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Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate

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Is it possible for an attorney to have a conflict of interest when the attorney represents a trustee who is also a beneficiary of the trust? Is that situation similar to having two clients? What if the trustee is not only a beneficiary, but also a claimant against the trust? Since the trustee has three roles to play, is that situation similar to the attorney having three clients? The issue presented by these potential conflicts was one of the most vexing for the drafters of the Fifth Edition of the ACTEC Commentaries. The range of possible approaches goes from a requirement that a separate lawyer is needed for each role to a view that a client with multiple roles can rely on one lawyer. This article examines the various court and ethics opinions, considers the arguments for the different approaches, and recommends best practices for attorneys when their clients have such conflicts.

The Professional Responsibility Committee of the American College of Trust and Estate Counsel (ACTEC) faced many tough issues when drafting the Fifth Edition of the Commentaries to the Model Rules of Professional Conduct. One of the most difficult topics was the ethical duties owed by a lawyer whose client is both a fiduciary and a beneficiary of a trust or estate. It is axiomatic that clients may be juggling conflicting personal and professional interests with respect to situations for which they are obtaining legal advice. However, a lawyer's duty to avoid conflicts of interest under the Rules of Professional Conduct may constrain the lawyer's advice to such a client. This is particularly problematic in a trusts and estates practice, where the fiduciary client, who seeks the lawyer's advice on how to discharge the client's fiduciary duties, also seeks advice on the client's personal interest in the trust that may conflict with the other beneficiaries of the fiduciary es-

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tate. There are three potential responses to this scenario: (1) that there can be no conflict since the client is one person; (2) that the client must have separate representation for each separate role; and (3) that whether a lawyer may represent a client with respect to both roles depends on the circumstances. Previous editions of the Commentaries had not directly addressed the issue but had given somewhat vague advice appearing to follow the first approach. The Fifth Edition, which is the most recent edition and was approved by the ACTEC Board of Regents at its annual meeting in March 2016, moves toward the third position and gives some specific examples.

However, analysis of case law and ethics opinions from the various states indicate disagreement in how to approach this issue. When a lawyer is faced with this issue, it is critical that the lawyer's first step is determining whether her jurisdiction has addressed the lawyer's ethical responsibilities. The different contexts in which the question arises also can affect the answer. One context is in connection with the discipline of an attorney for violating the Rules of Professional Conduct. Another context is where a party moves to disqualify an opposing counsel because the opposing counsel has a conflict of interest when the attorney's client fills two or more roles. A third context is where an attorney is seeking court approval of attorney fees, and an opponent is objecting because the attorney has a conflict of interest due to the fact that the attorney's client fills two or more roles. A fourth context is when an attorney is sued for malpractice because the attorney has a conflict of interest.

The relative frequency of this issue arising and the uncertainty of the lawyer's duties create enough risk to lawyers to warrant caution. This article discusses the various decisions dealing with this issue as well as the Commentaries' advice and attempts to identify the most problematic scenarios. The authors of the article hold somewhat different views on the topic and intend to offer the differing viewpoints and arguments for and against those viewpoints, as well as giving authority and analysis to assist lawyers in confirming any controlling authority, drawing their own conclusions and in managing such conflicts in their own practices.

I. The ACTEC Commentaries Position

A. History of the Commentaries

The first edition of the ACTEC Commentaries was issued in 1993 and was authored primarily by Professor John Price of the University of

Washington Law School.[1] The purpose of the Commentaries was to address the concern that the Rules of Professional Conduct did not sufficiently consider the professional responsibilities of trust and estate practitioners. The Commentaries aimed to give particularized guidance to ACTEC Fellows and other lawyers with respect to the types of ethical situations encountered in a trust and estate practice, including questions relating to representation of a fiduciary.[2] A Second Edition of the Commentaries was issued in 1995, and in 1999 a Third Edition was published, together with a separate publication containing sample engagement letters.[3] The Fourth Edition was published in 2005, and the Fifth Edition was published in 2015.[4] A Second Edition of the sample engagement letters was approved in 2007 and a Third Edition was approved in 2017.[5] The ACTEC Foundation funded preparation and dissemination of the Commentaries and the Engagement Letters.

The Commentaries have been used by courts and state bar associations for both ethics opinions and disciplinary actions.[6] The approach of the Commentaries, however, is to give general guidance in applying the RPCs to a trust and estates practice and recommend best practices rather than to create corollary rules or pronounce certain practices as violations of the RPCs. Where it is particularly relevant, the Commentaries point out state variations, but generally, the Commentaries address primarily the text of the Model Rules.[7]

B. Previous Commentaries Editions' Position on Representation of the Fiduciary/Beneficiary

The Commentaries before the Fifth Edition did not directly address the issue of a fiduciary's multiple roles. However, in the commentary to Rule 1.7, the Fourth Edition stated,

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1 Am. Coll. Tr. & Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 3 (5th ed. 2016), http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf [hereinafter *ACTEC Commentaries*].

2 *See* John R. Price, *New Guidance on Ethics for Estate Planners,* 22 EST. PLAN. 17 (1995).

3 *ACTEC Commentaries*, *supra* note 1, at 6; Am. Coll. Tr. & Estate Counsel, *Engagement Letters: A Guide for Practitioners*, at 1 (3d ed. 2017), http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

4 *ACTEC Commentaries*, *supra* note 1, at 7, 9.

5 *ACTEC Engagement Letters*, *supra* note 3, at 1.

6 *See, e.g.*, Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 135 Cal. Rptr. 2d 888, 901-02 (Cal. Ct. App. 2003); A v. B, 726 A.2d 924, 929 (N.J. 1999); Estate of Albanese v. Lolio, 923 A.2d 325 (N.J. Super. Ct. App. Div. 2007); *In re* Estate of Dawson, No. 51778-3-1, 2004 WL 2430120, at *4 (Wash. Ct. App. Nov. 1, 2004); Conn. Bar Ass'n., Informal Op. 15-07 (Oct. 2015); Ky. Bar Ass'n., Ethics Op. E-401 (Sept. 1997).

7 Price, *supra* note 2, at 18.

> Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party.[8]

This language indicates a position consistent with the most conservative approach to the issue, that the lawyer may not represent the client in both the fiduciary and claimant roles, regardless of the circumstances. The Fourth Edition also gave the following example:

> Example 1.7-2. Lawyer (*L*) represents Trustee (*T*) as trustee of a trust created by *X*. *L* may properly represent *T* in connection with other matters that do not involve a conflict of interest, such as the preparation of a will or other personal matters not related to the trust. *L* should not charge the trust for any personal services that are performed for *T*. Moreover, in order to avoid misunderstandings, *L* should charge T for any substantial personal services that *L* performs for *T*.[9]

This example also implies that the lawyer must avoid the conflict. However, it would allow the lawyer to represent the trustee in matters that "do not involve a conflict of interest."

C. Fifth Edition Commentary on the Issue

In the ACTEC Professional Responsibility Committee's discussions on the issue, a conservative position that a lawyer should always avoid a conflict by not representing a fiduciary client in the client's individual capacity was considered too restrictive, particularly in light of common practice of representing a surviving spouse who is both fiduciary and beneficiary of the deceased spouse's estate.[10] The Fifth Edition added the following language to the commentary on RPC 1.7:

> *Representation of Fiduciary in Representative and Individual Capacities*
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> Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be serving as executor while at the same time being a beneficiary of the estate, and may want

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[8] Am. Coll. Tr. & Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 93 (4th ed. 2006) (on file with author).

[9] *Id.*

[10] UNIF. TRUST CODE § 802 cmt. (UNIF. LAW COMM'N 2000) ("For example, it is not uncommon that the trustee will also be a beneficiary."). Reports of the Professional Responsibility Committee's deliberations are based solely on Professor Boxx's recollections.

the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client's personal interest, such a "dual capacity representation" poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities.

In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer's clients. MR 1.7(a)(2) notes that "if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person" then MR 1.7(b) must be complied with, including the duty to get informed consent found in MR 1.7(b)(4). Waivers from beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MR 1.7(b)(4) only contemplates waivers from "affected client[s]." Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

> Example 1.7-4 *X* dies leaving a will in which *X* left his entire estate in trust to his spouse *A* for life, remainder to daughter *B,* and appointed *A* as executor. *A* asked *L* to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. *L* explained to *A* the duties *A* would have as personal representative, includ-

> ing the duty of impartiality toward the beneficiaries. *L* also described to *A* the implications of the common representation, to which *A* consented, including an informed agreement to forego any right to have the *L* advocate for *A*'s personal interest insofar as it conflicts with *A*'s duties as executor. *L* may properly represent *A* in both capacities. However, *L* should inform *B* of the dual representation and indicate that *B* may, at his or her own expense, retain independent counsel. In addition, *L* should maintain separate records with respect to the individual representation of *A*, who should be charged a separate fee (payable by *A* individually) for that representation. *L* may properly counsel *A* with respect to her interests as beneficiary. However, *L* may not assert *A*'s individual rights on *A*'s behalf in a way that conflicts with *A*'s duties as personal representative. If a conflict develops that materially limits *L*'s ability to function as *A*'s lawyer in both capacities, *L* should withdraw from representing *A* in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).
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> Example 1.7-5 *X* dies, leaving a will giving *X*'s estate equally to his three children. Child *A* was appointed executor. *A* engages *L* to represent her as executor. A dispute arises among the three children over distribution of *X*'s tangible personal property, and *A* asks *L* to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, *L* may need to advise *A* to obtain independent counsel to represent her in the dispute. In addition, *L* may need to advise *A* to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties.[11]

In other words, the Commentaries now take the position that representing a client as both fiduciary and beneficiary can be done but depending on the circumstances, there may be an insurmountable conflict.

II. The Client's Conflict

It is important to note that a fiduciary is generally not subject to the same prohibition on conflicts of interest to which attorneys are subject. For example, a conflict of interest on the part of a trustee is not necessarily grounds for removal. Often the trustee is also one of several beneficiaries of the trust, yet the trustee is allowed to serve, as pointed out in

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[11] *ACTEC Commentaries*, *supra* note 1, at 107-08.

the official comments to section 802 of the Uniform Trust Code. A comment to the Third Restatement of Trusts, section 37, states:

> Thus, the fact that the trustee named by the settlor is one of the beneficiaries of the trust, or would otherwise have conflicting interests, is not a sufficient ground for removing the trustee or refusing to confirm the appointment. This is so even though the trustee has broad discretion in matters of distribution and investment.[12]

However, in some cases the conflict of interest is so fundamental that removal of the fiduciary is warranted. In *Wharff v. Rohrback*,[13] one of the duties of the personal representative was to consider suing herself for causing the wrongful death of the decedent. The court held that the personal representative should be removed because that conflict was sufficiently substantial to justify removal.[14] But when such a fundamental conflict was not present, courts have declined to remove the personal representative, even when the personal representative served in two roles.[15]

A trustee does not have a conflict of interest merely because a trustee must balance the conflicting interests of the various beneficiaries. The Third Restatement of Trusts, section 90, comment c, states:

> Unlike the financial and other personal interests of the trustee, the divergent economic interests of trust beneficiaries give rise to conflicts of types that cannot simply be prohibited or avoided in the investment decisions of typical trusts. These problems regularly present the trustee with problems of conflicting obligations to diverse beneficiaries. . . . The interests of a life-income beneficiary, for example, are almost always inherently in competition with those of the remainder beneficiaries, especially in light of the risks of inflation; and the different tax circumstances of the various beneficiaries frequently create competing investment preferences, among concurrent as well as successive beneficiaries. . .

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12 RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f(1) (AM. LAW INST. 2003).

13 952 P.2d 87, 89-90 (Or. Ct. App. 1998).

14 *Id.* at 90. Other Oregon cases have held that a personal representative with such a fundamental conflict of interest warranted removal. *See, e.g.*, *In re* Estate of Elder, 83 P.2d 477, 479 (Or. 1938); *In re* Estate of Faulkner; 65 P.2d 1045, 1047 (Or. 1937); Bean v. Pettengill, 109 P. 865, 865 (Or. 1910); *In re* Estate of Vander Galien 614 P.2d 127, 128 (Or. Ct. App. 1980).

15 *E.g.*, Roley v. Sammons, 170 P.3d 1067, 1073 (Or. Ct. App. 2007), *review denied*, 174 P.3d 1016 (Or. 2007); *see also* Schaad v. Lorenz, 688 P.2d 1342, 1350 (Or. Ct. App. 1984).

> These conflicting fiduciary obligations result in a necessarily flexible and somewhat indefinite duty of impartiality. The duty therefore requires the trustee to balance the competing interests of differently situated beneficiaries in a fair and reasonable manner.[16]

Similarly, section 79(1)(a) of the Third Restatement notes that trustees should take into account the differing interests of the beneficiaries, noting that the trustee has a duty to administer the trust "impartially and with due regard for the *diverse* beneficial interests created by the terms of the trust."[17] Thus, if one beneficiary has received property from the trust to which the beneficiary was not entitled, that beneficiary can be required to repay the funds, or "his beneficial interest is subject to charge for the repayment thereof, unless he has so changed his position that it is inequitable to compel him to make repayment."[18] Such a charge is often referred to as an offset. The Uniform Trust Code is silent on the subject of offsets, but the *Arken* case indicates that the right of offset is nevertheless available to a trustee.[19] Moreover, UTC section 816(18) permits a trustee to lend money to a beneficiary, and may collect such loans by offsetting the loan amount from future distributions to the beneficiary.

The Restatement (Second) of Trusts, section 255, agrees: "If the trustee makes an advance or a loan of trust money to a beneficiary, the beneficiary's interest is subject to a charge for the repayment of the amount advanced or lent."[20] Comment (f) to that section states that a spendthrift clause does not change that result: "Although the interest of the beneficiary is not transferable by him or subject to the claims of creditors, his interest is subject to a charge for advances made to him out of the trust property unless the trustor has manifested a different intention."[21]

The application or enforcement of that offset does not create an impermissible conflict of interest for the trustee. The trustee has a fiduciary obligation to deal fairly with diverse beneficial interests, even if that action benefits the interests of one beneficiary and harms the interests of another: "[A] trustee's obligations are not met simply by maximizing current allocations to beneficiaries – and certainly not to one

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16 RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. c.

17 *Id.* § 79(1)(a) (emphasis added).

18 Arken v. City of Portland, 263 P.3d 975, 1006 (Or. 2011) (quoting RESTATEMENT (SECOND) OF TRUSTS § 254 (AM. LAW INST. 1959)).

19 *Id.* at 996 (citing PERB's Cross-Motion for Summary Judgment as the source of their contention, which mentions offsetting amounts owed to trustees).

20 RESTATEMENT (SECOND) OF TRUSTS § 255 (AM. LAW INST. 1959).

21 *Id.* at cmt. f; King v. King, 434 P.3d 502, 510 (Or. Ct. App. 2018).

group of beneficiaries. A trustee has a duty of impartiality and, 'with respect to the various beneficiaries of the trust,' must administer the trust 'impartially and with due regard for the *diverse* beneficial interests created by the terms of the trust.'"[22]

Similarly, a trustee does not have an impermissible conflict of interest merely because the trustee is able to determine the trustee's compensation and to pay that compensation from the trust. Obviously, a conflict exists between the trustee and the trust (or the beneficiaries) every time a fee is determined and paid from the trust, but that fact does not restrict the ability of the trustee to be compensated, if the compensation is fair.[23] Thus, reasonable trustee compensation does not create an impermissible conflict.[24]

III. The Three Approaches to the Issue of Multiple Client Roles

A. Introduction

In contrast to fiduciaries, attorneys must be much more willing to eliminate potential conflicts of interest. In general, attorneys should not represent a fiduciary while simultaneously representing one or more separate parties who are beneficiaries. Whenever communicating with beneficiaries, the trustee's attorney must avoid giving a beneficiary the impression that the trustee's attorney also represents the beneficiaries; for that reason, it would be helpful to frequently remind the beneficiaries that the trustee's attorney represents only the trustee, and not any of the beneficiaries.[25]

Having established that fiduciaries are generally allowed to have conflicts of interest, while attorneys are not, we turn now to the main question at hand: May one attorney represent one fiduciary who has additional, conflicting roles? There are three potential answers to this question: (1) the client must have separate representation for each conflicting role; (2) the client is one person and therefore may be represented by one attorney in all roles; and (3) the lawyer can represent the client in all roles, unless there is an actual conflict that limits the lawyer's ability to represent the client competently and diligently.

The starting point of our analysis is the general rule that an attorney should not represent a fiduciary while simultaneously also repre-

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22 White v. Pub. Emp. Ret. Bd., 268 P.3d 600, 608-09 (Or. 2011) (quoting Restatement (Third) of Trusts § 79(1)(a)) (emphasis added).

23 Unif. Trust Code § 802(h)(2) (Unif. Law Comm'n 2010).

24 *See* Restatement (Third) of Trusts § 78 cmt. c(4) (Am. Law Inst. 2007).

25 *ACTEC Commentaries*, *supra* note 1, at 36.

senting a *different* person who is a beneficiary, particularly when the beneficiary's interests are adverse to the fiduciary.[26]

All editions of the Commentaries have included an example that somewhat undercuts this general rule:

> Example 1.7-3. Lawyer (*L*) represented Husband (*H*) and Wife (*W*) jointly with respect to estate planning matters. *H* died leaving a will that appointed Bank (*B*) as executor and as trustee of a trust for the benefit of *W* that meets the QTIP requirements under I.R.C. 2056(b)(7). *L* has agreed to represent *B* and knows that *W* looks to him as her lawyer. *L* may represent both *B* and *W* if the requirements of MRPC 1.7 are met. If a serious conflict arises between *B* and *W*, *L* may be required to withdraw as counsel for *B* or *W* or both. *L* may inform *W* of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients). However, without the informed consent of all affected parties confirmed in writing, *L* should not represent *W* in connection with an attempt to set aside *H*'s will or to assert an elective share.[27]

The Commentaries also state that "[u]nder some circumstances it is acceptable for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate, subject to the fiduciary client's overriding fiduciary obligations."[28] Previous versions of the Commentaries stated that such representation was "appropriate" but the Fifth Edition changed the adjective to "acceptable," weakening the endorsement of the practice.

California courts have also acknowledged that it is possible to represent a fiduciary and a beneficiary. "Whether the attorney for an administrator of an estate may act for one of the heirs as against the other heirs in an adversary proceeding relating to the property of the estate depends on the circumstances of the particular case, and whether there is any conflict between the interests of the estate and those of the heir in respect of the matter involved."[29] In *In re Estate of Healy*,[30] the court held that the attorney for an executor did not violate any duty to the executor by also serving as the attorney for an heir in a dispute with

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26 *See* Potter v. Moran, 49 Cal. Rptr. 229, 231 (Cal. Dist. Ct. App. 1966); Va. Legal Ethics Op. 1720 (1998).

27 *ACTEC Commentaries*, *supra* note 1, at 104.

28 *Id.* at 39.

29 Morales v. Field, DeGoff, Huppert & MacGowan, 160 Cal. Rptr. 239, 245-46 (Cal. Ct. App. 1979), (citing McCabe v. Healy, 70 P. 1008 (Cal. 1902); Fairchild v. Bank of Am., 13 Cal. Rptr. 491 (Cal. Ct. App. 1961)).

30 70 P. 455 (1902).

other heirs in which the administrator had no interest. The court stated that the dispute "is in effect a suit to determine a controversy between different heirs as to their respective rights of inheritance, and in such a controversy it is well settled that the administrator has no interest, but is a mere officer of the court, holding the estate as a stakeholder, to be delivered to those whom the court shall decide to be entitled thereto."[31] There are therefore exceptions to the general rule against representing both a fiduciary and one of the beneficiaries, but those exceptions are very fact specific and require that no actual conflict exists.

The more difficult issue, addressed in this article, is whether the attorney may represent a fiduciary while simultaneously representing the *same* person as beneficiary.

To contend that an attorney may represent a party who has two roles is not to say that an attorney may represent co-trustees who have differing interests. An attorney may not represent co-trustees if their interests differ.[32] Co-trustees are often a source of conflicts; because of the possibility of conflicts, the most cautious approach would be to represent only one of the co-trustees. If, for example, the co-trustees are siblings who have a long history of compatibility, an attorney might be able to represent all of the co-trustees, but that attorney will need to keep a very close watch for any conflicts, and if a conflict develops the attorney will likely need to resign from further representation of any of the co-trustees. That same approach should be taken when an attorney is asked to represent two or more beneficiaries. In either instance, the attorney is generally not permitted to keep confidences of one client from the other client.[33] Both clients should be informed in advance that any communication with the attorney and one of the clients will be shared with the other client. If a confidential matter or a conflict develops, the attorney will likely be required to resign from further representation of either person.

B. The Conservative Approach: Client Must Have Separate Representation for Each Role

The most conservative approach is the position apparently taken in the earlier versions of the Commentaries, that a lawyer cannot advise a client both as to the client's fiduciary role and the client's individual interests as a beneficiary. Under this interpretation, the client's conflict between her duties as fiduciary and her personal interests in the estate is imputed to the lawyer, and this makes it impossible for the lawyer to

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31 *Id.* at 477.

32 *In re* Estate of Marks, 569 N.E.2d 1342, 1350 (Ill. App. Ct. 1991); *In re* Disciplinary Action Against McIntee, 833 N.W.2d 431, 433 (N.D. 2013).

33 *ACTEC Commentaries*, *supra* note 1, at 84.

advise the client. In *Smith v. Jordan*,[34] for example, a Connecticut court noted that the lawyer representing the administrator in requesting construction of the Will also represented the administrator and his brother as claimants under the will, and stated that "undoubtedly no harm was done or intended; but sound policy forbids such a practice, and . . . counsel who appear for the executor or trustee in cases brought for the construction of wills ought not to appear and act for legatees and devisees under the will."[35]

RPC 1.7 states:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Neither the rule nor its official comments contemplate the circumstance where the lawyer may represent one person with respect to more than one role in the transaction. In order to conclude that the client with dual roles presents a potential conflict, the term "client" would need to be interpreted as "client with respect to a particular role." As stated by a Connecticut state court, "[a]s a reasonable extrapolation, this court finds that this rule of law, which applies to two clients with adverse interests, should also apply to one client represented in a dual capacity with adverse interests."[36]

The definition of concurrent conflict includes the situation where there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client or a third person. Representation of a fiduciary arguably creates duties owed to the beneficiaries of the fiduciary estate. The extent of a fiduciary's lawyer's duties to the beneficiaries varies among jurisdictions and among the type of fiduciary. The Commentaries acknowledge that the lawyer owes some duties to the beneficiary, depending on the circumstances:

> *Duties to Beneficiaries.* The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary ac-

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34 59 A. 507 (Conn. 1904).

35 *Id.* at 508.

36 Frank v. Estate of Frank, No. 66226, 1992 WL 394682, at *5 (Conn. Super. Ct. Dec. 22, 1992).

> cording to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.[37]

Courts have imposed duties on the fiduciary's lawyer in particular circumstances. For example, in *Pederson v. Barnes*,[38] the Alaska court upheld a malpractice verdict against a guardian's attorney where the guardian client had stolen almost all of the ward's property. The court relied on the Restatement of the Law Governing Lawyers section 51 and comment h. Under that standard, said the court, an attorney for a guardian owes a duty of care to a minor ward if the lawyer "knows that appropriate action by the lawyer is necessary . . . to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient."[39] Similarly, in *Janssen v. Topliff (Guardianship of Karan),*[40] the Washington court held that the attorney for the guardian of a minor ward owes a direct duty of care to the guardian's ward and could be liable in malpractice for failing to ensure that guardian either posted a bond or deposited guardianship proceeds in a blocked account.[41]

In *Charleson v. Hardesty*,[42] the beneficiaries of a trust sued the lawyer who allegedly represented the trustee. The Supreme Court of Nevada stated that "when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law. In the present case if

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37 *ACTEC Commentaries*, *supra* note 1, at 39 (commentary on RPC 1.2).

38 139 P.3d 552 (Alaska 2006).

39 *Id.* at 557 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51).

40 38 P.3d 396 (Wash. Ct. App. 2002).

41 *See In re* Estate of Treadwell, 61 P.3d 1214, 1217 (Wash. Ct. App. 2003) (citing Janssen v. Topliff (Guardianship of Karan), *supra* note 40) (duty of care owed directly to the ward by the lawyer for the guardian of an incapacitated adult).

42 839 P.2d 1303 (Nev. 1992).

[Defendant Lawyer] was the attorney for the trustee, we conclude that he owed the [Plaintiff Beneficiaries] a duty of care and fiduciary duties."[43]

In an Arizona case, *Estate of Shano*,[44] the court held that an attorney should be disqualified, and his fees disallowed, because the attorney had a conflict of interest when his ethical obligations to his client, the executor, conflicted with the duties of fairness and impartiality that the executor owed to the surviving spouse, a beneficiary. The court reasoned that the duties of the attorney for the executor were "congruent" with the fiduciary duties the executor owed to the surviving spouse.[45] The holding in that case was limited seven years later when the same court held that the duties of fairness and impartiality that the executor owes to beneficiaries do not result in the beneficiaries becoming clients of the executor's attorney.[46]

Under an interpretation that the fiduciary's lawyer owes duties to the beneficiaries, representation of a client in both their fiduciary and beneficiary role could create a concurrent conflict because of the duties owed to the other beneficiaries.[47]

A conflict could also be found if the "client" as identified in the rule may be the estate or trust rather than the fiduciary. As stated in the comments to RPC 1.7,

> 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. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.[48]

In a jurisdiction where the fiduciary estate is considered the client rather than the fiduciary, it is more likely that a court or disciplinary committee will find a conflict of interest in representing the fiduciary with respect to his or her individual interests.

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43 *Id.* at 1306-07.

44 *In re* Estate of Shano, 869 P.2d 1203 (Ariz. Ct. App. 1993).

45 *Id.* at 1208.

46 *In re* Estate of Fogleman, 3 P.3d 1172, 1177 (Ariz. Ct. App. 2000).

47 *See* Daniel R. Nappier, *Blurred Lines: Analyzing an Attorney's Duties to a Fiduciary-Client's Beneficiaries,* 71 WASH. & LEE L. REV. 2609, 2648 (2014).

48 MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt (AM. BAR ASS'N 1983). The Reporter's Note to the First Edition of the ACTEC Commentaries noted that the majority rule was that "a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries. *ACTEC Commentaries*, *supra* note 1, at 2.

For example, in *Gagliardo v. Caffrey*,[49] an Illinois case, a brother and sister each owned 47.5% of a family company, with the mother owning the remaining 5%. The brother's estate plan left his estate to his wife and minor children but named the sister as executor and trustee. The brother died in an automobile accident while driving a car owned by the family company. An attorney did some legal work regarding the potential wrongful death claim, and stated that he represented the sister personally as well as the estate of the brother. The wife sued the sister for breach of fiduciary duty (including trying to buy out the estate's interest in the company at a deep discount). The lawyer represented the sister individually in this suit, and the wife moved to disqualify the attorney. The grounds for disqualification were based on RPC 1.9, prohibiting an attorney who has formerly represented a client in a matter from later representing another person in the same or substantially related matter in which the new client's interests are materially adverse to the interests of the former client. The court viewed the client of the prior representation on the wrongful death claim as the estate, rather than the sister as executor. "The adversarial situation here arose instead from a divergence of the estate's interests, which cannot be delineated from those of the sole beneficiary, and the interests of [the family business]. . . . Therefore, the conflict alleged is between the estate and the executor, whose individual interests would benefit from an action detrimental to the estate."[50] The court further stated that because the wife was the sole beneficiary, "under the narrow circumstances of this case, we conclude that, for the time [the lawyer] represented the estate, he represented [the wife]."[51] So under the court's application of RPC 1.7, the wife was considered the former client. The court went on to determine whether the attorney could have obtained confidential information about the estate when he was involved as the estate's attorney that would be relevant to the wife's action against the sister. The court said it was enough to show that confidential information "could have been" communicated, and upheld the trial court's disqualification of the attorney.[52]

In another Illinois case, *Estate of Hudson v. Tibble*,[53] the decedent left a spouse as well as a son from a previous marriage. There was a dispute over a business that the surviving spouse claimed was owned 100% by her. The son argued that the business was included in his father's estate, which would give him a 50% ownership. The spouse had

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49 800 N.E.2d 489 (Ill. App. Ct. 2013).

50 *Id.* at 496.

51 *Id.* at 497.

52 *Id.* at 498.

53 99 N.E.3d 105 (Ill. App. Ct. 2018).

been appointed executor and hired a lawyer to represent her as executor. The son moved to remove the spouse as executor, and the lawyer defended her in those actions. Eventually, the spouse agreed to resign and an independent executor was appointed. The lawyer continued to represent the spouse in her individual capacity. The new executor and the son then sued the lawyer for malpractice. They alleged that the lawyer also represented the business. The spouse also sued the lawyer for malpractice. The court first noted that Illinois law holds that an attorney hired by an estate representative owes a duty to the estate:

> [I]t seems axiomatic to this court that when an attorney is retained by an administrator for the purpose of administering the estate, its client is in actuality the administrator and the estate due to the symbiotic nature of their concurrent existence. The administrator only acts to serve the estate, and the estate cannot act but through the name of the administrator. Thus, we find the attorney-client relationship between an attorney and an estate to be inherent when the attorney is retained to assist in the administration of the estate.[54]

The court noted that the engagement letter was not clear as to whether the lawyer was representing the spouse as executor or whether the purpose was to advance her personal interests in the estate. The lawyer advocated for the spouse's position that the company was hers alone. But the lawyer also filed documents on behalf of the estate. The court reversed the trial court granting of the lawyer's summary judgment motion, because "here, an adversarial situation arose regarding ownership of the bus company, which should have resulted in defendants' first and only allegiance being to the Estate."[55] The court also quoted from another opinion that "an attorney representing an estate must give his first and only allegiance to the estate when . . . an adversarial situation arises."[56]

In both *Gagliardo* and *Estate of Hudson,* there were significant conflicts between the estate's interests and the executor's personal interests, so it is difficult to judge whether a court would be more forgiving if the conflict were more benign.[57]

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54 *Id.* at 114.

55 *Id.* at 116.

56 *Id.* (quoting *In re* Estate of Kirk, 686 N.E.2d 1246, 1250 (Ill. App. Ct. 1997)).

57 In two cases, an attorney who was representing one person who was serving in two roles stipulated to the presence of a conflict of interest on the part of the attorney. One was an Ohio case, in which the attorney was suspended for six months after he stipulated to a conflict of interest caused by his simultaneous representation of an executor in her fiduciary capacity and in her individual capacity, when her siblings accused her of misappropriating estate assets. Because the matter was stipulated, the issue of the

A Minnesota court took a similar position in *Estate of Peka*.[58] In that case, the decedent was survived by his minor child and his ex-wife. The estate was left to the minor child with the decedent's sister as trustee. The will included a provision that the ex-wife and her mother would never be allowed to live in his home. The ex-wife filed an action to be able to purchase the home, either in her own name or as conservator for the minor child. She also contested the estate's position on using life insurance to pay child support arrears. The same law firm represented the ex-wife individually and as conservator for the child. She argued the firm had no conflict because they represented only her, but the court distinguished her from the conservatorship and noted there were actual conflicts between her individual interests and those of the conservatorship.[59] She was required to hire separate counsel for the conservatorship.[60]

The North Carolina disciplinary authorities and courts have taken a strict view on the issue. In a 1987 ruling,[61] the North Carolina Bar's Ethics Committee was asked whether a lawyer could represent a surviving spouse as executor and in her individual capacity. The spouse's deceased husband's estate had two contested creditor claims that also made claims against the surviving spouse individually. One creditor was attempting to collect a debt owed jointly by husband and the surviving spouse. The second creditor was the first wife, who was claiming the estate owed money to her and her minor children pursuant to a separation agreement. Both of the creditors sought costs from second wife in her capacities as personal representative and individually. The surviving spouse who was the personal representative engaged one attorney to represent her in both claims. The North Carolina State Bar ruled that one attorney cannot represent the surviving spouse in her two capacities

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conflict was not contested or litigated. Cin. B. Ass'n. v. Robertson, 49 N.E.3d 284, 285 (Ohio 2016). In the second case, a 2001 Washington disciplinary case, a lawyer was disciplined for representing a client both as executor of an estate and in her individual capacity claiming a bank account that was the major asset of the estate. The client claimed that she was added as owner to the bank account during her father's life, and the other beneficiaries contested her claim. That ruling is of limited assistance because the attorney stipulated to the presence of a conflict, and thus that issue was not discussed in any detail. *Discipline Notice: Thomas Robinson*, WASH. BAR ASS'N (May 4, 2001), https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=1541&dID=436 (last visited May 17, 2019).

58 *In re* Estate of Peka, No. A07-147, 2008 WL 467425 (Minn. Ct. App. Feb. 12, 2008).

59 *Id.* at *5.

60 *Id.*

61 N.C. State Bar, *Representation of Administratrix in Official and Individual Capacities*, Formal Ethics Op. 22 (Apr. 17, 1987), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-22/.

because "there are conflicts between her interests in the two roles."[62] The opinion indicated a treatment of the estate as the client, and went even further, stating that the conflict would have to be waived by the first wife and the minor children.[63]

A 1992 ethics opinion made a similar conclusion.[64] An attorney was retained to represent the personal representative of an estate. The personal representative was accused of misappropriating assets. The personal representative resigned and was being sued by the successor personal representative. The attorney represented the original personal representative in defending against the suit. The North Carolina Bar ruled that the attorney had represented the personal representative in her fiduciary capacity and had also represented the estate as an entity, and thus the attorney could not take a position against the former client — the estate — when the interests of the former client are adverse to the current client — the former personal representative — unless the estate consented.[65] The successor personal representative then moved the court to disqualify the attorney due to a conflict of interest.

A North Carolina appellate court also followed this approach, affirming a trial court ruling that an attorney should be disqualified from representing an executor in her capacity as executor and in her individual capacity, when the executor/individual was accused of removing assets from the estate.[66] This was not an ethics disciplinary action; instead, it was a ruling on a motion to disqualify the attorney from continuing to represent the client in her two roles. The appellate court found that the granting of the disqualification motion was a discretionary act by the trial court, and that the trial court had not abused its discretion when it granted the disqualification motion.[67] The appellate court did not necessarily conclude that the ethics rules had been violated, but the court cited both the rules of professional conduct and the ethics opinions cited above.[68] The language of the opinion indicated that the court considered the estate as a separate client.[69]

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62 *Id.*

63 *Id.*

64 N.C. RULES OF PROF'L CONDUCT Op. 137 (Oct. 23, 1992). The opinions issued before 1997 were decided under a prior version of the rules of professional conduct.

65 *Id.*

66 Williams v. Williams, 746 S.E.2d 319 (N.C. Ct. App. 2013).

67 *Id.*

68 *Id.* at 323.

69 *Id.* at 321 (stating "Plaintiffs asserted that the nature of this representation created a conflict of interest between two current clients of [the lawyer] – or between a current and a former client, depending on whether Harrington continued to represent the [estate] through representation of Defendant in her capacity as administratrix.").

These cases and rulings, and the text of the rule, lend support to the view that representation of a client in both fiduciary and beneficiary capacities is a conflict of interest for the attorney. Even with the strict view, there are circumstances where there is no conflict, such as where the client is the sole beneficiary of the estate. Certainly an attorney can represent a fiduciary who is also a beneficiary where the beneficiaries are not in conflict and the client is not asking for assistance with individual concerns. However, particularly in jurisdictions that would consider the estate or trust the client, representing the fiduciary's individual interests that diverge from the interests of the other beneficiaries can be considered a conflict under RPC 1.7(b)(1), a matter that is directly adverse to another client. In jurisdictions where some duty to the beneficiary is inferred when the lawyer represents the fiduciary, a conflict can be found under RPC 1.7(b)(2), that prohibits representation where duties to a third person may materially limit representation. Conflicts under RPC 1.7(b)(2) may require more facts indicating an actual conflict than conflicts under RPC 1.7(b)(1).

C. The One Client One Lawyer Approach: Lawyer Can Represent the Client in Both Roles

In Oregon and in a few other states, the answer is that the attorney cannot have a conflict of interest if he or she represents one client who has two roles; the attorney nevertheless has only one client.[70] If the client has three roles, the answer is the same. In each case, the duty of the attorney is to advise the one client how to balance that one client's various interests. The client has conflicting interests, but the attorney does not have conflicting clients.

The fact that the trustee is also one of the beneficiaries does not require that person to retain two attorneys: one to represent the person as the trustee, and one to represent the person as a beneficiary. That one person needs only one attorney, and the attorney will not have a conflict of interest simply because the one client has a conflict of interest, or plays two conflicting roles. The Oregon State Bar has stated,

> It follows that when Lawyer A represents Widow as an individual and Widow in her capacity as personal representative, Lawyer A has only one client. Alternatively stated, the fact that Widow may have multiple interests as an individual and as a

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[70] *See* Oregon State Bar, *Conflicts of Interest, Current Clients: Fiduciaries*, Formal Op. No. 2005-119, at 2 (Aug. 2005), https://www.osbar.org/_docs/ethics/2005-119.pdf. Note that in 2005 and 2006, the OSB Ethics Committee re-wrote and re-published many of the prior Formal Ethics opinions. As a result, Opinions 1991-119 and 2005-119 are essentially the same opinion, but the latter opinion has citations to the more recent version of the rules.

> fiduciary does not mean that Lawyer A has more than one client, even if Widow's personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7 do not apply to Lawyer A's situation.[71]

In short, the Oregon approach relies heavily on the fact that RPC 1.7 is based on the possibility that a conflict might exist between *two* clients of the same attorney. RPC 1.7(a)(1) finds a conflict to be present when "the representation of *one* client will be directly adverse to *another* client."[72] RPC 1.7(a)(2) is similarly worded, referring to the interests of one or more clients conflicting with the interests of *another* client. Thus, the rule clearly contemplates a conflict among two or more clients, not a conflict within the roles of just one client.

Two cases indicate that California may have opted to follow this approach. In *Baker Manock & Jensen v. Salwasser*,[73] the court allowed an attorney to represent a client with dual capacities after finding there was no conflict. It was an attorney disqualification case in which an executor named George was also a beneficiary of the estate. George was represented by one law firm, but his position in the litigation as executor was the same as his position as beneficiary. The court stated, "Thus, even if the law firm were viewed as representing 'two Georges' who at least in theory, could have conflicting interests . . . , in the case before us, there is no divergence of the interests of George as executor and George as beneficiary. Accordingly, there is no conflict of interest in representing both the executor and the beneficiary."[74]

Also in California, in *Estate of Buoni,*[75] an attorney represented an executor who was also a creditor of the estate. When an opponent moved to disqualify the attorney due to an alleged conflict of interest, the court concluded that the client had a conflict, but the attorney did not. The court noted that under California probate statutes, claims submitted by an executor must be reviewed by the probate court, thus offering an additional layer of protection. The court held:

> In applying the above standards here, the identity of the client must first be determined. Only one individual is involved, i.e.,

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71 *Id.* at 2-3 (citations omitted).

72 OR. RULES OF PROF'L CONDUCT r. 1.7(a)(1) (OR. STATE BAR 2018) (emphasis added).

73 96 Cal. Rptr. 3d 785 (Cal. Ct. App. 2009).

74 *Id.* at 787.

75 *In re* Estate of Buoni, No. F048163, 2006 WL 2988737 (Cal. Ct. App. Oct. 20, 2016).

> respondent. However, does respondent, as personal representative and creditor, become two clients for purposes of rule 3-310(C)?
>
> The attorney for a personal representative represents the fiduciary alone, not the estate. An estate is neither a legal entity nor a natural or artificial person. Accordingly, respondent, as a personal representative and as a creditor, is only one client. As respondent's attorney, [the attorney] does not represent either the estate or appellant as a beneficiary.
>
> Nevertheless, there still remains the question of whether the representation of one client in these two capacities violates rule 3-310(C). In other words, is [the attorney] disloyal to respondent as the personal representative by also representing respondent as a creditor of the estate and vice versa? The answer clearly is "no." Logically, where only one person is the client, the attorney is not dividing his or her loyalty between two or more clients. [The attorney] remains in a position to be loyal to respondent's interests alone. Thus, this case is distinguishable from the situation where an attorney for a corporation, who as corporate counsel represents the corporation's officers in their representative capacity, also attempts to represent a corporate officer personally. In that case, the attorney acquires a conflict of interest with the corporation, a separate legal entity to whom the attorney owes a separate duty of loyalty.
>
> This is not to say that no conflict of loyalties may exist in this case. However, it is respondent (the personal representative) who has the conflict, i.e., a personal interest in a claim against the estate that he is administering, not his attorneys. . . .
>
> In fact, if it were concluded that [the attorney] was disqualified, respondent would be in the untenable position of having to employ two separate attorneys to avoid the identical situation.
>
> In sum, in representing respondent, [the attorney] represents only one client. Further, the interests of the estate and the beneficiaries are protected by the section 9252 procedure. Accordingly, disqualification of [the attorney] is not required.[76]

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[76] *Id.* at *2-3 (citations omitted).

D. The Compromise Approach: Lawyer Can Represent the Client in Both Roles Unless There is an Actual Conflict

When drafting the Fifth Edition, the ACTEC Professional Responsibility Committee moved away from the more conservative, simplistic approach of previous editions and took this more pragmatic approach because the realities of practice frequently put a lawyer in a "conflict" when there is little danger of actual conflict. The most common scenario is the estate where the surviving spouse is the executor as well as the lifetime beneficiary of trusts under the decedent's Will. The surviving spouse can be faced with a number of decisions both as executor and as beneficiary, and will look to the lawyer for advice on those decisions. Those decisions could have effects on the remainder trust beneficiaries and other beneficiaries. If those beneficiaries are children of the surviving spouse or are otherwise in agreement with the surviving spouse, the lawyer should be able to advise the surviving spouse as to all decisions. In fact, the client would likely be dissatisfied with advice from a lawyer that she will need separate attorneys for the two categories of decisions. Because it is common for attorneys to represent such a client in both roles, and the Commentaries should not disapprove of a common practice that in fact serves the client well, the Fifth Edition shifted to an approach that would allow such representation except where there is an actual conflict.

There are numerous cases and ethics opinions that support this approach, although the rulings are very fact-dependent. In *Kennedy v. Kennedy*,[77] the court held that the client's positions as plaintiff suing his brother and as executor of his mother's estate were not in conflict, so the lawyer could represent the client in both capacities.

In a New York attorney disqualification case, *Flasterstein's Estate*,[78] the court held that an attorney may represent an executor who is also a residuary beneficiary of the estate, and thus the attorney should not be disqualified from doing so. In that case, the executor was attempting to acquire assets for the estate, which would have increased the shares of all of the residuary beneficiaries, and thus a conflict was not created by the two roles.[79] In dicta, the court commented that "it may be claimed" that an attorney represents conflicting interests if the attorney were to represent an executor who is also individually making a claim against

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[77] Nos. HHDCV084038504S, HHDCV094042030S, HHDCV106016706S, HHDCV115035876S, HHDCV116022030S, HHDCV116026647S, 2013 WL 3119216 (Super. Ct. Conn. May 28, 2013).

[78] *In re* Flasterstein's Estate, 210 N.Y.S.2d 307 (Sur. Ct. 1960).

[79] *Id* at 308.

the estate, but the opinion did not indicate what the court's ruling would have been under those facts.[80]

Subsequently in New York, the Surrogate's Court decided *Birnbaum's Estate*,[81] which relied on *Flasterstein* to conclude that an attorney representing a widow who was both a co-executor and a beneficiary of the estate, would not be disqualified from representing the widow.[82] In that case, the co-executor had made a loan from the estate to her son. A different co-executor brought suit to seek repayment of the loan. In addition, that other co-executor sought disqualification of the widow's attorney, based on an alleged conflict of interest due to the two roles played by the widow. The court ruled against disqualification, stating that the pending dispute involved the widow in her fiduciary capacity, not in her individual capacity as beneficiary.[83] The court also noted that three separate law firms were representing the three separate co-executors, that all of the children beneficiaries also had separate counsel, and that hiring separate counsel for the widow individually would be "unnecessary and wasteful."[84]

Also in New York, in *Estate of Tenenbaum*,[85] an attorney represented a client who was serving as both claimant and co-executor. When an opposing party moved to disqualify the attorney due to an alleged conflict of interest, the court declined to disqualify the attorney. The court noted that the client was pursuing her claim in her individual capacity as a claimant, and not as a co-executor.[86] In addition, the three co-executors were opposing the claim, and all three were represented by counsel. Thus the interests of the estate were adequately protected.[87] The court did note that if the claimant were the sole executor, then a conflict of interest "might conceivably" be present.[88]

In *Estate of Klarner,*[89] a Colorado case, the decedent left funds in a QTIP trust, with the remainder at the spouse's death to go to his two children and her two children. After he died, the widow changed her estate plan so that her estate would go to her two children alone. She had her two sons and a law firm appointed as trustees of the QTIP trust. On her death, there was a dispute whether the QTIP trust had to pay

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80 *Id.*

81 *In re* Birnbaum, 460 N.Y.S.2d 706 (Sur. Ct. 1983).

82 *Id.* at 707.

83 *Id.* at 708.

84 *Id.* at 709.

85 2006 N.Y. Misc. Lexis 9013 (Sur. Ct. Jan. 4, 2006).

86 *Id.* at *3-4.

87 *Id.* at *4.

88 *Id.* at *4-5.

89 *In re* Estate of Klarner, 98 P.3d 892 (Colo. App. 2003), *rev'd*, 113 P.3d 150 (Colo. 2005).

the estate taxes due as a result of its inclusion in the widow's estate. One of the arguments made by the decedent's two children was that the widow's sons and the law firm had a conflict of interest. The court of appeals held that the widow's sons had a conflict of interest in serving as trustees of the QTIP trust, and the law firm also had a conflict because it was in the "precarious position of advocating . . . an advantageous position for its clients, Marian's sons, that, if successful, would operate to the detriment of the beneficiaries to whom it owes a duty of loyalty."[90] The court of appeals directed the trial court on remand to determine whether the trustees should be removed and whether their compensation should be reduced or denied.[91] The decision was reversed by the Colorado supreme court, which held that the "friction" caused by the apportionment of taxes issue was insufficient grounds for removal of the trustees.[92] While this case involved a conflict because of the lawyers' role as trustee, where they owed clear duties to the trust beneficiaries, rather than mere representation of trustees, it illustrates the conflict that can arise.

So where is the line that triggers the need for separate representation of the client? The ACTEC Commentaries leave that up to the lawyer, with two examples that illustrate the safe zone without exploring the grey zone. An opinion analyzing the position of an attorney in an insurance defense tripartite relationship of lawyer/insurance company/insured gives a helpful description of how a conflict can arise when a lawyer is juggling a client's multiple roles. In *American Mutual Liability Insurance Co. v. Superior Court*,[93] the law firm was engaged by an insurance company to represent its insured, a doctor being sued for malpractice in several cases. The doctor then sued the insurance company for bad faith in connection with one of the malpractice cases. The law firm withdrew from representing the insured, and the plaintiff in a separate malpractice case petitioned for the law firm's files. The insurance company objected to the disclosure of the files. The court discussed the nature of a representation in an insurance defense setting that has some relevance to the fiduciary/beneficiary client because of the two roles.

In such a situation, the attorney has two clients whose primary, overlapping and common interest is the speedy and successful resolution of the claim and litigation. Conceptually, each member of the trio — attorney, client-insured, and client-insurer — has corresponding rights and obligations founded largely on contract and, as to the attorney, by the Rules of Professional Conduct as well. The three parties may be

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90 *Id.* at 894, 895.
91 *Id.* at 899.
92 *See In re* Estate of Klarner, 113 P.3d 150 (Colo. 2005).
93 113 Cal. Rptr. 561, 565 (Cal. Ct. App. 1974).

viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim or litigation against the insured. Communications are routinely exchanged between them relating to the joint and common purpose — the successful defense and resolution of the claim. Insured, carrier, and attorney, together form an entity — the defense team — arising from the obligations to defend and to cooperate, imposed by contract and professional duty. This entity may be conceived as comprising a unitary whole with intramural relationships and reciprocal obligations and duties each to the other quite separate and apart from the extramural relations with third parties or with the world at large. Together, the team occupies one side of the litigating arena.

> The tranquility of this coalition is disturbed however, where, as here, disagreement arises between the members. Dissatisfaction flowering into litigation may disrupt the harmony of the arrangement. The attorney who formerly represented two clients in a special and unique relationship now must choose among alternative courses of action. He may totally withdraw from the entire relationship. He may continue to represent the insured as to third parties on pending matters, continuing at the same time to represent the insurer. Other avenues may be open to the attorney but the carefully structured relationship, and the communications between the participants which theretofore had been founded upon and exchanged in confidence, and which had been an integral part of the arrangement, thereafter are markedly different in cases where insured and insurer become antagonists. Where, as here, the insured in suing the insurer further alleges active participation, indeed collusion, in the conduct in question of attorney and insurer, the attorney must and has withdrawn from further representation of the insured in all pending matters involving the insured. The situation has changed. Partners have become adversaries. The closely-knit fabric of confidentiality is torn and shredded.[94]

Applying this analysis to the fiduciary/beneficiary client, as long as the client's role as fiduciary does not conflict with the client's interests as a beneficiary, there is no conflict. But if those interests conflict, the "harmony" of the arrangement has been disturbed. The issue in this case was confidentiality, and ultimately the court held that the files could not be disclosed because of the duty of confidentiality owed to the client insurance company (although the language of the opinion was some-

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94 *Id.* at 572.

what confusing as to the basis of the holding).[95] The court's analysis is helpful in showing that the lawyer continues to owe duties to both clients in the tripartite relationships, even after the relationship deteriorates.

In *In re Trust Created by Hill*,[96] the law firm had drafted the trusts in 1917 and had represented the trustee of the trusts since then. The trusts held Oregon timberland. The daughter of the trustor was the beneficiary of one of the trusts and brought an action against the trustee for breach of fiduciary duty. The law firm had previously represented the daughter with respect to her personal business matters, and the daughter moved to disqualify the law firm from representing the trustee in the action. The law firm had also advised the daughter that she could not remove and replace trustees (one of the contested issues). The law firm no longer represented the daughter. The court held that the law firm should not be disqualified.[97] The court noted that the law firm had represented the trust for over seventy years and the daughter was aware of this.[98] The court further found that there were no confidences shared by the daughter that she could expect to be withheld from the trust.[99] The court analyzed the circumstances of the representation of the daughter and held that the matters were not substantially related.[100] This is likely a common scenario where a law firm represents a family for decades and advises multiple generations. The law firm avoided disqualification in this case but this could have gone either way, particularly since the law firm had advised the daughter on her rights in the trust.

In *Estate of Gory*,[101] the widow was the personal representative of the estate. She hired one law firm to represent her as personal representative and separate counsel for personal claims against the estate. The other beneficiaries objected to her fee, and the law firm representing her as personal representative represented her at the fee hearing. The other beneficiaries moved to disqualify the law firm, arguing that the law firm owed a fiduciary duty to the beneficiaries to ensure that excessive compensation was not paid. The trial court agreed that the fiduciary duties owed to both the personal representative and the beneficiaries meant that the lawyers could not represent one against the other.[102] The appellate court reversed.[103] The court had "no quarrel with the view

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95 *Id.*
96 499 N.W.2d 475 (Minn. 1993).
97 *Id.* at 495.
98 *Id.* at 493.
99 *Id.*
100 *Id.* at 492.
101 *In re* Estate of Gory, 570 So. 2d 1381, 1382 (Fla. 2015).
102 *Id.* at 1382-83.
103 *Id.* at 1383.

that counsel for the personal representative of an estate owes fiduciary duties not only to the personal representative but also to the beneficiaries of the estate."[104] However, the court pointed out that in Florida, the client is the personal representative rather than the estate or the beneficiaries:

> It follows that counsel does not generate a conflict of interest in representing the personal representative in a matter simply because one or more of the beneficiaries takes a position adverse to that of the personal representative. A contrary position would raise havoc with the orderly administration of decedents' estates, not to mention the additional attorney's fees that would be generated.[105]

In a similar holding, the Illinois court held that an executor's lawyer's duty is to the estate rather than the beneficiaries. In *Tagliasacchi v. Morrone,*[106] the lawyers represented the executor (who was also a beneficiary) for less than a year. When the lawyers withdrew, another beneficiary sued them for breach of fiduciary duty. The court noted that in a controversy among beneficiaries, the lawyer's duty is owed to the estate.[107] The court also noted that at the time the lawyers began representing the executor, the executor and her sister had been in conflict over the estate for years.[108] The lawyers could therefore not be able to represent the executor if they were also charged with protecting the "diametrically opposed" interests of the sister.[109] The lawyers therefore owed no duty to the sister and her complaint had been properly dismissed.

E. Evaluation of the Different Approaches

There are reasonable justifications for each of the aforementioned approaches, and that fact establishes how difficult it is to resolve which approach is the most consistent with a lawyer's ethical duties under the Rules of Professional Conduct. This section considers those justifications but leaves it to the reader (and the courts and disciplinary authorities) to answer that question.[110]

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104 *Id.*

105 *Id*. Notably, Florida's lawyer-client privilege statute states that for purposes of the privilege, "only the person or entity acting as a fiduciary is considered a client of the lawyer." FLA. STAT. § 90.5021(2) (2019).

106 2017 IL 1–17–1178 (Ill. App. Ct. unpubl. Nov. 21, 2017).

107 *Id*. at ¶ 12 (citations omitted).

108 *Id.* at ¶ 13.

109 *Id.*

110 Mr. Jones is most familiar with the Oregon approach, *see supra* Part III.C, and finds that approach to be most protective of the client's interests; Professor Boxx, who

The conservative approach, requiring separate attorneys for each role the client plays, may be the most expensive but certainly is the most protective for the attorneys involved, because it eliminates any suggestion of conflict. Each attorney can give focused advice on what is best for the specific role the attorney has been asked to advise, while still tailoring the advice to consider the effect of any course of action on the client's other interests. The Rules of Professional Conduct acknowledge that a lawyer should give more than "purely technical advice" and that it is "proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."[111] In *Bagley v. Bagley*,[112] the Utah court was considering whether an automobile accident victim's surviving spouse could bring an action as heir and personal representative against herself as driver. In holding that she could bring the suit, the court responded to arguments from the Utah Defense Lawyers Association that allowing the suit would create a concurrent conflict of interest, even with separate lawyers representing her, because it would strain the attorney's ability to communicate with the client, who is also the opposing party.[113] The Association also argued that the client's ability to communicate with the attorney would be limited because she would be reluctant to reveal information to one lawyer that could be used against her.[114] The court said these arguments were "not without merit" but fail because the issues were "manageable," noting that the client had a requirement to cooperate with her insurer and the court could mitigate the issues.[115]

This situation is similar to a shareholder derivative suit, where a disgruntled shareholder is suing the corporation to compel the corporation to make claims against members of the management who have allegedly misappropriated corporate assets. In those situations, the corporation and the management have different interests, and the corporation must retain counsel different than the counsel retained by

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was co-Reporter for the Fifth Edition of the Commentaries, favors the middle ground approach followed by the Fifth Edition, *see supra* Part III.D.

111 MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2, 3 (AM. BAR ASS'N 1983).

112 387 P.3d 1000, 1003 (Utah 2016).

113 *Id.* at 1011 n. 37 (citing UTAH RULES OF PROF'L CONDUCT r. 4.2(a)).

114 *Id.*

115 Another example of a lawyer's ability to represent only one role when necessary is the position of White House Counsel. The White House Counsel is not the President's personal lawyer; he or she provides legal advice to the Office of the Presidency. While the position has come under significant criticism, primarily because the lawyers are "yes men" to the President, *see* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 19 (2010), President Bill Clinton's relationship with White House Counsel Bernard Nussbaum was an example of the need to draw lines between the personal interests of the President and the role of the Presidency. *See* William H. Simon, *The Professional Responsibilities of the Public Official's Lawyer: A Case Study from the Clinton Era,* 77 N.D. L. REV. 999, 1009 (2002).

management. However, a corporation is an entity that can retain counsel to protect its interests. An estate cannot retain counsel in most states; only the personal representative retains counsel. Because of this legal disability, the two roles cannot be separated into two separate clients, but may be represented by separate lawyers.

In jurisdictions where the estate, rather than the fiduciary, is considered the client, the conservative approach seems to be the only ethical choice, since representing a beneficiary and the estate would present a significant conflict. Also, in jurisdictions where the fiduciary's lawyer owes some duties to the beneficiaries, the conservative approach may be necessary to keep the lawyer from impermissible conflicts.

The conservative view protects the lawyer in a claim that the lawyer failed to protect the executor's individual interests. In *Sabin v. Ackerman*,[116] for example, the lawyer represented the daughter of the decedent as executor of her father's estate. Her brother leased the father's farm and exercised an option to purchase the farm for less than fair market value. The lawyer prepared the documents to complete the sale. After the estate closed, the executor and her other brother sued the farming brother, challenging the option, and settled for a small amount. She then sued the lawyer for failing to advise her or to recommend independent counsel because of her potential claim as a beneficiary to challenge the terms of the option. The court ultimately dismissed the claim, finding that the relationship between an attorney and an executor does not impose a duty to protect the executor's personal interests.[117] The court also held that the facts did not indicate the executor thought the lawyer was representing her individually nor did they indicate a reason the option was open to challenge.[118]

The one-client-one-lawyer approach followed in Oregon, however, has logical appeal. Arguably, one attorney representing one client cannot present a conflict of interest. Consider the alternative: Let's assume an executor is also a claimant. One attorney can advise that one client whether it would be a breach of her fiduciary duties to pursue a claim against the estate. If the claim is valid and is supported by adequate evidence, then the executor cannot be held to have breached her fiduciary duties by pursuing that valid claim. But if the claim is uncertain or is not supported by adequate evidence, the pursuit of that claim might invite the beneficiaries to allege that the executor has breached her fiduciary duties by pursuing that questionable claim. The executor does not need two attorneys to so advise her. One attorney can (and should) eas-

116 846 N.W.2d 835, 837 (Iowa 2014).

117 *Id.* at 843.

118 *Id.* at 845.

ily recommend a course of action regarding that claim that will avoid potential liability on the part of the executor.

This is consistent with the notion that the job of the fiduciary's attorney is to help the fiduciary stay out of trouble, i.e., help prevent the fiduciary from breaching any fiduciary duties. In particular, one responsibility of the attorney is to minimize the liability of the fiduciary to the beneficiaries and the creditors. Any duties owed by the fiduciary's lawyer to the beneficiaries and creditors must be limited, or there will be conflicts with the duties of the lawyer owed to the fiduciary.[119] If the fiduciary's attorney does her job correctly, the beneficiaries will indirectly benefit because the attorney will advise the fiduciary to do her job properly by taking actions to protect the interests of the beneficiaries.

If an attorney cannot represent a fiduciary who is also a claimant, the client will need two independent attorneys: one to represent her as a fiduciary, and one to represent her as a claimant. What happens if the attorney for the creditor recommends that she pursue her claim, while the attorney for fiduciary recommends that the fiduciary resist that claim? That seems to be an untenable situation.

The two solutions at the far ends of the spectrum both can be justified but both have their flaws. The conservative approach is expensive and can be confusing to the client, particularly a client not experienced in dealing with lawyers. The client can be put in a position of getting conflicting advice without any counsel on how to reconcile such advice. The conservative approach therefore protects the lawyer from any ethical violations but does not necessarily serve the client. The one-client-one-lawyer approach is most appealing to the client, because the client can discuss all angles of the client's situation with one trusted advisor who is able to tailor his advice to serve both roles. However, the conflict between the two roles may make it impossible for the lawyer to give competent advice. The surviving spouse suing herself is one example where one lawyer could not advise both roles. In the trusts and estates context, one example of extreme conflict is the personal representative who is claiming personal ownership of a significant asset that can also be claimed by the estate. Another example is interpretation of distribution provisions in a trust where the surviving spouse is trustee and lifetime

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119 The Commentaries describe the duties to the beneficiaries and creditors as follows: "The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries." *ACTEC Commentaries*, *supra* note 1, at 39.

beneficiary and the remaindermen are children from a prior marriage who are hostile to the stepparent.

The compromise position is appealing to lawyers because it suits lawyers' tendency to give "it depends" as an answer to everything. It attempts to achieve the best of both worlds, allowing the client one advisor (and one bill) except where the conflict would cause disciplinary or other problems for the lawyer. However, its drawback is the uncertainty. The lawyer must make the determination, in every case, whether the circumstance warrants separate representation, while most likely getting pressure from the client to represent the client in both roles. Lawyers in a jurisdiction like Oregon have the comfort of the ethical opinions and can always insist on separate representation in extreme cases. Lawyers in jurisdictions following the conservative approach can rely on the restrictions imposed by the disciplinary authorities in their state. Nevertheless, the compromise approach is the one most likely to be used by a lawyer not aware of any controlling authority, because it follows the general contours of how lawyers must evaluate any potential conflict.

IV. Best Practices for the Attorney for the Fiduciary

In contrast to fiduciaries, attorneys must studiously avoid conflicts of interest. In reviewing the various rulings and decisions, unless an attorney is practicing in a jurisdiction like Oregon or North Carolina that has drawn clear lines on the issue, the attorney is left with only vague guidance. The critical first step is to determine the positions taken by courts and the bar association in your own jurisdiction, and then to familiarize yourself with the common circumstances that have caused attorneys to be disciplined, sued for malpractice, or disqualified. If an attorney determines that dual representation is acceptable under the circumstances, additional precautions nevertheless should be taken.

The first best practice is to avoid representing a fiduciary while simultaneously representing one or more beneficiaries. As noted above,[120] the Commentaries and other authorities recognize some circumstances where this would be acceptable, but the lawyer must be clear that no conflict exists. Whenever communicating with beneficiaries, the fiduciary's attorney must avoid giving a beneficiary the impression that the attorney also represents the beneficiaries. The commentary to RPC 1.2 in the Commentaries recommends,

> As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will,

120 *See supra* notes 29-33 and accompanying text.

> from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.[121]

It would also be helpful to frequently remind the beneficiaries that the fiduciary's attorney represents only the fiduciary, and not any of the beneficiaries.

If the client is both fiduciary and beneficiary, the lawyer should clarify at the outset of the representation whether the scope of the representation will include both roles. The ACTEC sample engagement letter for fiduciaries contains the following language:

> Please understand that we represent you only in your fiduciary capacity as [PERSONAL REPRESENTATIVE/EXECUTOR]. We do not represent individual beneficiaries of the estate, even though we will from time to time provide them with information about your administration of the estate. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel, as we do not represent them.
>
> [OPTIONAL PROVISIONS where the executor is also a beneficiary:]
>
> Because you are a beneficiary of the estate, we cannot advocate for you to maximize your share. If there is a dispute with another beneficiary about your entitlements, we cannot represent you individually in that dispute, and you will have to seek your own independent counsel.[122]

In addition to clarifying the scope of representation in the engagement letter, the lawyer should discuss the issue directly with the client so that there is no misunderstanding.

If the lawyer determines that under the circumstances, it is acceptable to advise the client with respect to both her fiduciary duties and her individual interests in the estate, it may be necessary or advisable to keep two sets of time entries, one reflecting time spent representing the fiduciary and one reflecting time spent representing the same person as beneficiary. The purpose of the two sets of time entries would be to charge the fiduciary estate for its representation, and to charge the same person individually for services related to the person's individual interests in the estate. In most situations where the client is both fiduciary and beneficiary, two sets of time records will not be necessary as long as

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121 *ACTEC Commentaries*, *supra* note 1, at 37.

122 *ACTEC Engagement Letters*, *supra* note 3, at 72.

the client's individual interests are not in conflict with other beneficiaries and the lawyer's advice is focused on the fiduciary estate administration. If the client's personal interests coincide with the clear wording of the trust document, then the fiduciary is not advancing the personal interests of the fiduciary as beneficiary, but instead is merely carrying out the terms of the fiduciary estate, which the fiduciary is obligated to do.

The ACTEC Commentaries suggest that if an attorney determines that it is acceptable to represent a person in both fiduciary and beneficiary capacities, the attorney should "insist" that the client sign a waiver releasing the attorney from any obligation to argue for the fiduciary's personal interest that may be "inconsistent with the client's fiduciary duty."[123] If the client declines to sign the waiver, the Commentaries suggest that the attorney should refuse to accept the dual capacity representation, and if such a conflict arises without a waiver in place the lawyer must withdraw from representation of the client in any capacity.[124] Under the Oregon approach, that seems to be too conservative, and would appear to lead to the need for the client to retain two different attorneys. Under the Oregon approach, one attorney can help the client balance her two interests and select a course of action that protects the interests of all parties. For example, in a sensitive situation the beneficiaries can be notified of the proposed course of action and be given an opportunity to object. If an objection is received, or one is anticipated, a petition can be filed with the court asking for instructions to be granted after a hearing at which the fiduciary and the objecting parties can all be heard.

The ACTEC Commentaries also discuss the question of obtaining waivers from the other beneficiaries in which they consent to the dual representation and waive the potential conflict. The Commentaries conclude that such waivers are not necessary, because the beneficiaries are neither present nor past clients of the attorney. As a result, the Commentaries conclude that such waivers "do not seem called for by the rules, nor do they seem necessary or appropriate."[125] But in Example 1.7-4, the Commentaries suggest that the beneficiaries should be advised that the attorney represents the fiduciary in both capacities and the beneficiaries should be advised that they may need to obtain independent counsel. Advising the other beneficiaries of the lawyer's role is consistent with the lawyer's duties under RPC 4.3[126] and should prevent misunderstanding. In any estate or trust administration, even one without a

123 *ACTEC Commentaries*, *supra* note 1, 107.
124 *Id.*
125 *Id.*
126 *Id.* at 192.

dual role held by the fiduciary, the attorney for the fiduciary should advise the beneficiaries that the attorney represents only the fiduciary, and not any of the beneficiaries, and the beneficiaries should be advised to obtain their own counsel if they have legal questions.[127] The presence of a fiduciary with two roles does not change that best practice. The notice to the beneficiaries should always inform them whom the attorney represents, and if the fiduciary has two roles, those two roles should be disclosed. However, the lawyer must remain vigilant to changes in circumstances that create an untenable conflict, considering the jurisdiction's view of the role of counsel for the fiduciary.

V. Conclusion

As with most ethical issues, there is no clear answer to whether an attorney may advise a client as to both the client's fiduciary duties and the client's individual interests as beneficiary of or creditor to the fiduciary estate. A strong argument can be made for allowing the practice, because then the attorney is in a position to assist the client in weighing the available options to serve both roles. Also, the attorney can be under pressure from the client to take on the dual representation as more efficient and economical. The potential for conflict, however, requires careful consideration of the specific circumstances before determining to take on such dual representation. The attorney should clarify the attorney's role at the beginning of the representation, to both the fiduciary and the beneficiaries, and all parties should be reminded of the attorney's role throughout the representation. The attorney must remain alert to the potential for conflict that limits the attorney's ability to give competent advice with respect to either role. As pointed out in the examples described in this article, failure to be alert to those conflicts can lead to a need to withdraw, or disqualification, discipline, or liability to a client.

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127 *Id.*