the trustee;
- Educate the trustee as necessary in portfolio management.

Portfolio Managers, also referred to as money managers, are those who have discretion over day-to-day decisions – buy, sell, and reorganization tender decisions, proxy voting. Choices for portfolio managers include separate and pooled account managers, mutual funds, unit investment trusts or brokerages.

After delegation, the relationships with the consultant and managers require management -- the IPS may be viewed as a management statement. The investment management consultant is usually responsible for monitoring and measuring the performance of portfolio managers.

Trusts starting at \$2 million in liquid assets may find it cost-effective to use a consultant and portfolio managers. This potential benefit may be the basis for the imposition of a stricter duty for the trustee to employ levels of professional advisors. Depending on the asset allocation structure, more than one portfolio manager may be necessary. Some of the “full service” brokerage houses even offer the equivalent of consultant services for trust with liquid assets as low as \$500,000.

The costs of delegation must be weighed against the benefits of delegation. The trustee has a duty only to incur “costs that are appropriate and reasonable in relationship to the assets, overall investment strategy, purposes, and other circumstances of the trust.” Probate Code §16050. Consultants may be helpful in this analysis, too. *E.g.*, They can help Trustee compare costs and tax consequences of active and passive portfolio management styles. It must be kept in mind that to not delegate when it would have been wise to do so could be basis of liability.

Regardless of whether Trustee actually hires advisors, it is important to adhere to coherent, reasonable investment decision procedures. Attorneys should so advise the Trustee.

D. Total Return Laws (UPAIA § 104 and TRU Statutes)

In 1997, the National Conference of Commissioners on Uniform State Laws adopted a new Uniform Principal and Income Act (“UPAIA”). See 7B U.L.A. 131. The 1997 UPAIA is intended to deal with the challenges of working with the traditional income allocation in the context of modern investment theory. The UPAIA is intended to coordinate with the Uniform Prudent Investor Act (1994), 7B U.L.A. 280, and the Restatement (Third) of Trust: Prudent Investor Rule § 227 *et seq.* (1992).

The UPAIA § 104 is the famous “power of adjustment” section that allows trustees to adjust between principal and income in specified circumstances, in order to allow the trustees to both invest for total return and comply with the duty of impartiality among beneficiaries. Total Return Unitrust (TRU) statutes, statutes that allow trustees to convert income trust into unitrusts, is another approach to the conflict between the traditional income allocation and modern investment theory. The UPAIA and TRU statutes together are referred to as “Total Return Laws.”

As of June, 2008 forty-two states plus the District of Columbia have enacted some form of Total Return Laws, either the UPAIA with § 104 or TRU statutes or both.¹⁷

California¹⁸ and the District of Columbia are among those that opted for the UPAIA with §104 power only; New Jersey and Louisiana are among those that opted for the UPAIA § 104 power with a unitrust safe harbor; Delaware is among those that opted for unitrust conversion only; New York, Florida, Maine, Maryland, Missouri, Pennsylvania, Washington are among those that opted for both.

Examples of the variety seen in the Total Return Laws are as follows:

- California –§ 104 only. To address concern about litigation exposure, removes mandatory factors to consider prior to exercise of power and provides notice procedure.
- Delaware – TRU only. Trustee has choice of payout between 3-5% and has discretion to use an “ordering provision” for capital gains. The statute provides for appointment of independent decision maker when there is no independent trustee.

¹⁷ See The National Conference of Commissioners on Uniform State Laws webpage of information regarding UPAIA: http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upia.asp.

¹⁸ Prob. Code §16320 *et seq.* Effective January 1, 2000.

- New York – §104 and TRU. 4% default rate, variable by court. Informal procedure to adopt TRU available. No ordering provision. Very detailed statute.
- New Jersey – § 104, with unitrust safe harbor (up to 4%, down to 6%). No unitrust definition of income yet encouragement of unitrust methodology in exercise of adjustment power.

The changes made to “income” under Total Return Laws raised concerns about the continued availability of the marital deduction, the grandfathered status of older GST trusts, and appropriate treatment of capital gains as part of distributable net income, among others.

In response to these concerns, the IRS created Treasury Regulation section 1.643(b)-1 that revises the definition of income under section 643(b) to take into account changes in the definition of trust accounting income under state laws.

Without such changes, in order to preserve the marital deduction and the grandfathered status of GST trusts, drafters would always have to use “the greater of unitrust or income” standard. The regulation allows trust income to be defined by the provisions of the trust instrument and applicable state law. Trust provisions that depart fundamentally from traditional principles of income and principle will not be recognized. Accordingly items such as dividends, interest and rents will generally be allocated to income and proceeds from the sale or exchange of trust assets will be principal. The regulation allows different allocations such as a unitrust percentage or the use of the adjustment power, without worrying about jeopardizing the tax benefits, *as long as supporting state law exists*.

This is why in order to be able to use a unitrust scheme or the adjustment power in a marital deduction trust, it is crucial for the state to have a unitrust definition of income or the appropriate adjustment power provisions, respectively. Using a unitrust or adjustment power provision without supporting state law may result in the income interest not qualifying for the marital trust!

Remember also that there are other tax issues if the trustee could appoint an interested party.

E. Duty of Loyalty & Duty to Avoid Conflict of Interest & Self-Dealing by the Trustee

Prob. Code §16002. Duty of Loyalty.

(a) The trustee has a duty to administer the **trust solely in the interest of the beneficiaries.**

(b) It is not a violation of the duty provided in subdivision (a) for a **trustee who administers two trusts** to sell, exchange, or participate in the sale or exchange of trust property **between the trusts**, if both of the following requirements are met:

(1) The sale or exchange is **fair and reasonable** with respect to the beneficiaries of both trusts.

(2) The trustee gives to the beneficiaries of both trusts **notice** of all material facts related to the sale or exchange that the trustee knows or should know. Leg.H. 1990 ch. 79 §14, operative July 1, 1991. [bold added]

Prob. Code §16004. Duty to Avoid Conflict of Interest.

(a) The trustee has a duty **not to use or deal with trust property for the trustee's own profit** or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.

(b) The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee, but the court may allow the trustee to be reimbursed from trust property the amount that the trustee paid in good faith for the claim.

(c) **A transaction between the trustee and a beneficiary** which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and **by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties.** This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee. Leg.H. 1990 ch. 79 §14, operative July 1, 1991. [bold added]

Self-dealing is a trustee dealing with the trust property for the trustee's own benefit, regardless of whether such self-dealing also benefits the trust and the trust beneficiaries. Unless self-dealing is authorized by the trust instrument, the trustee is inviting trouble by engaging in any acts of self-dealing. Self-dealing which by definition violates the duty of loyalty and the duty to avoid conflict of interest cannot be defended on basis of good faith nor by the assertion that the behavior is customary and accepted within the community. *Van de Kamp v. Bank of America* (1988) 204 Cal. App. 3d 819 [251 Cal. Rptr. 530].

Analogous to beneficiaries of an estate, the trust beneficiaries may have standing to void a self-dealing transaction by the trustee that is prohibited under Prob. Code §16004. *Estate of Martin* (1999) 72 Cal. App. 4th 1438 [86 Cal. Rptr. 2d 37] (a case discussing Prob. Code §9880, a section comparable to Prob. Code §16004 of Trust Law).

Despite the stringent requirement against it, self-dealing is surprisingly common. For example, self-dealing occurs when the trustee purchases or leases trust property directly or indirectly and when the trustee pays him or herself compensation for services rendered in a non-fiduciary capacity without court or beneficiary approval. In *Estate of Pitzer*, a bank acting as trustee engaged in

prohibited self-dealing when extending a loan, secured by the trust property, to the purchasers of trust property. (1984) 155 Cal. App. 3d 53. Even when self-dealing transactions do not form the original basis of a disgruntled beneficiary's discontentment, such transactions can become the trustee's weak point that may be attacked by the beneficiary's attorney.

The trustee and his or her attorney should scrutinize all the trustee's actions and transactions through the filter of fiduciary duty to be sure that no self-dealing takes place unless authorization by the trust instrument, the beneficiaries or the court is available.

Case law:

***Faraone v. Kenyon* (2004) Del. Ch. LEXIS 26. The creation of a power of attorney places a fiduciary duty on the attorney in fact. *Schock v. Nash* (Del. 1999) 732 A.2d 217.** The fiduciary obligations of trust law are increasingly being applied to agents under power of attorney. Agent may be given power to self-deal. Principal has power to avoid any self-dealing transactions by agent.

***Stegemeier v. Magness* (2000) 748 A. 2d 408.** The Delaware Supreme Court held that the fiduciary obligation of trustees is higher in trust law than in corporate law in areas such as self-dealing.

***In re Estate of Martin* (1999) 72 Cal. App. 4th 1438 [86 Cal. Rptr. 2d 37.]** Good faith alone is insufficient where the executor failed to obtain the consent of beneficiary required under applicable law.

***Administrator of the Estate of Bessie R. Jordan v. Remer* (Iowa 2000) 616 N.W. 2d 553** That trustee purchased property at fair price is insufficient; notice must be given to incompetent beneficiary via his guardian ad litem.

F. Trustee's Duty to Enforce, Defend, or Compromise Claims

The trustee has a duty to act reasonably to enforce claims that are part of trust property and to defend actions that may result in a loss to the trust. The trustee generally has the power to compromise under the general powers of the trustee. In addition, the trust instrument may grant the trustee the power to compromise or the trustee may obtain court approval of a compromise, prior to or after the fact.¹⁹

- **Prob. Code §16200. General Powers of Trustee.**

A trustee has the following powers without the need to obtain court authorization:

(a) The powers conferred by the trust instrument.

¹⁹ See Dana T. Pickard and Janet Bohon O'Connor, *The Fiduciary's Standard of Care in the Enforcement, Contest, or Compromise of Claims in Favor of or Against the Estate*, 30 Real Property, Probate and Trust Journal 1 (Spring 1995).

(b) Except as limited in the trust instrument, the powers conferred by statute.
(c) Except as limited in the trust instrument, the power to perform any act that a trustee would perform for the purposes of the trust under the standard of care provided in Section 16040 or 16047.

- **Prob. Code §16249. Power to Prosecute or Defend Actions or Procedures.** The trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties.
- **Prob. Code §16010. Duty to Enforce Claims.** The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property.
- **Prob. Code §16011. Duty to Defend Actions.** The trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust.

1. Threshold Issue: Standing

For certain actions, the trustee may not have the required interest. Alternately, the trustee may be precluded from participating in other actions. For example, in certain disputes by or between the beneficiaries, the trustee may be prevented from participating under the trustee's duty of impartiality. Nonetheless, depending on the facts, it may be the duty of the trustee to participate if upholding the purposes of the trust are at stake or some beneficiaries are not represented.

“Since a trustee must deal impartially with beneficiaries (see Scott on Trusts § 183), he should not be allowed to participate in the adjudication of their individual claims. Under such circumstances the trustee is therefore to be regarded as a mere stakeholder with no duties to perform other than to pay out funds to the various claimants as ordered by the proper court, [**3] and the beneficiaries must then protect their own rights. On the other hand, it is generally held that a trustee may appeal in his representative capacity if it is necessary to protect the interests of those whom he represents. Thus, since it is the duty of the trustee to defend the estate against attacks by third persons (citation omitted), he may appeal from an order in their favor that affects the estate as a whole. (citations omitted) Moreover, a trustee may appeal from a decree determining the relative rights of beneficiaries if some of them are unascertained or without representation (citations omitted). *Estate of Ferrall* (1948) 33 Cal. 2d 202, 204-205; 200 P.2d 1, 4-5.

In *Estate of Goulet* (1995) 10 Cal. 4th 1074 [43 Cal. Rptr. 2d 111, 898 P.2d 425], the trustee filed an appeal following a section 21320 determination that a claim would not violate the trust's no contest clause. Respondent argued that the trustee was not an aggrieved party and had no standing to appeal. The California Supreme Court held in a case of first impression that “[c]onsiderations of law and policy lead us to conclude a trustee must be permitted to appeal an order determining a trust beneficiary's proposed claim would not violate a trust's no contest clause.”

2. Enforcing Claims

The duty to act reasonably to collect claims includes claims against the following persons:

- predecessor trustee (*e.g.* if predecessor not transferring the trust property to successor);
- co-trustee (*e.g.* if other co-trustee is engaging in breach)
- beneficiary (*e.g.* trustee believes beneficiary is acting in violation of trust purposes²⁰)
- third-parties (*e.g.* third party possesses property that belongs to the trust)

3. Defending Claims

The trustee should raise all proper defenses to any action or creditor claims, including engaging in litigation if that is justifiable depending on the risks and costs.

In ***Parson v. Parson*** (1996) 49 Cal. App. 4th 537 [56 Cal. Rptr. 2d 686], the trustee successfully resisted a demand by the surviving spouse that the decedent's trust be liable for family allowance granted by the Probate Court. The trust had named the son as trustee and had specifically disinherited the surviving spouse, who was 90 years old and a resident in a nursing home. The Court of Appeals held that the family allowance could not be paid from a trust because a family allowance was payable only from "the estate."

4. No Obligation to Consult with Beneficiaries

The power to pursue, contest, abandon, defend, and compromise an action is within the power of the trustee and consultation with the beneficiaries is not required. ***Estate of Wilson*** (1953) 116 Cal. App. 2d 523 [253 P.2d 1011] (court upheld personal representative's compromise of surviving spouse's claim); ***Estate of Lucas*** (1943) 23 Cal.2d 454 [144 P.2d 340] (court approved personal representative's compromise of a claim barred by the statute of limitations).

5. Trustee's Shield of Good Faith & Reliance on Legal Counsel

The trustee is under the duty of act as a prudent person. The trustee must also invest as a prudent investor. While reliance on an attorney's advice may not provide automatic immunity, when the trustee acts reasonably in procuring advice and the decision is heavily dependent upon legal expertise, the trustee has a defense to a claim of breach. See ***Estate of Gilliland*** (1977) 73 Cal. App. 3d 515 [140 Cal. Rptr. 795] (under given facts, it was reasonable for trustee to rely on tax and accounting advise).

²⁰ *E.g. Estate of Goulet* (1995) 10 Cal. 4th 1074, 43 Cal. Rptr. 2d 111, 898 P.2d 425.

G. Trustee Liability

1. Liability to Beneficiaries: Breach of Fiduciary Duty

A breach of trust is defined as a violation of any fiduciary duty that the trustee owes the beneficiary. Prob. Code § 16400. Usually, the trustee must be personally at fault for breach of trust; however, a breach of trust may also include mistakes, for example, where the trustee exceeds his authority.

In addition to the various duties discussed above, the trustee's duties also include:

a) Duty to Review Trust Terms

In order to administer the trust, the trustee must diligently review the trust terms and understand them. *Estate of Gilmaker* (1964) 226 Cal. App. 2d 658, 663 [38 Cal. Rptr. 270]. Where the terms are ambiguous, the trustee may petition the court for instructions.

b) Duty to Use Special Skills

Prob. Code § 16014 Duty to use special skills.

(a) The trustee has a duty to apply the full extent of the trustee's skills.

(b) If the settlor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.

In case of a sophisticated trustee or an institutional trustee, this duty to apply the "full extent" of the trustee's skills may make the trustee extra vulnerable. For example, *In the matter of the Revocable Trust of Elizabeth McCoy* (1987) 142 Wis. 2d 750 [419 N.W.2d 301], a trustor had a meeting with the bank trustee at which she discussed her charitable dispositive wishes. She subsequently wrote a letter to the bank memorializing her wishes. The bank filed the letter. After the trustor died litigation arose between the charity and the estate as to their respective interest in the trust estate. The charity sued the bank for breach of fiduciary duty to the trustor that resulted in loss to the charity. The court held that "given the Bank's expertise in trust matters," the Bank had breached its duty by failing to warn the trustor of easily identifiable impediments or pitfalls of achieving her dispositive intent; mere reminders at the time of the trust creation and at the meeting that she should consult a lawyer was insufficient. The court further held that the charity had a cause of action as the intended beneficiary.

c) Duty Not to Pressure

The trustee should also be careful that certain seemingly innocuous statements regarding ordinary acts of trust administration could constitute a threat and violate the trustee's duty toward the beneficiaries if done in the wrong context. For example, in *Estate of Gump* (1991) 1 Cal. App.4th 582 [2 Cal. Rptr.2d 269], the trustee's statements to the beneficiaries that costs of an audit will be charged to that beneficiary's share qualified as a threat and thus, the trustee's litigation costs were denied, despite the fact that the trustee had

prevailed on most of the objections to the account. Concealment, threat, or adverse pressure of any kind is prohibited as long as the confidential relationship exists. *Estate of Vokal* (1953) 121 Cal. App. 2d 252, 257 [263 P.2d 64].

2. Liability for Acts of Others

In general, the trustee is not liable for acts of agents or a cotrustee, including wayward attorneys, unless the trustee somehow acted in bad faith, negligently, or otherwise acted improperly. Prob. Code § 16401.

3. Liability of Trust Property vs. Trustee's Personal Liability

Unless the trustee is personally at fault, the trustee is not generally liable to creditors and claimants against the trust. The trust property is liable for torts committed personally by the trustee or by trust employees in the course of trust administration. *Johnston v. Long* (1947) 30 Cal. 2d 54, 59 [181 P.2d 645].

4. Defenses to Liability: Exculpatory Clauses and Others

While the trustee's duties may be clearly explained in the trust instrument and in the statutes, nonprofessional trustee may not fully understand the actual requirements of such fiduciary duties nor appreciate the difference between what are excusable as errors in judgment or negligence and what are not. The attorney advising such a trustee should provide clear and frequent guidance on what the law requires.

A trust instrument may "limit" the liability for failure to carry out the trustee duties or "exculpate" a trustee from liability for breach of trust except (1) for breaches committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, and (2) for breaches that profits the trustee. Prob. Code §16461.

A gross negligence standard rather than the default negligence standard in a trust can protect a trustee from contentious beneficiaries. Such a standard can create various hurdles for the beneficiaries:

- if such a standard is provided in the trust instrument and the beneficiary wishes to challenge the standard, the beneficiary would have to show the standard is somehow against public policy or that the standard does not reflect the settlor's intent because settlor did not understand the effect of the gross negligence standard;
- assuming the gross negligence standard is applicable, ordinary errors of judgment would be protected by such a standard and thus the trustee would be liable only for acts of gross negligence or worse.

Additionally, a beneficiary cannot hold a trustee liable for a breach when (1) the beneficiary consents to the act or omission at the time of the act or omission, (2) the beneficiary releases the trustee, or (3) the beneficiary affirms

the acts of the trustee. Prob. Code §§ 16463-16465. Nevertheless, such consent, release, or affirmation is not enforceable in any of the following circumstances:

- the beneficiary was under an incapacity at time of the act or omission, release, or affirmation;
- the beneficiary did not know of his or her rights and of the material facts (A) that the trustee knew or reasonably show have known and (B) that the trustee did not reasonably believe that the beneficiary knew;
- the consent, release or affirmation was induced by improper conduct of the trustee; or
- the transaction was not fair and reasonable.

Prudence may suggest that the trustee obtain a consent, release or affirmation in situations that may lead to beneficiary dissatisfaction.

5. Trustee Liability for Trustee's Attorney's Fees

a) Attorney's Fees During Trust Administration

The general rule is that the trustee, in retaining an attorney, is personally liable for the services that the trustee's attorney provides unless specifically agreed to otherwise. The exception to this general rule, which for practical purposes may be as large as the rule, is that when the trustee has the authority to make expenditures for the benefit of the trust estate he may by agreement require those rendering service to look solely to the trust estate for compensation.

In re Estate of Ogier concerned a testator who by will nominated an executrix and an attorney for the executrix. The executrix hired another attorney to serve and the court upheld the executrix position, finding that the testator's nomination of the attorney was only advisory and based its holding on the fact that the executor is personally liable for the fees of the executor's attorney. "When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate, and for his services the executor is personally responsible" *In re Estate of Ogier* (1894) 101 Cal. 381, 385, 35 P. 900.

"When a trustee, authorized to make expenditures for the protection or safety of the trust estate, is without funds of the estate in his possession and is unwilling to make himself liable therefor, he may by agreement require those rendering the services to look solely to the trust estate (citations omitted), and when facts creating the exception appear the creditor may proceed in equity for the satisfaction of his claim out of the trust estate." *Cullinan v. Mercantile Trust* (1926) 80 Cal. App 377 [252 P. 647].

b) Trustee Liability for Litigation Fees

For fees incurred in litigation against the beneficiaries, the trustee may be liable for attorneys' fees unless the litigation was of benefit to the trust, despite the trustee's acting in good faith.

The general rule is that attorneys fees incurred in a successful defense of an action brought by the beneficiary are recoverable from the trust. If the results of the litigation are mixed, the court has the discretion to deny all fees. ***Estate of Gump*** (1991) 1 Cal. App.4th 582 [2 Cal. Rptr.2d 269].

"The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust." ***Dingwell v. Seymour*** (1928) 91 Cal. App. 483, 513 [267 P. 327]. "Because the litigation for which appellant demands compensation was of no benefit to the trust and was caused by no fault of the beneficiaries, the expense thereof must be borne personally by appellant who caused the controversy and incurred the debt." (citations omitted) ***Estate of Vokal*** (1953) 121 Cal.App.2d 252 [263 P.2d 64.]

In ***Estate of Gilmaker*** (1964) 226 Cal. App. 2d 658 [38 Cal. Rptr. 270], the trustee unsuccessfully sought to charge the trust estate for the fees it incurred in contesting a petition for the trustee's removal. Though the trial court found that the trustee had acted in good faith, the trustee was removed because the trustee had failed in performance of its duties and the hostility between the trustee and beneficiary had so impaired the administration as to require the substitution of a new trustee.

"It cannot be said that it is the exercise of a reasonable judgment to assert or defend a position for which no reasonable support can be found in the trust provisions and the governing law. One in whom trust is placed is duty bound to exercise reasonable diligence for the purpose of ascertaining the nature and extent of his obligations and to be faithful in the performance thereof. There having been a conclusive adjudication in the present case that the trustee failed to administer the trust in conformity with its terms and that the prevailing hostility between it and the beneficiary required its removal, it is not reasonable or fair to rely upon the element of good faith, standing alone, as the criterion by which to determine whether the trust estate should bear the cost of the trustee's defense of its untenable position. (See *Dickerson v. Camden Trust Co.*, 1 N.J. Super. 459 [64 A.2d 214, 218-219]; *In re Drake's Will*, 195 Minn. 464 [263 N.W. 439, 442, 101 A.L.R. 801]; *Scott on Trusts* (2d ed.) §§ 174.1, 201; *Rest. 2d Trusts*, § 201, com. a and com. b.)" ***Estate of Gilmaker*** (1964) 226 Cal. App. 2d 658, 672-273 [38 Cal. Rptr. 270].

When not all the beneficiaries participated in the litigation against a trustee, if the contest is frivolous or unfounded, the trustee's attorney's fees may be allocated to only the contestant beneficiary's interest in the trust. ***Estate of Ivey*** (1994) 22 Cal. App. 4th 873, [28 Cal. Rptr. 2d 16]. For probate estates

however, fees are charged against the estate as a whole. *Estate of Beach* (1975) 15 Cal. 3d 623, 645, [125 Cal. Rptr. 570].

H. Preventing Trust Litigation by Maintaining a Good Trustee-Beneficiary Relationship

An attitude of paternalism or complacency toward the beneficiaries is typical when the surviving spouse or a family member serves as the successor trustee. In such cases, the attorney advising the trustee should remind the trustee that the beneficiaries possess enforceable rights and that their interests and views need to be taken seriously.

Pre-existing hostility between the trustee and other beneficiaries is typical when the trustee is the second spouse and the other beneficiaries are the children of a prior marriage. Although such antagonism may be grounds for removal of a trustee when it impairs the proper administration of a trust, courts generally do not remove a trustee just because of antagonism, especially where the settlor was aware of the situation and yet proceeded to name such trustee. For example, in *Copley v. Copley* (1981) 126 Cal. App. 3d 248 [178 Cal. Rptr. 842], everyone acknowledged the hostility between the surviving second spouse-trustee and the children of a prior marriage, but the court refused to remove the spouse-trustee because the remainder-beneficiaries were unable to show any breach of trust. On the other hand, where hostility exists, even a minor breach of trust may result in removal of the trustee, as with *In re Memorial National Home Foundation* (1958) 162 Cal. App. 2d 513 [329 P.2d 188].

A method that the trustee and the trustee's advisors can use to keep potential hostility in check is frequent communication with the beneficiaries. For example, the trustee and the trustee's advisors can regularly inform the beneficiaries of intended actions, which have the double benefit of reminding the trustee of his or her duties and of informing the beneficiaries of trust administration.

Periodic meetings between the trustee and the beneficiaries to discuss trust affairs may also be helpful. The opportunity to express concerns and frustrations may avoid build-up of resentment. In certain cases, if hostility and dysfunctional relationships prevents such meetings, it may be necessary to employ a psychological advisor.

I. Reports

Beyond the general duty to keep the beneficiaries reasonably informed of the trust and its administration, under Prob. Code §16060, Prob. Code §16061 also provides that "on reasonably request by a beneficiary, the trustee shall provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust."

A request for a report is usually done informally. A petition is usually filed by a beneficiary when seeking to compel an account. In light of the general rule that requires annual accounts (unless modified in the trust instrument), it appears that semi-annual requests would be reasonable. A beneficiary may request a report to determine the trustee's misconduct or mistakes and to prompt the trustee that the beneficiary is watching the trustee.

An alert trustee will recognize that the request for a report may be a sign that the beneficiary may be disgruntled about something. If the trustee anticipates that the request for a report is the initial step in litigation to replace the trustee and/or to seek a surcharge against the trustee, the trustee may want to prepare a thorough report that can be easily modified to become an account or that actually is an account meeting statutory requirements.

A prudent trustee may want simply to provide such reports on the trustee's own initiative as a means to show the trustee's diligence and good faith as well as to provide the information before any beneficiaries show signs of discontent.

J. Accounts

A simple means to prevent charges of negligence (or worse) from the beneficiaries is to provide periodic detailed accounts.

Prob. Code §16062 provides that unless an exception applies, "the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distribution."

Prob. Code §16063 provides the required contents of an account:

- a statement of receipts and disbursements of principal and income during the relevant period;
- a statement of assets and liabilities of the trust as of the relevant time;
- the trustee's compensation for the relevant period;
- the agents hired by the trustee, their relationship to the trustee, if any, and their compensation for the relevant period;
- a statement that the recipient of the account may petition the court pursuant to §17200 to obtain a court review of the account and the acts of the trustee; and
- a statement that claims against the trustee for breach of trust may not be made after the expiration of the three years from the date the beneficiary receives an account or report disclosing facts giving rise to the claim.

Often, the trustee's failure to account is the crucial factor in commencing the dispute between the trustee and beneficiaries. Sometimes the waiver of account provided by the trust instrument contributes the trustee's inattentiveness to his or her duties, leading to beneficiaries' complaints. Other times, the trustee

does attempt to provide an account but does so inadequately. Whether the trustee attempts to provide an account on the trustee's own or hires an accountant for the task, often the Probate Code account requirements are not satisfied.

Despite good faith attempts at providing an account, if the Probate code account requirements are not satisfied, the statute of limitations for actions based on facts disclosed in the account is probably not triggered. This means that even the shortened 90-day or 120-day statute of limitations often found in trust instruments as a means to protect the trustee also is probably not triggered.

The trustee should be aware that an account is not simply information about assets and liabilities and income taxes: an account is generally a bookkeeping system that distinguishes between principal and income and provides sufficiently detailed information about trust transactions and trust investments.

The trustee should also be aware that in any contest concerning the accounts, the trustee has the burdens of proof of establishing that the trustee has acted properly, rather than the burdens being on those attacking the accounts. The burden of proof is imposed on the trustee because the trustee has the duty to allocate receipts and disbursements between principal and income while the beneficiary has no power so to act. In fact, where the trustee has failed to keep accounts, all presumptions are against the trustee. Therefore, the trustee is under the duty to prove every item of their account by "satisfactory evidence." Any doubt arising from the trustee's failure to keep proper records or from the nature of the evidence they produce, is resolved against them. This presumption applies not only to accounting matters but also to the trustee's establishing any services rendered by the trustee to the trust. See *Purdy v. Johnson* (1917) 174 Cal. 521 [163 P. 893], *In re McCabe's Estate* (1948) 87 Cal. App.2d 430 [197 P.2d 35].

An awareness of the actual requirements of an account and the legal presumptions against the trustee should motivate the trustee to be particularly conscientious about providing timely and accurate accounts.

K. Practical Pointers Summary

Ideally, the attorney has a chance to prevent improper acts by the trustee through active education and guidance. A series of innocent acts may accumulate into a breach of duty. To prevent improper acts, both inadvertent and intentional, by the trustee and to avoid joint liability for any such acts, the attorney should counsel the trustee as to the trustee's duties, especially the duty of loyalty, the duty of impartiality, the duty to avoid self-dealing, and the duty to report and account.

Pointers to remind the trustee:

1. Follow the trust instrument's expression of the settlor's intent; not what the trustee believes is the settlor's "real" intent.
2. Document the basis of the exercise of discretionary principal invasion powers.
3. Provide sufficient information regularly -- before the requests come in.
4. Obtain written consents from all beneficiaries prior to any self-dealing transactions, even though for full and adequate consideration. Suggest group meetings where all parties have a chance to air their views.
5. Invest under the "prudent investment rule" and document the investment policy, as protection in case of less than expected performance. Delegate, with reasonable care, if necessary.
6. Obtain insurance if available.

L. Ineffective Spendthrift Provision: Trust Estate Available to Beneficiary's Creditors

Recent cases have held that trust the estate, despite spendthrift intentions of the trustor, is available to the beneficiary's creditors. These cases have many lessons regarding drafting for attorneys and implementation for trustees.

In re George McCoy 274 B.R. 751 (2002 N.D. Illinois), George McCoy was the primary beneficiary and sole trustee of his deceased wife's testamentary trust. The trust provided that the trustee shall pay all net income to the surviving spouse and that the trustee "may in its discretion pay to my spouse, or to his benefit, so much or so much or all of the principal of the Family Trust as the trustee from time to time determines to be **required or desirable** for his health, maintenance and support. **The trustee need not consider the interests of any other beneficiary in making distributions to my spouse or for his benefit.** ...the trustee may in its discretion...pay to...one or more of my descendants to the exclusion of one or more of them so much of the principal...as the trustee ...determines **to be required** for their health, education, maintenance and support." [bold added] The trust contained a standard spendthrift/anti-alienation clause.

The test under Illinois law relevant in this case for whether the spendthrift provision is given effect is, whether "the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust." The court noted that had the trust used only the terms "as required for health, maintenance, and support," the spendthrift nature of the trust may have been accepted under Illinois law. The court also noted that for all the other beneficiaries, the standard of distribution was limited to what was "required." The addition of the phrase "or desirable" to the commonly used

ascertainable standard language used for tax purposes (*i.e.* “required for health, maintenance and support”) and the fact that he “need not consider the interests of any other beneficiary” was construed to mean that the settlor had intended McCoy to have “complete dominion and control” over the trust estate. The court concluded that the trust estate was part of the bankruptcy estate because the settlor had granted McCoy complete discretion to invade the entire trust for his benefit.

In re Pugh 274 B.R. 883 (2002 Arizona), Pugh’s mother created a testamentary trust for her son, intended to be a spendthrift trust because she was aware of Pugh’s financial difficulties. The trust provided that the son was to be a cotrustee with another of the son’s election and that no beneficiary acting as cotrustee could exercise discretionary powers of invasion without the agreement of the other cotrustee. Although the son named his sister as cotrustee, he then proceeded to control and to spend the trust assets alone, without the involvement, knowledge, or consent of his sister.

The test under Arizona law relevant to this case for the validity of the spendthrift provision provided that a valid spendthrift trust cannot exist where the sole beneficiary is also the sole trustee. Due to the uncontroverted facts of this case, the son’s argument was that the sister need not know that she even was the trustee or do anything unless and until a creditor attempts to reach the trust assets. The court rejected that the son’s argument and held that because the beneficiary was in reality the sole trustee, the spendthrift provision is invalid and that the trust estate was part of the bankruptcy estate.

In *Birdsell v. Coumbe*, (2003) 304 B.R. 378, a bankruptcy appellate case for the Ninth Circuit, a debtor and his sister were the beneficiaries of a testamentary trust. On the death of the settlor, the trust was to be divided into two separate trusts for each beneficiary, with each beneficiary’s children named as secondary beneficiaries. The trust contained a spendthrift provision. The debtor’s creditors attempted to reach the debtor’s trust, arguing that the debtor was the sole trustee and beneficiary of his separate trust and accordingly, the spendthrift provision was invalid. The court found that the spendthrift provision did apply because the settlor named her grandchildren as the secondary beneficiaries of debtor’s trust.

California Probate Code section 15305.5 permits a court to order a trustee to satisfy all or part of a beneficiary’s restitution judgment (a judgment awarding restitution for the commission of a felony.) The section provides that whether or not the beneficiary has the right under the trust to compel payments of income or principal from the trust, the court has discretion to order a trustee to satisfy restitution judgment awards. Nevertheless, in *Young v. McCoy*, the court did not compel the trustee to satisfy a restitution judgment against the beneficiary. (2007) 147 Cal. App. 4th 1078. The beneficiary was incarcerated and had been convicted of attempted murder of his brother, who had obtained a

restitution award against him. The trust permitted distributions to the beneficiary for his health, support, maintenance and education. The trustee determined not to make a distribution to the beneficiary because all of his needs were being cared for in prison. The court held that this was not an abuse of discretion by the trustee, who was clearly upholding the trustor's intent in refraining from making a distribution, and accordingly refused to order the trustee to release funds.

These cases are instructive as to what to do to have valid spendthrift provisions:

- Know what the local law requires.
- Stick with "tried and true" language.
- Consider discretionary standard for income as well as principal distributions when asset protection is an actual concern.
- Consider a cotrustee for any discretionary decisions.
- Make sure that the beneficiary is aware of the importance of complying with the provisions of the trust instrument and the local laws and the risk of not doing so!

M. Phantom Trustees

What happens when an institutional trustee nominated to serve no longer exists, or at least, does not exist by the same name? It may be that an individual trustee is next in line and wants to serve. It also may be that the reason for the testator or trustor's appointment no longer exists. The institutional trustee may not care one way or the other, depending on the size and nature of the estate, but in any case, it is incumbent on the attorney to comply with the trust nomination. What to do?²¹

California statutes regarding bank mergers and acquisitions require that the attorney ascertain the manner by which the nominated institution was merged or acquired by another in order to know what to do about the institutional trustees that no longer does business in the original name.

If an institution acquires another by merger, pursuant to Financial Code § 2073, the surviving institution succeeds to all fiduciary appointments and nominated by operation of law.

Financial Code § 4889. Rights and liabilities of survivor

(a) When a merger becomes effective:

(1) Any reference to the disappearing depository corporation in any writing, whether executed or taking effect before or after the merger, shall be

²¹ See Richard A. Gorini, *Ghost Banks*, California Trusts and Estates Quarterly Vol. 6, No. 4, p. 4 (Winter 2000). [Genealogy of corporate fiduciaries active in California since 1980. Author intends to update list periodically.]

deemed a reference to the surviving corporation, if not inconsistent with the other provisions of the writing.

(2) In case the disappearing depository corporation was transacting trust business, the surviving depository corporation shall succeed, without further transfer, to the rights, obligations, properties, assets, investments, deposits, demands, agreements, and trusts of the disappearing depository corporation under all trusts, executorships, administrations, guardianships, agencies, and all their fiduciary or representative capacities to the same extent as if the surviving depository corporation had originally assumed such fiduciary or representative capacities, and the surviving depository corporation shall be entitled to take and execute the appointment to all executorships, trusteeships, guardianships, and other fiduciary or representative capacities to which the disappearing depository corporation is or may be named in wills, whenever probated, or to which the disappearing depository corporation is or may be named or appointed by any other instrument.

(b) Subdivision (a) shall be construed as clarifying and amplifying, not as limiting or restricting, the provisions of Section 1107 of the Corporations Code.

Excerpt from Corporations Code § 1107. Cessation of existence of disappearing corporation and surviving corporations; Rights of creditors and liens on property; Pending actions

(a) Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.

As for mergers, California case law provides that there is no change of entity and accordingly, the nominations are effective. See *Estate of Barreiro* (1992) 125 Cal. App. 153 [13 P.2d 1017]; *Mutual Building and Loan Association of Pasadena v. Wiborg* (1943) 59 Cal. App. 2d 325 [139 P.2d 73].

Results from sale of an institution, however are different from a merger or an acquisition. The sale results in a change of entity and identity. Accordingly, Financial Code § 4842 provides that if the institution is sold, that is good cause for removal under the Trust Law.

For any banks that are federally chartered, to the extent that federal laws differ, the federal laws would apply.²²

Different states may have different rules regarding succession to fiduciary appointments or nominations upon merger, acquisition or sale. For example in

²² Financial Code § 4803. Preemption by federal law. If and to the extent that any provision of this division is preempted by federal law, the provision does not apply and shall not be enforced.

Utah, upon merger, complete delegation is possible if the beneficiaries are given notice and opportunity to respond.

N. Wayward Trustees & Attorney Withdrawal

Withdrawal can be precipitated by various causes. See CRPC 3-700 Termination of Employment, ABA MRPC Rule 1.16 Declining or Terminating Representation in Appendix A and B.

One cause of special concern to the attorney representing the trustee-client may be a trustee who is acting improperly. Whether the attorney either can disclose the improper acts to the courts or to beneficiaries is discussed in section V below. The short answer is, no.

A broader question for the attorney is how much responsibility does the attorney have to “police” the trustee? Moreover, when and how can the attorney withdraw?

In general, the attorney will have a certain amount of influence on the trustee-client; from the onset, the attorney can take steps to guide the trustee to act in accordance with the trustee’s duties. For example, if the attorney believes that the trustee may be remiss in keeping records, the attorney may suggest an initial review after three or six months, instead of waiting until the first annual account is due. If the trustee-client does not show the willingness or ability to perform adequately, the attorney should consider withdrawal. To do otherwise may mean assuming the risk of liability to third parties (or even the trustee himself – an irresponsible person usually is eager to point the finger when something goes wrong) relating to the trustee’s failure to fulfill the trustee’s duties. See discussion in section VI below.

If the attorney discovers a breach of fiduciary duty, the attorney can guide the trustee to immediately come clean and take steps to rectify the matter immediately. If the attorney is not successful in doing so, the attorney probably will want to or be required to withdraw. In these instances, even when not mandatory under the ethical rules, the limit of loyalty may be the attorney’s own self-protection.

CRPC 3-700 Termination of Employment (Excerpts)

“(B) Mandatory Withdrawal...

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act...

(C) Permissive Withdrawal

- (1) The client
 - (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
 - (b) seeks to pursue an illegal course of conduct, or
 - (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
 - (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
 - (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act...”

Due to the constraints under California ethical rules regarding confidentiality, a “noisy” withdrawal, one that is intended to alert others about the potential wrongdoings of the trustee, appears unavailable. See discussion in section V below.

A withdrawal, even in extreme cases, should not prejudice the client. The attorney should keep in mind that the attorney is bound by the duty of confidentiality and attendant attorney-client privilege, even after the engagement has ended.

V. CRUX OF CONFLICT: LIMITS OF LOYALTY TO CLIENT

A. In General

The importance of the duty of loyalty is reflected in the challenges of abiding by the ethical rules regarding representation of clients with potential or actual conflicts of interest and in regulating the attorney’s own involvement with the client. Nonetheless, there are some consistent and comprehensible rules regarding how to maneuver in those areas. An issue presenting the greatest variety in jurisdictional rules and perhaps in the viewpoints of the attorneys themselves is delineating the limits of that paramount duty. The key question facing attorneys: *Is it possible to be ethically disloyal?*

Less dramatically, the concern is determining when and how the duty of loyalty to clients must give in to other duties to other persons or to other principles. This issue only arises when there is actually a conflict between the duty of loyalty to the clients and other values.

Another related issue is what duties the attorney may have to non-client third parties and when the attorney may be found liable for failure to fulfill those duties. The issue of professional liability to third parties, however, focuses on what duties the attorney has to third parties, given the premise that such duties do not conflict with the duty of loyalty to the client. See section VI for discussion of liability to third parties.

B. California and the Other States' Ethical Rules

In a survey of the laws of all fifty states and the District of Columbia, only Washington allowed a disclosure of a fiduciary's breach of trust, with such disclosure to be made to the court.²³

The consensus in the states is that disclosure of mere misconduct is not allowed. It appears that the importance of the duty of confidentiality to the duty of loyalty and to the fostering of trust in the attorney outweighs the benefits of disclosure in nearly all cases. In the same survey, sixteen jurisdictions allowed disclosures of fraudulent conduct in certain circumstances; the remaining thirty-five jurisdictions allowed disclosure only for potential or actual crimes. Of the thirty-five, ten allowed disclosure only for murder or substantial injury.

In California, an attorney may not disclose confidential communications with the client, with two exceptions: the crime and fraud exception and the death or substantial bodily harm exception. Evid. Code §§ 956, 956.5. Ethics opinions have advised that the crime/fraud exception does not apply to prevent an impending civil fraud. **LACBA Ethics Op. 274** (1962); Attorney is forbidden from disclosing to the court prior misfeasance of client on related fiduciary administration, even when information not obtained from client. **State Bar Opinion 1988-96**.

C. Other Legal Communities: ACTEC, ABA, etc.

Despite the current near unanimity in the ethical rules prohibiting disclosure, there is a fair amount of literature about how it may be possible or how to make it possible.

1. ACTEC Commentaries on MRPC

ACTEC Commentary on MRPC 1.2 Scope of Representation includes the following:²⁴

Disclosure of Acts and Omissions by Fiduciary Client. In some jurisdictions a lawyer who represents a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty...In jurisdictions that do not require or permit such disclosures [of acts or omissions by the fiduciary that might constitute a breach of fiduciary duty to the beneficiaries or to a court] a lawyer engaged by a fiduciary may condition the representation upon the fiduciary's agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty. The lawyer may wish to propose that such

²³ "A Fiduciary's Lawyer's Duty to the Fiduciary and its Beneficiaries: A Rhyme and a Reason for Every Season" by Charles M. Bennett.

²⁴ ACTEC Commentaries on the Model Rules of Professional Conduct (ACTEC 4th ed. 2006), pp. 35-36.

an agreement entered into in order better to assure that the intentions of the creator of the fiduciary estate to benefit the beneficiaries will be fulfilled. Whether or not such an agreement is made, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. The nature and extent of the duties of the lawyer for the fiduciary are shaped by the nature of the fiduciary estate and by the nature and extent of the lawyer's representation.

Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them. Without having first given written notice to the beneficiaries of the fiduciary estate, a lawyer who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer otherwise owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, a lawyer should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary that the lawyer would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, the lawyer should not give up the opportunity to make such disclosures when the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

Much of the above ACTEC commentary appears moot for present purposes, since there is no jurisdiction that the author is aware of that actually permits disclosure to the beneficiary of any acts or omissions by the fiduciary client that may constitute a breach of fiduciary duty. The idea that the representation may be "conditioned" on accepting disclosure, however, deserves some thought.

In a state like California, where the duty of confidentiality is zealously guarded by attorneys and courts alike, it may be that attaching such a condition is against the ethical rules and against public policy. The author is unaware of any case that discusses such conditions on engagement.

2. ABA Report of the Special Study Committee

A Special Study Committee on Professional Responsibility of the ABA Section of Real Property, Probate and Trust Law issued three reports on ethics issues facing trusts and estates attorneys in 1994.²⁵ These reports were offered as "prescriptive guides" to assist attorneys.

The Report entitled "Counseling the Fiduciary" takes the position that the client is the fiduciary and the fiduciary alone,²⁶ while recognizing that the attorney may have certain duties to beneficiaries.

²⁵ These three reports are the following: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife; Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary; Counseling the Fiduciary. 28 Real Property, Probate and Trust Journal 765 (Winter 1994).

²⁶ 28 Real Property, Probate and Trust Journal 765, 828 (1994).

The Report's position, nonetheless, regarding disclosures of possible breach of fiduciary duty by the fiduciary is that the attorney for the fiduciary is authorized to make such disclosures to beneficiaries under the "implied authorization" clause of MRPC Rule 1.6 (Confidentiality of Information).²⁷

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

The Report reasons that the two sources of the duty of confidentiality – the law of evidence and the law of agency – do not apply to bar disclosure of a fiduciary's breach of duty. "Accordingly, authorization to disclose is implicit in the engagement unless there is an agreement to the contrary."²⁸ The Report's position is that because the fiduciary administration is ultimately intended to benefit the beneficiaries, a beneficiary can compel discovery of communications between a fiduciary and its counsel, and since the beneficiaries have the right to information upon request in any event, the lawyer may volunteer information even before it is requested when it would serve to prevent or rectify breaches of trust.²⁹

Consistent with this position regarding disclosure, in discussing how the duties of a lawyer for the fiduciary may be defined and modified by a written statement, the Report states: "if the rights and protections of the beneficiaries will be affected, the beneficiaries also must consent to the agreement. For example, if the fiduciary wants to take away the lawyer's authority to disclose breaches of fiduciary duty to the beneficiaries, the beneficiaries' consent is required."³⁰

In California, however, where the duty of confidentiality is also buttressed by the wide-reaching B & P Code § 6068(e), the Supreme Court has held that (1) there is no authority for requiring a trustee to produce communications protected by the attorney-client privilege, to the beneficiaries regardless of whether communications dealt with trust administration or allegations of misconduct, and that (2) work product of co-trustee's counsel is not subject to discovery by beneficiaries. *Wells Fargo Bank v. Superior Court (Boltwood)* (2000) 22 Cal 4th 201, 91 Cal.Rptr.2d 716.

In addition, various jurisdictions have modified the "implied authorization" phrase to require explicit authorization, making the Report's analysis inapplicable to that jurisdiction.

²⁷ 28 Real Property, Probate and Trust Journal 765, 848-850 (Winter 1994).

²⁸ 28 Real Property, Probate and Trust Journal 765, 850 (Winter 1994).

²⁹ 28 Real Property, Probate and Trust Journal 765, 851 (Winter 1994).

³⁰ 28 Real Property, Probate and Trust Journal 765, 861 (Winter 1994).

D. Reflections on Loyalty

The conflicting notions of what loyalty requires may stem from the competing notions of whom the attorney represents: That is, does the duty of loyalty to the trustee-client run to the client individually or to the “role” or “capacity” that the client is serving, the office of the trustee and its fiduciary duties.

For example, The Special Report’s construction of “implied authorization” makes sense if one believes that the attorney in fact represents the function, rather than the person. Those who view the attorney as representing the client *qua person* would find the “implied authorization” argument quite a stretch, if not ludicrous.

In fact, it is difficult to resolve the tension between the notions of representing persons and representing functions. The more attorneys, of their own accord, as result of specialization, or client request, limit the scope of representation, the more it appears that attorneys are representing “roles” or “functions,” and yet the historical and perhaps intuitive sense of representation is that attorneys represent persons. This tension is reflected in the case law. For example, in ***Wells Fargo Bank v. Superior Court (Boltwood)*** (2000) 22 Cal 4th 201 [91 Cal.Rptr.2d 716], the holding that the trustee’s confidential communications with its attorneys are not discoverable by beneficiaries support the view that loyalty and attendant confidentiality belongs to the person.

On the other hand, ***Moeller v. Superior Court*** (1997) 16 Cal.4th 1125 [69 Cal.Rptr.2d 317], supports the view that the loyalty and attendant confidentiality belongs to the function, the office of the trustee. The California Supreme Court in ***Borisoff v. Taylor & Faust*** (2004) 33 Cal. 4th 523 upheld the notion that a trustee’s attorney has a duty to a successor trustee. The Court held that although an attorney hired by a fiduciary represents only that fiduciary, the legislature had created standing of successor fiduciaries to sue lawyers hired to perform tax services for the estate by a predecessor based on Probate Code sections 8524(e), 10801(b) and 9820(a) which grant successor personal representatives the powers and duties of the prior personal representative.

Given the special status that personhood has, it is likely that the traditional notion of loyalty as a duty to the individual will remain the prevailing view with certain carved out exceptions. One such important exception is the potential duty of a trustee’s attorney to a successor trustee of the trust.

VI. CONTROLLING LIABILITY TO THE BENEFICIARIES

A. In General

The law regarding attorney liability to non-clients is expanding.³¹ Reviewing the rules regarding potential liability in this area may also lead the attorney to decline a matter that one may ethically accept or lead an attorney to take appropriate defensive and affirmative steps to shield the attorney from potential liability. First are some practical rules; a more academic discussion follows.

B. Practical Rules

1. Make Non-Engagement Clear

The attorney should inform the beneficiaries that the attorney is not representing them. Whenever an attorney represents a trustee, it is advisable to notify not only the trustee but also the beneficiaries that the attorney is representing only the trustee. Without such clarification, a beneficiary or even the trustee may believe that the attorney represents the “trust” and is thereby representing the beneficiaries.

In fact, the notification to the beneficiaries may be required if the beneficiaries have any reason to believe that the trustee’s lawyer is somehow representing them or their interests because a lawyer has the duty to communicate to a person who reasonably believes they are clients that they are not clients. *Butler v. State Bar* (1986) 42 Cal. 3d 323, 329, 721 P.2d 585; *Miller v. Metzinger* (1979) 91 Cal. App. 3d 31, 154 Cal. Rptr. 22.

The attorney should also inform the beneficiary that the communications between the attorney and the beneficiary are not confidential or privileged and that the beneficiary should consider obtaining separate counsel in order to protect the beneficiary interest in the trust.

The cautious attorney may choose to minimize and avoid direct communication with the beneficiaries, opting to have all communication come from the trustee. Practically speaking, that may be difficult. In the usual case, it may be prudent to document the facts supporting the absence of any attorney-client relationship between the attorney and the beneficiaries. *Garner v. Wolfinbarger* (5th Cir. 1970) 430 F.2d 1093, *cert. denied* 401 U.S. 974.

2. Avoid Engagement

In the course of trust administration the attorney should avoid taking any actions that will inadvertently raise the argument that the attorney is also

³¹ See Professional Liability to Third Parties by Jay M. Feinman (ABA Tort and Insurance Practice Section and Section of Business Law 2000)[Comprehensive overview of this area of law from history to current law for lawyers and other professionals.]

representing one or more of the beneficiaries. **Johnson v. Superior Court** (1995) 38 Cal. App. 4th 463 [45 Cal. Rptr. 2d 312].

For example, a beneficiary may be the designated beneficiary of a pension plan or IRA and request assistance. The attorney should determine whether there are any conflict of interest issues and then proceed accordingly, be it to decline employment, to obtain the necessary informed written consents, or to proceed.

For an example of what NOT to do, see **Morales v. Field, DeGoff, Huppert & MacGowan** (1979) 99 Cal. App. 3d 307 [160 Cal. Rptr. 239], wherein the executor's attorney may have assumed duties to beneficiaries by sending them letters suggesting that the attorney will inform them of unusual developments and assuring them their interests will be protected in the estate proceeding.

3. Attorney Has Some Duty to Beneficiaries

The trustee's attorney does have some duties to the beneficiaries. The exact nature of the trustee's attorney duties to the beneficiaries is unclear. Since the attorney for the trustee is not the attorney for the beneficiaries, these duties are not the fiduciary duties of an attorney to a client. Accordingly, the lack of privity or contractual relationship between the attorney and beneficiaries means that the beneficiaries generally do not have an action for malpractice against the attorney. **Goldberg v. Frye** (1990) 217 Cal.App.3d 1258, 266 Cal. Rptr. 483.

While it seems possible to avoid an attorney-client relationship with the beneficiary through clear communication, it appears that the attorney of the trustee may have some duties to the beneficiaries, where such duties do not conflict with the attorney's fiduciary duties to the trustee. This conclusion stems from the fact that beneficiaries and other non-client third parties have been successful in holding attorneys liable in civil proceedings. The attorney may also have a duty to disclose to the beneficiaries any potential conflict of interest that the attorney may have affecting the beneficiaries' interest.

A minimum duty appears to be the duty of the attorney not to participate in the breach of fiduciary duty by the fiduciary. If an attorney participates in the breach of fiduciary duty by a fiduciary, the beneficiary may bring a legal action against the attorney. **Wolf v. Mitchell, Silberberg & Knupp** (1999) 76 Cal. App. 4th 1030 [90 Cal. Rptr. 2d 792]; **Pierce v. Lyman** (1991) 1 Cal. App. 4th 1093 [3 Cal. Rptr. 2d 236].

C. Discussion

The traditional "privity rule" that the attorney owes no duty to one with whom the attorney is not in privity is no longer the law in most jurisdictions. The laws in various jurisdictions differ. The courts in different jurisdictions have used different bases for expanding the third party liability of attorneys.

The original privity rule case in United States is **National Savings Bank v. Ward** (1879) 100 U.S. 195. California led the way in making exceptions to the privity rule with **Biakanja v. Irving** (1958) 320 P.2d 16. The California Supreme Court held a notary public liable for an invalidly executed will to a beneficiary, using a six-prong balancing test. **Lucas v. Hamm** (1961) 56 Cal. 2d 583 [364 P.2d 685] kept and modified the six-prong test, but provided a remedy under contract law consonant with the court's treatment of the plaintiff as the third party beneficiary. The California Supreme Court held the attorney liable to beneficiaries of a defective testamentary trust. **Heyer v. Flaig** (1969) 70 Cal. 2d 223 [74 Cal. Rptr. 225, 449 P. 2d 161] kept the six-prong balancing test, but discarded the "contract" element, making the cause of action one of negligence only. The California court refused to extend the third party liability in **Goodman v. Kenney** (1976) Cal. 3d 355 [134 Cal. Rptr. 375, 556 P. 2d 737] where the third party plaintiff sued an attorney who had negligently advised clients in an arm's length business transaction.

Some states, such as New York, have retained the privity rule for negligence actions, while accepting "near privity" for negligent representation actions. In states allowing negligence actions by third parties but only in limited exceptions, sometimes the negligent representation actions are an alternative theory available to third parties. **Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer, & Wood** (1992) 80 N.Y. 2d 377 [605 N.E. 2d 318, 690 N.Y.S.2d 831]. **Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices** (1989) 207 Cal. App. 3d 1277 [255 Cal. Rptr. 483]; **Riggs Nat'l Bank v. Freeman** (S.D. Fla. 1988) 682 F. Sup. 519. Certain states such as Texas and Nebraska have retained the strict privity theory. **Barcello v. Elliott** (Tex 1996) 923 S.W.2d 575, 580; **Lilyhorn v. Dier** (Neb. 1983) 335 N.W.2d 554, 555. On the other end is Nevada and Kansas, where under the balancing test, the attorney may more likely be held liable to the beneficiaries. **Charleson v. Hardesty** (P.A. 1992) 108 Nev. 878 [839 P.2d 1303]; **Pizel v. Zuspahn** (1990) 247 Kan. 54 [795 P.2d 42]. The most extreme at this end of the spectrum is Arkansas where the beneficiaries were determined to be joint clients with the executor. **Estate of Torian v. Smith** (Ark. 1978) 564 S.W.2d 521 (This case was a dispute over whether the executor's attorney could testify in support of a fee application. It may be that evidentiary disputes are distinguishable from malpractice liability issues.)

1. Theories of Recovery by Third Parties

The theories of recovery used by third parties have included third party beneficiary, negligence, negligent misrepresentation, fiduciary duty; and assumption of duty (or reliance or undertaking).

These theories are in additional sources of liability for attorneys, in addition to general gamut of causes of action under which attorneys may be sued, such as intentional tort claims, (e.g. fraud, malicious prosecution, abuse of

process, defamation, and invasion of privacy) or statutory causes of action (RICO, security laws, etc.).

a) Third Party Beneficiary

The classic case is the disappointed beneficiary of a negligently prepared will. In most jurisdictions, an attorney may be liable for malpractice to an intended beneficiary. The general rule of liability makes sense given that the engagement is in large part for the purposes of making effective bequests. See *Blair v. Ing* (Hawaii 2001) 95 Haw. 247, 21 P.3d 452, for good overview of current state of law in this area.

b) Negligence (Tort)

This is the most common cause of action for cases outside negligence relating to wills. In elements of a cause of action for negligence are duty, breach of duty, causation, and damages. The basic issue in third party cases is whether a duty exists. The inquiry into the existence of duty can be done under different tests, such as the “balancing test” based on California law that many jurisdictions have also followed.

c) Negligent Misrepresentation (Near Privity)

Often overlapping with the theory of negligence, this theory is often used in cases where the third party relies detrimentally on some type of communication from the defendant attorney, such as in business transactions.

d) Fiduciary Duty, Assumption of Duty, Undertaking, Reliance

This cause of action relies on some specific act by the defendant attorney that results in the creation of a duty to the third party. The leading authority of these types of cases is found in New Jersey cases, beginning with *Stewart v. Sbarro* (1976) 142 N.J. Super. 581, 362 A.2d 581, certif. denied, 72 N.J. 459 [371 A.2d 63]. See also *Petrillo v. Bachenberg* (1995) 139 N.J. 472 [655 A.2d 1354] and *Morales v. Field* (1979) 99 Cal. App. 3d 307 [160 Cal. Rptr. 239].

2. Case Law

Even after reviewing the apparently relevant cases, it is still difficult to formulate the rules and duties applicable to the attorney regarding their relationship with the beneficiaries. In California the *Goldberg v. Frye* rule providing that beneficiaries generally cannot bring a malpractice claim against the attorney of the administrator does provide some guidance. Nevertheless, definitive substantive guidance regarding the duties of the attorney to beneficiaries of a fiduciary estate is lacking. Outside California, jurisdictions vary significantly on whether be the beneficiaries of the estate (or legatees or ward of guardian) may bring a malpractice action against the attorney for the fiduciary (e.g. trustee, executor, or guardian)

a) California Cases

(1) Standing

- Successor personal representative have standing to sue attorneys of prior personal representative. **Borrisoff v. Taylor & Faust** (2004) 33 Cal. 4th 523.

In **Borrisoff**, the decedent died in 1989, leaving conflicting wills. By the time it was sorted out and Borrisoff was appointed the executor in 1995, much had happened. The special administrator Springer who had served interim had improperly “borrowed” money from the estate; Springer lost his attorney Taylor & Faust through withdrawal in February 1993 (probably due to Springer’s failure to rectify breach of fiduciary duty); Springer himself had died in May 1993; and the estate’s time to file an amended estate tax return had expired in September 1993.

In January 1997, Borrisoff filed a petition to surcharge the Springer estate, without including a claim for the loss due to tax errors. He filed a malpractice action for the tax errors against Taylor & Faust in May 1998, relying on large part on **Moeller v. Superior Court** (1997) 16 Cal.4th 1125 [69 Cal.Rptr.2d 317] (holder of the attorney client privilege for confidential communications between trustee and attorney is the current trustee).

The court affirmed the trial court, stating that reliance on **Moeller** is inappropriate and that the successor administrator had no standing to sue the attorney of the predecessor. It applied the six-prong test used in **Goldberg v. Frye** and also cited **Estate of Lagios** (1981) 118 Cal. App. 3d 459, 173 Cal. Rptr. 506, wherein surcharge against the attorney was found inappropriate.

The Supreme Court reversed the decision of the appellate court, reasoning that while an attorney hired by a fiduciary represents only that fiduciary, the legislature had created standing of successor fiduciaries to sue lawyers hired to perform tax services for the estate by a predecessor based upon the following statutes:

1. Probate Code section 8524, which provides that a successor personal representative has the powers and duties of the former personal representative;
2. Probate Code section 10801(b), which provides that the personal representative can employ or retain tax counsel and pay for such services from estate funds; and
3. Probate Code section 9820(a), which provides that a successor fiduciary has the power to commence and maintain actions and proceedings for the benefit of the estate.

The court also based its decision on **Moeller (supra)**, in which the court held that a successor fiduciary, upon taking office, becomes the holder of the attorney-client privilege for certain confidential communications between the predecessor fiduciary and the attorney on matters of trust administration. The court reasoned that the decision in

Goldberg did not apply because *Goldberg* held that an attorney for a fiduciary owes no duty to a beneficiary, rather than a successor fiduciary. From a practical perspective, the court added, if the successor fiduciary did not have standing to sue, then no one would be able to obtain the appropriate remedy for the damages arising from the attorney's negligence. Apparently the court did not agree with the defendants' argument that the successor fiduciary should be required to sue the predecessor, who would then be forced to bring an action against the attorney.

- Beneficiaries of an estate do not have standing to sue attorney of administrator. ***Goldberg v. Frye*** (1990) 217 Cal. App. 3d 1258 [266 Cal.Rptr. 483].

In ***Goldberg v. Frye***, general legatees brought action against administrator of estate and attorney for administrator. The court granted summary judgment in favor of administrator and attorney, and appeal was taken. The Court of Appeal held that: (1) legatees were precluded from claiming that administrator engaged in malfeasance in separate action where they failed to raise such contentions at time of final accounting, and (2) legatees could not maintain a malpractice action against attorney of the administrator.

The court reasoned that

"A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty, there can be no breach and no negligence. (citations omitted) By assuming a duty to the administrator of an estate, an attorney undertakes to perform services that may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate...

Therefore, if the legatees are to have grounds for an action for malpractice against Frye, they must rely on circumstances and principles, from which a duty may arise absent privity of contract, and not based upon an attorney-client relationship.

The principles governing such duty are set forth in 1 *Mallen & Smith, Legal Malpractice* (3d ed. 1989) section 7.11, page 382. The determination of duty rests upon the assessment of six considerations: "(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession."

The predominant inquiry, *Mallen* states, is whether the principal purpose of the attorney's retention is to provide legal services for the benefit of the plaintiff. For example, the intention of a testator to benefit legatees, through the retention of an attorney to draft his will, can confer a cause of action in favor of a disappointed legatee against the negligent draftsman. (See, e.g., *Lucas v. Hamm*

(1961) 56 Cal.2d 583 [15 Cal.Rptr. 821, 364 P.2d 685]; *Biakanja v. Irving* (1958) 49 Cal.2d 647 [320 P.2d 16, 65 A.L.R.2d 1358].)

Viewing the legatees' claim in this light, we find it impossible to conclude that the parties to the attorney's contract...entered into same for the principal purpose of providing benefit to the legatees. We find nothing to indicate that this attorney's retention was in any respect different from the typical retention of counsel by the fiduciary of a decedent's estate. As noted above, such retention constitutes the counselor the attorney for the fiduciary, and not the attorney for the estate, its beneficiaries, its creditors or others who may be interested therein." *Id.* pp. 1267-1268

(2) Attorney Liable If Participates In Trustee Breach

- If a third party knowingly participates in a breach of trust by the trustee, the trust beneficiaries may be able to bring a direct suit against the third party, without having to have the trustee sue on their behalf. ***Wolf v. Mitchell, Silberberg & Knupp*** (1999) 76 Cal. App. 4th 1030 [90 Cal. Rptr. 2d 792]; ***City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*** (1998) 68 Cal. App. 4th 445 [80 Cal. Rptr. 2d 329].

In ***Wolf v. Mitchell, Silberberg & Knupp***, the mother's trust provided for the father, with the two sons Robert and Fred as the remaining beneficiaries. While father served as trustee, the father had commingled funds and Fred had inappropriately used the bulk of the trust estate with the cooperation of the attorney and accounting firm. The court stated:

"In addition to the remedies for breach of trust specified in subdivision (a) of Probate Code section 16420 [Remedies for Breach of Trust], a beneficiary or cotrustee may "resort to any other appropriate remedy provided by statute or the common law." (Prob. Code, § 16420, subd. (b).) Such an appropriate common law remedy is defined in section 326 of the Restatement Second of Trusts. Section 326 of the Restatement provides that "[a] third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." (See also Bogert, *Law of Trusts and Trustees* (rev. 2d ed. 1995) § 868, pp. 104-109 [person who knowingly aids trustee in committing a breach of his duties is liable to the beneficiary]; 11 *Witkin, Summary of Cal. Law* (9th ed. 1990) *Trusts*, § 164, p. 1017 [beneficiary may sue third persons who participated in breaches of trust].) Comment a to section 326 of the Restatement Second of Trusts provides an example that is relevant to this case: "[I]f the trustee purchases through a stockbroker securities which it is a breach of trust for him to purchase and the broker knows [**19] that the purchase is in breach of trust, the broker is liable for participation in the breach of trust." (At p. 124.)

A Court of Appeal decision (decided after the lower court's decision in this case) expressly adopts the rule of Restatement Second of Trusts section 326. In ***City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*** (1998) 68 Cal. App. 4th 445 [80 Cal. Rptr. 2d 329] (*Atascadero*), the court considered whether beneficiaries of the Orange County Investment Pools, a statutory investment

trust, could bring a direct tort action for breach of fiduciary duty (and other claims) against Merrill Lynch, a securities and financial broker and adviser, even though the county, the trustee of the investment pools, already had filed suit against Merrill Lynch. (Id. at pp. 451-458.) As in this case, the defendant in Atascadero argued that the suit only could be maintained by the trustee, and that the beneficiaries lacked standing. (Id. at pp. 458-459.) The Court of Appeal, drawing extensively on the authorities cited above, held that ". . . trust beneficiaries may bring suit on their direct claims against third persons who have actively participated with a trustee in a breach of trust for their own financial advantage, whether by inducing, aiding or abetting the trustee's breach of duty, or by receiving trust property from the trustee in knowing breach of trust." (Id. at p. 467; accord, *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal. App. 3d 307, 314-315 [160 Cal. Rptr. 239] [beneficiary may sue attorney for trustee when attorney actively participates in a breach of trust].)" *Id.* pp. 1038-1039.

In *City of Atascadero v. Merrill Lynch*, certain trust beneficiaries entered into a settlement agreement with the trustee, the County Treasurer of Orange County, that expressly permitted them to bring their own claims against Merrill Lynch. The trial court sustained Merrill Lynch's demurrer to the trust beneficiaries' second amended complaint without leave to amend. The main issue was whether the trustee rather than the beneficiaries had to bring suit against Merrill Lynch. Reversing the trial court, the Court of Appeal held that under certain circumstances, a trust beneficiary may sue third persons who directly participated with the trustee in breaches of trust, citing, *Pierce v. Lyman* (1991) 1 Cal. App. 4th 1093 [3 Cal. Rptr. 2d 236]; *Saks v. Damon Raike & Co.* (1992) 7 Cal. App. 4th 419, 428 [8 Cal. Rptr. 2d 869]; and Rest. 2d Trusts §§ 291-295, 326, pp. 57-73, 124-125.

In *Berg & Berg Enterprises, LLC v. Sherwood Enterprises* (2005) 131 Cal. App. 4th 802, appellants, an assignee for the benefit of creditors and the assignee's counsel, sought review of an order from the Superior Court of Santa Clara County, which granted leave to respondent creditor to file an amended complaint alleging a civil conspiracy between the assignee and its counsel. The court held that an action against an attorney based on actions performed with representation of a client in connection with any claim to contest or compromise a claim or dispute must comply with California Civil Code section 1714.10. That Civil Code section pertains to actions against an attorney for civil conspiracy with a client. In order to file such an action, a plaintiff must obtain an order from the court establishing a reasonable probability that the party will prevail in the action. The code section does not apply if (1) the attorney had an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain. Cal. Civ. Code section 1714.10(c). The respondent creditor had argued that the requirements of Civil Code section 1714.10(c) applied to allow respondent to bring the action against attorney for the assignee.

The court held that the attorney did not owe an independent duty to respondent creditor. The court distinguished this case from *Wolf* because in *Wolf* the attorney had advised the beneficiary to waive an accounting, which act may have created an independent duty to the beneficiary. The attorney's misrepresentations to the beneficiary in *Wolf*, the court reasoned, veered into fraud and personal financial advantage on the part of the attorney, and accordingly, the action against the attorney in that case was permissible. In this case, no such misconduct was alleged by the creditor on the part of the attorney. *Id. at 828.*

The court in *Berg* also cites to an ABA Standing Committee on Ethics and Professional Responsibility, Counselling a Fiduciary, Formal Opinions 94-380. That opinion states "[w]hen the fiduciary is the lawyer's client all of the Model Rules prescribing a lawyer's duties to a client apply. ... The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct". The *Berg* court found this language to undercut "any suggestion provided in the comment to ABA Model Rules, rule 1.2 that an attorney representing a fiduciary may have "special obligations" to the beneficiary in the trust situation". *Berg & Berg* (2005) 131 Cal. App. 4th 802, footnote 12.

(3) Assumption of Duty

"It is, of course, conceivable that the attorney for an administrator could undertake to perform legal services at the behest of, and as attorney for, a beneficiary of the estate. Under such assumed facts a duty would be created directly in favor of the beneficiary, an attorney-client relationship would be established, and the beneficiary would have recourse against the attorney for damages resulting from negligent representation. There is no evidence in this case (resorting to the documentation in support of and in opposition to the motions for summary judgment, as well as having recourse to the allegations of the first amended complaint), however, to support the establishment of an attorney-client relationship by virtue of direct contacts between Frye [attorney] and Goldberg [beneficiary], or any of the other legatees. Therefore, if the legatees are to have grounds for an action for malpractice against Frye, they must rely on circumstances and principles, from which a duty may arise absent privity of contract, and not based upon an attorney-client relationship." ***Goldberg v. Frye*** (1990) 217 Cal. App. 3d 1258, 1267-1268 [266 Cal.Rptr. 483].

Consider ***Morales v. Field, DeGoff, Huppert & MacGowan*** (1979) 99 Cal. App. 3d 307 [160 Cal. Rptr. 239] for its facts, though its general statements that "[a]n attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary" is not good law:

“[R]espondents [attorneys] sent appellant [beneficiary] a letter on October 9, 1969, which stated: “There is no action required to be taken on your part in connection with the hearing or further probate proceedings.’ Respondents sent a second letter on October 15, 1969, which stated: ‘. . . we will keep you advised if anything unusual arises during the probate administration. Since all aspects of probate administration will be under court supervision and subject to court orders, you should feel reasonably assured that your interests will be protected.” *Id.* pp. 311- 312.

Other California cases have reaffirmed the general rule that an attorney for a trustee does not owe a duty to the trust beneficiaries. In *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal. App. 4th 802 [32 Cal. Rptr. 3d 325], the court describes the notion that the attorney for the trustee represents only the trustee a “firm proposition”. See also *Sullivan v. Dorsa* (2005) 128 Cal. App. 4th 947, 964 (“An attorney engaged by a *trustee* does not thereby become the attorney for the trust’s *beneficiaries*.”)

(4) Limitations on the Third Party Beneficiary Theory

The attorney has no duty to the beneficiary to an unsigned will. Testator was a cancer patient on chemotherapy and died before executing the will. The beneficiary claimed that the attorney had delayed and failed to follow-up though the attorney was aware that the testator was ill. Applying the *Lucas v. Hamm* six-prong balancing test, the court held that “imposition of liability in a case such as this could improperly compromise an attorney’s primary duty of undivided loyalty to his or her client, the decedent.” ***Radovich v. Locke-Paddon*** (1995) 35 Cal. App. 4th 946, 965 [41 Cal. Rptr. 2d. 573], citing ***Krawczyk v. Stingle*** (1988) 208 Conn. 239 [543 A.2d 733].

Nevertheless, a recent California case extended the rule in *Lucas* to allow a beneficiary under a will to bring an action against the attorney who drafted the will. The beneficiary alleged negligence on the part of the attorney because he failed to advised the testator that under California’s care custodian laws, her gift to her intended beneficiary may fail unless she obtained a Certificate of Independent Review. *Orsonio v. Weingarten* (2004) 124 Cal. App. 4th 304.

b) Cases Outside California

(1) Estate Cases

Roberts v. Fearey (Or.App. 1999) 162 Ore. App. 546, 986 P.2d 690 [693-696]. Based on policy analyses, the court held that attorney for personal representative has no duty to beneficiaries, distinguishing *Moeller*.

Trask v. Butler (Wash. 1994) 123 Wash. 2d 835 [872 P.2d 1080, 1083-1085] The court used the California six-prong balancing test and, relying in part on *Goldberg*, held that no duty found to run from estate personal representative’s

attorney to the estate or estate beneficiaries, as they were incidental beneficiaries, a direct cause of action for breach of fiduciary duty was available against the personal representative, and that to impose a duty would result in an irresolvable conflict of interest unduly burdensome to the legal profession. But see *Campbell v. Johnson* (2007) Wash. App. LEXIS 2930 (in the context of statutory wrongful death actions, the statutory beneficiaries are intended and not merely incidental beneficiaries of the attorney - personal representative relationship).

***Kramer v. Belfi* (1984 N.Y. App. Div) 106 A.D. 2d 615.** Applying New York's strict privity rule, the court held the beneficiary of decedent's estate had no standing to sue the attorney of the executor for failure to give tax advice.

***Weingarten v. Warren* (S.D.N.Y. 1990) 753 F. Supp. 491.** The court held that beneficiaries of a trust could not make a malpractice claim due to the privity rule, but that the beneficiaries could claim a cause of action against the attorney for breach of fiduciary duty, under ***In re Estate of Clarke* (N.Y. 1962) 188 N.E. 2d 128.**

***Baer v. Broder* (Sup. Ct 1981) 436 N.Y.S.2d 693, *aff'd on other grounds*, (1982) 447 N.Y.S.2d 538.** The executor hired an attorney to pursue a wrongful death claim, which was the claim of the executor as a beneficiary of the estate, not a claim of the estate. The executor-beneficiary later filed an action against the attorney. The attorney claimed that the estate had no interest in the action and that the beneficiary was not in privity with the attorney. Despite the usual strict privity doctrine, the court held that beneficiary had cause of action because of the "face to face" nature of the meetings with the attorney. In effect, the court implied a contract.

(2) Guardianship Cases

***Guardianship of Karan (Janssen v. Topliff)* (Wash 2002) 38 P3d 396.** The mother of the ward was appointed guardian and misused most of the guardianship funds, which was life insurance on the father's life. The order naming the mother as guardian had not required a bond or deposit of the proceeds in a blocked account as required under applicable law. The guardian was surcharged but had no available assets. The successor guardian sued the attorney for the mother. The trial court granted summary judgment in favor of Attorney on the ground that successor guardian did not have standing, because Attorney's duty of care was only to the original guardian. The appellate court reversed, applying the California six-prong test it had used in ***Trask v. Butler* (Wash. 1994) 123 Wash. 2d 835, 872 P.2d 1080.** "In contrast to Trask, the legitimate interests of the guardian here are inseparable from those of the ward. The profession will not be unduly burdened by finding a duty in this case, because the applicable law mandates either a bond or a blocked account. The obligation to protect the interests of wards in circumstances such as this does not put lawyers in an ethical bind. To require them to inform a would-be guardian that

Washington statutes mandate either a bond or a blocked account is not a burden on the profession.” [The special vulnerability of wards of guardianship supports the imposition of duty on attorney. Washington courts are reluctant to extend this duty when the beneficiaries are not wards and are able to protect themselves. *Estate of Deigh v. Perkins* (2006) Wash. App. LEXIS 2160.]

Fickett v. Superior Court (Ariz. App. 1976) 558 P.2d 988. The successor guardian sued the former guardian’s attorney after the former guardian ran off with the assets. The court applied the *Lucas v. Hamm* balancing test and held that the attorney assumes a relationship with the ward, in fact “the ward’s interest overshadow those of the guardian.” *Id.*, p. 990. [Arizona generally applies the ***Lucas v. Hamm*** six-prong balancing test, according no duty to beneficiaries of estate.]

(3) Discovery

Riggs National Bank v. Zimmer (Del. Ch. 1976) 355 A.2d 709. Unlike California (***Wells Fargo, Lasky*** – see section III above), the court held that trust beneficiaries can compel production of communications between the trustee and its attorney. (Followed by *Hendon v. Bancorp Asset Management* (2007) U.S. Dist. LEXIS 17357 (Ed. Mo. March 13, 2007).

c) ACTEC Commentaries

The entire commentary under the subheading “duties to beneficiaries” of commentary to MRPC Rule 1.2 (Scope of Representation):³²

“Duties to Beneficiaries. The nature and extent of the lawyer’s duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). **The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them.** The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally [i.e., in a representative capacity as opposed to individually] with respect to the fiduciary estate.

The scope of the representation of a fiduciary is an important factor in determining the extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe

³² ACTEC Commentaries on the Model Rules of Professional Conduct (3rd ed. 1999) pp. 57-59.

few, if any, duties to the beneficiaries of the fiduciary estate other than ones the lawyer owes to other third parties. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those due to other adverse parties or nonclients. In resolving conflicts regarding the extent of the lawyer's duties, some courts have considered the source from which the lawyer is compensated. The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular, in such a case unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary. See MRPC 4.2 (Communications with Persons Represented by Counsel). Nevertheless, **even though a separate represented beneficiary and the fiduciary are in a conflict with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally** [i.e., in a representative capacity as opposed to individually] **continue to be bound by duties to the beneficiary.** Additionally, the lawyer's communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them. In this connection note the Comment to MRPC 4.3 (Dealing with Unrepresented Person) stating that a lawyer should "not give advice to an unrepresented person other than the advice to obtain counsel." [bold added]

VII. Conclusion

Many of the potential problems raised in this outline can be avoided by a thoughtful and comprehensive engagement letter. A practitioner can design his common form to suit the specific situation. Clients can have selective memories, and an engagement letter that has specified the scope of representation, identifying the tasks to be undertaken and any limits to those tasks, the basis upon which fees will be determined, and issues relating to confidentiality and conflicts of interest will go a long way to refreshing an otherwise faulty recollection. Potential conflicts of interest are of paramount importance when a lawyer undertakes representation of multiple clients in the same matter. Such representation should be explicitly explained and agreed to by the joint clients.

There is an old saw that the most effective method to avoid a malpractice claim is to be nice to your clients. The practitioner should treat this phrase like fine wine, rather than a rusty tool. Good client relations with effective and regular communications will do more to avoid a claim than innumerable hours of continuing education. Remember that our clients are human too, and will understand a mistake more forgivingly if the lawyer has established a personal relationship rather than simply treating the client as an account receivable.

Appendix A – CRPC (Selected Rules)

California Rules of Professional Conduct (Selected Rules)

Rule 3-110. Failing to Act Competently.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Rule 3-300. Avoiding Interests Adverse to a Client.

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Rule 3-310. Avoiding the Representation of Adverse Interests.

(A) For purposes of this rule:

(1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) “Informed written consent” means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law, or

(b) the member is rendering legal services on behalf of any public agency which *provides legal services to other public agencies or the public.*

Rule 3-320. Relationship With Other Party's Lawyer.

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

Rule 3-400. Limiting Liability to Client.

A member shall not:

(A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Rule 3-500. Communication.

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Rule 3-700. Termination of Employment.

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Rule 4-300. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.

(A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

(B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

Appendix B – ABA MRPC (Selected Rules)

American Bar Association Model Rules of Professional Conduct (Selected Rules)

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to be a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage in, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations of the lawyer's conduct.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in presenting a client.

Rule 1.4 Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Rule 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 –Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other

recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by the tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Appendix C – Evidence Code §§ 950-962: Lawyer-Client Privilege

Lawyer-Client Privilege

§950. “Lawyer” Defined.

As used in this article, “lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation. Leg.H. 1965 ch. 299, operative January 1, 1967.

§951. “Client” Defined.

As used in this article, “client” means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent. Leg.H. 1965 ch. 299, operative January 1, 1967.

§952. “Confidential Communication Between Client and Lawyer” Defined.

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. Leg. 1965 ch. 299, operative January 1, 1967, 1967 ch. 650, 1994 chs. 186, 587, 2002 ch. 72 (SB 2061).

§953. “Holder of Privilege” Defined.

As used in this article, “holder of the privilege” means:

- (a) The client when he has no guardian or conservator.
- (b) A guardian or conservator of the client when the client has a guardian or conservator.
- (c) The personal representative of the client if the client is dead.
- (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence. Leg.H. 1965 ch. 299, operative January 1, 1967.

§954. Who May Claim Privilege.

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities. Leg.H. 1965 ch. 299, operative January 1, 1967, 1968 ch. 1375, 1994 ch. 1010.

§955. When Lawyer Must Claim Privilege.

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954. Leg.H. 1965 ch. 299, operative January 1, 1967.

§956. Services of Lawyer Obtained to Aid in Commission of Crime or Fraud.

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud. Leg.H. 1965 ch. 299, operative January 1, 1967.

§956.5. No Privilege If Disclosure Will Prevent Criminal Act by Client.

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. Leg.H. 1993 ch. 982, 2003 ch. 765 (AB 1101), operative July 1, 2004, 2004 ch. 183 (AB 3082).

§957. Parties Claiming Under Deceased Client.

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction. Leg.H. 1965 ch. 299, operative January 1, 1967.

§958. Breach of Duty Arising Out of Lawyer-Client Relationship in Issue.

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. Leg.H. 1965 ch. 299, operative January 1, 1967.

§959. Intention or Competence of Client Executing Attested Document in Issue.

There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document. Leg.H. 1965 ch. 299, operative January 1, 1967.

§960. Intention of Deceased Client With Respect to Writing Affecting Interest in Property in Issue.

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property. Leg.H. 1965 ch. 299, operative January 1, 1967.

§961. Validity of Writing Affecting Interest in Property Executed by Deceased Client in Issue.

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property. Leg.H. 1965 ch. 299, operative January 1, 1967.

§962. Two or More Clients Retaining Same Lawyer in Matter of Common Interest.

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest). Leg.H. 1965 ch. 299, operative January 1, 1967.

Appendix D – Resources on Ethics

Various bar association's ethics committees publish opinions regarding ethical issues raised by their members. While advisory only, they provide helpful advice on matters not addressed in case law.

CALIFORNIA STATE BAR

www.calbar.ca.gov

State Bar's California Compendium on Professional Responsibility. It is a three-volume ethics reference manual containing the ethics opinions published by the State Bar of California, the Bar Association of San Francisco, the Los Angeles County Bar Association, the Orange County Bar Association and the San Diego County Bar Association, with a comprehensive subject matter index; Publication 250 (Booklet containing the California Rules of Professional Conduct, The State Bar Act (Bus. & Prof. sections 6000 et seq.), relevant California Rules of Court, relevant statutes regarding duties of members of the State Bar, Rules and Regulations Pertaining to Lawyer Referral Services, and the Minimum Continuing Legal Education (MCLE) Rules and Regulations); and the California Code of Judicial Conduct. (\$157.33 a set (\$145 plus tax) by mail only. Current years' annual update is sold for \$40, and prior years' updates are sold for \$20.) The Compendium can be ordered by mail with prepayment: The State Bar of California, Attn: Compendium, 180 Howard Street, San Francisco, CA 94105-1639 (Call (415) 538-2112 for updated info on ordering).

2008 Edition of Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel. Susan T. House, Esq. and Bruce S. Ross, Esq. eds. (State Bar of California Estate Planning, Trust and Probate Law Section [now the Trusts & Estates Section], 1997) Ordering information available online at: calbar.ca.gov/trusts.

AMERICAN BAR ASSOCIATION

www.abanet.org

Model Rules of Professional Conduct, 2008 Edition. (Annotated versions are periodically available. Most recent is the 2007 Sixth Edition, available for \$124.95.)

ABA Compendium of Professional Responsibility Rules and Standards (2008 Edition) (Available for \$39.95)

Reports of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar

Association (“Special Study Committee Report”), published in 28 Real Property, Probate and Trust Journal 765 (Winter 1994).

ACTEC

www.actec.org

American College of Trusts and Estates Counsel Commentaries on the ABA’s Model Rules of Professional Conduct (4th Edition 2006), along with pamphlet ACTEC Engagement Letters: A Guide for Practitioners.

OTHERS

Treatises

American Law Institute Restatement (Third) of the Law Governing Lawyers (2000)

George C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* (Prentice Hall & Business 3rd ed. 2000)

Mallen & Smith, *Legal Malpractice* (4th Ed. 1996)

Witkin, *California Procedure*, vol. 1, Attorneys (4th ed. 1996)

Practice Guides

California Forms of Pleading and Practice, Ch. 72 Attorney Practice and Ethics, Ch. 76 Attorney Professional Liability (Matthew Bender 2002)

John A. Hartog, *As the Trust World Turns*, California Trusts & Estates Quarterly, Vol. 5 No. 4 (Winter 1999)

John A. Hartog and George R. Dirkes, *California Trust Practice*, Chapter 10 (Matthew Bender 2002)

Roy M. Adams, *Ethics at the Edge: Sophisticated Estate Planning and Professional Responsibility* (University of Miami School of Law Phillip E. Heckerling Institute on Estate Planning, Chapter 18, June 2001)

Articles

[Attorney v. Client--Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning](#), 68 Tenn. L. Rev. 261 (2001)

[Avoiding Malpractice Claims in Planning and Administration](#), 22 Est. Plan. 359 (1995)

[Defining An Attorney's Duty Of Care To Nonclients](#), 39 Boston Bar Journal 16 (1995)

[Duties of Estate Planners to Nonclients: Identifying, Anticipating and Avoiding the Problems](#), 37 S. Tex. L. Rev. 1063 (1996)

[Fickett's Thicket: The Lawyer's Expanding Fiduciary And Ethical Boundaries When Serving Older Americans Of Moderate Wealth](#) 32 Wake Forest L. Rev. 445 (1997)

[The Fiduciary's Fiduciary: Legal Ethics In Fiduciary Representation](#), 1994 U. Ill. L. Rev. 889 (1994)

Appendix E
Form Engagement Letter

June 23, 2008

PRIVILEGED AND CONFIDENTIAL

Re: Legal Representation

Dear

It was a pleasure meeting with _____. As requested, I will represent you in your capacity as cotrustees of the_____.

I will perform only those legal services as described above. I will notify you promptly of all significant developments regarding this matter, and will consult with you in advance as to any significant decisions which may be required.

You hereby authorize and direct me to take all actions which I deem advisable on your behalf in this matter. Such action may include employment of other persons or companies to render services in connection with this matter as authorized by you. Such action may also include employment of experts and consultants, provided, however, that employment of experts and consultants will require your prior approval. I may undertake any other related work upon your oral authorization.

Time spent by me on this matter will be charged at my current hourly rate of \$_. Time spent by my associate will be charged at his current hourly rate of \$. In addition, time spent by my paralegals will be charged according to their current applicable hourly rate of \$.

You hereby agree to reimburse me for any out-of-pocket expenses I pay; or if you are billed directly for these expenses, to make prompt, direct payments to the originator of these bills. Such expenses include, but are not limited to, charges for serving and filing papers with governmental agencies, courier or messenger services, recording and certifying documents, long distance telephone calls, title insurance premiums,

photocopying costs, overtime clerical assistance, travel expenses, postage, and notary fees.

My fees and costs incurred (to the extent not previously billed) will be billed monthly, and you hereby agree to pay such fees and expenses within 30 days of the date of each statement. If amounts due me remain outstanding for more than 30 days, your account is delinquent and I reserve the right to impose a late charge on the unpaid amounts. The purpose of the late charge is not to grant any right to defer payment but to encourage prompt payment. The present late charge rate is ten percent (10%) per annum or the maximum amount allowed by law, whichever is less.

If you have any questions regarding any of my billings, I ask that you notify me as quickly as possible after receiving the bill, so that I can answer the questions while the relevant facts are still fresh in my mind. If a dispute arises as to any billings which I deliver to you in connection with my representation of you, you have the right to have any such dispute arbitrated through the Contra Costa County Bar Association arbitration panel. If you choose not to arbitrate a fee dispute through the Bar Association panel, that fee dispute will be submitted to binding arbitration before a member of the American Arbitration Association or a comparable alternate dispute resolution service. All other disputes that may arise between us, including claims of professional negligence, will be submitted to binding arbitration before a member of the American Arbitration Association or comparable alternate dispute resolution service. The party prevailing in any such dispute shall be entitled to recover reasonable attorneys' fees.

You retain the right to terminate my services with respect to my representation of you in this matter with or without cause, and at any time. Similarly, I may withdraw from representation of you at such time and in the event that I determine that such representation is incompatible with my professional responsibilities.

It is customary for cotrustees to employ the same lawyer to assist them in administering trusts. It is nevertheless important that you understand that because I would represent you as a group, each of you would be my client. As a result, matters that one of you might discuss with me would not be protected by the attorney-client privilege from disclosure to the other of you, and I will disclose to the other any material comment made to me by either of you. The Rules of Professional Conduct prohibit me from withholding information from either of you given to me by the other. Please note that any information given by either of you to me will continue to be protected by the privilege from disclosure to any third person.

If you have a difference of opinion concerning the administration of the trust, I can point out the advantages and disadvantages of each position, but I can not advocate one position to the detriment of the other. I doubt that conflicts between you in this matter will arise. If conflicts do arise between you, however, that are of such nature that I determine that I am unable to perform my obligation to you in accordance with my engagement, I would be required to withdraw as your joint attorney. I would then advise each of you to obtain independent counsel.

Another purpose of this letter is to discuss the effect of my representing you as cotrustees of the _____ in view of my pre-existing and current representation of _____. You are aware that I have represented _____ for a period of time. All my communications with him/her up to the point of your engagement of me as joint counsel will remain confidential. You should also be aware that in the event of an irreconcilable conflict between you as the cotrustees of the _____, I will withdraw as counsel for you as cotrustees, but I will continue to represent _____ individually. In consequence, all of my communications with _____ regarding my individual representation of him/her will remain confidential and will not be discoverable by the other trustees.

By copy of this letter I am asking that _____ consent to my representation of _____ consent to my representation of _____. After receipt of the signed consents, I will commence work on your matter.

If you have any questions or concerns or wish to discuss the terms of my retention further, please do not hesitate to call me. Otherwise, please date and sign the enclosed copy of this letter where indicated to approve my representation of you based on the terms described above.

I look forward to working with you on this matter and will keep you fully informed of the progress of my work.

Very truly yours,

JOHN A. HARTOG, INC.

JAH:js
Enclosures

_____ have read the foregoing letter and understand its contents. We consent to having you represent us on the terms and conditions set forth. We agree to retain John A. Hartog, Inc. in accordance with the understanding described above.

Dated: _____, 2008 _____

Appendix F

MEMORANDUM REGARDING TRUSTEE'S DUTIES TO BENEFICIARIES

A "trust" is often described as any arrangement in which property (the "trust estate") is transferred by someone (the "settlor") to another person (the "trustee") for the benefit of a third person (the "beneficiary"). Trusts have existed for hundreds of years in England and the United States, originally being used to place an adult in charge of property which had been inherited by a child who was too young to manage his/her own affairs. Over the centuries, rules have developed which impose duties on persons acting as trustees. In 1986, the California legislature enacted statutes which list many of those duties. A copy of the relevant statutes is attached. Trustees should be particularly aware of the following:

Probate Code Section 16000: Duty to administer trust. This statute requires the trustee to administer a trust according to law and in accordance with the trust instrument. No matter how good the trustee's intentions, the trustee is not free to administer the trust in some other manner.

Probate Code Section 16002: Duty of loyalty. This statute states that the trustee has a duty to administer the trust solely in the interest of the beneficiaries. The trustee cannot use the trust for his or her own benefit.

Probate Code Section 16003: Duty to deal impartially with beneficiaries. This statute states: "If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them." A trustee cannot favor one beneficiary over another. This is particularly critical when the trustee is also one of the beneficiaries. In such cases, it is a clear violation of the law for the trustee to favor himself or herself over another beneficiary.

Probate Code Section 16004: Duty to avoid conflict of interest. This statute requires that trustees avoid conflicts of interest. This prohibits a trustee from entering into transactions with trust property which will result in a profit to the trustee, or in which the trustee's interest is adverse to the interests of the trust or its beneficiaries. For example, a trustee usually must avoid loaning personal funds to a trust, because it would result in the trustee having a conflict between his duties to the trust and his duties to himself.

Probate Code Section 16006: Duty to take control of and preserve trust property. This statute requires trustees to take affirmative action to take and keep control of trust property and to preserve that property.

Probate Code Section 16007: Duty to make trust property productive. This statute requires a trustee to make property productive. This generally requires that the trustee make sure that property is wisely invested.

Probate Code Section 16009: Duty to keep trust property separate and identified. This statute requires a trustee to keep trust property separate from property not subject to the trust. For example, a trustee should not keep personal funds and trust funds in the same bank account.

Probate Code Section 16060-16061: Trustee's general duty to report information to beneficiaries. This statute requires trustees to keep beneficiaries informed with respect to matters involving the trust.

Probate Code Section 16062: Duty to account to beneficiaries. This statute requires trustees to provide beneficiaries with "accounts." Accounts are detailed statements regarding the financial transactions of the trust. They are similar to bank account statements in which a bank reports a "beginning balance," an "ending balance," and all the transactions that occurred during the reporting period that "account" for the difference between the beginning balance and ending balance. A trustee must keep careful records in order to be able to comply with this requirement.

Probate Code Section 16080: Discretionary powers to be exercised reasonably. This statute states that, when a trustee is given "discretion" with respect to a matter, the "discretion" must be exercised in a reasonable manner. The trustee is not free to act in whatever way the trustee wants. This is true even if the trust documents state that the trustee's discretion is "absolute" or "uncontrolled."

Probate Code Section 16200: General powers of trustee. A trustee's power (legal authority) to take actions pertaining to the trust is not unlimited, and in some cases may be very restricted. For example, a trust instrument may limit the kinds of investments which the trustee can make with trust property. This statute provides the trustee powers of those conferred by the statute and the trust instrument. Trustees must be careful to avoid taking unauthorized actions.

Appendix G
Administration
Checklist/Questionnaire

Date: _____

Please use "N/A" to indicate "not applicable."

GENERAL INFORMATION

Please provide the following documents:

- certified copies of the death certificate
(2 copies and 1 additional for each parcel of real estate)
- current Will of the decedent
- all trust documents executed by the decedent, and all amendments
- all partnership agreements in which the decedent had an interest
- all buy-sell agreements for the buy out of the decedent's stock
- financial statements for all closely held corporations and limited partnerships
- all gift tax returns filed by the decedent and spouse
- all premarital or postmarital property agreements
- any agreements as to the character of community or separate property
- all property agreements incident to dissolution of marriage
- prior three years' income tax returns

1. Decedent's full name: _____

Decedent's Date of Death: _____ Social Security #: _____

Was decedent a U.S. citizen? _____

(a) Permanent Residence

Address: _____

(b) Other Residence

Address: _____

The year decedent established California residence: _____

Did the decedent receive Medicaid? Yes No

Marital Status: _____

Name of spouse: _____

Date of Marriage: _____

Spouse's Social Security #: _____

Is surviving spouse a U.S. citizen? _____

Court and Case Number of any Dissolution of Marriage proceedings:

2. Executor's (trustee's) full name: _____

Social Security # _____

(c) Residence

Address: _____

Telephone: _____

Facsimile: _____

E-mail: _____

Business Address: _____

Business Telephone: _____

Facsimile: _____

Coexecutor's (cotrustee's) full name: _____

Social Security # _____

(d) Residence

Address: _____

Telephone: _____

Facsimile: _____

E-mail: _____

Business Address: _____

Business Telephone: _____

Facsimile: _____

E-mail: _____

3. Living children and grandchildren of decedent

Full Names, Addresses and Telephone Numbers and Birth Dates of Children and Grandchildren (*please include the date of adoption if child is adopted*):

a) Child's Full Name: _____

Sex: Male Female Date of Birth: _____

Address: _____

Spouse's Name: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

b) Child's Full Name: _____

Sex: Male Female Date of Birth: _____

Address: _____

Spouse's Name: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

c) Child's Full Name: _____

Sex: Male Female Date of Birth: _____

Address: _____

Spouse's Name: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

d) Child's Full Name: _____

Sex: Male Female Date of Birth: _____

Address: _____

Spouse's Name: _____

Grandchild: _____ Date of Birth: _____

Grandchild:_____ Date of Birth:_____

Grandchild:_____ Date of Birth:_____

e) Child's Full Name:_____

Sex: Male Female Date of Birth:_____

Address:_____

Spouse's Name:_____

Grandchild:_____ Date of Birth:_____

Grandchild:_____ Date of Birth:_____

Grandchild:_____ Date of Birth:_____

3A. Deceased children

a) Child's Full Name:_____

Date of Death:_____

Spouse's Name:_____

Address:_____

Any living issue of this child? Yes No

Grandchild:_____ Date of Birth:_____

Grandchild:_____ Date of Birth:_____

Grandchild:_____ Date of Birth:_____

b) Child's Full Name:_____

Date of Death:_____

Spouse's Name:_____

Address: _____

Any living issue of this child? Yes No

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

Grandchild: _____ Date of Birth: _____

Valuation Issues. Property listed on an estate tax return is valued as of the date of death. Alternatively, the property may be valued as of the date, six months after the date of death (the "alternate valuation date"). If the aggregate value of property on the estate tax returns decreases as of the alternate valuation date, then values as of that date must be used for all property. In valuing assets on this questionnaire please provide values for both date of death and the date six months later.

Please check here if the estate includes real property that was used as a farm for farming purposes or in another trade or business. _____

Please check here if the estate includes real property that was subject to a conservation easement. _____

Prior Gifting. Has either of the decedent or his/her spouse made a gift in any one year to any person in the amount of more than \$3,000 before 1981 or more than \$10,000 in any one year since 1981? If so, please describe below:

Separate Property After Marriage. Has either the decedent or his/her spouse received any real or personal property since the date of their marriage by gift, bequest, devise or inheritance, or as proceeds of life insurance on the life of another, as surviving joint tenant, or as a beneficiary of a trust?

EXISTING TRUSTS

Trusts created by the decedent:

(Please indicate the type of trust created: insurance, minor's trust, QTIP, etc. If a gift tax return was filed in connection with the transfer of assets to the trust, note the year for which the return was filed and indicate if any tax was paid.)

1. Trustee(s): _____

Name and Date of Trust: _____

Beneficiaries: _____

Type of Trust: _____

Gift Tax Information: _____

2. Trustee(s): _____

Name and Date of Trust: _____

Beneficiaries: _____

Type of Trust: _____

Gift Tax Information: _____

Trusts created for the decedent's benefit:

1. Grantor(s): _____

Trustee(s): _____

Name and Date of Trust: _____

Type of Beneficial Interest: _____

2. Grantor(s): _____
Trustee(s): _____
Name and Date of Trust: _____
Type of Beneficial Interest: _____

3. Grantor(s): _____
Trustee(s): _____
Name and Date of Trust: _____
Type of Beneficial Interest: _____

Trusts of which the decedent was trustee:

1. Grantor(s): _____

Trustee(s): _____
Name and Date of Trust: _____
Type of Beneficial Interest: _____

2. Grantor(s): _____

Trustee(s): _____
Name and Date of Trust: _____
Type of Beneficial Interest: _____

Gifts to Children:

List gifts the decedent or others have made to minor children pursuant to UGMA (Uniform Gifts to Minor Act) or UTMA (Uniform Transfers to Minors Act) for which the decedent is the custodian:

PROFESSIONAL ADVISORS

Please list the names, addresses and phone numbers of the following professional advisors, if applicable:

Decedent's accountant: _____

Decedent's financial planner/stock broker: _____

Decedent's financial planner/stock broker: _____

Decedent's insurance agent: _____

Decedent's primary banker (trust officer): _____

Decedent's pension plan administrator: _____

Other _____ : _____

Other _____ : _____

2. REAL PROPERTY IN CALIFORNIA

Please provide the following information about all real property (including any timeshares, rental property or farmland) that the decedent owned as an individual (not as a general or limited partner), and please provide a photocopy of the most recent Grant Deed and any Deed of Trust.

- 1) Name of Owner exactly as shown on the Grant Deed (after "hereby grants to"): FOR EXAMPLE: John Doe and Jane Doe, husband and wife; John Doe and Jane Doe, his wife; John Doe and Jane Doe, as joint tenants; Jane Doe, as separate property; John Doe and Jane Doe, as community property; John Doe and Jane Doe, as tenants in common; John Doe, Sr., as to an undivided four-fifths interest and John Doe, Jr., as to an undivided one-fifth interest:

Property address: _____

Assessor's Parcel Number (APN): _____
(The APN will sometimes appear on the decedent's grant deed. It will always appear on the decedent's real property tax statement.)

Name and Address of Lender: _____

Loan Number: _____

Amount of Loan Outstanding: _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value (Total and Net):



2) Name of Owner exactly as shown on the Grant Deed (after "hereby grants to"):

Property address: _____

Assessor's Parcel Number (APN): _____

(The APN will sometimes appear on the decedent's grant deed. It will always appear on the decedent's real property tax statement.)

Name and Address of Lender: _____

Loan Number: _____

Amount of Loan Outstanding: _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value (Total and Net):

3) Name of Owner exactly as shown on the Grant Deed (after "hereby grants to"):

Property address: _____

Assessor's Parcel Number (APN): _____

(The APN will sometimes appear on the decedent's grant deed. It will always appear on the decedent's real property tax statement.)

Name and Address of Lender: _____

Loan Number: _____

Amount of Loan Outstanding: _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value (Total and Net):

4) Name of Owner exactly as shown on the Grant Deed (after "hereby grants to"):

Property address: _____

Assessor's Parcel Number (APN): _____
(The APN will sometimes appear on the decedent's grant deed. It will always appear on the decedent's real property tax statement.)

Name and Address of Lender: _____

Loan Number: _____

Amount of Loan Outstanding: _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value (Total and Net):



REAL PROPERTY OUTSIDE CALIFORNIA

IF THE DECEDENT OWNED REAL PROPERTY IN ANOTHER STATE OR IN ANOTHER COUNTRY, PLEASE PROVIDE ALL OF THE INFORMATION REQUESTED BELOW FOR EACH PROPERTY IN ADDITION TO THE NAME, ADDRESS AND PHONE NUMBER OF A TITLE COMPANY IN THE COUNTY IN WHICH THE DECEDENT'S PROPERTY IS LOCATED AND THE COUNTY RECORDER/CLERK'S OFFICE FOR THE COUNTY IN WHICH THE DECEDENT'S PROPERTY IS LOCATED. IF POSSIBLE, PLEASE PROVIDE A PHOTOCOPY OF ANY GRANT DEEDS OR DEEDS OF TRUST.

1) Name of Owner exactly as shown on the Grant Deed:

Property address: _____

Assessor's Parcel Number (APN): _____

Name and Address of Lender: _____

Loan Number: _____

Amount of Loan Outstanding: _____

Title Company: _____

County: _____

County Recorder/Clerk: _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value (Total and Net):

2) Name of Owner exactly as shown on the Grant Deed:

Property address: _____

Assessor's Parcel Number (APN): _____

Name and Address of Lender: _____

Loan Number: _____

Amount of Loan Outstanding: _____

Title Company: _____

County: _____

County Recorder/Clerk: _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value (Total and Net):



SECURITIES ACCOUNTS

For all securities accounts, please provide the information requested below, including the exact title of the account, e.g., John Doe and Jane Doe as Joint Tenants; John Doe and Jane Doe as Community Property; Jane Doe as Separate Property. If it is more convenient, the decedent may send us a photocopy of the most recent statement, containing all of the requested information.

1) Name of Brokerage: _____

Brokerage Address: _____

The decedent's account representative and telephone number: _____

Account No.: _____

Title of Account: _____

Date of Death Value: _____

2) Name of Brokerage: _____

Brokerage Address: _____

The decedent's account representative and telephone number: _____

Account No.: _____

Title of Account: _____

Date of Death Value: _____

3) Name of Brokerage: _____

Brokerage Address: _____

The decedent's account representative and telephone number: _____

Account No.: _____

Title of Account: _____

Date of Death Value: _____

4) Name of Brokerage: _____

Brokerage Address: _____

The decedent's account representative and telephone number: _____

Account No.: _____

Title of Account: _____

Date of Death Value: _____

5) Name of Brokerage: _____

Brokerage Address: _____

The decedent's account representative and telephone number: _____

Account No.: _____

Title of Account: _____

Date of Death Value: _____

3. STOCKS AND BONDS

For all stocks and bonds held by the decedent outside a brokerage account (i.e., the decedent holds the certificates), please provide the information requested below, including the exact title of the owner as it appears on the stock certificate or bond, e.g., John Doe and Jane Doe as Joint Tenants; John Doe and Jane Doe as Community Property; John Doe as Separate Property. In addition, please include a photocopy of each stock certificate and/or bond.

1) Full Name of Issuing Company as it appears on stock certificate:

Full Name of Owner exactly as it appears on stock certificate:

<u>Certificate No.</u>	<u>How many shares Common or on this Certificate</u>	<u>Preferred</u>
------------------------	--	------------------

_____	_____	_____
_____	_____	_____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value: _____

2) Full Name of Issuing Company as it appears on stock certificate:

Full Name of Owner exactly as it appears on stock certificate:

Certificate No. How many shares Common or
on this Certificate Preferred

_____ _____ _____
_____ _____ _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value: _____

3) Full Name of Issuing Company as it appears on stock certificate:

Full Name of Owner exactly as it appears on stock certificate:

Certificate No. How many shares
on this Certificate Common or
Preferred

_____ _____ _____
_____ _____ _____

Form of Ownership:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Date of Death Value: _____

Stock Not Sold on an Established Securities Market

If the decedent owned stock in a closely held company or not sold on an established securities market, please provide a copy of the stock certificate financial statements or corporate tax returns for the corporation for the past five years.

1) Was there an outstanding buy-sell agreement whereby the executor was required to sell the shares to the corporation or to other shareholders?

_____ If so, please provide a complete copy of the agreement.

2) Did the corporation own any life insurance on the life of the decedent shareholder? If so, please provide the following information:

a) Name of the Insurer:

b) Policy Number:

c) Beneficiary (ies):

CASH ACCOUNTS

*For all cash accounts, please provide the information requested below, including the exact title of the account, e.g., John Doe and Jane Doe as **Joint Tenants**; John Doe and Jane Doe as **Community Property**; Jane Doe as **Separate Property**, etc. If applicable, please provide the name of a contact person at the financial institution. If it is more convenient, you may send us a photocopy of a recent monthly statement, containing all of the requested information.*

1) Name of Institution: _____

Branch and Address: _____

Contact person and telephone number: _____

Type of Account: _____

Account No.: _____

Exact Title of Account: _____

Date of Death Value: _____

2) Name of Institution: _____

Branch and Address: _____

Contact person and telephone number: _____

Type of Account: _____

Account No.: _____

Exact Title of Account: _____

Date of Death Value: _____

3) Name of Institution: _____

Branch and Address: _____

Contact person and telephone number: _____

Type of Account: _____

Account No.: _____

Exact Title of Account: _____

Date of Death Value: _____

4) Name of Institution: _____

Branch and Address: _____

Contact person and telephone number: _____

Type of Account: _____

Account No.: _____

Exact Title of Account: _____

_____ Date of Death Value: _____

5) Name of Institution: _____

Branch and Address: _____

_____ Contact person and telephone number: _____

Type of Account: _____

Account No.: _____

Exact Title of Account: _____

_____ Date of Death Value: _____

6) Name of Institution: _____

Branch and Address: _____

_____ Contact person and telephone number: _____

Type of Account: _____

Account No.: _____

Exact Title of Account: _____

Date of Death Value: _____

4. NOTES PAYABLE TO THE DECEDENT

1) Exact Name of holder as it appears on the Note:

Exact name of debtor:

Interest rate: _____

Secured by: _____

Location of the original Note: _____

Amount Outstanding: _____

2) Exact Name of holder as it appears on the Note: _____

Exact name of debtor: _____

Face amount: _____ Due date: _____

Interest rate: _____

Secured by: _____

Location of the original Note: _____

Amount Outstanding: _____

3) Exact Name of holder as it appears on the Note: _____

Exact name of debtor: _____

Face amount: _____ Due date: _____

Interest rate: _____

Secured by: _____

Location of the original Note: _____

Amount Outstanding: _____

LIFE INSURANCE

For each life insurance policy the decedent owned, please provide the information requested below, including the exact name of the owner, e.g., John Doe and Jane Doe as Joint Tenants; John Doe and Jane Doe, Husband and Wife; John Doe as Separate Property. If it is more convenient, you may send us a photocopy of the front page of the decedent's policy, which will contain all of the requested information. PLEASE ALSO SUPPLY A COPY OF THE CURRENT BENEFICIARY DESIGNATION.

If the insurance company has sent to you a Form 712, Life Insurance Statement, please provide a copy of that form as well.

1) Carrier's Name and Address: _____

Policy Number: _____ Face Value: _____

Cash Surrender Value: _____

Loans Against Policy: _____

Name of Insured: _____

Owner of Policy: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

CIRCLE ONE: Term Universal Life Whole Life

2) Carrier's Name and Address: _____

Policy Number: _____ Face Value: _____

Cash Surrender Value: _____

Loans Against Policy: _____

Name of Insured: _____

Owner of Policy: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

CIRCLE ONE: Term Universal Life Whole Life

3) Carrier's Name and Address: _____

Policy Number: _____ Face Value: _____

Cash Surrender Value: _____

Loans Against Policy: _____

Name of Insured: _____

Owner of Policy: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

CIRCLE ONE: Term Universal Life Whole Life

4) Carrier's Name and Address: _____

Policy Number: _____ Face Value: _____

Cash Surrender Value: _____

Loans Against Policy: _____

Name of Insured: _____

Owner of Policy: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

CIRCLE ONE: Term Universal Life Whole Life

5) Carrier's Name and Address: _____

Policy Number: _____ Face Value: _____

Cash Surrender Value: _____

Loans Against Policy: _____

Name of Insured: _____

Owner of Policy: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

CIRCLE ONE: Term Universal Life Whole Life

6) Carrier's Name and Address: _____

Policy Number: _____ Face Value: _____

Cash Surrender Value: _____

Loans Against Policy: _____

Name of Insured: _____

Owner of Policy: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

CIRCLE ONE: Term Universal Life Whole Life

BUSINESSES, PARTNERSHIPS AND JOINT VENTURES

For all businesses and partnerships in which the decedent owned an interest, please provide the information requested below, including the exact title of ownership, e.g., John Doe and Jane Doe as Joint Tenants; John Doe and Jane Doe, Husband and Wife; Jane Doe as Separate Property. If it is more convenient, you may send us a photocopy of the Schedule K1 the decedent filed with his/her most recent Federal income tax return, which will contain all of the requested information.

Business Interests

1) Name and address of Business: _____

Full Names and addresses of Owners: _____

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Percentage ownership of Decedent: _____

Date of Death Value: _____

2) Name and address of Business: _____

Full Names and addresses of Owners: _____

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

Percentage ownership of Decedent: _____

Date of Death Value: _____

Partnerships

1) Name of Partnership: _____

Full Name of Owner as it appears on Partnership records:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

CIRCLE ONE: General Partner Limited
Partner

Name and Address of General Partner: _____

Amount of original investment: _____

Date of Death Value: _____

2) Name of Partnership: _____

Full Name of Owner as it appears on Partnership records:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

CIRCLE ONE: General Partner Limited
Partner

Name and Address of General Partner: _____

Amount of original investment: _____

Date of Death Value: _____

3) Name of Partnership: _____

Full Name of Owner as it appears on Partnership records:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

CIRCLE ONE: General Partner Limited
Partner

Name and Address of General Partner: _____

Amount of original investment: _____

Date of Death Value: _____

4) Name of Partnership: _____

Full Name of Owner as it appears on Partnership records:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

CIRCLE ONE: General Partner Limited
Partner

Name and Address of General Partner: _____

Amount of original investment: _____

Limited Liability Companies

1) Name of Limited Liability Company: _____

Full Name of Owner as it appears on Partnership records:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

CIRCLE ONE: Member/Manager Member

Name and Address of Member/Manager: _____

Amount of original investment: _____

2) Name of Limited Liability Company: _____

Full Name of Owner as it appears on Partnership records:

CIRCLE ONE: Joint Tenants Community Husband's Wife's
 Tenancy in Common Property Separate Separate

CIRCLE ONE: Member/Manager Member

Name and Address of Member/Manager: _____

Amount of original investment: _____

5. SAFETY DEPOSIT BOXES

1) Name and address of bank: _____

Full name(s) of person(s) entitled to access:

Contents:

2) Name and address of bank: _____

Full name(s) of person(s) entitled to access:

Contents:

a. Automobile #1 \$_____;
Year/Make/Model/Submodel: _____
Title _____

b. Automobile #2 \$_____;
Year/Make/Model/Submodel: _____
Title _____

c. Automobile #3 \$_____;
Year/Make/Model/Submodel: _____
Title _____

INDIVIDUAL RETIREMENT ACCOUNTS (IRA) OR KEOGH ACCOUNTS

For all individual Retirement Accounts (IRA) and/or KEOGH Accounts, please provide the information requested below. If it is more convenient, you may send us a photocopy of the most recent annual statement, which will contain all of the requested information. PLEASE ALSO SUPPLY A COPY OF THE CURRENT BENEFICIARY DESIGNATION.

PLEASE OBTAIN QUALIFIED TAX ADVICE REGARDING THE INCOME TAX CONSEQUENCES OF IRA DISTRIBUTIONS BEFORE MAKING ANY ELECTION OR RECEIVING ANY DISTRIBUTIONS FROM AN IRA.

1) Participant's Name: _____

Account No.: _____ CIRCLE ONE: IRA
KEOGH

Name and address of custodial institution: _____

Name of Primary Beneficiary: _____

Name of Contingent Beneficiary: _____

Date of Death Value: _____

2) Participant's Name: _____

Account No.: _____ CIRCLE ONE: IRA
KEOGH

Name and address of custodial institution: _____

Name of Primary Beneficiary: _____

Name of Contingent Beneficiary: _____

Date of Death Value: _____

3) Participant's Name: _____

Account No.: _____ CIRCLE ONE: IRA
KEOGH

Name and address of custodial institution: _____

Name of Primary Beneficiary: _____

Name of Contingent Beneficiary: _____

Date of Death Value: _____

4) Participant's Name: _____

Account No.: _____ CIRCLE ONE: IRA
KEOGH

Name and address of custodial institution: _____

Name of Primary Beneficiary: _____

Name of Contingent Beneficiary: _____

Date of Death Value: _____

5) Participant's Name: _____

Account No.: _____ CIRCLE ONE: IRA
KEOGH

Name and address of custodial institution: _____

Name of Primary Beneficiary: _____

Name of Contingent Beneficiary: _____

Date of Death Value: _____

6) Participant's Name: _____

Account No.: _____ CIRCLE ONE: IRA
KEOGH

Name and address of custodial institution: _____

Name of Primary Beneficiary: _____

Name of Contingent Beneficiary: _____

Date of Death Value: _____

B. CORPORATE RETIREMENT PLANS

For all Corporate Retirement Plans in which the decedent participated, please provide the information requested below, including the exact name of the participant and the exact name of the Plan, e.g., THE JOHN DOE CORPORATION PROFIT SHARING PLAN. If it is more convenient, a photocopy of the most recent annual statement will contain all of the requested information. PLEASE ALSO SUPPLY A COPY OF THE CURRENT BENEFICIARY DESIGNATION.

PLEASE OBTAIN QUALIFIED TAX ADVICE REGARDING THE INCOME TAX CONSEQUENCES OF RETIREMENT PLAN DISTRIBUTIONS BEFORE MAKING ANY ELECTION OR RECEIVING ANY DISTRIBUTIONS FROM A RETIREMENT PLAN.

1) Participant's Name: _____

Name of Plan: _____

Name and Address of Plan Administrator: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

Date of Death Value: _____

2) Participant's Name: _____

Name of Plan: _____

Name and Address of Plan Administrator: _____

Primary Beneficiary: _____

Contingent Beneficiary: _____

Date of Death Value: _____

- 3) Participant's Name: _____
Name of Plan: _____
Name and Address of Plan Administrator: _____

Primary Beneficiary: _____
Contingent Beneficiary: _____
Date of Death Value: _____
- 4) Participant's Name: _____
Name of Plan: _____
Name and Address of Plan Administrator: _____

Primary Beneficiary: _____
Contingent Beneficiary: _____
Date of Death Value: _____
- 5) Participant's Name: _____
Name of Plan: _____
Name and Address of Plan Administrator: _____

Primary Beneficiary: _____
Contingent Beneficiary: _____
Date of Death Value: _____

1. FUNERAL AND ADMINISTRATION COSTS

2.

1. The total amount of last illness expenses of the decedent: \$ _____

Please itemize:

\$ _____

3.

\$ _____

\$ _____

\$ _____

2. The total of funeral expenses for the decedent: \$ _____

All reasonable expenses of the decedent's funeral and burial are deductible, including charges of the funeral home, costs associated with obtaining or opening a cemetery plot, costs of a monument or headstone, payments to clergy and others, transportation costs and costs of a post funeral reception.

Please itemize:

\$ _____

4.

\$ _____

\$ _____

\$ _____

\$ _____

\$ _____

3. A fee estimate of the following administration expenses:

a) Executor's Commission \$ _____

b) Attorney's Fees \$ _____

c) Accountant Fees \$ _____

d) Miscellaneous Administration Costs(please itemize):

\$ _____

5.

\$ _____

\$ _____

\$ _____

6. LIABILITIES

Please list any outstanding indebtedness owed by the decedent and/or his/her spouse at the time of the decedent's death, which is not reflected in the above listing of the decedent's assets.

Please provide a copy of the most recent real estate tax bill for all parcels of real estate that the decedent owned or in which the decedent had an interest.

<u>Debt Description</u>	<u>Amount</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

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