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The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations

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The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations

Cover Page Footnote

Edward D. Spurgeon, a member of the California bar, is Dean and Professor of Law at The University of Georgia School of Law and former Dean (1983-1990) and William H. Leary Professor of Law (1990-1993) at the University of Utah College of Law. He is a member of the ABA Commission on Legal Problems of the Elderly. Mary Jane Ciccarello, B.A., Barnard, 1974; M.A., Columbia, 1976; J.D., University of Utah College of Law, 1993, is a staff attorney and Pro Bono Coordinator at the Legal Aid Society of Salt Lake City.

THE LAWYER IN OTHER FIDUCIARY ROLES: POLICY AND ETHICAL CONSIDERATIONS

EDWARD D. SPURGEON and MARY JANE CICCARELLO*

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INTRODUCTION

BLACK’S Law Dictionary defines “fiduciary” as “a person having duties involving good faith, trust, special confidence, and candor to-

wards another A lawyer is . . . in a fiduciary relationship with the client."¹

A lawyer is always in a general fiduciary relationship with her client, but a lawyer may serve clients in other fiduciary capacities as well. Other capacities may include executor, administrator, trustee, guardian, and agent. A lawyer may even serve a client solely in one of these fiduciary capacities.²

Lawyers are particularly well suited to serve in fiduciary roles because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. Furthermore, lawyers are bound by both the ethical rules of professional conduct and state laws governing malpractice liability. Lawyers serving as fiduciaries may also be subject to the ethical and legal rules that govern fiduciaries.

Legal and ethical safeguards are essential to protect clients from possible ethical misconduct by lawyer/fiduciaries as well as to protect lawyers from unjustified professional discipline and malpractice liability. The existing standards of ethical conduct (e.g., the ABA Model Code of Professional Responsibility ("Model Code") and Model Rules of Professional Conduct ("Model Rules")) do not specifically address the ethical considerations that a lawyer encounters when serving in specific fiduciary capacities. The ethical standards that regulate the professional conduct of lawyers have, to a great extent, been developed to govern the ethical behavior of lawyers as zealous advocates or litigators. Nonetheless, in many areas of legal practice, and in particular those areas that most often affect the elderly client (such as domestic relations, estate planning, and life and health care planning), the lawyer is frequently called upon to act as counselor, intermediary, and fiduciary. In such roles, the lawyer often must function without clear guidance from the profession's ethical standards.

This Article advocates that lawyers should serve as fiduciaries in certain situations. A client may want to nominate his lawyer to a fiduciary role because of a long-standing, close lawyer-client relationship or because the client has no one else to turn to (recognizing that the lawyer provides the client with a trusted, competent person as well as the prospect of continuity through use of the lawyer's firm). There may also be situations when the lawyer is not well-known by the client but may still be the appropriate person to be named as fiduciary. This may occur, for example, when the client's assets do not meet the threshold level for a corporate fiduciary, or when no other family member or trusted person is available.

To allow lawyers to function as fiduciaries, there must be well-defined safeguards for the protection of the client, the lawyer, and the legal pro-

1. Black's Law Dictionary 625 (6th ed. 1990).

2. For purposes of this Article, use of the term "fiduciary" refers to specific fiduciary roles (e.g., trustee, guardian, and agent) that a lawyer may perform, rather than the general fiduciary relationship between attorney and client.

fession. Because the ethical standards now in place do not adequately provide such safeguards, we suggest several options for better regulating the ethical behavior of lawyers as fiduciaries.

Part I of this Article examines the development of fiduciary law and how it intersects with the ethical standards that affect lawyers serving as fiduciaries. Part II sets forth the public policy reasons for having lawyers serve as fiduciaries. Part III explores the possible legal and ethical considerations of the Model Rules and their application to lawyers serving as fiduciaries. This last section is divided into three main areas: (1) the ethical and legal consequences of a lawyer/scriver designating herself in a will or trust as a fiduciary for the estate or trust; (2) the ethical and legal considerations that arise when a lawyer serves in the dual capacity of both fiduciary and lawyer for herself as fiduciary; and (3) possible conflicts of interest when the lawyer serves solely as a fiduciary.

Finally, this Article concludes by suggesting clearer ethical guidelines for lawyers who serve in numerous fiduciary roles. We do this in the belief that, in certain situations, lawyers should be encouraged to serve as fiduciaries, and that lawyers as fiduciaries should understand clearly the ethical and legal parameters within which they function. The ultimate goal is to broaden our thinking about lawyers: not only are they zealous advocates serving the legal needs of the individual client, but they are also trusted professionals capable of serving clients, and even groups of clients, in many roles.³

I. THE DEVELOPMENT OF FIDUCIARY LAW

A. *What is a Fiduciary?*

A fiduciary is generally thought to be that person in whom another person reposes trust. Austin W. Scott defined fiduciary as "a person who undertakes to act in the interest of another person."⁴ Certainly, a fiduciary is a person who has been entrusted with some level of power to act on behalf of the person who has that power to entrust.

The fiduciary relationship involves an interplay of power and depen-

3. For interesting discussions of lawyers serving more than one client simultaneously, see Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 *Geo. J. Legal Ethics* 319, 325-31 (1992); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 *Geo. J. Legal Ethics* 15 (1987).

4. Austin W. Scott, *The Fiduciary Principle*, 37 *Cal. L. Rev.* 539, 540 (1949). See also Tamar Frankel, *Fiduciary Law*, 71 *Cal. L. Rev.* 795, 808-09 (1983) (asserting that the two central features of a fiduciary relationship are: 1) the fiduciary acts as a substitute for an entrustor, and 2) the fiduciary obtains power to act in the entrustor's interests); Robert W. Hallgring, *The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary Responsibility*, 41 *Wash. L. Rev.* 801, 802 (1966) (defining fiduciary relationship as "those in which a person is entitled to repose confidence in another who has undertaken to act in his interest"); L.S. Sealy, *Fiduciary Relationships*, 1962 *Cambridge L.J.* 69, 76 (1962) (defining one type of fiduciary as one who is "under an obligation . . . to act on another's behalf or for another's benefit") (footnote omitted).

dency for the achievement of certain ends. While the person who entrusts power (or "trusting person") remains dependent on the fiduciary during the course of their relationship, the trusting person nonetheless has (or should have) the authority to define the limits of the relationship. Within the confines of the relationship, the fiduciary is independent to act as she sees fit, so long as she acts in the interest of the trusting person who depends on her. The relationship may vary in intimacy, intensity, temporal duration, and legal potential.⁵

B. *What is Fiduciary Law?*

Fiduciary relations have existed since ancient times, being well documented, for example, in biblical texts.⁶ Fiduciary relations typically include those of trustee/beneficiary, guardian/ward, conservator/conservatee, principal/agent, attorney/client, partner/partner, executor/legatee.⁷ While common law principles regarding fiduciaries stem primarily from the law of trusts, the law has traditionally dealt with fiduciary relations by applying the legal principles of the substantive areas of law in which those relations appeared.⁸

Several contemporary commentators on fiduciary law suggest that this traditional approach is inadequate both in regulating fiduciary relations for the protection of the dependent or trusting parties, and in providing legal and ethical guidelines to those functioning as fiduciaries.⁹

The regulation of fiduciary relations is difficult in part because the rela-

5. As Scott notes, "[s]ome fiduciary relationships are undoubtedly more intense than others. The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty." Scott, *supra* note 4, at 541.

6. See, e.g., The Parable of the Unjust Steward in *Luke* 16:1-13 (describing the relationship between a rich man and his steward; the steward was entrusted with the management of certain of the rich man's goods).

7. The Uniform Probate Code, for example, provides that "'Fiduciary' includes a personal representative, guardian, conservator and trustee." Unif. Probate Code § 1-201(13) (1989).

8. According to one author:

Traditionally, the courts have developed fiduciary law by defining various relations as fiduciary and designing rules for these relations This method of developing the law was adequate in the past because new types of fiduciaries were recognized gradually over the centuries. The "use" emerged during the twelfth and thirteenth centuries in England, and the trust developed over the fourteenth through seventeenth centuries. Partnerships appeared in the sixteenth century, and evolved into joint stock companies and corporations. Emancipated servants and employees emerged from domestic relations law to become agents and factors. It was therefore sufficient to describe an arrangement, call it fiduciary, and decide on appropriate rules.

Frankel, *supra* note 4, at 804-05 (footnotes omitted).

9. For recent attempts to establish basic principles of fiduciary law, see generally Robert Flannigan, *The Fiduciary Obligation*, 9 Oxford J. Legal Stud. 285 (1989); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 Law Q. Rev. 51 (1981); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. Toronto L.J. 1 (1975); Frankel, *supra* note 4; Hallgring *supra* note 4; Sealy, *supra* note 4.

tions themselves are neither static nor easily definable.¹⁰ The nature of the relationship may vary or be classified in a variety of ways: the relationship may be one based entirely on the entrustment of power;¹¹ on profit making;¹² on varying degrees of intensity and dependency;¹³ or the interplay of substitution and delegation.¹⁴

The underlying premise of fiduciary law is to protect the trusting person against any abuse of position, or trust, by the fiduciary. As noted above, judge-made law has developed by analogy, constructing rules that have sought to prevent fiduciary abuse and over-reaching. Based in trust law, the basic measure of a fiduciary's duty is that the fiduciary/trustee is required to exercise only the skill and prudence that an ordinarily capable and careful person would use in the conduct of his or her own business of a like character and with objectives similar to those of the trust.¹⁵ Moreover, it is the duty of the trustee to administer the trust solely in the interests of the beneficiaries.¹⁶ She is not permitted to place herself in a position where it would be for her own benefit to violate a duty to the beneficiaries.¹⁷

George G. Bogert and the Restatement (Second) of Trusts have also set forth an exception to the "prudent man rule" when the trustee has superior or specialized skills or has represented himself as possessing such skills.¹⁸ According to Bogert and the Restatement (Second) of Trusts:

when a trustee accepts a trust, after having emphasized . . . its extraordinary abilities, or with knowledge that the settlor knows of the trustee's extraordinary capacity, . . . the trustee should be held impliedly to have promised the settlor that it could and would use its powers to the maximum.¹⁹

Thus, the existence, or representation, of higher skill imposes a duty on the fiduciary to exercise it.

10. An exception is in a trust situation, for example, where a written instrument specifically names the fiduciary and describes the limits of the fiduciary's duties. However, as we shall discuss below, even in the most seemingly definite of fiduciary relations, there may always be questions of confidentiality, conflicts of interest, and to whom specifically the fiduciary owes her duty of loyalty.

11. See Flannigan, *supra* note 9, at 286-97.

12. See Weinrib, *supra* note 9, at 2.

13. See Scott, *supra* note 4, at 541.

14. See generally Frankel, *supra* note 4 (describing the anatomy of fiduciary relations as consisting of substitution of roles and delegation of powers).

15. See George G. Bogert, *Trusts and Trustees* § 541 (Rev. 2d ed. 1993).

16. See Restatement (Second) of Trusts § 170 (1959) ("Duty of Loyalty. (1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.").

17. See Bogert, *supra* note 15, at § 543.

18. See Bogert, *supra* note 15 § 541; Restatement (Second) of Trusts § 174 (1957).

19. Bogert, *supra* note 15 § 541; Restatement (Second) of Trusts § 174 (1959). For a discussion of the Supreme Court of Pennsylvania's interpretation of a fiduciary's representation of greater skill than that of the ordinary person, see generally, W. Preston Granbery, *Recent Developments*, 21 Vill. L. Rev. 151 (1975).

The fiduciary relationship is based on the concept of trust; this trust stems primarily from a moral and ethical duty, not from a legal or contractual one.²⁰ The trusting person places his trust in another to carry out some specific task he is not capable of performing. The entrusted person thus wields a great deal of power. To keep the fiduciary in line and to protect the trusting person, the fundamental principle applied to the fiduciary relationship has been the duty of loyalty. All fiduciaries are subject to the fiduciary principle of loyalty, but not every fiduciary will be subject to that principle to the same extent as every other fiduciary.²¹ The limits of the duty of loyalty, as well as other fiduciary duties, will be established by the parties through their words and conduct. When a breach of this duty occurs, judicial intervention becomes necessary.

The fiduciary relationship carries with it a great deal of risk. The trusting person risks that the fiduciary may act in ways the trusting person has not consented to, may breach the trusting person's confidentiality, may develop conflicts of interest, or may use the trusting person's property to the fiduciary's own benefit. The law of fiduciaries has continuously attempted to protect the trusting person from abuses of power by the fiduciary. Moreover, fiduciary law has provided the fiduciary with rules—if only to be applied by analogy to prototypical relations—about what the fiduciary may or may not do with the power entrusted.

Any fiduciary is subject to potential civil liability for breach of a fiduciary duty, including the duty of care, to the trusting person. Once it is clear that a fiduciary relation exists, the question is often to what degree has the fiduciary actually breached her duty. Yet, the extent to which the fiduciary must adhere to the principle of loyalty remains an unsettled area of the law.

Certainly the underlying premise of the fiduciary's duty of loyalty is that the fiduciary must act in the trusting person's best interests. But are the trusting person's best interests entirely separate from the interests of third parties, as in the case of the trust's settlor and its beneficiaries? Are the trusting person's best interests clearly understood by all the parties potentially affected by the fiduciary's acts? Should they be? Do the duties of care and loyalty adequately protect the trusting person from potential abuses of power by the fiduciary?

20. This concept was expressed by Chief Judge Cardozo (later Mr. Justice Cardozo) in a well-known opinion:

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 market place. Not honesty alone, but the punctilio of an honor the 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 for fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (citation omitted).

21. See Scott, *supra* note 4, at 541.

Tamar Frankel suggests that the goal of fiduciary law should be to permit the parties to enter into the fiduciary relation freely and to ensure that the fiduciary will not coerce the trusting party.²² She suggests that the proper monitoring of individual fiduciary relations should be accomplished by the courts' evaluation of the fiduciary power entrusted and its potential for abuse. Thus, the parties themselves would be free to establish the limits of power (including the limits of such essential aspects of a fiduciary relation as confidentiality) for that particular relationship, knowing that the courts will be there to evaluate any abuses of power that may ensue.²³

C. *Lawyer as Fiduciary*

Lawyers always stand in a fiduciary relationship with their clients. This Article examines only those situations where a lawyer serves in specific fiduciary roles, such as trustee, guardian, executor, or administrator. In these situations, the pressing questions are: (1) What is the lawyer's liability for breach of the fiduciary duty of loyalty?; (2) What is the lawyer's liability for breach of the fiduciary standard of care?; (3) How do the rules of ethical conduct affect the lawyer when serving as fiduciary?

A lawyer serving in fiduciary roles may be governed not only by fiduciary and civil malpractice law, but also by the ethical standards of the rules of the profession. The difficulty for a lawyer functioning as fiduciary is determining to what extent fiduciary law and professional standards mesh.

Just as a fiduciary will be subject to potential civil liability for breach of fiduciary duty, the lawyer serving as a fiduciary may incur civil liability to third persons for a breach of her fiduciary duties. Moreover, even when a lawyer is serving solely as a fiduciary, she may still be subject to liability for legal malpractice.

1. A Lawyer's Civil Liability to Third Persons Other Than Clients

Lawyers may be liable to beneficiaries for negligently drafting wills and trusts for their clients. As a general rule, a lawyer is held liable in malpractice to her client because of the contractual lawyer-client relationship. Thus, negligence on the part of the lawyer in the course of her professional representation is insufficient to give a right of action to a third person with whom she is not in privity.²⁴ The majority of jurisdictions, however, now hold that even in the face of no privity of contract, lawyers may be held liable to third persons, under prescribed circumstances, for professional negligence.

22. See Frankel, *supra* note 4, at 801.

23. See *id.* at 836.

24. See 7A C.J.S. *Attorney & Client* § 142(a) (1980); Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client*, 61 A.L.R. 4th 464 (1988).

For example, in *Lucas v. Hamm*,²⁵ the Supreme Court of California held that the "intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries."²⁶ In reaching its decision, the court based its analysis on an earlier decision, *Biakanja v. Irving*,²⁷ which abolished the privity defense in California in malpractice cases involving estate planning.²⁸ The Supreme Court of California, in *Lucas*, developed a balancing test to determine, as a matter of policy, a lawyer's liability to third persons not in privity.²⁹ The test's factors include: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.³⁰

While not all jurisdictions have adopted the California test, the majority have assumed that the lack of contractual privity is no defense to the lawyer/drafter.³¹ Thus, a lawyer faces possible civil liability to third persons other than clients even though no privity of contract exists between them where the third person is a beneficiary and the damage is foreseeable and proximately caused by the lawyer's negligence.

The rejection of the privity rule does not necessarily extend to the lawyer for the fiduciary. This is an area open to debate in the various jurisdictions. In the majority of jurisdictions, the privity rule still applies to a malpractice action by third parties against the lawyer for the fiduciary.³² The reasoning behind this practice is that the lawyer's duty of care is owed to the fiduciary alone.³³

On the other hand, some courts have extended the privity doctrine to establish a legal relationship between beneficiaries and a fiduciary's lawyer: "A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."³⁴

In *Fickett v. Superior Court of Pima County*,³⁵ the court applied the

25. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

26. *Id.* at 689.

27. 320 P.2d 16 (Cal. 1958).

28. *See Lucas*, 364 P.2d at 687.

29. *See id.*

30. *See id.*

31. For a more detailed discussion of the approaches taken by different jurisdictions, see Bruce S. Ross, *Legal Malpractice in Estate Planning and Administration*, 18 ACTEC Notes 248, 250 (1993).

32. *See Ross, supra* note 31, at 262. Ross also points out that the executor or trustee who is surcharged as a result of conduct taken in reliance on counsel's advice may look to that counsel for recompense or indemnification. *See id.*

33. *See Saks v. Damon Raike & Co.*, 8 Cal. Rptr. 2d 869, 877 (Ct. App. 1992).

34. *Elam v. Hyatt Legal Servs.*, 541 N.E.2d 616, 618 (Ohio 1989).

35. 558 P.2d 988 (Ariz. Ct. App. 1976).

Biakanja balancing test to determine whether the court-appointed attorney for the conservator would be held liable to the ward of the conservator.³⁶ The court determined that "when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward."³⁷

2. Application of the Model Rules of Professional Conduct

The Model Rules of Professional Conduct are generally used only to discipline lawyers. An area of confusion is the extent to which a court will examine the Model Rules, or other standards of professional conduct, when determining whether there has been a breach of the standard of care in a legal malpractice action. The Model Rules specifically state in the Preamble that the Rules "are not designed to be a basis for civil liability."³⁸ The general rule is that a violation of the Model Rules does not provide the basis for a civil malpractice action. Nonetheless, courts have found violations of the Model Rules to be evidentiary as to the standard of care due a client.³⁹ Despite disagreement and uncertainty, courts do examine breaches of ethical rules when determining negligence, and a breach cannot in any way be helpful to the defendant/lawyer in a malpractice suit.⁴⁰

This confusing situation begs the question whether a lawyer should be subjected to professional discipline for a breach of duty occurring outside the practice of law.⁴¹ That is, how do the ethical rules apply to a lawyer

36. *See id.* at 990.

37. *Id.*

38. Model Rules of Professional Conduct pmb. (1992); *see also*, Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J., Spring 1991, at 1, 11 n.14 (stating that the Model Rules do not impose malpractice liability for a breach of an ethical rule).

39. *See* *Mirabito v. Liccardo*, 5 Cal. Rptr. 2d 571, 573-74 (Ct. App. 1992).

40. *See* *Ross*, *supra* note 31, at 266-67. According to *Ross*:

Despite the conflict . . . it is fair to observe that, whether an ethical rule in a given jurisdiction (1) establishes the attorney's duty of care, (2) is "some evidence" of the attorney's duty, or (3) otherwise impinges on the attorney's duty, an attorney who has breached an ethical rule in the course of representing his or her client will have greater difficulty in establishing a defense to the client's later action for malpractice than would be the case if no ethical violation existed.

Id. at 267.

41. The lack of specific answers to questions regarding the applicability of ethical rules to lawyers serving in fiduciary capacities may stem, in part, from the lack of delineation between the roles of lawyer and lawyer serving in other capacities. Jeffrey N. Pennell notes:

Other ancillary activities can generate . . . ethics concern, including acting as a fiduciary, as an investment counselor, operating an investment fund, providing real estate brokerage or title insurance, performing investment banking services, or acting as a paid political lobbyist. Each of these may provide a valuable service to clients. Nevertheless, although not specifically focusing on estate planners and their ancillary activities, the Litigation Section of the American Bar Association has concluded that

the provision of both legal and non-legal services through a law firm may

serving in a fiduciary capacity?⁴²

According to fiduciary law, a lawyer in a fiduciary position is entrusted to perform certain functions, by a trusting person, and is in a position of power regarding that trusting person's dependency. The lawyer as a fiduciary owes a duty of loyalty. Any breach of that loyalty breaches the fiduciary duty, provides grounds for removal, and subjects the lawyer to possible negligence claims. Also, since a breach of fiduciary loyalty by the lawyer serving as fiduciary would indicate that the lawyer is not competent in the fiduciary role, a breach of fiduciary duty may mean a breach of professional ethics as well.⁴³ Just as an ethical breach can be used as evidence in civil malpractice, a fiduciary breach by the lawyer fiduciary

compromise the independent professional judgment of lawyers, and create conflicts of interest between lawyers and their clients.

Jeffrey N. Pennell, *Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counseling*, in 25 Univ. of Miami Philip E. Heckerling Inst. on Est. Plan. ¶ 1804.3 (John T. Gaubatz ed. 1991) (citations omitted) (footnote omitted).

Patricia Brosterhous points out:

Conflicts of interest and other problems relating to attorney conduct may inevitably arise once an attorney actually undertakes [estate] administration. . . . [T]he attorney acting in another fiduciary role must rely on the Code or the Model Rules, as the case may be, and judicial construction thereof, and of course statutory or common law rules defining and [sic] executor's or trustee's relationship to the trust's or estate's beneficiaries.

Patricia Brosterhous, *Draft Statement of Principles Comes Not a Moment Too Soon*, 127 Tr. & Est., Dec. 1988, at 12, 18. Brosterhous also notes that "the difficult question of whether attorney malpractice is to be differentiated from trustee malfeasance, and if so how: at what point does the attorney acting in another fiduciary role cross from legal work into the realm of non-legal work?" *Id.* at 16.

William D. Haight notes that the Task Force on Attorneys Acting in Other Fiduciary Roles, sponsored by the Real Property, Probate & Trust Law Section of the American Bar Association, determined that trustee malfeasance was covered by most, but not all malpractice policies carried by lawyers. One question unresolved by the task force is "whether the performance of fiduciary activities is or may be equivalent to performing 'legal services' or is performed in one's 'capacity as a lawyer.'" William D. Haight, *Attorneys Take Fiduciary Roles*, 127 Tr. & Est., Feb. 1988, at 10, 13-14.

42. See *infra* part III.C.

43. Courts have disciplined attorneys for breaching their fiduciary duties. See, e.g., *Cutler v. State Bar*, 455 P.2d 108, 114 (Cal. 1969) (disbarring attorney for commingling and mismanagement of estate funds, and noting that "[a] member of the bar . . . is held to a high standard of conduct when dealing with his clients and their funds, even though not in an attorney-client relationship, particularly when the relationship has fiduciary aspects"); *Florida Bar v. Rhodes*, 355 So. 2d 774, 775 (Fla. 1978) (disbarring attorney in role of executor found guilty of violation of the Code of Professional Responsibility for improper withdrawal of estate funds for personal use and benefit); *In re Melin*, 102 N.E.2d 119, 121 (Ill. 1951) (censuring and suspending attorney from practice for three months for conversion of estate funds while serving as an executor, and stating that even when not "strictly in the discharge of professional duties" any act by a lawyer "which evidences want of professional or personal honesty, such as renders him unworthy of public confidence affords sufficient ground for disbarment"); *State ex. rel. Nebraska State Bar Ass'n v. Bremers*, 264 N.W.2d 194, 197 (Neb. 1978) (disbarring attorney for failure to account for funds entrusted to him as executor, and stating that "[a]n attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal"). See also generally

can serve as evidence in any disciplinary action.⁴⁴

A fiduciary will be held to a higher standard of care when special skills exist, or even when the client merely believes that those skills exist (due to the fiduciary's representation). In most cases, the lawyer who serves solely as fiduciary has been chosen as such because she is a lawyer. This may not always be so, but generally, a client chooses a lawyer to serve as fiduciary with the expectation that the lawyer will use her legal and professional skills while serving as fiduciary.

Thus, a lawyer serving solely as a fiduciary should expect to be held to the higher standard of care imposed by fiduciary law upon a fiduciary with special skills. She should also be aware that a breach of ethical standards may be used as evidence—if not more—of a breach of fiduciary duty. Such a breach may also lead to disciplinary actions against the lawyer.

II. SHOULD LAWYERS SERVE AS FIDUCIARIES AS A MATTER OF PUBLIC POLICY?

Legal relationships are usually based on contract, status, or fiduciary relations.⁴⁵ We live in a society where people are growing increasingly dependent upon fiduciary relations because of the need to delegate power. Moreover, many lawyers may be finding that they are serving—or being asked to serve—as fiduciaries, whether they like it or not.⁴⁶ Some commentators have also pointed out that for business reasons, lawyers should accept opportunities to be a fiduciary, as the changing nature of estate planning law is curtailing the amount of legal work needed in the field.⁴⁷ This idea extends further. For example, as society becomes more and more dependent upon government entitlement programs, we need experts—such as lawyers who can also serve as fiduciaries—to guide us through the legal maze of those programs.

Societal changes indicate a real need for professional and honest fiduci-

Debra T. Landis, Annotation, *Conduct of Attorney in Capacity of Executor or Administrator of Decedent's Estate as Ground for Disciplinary Action*, 92 A.L.R.3d 655 (1973).

44. See *Mirabito v. Liccardo*, 5 Cal. Rptr. 2d 571, 573-74 (Ct. App. 1992).

45. See Frankel, *supra* note 4, at 797-802.

46. See Bradley R. Cook, *New Developments Alter the Role of Estate Planners in Recommending Fiduciaries*, 16 Est. Plan. 356, 356 (Nov./Dec. 1989) ("Indeed, the fiduciary responsibility owed by the lawyer to the client has grown significantly in recent years. The lawyer has, in effect, become the ultimate 'caretaker' whether he likes that role or not!").

47. See generally Cook, *supra* note 46, at 356-58 (noting that lawyers "almost inevitably . . . assume[] the function[s] of the 'quarterback' of the estate planning team," and the client can be better served by having his legal affairs and trust handled by the lawyer); Haight *supra* note 41, at 12 (arguing that serving as fiduciary places lawyer in position of trust and confidence, better positioning the attorney to identify and resolve a broader range of legal, financial, and family problems); Martin A. Heckscher, *The Special Problems Which Arise When an Attorney Serves as Fiduciary*, 17 ACTEC Notes 137, 138 (1991) (stating factors that contribute to the increase in the practice of attorneys serving as fiduciaries).

aries. The fiduciary relationship is based upon an exchange of power and thus remains a source of potential abuse. Only with legal and ethical safeguards on the relationship can we proceed.⁴⁸ Lawyers, already functioning as a fiduciary class, are monitored by professional self-regulations in addition to fiduciary laws and malpractice risks of which they are well aware. Thus, they are likely candidates to serve as fiduciaries.

Changes in the elderly population may indicate a particular need for fiduciaries. There has been a dramatic increase in the elderly population with a greater increase in those over eighty-five, most of whom are women.⁴⁹ As our society becomes more and more geographically mobile and socially fragmented, these older people often have fewer family members to depend on.

There has also been a breakdown in the traditional family structure. Few older people live in the same location as their children, if indeed they have children to care for them. But the breakdown in the family unit is not the only source of a growing need for trusted professionals to serve as fiduciaries. Imagine the following scenarios: an older couple planning for the needs of the spouse who survives and who may soon be incompetent; an aging and ill parent attempting to provide for an incompetent child; a middle-aged or older single child without sufficient time or desire to care for an older parent; a single older person in need of a guardian or someone to have power of attorney regarding the elder's health care decisions; an artist dying of AIDS who wants to protect his art work and direct the receipt of royalties after his death. These are all scenarios that could involve the need for a fiduciary.

Another group in need of fiduciaries are people with assets valued under \$500,000. This group lacks access to banks and corporate fiduciaries, which will not accept clients below a threshold asset level.⁵⁰

There are also an increasing number of persons eligible for public entitlements at federal, state, and local levels.⁵¹ Pension programs such as ERISA, for example, require fiduciaries.⁵²

48. See generally Luther J. Avery, *The Rules of Professional Conduct for Lawyers are Confusing*, 131 Tr. & Est., Apr. 1992, at 8, 10 (explaining that there is a great need for special rules in the field of estate planning to protect the client, as the estate planning lawyer deals with future possibilities involving personal rights and relationships); AC-TEC Commentaries to Model Rules of Professional Conduct 5 (Oct. 18, 1993) (contending that the Rules of Professional Conduct proscribe terms for resolving difficult ethical problems); Brosterhous, *supra* note 41, at 14 (arguing that ethical guidelines are vital given the potential conflicts of interest that may result when lawyers serve as fiduciaries and the potential negligence liability); Pennell, *supra* note 41, ¶ 1801 (contending that many of the existing rules, based on a conflict resolution perspective, are inapplicable in the planning context).

49. See U.S. Senate Special Committee on Aging, *America in Transition: An Aging Society*, at 7-15, U.S. Govt. Printing Office, 1984-85 edition (June 1985).

50. See Cook *supra* note 46, at 357.

51. See Nancy R. Hooyman & H. Asuman Kiyak, *Social Gerontology: A Multidisciplinary Perspective* 505-33 (2d ed. 1991).

52. See 29 U.S.C. § 1102(a) (1988).

Lawyers are well suited to serve as fiduciaries because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. Although lawyers may lack expertise in such areas as financial investments and business, they can obtain further education in these areas or hire specialists as needed. There is also an increase in the number of lawyers in the job market, which should provide an adequate supply to meet society's growing demand for fiduciaries. Serving as a fiduciary may also be in the financial interest of estate-planning lawyers. Besides the increase in the number of lawyers, the simplification of probate procedures, the greater use of probate-avoiding estate plans, and liberalized estate and gift tax credits, exclusions and deductions, contribute to the need for such lawyers to diversify and expand their practice.

Even if lawyers do not want to serve as fiduciaries (perhaps because of the many legal risks involved and the possibility of low remuneration for such service), they should be fully informed about the role of fiduciaries and know how to inform clients about the use of fiduciaries. For example, part of any estate planning process should involve fully informing the client of how fiduciaries work.⁵³

In sum, society's growing need for well-trained and honest fiduciaries, coupled with the expertise and availability of lawyers and the fact that a lawyer/fiduciary's conduct is regulated by rules of professional responsibility as well as fiduciary law, supports a public policy that should encourage lawyers to serve as fiduciaries.

III. WHEN THE LAWYER SERVES AS FIDUCIARY: ETHICAL CONSIDERATIONS AND APPLICATION OF THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY

Lawyers engaged in the practice of elder law and estate planning should have clear rules of professional conduct to guide them when they serve in fiduciary roles. Such rules are necessary to protect clients from possible ethical misconduct by lawyers, as well as to protect lawyers from disciplinary actions and potential malpractice liability.

The Model Rules are the legal profession's most recent attempt at ethical self-regulation.⁵⁴ The ethical standards that regulate the professional

53. See Cook, *supra* note 46, at 357; see also *Principles for Attorneys Acting in Other Fiduciary Roles*, 1992 ABA Sec. Real Prop. Prob. & Tr. L. (Oct. 16, 1992) (on file with *Fordham Law Review*) (Principle 9 provides: "Role of the Attorney in Advising the Client. Regardless of whether the attorney is named as a fiduciary, it is the responsibility of the attorney to advise the client as to the considerations affecting the choice of an appropriate fiduciary.")

54. The Model Rules of Professional Conduct ("Model Rules") were promulgated by the American Bar Association in 1983. They replaced the Model Code of Professional Responsibility ("Model Code") promulgated in 1969, which had replaced the 1908 Canons of Professional Ethics. According to one noted authority that discusses the codes and standards that regulate lawyers:

[T]he various states and the federal courts have looked to the ABA versions as a

conduct of lawyers have, to a great extent, been developed to govern the ethical behavior of lawyers as zealous advocates. But in many areas of legal practice, particularly in those areas most often affecting the elderly client (such as domestic relations, estate planning, and life and health care planning), the lawyer may also act as advisor, negotiator, intermediary, or fiduciary. The Preamble to the Model Rules acknowledges that a lawyer performs various functions including those of advisor, advocate, negotiator, intermediary, and evaluator.⁵⁵ Neither the Model Rules nor earlier ABA standards of ethical conduct, however, specifically addresses the ethical considerations of lawyers serving as fiduciaries.⁵⁶ In such roles, the lawyer often attempts to adhere to the ethical standards set out for zealous advocates of the individual and autonomous client. In reality, the lawyer often represents various family members who view the attorney as a professional working for the good of the family unit.⁵⁷

basis for regulating lawyers within the jurisdiction. Thus, the ABA's codes have been used as the basis for state and federal codes. With the Model Code, many states adopted the ABA version without many significant changes. . . . Many states have made significant modifications to the ABA version [of the Model Rules].

Selected Statutes, Rules and Standards on the Legal Profession 1, 1-2 (Dzienkowski ed. 1992).

55. The Preamble to the Model Rules provides:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

Model Rules of Professional Conduct pmbl. (1992).

56. Luther Avery has written extensively on lawyers as fiduciaries. He notes that "lawyer specialists like estate planners [should] develop procedures that will be prudent and productive in the face of rules that were not designed with their best interests in mind." Avery, *supra* note 48, at 10. He further notes that "[w]hat the estate planning lawyer must recognize is that the problem areas arising out of the mandates and uncertainties of the ABA and state rules of professional conduct, also arise out of the fact that the lawyer's relationship with the client is a fiduciary relationship." *Id.*

The preface to the ACTEC Commentaries on the Model Rules of Professional Conduct states:

Neither the Model Rules of Professional Conduct . . . nor the Comments to them 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.

ACTEC Commentaries, *supra* note 48 (preface).

57. In discussing the ethical dilemmas confronted by elder lawyers, one commentator notes: "Elder lawyers view conflict of interest rules as the most troublesome source of their ethical dilemmas. Many assert that the *Model Rules'* conflict of interest principles are rooted in the traditional, adversarial one-on-one attorney-client relationship and thus

This section addresses the question of whether the existing ethical standards, particularly those codified within the Model Rules,⁵⁸ sufficiently regulate the possible situations that may arise when a lawyer serves in a fiduciary capacity. The three main problem areas of focus are: (1) when the drafting lawyer is also named a fiduciary; (2) when the lawyer/fiduciary also serves as the lawyer for the fiduciary; and (3) the possible conflict of interest problems that may arise when the lawyer serves solely as fiduciary.

Ethical considerations common to these three main areas fall into two basic groups: those concerning the appointment of the lawyer as fiduciary and those relating to the lawyer's actual function as a fiduciary. Questions of solicitation, undue influence, overreaching, and the appearance of impropriety arise when a client asks a lawyer to serve in a fiduciary role, whether or not that lawyer has also drafted the client's testamentary instrument. Issues regarding dual compensation are significant because a lawyer serving both as attorney and executor of an estate may earn substantial fees for both roles. A lawyer's appointment as executor may directly result from that lawyer's desire for the fees she may earn for performing both of those tasks.

A lawyer who serves as executor or trustee under the will she has drafted assumes additional specific fiduciary responsibilities regarding the client's estate, beyond her continuing fiduciary duty to the former testator/client.⁵⁹ These various responsibilities may well lead to serious conflict of interest problems. Multiple client representation, as in the representation of a family unit, also poses ethical dilemmas for the lawyer as fiduciary. The Model Rules' conflict of interest principles do not resolve these issues.

This section analyzes the application of the Model Rules to various situations occurring under the three main areas noted above. The Model Rules that most often apply in fiduciary situations are those dealing with confidentiality;⁶⁰ conflicts of interest;⁶¹ and the lawyer as advisor and intermediary.⁶² Other pertinent rules are also discussed when

cannot adequately address elder law issues." Batt, *supra* note 3, at 326 (emphasis in original) (footnotes omitted).

58. Special emphasis is placed upon the Model Rules because the majority of states follow them. See *supra* note 54.

59. According to one commentator:

If the attorney acts as executor, he assumes fiduciary responsibilities towards the estate. If the attorney acts as the attorney who handles the legal affairs of the estate, he becomes a fiduciary towards the executor, or, in some states, towards the estate itself. If the attorney acts both as executor and attorney, the question of where his fiduciary responsibilities lie becomes quite complex.

Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney—Draftsman as Testamentary Fiduciary*, 36 Kan. L. Rev. 275, 277 n.9 (1988) (citation omitted).

60. Model Rules of Professional Conduct Rule 1.6 (1992).

61. Model Rules of Professional Conduct Rules 1.6, 1.7, 1.8, 1.9 (1992).

62. Model Rules of Professional Conduct Rules 2.1, 2.2 (1992).

appropriate.⁶³

The Model Rules, however, do not stand alone. Other considerations include previously established standards of professional conduct, case law which discusses ethical misconduct and the application of these standards, ethics opinions, and commentaries. This section concludes that while the Model Rules are in many ways more flexible than previously promulgated standards, they do not adequately address the ethical problems that arise when lawyers serve as fiduciaries. Several options for providing lawyers who serve as fiduciaries with clearer ethical guidelines are suggested.

A. *The Attorney/Drafter as Fiduciary*

This section analyzes the ethical consequences of an attorney/drafter designating herself in wills (or trusts) as a fiduciary for the estate.⁶⁴ Should a drafting attorney ever serve as a fiduciary? If so, why? What ethical issues are potentially raised when the lawyer is named fiduciary in the instrument she drafts? How is such a situation affected by the ethical rules and existing case law? Finally, how should these situations be regulated?

1. Should the Attorney/Drafter Serve as Fiduciary?

Although the practice of lawyers appointing themselves as fiduciaries in wills they draft is fraught with ethical problems (including fee considerations, solicitation, undue influence, overreaching, and conflict of interest issues), there are times when such behavior may be desirable.

There are no ethical or legal prohibitions against an attorney serving as fiduciary.⁶⁵ The practice of lawyers serving as trustees or other fiduciaries is common in certain areas of the country, notably Boston and Philadelphia.⁶⁶ In those cities, several law firms have sizeable in-house trust departments and individual lawyers have served families as trustees for generations.⁶⁷

63. The American Bar Association Real Property, Probate and Trust Law Section Special Committee on Professional Responsibility recently prepared two articles concerning the application of the relevant codes to situations involving lawyers serving in fiduciary capacities. The papers, made available in October of 1993, are entitled "Preparation of Wills and Trusts That Name Drafting Lawyer as Fiduciary" and "Counseling the Fiduciary."

64. Virtually the same ethical considerations apply either when a lawyer who has drafted a will is designated as the will's executor or when a lawyer who prepares an inter vivos or testamentary trust is named to serve as trustee. See Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices-Is Good Business Bad Ethics?*, 45 Ohio St. L.J. 57, 88 (1984).

65. See Edgar C. Gentle, III, *Lawyers as Executors and Trustees: Snakes and Ladders*, Ala. Law., Mar. 1987, at 94, 94; Panel, *Lawyers Serving as Executors and Trustees*, 7 Real Prop. Prob. & Tr. J. 745, 748 (1972).

66. See Haught, *supra* note 41, at 10; Heckscher, *supra* note 47, at 137.

67. See Haught, *supra* note 41, at 10 ("One estimate is that Boston law firms, in the aggregate, have assets under fiduciary management in the range of \$3 to \$4 billion.");

In other parts of the country, the number of attorneys who serve as fiduciaries may depend on whether the jurisdiction permits the fiduciary to earn extra compensation for legal services rendered in connection with the estate. A 1975 American Bar Foundation comparative study of estate administration in the United States found that in those states where a lawyer serving as fiduciary was entitled to double compensation, approximately ten percent of the estates were administered by attorneys.⁶⁸ In states where the fiduciary was not entitled to double compensation, the percentage of attorneys serving as personal representatives dropped to one or two percent.⁶⁹ Thus, as some commentators have suggested, the main reason attorneys are willing to serve as fiduciaries may be because "they can earn substantial legal fees during probate that more than offset the tendency among practitioners to undercharge for their work in planning estates and preparing the necessary implementing documents."⁷⁰

Good reasons exist for the nomination of the lawyer/draftsman as fiduciary. A lawyer may have served as the client/testator's lawyer for many years and may have become familiar with the testator's family, personal interests, and financial affairs. When such a level of familiarity and intimacy exists, the lawyer—as a trusted advisor—may very well be the logical person to appoint as executor or trustee.

In some cases, the client/testator may not have any other trusted person, such as a family member, who can be depended upon to serve in a fiduciary role. Any existing family members, beneficiaries, or legatees, may be incapable of serving as fiduciary due to age, domicile, citizenship, health, or mental capacity. In such circumstances, the lawyer may accept designation as a fiduciary as an accommodation to the client.

The client/testator may also want to vest a great deal of discretion in the executor and may think that a lawyer/executor—especially one who has dealt with the testator in the past—would better serve the beneficiaries than would a beneficiary or a corporate fiduciary. Moreover, a client may not meet a corporate fiduciary's asset thresholds.

The client/testator may also believe that the lawyer has expertise in both drafting the instrument and in estate management. Indeed, legal training and knowledge may make the lawyer better suited than others to manage an estate even though no long-term or intimate relationship exists between the client/testator and the lawyer.⁷¹

Frank Coolidge, *New Avenue for Lawyers Boasts Old Tradition*, Tr. & Est., Dec. 1989, at 20, 20; *Lawyers Serving as Executors and Trustees*, *supra* note 65, at 745.

68. See Louis D. Laurino, *The Duties and Responsibilities of the Attorney/Fiduciary*, in 19 Univ. of Miami Philip E. Heckerling Inst. on Est. Plan. ¶ 1601.2 (John T. Gaubatz ed. 1985).

69. See *id.*

70. Johnston, *supra* note 64, at 87; see also Haight, *supra* note 41, at 14 (arguing that providing fiduciary services is not profitable unless offered with sufficient regularity and volume).

71. Martin A. Heckscher notes that another reason why client/testators may want to

There are also some drawbacks to appointing a lawyer as fiduciary. The very fact that a long-term, intimate relationship exists between the client/testator and lawyer may provide the lawyer with the opportunity to influence the client inappropriately in selecting the fiduciary. Furthermore, the lawyer may be so trusted that the client will not find it necessary to obtain advice from outside counsel. Such a situation might provide the lawyer with the power to abuse her fiduciary status.

2. Ethical Issues Potentially Raised When a Lawyer Drafts an Instrument Naming the Lawyer as Fiduciary

Improper solicitation and conflicts of interest are the main ethical issues raised when a lawyer drafts a will in which she is named as a fiduciary. While these issues are avoided if the client initiates the nomination, problems may arise when the client has not requested such service. When a lawyer is asked to write a will or trust instrument for a client, she enters into a confidential relationship. The lawyer owes that client a duty of loyalty and is ethically obliged to act competently, to deal fairly, and to provide full disclosure. A competent lawyer has to explain to the client/testator the need for, and duties of, an executor (or trustee, depending on the instrument). The lawyer must make this explanation without imposing services on the client.

A client/testator may have little understanding of the role and functions of a fiduciary. As Gerald P. Johnston has pointed out, a client may not be able to "protect his or her own interests from an overzealous attorney when the person being solicited is not even aware of the solicitation."⁷²

Clients seeking advice about their wills are often in an extremely vulnerable position. Often they are concerned about the well-being of loved ones and realize the importance of legal assistance to execute their testamentary wishes. Lawyers may run the risk of unduly influencing clients or overreaching simply because a client-lawyer relationship already exists: the client inherently believes in and trusts her lawyer.

The designation of a drafting lawyer as fiduciary may also involve conflict of interests problems. If the lawyer acts as executor, she assumes fiduciary responsibilities towards the estate. Thus, she serves now as a fiduciary for the beneficiaries whose interests may conflict with the wishes of the testator.

3. Prior and Current Ethics Rules

In the days before the Model Code, "the practice of an attorney drafting a will and naming himself as a fiduciary was seldom questioned."⁷³

appoint their lawyer as fiduciary is the client's freedom to select his own executor or trustee. See Heckscher, *supra* note 47, at 137-38.

72. Johnston, *supra* note 64, at 90.

73. deFuria, *supra* note 59, at 278.

Indeed, the 1908 Canons of Professional Ethics were seldom used as the basis for questioning the common practice of such an appointment.⁷⁴ The overriding opinion was that so long as the client originally had the idea for the attorney to serve as fiduciary, then there were no ethical violations.

The Model Code was promulgated in 1969 and had three parts: the Canons, the Ethical Considerations ("EC"), and the Disciplinary Rules ("DR"). Only the DR's were mandatory, providing the minimum standards below which no attorney could fall without being subjected to disciplinary action. The EC's were merely aspirational, and the Canons were simply statements of general norms.

EC 5-6 is directly on point for this situation: "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."⁷⁵

The terms "consciously influence" and "appearance of impropriety" are vague and thus hardly provided the lawyer with clear guidelines as to ethical conduct under the circumstances. In a 1977 opinion, the Committee on Professional Ethics of the New York State Bar Association interpreted the EC 5-6 phrase "consciously influence" to mean "substantially less psychological pressure than 'undue influence.'" ⁷⁶ In his analysis of the phrase, one commentator believes it to "describe the act of overreaching for employment of a kind for which the lawyer has not been retained and could not otherwise reasonably expect to obtain."⁷⁷

A more recent commentator has found EC 5-6 to be an unsatisfactory standard for lawyers who are asked to serve in other fiduciary roles because the rule is so vague: "the appearance of impropriety standard has been repeatedly criticized as being entirely subjective, [and] generally applicable through hindsight. How does one determine conscious influence? Does conscious influence differ from undue influence?"⁷⁸

74. The prevailing attitude of the time is reflected in this passage from a leading commentator on legal ethics:

A question is sometimes raised as to the propriety of . . . a provision appointing [the drafting lawyer as] executor or trustee, or one directing [the] executors to employ [the lawyer] as counsel for the estate. This, of course, depends on the surrounding circumstances. If they are such that the lawyer might reasonably be accused of using undue influence, he will be wise to have the provision inserted in a codicil drawn by another lawyer. Where, however, a testator is entirely competent and the relation has been a longstanding one, and where the suggestion originates with the testator, there is no necessity of having another lawyer in the case . . . of a provision appointing the draftsman executor, or of a direction that he be retained by the executors.

Id. at 280 (quoting Henry S. Drinker, *Legal Ethics* 94 (1953)).

75. Model Code of Professional Responsibility EC 5-6 (1980).

76. Opinion No. 481, 50 N.Y. St. B.J. 356, 356 (1978).

77. Laurino, *supra* note 68, ¶ 1601.1(A)(1).

78. Brosterhous, *supra* note 41, at 14.

The ABA Model Rules of Professional Conduct have eliminated EC 5-6. There is no specific provision in the Model Rules regarding the appointment of a lawyer as a fiduciary. Although deleted from the final version of the Model Rules, a note to Model Rule 1.8 in the Proposed Final Draft of the Model Rules states:

EC 5-6 of the Code states that a lawyer should not seek to have himself or a partner or associate named in an instrument as executor of the client's estate Such an appointment is not expressly prohibited under this Rule, but is subject to the general conflict of interest provision in Rule 1.7 and the more specific requirements of paragraph (a) of . . . Rule [1.8].⁷⁹

Thus, the Model Rules intended that the appointment of a lawyer as fiduciary be governed by the conflict of interest rules, particularly 1.7(b) and 1.8(a).⁸⁰ Neither of these rules, however, are situation-specific and could easily be overlooked by a lawyer.

More than the rule itself, the commentary to Rule 1.7(b) indicates that the lawyer must not encourage her appointment as fiduciary in order to achieve some personal pecuniary gain.⁸¹ Nonetheless, the rule and commentary fail to give guidance to the lawyer who must inform a client of the role, functions, and compensation of the fiduciary, and who believes

79. Model Rules of Professional Conduct Rule 1.8, Legal Background (Proposed Final Draft 1981).

80. Model Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

According to Model Rule 1.8(a):

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

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

Model Rules of Professional Conduct Rule 1.8 (1992).

81. The Comment to Rule 1.7 provides: "The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." Model Rules of Professional Conduct Rule 1.7 cmt. (1992).

that she is probably the best choice as fiduciary for that client.⁸²

Some commentators believe that while Rule 1.8(a) explicitly prohibits a lawyer/drafter from receiving a testamentary gift, it ignores the similar situation of the lawyer's potential for gain as an appointed fiduciary.⁸³ Under Rule 1.8(a), a lawyer may be named fiduciary in an instrument she prepares and may receive payment for both roles if: (1) the situation is "fair" and "reasonable" to the client and the lawyer gives full disclosure in writing; (2) the client is given the reasonable opportunity to seek independent counsel; and (3) the client consents in writing.⁸⁴

The meaning of this rule is unclear in the case of the lawyer/drafter who is appointed as fiduciary. For example, what information needs to be provided to constitute full disclosure and for the client to reasonably understand. It appears possible that even after full disclosure and consultation with outside counsel, a disgruntled beneficiary could claim that the lawyer used undue influence, especially if the client was in a vulnerable condition at the time of the appointment and the lawyer was a trusted individual. On the other hand, in such a situation, it may never be possible actually to prove undue influence because a trusted lawyer may have an ethical obligation to serve as fiduciary to a needy client.

82. In the ACTEC Commentaries to The Model Rules of Professional Conduct Rule 1.7, the following applies to the appointment of scrivener as fiduciary:

An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). None of the provisions of the MRPC deals explicitly with the propriety of a lawyer preparing for a client a will or other document that appoints the lawyer to a fiduciary office. As a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7 (Conflict of Interest: General Rule), and the appointment is not the product of undue influence or improper solicitation by the lawyer. This conclusion is consistent with EC 5-6:

A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

(In some instances a lawyer may reasonably conclude that Rule 1.8 (Conflict of Interest: Prohibited Transactions) is implicated in which case the lawyer should comply with the provisions of Rule 1.8(a).)

For the purposes of this commentary a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a layperson to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary. The client should also be informed of any significant lawyer-client relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary under consideration for appointment.

ACTEC Commentaries, *supra* note 48, at 49-50.

83. See Johnston, *supra* note 64, at 87-88; Leonard Levin, *Legal Ramifications of Unethical Estate Planning Practices*, Tr. & Est., Oct. 1985, at 47, 49.

84. See Model Rules of Professional Conduct Rule 1.8(a) (1992).

4. Ethics Opinions and Case Law

While several ethics opinions and commentators condemn the routine insertion of provisions in wills appointing lawyer/drafters as fiduciaries, the case law has not been particularly unfavorable to such appointments.⁸⁵

Two significant state ethics opinions offer differing views on the subject. As noted above, a New York State Bar ethics opinion interpreted the EC 5-6 phrase "consciously influence" to mean "substantially less psychological pressure than 'undue influence.'"⁸⁶ The opinion also stated that ethical conduct does not require in all instances that the testator make the initial suggestion for the lawyer to serve as executor.⁸⁷ There are some instances—for example, a long-term relationship between lawyer and client or a lawyer sincerely believing that the client desired that particular lawyer to serve as fiduciary—that would justify the lawyer offering her services as executor.⁸⁸

The Wisconsin Ethics Committee, however, found that even though it is not per se unethical for a lawyer/drafter to name herself executor or legal counsel for the estate, the attorney should furnish persuasive evidence that the client acted on his own in the appointment.⁸⁹

One of the leading cases in the area of ethics in estate planning is the Wisconsin Supreme Court decision in *Wisconsin v. Gulbankian*.⁹⁰ In *Gulbankian*, the court held that it was unprofessional for an attorney to solicit business by directly or indirectly suggesting to a testator that the attorney or an associate should be employed as executor or as attorney to the executor.⁹¹ Moreover, the Wisconsin Supreme Court allowed both circumstantial evidence and direct testimony to prove such solicitation.⁹²

In this disciplinary proceeding, the court found that the record did not show that the two attorneys, a brother and sister who practiced as partners, had solicited the probate of estates by drafting wills designating themselves as executors or attorneys for the executors because they had been the only Armenian attorneys in the county for many years and that

85. See generally deFuria, *supra* note 59 (arguing that courts are too lenient in allowing lawyers to designate themselves as executor); Laurino, *supra* note 68 (commenting on attorney's fiduciary duties in drafting and executing wills); Frank D. Wagner, Annotation, *Attorneys at Law: Disciplinary Proceeding Based Upon Attorney's Naming of Himself or Associate as Executor or Attorney for Executor in Will Drafted by Him*, 57 A.L.R. 3d 703, 704 (1974) (discussing cases sanctioning attorneys who designated themselves as executor).

86. Opinion No. 481, 50 N.Y. St. B.J. 356, 356 (1978).

87. See *id.* at 357.

88. See *id.* For a recent affirmation of the New York State Bar Association's interpretation of EC 5-6, see *In re Will of Corya*, 563 N.Y.S.2d 581, 585 (Sur. Ct. 1990), *rev'd on other grounds*, 572 N.Y.S.2d 51 (App. Div. 1991).

89. See Memorandum Opinion No. 10-76, Wis. B. Bull. 91, 91 (Supp. June 1979).

90. 196 N.W.2d 733 (Wis. 1972).

91. See *id.* at 736.

92. See *id.* at 735-37.

many of their clients had been Armenians.⁹³ This was the finding of the court notwithstanding the fact that between 1955 and 1971 approximately 94% of the wills filed by the brother and sister were wills they had drafted in which either they or some member of their family had been requested to serve in a fiduciary capacity.⁹⁴

The court further noted that in Racine County up to 71% of wills drawn contained such provisions and this widespread practice could lead the public to perceive pervasive solicitation by the drafting attorneys.⁹⁵ However, in this case of first impression, the court did find that an attorney should not use a will form for the designation of the drafter as attorney for the probate of an estate or as executor.⁹⁶ Furthermore, an attorney must be especially careful not to intimate, suggest, or solicit, directly or indirectly, her employment when discussing the identity and duties of an executor with the client.⁹⁷

The Pennsylvania Supreme Court, in *Office of Disciplinary Counsel v. Walker*,⁹⁸ punished a lawyer for professional misconduct in connection with estate planning and the subsequent administration of the estate.⁹⁹ The attorney drafted the will for an elderly client whose estate was valued in excess of \$2,000,000.¹⁰⁰ He was named co-executor along with his father, and a beneficiary under the will.¹⁰¹ After the death of the client, the lawyer—as co-executor—also named himself attorney for the estate.¹⁰² He claimed \$32,500 in commissions along with his deceased father's \$62,500 in commissions, \$22,000 in attorneys fees, and his 1/4 share of the residue, \$239,000.¹⁰³ The other residuary legatees filed exceptions to this account and he settled these claims by paying the three other residuary legatees \$80,000 each.¹⁰⁴ The account was approved, but the probate court referred the matter to the state disciplinary board.¹⁰⁵

The Disciplinary Board found improprieties in both the preparation

93. *See id.* at 735.

94. *See id.* at 734.

95. *See id.* at 736-37.

96. *See id.* at 737.

97. *See id.* at 736-37; *see also* *Zeigler v. Coffin*, 123 So. 2d, 24 (Ala. 1929) (stating that the attorney should not exert "undue influence" in the execution of testator's will); *In re Isaacs*, 541 N.Y.S.2d 60, 60 (App. Div. 1989) (finding respondent guilty of misconduct for influencing client to designate him as executor and respondent's brother as alternate executor); *Disciplinary Bd. v. Amundson*, 297 N.W. 2d 433, 441-42 (N.D. 1980) (recommending that attorneys should not draft wills in which they are named as beneficiaries, but finding no misconduct when defendant drafted will, was named as beneficiary and executor due to the close relationship with client and because client refused advice to use another attorney).

98. 366 A.2d 563 (Pa. 1976).

99. *See id.* at 569.

100. *See id.* at 565.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.* at 566.

and administration of the estate.¹⁰⁶ While the state committee had initially recommended private censure, the Disciplinary Board censured him publicly.¹⁰⁷ The Supreme Court of Pennsylvania imposed a one-year suspension from the practice of law and ordered that all executor's fees and attorney's fees collected by the lawyer be refunded to the estate and distributed in conformity with the terms of the will.¹⁰⁸

The court imposed these sanctions for the lawyer's gross abuse of position and knowledge of the law in dealing with other beneficiaries, for discouraging the use of outside counsel, for failure to fully explain the conflict of interests between his role in the administration of the estate, his role as beneficiary, and the roles of the other beneficiaries, and for failing to explain to the other beneficiaries the need for an independent attorney for the estate.¹⁰⁹

Katz v. Usdan (In re Weinstock),¹¹⁰ is another example of extreme impropriety and overreaching and remains the leading case in the area of ethical misconduct by attorneys serving as fiduciaries.¹¹¹ In *Weinstock* an elderly testator wanted to revise his will and intended to minimize the commissions to executors.¹¹² The attorney and the attorney's son, who were previously total strangers to the client, were named the new executors.¹¹³ At the time of probate, the court struck these appointments as constructive fraud, because, on the basis of EC 5-6, the testator had not independently and freely designated the attorneys to be his executors.¹¹⁴ The court also found that the executors would each have been entitled to a full commission under New York law even though there was no purpose in having two executors.¹¹⁵

The court in *Weinstock* stated that the mere naming of an attorney/drafter as fiduciary does not give rise to an inference of undue influence.¹¹⁶ This is in contrast to when an attorney has prepared a will and is named a beneficiary, which does give rise to a presumption of undue influence.¹¹⁷ Some jurisdictions, especially in New York, find that an attorney/drafter named as a co-executor, who fails to advise the testator of double commissions, risks disqualification from service or denial of

106. *See id.*

107. *See id.* at 568.

108. *See id.* at 569.

109. *See id.*

110. 351 N.E.2d 647 (N.Y. 1976).

111. *See id.* at 647-48.

112. *See id.* at 648.

113. *See id.*

114. *See id.* at 649.

115. *See id.* at 649 n.*.

116. For a discussion of recent cases following *Weinstock*, see Heckscher, *supra* note 47, at 140-43; Nancy Stranger Wood, *Selection of Fiduciaries and the Role of the Attorney Draftsperson, Ethical Considerations, Administrative Powers, Simultaneous Death, and Tax Apportionment, in Handling Your First Basic Will 1992*, at 201, 204-09 (PLI Tax & Est. Plan. Course Handbook Series No. D4-5236, 1992).

117. *See Smith v. Mitchell (In re Putnam's Will)*, 177 N.E. 399, 400 (N.Y. 1931).

commissions upon serving.¹¹⁸ In other jurisdictions, the attorney designated as fiduciary is considered a beneficiary and thus the burden of proof is cast upon the proponent of the will to establish there was no undue influence.¹¹⁹

5. Malpractice Actions Against Lawyer/Drafter/Fiduciary

Another aspect of ethical misconduct important to the attorney serving as fiduciary is the possibility that the breach of an ethical duty will create a civil cause of action for malpractice. Although the Model Rules explicitly state that a breach of an ethical duty is not a basis for civil liability and many courts follow this principle, other courts have found that a breach creates a rebuttable presumption of malpractice.¹²⁰

In an unreported Texas trial court opinion, a widow obtained a multi-million dollar settlement because of attorney malpractice.¹²¹ She had alleged that the firm had a conflict of interest in drawing her husband's will. The trial court rejected the defense, asserted by the lawyer/fiduciary whose firm drafted the will, that the purported exculpatory language in the will excused any breach of trust.¹²²

6. Possible Ethics Rules Options on Attorney/Drafter Named as Fiduciary

In the face of general confusion in applying the ethical rules (not to mention the threat of malpractice liability) to lawyer/drafters serving as fiduciaries, we review here various options.

a. *Option A: Absolute Prohibition Against the Attorney/Drafter Serving as Fiduciary*

Joseph W. deFuria, Jr. suggests that an absolute rule should be estab-

118. See *In re Laffin*, 491 N.Y.S.2d 35, 35 (App. Div. 1985).

119. See *Zeigler v. Coffin*, 123 So. 22, 24 (Ala. 1929).

120. For example, according to the court in *Kidney Ass'n v. Ferguson (In re Estate of Ragan)*,

[t]his court has held that a lawyer's violation of disciplinary rules does not, in itself, establish the lawyer's negligence . . . This is the common rule across the nation. The Supreme Court of the State of Washington has gone further by disallowing any reference to disciplinary rules in a legal malpractice case because of the court's conclusion that the rules were not intended to set a standard for civil liability.

843 P.2d 442, 446 n.12 (Or. 1992) (citations omitted).

In contrast, for a finding that a breach of ethical rules creates a rebuttable presumption of malpractice, see *Jenkins v. Wheeler*, 316 S.E.2d 354, 358 (N.C. Ct. App. 1984). See generally *Link, supra* note 38, at 11-12 n.14 (discussing cases where "courts [have found] that a breach of ethical rules creates a rebuttable presumption of malpractice").

121. See *Willeford v. Willingham*, Civ. No. 84 PC 3158 (Bexar County, Tex.) (filed Oct. 25, 1984); *Link, supra* note 38, at 8-9 (discussing *Willeford*).

122. See *Willeford v. Willingham*, Civ. No. 84 PC 3158 (Bexar County, Tex.) (filed Oct. 25, 1984); *Heckscher, supra* note 47, at 142, 143-44; *Link, supra* note 38, at 8-9 (discussing *Willeford*).

lished: an attorney is absolutely precluded from drafting a testamentary instrument in which she is named as fiduciary.¹²³ Furthermore, if a client insists that her regular attorney serve in a fiduciary capacity under her will, the document would have to be drafted by a truly independent attorney.¹²⁴ This prohibition would be useful in cutting out potentially hard to detect undue influence and in forcing the parties to have an independent lawyer draw the instrument.

Certainly a lawyer who drafts a will is in the position to influence her client as well as profit from further appointment. As the case law readily indicates, lawyers are not beyond such overreaching. Clients are likely to accept a lawyer's suggestion for self-nomination because they are trusting, incapacitated, or ignorant of the consequences of such a nomination.

An absolute prohibition would also be consistent with EC 5-6¹²⁵ and Rule 1.8(c) which provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."¹²⁶ Several commentators believe that there is no significant difference between a lawyer/drafter naming herself a direct beneficiary in a will she drafts and the lawyer/drafter who names herself as executor of the estate.¹²⁷ In both cases, the lawyer is actively engaged in providing for her own future interests—in possible direct conflict with the interests of the client.

A flat prohibition, however, may be too extreme an option. Even commentators wary of lawyer misconduct find that an absolute prohibition would be harmful in those cases where the testator truly wants the lawyer to serve as fiduciary and does not want the inconvenience or extra expense of obtaining independent counsel.¹²⁸ As Leonard Levin points out, a flat prohibition would also cause serious disruption to the legitimate expectations of clients.¹²⁹

b. *Option B: A Return to EC 5-6*

Some have argued that EC 5-6 does provide specific guidelines to lawyers and still allows lawyers to be fiduciaries when there is no unconscious influence.¹³⁰ This interpretation also appears consistent with a policy intended to encourage lawyer appointments as fiduciaries. How-

123. See deFuria, *supra* note 59, at 309.

124. See *id.*

125. See Model Code of Professional Responsibility EC 5-6 (1980).

126. Model Rules of Professional Conduct Rule 1.8(c) (1992).

127. See, e.g. Johnston, *supra* note 64, at 89 & n.197 (suggesting that there are only subtle distinctions between an attorney/draftsman and an attorney/executor).

128. See *id.* at 99 (discussing usefulness of lawyer serving dual purpose as both drafter and fiduciary).

129. See Levin, *supra* note 83, at 50.

130. See ACTEC Commentaries, *supra* note 48, at 49-50; Laurino, *supra* note 68, ¶ 1601.1.A.1-2 ("The prohibition of EC 5-6 is self-explanatory and far clearer than the general language of the Model Rule and should be retained.").

ever, as Patricia Brosterhous notes, the standards are vague and just do not provide the practitioner with useful guidelines.¹³¹

c. *Option C: Stick to Model Rules 1.7(b) and 1.8(a)*

Option C would allow Model Rules 1.7(b) and 1.8(a) to serve as guideposts for the attorney/drafter as fiduciary. But, as discussed above, these rules do not specifically address the problems that arise when lawyers serve as fiduciaries. Brosterhous and Luther J. Avery believe that EC 5-6 was too restrictive and that the Model Rules are more flexible because they allow practitioners in different areas of the law to develop their own guidelines not in contradiction with the Model Rules.¹³²

d. *Option D: Principles for Attorneys Acting in Fiduciary Roles*

Option D would follow the path laid out by the Principles for Attorneys Acting in Other Fiduciary Roles.¹³³ These principles were developed in 1988 by the ABA Section on Real Property, Probate and Trust Law's Task Force on Attorneys Acting in Other Fiduciary Roles. There are nine different principles, and although only the first one is entitled "ethics," they all touch on problems we have noted in this discussion.¹³⁴

The introduction sets forth that a "client or non-client has and should have the right to appoint a fiduciary of the client's own choice."¹³⁵ Furthermore, "the appointment of the attorney to serve as an executor or trustee or in another fiduciary role may be appropriate even if the attorney or another attorney in the attorney's firm drafts the governing document."¹³⁶ Thus, in direct opposition to Option A, the Principles acknowledge that there may be times when a lawyer/drafter may best serve her client by also serving as fiduciary.

The ethical restrictions placed on the attorney who drafts a document naming such attorney to serve as a fiduciary are that there should first be a full disclosure to the client of all relevant matters, including fees, and an informed discussion of viable alternatives. Finally, the choice of a fiduciary in all events must be freely made.

Principle number nine provides that whether or not an attorney is named as a fiduciary, it remains the attorney's responsibility to advise the client about the considerations affecting the choice of an appropriate fiduciary.¹³⁷

131. See Brosterhous, *supra* note 41, at 12-27.

132. See generally Avery, *supra* note 48 (discussing the ability of lawyers to deal with the problems inherent in the Model Rules); Brosterhous, *supra* note 41, at 12 (suggesting that the Model Rules offered lawyers an opportunity to develop standards of their own).

133. See *Principles for Attorneys Acting in Other Fiduciary Roles*, *supra* note 53.

134. See *id.*

135. See *id.*

136. See *id.* For an excellent comparison of the Principles to the Model Code and the Model Rules, see Brosterhous, *supra* note 41, at 14-18.

137. See *Principles for Attorneys Acting in Other Fiduciary Roles*, *supra* note 53.

Generally, these principles are client oriented. They attempt to examine the best interests of a client in need of a fiduciary and to provide basic guidelines for the lawyer who may find herself in the position of serving as a fiduciary. Nonetheless, the principles do not explain to the lawyer what proof may be required for a showing of a "full disclosure," and what it means that the choice of a fiduciary "must be freely made."¹³⁸

e. *Option E: The Nomination of the Attorney/Drafter as Fiduciary Under State Law*

Finally the question remains whether the attorney/drafter's nomination as fiduciary will be upheld under state law. As noted earlier, the judicial procedures in several New York counties provide a framework for proving that the nomination was not the product of undue influence. In New York, the Uniform Rules for Surrogate's Courts section 207.19(g) requires the filing of a statement at the time of probate disclosing that the named fiduciary is an attorney, whether the attorney will be estate counsel, and whether the attorney was the drafter. Uniform Rules for Surrogate's Courts section 207.60 requires the filing of an affidavit within twelve months of the issuance of letters as to commissions and legal fees if the attorney is either the sole executor/administrator and also the estate attorney, or is a co-fiduciary and the estate attorney when there is no other fiduciary who is not an attorney. As Nancy Stranger Wood points out, various counties have further requirements.¹³⁹

In New York County, for example, the surrogate may inquire into why the attorney was named and whether the client was aware that the attorney would be paid commissions and legal fees.¹⁴⁰

In Queens County, if the fiduciary is an attorney then an accounting must be filed within twelve months of an appointment or twenty-four months if a federal estate tax return is required, regardless of whether another attorney or firm represents the estate.¹⁴¹ Furthermore, the accounting may not be waived with consent of the beneficiaries.¹⁴² In Queens, when an attorney is nominated as fiduciary, an affidavit must be submitted as to the following: (1) the length and nature of the attorney's association with the testator prior to the date of the will; (2) the reasons the decedent gave for selecting the attorney as fiduciary; (3) conversations between the testator and the attorney-drafter regarding fees and

138. For other suggestions regarding the ethical conduct of lawyers serving as fiduciaries, see *Guidelines for Estate Planners*, 13 Prob. Notes 7 (1987); *A Baker's Dozen Topics*, 10 Real Prop. Prob. & Tr. J. 243 (1975).

139. See Wood, *supra* note 116, at 207-08; see also, Heckscher, *supra* note 47, at 140-41 (noting that the surrogate court in Suffolk County adopted a rule requiring the testator's to state by affidavit the reasons for nominating the attorney as fiduciary and that the testator was advised about the fees that the attorney would be entitled to recover).

140. See Wood, *supra* note 116, at 207.

141. See *id.*

142. See *id.*

commissions; (4) whether the attorney-fiduciary or her firm will also serve as the estate attorney, and if not, why not (a hearing is required to explain why not); and (5) the attorney must attach her drafting notes, including next-of-kin data.¹⁴³

f. *Suggested Solution*

In sum, we suggest that an attorney should avoid being named as fiduciary simply because she happens to draft a will or trust. Nevertheless, a client may want to name a drafting attorney as fiduciary if there is a longstanding lawyer-client relationship, or if the client has no one else to name (recognizing that the attorney provides the client with a trusted, competent person as well as the prospect of continuity through the attorney's firm). There may also be times when the drafting attorney is not well known by the testator, however, she still may be the proper person to be named as fiduciary. For instance, if a client's assets do not qualify for a corporate fiduciary, no other family member or trusted person is available, and/or the client recognizes the attorney (and/or her firm) as capable of providing the confidentiality and continuity that the specific situation may demand. To allow for the attorney/drafter to function as a fiduciary, there must be well defined and clear safeguards for the protection of the client, the lawyer, and indeed the legal profession. These guidelines are not to be in contradiction with the Model Code or Model Rules, but should stand alongside them, just as the principles discussed in Option D attempt to do. Furthermore, as in several New York counties, surrogate or probate court procedures should require an attorney/drafter to prove that the nomination as fiduciary was free from undue influence.

B. *Dual Capacities: Should a Lawyer/Fiduciary Be Able To Serve Also as the Attorney for the Fiduciary, or To Employ the Law Firm with Which She Is Associated as the Attorney for the Fiduciary?*

A lawyer may serve as a fiduciary (e.g., as executor or personal representative for an estate) or as legal counsel for a fiduciary. Serious ethical and legal considerations arise when a lawyer serves in the dual capacity of both fiduciary and lawyer for herself as fiduciary. Further complications may ensue when the lawyer serving in such a dual capacity is also the scrivener of the testamentary instrument that designates her for those estate administration roles.

As we have earlier seen, there are situations in which it is desirable to have lawyers serving as fiduciaries. We have also examined circumstances where the lawyer/drafter may properly designate herself as fiduciary. The issue we explore in this section is whether the lawyer/fiduciary should also serve as the lawyer for the fiduciary.

143. *See id.*

The questions presented to lawyers serving in such dual capacities are: (1) how much compensation is the lawyer entitled; (2) what are the ethical problems arising from dual capacity designation; and (3) if there are pertinent ethical standards, how might they be enforced?

Keeping these problem areas in mind throughout this section, we examine the benefits as well as the risks and abuses that accompany the designation of the lawyer/fiduciary as counsel for the fiduciary. We also look at the regulation of fees under the common law and by the various states. After examining ethics opinions and case law, we present options regarding the possible regulation of lawyers serving in a dual capacity.

1. Potential Benefits of Having the Lawyer/Fiduciary Also Serve as Lawyer for the Fiduciary

Arguably, one of the most compelling reasons to have lawyer/fiduciaries serve as their own legal counsel is to provide the client with the most efficient and cost-effective estate administration. If a lawyer is familiar with the estate and already serving as its executor, that lawyer is presumably qualified to serve as her own counsel. Indeed, the non-legal duties of the executor may be very difficult to distinguish from the legal duties that are carried out by the lawyer for the executor. We discuss below the complications of fees and compensation and note simply that in most cases a lawyer has the requisite skills to serve as counsel to herself as executor. The use of another lawyer may entail more time, effort, and fees. One commentator believes, in fact, that

except in rare instances where the aid of a legal specialist is required such as a case involving actual litigation or one requiring sophisticated post death estate tax planning, the attorney who accepts an appointment as a fiduciary should be required to provide the legal services himself rather than to employ additional counsel.¹⁴⁴

Another perhaps more obvious benefit—especially in the case of the lawyer/drafter being appointed fiduciary and then also serving as her own legal counsel—is the fulfillment of the client/testator's expectations. While many clients are aware of the need for and function of an estate executor, they may not think of the need for a lawyer for the executor. Many clients come to the estate planning lawyer expecting that the same lawyer will take care of the estate—before and after the client/testator's death.

In some cases the client/testator may well understand the roles of both the executor and counsel for the executor and specifically desire the same lawyer to carry out both roles. In such a situation, the lawyer most likely may fulfill both roles as long as the desires of the client have been expressed, and it is clear that the decision was not a result of the lawyer's

144. Levin, *supra* note 83, at 50.

undue influence or overreaching.¹⁴⁵

2. Potential Risks and Abuses When the Lawyer/Fiduciary Also Serves as Lawyer for the Fiduciary

The risks and abuses that potentially may arise when the lawyer serves in this dual capacity center on issues concerning fees and compensation, the lawyer serving in the client's best interests, and the lawyer's duty to use independent judgment in representing the client.

The main duty of loyalty of a lawyer is to serve her client's best interests. Once appointed as fiduciary, the lawyer owes her client a duty of loyalty both as a fiduciary and as a lawyer. As fiduciary, the lawyer may also have to serve the best interests of the beneficiaries. A lawyer as fiduciary may certainly carry out these duties. Although, once that lawyer/fiduciary also selects herself as attorney for the fiduciary, a serious dilemma arises: is that lawyer's duty of loyalty to herself as fiduciary or to the estate because she is the estate's fiduciary? Furthermore, is that lawyer serving her own self-interest by appointing herself as counsel, and thus possibly assuring herself more future fees and influence? Has the lawyer exercised—or is she capable of exercising—the independent judgment (required of her by the ethical standards) when she is also counsel for the fiduciary?

The situation becomes far more complicated when the scrivener designates herself as both fiduciary and attorney for the fiduciary. One immediate question is whether it was the client who actually made such a designation? As one commentator notes, it is "unlikely that a testator would know about the role of an attorney in the probate of an estate, much less think it desirable to include a specific appointment at the time the will is drafted."¹⁴⁶

Thus, such a designation may involve an improper conflict of interest. The lawyer/scrivener must provide the client/testator with independent legal advice. By designating herself, however, the attorney may simply be promoting her own self-interest by securing future employment for herself.

Furthermore, there is no legitimate purpose in naming an attorney for the estate in the will. The designation is not binding, particularly because courts have long recognized that the estate's executor has the right to choose his own legal counsel.¹⁴⁷

145. See *In re Will of Corya*, 563 N.Y.S.2d 581, 585 (Sur. Ct. 1990), *rev'd on other grounds*, 572 N.Y.S.2d 51 (App. Div. 1991).

146. Johnston, *supra* note 64, at 103.

147. According to the American Bar Association in an ethics opinion,

[t]his committee has specially held in Decision 244A in the Appendix of the Opinions of this Committee that drawing a will does not carry the right to represent the estate of the testator regardless of any direction in the will, and that a lawyer has no vested interest in representing the estate of one who [sic] will he has drawn, and that the executor is entirely free to select any counsel he may wish.

Improper solicitation is another ethical issue that arises when the lawyer/fiduciary chooses herself as her own legal counsel. Was the client aware of the possibility that the attorney could designate herself for such a role? Was such a designation inserted in the will without making clear its implications to the client/testator? Johnston points out that

[t]he insertion of a clause appointing the drafting attorney as executor may not put the testator on notice that the draftsman is seeking future business, and the designation of an attorney to provide legal services to the estate is even less likely to be detected as solicitation, because the testators generally do not understand the meaning of such a legal position or that an appointment in advance is hardly necessary or desirable in the way that the selection of an executor is.¹⁴⁸

There is a concern that when the lawyer/fiduciary also acts as her own lawyer, she, and the persons for whom she is acting as fiduciary, are denied the benefit of the perspective and advice of another lawyer. The fiduciary must serve the best interests of the beneficiaries while maintaining her duty of loyalty to the estate. When a lawyer serves as fiduciary, she must select as legal counsel to the estate the lawyer best suited to the job, and not herself merely because she is also a lawyer.

Finally, in some states dual representation is not cost effective for the client. In these states, attorneys can receive fees for acting as fiduciary and as lawyer for the fiduciary. This is known as "double dipping." Particularly in states where both the fiduciary and the attorney receive a fee—which, as a minimum, is a percentage of asset value—there is a significant risk that the lawyer/fiduciary also serving as the lawyer will receive excessive total compensation. Indeed, lawyers can earn so much when working in estate administration that there is a tendency to undercharge during will preparation.¹⁴⁹

3. Regulation of the Lawyer/Fiduciary Serving as Lawyer to the Fiduciary

a. *The Lawyer/Fiduciary's Entitlement to Compensation as Fiduciary and as Lawyer for the Fiduciary*

At common law fiduciaries were not compensated. Moreover, historically most jurisdictions prohibited lawyers from collecting dual fees as both fiduciary and attorney because common law prohibited divided loyalties. Today, usually by statute, fiduciaries are entitled to compensation. When lawyers serve in the dual capacity of fiduciary and lawyer for the fiduciary, they may—at least in some states—be entitled to dual

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 602 (1963).

148. Johnston, *supra* note 64, at 105.

149. See Johnston, *supra* note 64, at 102. There is also the related problem of the safekeeping of wills. After the death of the testator, families come in to the lawyer/scrivener and simply assume that she will also serve as lawyer for the estate. See Levin, *supra* note 83, at 50.

compensation.¹⁵⁰

Statutes generally use one of two methods to set fiduciary compensation: (1) a "reasonable" fee standard; or (2) a fee schedule method, based upon a percentage of the value of the estate.¹⁵¹ There is also a recent trend towards basing compensation on an hourly basis for actual services rendered.¹⁵² However, states still differ on the regulation of dual fees.

In California, the fiduciary/lawyer may not receive compensation in both capacities unless the will specifically so provides.¹⁵³ The California courts scrutinize even more closely provisions allowing a double fee when the lawyer also drafted the will.¹⁵⁴ The California Probate Code section 10804 provides that a lawyer/personal representative may receive compensation as the personal representative, but not compensation for services as the estate attorney "unless the court specifically approves the right to the compensation in advance and finds that the arrangement is to

150. See generally L.S. Tellier, Annotation, *Right of executor or administrator to extra compensation for legal services rendered by him*, 65 A.L.R.2d 809, 810 (1959) ("[T]he majority rule appears to be that in the absence of statute otherwise providing, an executor or administrator is not generally entitled to extra compensation for legal services rendered by him in connection with the estate.").

151. According to deFuria:

[W]ith respect to the reasonable standard, the reasonableness of a fee usually is determined by court order, which in all likelihood is based upon a percentage of the estate as a starting point. Hence, the reasonableness standard is more of a formal rather than a substantive distinction. In both cases, the fee actually awarded to the attorney-fiduciary often bears less than a realistic relationship to the actual amount of work involved.

deFuria, *supra* note 59, at 306.

For examples of the reasonable fee standard approach, see Unif. Prob. Code § 3-719 (West 1987); Colo. Rev. Stat. § 15-12-719 (1987); D.C. Code Ann. § 20-751 (1989); Fla. Stat. Ann. § 733.617 (West Supp. 1993); Ill. Ann. Stat. ch. 110§ para. 27-1 (Smith-Hurd 1978 & Supp. 1992); N.C. Gen. Stat. § 28A-23-3 (1984); N.Y. Surr. Ct. Proc. Act Law § 2307 (McKinney 1967 & Supp. 1994) (reasonable fee and schedule); R.I. Gen. Laws § 33-14-8 (1984); W.Va. Code § 44-4-12 (1982).

For examples of the fee schedule method, see Del Ch. Ct. R. 192 (1991); Mo. Ann. Stat. § 473.153 (Vernon 1992); Okla. Stat. Ann. tit. 58, § 527 (West 1965 & Supp. 1994); Or. Rev. Stat. § 116.173 (1984); Tex. Prob. Code Ann. § 241 (West Supp. 1993).

152. For example, the court in *In re Will of Corya* stated:

Counsel fees, particularly where there is no retainer agreement, should be assessed on a quantum meruit basis and in accordance with the general criteria established by the courts . . . to wit: the time spent, the difficulties involved in the matter, the nature of the services rendered, the amount involved, the professional standing of counsel, and the results obtained.

563 N.Y.S.2d 581, 587 (Sur. Ct. 1990) *rev'd on other grounds*, 572 N.Y.S.2d 51 (App. Div. 1991).

153. See *In re Estate of Thompson*, 328 P.2d 1, 2-3 (Cal. 1958). Laurino finds it troubling to forego the common law rule that no person in whom fiduciary duties are vested shall make a profit of them by employing himself. See Laurino, *supra* note 68, ¶ 1600. However, even in those jurisdictions still following the common law rule, there is an exception of which Laurino approves: legal compensation should be provided "to the attorney/fiduciary where the will expressly directs that in the event that the attorney/executor also acts as his own attorney, he shall be entitled to extra compensation in the form of a legal fee." *Id.* ¶ 1601.3(c).

154. See *In re Thompson*, 328 P.2d at 2-3.

the advantage, benefit, and best interests of the decedent's estate."¹⁵⁵

Mississippi and Missouri are among the states that do not allow dual compensation. In Mississippi, the lawyer/fiduciary may choose which fee to take.¹⁵⁶ Moreover, the fees must be "reasonable" and approved by the court. For instance, "[w]here the executor, administrator, or guardian acts also as attorney, the court may allow such executor, administrator, or guardian credit for his reasonable compensation as attorney in lieu of his compensation as executor, administrator, or guardian."¹⁵⁷

Missouri bases the personal representative's compensation on a fixed percentage scale.¹⁵⁸ When the personal representative's reasonable compensation is in excess of that provided by the schedule, the court must approve such increase to insure that the compensation is "reasonable and adequate."¹⁵⁹ There are no attorney's fees allowed for the attorney/personal representative unless authorized by the court or consented to by all the affected heirs and devisees.¹⁶⁰ Additionally, "when one member of a law firm or professional corporation serves as personal representative of the estate and another member of the same law firm or professional corporation serves as the attorney for the estate, only one fee as set forth in subsection 1 of this section shall be allowed."¹⁶¹

A majority of states allow dual compensation for the executor and the attorney for the estate.¹⁶² Most of these states limit compensation to a "reasonable" amount which is further conditioned on court approval.¹⁶³ Louis D. Laurino suggests that in New York, which allows dual compensation, the actual practice is that the safeguards of reasonable compensation and judicial discretion are almost non-existent.¹⁶⁴

Recently, dual compensation has been challenged in New York as well

155. California Probate Code § 10804 (1993) (emphasis omitted). The term "estate attorney" includes the associates, partners, and attorneys of counsel with the law firm of the attorney retained by the personal representative as estate attorney, and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of that attorney, if the personal representative will share in the compensation that would be paid to the law firm.

Recent legislation in California prohibits lawyers from serving as both the executor and attorney for the executor, except in certain circumstances approved by the court in advance. The legislation requires the court to make sure the arrangement is to the advantage, benefit and best interests of the decedent's estate. See Daniel B. Kennedy, *Estate Lawyers Mount Bicoastal Battle*, A.B.A. J., Oct. 1993, at 30, 30.

156. See Miss. Code Ann. § 91-7-281 (1972).

157. *Id.*

158. See Mo. Ann. Stat. § 473.153 (Vernon 1992).

159. See *id.*

160. See *id.* § 473.153 § 3.

161. *Id.*

162. See Laurino, *supra* note 68, ¶ 1600.

163. See *id.* ¶ 1601.3(D).

164. See deFuria, *supra* note 59, at 304-08 & n.174 (discussing the ethical problems of fee charging by attorneys acting as testamentary fiduciaries); Laurino, *supra* note 68, ¶ 1601.3(D); see generally *Fiduciary and Probate Counsel Fees in the Wake of Goldfarb*, 13 Real Prop. Prob. & Tr. J. 238, 249-50 (1978) (discussing the practice and regulation of dual representation within different jurisdictions); Link, *supra* note 38, at 30-38 (discuss-

as in California. The New York bill provided that lawyers acting in dual capacities would have their statutory executor's commission cut in half.¹⁶⁵

The bill met with strong opposition from the New York County Lawyers Association.¹⁶⁶ Members of that association proposed a counter statute based on the necessity of disclosure to the client rather than the loss of income by the lawyer.¹⁶⁷ Under this bill, the lawyer must disclose three things to a testator who wants to name that lawyer as executor of his will:

- 1) [e]xecutors are entitled to a commission, based upon a sliding scale;
- 2) the statutory rates of commission; and 3) the lawyer or his firm is entitled to a fee for legal services rendered in addition to the executor's commission.¹⁶⁸

After disclosure, the testator may choose whether or not to designate the lawyer as executor.¹⁶⁹ Moreover, the court has the discretion to fix the executor's commission if the lawyer fails to disclose.¹⁷⁰

Finally, we should note that the ABA Section of Real Property, Probate, and Trust Law suggested in its 1973 Statement of Principles Regarding Probate Practices and Expenses that the practice of lawyers serving in such dual roles is "in the public interest" and explicitly approved of the practice.¹⁷¹

b. *Ethical Provisions*

Certain ethical provisions may place constraints on the lawyer serving as both an executor and the lawyer/fiduciary's lawyer. As noted earlier, there is no specific provision in the Model Rules prohibiting an attorney from serving as a fiduciary. Similarly, there is no prohibition in the Model Rules against a lawyer serving in this dual capacity.

EC 5-6 of the Model Code provides that a lawyer must not "consciously influence" a client to name that lawyer in an instrument as executor, trustee, or lawyer. As discussed above, the term "consciously influence" is helplessly vague. Under the Code, however, one supposes

ing the issue of dual compensation for attorneys acting as personal representatives and counsel for an estate).

Nonetheless, there is a common law rule in New York limiting lawyers' rights to fees when they designate themselves as executors. See *In re Estate of Weinstock*, 351 N.E.2d 647, 649 (N.Y. 1976).

165. See Kennedy, *supra* note 155, at 30.

166. See *id.*

167. See *id.*

168. *Id.*

169. See *id.*

170. See *id.*

171. The same ABA section published in 1992 *Principles for Attorneys Acting in Other Fiduciary Roles*, A.B.A. Sect. Real Prop. Prob. & Tr. L. (Oct. 16, 1992) (providing that "[t]he attorney-fiduciary should comply with such ethical principles regarding fiduciary fees and expenses as may be applicable under state laws") (on file with *Fordham Law Review*).

that if a lawyer does not exert undue influence over a client, then the lawyer may be properly named as both executor and lawyer for the executor. One commentator points out that EC 5-6 does not assist with the virtually impossible determination of whether the draftsman or the client first suggested appointing the attorney.¹⁷² Additionally, even if the draftsman suggested appointment first, EC 5-6 does not help with determining whether that necessarily constitutes improper influence in the particular circumstances.¹⁷³

An ABA ethics opinion prior to the promulgation of the Model Code held that the "customary and regular inclusion of provisions in wills directing the retention of the services of the attorney drawing the will, without the specific request or suggestion of the client is clearly in violation of Canon 11 and improper."¹⁷⁴ But this opinion also emphasizes that the executor has the prerogative of naming his own counsel.¹⁷⁵ Thus, there is no ethical violation when a client freely names an attorney to these roles, or when a client properly names an attorney as executor and then the attorney chooses herself as counsel.

DR 2-106(A) of the Model Code provided that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."¹⁷⁶ DR 2-106(B) provided that a fee is "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."¹⁷⁷ The factors that determine the reasonableness of the fee are: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the likelihood that acceptance will preclude other employment; 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.¹⁷⁸

The ethical consideration EC 2-17 made an interesting attempt to deal with the determination of a proper fee. According to EC 2-17:

The determination of a proper fee requires consideration of the inter-

172. See Johnston, *supra* note 64, at 103.

173. See *id.*

174. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 602 (1963).

175. See *id.*

176. Model Code of Professional Responsibility DR 2-106(A) (1980).

177. *Id.* at DR 2-106(B).

178. See Model Rules of Professional Conduct Rule 1.5(a) (1992). deFuria argues that attorney/drafters who appoint themselves fiduciaries ignore the ethical rules when they determine their fees because the Model Code and the Model Rules say to avoid excessive fees. See deFuria, *supra* note 59, at 307. Because both the Model Code and Model Rules use similar factors for determining "reasonable," deFuria concludes that a percentage method could be used under either set of rules to arrive at a reasonable fee. See *id.*

ests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.¹⁷⁹

Model Rule 1.5 replaced DR 2-106 by stating affirmatively that "[a] lawyer's fee shall be reasonable."¹⁸⁰ Reasonableness here is based on factors almost identical to those listed above for the Code. Under this rule, however, when the lawyer serving in dual capacities receives both attorney's fees and the statutory personal representative fee, the legal fee may be excessive.¹⁸¹

Several other ethics provisions must be considered when discussing a lawyer serving in a dual capacity. Pervasive problems include those of solicitation and undue influence. When the lawyer names herself fiduciary because that fiduciary has the right to name her own counsel as fiduciary, it is almost impossible to know what went on between client and lawyer.¹⁸²

Rule 7.3(a) provides that "[a] lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."¹⁸³ Thus, if a lawyer has a prior relationship with the client and is not engaging herself for her own pecuniary gain, there appears to be no violation.

Even the comment to Model Rule 7.3(a) indicates that there is little likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship, or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain.¹⁸⁴ Thus, the general prohibition in 7.3(a) would not be applicable.

The rule, however, does not give any indication of what a lawyer's consideration of pecuniary gain might be. As noted earlier, the loss leader practice in estate planning is common. That is, there is little cost

179. Model Code of Professional Responsibility EC 2-17 (1980).

180. Model Rules of Professional Conduct Rule 1.59(a) (1992).

181. See generally *id.* (discussing factors determining attorneys fees).

182. See Johnston, *supra* note 64, at 90.

183. Model Rules of Professional Conduct Rule 7.3 (1992).

184. The Comment to Rule 7.3 provides:

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

Id. at Rule 7.3 cmt.

for the initial drafting of a will in the hope of later, more lucrative involvement in the estate administration. Even if the lawyer is not appointed fiduciary, the hope is that the family fiduciary will turn to the drafting lawyer for future counsel. Are these two common practices unethical because the lawyer engaging in them may also consider her own pecuniary gain?¹⁸⁵

Model Rules 1.7(b) and 1.8(a) touch upon similar matters in the context of conflict of interest. Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.¹⁸⁶

The lawyer is not to represent someone if her own interests affect her representation of the client. Thus, when the lawyer serves in a dual capacity, if the lawyer believes she can maintain her independent judgment, there is no ethical violation.

The comment to Model Rule 1.7(b) provides that the "lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee."¹⁸⁷

If a lawyer engages in such a practice to secure future employment for herself, then this is an ethical violation. Yet, if a client—after disclosure—still wants that lawyer to so serve, the lawyer properly may serve without violating Model Rule 1.7(b).

Rule 1.8(a) appears to impose similar ethical constraints: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest"¹⁸⁸

Both these rules are tempered by Model Rule 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."¹⁸⁹ The client depends upon the lawyer for such advice. If the lawyer is so bound by her own interest in compensation that she cannot advise the client in the client's best interests, then that lawyer should not take on the dual capacity obligations.

185. See Levin, *supra* note 83, at 53.

186. Model Rules of Professional Conduct Rule 1.7(b) (1992).

187. *Id.* at Rule 1.7(b) cmt.

188. *Id.* at Rule 1.8(a).

189. *Id.* at Rule 2.1.

4. State Law and Ethics Rules Regulating Options and Analysis of the Options

a. *Lawyer/Fiduciary Appointment as Lawyer for the Fiduciary*

(i) Option I

One option would be an absolute prohibition against the lawyer serving as lawyer when she is already the fiduciary. Such a prohibition would eliminate the following problems: a lawyer not exercising independent judgment in selecting the best qualified lawyer; providing the lawyer with additional reasons to seek being named fiduciary (as she can then later name herself lawyer, too); not having the perspective and advice of another lawyer; and the "double dipping" issue.

An absolute prohibition, however, would prevent the lawyer from serving in a dual role even in appropriate cases, such as where special independent counsel is unnecessary and where costs are lower without separate counsel.

Furthermore, in such appropriate cases, there is no ethical violation, especially if the lawyer has made full disclosure to the client and the lawyer is satisfied that she is not acting for her own pecuniary gain.

(ii) Option II

Another option is an absolute prohibition against serving as lawyer only when the lawyer/fiduciary was the scrivener of the instrument naming herself as fiduciary. According to Laurino, lawyers appear to name themselves as fiduciary in cases not seeming to need their special skills, mostly in states permitting dual compensation.¹⁹⁰ In such cases, Option II would reduce the number of cases where lawyers are named as fiduciaries. However, it would also prevent lawyers from serving in dual roles even in those cases where it would be more efficient and cost effective to actually have the lawyer serving in both roles.

Options I and II assume the enforceability of a state law prohibiting the lawyer/fiduciary from serving also as lawyer. It is questionable, however, whether such a law would be enforceable. Testators have the right to name their own fiduciaries, and may even name the lawyer for the fiduciary, depending on the circumstances of the case.¹⁹¹

190. See Laurino, *supra* note 68, ¶ 1601.2.

191. In *In re Estate of Thompson*, the California Supreme Court expressly avoided the public policy considerations concerning the testator's designation that the named fiduciary, who is a lawyer, may also serve as his own lawyer. See 328 P.2d 1, 2-3 (Cal. 1958). The court, however, did hold that where a testatrix imposes her faith and trust in her designated executor (who is also an attorney) by expressly providing for his additional compensation if he also acts as his own attorney, the purpose of the policy which might otherwise restrict self-dealing transactions cannot be accomplished and the policy is no longer a controlling consideration, especially in view of the added safeguard of a statutory standard by which services performed for the estate may be objectively evaluated. See *id.*

(iii) Option III

When a lawyer is appointed fiduciary (which presumes the appointment has not been voided by a finding of undue influence by the probate judge), the lawyer/fiduciary may employ herself as counsel, subject to all restrictions imposed by applicable state fiduciary law and the Model Rules.

Option III has the benefit of not being an absolute prohibition while still providing a variety of safeguards. For example, if a lawyer commits malpractice that might have been avoided if the client had advice from independent separate counsel, then she will still be liable for malpractice.

A negative aspect of this option is the vagueness of the Model Rules that might govern the lawyer serving in a dual capacity. As noted above, the rules do not distinguish whether the lawyer was appointed by the client/testator with sufficient disclosure. Even though Option III acknowledges that a judge will make a determination of the validity of the appointment of the lawyer as fiduciary, there should be stronger ethical standards in place that would discourage lawyers from even considering the avoidance of disclosure.

b. *The Lawyer/Fiduciary's Right to Dual Compensation When She Serves as Lawyer for the Fiduciary*

The California, Missouri, and Mississippi common law prohibitions against dual fees for the personal representative—unless there is other specification in the will—may reduce the number of cases where the lawyer/scrivener names herself as fiduciary. In addition, these prohibitions will certainly protect against the excessive compensation of double dipping, at least to the same lawyer.¹⁹² However, such a prohibition may still lead to overall excessive compensation because the lawyer/fiduciary will now often hire separate counsel, and there will be two fees to pay. This is a particular problem in states like California where the executor's commissions and the attorney's fees are a statutory percentage without regard to the services actually rendered in the particular case. Such a prohibition may also prevent a lawyer from receiving fair overall compensation in cases where the lawyer serving in dual roles is best for the client.

The best approach is to allow both the lawyer/fiduciary and the lawyers for the fiduciary, whether it be the lawyer/fiduciary or someone else, to receive reasonable compensation after a full report and hearing by the court. If the lawyer/fiduciary should have performed routine services that were needlessly performed by the lawyer, then the court should reduce the fiduciary's compensation accordingly. Perhaps the fiduciary should have the burden to justify the use of a lawyer. Lawyers should be allowed to serve in dual capacities and receive reasonable compensation

192. See *In re Will of Corya*, 563 N.Y.S.2d 581 (Sur. Ct. 1990), *rev'd on other grounds*, 572 N.Y.S.2d 51 (App. Div. 1991) (statutory percentage fees were found to be excessive).

for both roles when they can show to a reviewing court the work done for such compensation.¹⁹³

c. *Ethics Rules When the Lawyer/Fiduciary is Also the Lawyer*

As pointed out above, there are a number of current Model Rules that appear to be pertinent to both the appointment and the conduct of the lawyer who is also the fiduciary. The question is whether these various provisions should be combined into a situation-specific ethical rule.

We suggest the following situation-specific rule:

When a lawyer is appointed to serve as an executor, administrator, trustee, guardian, conservator, or in a similar fiduciary capacity, in deciding whom to employ as attorney(s) for the fiduciary, the lawyer/fiduciary shall consider only the best interests of the fiduciary estate and all the persons interested therein, including the necessity for specialized, independent legal assistance, and the comparative overall costs involved. In those cases where the lawyer/fiduciary also serves as attorney for the fiduciary/fiduciary estate, or employs the firm with which she is associated to serve as the attorney, she shall not have the attorney(s) perform legal services that she reasonably could perform as part of her duties as the fiduciary.

A client/testator may appoint a lawyer as fiduciary and even designate in a testamentary instrument that the lawyer/fiduciary serve as lawyer for the fiduciary. The client/testator may also establish the fees to be paid, or not to be paid, to the person serving in these dual capacities. However, the client should be well informed of the situation and the consequences of such a designation. In order to ensure that the client understands, the lawyer should fully disclose all the consequences, including costs to the estate and compensation to the lawyer, and suggest independent counsel, especially in the case of the lawyer also acting as scrivener.

There should be court approval any time a lawyer is appointed as fiduciary and when the lawyer/fiduciary also acts as her own legal counsel. Fees should be statutorily defined, but there should not be an absolute prohibition against the lawyer/fiduciary receiving dual compensation when she also serves as her own lawyer.

The current Model Rules do not adequately address the ethical issues that concern lawyers serving in dual capacities. Thus, there should be a situation-specific rule, such as the one we have suggested above, that stresses the importance of the attorney serving only the interests of the client, including the performance of routine legal services as part of her duties as the fiduciary. This would avoid the possibility of the lawyer serving her own interests, particularly her own pecuniary interests.

193. For the recent controversy in New York over the proposed legislation prohibiting statutory fees for both the lawyer and fiduciary see Kennedy, *supra* note 155.

C. Possible "Conflicts Rules" Problems When the Lawyer Serves Solely as a Fiduciary

Conflict of interest problems are of great concern to lawyers practicing in the area of estate planning and administration.¹⁹⁴ In this section we examine the application of the Model Rules—in particular Rule 1.7 (general rule for conflicts), Rule 1.9 (former client), Rule 2.1 (advisor), and Rule 2.2 (intermediary)—to the conflict of interest problems that arise when the lawyer serves solely as fiduciary.¹⁹⁵

We focus here on several hypothetical situations in an effort to determine: (1) the effect of the conflict of interest rules upon lawyers serving in various fiduciary roles; and (2) the possibility of changes in the rules to better accommodate the problems arising when lawyers serve as fiduciaries. Virtually all commentators agree that the ethical rules were developed to respond to the issues arising when the lawyer engages in litigation for her client. And even though the Model Rules (unlike the Model Code) attempt to provide rules for the lawyer serving in different roles (advocate, advisor, intermediary), they fail to address adequately the specific ethical issues faced by lawyers serving as fiduciaries, especially in a non-litigation context.¹⁹⁶

When a lawyer is serving solely as fiduciary, is she considered to be "representing a client," so that the conflicts of interest rules potentially apply? Nothing in the Model Rules or Code specifically addresses this

194. See Patricia Brosterhous, *Conflicts of Interest in Estate Planning and Administration*, Tr. & Est., June 1984, at 18; Mercer D. Tate, *Handling Conflicts of Interest That May Occur in an Estate Planning Practice*, 16 Est. Plan. 32 (1989).

195. We focus here on the problems faced by the lawyer when serving as fiduciary. However, much of the work done on conflicts of interest issues for lawyers generally is pertinent. See Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 Minn. L. Rev. 227 (1987); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 Geo. J. Legal Ethics 823 (1992); Millard L. Midonick, *Attorney-Client Conflicts and Confidences in Trusts and Estates*, 35 Rec. Ass'n B. City N.Y. 215 (1980); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211 (1982); Debra B. Perschbacher & Rex R. Perschbacher, *Enter at Your Own Risk: The Initial Consultation & Conflicts of Interest*, 3 Geo. J. Legal Ethics 689 (1990); Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 Notre Dame L. Rev. 1 (1990); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981).

196. According to Mercer D. Tate, "under the prior Code of Professional Responsibility (CPR), dating from the early 1970s in most jurisdictions, there were few provisions that were specifically relevant to estate planning attorneys. The CPR primarily addressed litigators; the non-litigating lawyer received little guidance." Tate, *supra* note 194, at 32.

Jeffrey N. Pennell states that "[t]he ABA Model Rules and Model Code are indicative of the problems that confront all estate planning professions. These dictates clearly were written by, and for, litigators; in many respects they do not anticipate and therefore apply poorly (or not at all) to estate planning engagements." Jeffrey N. Pennell, *Ethics Concerns are Being Addressed*, Tr. & Est., Jan. 1992, at 14; see also Avery, *supra* note 48 (arguing that the ABA and state supreme courts should develop ethical rules for such lawyer specialists like estate planners).

question. However, several authorities and some courts have contended that the ethics rules apply to any and all professional conduct of lawyers. When a lawyer who holds herself out as a lawyer engages in other activities, she is still held to the same ethical standards required of lawyers acting as lawyers.¹⁹⁷

A fundamental duty implied in the conflict of interest provisions in the Model Rules, especially in Rule 1.7, is the lawyer's duty of loyalty. A lawyer must always serve in the best interests of the client. The duty of loyalty is also a fundamental duty of a fiduciary. Therefore, apparently the assumption by some courts has been that when the lawyer serves as fiduciary she is nonetheless representing that client as a lawyer, and will thus be subject to disciplinary action as a lawyer for misconduct as a fiduciary.¹⁹⁸

1. Hypotheticals

We look now briefly at several hypothetical situations that attempt to illustrate some of the potential difficulties lawyers serving as fiduciaries face when they deal with multiple client representations.

a. *Hypothetical I*

Let us assume that a lawyer ("L") is appointed as the guardian/conservator or agent for an individual client and must make a decision in her fiduciary capacity that could possibly affect other family members. When L also represents other family members of that client, conflicts under Rule 1.7(b) can arise that would force L to withdraw from representing the other family members.¹⁹⁹ While in some cases this may in-

197. See *supra* notes 43-44 and accompanying text. But see *The Florida Bar (In re Amendment to the Integration Rule and Bylaws Respecting Clients' Security Fund)*, where the Board of Governors of the Florida Bar petitioned the Florida Supreme Court to extend the Clients' Security Fund's coverage to misappropriations by attorneys acting in fiduciary capacities unrelated to an attorney-client relationship. See 346 So. 2d 537, 537 (Fla. 1977). The court refused to extend this coverage explaining that "[t]he Clients' Security Fund was established to protect persons victimized as a result of an attorney-client relationship. The Legislature has already acted to protect persons who must use individual fiduciaries, and the reach of the law quite clearly encompasses persons serving as fiduciaries who happen to be attorneys." *Id.* at 538. The court apparently implies here that a lawyer also serving as a fiduciary will be held to both the ethical standards for lawyers as well as the statutory regulations regarding fiduciaries. The court did not address whether the breach of one standard implies *per se* the breach of the other.

Others have been concerned with the protection of lawyers serving as fiduciaries. See *Lawyers Serving as Executors and Trustees*, *supra* note 65, at 764-67; *Principles for Attorneys Acting in Other Fiduciary Roles*, *supra* note 53.

198. See Landis, *supra* note 43, at 658. Landis states:

[A]lthough a personal representative who is a layman may be liable to an estate in a civil suit, the attorney who is a personal representative of a decedent's estate may, in addition to any civil liability, be subject to disciplinary action as an attorney for his misconduct in the capacity of a personal representative.

Id.

199. Rule 1.7 provides:

deed be desirable, in many other cases the family as a group wants that lawyer to advise them as a family unit, instead of serving as a zealous advocate for one family member. In such instances, the interests of everyone involved are intertwined, but not necessarily adverse. As Avery suggests, the lawyer/fiduciary often does not really represent solely one individual, but must be able, as is often expected by family members, to serve in the best interests of the entire family.²⁰⁰

Rule 1.9²⁰¹ would prevent L from being the guardian/conservator without first obtaining the consent of the other potentially affected family members, if L had previously represented those family members. One possible remedy would be to change Rule 1.9 to allow the fiduciary to continue serving in this capacity regarding the issue without the consent of anyone else.

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- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
 - (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after [full disclosure and] consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct Rule 1.7 (1992).

200. See Avery, *supra* note 48, at 12.

201. Rule 1.9 provides:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Model Rules of Professional Conduct Rule 1.9 (1992).

b. *Hypothetical II*

Assume the clients are husband and wife ("H" and "W") who have children. L has previously represented H's business, as well as H and W jointly on tax issues and estate planning. Moreover, L has also provided H and W's children with legal advice on various issues from time to time and has drafted their wills.

H and W each have reciprocal wills with maximum credit shelter and QTIP trusts, with the remainder over to H and W's issue equally. When H dies, W has no expertise or interest in business, and the children all reside out of state. In such a case, the lawyer as fiduciary serves W, the life beneficiary of the trust and not the trust itself.

Assume, however, that L is appointed guardian of H's estate when H becomes incompetent; or, alternatively, as agent under H's general durable power of attorney. Clearly, the fiduciary's duty runs to H as ward. But what are the fiduciary's duties to W and the children?²⁰²

Assume that H's interests are to sell the business, but a son of H (and a former client of L) wants to keep it in the family's possession so that he can run the business. How would the son's interests in the business affect, for example, H's Medicaid eligibility planning? From the overall family standpoint, it may be best to make gifts to the children of H's money, except for H's exempt assets. However, regarding H's medical care, it may be best for H not to qualify for Medicaid, but to keep all her money to pay for her own medical costs.

Under Rule 1.7(b), a lawyer shall not represent a client, if representation may be materially limited by the lawyer's responsibility to another, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. Rule 1.7(b) addresses such a situation. A possible conflict does not itself preclude the representation. The critical issues are the likelihood that a conflict will develop and, if it does, whether it will materially interfere with the lawyer's independent judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. The lawyer should consider whether the client wishes to accommodate the other interests involved.

202. According to the court in *Fickett v. Superior Court*,

when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If [the lawyer] knew or should have known that the guardian was acting adversely to his ward's interest, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward.

558 P.2d 988, 990 (Ariz. Ct. App. 1976). See also Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15, 18 (1987) (quoting the above passage).

A nagging question is whether there is a "substantial risk" that responsibilities to the other client (e.g., H's son) might impair L's independent judgment regarding ward H? If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation under Rule 1.16(a)(1).²⁰³ When more than one client is involved and the lawyer withdraws because a conflict arises after representation, Rules 1.9 and 2.2 dictate whether the lawyer may continue to represent any of the clients.

In our extended hypothetical, if there is a conflict between the interests of H and the son (whom L also represents as a lawyer), regarding the sale of the business, for example, Rule 1.9(a) would apply. It provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."²⁰⁴ Therefore, under this Rule, and Rules 1.7 and 1.16(a), L must withdraw from representing the son in this matter. Also, L cannot, as guardian, represent the ward H regarding the sale of the business unless the son consents after consultation.

For the purposes of the conflicts rules, in a case where L represents one party as lawyer (e.g., the son) and another party as only a fiduciary (e.g., H as guardian), it is not reasonable to suppose that H is not L's client because L does not represent H in her capacity as a lawyer. This is so because to both son and H, L is acting as a paid, professional fiduciary. As discussed in earlier sections of this Article, H probably chose L to serve as his fiduciary precisely because L is a lawyer. Thus, H himself most probably believes himself to be L's client even when L is serving only as guardian.

If L is serving as guardian/conservator or agent, and also represents as lawyer one or more other persons (e.g., son), and a conflict arises under Rule 1.7(b) that forces L to withdraw from representing the son, L should be allowed to continue as guardian and to handle matters where there was a conflict between H and son (e.g., Medicaid issue and sale of business) without the son's consent. Thus, an amendment to Rule 1.9 would clarify that the phrase "shall not thereafter represent another per-

203. Rule 1.16 addresses declining or terminating representation. Rule 1.16(a)(1) provides:

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the rules of professional conduct or other law.

Model Rules of Professional Conduct Rule 1.16(a)(1) (1992).

204. *Id.* at Rule 1.9(a). For a history of the judicial interpretation of Rule 1.9, see generally, Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 Minn. L. Rev. 227, 231-59 (1987) (arguing that the Rule leads to incompatible results and does not advance the adversary system).

son in the same or a substantially related matter in which that person's interests are materially adverse . . . unless the former client consents after consultation[.]"²⁰⁵ to make it inapplicable where the representation of another person is solely in the capacity as guardian/conservator.

Another possible solution is to set up a special or provisional guardian for this one issue causing the conflict. The real problem to be avoided in such a situation is L's misuse of confidential information. This risk should be disclosed to all possible clients before L becomes guardian. Everyone involved, especially H, should be aware of all the potential ramifications of L's appointment as fiduciary. Another protective measure would be to have H sign a letter of intent regarding the scope of the appointment. It may be a good idea also to have clients name an alternate provisional guardian in the event of conflicts of interest. The provisional guardian could assume L's obligations when L's conflicts of interest would prohibit her from carrying out her fiduciary duties.²⁰⁶

c. *Hypothetical III*

Assume L's fiduciary appointment is as executor and (1) although the estate has multiple beneficiaries, L has not otherwise represented the testator or any of the beneficiaries; or (2) L has previously represented the testator, but not any of the beneficiaries; or (3) L has previously represented one or more of the beneficiaries.

In each of these permutations, the basic dilemma is who is the client of the fiduciary? The estate or the beneficiaries?

Application of the conflict of interest rules depends on whether L's client is the entity (the estate) or the beneficiary of the estate. Under Rule 1.7(b), for example, if L is considered to represent each of the beneficiaries (therefore, multiple clients), the representation of each may be materially limited by the lawyer's responsibility to another client. However, one might argue that L is not materially limited because the duty of a fiduciary is to represent all of the beneficiaries fairly. Furthermore, L would also be bound by fiduciary law and malpractice safeguards.

One might also argue that the Model Rules do not apply when L is

205. Model Rules of Professional Conduct Rule 1.9 (1992).

206. Another way to provide for the scope of the lawyer's duties while serving solely as fiduciary may be to expand Rule 1.2 which provides in pertinent part:

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued.
- (c) A lawyer may limit the objectives of the representation if the client consents after consultation.

Id. at Rule 1.2.

The Comment to Rule 1.2 states that the "client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." *Id.* at Rule 1.2 cmt.

While the lawyer serving as fiduciary may or may not also be engaged in legal representation, this rule suggests that the lawyer and client may agree to the parameters of their relationship so long as no violations of the law or professional rules occur.

servicing only as a fiduciary. Nonetheless, as noted above, the courts tend to consider a lawyer—even when not acting as a lawyer—to be bound by the rules of ethical conduct.

One way to clarify such a situation would be to amend Rule 1.7 (and its comment) to provide that for purposes of the Model Rules, when a lawyer is a fiduciary for an estate, the lawyer/fiduciary represents the estate, including all of its beneficiaries.²⁰⁷ This would eliminate the possible application of Rules 1.7(b) and 1.9. That is, amend the comment to show that Rule 1.7(b) should not apply when the client is actually all the beneficiaries.

d. *Hypothetical IV*

Assume that L is named the trustee of a trust, and is also a beneficiary of the trust, and L has not and does not serve as lawyer for any of the parties. The issue is whether the conflict of interest provisions of the Model Rules should apply because the lawyer is serving only as the fiduciary and not in her capacity as lawyer. According to one commentator, “[t]he Model Rules do not expressly address the question of whether they would apply to a . . . fiduciary who was licensed to practice law but was holding himself out as a . . . fiduciary and not as a lawyer.”²⁰⁸

Several commentators advocate application of the Model Rules for lawyers in all professional assignments in the belief that a lawyer is a fiduciary at all times.²⁰⁹ Thus, assuming that the conflict rules do apply, what affect would they have on this situation? Rule 1.7(b) provides that

207. The Comment to Rule 1.7 provides:

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

Id. at Rule 1.9 cmt.

208. Link, *supra* note 38, at 7 n.12.

209. See generally deFuria, *supra* note 59 (advocating more stringent application of the Model Rules for an attorney who drafts a will that names herself as a testamentary fiduciary); Laurino, *supra* note 68 (addressing the legal and ethical problems arising when an attorney is named executor in a will she drafts and thereafter acts as a fiduciary).

While a lawyer serving as fiduciary should expect to be held to professional standards of conduct, it is not clear that a lawyer acting as an executor or trustee is subject to federal or state regulation. According to William D. Haught:

One federal agency possibly having regulatory authority is the Securities and Exchange Commission under the Investment Advisers Act of 1940. While there is an exemption from that Act for an attorney providing investment advice and services which are “solely incidental to the practice of his profession,” the SEC position appears to be that attorneys acting as private fiduciaries may have stepped beyond the scope of the “lawyer’s exemption.” Attorneys who provide no investment advice incidental to those services, but instead engage outside investment advice and services, are probably outside the ambit of the Act. The SEC considers that acting as a fiduciary may not be incidental to the

a lawyer shall not represent a client (here, the trust, or other beneficiaries) if representation may be limited materially by the lawyer's own interests, unless all parties agree after consultation.²¹⁰ Irrespective of whether the entity, or the beneficiaries, are considered the client, the lawyer's own interests as a beneficiary might create a conflict at some point requiring L either to decline the appointment at the outset, or to later withdraw if a conflict arises.

Rule 2.1 would apply in this situation because the lawyer/fiduciary might be unable to render candid advice or exercise independent judgment on behalf of the interests of the entity, or all of the beneficiaries.²¹¹ But application of this rule assumes that the lawyer cannot shed the role of lawyer even though acting solely as fiduciary.

Should there then be any changes in the Model Rules to accommodate the lawyer serving as fiduciary in such a situation? The comment to Rule 1.7 says that "[a] possible conflict does not itself preclude the representation," and suggests there is a problem only when L cannot consider or recommend appropriate action for a client because of a conflict.²¹² Because of the inherent risks involved whenever a lawyer/fiduciary is a beneficiary, should we prohibit L's service as fiduciary in all cases? No. There is no reason why the rules here should be any more restrictive than they are when the lawyer is acting as lawyer.²¹³ It is probably preferable, however, to have the existing conflicts rules apply.

2. Application of the Model Rules Affecting Confidentiality When the Lawyer Serves as Fiduciary

A common problem arising out of a conflict of interest concerns the issue of confidentiality.²¹⁴ If there are multiple clients, either simultane-

practice of law, depending on the circumstances of the lawyer's engagement and the scope of his fiduciary activities.

Haight, *supra* note 41, at 14.

210. The Comment to Rule 1.7 discusses lawyer's interests as follows: "The lawyer's own interest should not be permitted to have an adverse effect on representation of a client. . . . If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Model Rules of Professional Conduct Rule 1.7 cmt. (1992).

211. Rule 2.1 addresses the lawyer as advisor as follows: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." *Id.* at Rule 2.1.

212. Model Rules of Professional Conduct Rule 1.7 cmt. (1992).

213. See *supra* part III.B.3.b.

214. Avery suggests that confidentiality in the estate planning process is by necessity very different from the need of confidentiality in litigation:

In the estate planning process, there is a need for less confidentiality and more sharing, because the process deals with future consequences of present decisions and deals with contingencies arising in the future. The litigation process deals with what occurred; the estate planning process deals with what might occur. In assisting in the estate planning process, the lawyer should be helping in the information-sharing process. The lawyer should not be pressing for confidentiality and preservation of secrets. The lawyer should be helping develop care

ously or successively, how much can the lawyer reveal to the other concerned parties? Furthermore, is the lawyer serving as fiduciary bound by the same rules of confidentiality?

When the lawyer serves as a fiduciary, her common law duty of loyalty includes the duty not to disclose information acquired as fiduciary at least where disclosure would be detrimental to the interests of the beneficiaries, or to those of the principal.²¹⁵ Rule 1.6 states that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. But the question here is whether, and under what circumstances, a lawyer/fiduciary can act on confidential information that is not disclosed?

For example, L has for many years been the lawyer for X, now incompetent, and X needs a conservator of the person/estate appointed.²¹⁶ If L is appointed conservator, Rule 1.6 applies to information acquired by L when acting as X's lawyer, since according to the comment of that rule, the duty of confidentiality continues after the lawyer/client relationship is terminated.²¹⁷ Of course, as conservator, L can and should act with the benefit of information acquired while X's lawyer and in X's best interests.

Consider another scenario. L has represented X as a lawyer for many years, and now is appointed trustee of a trust created by X. Under one alternative situation, L has not, and does not now represent any of the trust beneficiaries. Thus, Rule 1.6 would apply to information acquired from X while acting as X's lawyer; and L may not reveal that information except as authorized by Rule 1.6. Can L, nonetheless, act on that information? Providing that L acts in the best interests of all the beneficiaries and exercises independent judgment, she probably can act on the information acquired.

An alternative situation would arise if L has, or does, also represent as lawyer, one or more of the trust beneficiaries. Rule 1.6 would apply to information L acquired from X and also from the represented benefi-

systems, systems for caring for the surviving spouse, systems for caring for needy relatives, systems for dealing with unexpected emergencies, and systems for dealing with persons who may have potential conflicts among each other and with the client for whom the estate planning is being done.

Avery, *supra* note 48, at 12.

215. See Restatement (Second) of Trusts § 170 cmt. s (1959) ("The trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary.").

216. The key issue of if, and to whom, L may disclose X's incompetence and seek appointment of a conservator, is beyond the scope of this article. Nonetheless, there may be a need to either clarify or expand Rule 1.14 to allow the lawyer, under specific circumstances, to assume the role of guardian/conservator.

217. The Comment to Rule 1.6 provides: "The duty of confidentiality continues after the client-lawyer relationship has terminated." Model Rules of Professional Conduct Rule 1.6 cmt. (1992).

ciaries; and L may not reveal the information except as authorized in Rule 1.6.

Can L act on the information? For example, information learned while representing beneficiary ("B") led L to conclude that B is a no good spendthrift and as trustee L has broad discretion to distribute or accumulate income.

Rules 1.7(b), 1.9, and 2.1 are applicable here and might force the lawyer to withdraw both as lawyer for the beneficiary, and as fiduciary, unless the beneficiary consents to her use of the information. It is debatable whether it is appropriate to recommend that the Model Rules be changed to allow L to continue to serve as trustee. Arguably, because L can act to B's detriment on the basis of information acquired while representing B, the rules should not be changed. A better solution is for L to resign as the trustee.

Alternatively, the rules could be expanded to allow for a special or provisional fiduciary to take the place of the original fiduciary only in dealing with the specific issue causing the conflict. This would allow the fiduciary to be "screened" from the situation for which she has detrimental information regarding B.

3. Application of Rule 2.2 Intermediary Provisions When the Lawyer Serves as a Fiduciary

Typically, a fiduciary trustee or personal representative is not a mediator between parties, but is instead an independent decision maker who, in making decisions, keeps the best interests of all the beneficiaries in mind. Nonetheless, cases where the need for mediation could develop include:

I. The will or trust requires all of the beneficiaries to agree, for example, regarding the division, or sale, of some property, and they in fact disagree;

II. After the fiduciary makes a decision, one or more of the beneficiaries is dissatisfied with the decision.

Case I seems an appropriate matter for the lawyer/fiduciary to mediate, subject to the safeguards of Rule 2.2. Rule 2.2 refers to the lawyer as intermediary and had no counterpart in the Model Code. The rule allows a lawyer to represent multiple parties simultaneously when the clients' interests are substantially, though not entirely compatible.²¹⁸

218. According to Rule 2.2:

(a) A lawyer may act as intermediary between clients [after meeting three conditions]: (1) the lawyer [must] consult[] with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtain[] each client's consent to the common representation; (2) The lawyer [must] reasonably believe[] that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and (3) the lawyer [must] reasonably believe[] that the common representation can be

Case II, however, does not seem appropriate for mediation; the fiduciary is not disinterested because she made the decision to which the beneficiary objects and could be sued for breach of fiduciary duty if the mediation is unsuccessful. In fact, perhaps the requirement in Rule 2.2(a)(3) that the lawyer reasonably believes that the common representation can be undertaken impartially cannot be met in case II.

If there is a need for mediation, for example, as in case I above, it would seem that the requirements/safeguards of Rule 2.2(a) and (b) are desirable and appropriate where the lawyer/fiduciary can mediate. Suppose in case II, however, that the lawyer does, or has, represented one of the beneficiaries as lawyer in other matters. In that case, either because the lawyer has confidential information that she could use to the betterment or detriment of that client's position, or because of general conflict of interest problems, the lawyer/fiduciary should not intermedicate. In fact, it would seem that Rule 2.2(a)(2) and/or (3) would prevent the lawyer/fiduciary from intermediating.

In a case that is a proper one for mediation by the lawyer/fiduciary (e.g., case I), any party can later force the withdrawal of the fiduciary as mediator under Rule 2.2(c), and the rule may also require the lawyer/fiduciary to resign as fiduciary. Because withdrawal from the mediation should not require in many situations the lawyer/fiduciary to resign as the fiduciary, Rule 2.2(c) should be amended to include that when a lawyer serving as fiduciary withdraws from a mediation, that withdrawal does not itself affect her capacity to continue as the fiduciary.

The conflicts of interest Rules 1.7 and 1.9 necessarily imply consideration of the rules of confidentiality and mediation as well. In the context of the lawyer serving solely as fiduciary, the Model Rules fail to address the conflict of interest, confidentiality, and mediation problems the lawyer as fiduciary faces. While the rules provide guidelines, further clarifications or amendments regarding the role of lawyers as fiduciaries would be helpful. This is particularly so because lawyers serving solely in a fiduciary capacity apparently will still be bound by the rules of ethical conduct because they are considered to be functioning in their professional capacity.

CONCLUSION

The ethical and legal regulations governing lawyers serving in other fiduciary roles are not developed fully enough to provide adequate guidelines to lawyers functioning in those roles. Lawyers need clearer guidelines to help them serve their clients as fiduciaries. This need is crucial in

undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

Id. at Rule 2.2(a). If any of these conditions is no longer satisfied, then the "lawyer shall withdraw as intermediary if any of the clients so request. . . . Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation." *Id.* at Rule 2.2(c).

light of the tendency by the courts to assume that both the standards of professional ethics and fiduciary law are applicable to a lawyer serving as fiduciary, whether or not she is also serving as a lawyer. We have suggested here several possible amendments to the Model Rules of Professional Conduct to help lawyer/fiduciaries better protect themselves and their clients.