TREADING THE TIGHTROPE:
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.

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

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

- Duty of loyalty
- Duty to avoid conflicts of interest
- Duty of confidentiality
- Duty of competence and diligence[2]
- Duty of communication[3]

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.

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[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 Nunez*** (Review Dept.1992) 2 Cal. State Bar Ct.Rptr. 196, 200; ***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.

"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

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.

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

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 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. CONTROLLING LIABILITY TO THE BENEFICIARIES

A. In General

The law regarding attorney liability to non-clients is expanding.[6] 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.

[6] 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.]

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 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 text. ***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. Zuspann*** (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 additional 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. ***Borissoff v. Taylor & Faust*** (2004) 33 Cal. 4th 523.

In **Borissoff**, the decedent died in 1989, leaving conflicting wills. By the time it was sorted out and Borrissoff 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, Borissoff 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."
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> 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.)
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> 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.

III. 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.