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"Professional Responsibility and Ethics - Practical Applications for Law, Accounting and Related Professions"

I. CONFLICTS BETWEEN TRUSTEE AND BENEFICIARIES

A. **Trustee's Duty of Loyalty**

(1) The Probate Code imposes on a trustee the duty to administer the trust solely in the interests of the beneficiaries. [1]

(2) If a trustee is acting pursuant to the written directions of someone who has the power to revoke the trust, the trustee is not liable to a beneficiary but solely to the person with the power to revoke. [2]

(3) Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. … Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. [3]

(4) The prohibition on self-dealing forbids a trustee from purchasing, selling or leasing trust property directly or indirectly. [4]

(5) This duty also prohibits a trustee from individually acquiring property which should have been acquired for the trust. [5]

(6) If permitted to represent antagonistic interests the trustee is placed under temptation and is apt to yield to the natural prompting to give himself the benefit of all doubts, or to make decisions which favor a third person who is competing with the beneficiary. [6]

(7) It does not matter that a trustee may have acted in good faith. Self-dealing in violation of the duty of loyalty cannot be justified by the good faith of the trustee. [7]

(8) The trustee cannot defend self-dealing by claiming that the behavior is accepted within the community. Custom cannot overcome positive provisions of statutes. [8]

B. Exculpation of Trustee

(1) The trust instrument can exculpate a trustee from liability for breach of trust except with respect to the following:

- a breach committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary; or
- a breach that profits the trustee. [9]

(2) Also, a beneficiary may not hold a trustee liable for a breach when the beneficiary consented to the act or omission before or at the time of the act or omission. But, the consent will not be enforceable against a beneficiary:

- when (a) the beneficiary was under a disability at the time of consenting to the extent that the beneficiary did not know of his or her rights and the material facts, and (b) the trustee knew or should have known this fact, and (c) and the trustee did not reasonably believe the beneficiary knew his or her rights or the material facts;
- when the consent of the beneficiary was induced by improper conduct of the trustee; and
- when the trustee had an interest in the transaction adverse to the interest of the beneficiary or where the transaction consented to by the beneficiary was not fair and reasonable to the beneficiary. [10]

(3) A beneficiary may not hold a trustee liable for a breach if the beneficiary releases the trustee [11]

(4) or if the beneficiary later affirms the acts of the trustee. [12]

C. Multiple Beneficiaries

(1) This duty extends to investing and managing trust property. [13]

(2) A trustee may decide to make nonprorata distributions resulting in one beneficiary's receiving assets with a lower income tax basis than another beneficiary, although each beneficiary receives assets of equal current value. [14]

(3) However, as the asset is depleting, there is the prospect that there will be little or no value remaining for the remainder beneficiary at the conclusion of the life estate. [15]

D. **Recourse Against a Trustee for Breach of Trust**

(1) Generally, a trustee may be removed on petition to the court if:

(a) the trustee has committed a breach of trust;

(b) the trustee is insolvent or otherwise unfit to administer the trust;

(c) hostility between co-trustees impairs the administration of the trust;

(d) the trustee fails or declines to act;

(e) the trustee's compensation is excessive under the circumstances; or

(f) "other good cause" arises. [16]

(2) Nevertheless, if the trustee acted "reasonably and in good faith under the circumstances" the court may excuse the trustee from liability if "it would be equitable to do so." [17]

E. **Statute of Limitations**

(1) In California, the general statute of limitations is four years. [18]

(2) Prob. Code § 16460 is an exception to Code Civ. Proc. § 343 by providing a three-year statute of limitations for an action against a trustee.

(3) The statute runs from the beneficiary's receipt of the account or report disclosing facts giving rise to the claim. [19]

(4) Otherwise the statute of limitations is three years from the time the beneficiary discovered or reasonably should have discovered the existence of the claim. [20]

(5) If a beneficiary has no reasonable way of discovering facts giving rise to the existence of a claim, the statute of limitations against a trustee never begins to run. [21]

(6) Even after complying with these requirements, the statute will begin to run only as to those claims which would be revealed in the account or report. [22]

(7) If a beneficiary is a minor or otherwise under a disability, and the trustee wishes to provide an account to that beneficiary in order to start the running of the statute of limitations, it may be advisable to seek the appointment of a conservator or guardian ad litem to receive the account on behalf of the beneficiary whose ability to understand the account may be impaired. [23]

II. CONFLICTS BETWEEN TRUSTEES

A. **Conflicts Between Co-Trustees**

(1) Unless the trust instrument provides otherwise, powers vested in two or more trustees may be exercised only by their unanimous action. [1]

(2) A common example is where the surviving spouse is the primary trustee of the Bypass Trust, but cannot have the unrestricted power to invade the corpus without risking inclusion of the corpus in his or her estate. [2]

B. **Conflicts Between Successor Trustees**

(1) Whether a resigning trustee is required to provide the successor trustee with information that the resigning trustee claims fall within the attorney-client privilege is a "hot topic." [3]

III. CONFLICTS BETWEEN THE ATTORNEY AND THE CLIENT

A. **In General**

(1) The ethical rules for attorneys are derived from the Law of Agency, which applies as well to accountants, insurance professionals, financial advisors, and anyone else to whom powers are delegated. [1]

B. **Identifying the Client - The Fundamentals**

(1) The practitioner's communication of this representation to third parties who may not understand the differences between a fiduciary (the trustee) and a beneficiary is essential. [2]

(2) The disagreement among commentators,[3] and the confusion among courts, [4] in defining the attorney-client relationship stems from the dearth of well established law on the subject of to whom does the attorney owe a duty.

(3) The Report of the ABA Special Study Committee on Professional Responsibility [5] enunciated the following three fundamental elements in an attorney's representation of a trustee:

- The attorney's client is the fiduciary, not the entity or the beneficiaries, unless an agreement to the contrary exists.

- The attorney has no duty to the beneficiaries other than the duty to avoid the breaches of duty that are imposed upon the fiduciary directly.

- An attorney's duty of confidentiality does not prevent the attorney from sharing information with the beneficiaries to the extent that such information would not be protected from discovery in litigation between the fiduciary and the beneficiaries.

(4) The nature and consequences of the fiduciary-attorney relationship have also been examined at some length by the American College of Trust and Estate Counsel (ACTEC).

(5) The ACTEC Commentaries on the Model Rules of Professional Conduct [6] are at odds with the views of some commentators, [7] but are often cited as a leading exposition on how the law should currently be applied.

C. The Engagement Letter

(1) Most of the problems addressed in this section can be avoided by a well drafted engagement letter. [8]

(2) The scope of an advisor's responsibilities should be defined by the advisor at the commencement of the engagement. Most commentators believe that the engagement letter is the most effective defense against subsequent claims of conflicting loyalties.[9]

IV. DEFINING THE RELATIONSHIP BETWEEN THE ATTORNEY AND THE BENEFICIARY

A. Authority Supporting Theory of "No Duty" to Beneficiaries

(1) Courts have from time to time implied a duty, the extent of which was not always clear, on the fiduciary's attorney toward the beneficiaries. Where an attorney participates in a breach of trust, the courts have less reluctance to impose a duty on the part of the attorney toward the beneficiaries. [1]

(2) Authorities appear to have held uniformly that the legal representation of a fiduciary, standing alone, does not impose upon the attorney a duty to the beneficiary. [2]

(3) In the context of a probate estate, the California rule now appears well established that absent active participation in a breach, the attorney for the fiduciary of an estate represents the fiduciary and not the estate. [3]

(4) The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney. [4]

(5) The courts are apparently recognizing the onerous burden that would be placed on attorneys if they were to be expected to maintain a continuing loyalty to the divergent interests that a fiduciary and beneficiary may often have. [5]

(6) The trend of the recent cases outside California has also been to solidify this approach by limiting the attorney's duty to the fiduciary who is the client. [6]

B. Authority Supporting Theory of Duty to Beneficiaries

(1) Despite the recent trend in the cases, some courts have found some duty on the part of a fiduciary's attorney toward the beneficiaries. [7]

(2) The advisor must, therefore, from the beginning of any conversation about representation, determine the identity of the potentially adverse parties before receiving any confidential information. [8]

(3) The ACTEC Commentaries on the Model Rules of Professional Conduct state that "[t]he lawyer for the fiduciary owes some duties

to the beneficiaries of the fiduciary estate even though he or she does not represent them." [9]

(4) The commentaries go on to state that the duties are restrictive in nature and prevent the attorney from taking advantage of his or her position to the disadvantage of the beneficiaries or the fiduciary estate.

(5) According to the commentary, the duty of the trustee's lawyer to the beneficiaries continues even though the beneficiaries and the fiduciary are in a conflict and the beneficiaries are represented by independent counsel. [10]

(6) What is unclear is whether the attorney for the trustee has a duty to take affirmative steps to protect the interests of the beneficiaries, particularly where the affirmative action may be in opposition to the position of the trustee.

(7) Where the attorney participated in the trustee's breach of fiduciary duty and for personal gain actively concealed the breach and made misrepresentations to the court, the court found a duty on the part of the attorney to the beneficiaries. [11]

C. **Trust as Entity Approach**

(1) Because of the difficulties an attorney would have in representing disparate interests represented by the trustee and the various beneficiaries, the attorney is advised not only to avoid such multiple representations but to assert in unambiguous terms that it is the trustee and not the beneficiaries whom the attorney represents. This advice should be done in writing at the earliest possible time during the administration of the trust and should be communicated to all beneficiaries. [12]

(2) The unfortunate result has been uncertainty and confusion, preventing meaningful understanding of the attorney's role and responsibility. One commentary has attempted to resolve this morass by defining the client as the fiduciary entity, with the fiduciary as the "primary" client, and the beneficiaries as "derivative" clients. [13]

(3) This view has not yet gained wide acceptance among the courts, [14] and has been criticized by certain commentators, [15] but does provide a method of reconciling the attorney's responsibilities to the several interested parties to an estate or trust.

D. **Extent of the Attorney-Client Privilege - In General**

The extent of an attorney's duty to the trustee and the beneficiaries must be distinguished from the scope of the attorney-client privilege between the trustee and the attorney. The existence of the privilege may prevent disclosure to the beneficiaries of communications between the attorney and the trustee. The privilege will not relieve the attorney, however, from the obligations imposed by a duty that may be owed to the beneficiaries. This contradiction can create a substantial burden on the attorney.

E. **Majority Rule-Before and After a Dispute Arises**

(1) The general rule requires the trustee, and therefore the trustee's attorney, to disclose to the beneficiaries all communications between attorney and trustee. [16]

(2) The exception to the general rule arises when the potential for litigation between the trustee and the beneficiaries becomes apparent, and the trustee consults the attorney for the trustee's own protection. [17]

(3) Cases have distinguished between situations where the interests of the fiduciary and the beneficiaries are not in conflict, and where their interests are in conflict. [18]

F. **Authority Regarding Duty of Attorney to Disclose Information to Beneficiaries**

(1) The seminal case in this area is Riggs National Bank v. Zimmer. [19]

(2) The court held that the beneficiaries ought to be permitted to inspect documents prepared by the trustee's attorney, stating:

It seems clear to this Court that … a beneficiary's interest in trust affairs ought to be encouraged rather than thwarted and the trustee's duty in that respect should be characterized by complete and continuing openness … .The trustees cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. [20]

(3) This implicit responsibility extends to require disclosure of information to beneficiaries if necessary to protect the trust estate. [21]

G. **ABA Study**

(1) The essence of the reasoning in Riggs was adopted by the Report of the ABA Special Study Committee on Professional Responsibility, published in 1994. [22]

(2) The Report takes the position that the ABA Model Rules of Professional Conduct permit "disclosures [by the attorney for the trustee] that are impliedly authorized in order to carry out the representation." [23]

(3) Communications that occur after the onset of an adversarial relationship between the two can be treated as confidential by the attorney. [24]

(4) According to the Report, an attorney who represents a fiduciary should disclose breaches of fiduciary duty occurring during the course of administration. [25]

(5) The Report goes so far as to expect an affirmative duty on the attorney to disclose information to the beneficiaries when necessary to rectify a potential fiduciary breach, or to prevent a fiduciary breach, even if not requested by the beneficiaries. [26]

(6) In certain circumstances, this duty to disclose may extend to the court. Attorneys in Washington State are authorized to make this type of disclosure. [27]

(7) Some courts have implied this duty. [28]

(8) The Report has not been universally accepted. [29]

(9) The ACTEC Commentaries temper some of the broader statements of the ABA Special Committee. [30]

(10) The Commentaries suggest that the duty to disclose information to the beneficiaries by the fiduciary's attorney may be limited by an agreement between the fiduciary and the attorney. [31]

(11) Other commentators assert that communications between a fiduciary and the fiduciary's attorney should not be subject to disclosure to the beneficiaries when the trustee seeks advice on the exercise of a discretionary power conferred by the instrument. [32]

H. **California Rule**

(1) The approach of the Model Rules differs from the applicable rules in California. [33]

(2) The California Rules of Professional Responsibility impose as a paramount duty, the obligation to maintain client confidentiality. [34]

(3) This duty extends to information supplied pursuant to the preparation of a court-filed accounting. [35]

(4) The Riggs rule has not been followed in California. In Lasky, Haas, Cohler & Munter v. Superior Court, [36] the court expressly declined to follow the Riggs rule.

(5) The court further held that the public policy underlying full disclosure by a trustee to beneficiaries did not overcome the manifest legislative intent to create an absolute privilege, and also held that the beneficiaries were not clients of the trustee's attorney. [37]

(6) This privacy is honored even at the expense of the ability of the beneficiaries to discover information relating to the alleged misfeasance of the trustee. [38]

(7) Moreover, the principle has been extended to deny the existence of an attorney-client relationship between an attorney for a psychologist and the psychologist's patient [39]

(8) and between an attorney for a majority shareholder and the minority shareholder (despite recognition of a duty of care on the part of the majority shareholder to the minority shareholder). [40]

(9) The principle was further affirmed in a case involving an attorney for a limited partnership. In Johnson v. Superior Court, [41] the court questioned whether "an attorney who undertakes to represent a trustee or other fiduciary, by that fact alone, assumes a duty the breach of which will be actionable by the beneficiary.

(10) Even if such a proposition can be supported generally, it cannot apply in a situation in which the interests of the fiduciary and the beneficiary are adverse." [42]

(11) More recently, the California Supreme Court dealt with the attorney-client privilege in the context of a successor trustee

seeking to discover confidential communications between the prior trustee and the prior trustee's counsel. [43]

(12) In Moeller v. Superior Court, [44] the court distinguished Lasky Haas by claiming that Lasky Haas only settled the question that the attorney represents the trustee rather than the beneficiaries.

(13) This interest in the trust property gives the successor and the beneficiaries "the right to examine the files and therefore, there can be no attorney-client privilege to justify not engaging in discovery." [45]

(14) The court then ruled that the Probate Code empowers the successor trustee "to obtain, and exercise control over, the former trustee's files." [46]

(15) The Court of Appeal relied heavily on Strauss v. Superior Court [47] to support its holding.

(16) The petitioner then sought to take the testimony of one of the bank officers. In connection with that deposition, a subpoena duces tecum was issued directing the bank to produce all of the tenders that it had received under its call. At the deposition the bank officer refused to answer certain questions propounded to him and refused to produce the specified documents. The bondholder sought to discover the records showing:

(a) The number of outstanding bonds;
(b) Bonds acquired by purchase, or otherwise;
(c) Dates of acquisition of bonds;
(d) Prices paid for bonds;
(e) From whom the bonds were purchased; and
(f) Disbursements for counsel and other fees and charges. [48]

(17) The petitioner wanted this information in order to determine whether the bank's rejection of the tenders was wrongful. The bank-trustee resisted disclosing the information. The court ruled that "[A] trustee has a duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust." [49]

(18) The California Supreme Court, by a 4-3 decision upheld the decision of the Court of Appeal. The Supreme Court held that when the successor trustee assumes the office of trustee, the successor trustee assumes all of the powers of the trustee, including the power to assert the attorney-client privilege as to

confidential communications on the subject of trust administration [50].

(19) The Supreme Court declined to rule whether this right could be extended to include attempts by beneficiaries to discover such information. The majority opinion stated that the "client" for purposes of the privilege was the "current occupant" of the office, because only a "person" can hold the privilege. [51]

(20) If a predecessor trustee seeks legal advice in its personal capacity out of a 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 the advice out of its personal funds. [52]

(21) The majority opinion rationalized its decision by stating that a contrary result "would go far to prevent smooth transitions from one trustee to the next, would disrupt orderly administration of trusts, and would be detrimental to the interests of beneficiaries." [53]

(22) A second rationale used by the court was that its rule would allow the successor trustee to investigate and remedy any breaches by the prior trustee, and thereby fulfill the successor's statutory duty under Prob. Code § 16403. [54]

(23) The dissent argued that the majority departed from proper deference to the legislative prerogative in defining and controlling evidentiary privileges." [55]

(24) The majority offers only one clear basis for discerning truly privileged communications from those only conditionally privileged: Who paid the attorney? As a result, professional trustees can be expected to employ "shadow counsel" for consultation on any trust matters with potentially sensitive implications. In the majority's terms, this too will be "merely one of the burdens professional trustees take on, for, presumably, an appropriate fee." Unfortunately, increased fees are the most likely consequence of the majority's innovations in the Legislature's domain. [56]

(25) The court in Moeller also appeared to disregard the analytical impact of the series of cases requiring privity between the trustee's attorney and the beneficiaries for an action to sound in tort against that attorney. [57]

(26) Although the California Supreme Court has held that under certain circumstances, agents, including attorneys, may be liable in tort to third persons not in privity who are affected by their negligence, [citations] the principle of these cases has never been extended to trust beneficiaries and agents or employees of the trustees. [58]

(27) The beneficiaries are entitled to fair treatment from the fiduciary. This duty to act even-handedly does not, however, automatically create a direct duty by the fiduciary's attorney to the beneficiaries. [59]

(28) Moeller's categorical rejection of the existence of the privilege between multiple trustees and beneficiaries necessarily implies an absence of the attorney-client relationship. Absent the relationship, privity ceases to apply, and any beneficiary should be able to sue any fiduciary's attorney for professional negligence. The authors doubt that result would be intended by the Moeller court. [60]

I. Suggested Procedures for the Fiduciary's Attorney

(1) Throughout the administration of the trust and before any claims are asserted by the beneficiary, a prudent practice for the trustee's attorney is to identify and document the facts supporting the absence of an attorney-client relationship between the attorney and the beneficiaries. [61]

(2) This argument should emphasize that the smooth administration of the trust would suffer from the creation of a "fiduciary exception" to the attorney-client privilege. [62]

(3) Second, the argument could be advanced that the court should not create a judicial exception to a statutorily created privilege. [63]

(4) Characterizing the beneficiary as a client of the trustee's attorney would not only amount to the ceding of legislative functions to the judicial branch, but would amount as well to a "transparent contrivance." [64]

(5) Third, the attorney and fiduciary can argue for a "good cause" analysis [65] if the court does not accept the first and second arguments advanced above.

(6) In California, in contrast to the issue of the lawyer's duty to beneficiaries, the precise issue regarding the extent of the attorney-client privilege has not yet been conclusively answered. The cases in which the nature of the attorney's relationship with the trustee

and beneficiaries has arisen have usually been in the context of professional negligence. [66]

V. JOINT REPRESENTATION OF CLIENTS

A. **In General**

(1) A lawyer may represent more than one client with related but not necessarily identical interests. [1]

(2) A joint representation implies equal sharing of information with respect to the subject of the representation. [2]

(3) When an attorney represents actual or potential conflicting interests without the client's informed consent, the attorney is not entitled to a fee for services rendered. [3]

B. **California Rule**

(1) The California Rules of Professional Conduct provide that "a member shall not, without the informed written consent of each client … accept representation of more than one client in a matter in which the interests of the clients potentially conflict … ." [4]

(2) This "joint client" or "common interest" exception to the attorney-client privilege applies only where "two or more clients have retained or consulted an attorney upon a matter of common interest," in which event neither may claim the privilege in an action by one against the other. [5]

(3) Where two or more clients have retained or consulted an attorney 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 [or her] successor in interest) and another of such clients (or his [or her] successor in interest). [6]

(4) A federal court in New York has held that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited. [7]

(5) In California, the courts have established a multi-prong standard. A "substantial relationship" must be shown to exist between the

former representation and the current representation by virtue of the former representation of the attorney to his former client. By virtue of that former representation confidential information material to the current dispute would normally have been imparted to the attorney. When these factors are present, the attorney's knowledge of confidential information is presumed. [8]

(6) For the court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. … No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. [9]

C. **Consent of Client**

(1) The substantial relationship test will not disqualify an attorney if the prior representation was a joint representation. In such circumstances, the propriety of disqualification is not dependent upon the substantial relationship test. Instead, it generally turns upon the scope of the clients' consent. [10]

(2) Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2). [11]

(3) The Rules of Professional Conduct also require informed written consent before an attorney accepts "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." [12]

D. **Continuing to Represent One Client**

(1) Joint representation requires a sharing of communications among the several clients and the single attorney. [13]

(2) If co-trustees subsequently have a falling out, the attorney will generally withdraw as counsel for both of them. This result will not automatically occur, however, if the attorney makes clear from the outset that the attorney reserves the right to continue representation of one of the co-trustees. [14]

(3) Not all conflicts of interest require disqualification. In some situations, the attorney may still represent the client if the other client's consent is obtained. [15]

(4) The substantial relationship test does not prevent an attorney from continuing to represent one client from a joint representation if a falling out occurs between the joint clients. "Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose at the commencement [of the engagement] whatever champion the client feels is best suited to vindicate the client's legal entitlements." [16]

(5) Croce v. Superior Court [17] held that an attorney who had previously represented several clients in an action could later represent one client against the other even though the action was substantially related to the prior representation.

(6) Under the agreement, either party could secure its own separate counsel in the event of a conflict. Subsequently, one district retained separate counsel, and filed a cross-complaint against the other district. It also moved to disqualify the other district's counsel. The trial court denied the motion, and the appellate court affirmed. [18]

(7) The court stated:

> By signing the joint powers agreement [school district] waived its right to disqualify [the law firm] from representing other signatories to that agreement based on a presumption from a substantial relationship between [the law firm's] former representation and its current representation. It did not waive its right to disqualify [the law firm] if [law firm] acquired in the former representation confidential information pertaining to the current representation. However, [the school district] offered no substantial evidence that it had imparted confidential information to [the law firm] on this case. [19]

VI. REPRESENTING A TRUSTEE WHO IS A BENEFICIARY

A. **In General**

(1) Conflicts arise where the surviving spouse is both the trustee and income beneficiary of one or more trusts, and children or others are the remainder beneficiaries. The surviving spouse has a duty to treat all beneficiaries impartially. [1]

B. California Law

(1) In the context of a probate estate, the executor's attorney may not represent a beneficiary in a controversy with other beneficiaries except in those unusual cases where each of the parties expressly consent in writing and the attorney is not professionally hampered by the conflict problem. [2]

(2) In certain circumstances, even proper disclosure to the client may be inadequate to protect the attorney if disclosure is not made to the court. [3]

(3) Nevertheless, "at a minimum" the trustee's attorney should inform the beneficiaries of any "dual representation involving the trust… " [4]

(4) The authors have been unable to locate any California case directly addressing the propriety of an attorney's representation of a trustee who is also a trust beneficiary. The only California case containing any apparently relevant language is Jones v. Lamont. [5]

(5) We can conceive of situations where it might be improper- for example, where the administrator is an heir at law … . [6]

(6) The Probate Code requires that a person who is a beneficiary of a trust that permits the person, either individually or as trustee or cotrustee, to make discretionary distributions of income or principal to or for the benefit of himself … pursuant to a standard, shall exercise that power reasonably and in accordance with the standard. [7]

C. Restatement Second of Trusts

(1) In enacting the 1986 revisions to the Trust Law, now contained within the Probate Code, the Legislature relied on the Restatement Second of Trusts (Restatement). [8]

(2) Section 99(4) of the Restatement states that "If there are several beneficiaries of a trust, the beneficiaries may be the trustees." The Restatement finds that:

> In such a case each of the beneficiaries has an equitable interest that is separate from the legal interest held by the whole group. The trustees hold the legal title to the trust property as joint tenants, and they have equitable interests the extent of which is determined by the terms of the trust. No one of them has an undivided legal interest free of the trust. [9]

D. **The Law Outside of California**

(1) There does not appear to be a great deal of authority outside of California directly on point. In Smith v. Jordan [10] the administrator was also a claimant under the will.

(2) The Connecticut Supreme Court stated, in dicta, that "sound policy forbids such a practice, and … counsel who appear for the executor or trustee … ought not to appear and act for legatees and devisees under the will." [11]

(3) The Appellate Division of the New York Supreme Court has held that a distinction exists between an attorney's representation of an individual as an executrix and as a beneficiary for purposes of awarding attorney's fees from the trust estate. [12]

(4) In the case of In re Estate of Burlein, [13] the co-executrix petitioned the court to have her attorney's fees paid from the estate.

(5) The fact that a bank was named as both executor and trustee in the will was immaterial and its powers and duties as executor were just as distinct from its powers and duties as trustee as if the will had named another bank as trustee. [14] It would therefore appear that similar distinctions should be drawn when the same individual is a trustee and a beneficiary.

VII. REPRESENTING THE DEFALCATING FIDUCIARY

A. **Attorney Responsibilities**

(1) An attorney may not disclose confidential communications with the client, with two exceptions: the "crime" exception and the "fraud" exception. [1]

(2) The "fiduciary" exception discussed earlier is arguably a third exception to this duty of nondisclosure. Several ethics opinions have advised that the crime/fraud exception does not apply to prevent an impending civil fraud. [2]

(3) The ABA Special Report considers it permissible for the wrongdoing fiduciary's attorney to "consider disclosure to other constituents in the estate or trust relationship … " such as a co-fiduciary, or the beneficiaries. [3]

(4) If the fiduciary ignores the attorney's advice to avoid, or remedy, the breach of fiduciary duty, the attorney should consider the following factors:

(a) whether the information to be disclosed is substantial and important to the trust estate;

(b) whether disclosure is needed to protect the trust;

(c) whether the acts or omissions might continue or be repeated;

(d) whether the beneficiary is capable of acting on the information; and

(e) whether the interests of the beneficiary might be harmed. [4]

(5) Disclosure is not the sole remedy available to the attorney. The attorney may withdraw from representation without disclosure. [5]

(6) In fact, an attorney may be compelled to withdraw if continued representation of the fiduciary would result in a violation of the attorney's ethical duties, or in violation of another statute. [6]

(7) Additionally, the attorney has a right not to be implicated in the fiduciary's wrongdoing, as well as a duty not to assist the fiduciary in wrongdoing, or its concealment. [7]

(8) A withdrawal, even in an egregious circumstance, cannot unduly prejudice the client. [8]

(9) In California, the Rules of Professional Conduct specify the circumstances permitting the withdrawal of an attorney. An attorney is required to withdraw from a case when the attorney knows that:

(a) 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;

(b) continued employment will result in violation of the Rules or the State Bar Act;

(c) the client seeks to pursue an illegal course of conduct;

(d) the client insists that the attorney pursue a course of conduct that is illegal or prohibited by the Rules or the State Bar Act; or

(e) the client, by other conduct, renders it unreasonably difficult for the attorney to carry out the employment effectively. [9]

(10) Given these narrow limits, the "noisy withdrawal" may be the only practical approach available for a California attorney. In any event, the attorney's ability to disclose confidential communications will continue to be severely restricted. [10]

B. **Responsibilities of the Non-attorney Advisor**

(1) An agent's fiduciary responsibility when acting as an agent who holds an adverse interest to the fiduciary will be the same duty of disclosure as the trustee's duty of disclosure to the beneficiaries. [11]

(2) The agent need not profit directly from the transaction in order for the agent to be found liable for failing to disclose to the beneficiary. [12]

(3) As an agent, the non-attorney advisor assumes the fiduciary duty of the trustee toward the beneficiaries. [13]

(4) The only method by which a non-attorney could avoid disclosure of this information would be to make clear that the non-attorney advisor is the employee of the attorney. [14]

VIII. THE PRACTITIONER SERVING AS TRUSTEE

A. **The Attorney as Trustee**

B. **Should the Attorney Act as Trustee**

(1) Subject to the constraints recently placed on lawyers who serve as trustees, the decision whether to act as a trustee is personal to the attorney. [1]

(2) The attorney should also be aware of the changes in California law since 1993 with respect to attorneys who are beneficiaries under their clients' wills or trusts and with respect to attorneys who act as fiduciaries for clients. [2]

C. **Standard of Care**

(1) Standards of loyalty, care, confidentiality etc. that apply to trustees in general apply to attorneys who are serving as trustees. [3]

(2) In addition, where an attorney acts in a dual capacity performing services that a lay person could perform as well as legal services, all of the services provided by the attorney are deemed to involve the practice of law and must conform to the California Rules of Professional Conduct. [4]

(3) Thus, all services rendered by the attorney will be judged by a higher standard of care than would be the case for services rendered by an inexperienced fiduciary.

(4) The attorney/trustee also has a duty to use whatever special skills he or she has, and to use whatever special skills the attorney/trustee has represented to the client that he or she has. [5]

(5) On the latter point, the law in California is clear that a fiduciary holding itself out as an expert will be held to a higher standard of care than another fiduciary not making such representations. [6]

(6) In Estate of Beach, [7] the California Supreme Court opined that an executor can be held liable "if it failed to exercise the skill and knowledge ordinarily possessed by such professional fiduciaries." [8]

(7) The Court went on to state that "[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence." [9]

D. **New Probate Code Provisions**

(1) In 1993 the California Legislature decided to deal with a pernicious practice by some attorneys of preparing wills for clients that named the attorney as executor and chief or sole beneficiary. [10]

(2) These provisions of the law, commonly known as AB 21, [11] had the dual purpose of preventing donative transfers to "disqualified persons" [12] and creating a mechanism for the removal of a "disqualified person" who acts as sole trustee for a client. [13]

E. Donative Transfers to Attorneys and Other Disqualified Persons

(1) A principal purpose for the enactment of AB 21 was to invalidate donative transfers to "disqualified persons." A "disqualified person" is defined in Prob. Code § 21350(a)[Deering's] as:

- A person who drafted the instrument.

- Anyone who is related by blood or marriage to, or is a cohabitant with, or is an employee of the drafter of the instrument.

- Any partner or shareholder of any law partnership or law corporation in which the drafter has an ownership interest, and any employee of such law partnership or law corporation.

- Any person who has a fiduciary relationship with the transferor such as a conservator, trustee or person who transcribes the instrument or causes it to be transcribed.

- Any person who is related by blood or marriage to, is a cohabitant with, or is an employee of a person who has a fiduciary relationship with the transferor. [14]

(2) The definition of "disqualified person" in Prob. Code § 21350[Deering's] is narrowed by Prob. Code § 21351[Deering's] so that the following transactions are excluded from the class of prohibited transactions:

- Transfers to a transferee who is related by blood or marriage to or who is a cohabitant with the transferor or the person who drafted the instrument.

- Transfers where the instrument is reviewed by an independent attorney who counsels the transferor and signs and delivers a certificate of independent review. The certificate of independent review is contained in the statute and appears as Form § 10.203. (A 1995 amendment to Prob. Code § 21351[Deering's] eliminated the concern that an attorney signing the certificate of independent review was also certifying the effectiveness of the document as an estate planning document. It is now clear that the certifying attorney is not representing the client in any way other than in counseling the client with regard to the gift to the disqualified person.)

- Transfers approved by the court pursuant to Prob. Code § 2580[Deering's] relating to petitions of a conservator or other person authorizing the application of the substituted judgment rule.

- Transfers approved by the court based on clear and convincing evidence that the transfers were not the product of "fraud, menace, duress or undue influence."

(3) The exculpatory provision based on the court's finding that there was no fraud, menace, duress or undue influence will apply only:

(a) to instruments made by persons who were at the time not California residents;

(b) to instruments other than one making a transfer to a drafter; and

(c) to instruments executed on or before July 1, 1993 by a person who was a California resident at the time the instrument was signed. [15]

(4) Probate Code unless the person has actual notice of the possible invalidity of the transfer. Any person who receives actual notice of the possible invalidity of the transfer is not liable for failing to make the transfer unless the validity of the transfer has been established by the court. [16]

(5) If the transfer fails, the proposed transferee is deemed to have predeceased the transferor without spouse or issue except to the extent of the intestate share of the proposed transferee. [17]

(6) Thus, the provisions of AB 21 are not applicable to instruments that were irrevocable before September 1, 1993, or to an instrument created by a transferor who was permanently incapacitated before September 1, 1993. Any action to void an impermissible transfer must be brought after letters are issued but before final distribution, in the case of a transfer by will, or, in the case of any other transfer, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers or reasonably should have discovered the facts material to the transfer. [18]

F. **Removing Disqualified Person as Trustee**

(1) A disqualified person who is serving as sole trustee can be removed from office. [19]

(2) The removal can be made on petition of the settlor, a co-trustee, or a beneficiary. [20]

(3) The removal of a disqualified person cannot occur, however, if the court finds that the appointment of the disqualified person as trustee was consistent with the intent of the settlor and that the intent of the settlor was not the product of fraud, menace, duress, or undue influence. [21]

(4) Any waiver of these provisions by the settlor is void as against public policy. [22]

(5) The prohibition against a disqualified person serving as sole trustee of a trust will not apply in the following circumstances:

- Where the settlor is related by blood or marriage (within the seventh degree) to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

- Where the instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of the trustee designation and who (2) signs and delivers to the settlor and the designated trustee a certificate (in substantially the same form as Form § 10.204).

- Where after full disclosure the court approves the appointment under Prob. Code § 2580[Deering's] (relating to the substituted judgment rule). [23]

(6) If the court removes the trustee based on a finding that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence, the trustee must bear the costs of the proceeding, including reasonable attorney's fees. [24]

(7) If the court finds that the petition for removal was filed in bad faith and that removal would be contrary to the intent of the settlor, the person seeking the removal may be charged by the court with the costs of the proceeding, including reasonable attorney's fees. [25]

G. **Attorney Disciplinary Actions** .

(1) In 1995 the California Business and Professions Code was amended to make it clear that a violation of AB 21 will not be grounds for attorney discipline unless the attorney knew or should have known of the facts constituting the violation. [26]

H. **The Non-attorney as Trustee**

(1) The first case in California dealing with the applicability of AB 21 to non-attorneys held that the provisions of Prob. Code § 21350[Deering's] were applicable to the settlor's stockbroker. [27]

IX FEES

A. **Reasonableness**

B. **Trustees' Fees**

(1) A trustee is ordinarily entitled to the compensation allowed by the trust instrument. [1]

(2) Compensation may be reduced, or denied entirely, however, if the trustee has acted negligently, or has breached the trustee's fiduciary duty. [2]

(3) In the absence of an actual loss suffered by the beneficiaries, however, the disallowed compensation may not exceed the amount allocable to the negligence so long as the trustee neither acted fraudulently nor benefited personally from the negligence. [3]

C. **Attorneys' Fees**

(1) The Model Rules of Professional Conduct require that the attorney's fees be reasonable. [4]

(2) The Probate Code imposes a duty on the trustee to seek court approval for attorney's fees that the trustee considers unreasonable. [5]

(3) What is reasonable depends on the circumstances. The following factors are to be considered in determining the reasonableness of an attorney's fee:

- the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly;

- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

- the fee customarily charged in the locality for similar legal services;

- the amount involved and the results obtained;

- the time limitations imposed by the client or by the circumstances;

- the nature and length of the professional relationship with the client;

- the experience, reputation, and ability of the lawyer or lawyers performing the services; and

- whether the fee is fixed or contingent. [6]

(4) The trustee should undertake to examine the fees charged by the attorney prior to approving any fee request, because once paid, the trustee may not be able to recover those fees. [7]

(5) If the attorney is related to the fiduciary, the fiduciary might be estopped from paying any fees to the attorney. [8]

D. **Recovery of Attorneys' Fees**

(1) If a trust beneficiary litigates against the trustee and is unsuccessful, the trustee may allocate the expenses connected with the litigation to the beneficiary's share of the trust assets. [9]

(2) Conversely, a beneficiary who successfully asserts an interest in the trust over the objections of the trustee, or of other beneficiaries, is entitled to recover attorneys' fees from the trust. [10]

(3) When a trust beneficiary is compelled to defend the beneficiary's rights through litigation "occasioned by the bad faith or unreasonable conduct of the trustee, the trustee may be required to reimburse the beneficiary for attorneys fees and costs incurred." [11]

Footnotes for Section I

1. Prob. Code § 16002[Deering's] .

2. Prob. Code § 16462[Deering's] .

3. Meinhard v. Salmon (1929) 164 N.E. 545, 546, 547 (Cardozo).

4. Bogert, Law of Trusts, § 543 (6th ed. West).

5. Bogert, Law of Trusts, § 543 (6th ed. West).

6. Bogert, Law of Trusts, § 543 (6th ed. West).

7. Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 ; see also Sims v. Petaluma Gas Light Co. (1901) 131 Cal. 656, 63 P. 1011 ; Estate of Pitzer (1984) 155 Cal. App. 3d 979, 202 Cal. Rptr. 855 .

8. Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 ; see also Kohn v. Sacramento Electric, Gas & Ry. Co. (1914) 168 Cal. 1, 141 P. 626 ; accord Crocker Nat. Bk. v. Byrne & McDonnell (1918) 178 Cal. 329, 173 P. 752 ; Hayward Tamkin & Co. v. Carpenteria Inv. Co. (1968) 265 Cal. App. 2d 617, 71 Cal. Rptr. 462 .

9. Prob. Code § 16461[Deering's] .

10. Prob. Code § 16463[Deering's] .

11. Prob. Code § 16464[Deering's] .

12. Prob. Code § 16465[Deering's] .

13. Prob. Code § 16003[Deering's] ; Goldberg v. Frye (1990) 217 Cal. App. 3d. 1258, 266 Cal. Rptr. 483 .

14. See Chapter 4.

15. The trustee can deal with the wasting asset problem (a) by balancing the rest of the trust portfolio to provide overall equity between the income and remainder beneficiaries, or (b) by providing a depletion reserve by which a certain portion of income (for example, 15 percent) is added to principal. See also Prob. Code § 16313[Deering's] , which gives the trustee discretion to establish a reserve for depletion or depreciation.

16. Prob. Code § 15642[Deering's] ; Estate of Hammer (1993) 19 Cal. App. 4th 1621, 1641, 24 Cal. Rptr. 2d 190 .

17. Prob. Code § 16440[Deering's] . See also Estate of Talbot (1965) 141 Cal. App. 2d 309, 296 P.2d 848 .

18. Code Civ. Proc. § 343[Deering's] ; see Cortelyou v. Imperial Land Co. (1913) 166 Cal. 14 ; Estate of de Laveaga (1958) 50 Cal. 2d 480 ; 3 Witkin, Cal. Procedure § 469.

19. Prob. Code § 16460(a)(1)[Deering's] ; Prob. Code § 16063[Deering's] (effective July 1, 1997).

20. Prob. Code § 16460(a)(2)[Deering's] .

21. See DiGrazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 28 Cal. Rptr. 2d 37 where the court held that it is not enough to start the running of the statute of limitations that the beneficiary knew of facts which would have led an ordinary person to investigate the trustee's actions further.

22. Prob. Code § 16063[Deering's] , effective July 1, 1997, codifying the result in DiGrazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 28 Cal. Rptr. 2d 37 .

23. See Selected 1986 Trust and Probate Legislation, 18 Cal. L. Rev. Commn. Reports 1201.

Footnotes for Section II

1. Prob. Code § 15620[Deering's] .

2. I.R.C. § 2041 .

3. (1997) 97 C.D.O.S. 9091.

Footnotes for Section III

1. Code Civ. Proc. § 2296 .

2. See Form § 2.210 for a form of advisory nonrepresentation letter to beneficiaries.

3. Cf. Tuttle, "The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation," 1994 Ill. L. Rev. 889 (1994) with Pennell, "Representations Involving Fiduciary Entities: Who is the Client?" 62 Fordham L. Rev. 1319 (1994).

4. Cf. Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 266 Cal. Rptr. 483 (attorney has no duty to beneficiaries) with Morales v. Field, DeGoff, Hubert & MacGowan (1979) 99 Cal. App. 3d 307, 160 Cal. Rptr. 239 (attorney has relationship with beneficiaries similar to trustee's relationship); and In re Estate of Larson (Wash. 1985) 694 P.2d 1051 (the attorney has a fiduciary relation to the fiduciary that runs to the beneficiaries) with Charleson v. Hardesty (1992) 108 Nev. 878, 839 P.2d 1303 (trustee's attorney owes independent fiduciary duty to beneficiaries).

5. 28 Real Prop., Prob. & Trust J. 825.

6. 28 Real Prop., Prob. & Trust J. 825, 865; ACTEC Foundation (2d Ed. 1995).

7. See Link, "Significant New Developments in Probate and Trust Law Practice, Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct," 26 Real Prop., Prob. & Trust J. 1 (1991).

8. See Form § 2.202 for an example of an engagement letter.

9. Report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate, and Trust Law of the American Bar Association, 28 Real Prop., Prob. & Trust J. 763, 828 (1994); ACTEC Commentaries on the Model Rules of Professional Conduct, 28 Real Prop. Prob. & Trust J. 865, 867; Pennell, "Representations Involving Fiduciary Entities: Who is the Client?" 62 Fordham L. Rev. 1319, 1354 (1994).

Footnotes for Section IV

1. See e.g., Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 160 Cal. Rptr. 239 ; Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 .

2. Johnson v. Superior Court (1995) 38 Cal. App. 4th 463, 45 Cal. Rptr. 2d 312 .

3. Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1267-1268, 266 Cal. Rptr. 483 ; In re Ogier (1894) 101 Cal. 381, 385 ; Estate of Kruger (1904) 143 Cal. 141, 145 ; Baldock v. Green (1980) 109 Cal. App. 3d 234, 240, 167 Cal. Rptr. 157 ; see also Florida Rule of Conduct 4-1.7; Michigan Court Rule 5.117(A).

4. Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1269-1270, 266 Cal. Rptr. 483 .

5. See Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 701, 282 Cal. Rptr. 627 ; Goodman v. Kennedy (1976) 18 Cal. 3d 335, 342, 134 Cal. Rptr. 375 ; Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1329, 238 Cal. Rptr. 902 .

6. See Hopkins v. Akins (D.C. App. 1993) 637 A.2d 424 ; Spinner v. Nutt (1994) 417 Mass. 549, 631 N.E.2d 542 ; Trask v. Butler (1994) 123 Wash. 2d 835, 872 P.2d 1080 ; Maynard v. Adkins (1995) 193 W. Va. 456, 457 S.E.2d 133 ; Goldberger v. Kaplan, Strangis and Kaplan P.A. (Minn. App. 1995) 534 N.W.2d 734 .

7. See e.g., Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 160 Cal. Rptr. 239 ; In re Vetter (Wash. 1985) 711 P.2d 284, 289 ; see also NY State Bar Ass'n, Ethics Op. 512 (1979).

8. See e.g., Flatt v. Superior Court (1994) 9 Cal. App. 4th 275, 36 Cal. Rptr. 2d 537, 885 P.2d 950 .

9. ACTEC Commentary to MRPC 1.2.

10. ACTEC Commentary on MRPC 1.2.

11. Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 .

12. See e.g., Form § 2.210.

13. Hazard & Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.3:108 (2d ed. 1990).

14. But cf. Steinway v. Bolden (1990) 185 Mich. App. 234 (the attorney's client is the estate, rather than the personal representative).

15. Link, "Significant New Developments in Probate and Trust Law Practice, Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct," 26 Real Prop., Prob. & Trust J. 1 (1991).

16. See Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 ; Estate of Huber (1973) 31 Cal. App. 3d 126, 107 Cal. Rptr. 89 ; 2 Scott & Fratcher The Law of Trusts § 170 (4th ed. 1988).

17. Riggs Nat'l Bank v. Zimmer (Del. Ch. 1976) 355 A.2d 709, 712 ; Restatement (Second) of Trusts § 173, comment c.

18. Johnson v. Superior Court (1995) 38 Cal. App. 4th 463, 45 Cal. Rptr. 2d 312 .

19. (Del. Ch. 1976) 355 A.2d 709.

20. Riggs Nat'l Bank v. Zimmer (Del. Ch. 1976) 355 A.2d 709, 712-714 .

21. Report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate, and Trust Law of the American Bar Association, 28 Real Prop. Prob. & Trust J. 763, 825 (1994); see e.g., ABA Committee on Professional Ethics and Grievances, Formal Op. 202 (1940); Penna. Rules of Professional Conduct, Rule 1.6(c)(2)(1981); Texas Disciplinary Rules, Rule 1.05(c)(8)(1991).

22. 28 Real Prop., Prob. & Trust J. 825, 850 (1994).

23. 28 Real Prop., Prob. & Trust J. 825, 849 (1994).

24. 28 Real Prop., Prob. & Trust J. 825, 850 (1994).

25. 28 Real Prop., Prob. & Trust J. 825, 850 (1994); see also ACTEC Commentaries, Rules 1.2,1.6,1.7.

26. 28 Real Prop., Prob. & Trust J. 825, 852 (1994).

27. Washington Rules of Professional Conduct 1.6(c).

28. See In re Estate of Minsky (Ill. App. Ct. 1978) 376 N.E.2d 647, 650 .

29. See Hamel, Jr., "Trustee's Privileged Counsel: A Rebuttal," 21 ACTEC Notes 157 (1995); McChrystal, "Lawyers and Loyalty," 33 Wm & Mary L. Rev. 367 (1992).

30. See ACTEC Comment to MRPC 1.2, 1.6, and 1.7.

31. ACTEC Comment to MRPC 1.2.

32. See Hamel, Jr., "Trustee's Privileged Counsel: A Rebuttal," 21 ACTEC Notes 157 (1995).

33. See e.g., State Bar of California, Formal Opinion 1988-96.

34. Bus. & Prof. Code § 6048(e)[Deering's] ; Calif. Rule of Prof. Conduct 3-310 .

35. Shannon v. Superior Court (1990) 217 Cal. App. 3d 986, 266 Cal. Rptr. 242 (pertaining to the disclosure of an opinion letter prepared for a court appointed receiver).

36. (1985) 172 Cal. App. 3d 264, 218 Cal. Rptr. 205.

37. Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 218 Cal. Rptr. 205; see also Fletcher v. Superior Court (1996) 44 Cal. App. 4th 773 .

38. Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 271, 218 Cal. Rptr. 205 .

39. Schick v. Bach (1987) 193 Cal. App. 3d 1321, 238 Cal. Rptr. 902 .

40. Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 282 Cal. Rptr. 627 .

41. (1995) 38 Cal. App. 4th 463, 45 Cal. Rptr. 2d 312.

42. Johnson v. Superior Court (1995) 38 Cal. App. 4th 463, 474, 45 Cal. Rptr. 2d 312.

43. Moeller v. Superior Court (1997) 97 C.D.O.S. 9085 .

44. (1996) 50 Cal. App. 4th 353.

45. Moeller v. Superior Court (1996) 50 Cal. App. 4th 353 .

46. Moeller v. Superior Court (1996) 50 Cal. App. 4th 353 .

47. (1950) 36 Cal. 2d 396, 224 P.2d 726.

48. Strauss v. Superior Court (1950) 36 Cal. 2d 396, 399, 224 P.2d 726 .

49. Strauss v. Superior Court (1950) 36 Cal. 2d 396, 403, 224 P.2d 726 .

50. Moeller v. Superior Court (1997) 97 C.D.O.S. 9087 .

51. Moeller v. Superior Court (1997) 97 C.D.O.S. 9087 .

52. Moeller v. Superior Court (1997) 97 C.D.O.S. 9088 .

53. Moeller v. Superior Court (1997) 97 C.D.O.S. 9088 .

54. Moeller v. Superior Court (1997) 97 C.D.O.S. 9089 .

55. Moeller v. Superior Court (1997) 97 C.D.O.S. 9090 .

56. Moeller v. Superior Court (1997) 97 C.D.O.S. 9091 .

57. Saks v. Damon Raike & Co. (1992) 7 Cal. App. 4th 419, 8 Cal. Rptr. 2d 869 .

58. Moeller v. Superior Court (1996) 50 Cal. App. 4th 353 ; see also Saks v. Damon Raike & Co. (1992) 7 Cal. App. 4th 419, 8 Cal. Rptr. 2d 869 .

59. Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1269, 266 Cal. Rptr. 483, 489-90.

60. See also, Fletcher v. Superior Court (1996) 44 Cal. App. 4th 773 for a holding that because there is no attorney -client privilege between the attorney and the beneficiaries, any communications between the attorney and beneficiaries is not privileged and can be discovered.

61. Garner v. Wolfinbarger (5th Cir. 1970) 430 F.2d 1093, cert. denied 401 U.S. 974 .

62. See Huie v. De Shazo (Tex. S. Ct. 2-9-96) No. 95-0873, 1996 WL 51165 .

63. Gump v. Wells Fargo Bank (1987) 192 Cal. App. 3d 222, 237 Cal. Rptr. 311 .

64. Gibbs and Hanson, "The Fiduciary Exception to a Trustee's Attorney/Client Privilege," 21 ACTEC Notes 226 (1996).

65. See Garner v. Wolfinbarger (5th Cir. 1970) 430 F.2d 1093, cert. denied 401 U.S. 974 ; Hoopes v. Carota (N.Y. App. Div. 1988) 142 A.D.2d 906, aff'd (1989) 74 N.Y.2d 716 . "Good cause" requires that the privilege be honored unless the beneficiary can show "good cause" for allowing its waiver.

66. But cf. Moeller v. Superior Court (1997) 97 C.D.O.S. 9085 .

Footnotes for Section V

1. ACTEC Commentaries to MRPC 1.6.

2. ACTEC Commentaries to MRPC 1.6 & 1.7.

3. Giannini, Chin & Valinoti v. Superior Court (1995) 36 Cal. App. 4th 600, 616, 42 Cal. Rptr. 2d 389 ; see Asbestos Claims Facility v. Berry & Berry (1990) 219 Cal. App. 3d 9, 267 Cal. Rptr. 896

4. California Rules of Professional Conduct 3-310.

5. Rockwell Internt'l. Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 1267, 32 Cal. Rptr. 2d 153 ; see also Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 567, 237 Cal. Rptr. 528 .

6. Evid. Code § 962[Deering's].

7. T. C. Theatre Corp. v. Warner Bros. Pictures (S.D.N.Y. 1953) 113 F.Supp. 265, 268 .

8. Global Van Lines, Inc. v. Superior Court (1983) 144 Cal. App. 3d 483, 192 Cal. Rptr. 609 ; Trone v. Smith (9th Cir. 1980) 621 F.2d 994 .

9. Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 574, 286 Cal. Rptr. 609 ; T. C. Theatre Corp. v. Warner Bros. Pictures (S.D.N.Y. 1953) 113 F.Supp. 265, 269 .

10. Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1295, 37 Cal. Rptr. 2d 754 .

11. Drafter's Notes, Rule 3-310.

12. Cal. Rules Prof. Conduct, Rule 3-310(E); see Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1296, 37 Cal. Rptr. 2d 754 .

13. Cal. Rules Prof. Conduct, Rule 3-310(E); Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1296, 37 Cal. Rptr. 2d 754 .

14. Croce v. Superior Court (1937) 21 Cal. App. 2d 18, 68 P.2d 369 .

15. Ward v. Superior Court (1977) 70 Cal. App. 3d 23, 31, 138 Cal. Rptr. 532 ; In re Lee G. (1991) 1 Cal. App. 4th 17, 34, 1 Cal. Rptr. 2d 375 .

16. Wolfram, Modern Legal Ethics, (1986) § 7.2.2, p. 339.

17. (1937) 21 Cal. App. 2d 18, 68 P.2d 369.

18. Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 211 Cal. Rptr. 802 .

19. Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 573, 211 Cal. Rptr. 802 .

Footnotes for Section VI

1. Prob. Code § 16003[Deering's] .

2. Estate of Effron (1981) 117 Cal. App. 3d 915, 929, 173 Cal. Rptr. 93 . See Jones v. Lamont (1897) 118 Cal. 499 .

3. Potter v. Moran (1966) 239 Cal. App. 2d 873, 49 Cal. Rptr. 229 , where the court vacated several orders settling trust accounts because of a failure to disclose that the same attorneys were representing the trustee and the guardian for the minor beneficiaries.

4. Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 316, 160 Cal. Rptr. 239 .

5. (1897) 118 Cal. 499.

6. Jones v. Lamont (1897) 118 Cal. 499, 503 .

7. Prob. Code § 16081(b)[Deering's] .

8. 18 Cal. L. Rev. Commn. Reports. 521 (1985); see Estate of Heggstad (1993) 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433 ; Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 322-323, 282 Cal. Rptr. 354 .

9. Restatement (Second) of Trusts § 99, comment d.

10. (1904) 59 Atl. 507.

11. Smith v. Jordan (1904) 59 Atl. 507, 508 .

12. In re Estate of Burlein (1966) 272 N.Y.S.2d 429 .

13. (1966) N.Y.S.2d 429.

14. Estate of Beach (1975) 15 Cal. 3d 623, 637, 125 Cal. Rptr. 570, 542 P.2d 994 .

Footnotes for Section VII

1. Evid. Code § 956[Deering's]; MRPC 1.6(a).

2. LA County Bar Assoc. Ethics Op. 274 (1962) (issued prior to enactment of current Evid. Code § 956[Deering's]); see also State Bar Opinion 1988-96 (attorney forbidden from disclosing to the court prior misfeasance of client on related fiduciary administration, even when information not obtained from client).

3. ABA Special Report, 28 Real Prop., Prob. & Trust J. 852.

4. ABA Special Report, 28 Real Prop., Prob. & Trust J. 852.

5. MRPC 1.16.

6. MRPC 1.16.

7. MRPC 1.16; Wolfram, Modern Legal Ethics, (1986) § 9.5.3.

8. ABA Special Report, 28 Real Prop., Prob. & Trust J. 859.

9. California Rule of Professional Conduct 3-700, subdivisions (B) & (C).

10. See e.g., Moeller v. Superior Court (1997) 97 C.D.O.S. 9085 ; and § 10.05[4][d].

11. St. James Armenian Church of Los Angeles v. Kurkjian (1975) 47 Cal. App. 3d 547, 121 Cal. Rptr. 214 (1975) .

12. Jorgensen v. Beach'n' Bay Realty, Inc. (1981) 125 Cal. App. 3d 155, 177 Cal. Rptr. 882 .

13. See e.g., Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 161 Cal. Rptr. 342 ; Prob. Code §§ 4232[Deering's] , 4235[Deering's] .

14. See e.g., State Farm Casualty Co. v. Superior Court (1989) 216 Cal. App. 3d 1222, 265 Cal. Rptr. 372 .

Footnotes for Section VIII

1. For more on whether an attorney should consent to serve as trustee, see Alvarez, "The Attorney as Trustee: Problems When You Say Yes," Estate Planning, Trust and Probate News, (Winter 1992 and Spring 1993).

2. See discussion in § 10.09[2] regarding changes to the Probate Code contained in AB 21.

3. Prob. Code § 16040[Deering's] .

4. Layton v. State Bar (1990) 50 Cal. 3d 889, 268 Cal. Rptr. 845, 789 P.2d 1026 .

5. Prob. Code § 16014[Deering's] ; Coberly v. Superior Court (1965) 231 Cal. App. 2d 685, 42 Cal. Rptr. 64 .

6. Estate of Beach (1975) 15 Cal. 3d 623, 125 Cal. Rptr. 570, 542 P.2d 994 .

7. (1975) 15 Cal. 3d 623, 125 Cal. Rptr. 570, 542 P.2d 994.

8. Estate of Beach (1975) 15 Cal. 3d 623, 631, 125 Cal. Rptr. 570, 542 P.2d 994 .

9. Estate of Beach (1975) 15 Cal. 3d 623, 635, 125 Cal. Rptr. 570, 542 P.2d 994 .

10. See Estate of Rohde (1958) 158 Cal. App. 2d 19, 323 P.2d 490 where a presumption of undue influence was used against an attorney who prepared a will for an aged client naming him as executor and sole beneficiary of the estate.

11. Prob. Code § 21350[Deering's] et seq.; Prob. Code § 15642[Deering's] .

12. Prob. Code §§ 21350[Deering's] , 21350.5[Deering's] .

13. Prob. Code § 15642[Deering's] .

14. Prob. Code § 21350(a)(5)[Deering's] as originally enacted contained a typographical error. It erroneously referred to persons related to the drafter instead of persons related to someone with a fiduciary relationship with the transferor. The error was corrected in SB 392 signed into law on September 17, 1996.

15. Prob. Code § 21351(e)[Deering's] .

16. Prob. Code § 21352[Deering's] .

17. Prob. Code § 21353[Deering's] .

18. Prob. Code § 21356[Deering's] .

19. Prob. Code § 15642(b)(6)[Deering's] .

20. Prob. Code § 15642(a)[Deering's] .

21. Prob. Code § 15642(b)(6)[Deering's] .

22. Prob. Code § 15642(b)(6)[Deering's] .

23. Prob. Code § 15642(b)(6)[Deering's] .

24. Prob. Code § 15642(c)[Deering's] .

25. Prob. Code § 15642(d)[Deering's] .

26. Bus. & Prof. Code § 6103.6[Deering's] .

27. Graham v. Lenzi (1995) 37 Cal. App. 4th 248, 43 Cal. Rptr. 2d 407 .

Footnotes for Section IX

1. Estate of Lindner (1978) 85 Cal. App. 3d 219, 149 Cal. Rptr. 331 ; Estate of Russell (1968) 69 Cal. App. 2d 200, 70 Cal. Rptr. 561 .

2. Estate of Gump (1991) 1 Cal. App. 4th 582, 597, 2 Cal. Rptr. 2d 269 ; see also Prob. Code § 17211[Deering's] which authorizes the court to award attorneys' fees against a trustee who opposes a contest or objection "without reasonable cause and in bad faith."

3. Estate of Gump (1991) 1 Cal. App. 4th 582, 597, 2 Cal. Rptr. 2d 269 .

4. MRPC 1.5.

5. Prob. Code §§ 16040(a)[Deering's] , 17200(a)[Deering's] ; Wells Fargo Bank v. Marshall (1993) 20 Cal. App. 4th 447, 459, 24 Cal. Rptr. 2d 507 .

6. MRPC 1.5.

7. See e.g., Harpole v. Hilton Foundation (1996) 96 C.D.O.S. 2835 (relating to an award of statutory probate fees).

8. Prob. Code § 21350[Deering's] ; see Conservatorship of Bryant (1996) 96 C.D.O.S. 3308 (attorney for conservator who is related not entitled to compensation regardless of reasonableness of fee request and benefit to conservatorship estate).

9. Estate of Ivy (1994) 22 Cal. App. 4th 873, 28 Cal. Rptr. 2d 16 ; see also Prob. Code § 17211(a)[Deering's] which allows the trustee to recover attorneys' fees if the contest or objection "was without reasonable cause and in bad faith."

10. Wells Fargo Bank v. Marshall (1993) 20 Cal. App. 4th 447, 24 Cal. Rptr. 2d 507 ; see also Conservatorship of Lefkowitz (1996) 50 Cal. App. 4th 1310, 58 Cal. Rptr. 2d 299 ; see also Prob. Code § 17211(b)[Deering's] which allows the contestant to recover attorneys' fees if the court determines the trustee's opposition to be "without reasonable cause and in bad faith."

11. Prob. Code § 17211[Deering's] ; Schneider v. Friedman, Collard, Poswall & Virga (1991) 232 Cal. App. 3d 1276, 1283 283 Cal. Rptr. 882 ; see also Allard v. Pacific Nat'l Bank (1983) 99 Wn.2d 394, 663 P.2d 104 ; Wilmington Trust v. Coulter (1965) 42 Del. Ch. 253, 208 A.2d 677 .

Ethical Considerations for Estate Planners:

Dealing with the Mentally Impaired Client

I. RULES FOR GUIDANCE FOR PRACTITIONERS

A. Context of Dilemma. The situation usually arises with either (A) a potential new client whose competency is suspect or (B) a current client who is now clearly incompetent or whose capacity is at least questionable.

B. Surprisingly, there are no specific rules in California Rules of Professional Conduct (CRPC) which directly address the issue of dealing with the mentally impaired client. The CPRC were revised in 1989. At that time, California elected not to adopt the Model Rules of Professional Conduct (MRPC) which were promulgated by the American Bar Association in 1983. In addition, there are no controlling California cases. There are two (2) California ethics opinions which represent the minority view.

C. The ABA Model Rules do address the issue of the mentally impaired client, specifically in MRPC 1.14. The ABA Rules represent the majority view and are followed in some 40 states.

MPRC 1.14 – Client Under a Disability

"(1) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(2) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

D. The American College of Trust & Estate Counsel (ACTEC) has published Commentaries on the Model Rules of Professional Conduct because the College perceived that the MRPC did not provide "sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. Recognizing the need to fill the gap, ACTEC has developed the following Commentaries on selected rules to provide some particularized guidance to ACTEC Fellows and others

regarding their professional responsibilities". (Excerpt from the Introduction to the Commentaries). The Commentaries were first adopted in October, 1992 and a Second Edition adopted in March 1995. A Third Edition is in its second draft stage and should be adopted in 1999.

(1) The format of the Commentaries is to state the MRPC and then offer comments on the application of the Rule and provide annotations including cases, ethics opinions and published articles.

(2) It is instructive to consider the four (4) basic themes which the ACTEC Commentaries state are appropriate to our practice area :

(a) the relative freedom that lawyers and clients have to write their own charter for representation in the trusts and estates field;

(b) the generally non-adversarial nature of trusts and estates practice;

(c) the utility and propriety, in this area of the law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and

(d) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC.

E. In 1997, the Estate Planning, Trust and Probate Section of the State Bar of California published "Guide to California Rules of Professional Conduct for Estate Planning Trust and Probate Counsel" to assist California trusts and estates lawyers by providing commentaries similar in concept and format to the ACTEC Commentaries but directed to California's particular situation and taking into account that California has not adopted the MPRC. This publication is available for purchase from the State Bar of California.

F. There is a new Ethics Opinion being drafted by the Ethics Committee of the Bar Association of San Francisco (BASF) which will recommend adoption of a position similar to that contained in MRPC 1.14, the ACTEC

Commentaries and the State Bar Estate Planning Section publication.

G. The American Law Institute is also circulating a final draft of the Restatement, The Law Governing Lawyers" which indicates that adjustments must be made in the attorney-client relationship when the client is impaired. The lawyer must exercise informed judgment in choosing among "imperfect alternatives". These include discussions of the issue with a client's medical providers or relatives, bringing the issue to the attention of the court, and the discretion to seek a conservatorship.

II. PREVENTIVE MEASURES FOR COMPETENT CLIENTS

We must make sure we advise our current clients to take protective action while they are still competent and to take measures to protect their interests in event of diminished mental capacity.

A. Durable Powers of Attorney for (1) Asset Management (either current or springing powers) and (2) Health Care Decisions.

(1) Declaration under Natural Death Act (Living Will)

(2) Revocable Trusts: Specify how determination as to incompetency is made and the procedure for appointment of a successor trustee.

(3) Designation of a Conservator (can be in the durable power of attorney or otherwise)

(4) It has been suggested that it may be appropriate to include a provision in a durable power of attorney whereby the agent could waive the attorney-client or physician-patient provision on behalf of the principal under appropriate circumstances.

III. MEASURES TO CONSIDER FOR PROSPECTIVE/CURRENT CLIENTS

If there is a new client whose competency is questionable, the attorney can refuse to accept the engagement (at any stage until formal acceptance). The attorney may need more information or an evaluation by a mental health professional to make a decision. The attorney should also consider the family relationships, the likelihood of a challenge to any proposed documents and whether the attorney is prepared to take on the possible aftermath.

IV. DISCRETION TO PROTECT A MENTALLY IMPAIRED CLIENT. ISSUE: DOES A LAWYER HAVE IMPLIED AUTHORITY TO ACT IN THE BEST INTERESTS OF A MENTALLY IMPAIRED CLIENT?

A. Majority View: MRPC 1.14 allows an attorney to seek appointment of a conservator or take other protective measures on behalf of a client, but only when the lawyer reasonably believes the client cannot adequately act in his or her own best interests. The lawyer may, among other things, "seek guidance from an appropriate diagnostican".

The ACTEC Commentary on MRPC 1.14 adopts this majority view and states, in part:

> "The lawyer for a client who appears to be disabled may have the implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated in his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an apparently disabled client that the lawyer reasonably believes are in the best interests of the client."

In February, 1997, the comment to MRPC 1.14 was amended to include recommendations with respect to a lawyer's disclosure of the client's condition and the rendering of emergency legal assistance. Specifically, Comment 6 provides that

"In an emergency where the health, safety or financial interest of a person under a disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgements about the matter, when the disabled person or another acting in good faith on that person's behalf has consulted the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available."

In such cases, the lawyer should only act "to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm". In addition, the lawyer "should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action."

B. Minority View: California does not permit an attorney to seek appointment of a conservator or seek the advice of a physician, premised on lawyer's presumed "absolute" duty of confidentiality to the client.

(1) COPRAC Formal Opinion 1989-112 (1989) states that, without the client's consent, a lawyer may not initiate conservatorship proceedings on the client's behalf even though the lawyer believes it is in the client's best interests. It is impermissible because of the possibility the lawyer will disclose confidential information.

This Opinion appears to disregard the possibility that

(a) The lawyer may limit disclosures to matters which do not involve confidential communications.

(b) The lawyer could limit disclosures to otherwise confidential information that the client would want disclosed so the disclosure is impliedly authorized by the client or required by lawyer's duty of loyalty to the client.

(2) L.A. Opinion 1988-450 found that a lawyer could not initiate an involuntary conservatorship for a present or former client due to an impermissible conflict of interest.

C. The problem is these Opinions appear to place more importance on the duty of confidentiality than on the best interests of a mentally impaired client who now needs protection to protect his or her interests.

D. Options:

(1) May the lawyer talk to family members, if available, about any concerns regarding the client in general, i.e., appearance, speech, thought process, physical manifestations without disclosing specific information discussed in an interview? An expression of concern by the attorney may prompt family member to initiate an action.

(2) May the lawyer talk to the client's physician (with or without the client's permission) concerning the disability?

(3) ABA Informal Opinion 89-1530 finds an implied authority for an attorney to disclose information to the extent necessary to serve the best interests of a client reasonably believed to be disabled.

"[T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is *impliedly authorized* within the meaning of Model Rule 1.6 [Confidentiality of Information]. Thus, the inquirer may consult a physician concerning the suspected disability." [Emphasis added.]

(4) ABA Formal Opinion 96-104 (August 1996) specifically authorizes a lawyer who reasonably believes a client has become incompetent to handle his or her own affairs to take protective action on behalf of the client, including petitioning for appointment of a conservator. The protective action should be the least restrictive under the circumstances. Appointment of a conservator is a serious deprivation of client's rights and should not be undertaken if other, less drastic, measures are available.

"With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to handle the legal matters of the guardianship estate. However, a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client."

(5) Oregon Opinion 1991-41 (1991) permits a lawyer who has represented a client for many years and begins to observe extraordinary behavior by the client to take action on behalf of the client. Refers to an elderly client for whom the lawyer may speak to a spouse or child in an effort to end inappropriate conduct.

The Opinion notes: "An attorney in such a situation must reasonably believe that there is a need for protective action and must then take the least restrictive form of action necessary to address the situation. If, for example, Client is an elderly individual and Lawyer expects to be able to end the inappropriate conduct by talking to Client's spouse or children, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

X. TESTAMENTARY CAPACITY

If you are asked to make changes in the client's estate plan, what can you do? Is there guidance?

A. Criteria for Testamentary Capacity

California Probate Code Section 6100.5 Not competent to make a will if (A) Client does not have mental capacity to (1) Don't understand the nature of the testamentary act, or (2) understand and remember the nature and extent of your property, or (3) remember and understand your family relations and those whose interests are affected by a will or (b) Suffers from a mental disorder such as delusions or hallucinations which would result in the client leaving property in a way she wouldn't but for the delusions or hallucinations.

Use in California of Probate Code Sections 810-813 (Due Process in a Competency Determination Act) as a guideline to make a determination as to mental competency.

Use of substituted judgment in a conservatorship proceeding.

ACTEC Commentary on MPRC 1.14

> "If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.
>
> In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including so-called substituted judgment proceedings."

San Diego Opinion 1990-3 (1990) states that a lawyer must be satisfied that the client is competent to make a will and once the issue of capacity is raised in the lawyer's mind, it must be

resolved. The lawyer should schedule an extended interview with the client and keep a detailed and complete record of the interview. If the lawyer is not satisfied the client has capacity, the lawyer may decline to act and permit the client to seek other counsel or may recommend the initiation of a conservatorship.

It is often the case with the elderly or an impaired client that the lawyer may be the only person in a position to take action and with the knowledge to recommend appropriate action. Consider the common situations of a widow with no children or a client subject to undue influence by relatives, care givers or persons in a position to take advantage of the impaired person.

There are methods to address confidentiality issues: information filed under seal and in camera in a court proceeding.

XI. LAWYER'S DUTY TO CLIENT AFTER APPOINTMENT OF A FIDUCIARY

ACTEC Commentary to MRPC1.14 states lawyer may have a continuing duty to the client and may continue to meet with and counsel the client. A conflict may arise if fiduciary proposes to take action which lawyer believes is adverse to previously expressed wishes of client or is simply not in client's best interests.

XII. LAWYER'S DUTIES IN COURT PROCEEDINGS

There is no clear guidance in California. However, it does disservice to the client and to the profession to adhere to the view which supports following client's wishes at all costs when it is clear the client is incompetent to make appropriate judgments for his or her own protection, i.e., litigating to defeat imposition of a conservatorship. The lawyer should balance the client's expressed wishes against the client's capacity and best wishes (as viewed by others). If client is severely mentally impaired, the lawyer should have greater latitude to make a "best interests" judgment as to how to proceed; the less impaired the client, the more responsibility the lawyer has to try to follow client's wishes.

[1] *In re Markham's Estate* (1946) 28 Cal.2d 69, 168 P.2d 669)
[2] See, for example, Hoisington, William L., *Modern Trust Distribution Design and Implementing Investment Strategies*, 1998 CEB Estate Planning Institute; Wolf, Robert B., *Total Return Trusts-Can Your Clients Afford Anything Less?* 33 Real Property, Probate & Trust Journal 327 (1998)
[3] As of this writing the Revised Uniform Principal and Income Act has been adopted by several states, and is awaiting passage by the California Legislature. The new RUPIA would allow a trustee to adopt the total return approach, even when the language of the instrument provided for a net income approach.
[4] *In the Matter of the Estate Of John W. F. Smith*, (1981) 117 Cal.App.3d 511, 172 Cal.Rptr. 788
[5] *In re Marre's Estate* (1941)18 Cal.2d 191, 114 P.2d 591
[6] *In re Greenleaf's Estate*. (1951) 101 Cal.App.2d 658, 225 P.2d 945
[7] *Copley v. Copley* (1981) 126 Cal.App.3d 248, 178 Cal.Rptr. 842
[8] *In re Estate Of Gilmaker* (1962) 57 Cal.2d 627, 371 P.2d 321, 21 Cal.Rptr. 585)
[9] *In re Memorial National Home Foundation* (1958) 162 Cal.App.2d 513, 329 P.2d 118;
See also *Overell V. Overell* (1926) 78 Cal.App. 251, 248 P. 310
[10] *Copley v. Copley* (1981) 126 Cal.App.3d 248, 178 Cal.Rptr. 842
[11] For an excellent example of a beneficiary run amok *see* Wells Fargo Bank, v. Boltwood, 49 Cal.App.4th 1320; 57 Cal.Rptr.2d 335 Review Granted
[12] Prob. C. §*16000: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. C. §16002(a): *The trustee has a duty to administer the trust solely in the interest of the beneficiaries.* Prob. C. §16003*: 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.* Prob. C. §16040*: 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*
[13] *Ainsa v. Mercantile Trust Co. of San Francisco* (1917) 174 Cal. 504, 163 P. 898
[14] Prob. Code §16461(a)
[15] Prob. Code §16461(b)
[16] *See* Restatement (Second) of Trusts § 222 comments b & c (1957)
[17] *In re Merchant's Estate* (1904) 143 Cal. 537, 77 P. 475
[18] Prob. C. §16400
[19] *Horne v. Title Ins. & Trust Co*.,(S.D.Cal.1948) 79 F.Supp. 91
[20] *Estate of Gump* (1991) 1 Cal.App.4th 582, 2 Cal.Rptr.2d 269
[21] . Probate Code §16061.
[22] See *Estate of DeLaveaga* (1958) 50 C.2d 480, *Coberly v. Superior Court* (1965) 131 Cal.App.2d 685)
[23] *Purdy v. Johnson*, 174 Cal. 521 [163 P. 893].
[24] *Purdy v. Johnson,* supra; *In re McCabe's Estate* (9148) 87 Cal.App.2d 430, 197 P.2d 35
[25] *In re McLaughlin's Estate* (1954) 268 P.2d 519 *subsequent* 43 Cal.2d 462, 274 P.2d 868
[26] *Rosenfield, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, 237 Cal.Rptr. 14
[27] Probate Code §§ 16002(a), 16003, 16045-16054.
[28] See Raskin, John D., "*Some Observations on Compliance with the California Prudent Investor Act*" 19 CEB Estate Planning and California Probate Reporter 32 (October '96); Hartog, John A. and Sanderson, Paul, "*A Trustee's Crime and Punishment: Managing Fiduciary Liability under the California Prudent Investor Act*", 4 California Trusts and Estates Quarterly 4 (Summer 1998); Hartog, John A. and Sanderson, Paul, "*Fiduciary Delegation of Investment Power under the California Uniform Prudent Investor Act*", 5 California Trusts and Estates Quarterly 4 (Spring 1999)
[29] Prob. C. § 16051
[30] Prob. C. § 16047
[31] Prob. C. § 16048
[32] *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 82 Cal.Rptr.2d 829
[33] In re *Estate Of Janes*, 165 Misc.2d 743, 630 N.Y.S.2d 472 (Sur. 1995)
[34] In re *Estate Of Janes*, 165 Misc.2d 743, 630 N.Y.S.2d 472 (Sur. 1995)
[35] Probate Code §16049.
[36] *See, **e.g.*** 12 CFR 9.6 that requires banks to undertake a prompt review of assets after funding as well as conducting an annual review of the holdings in an account.

[37] See e.g. Prob. C. § 16012
[38] Prob. C. § 16052
[39] Prob. C. § 16006; see also *Estate Of Talbot* (1956) 141 Cal.App.2d 309, 296 P.2d 848
[40] *See e.g. Ed Miniat v. Globe Life Ins. Group* 805 F.2d732 (7th Cir., 1986)
[41] *See Credit Managers Ass'n v. Kennesaw Life & Accident ins. Co*. 809 F.2d 617 (9th Cir., 1987); *Donovan v. Mercer* 747 F.2d 304 (5th Cir. 1984); *Yeseta v. Baima* 837 F.2d 380 (9th Cir.,1988)