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Participant Guide

Developments in Trust and Estate Administration and Fiduciary Liability

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Presents

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Developments in Trust and Estate Administration and Fiduciary Liability

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A. Areas of Greatest Hazard for Fiduciaries

1. Trust Distributions

a. ***In re the G.B. Van Dusen Marital Trust Under the Grosvenor B. Van Dusen Revocable Trust Agreement Dated December 17, 1981, As Amended*, 834 N.W.2d 514 (Minn.App. 2013).** Grosvenor B. Van Dusen ("G.B.") established a marital trust for the benefit of his wife, Virginia, and directed the Trustee to pay the income to Virginia for her life. The trust instrument further provided that the Trustee had discretion to distribute principal to Virginia for her health, education, maintenance and care. The trust instrument stated that G.B. intended for the Trustee to distribute principal to Virginia to enable her to maintain the standard of living to which she was accustomed and to exercise his distribution discretion liberally. The Trustee denied multiple principal distribution requests, and Virginia filed a petition for relief.

The Minnesota Court of Appeals, reversing the trial court, held that the Trustee's denials of Virginia's requests for distributions of principal constituted an abuse of discretion. The court found that G.B.'s dominant intention was to provide for Virginia so as to maintain her standard of living without concern for the preservation of principal, and the Trustee's denial of Virginia's requests was contrary to that intent. The court also determined that the Trustee had a duty to determine Virginia's standard of living at the time of any request for a distribution of principal. Furthermore, although the Trustee had the discretion to consider Virginia's other resources, the Trustee was not permitted to withhold distributions contrary to G.B.'s direction to make liberal distributions of principal to maintain Virginia's standard of living.

b. ***O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400 (Mo.App. W.D. 2013).** The Trustee of a non-marital trust had discretion to make distributions of income to the settlor's wife, Arlene, and to the settlor's descendants for their care, support, maintenance and welfare. Principal could also be distributed to the same individuals to the extent their income and other financial resources were insufficient to provide for such purposes. Regarding distributions, the Trustee was directed to favor the interests of Arlene over the interests of the settlor's descendants. Upon Arlene's death, the trust property was to be distributed to the settlor's then living descendants. The Trustee honored Arlene's annual requests for distribution of all of the net income to her. The Trustee approved a request for a distribution of principal to one of the settlor's sons but denied two other requests from the same son. The sons sued the Trustee for breach of its duty of impartiality, arguing that the Trustee, by making distributions of all of the net income to Arlene essentially put the trust on "auto-pilot." The sons maintained these income distributions were unreasonable because the Trustee failed to examine and balance all of the beneficiaries' needs and resources.

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The court found that the Trustee's decision to distribute all net income to Arlene each year in accordance with her requests, even though there was no remaining net income for the settlor's descendants, was reasonable. The Trustee engaged in a reasoned and well-documented process that the Trustee used periodically to evaluate its distribution decisions. The court explained that Arlene was the preferred beneficiary, and the Trustee was not required to balance Arlene's needs against the needs of the settlor's descendants.

c. ***Beaudoin v. Davidson Trust Co.*, 263 P.3d 755 (Idaho 2011)**. The trust property was to be divided into two equal shares for the decedent's two daughters, Virginia Beaudoin and Margaret Van Dyke. Beaudoin's share was to be held in trust for her life, with the remainder passing to her appointee(s) or her estate. Van Dyke's share was to be held in trust for her life, with the remainder passing to "the surviving issue by right of representation of Beaudoin." The trust instrument further provided with respect to Van Dyke's share, "in the event that Beaudoin's issue are not surviving [at Van Dyke's death], then to Beaudoin."

Beaudoin withdrew her entire share within a couple of years. Van Dyke died less than a year thereafter, at which time Beaudoin had two living children whose interests in Van Dyke's share, contingent to that point, vested. Beaudoin spoke to a trust assistant from the corporate Trustee's office and was allegedly told that she was the remainder beneficiary of Van Dyke's share. The Trustee made a partial distribution of trust funds from Van Dyke's share to Beaudoin. When the mistake was discovered, Beaudoin sued the Trustee claiming breach of fiduciary duty, negligent representation and infliction of emotional distress. Beaudoin claimed damages for the costs she allegedly incurred in reliance on the mistaken distribution, asserting that, based on the Trustee's conduct, she retired from her job, booked a non-refundable vacation, made gifts to her children and made other personal expenditures.

The district court dismissed Beaudoin's breach of fiduciary duty claim against the Trustee. On appeal, the Idaho Supreme Court affirmed the district court's judgment, finding that the Trustee owed Beaudoin no fiduciary duty at the time of the alleged breach. The court explained that there is no fiduciary duty owed to a contingent beneficiary once the contingency has failed to materialize. Beaudoin's status as a beneficiary was eliminated upon Van Dyke's death, and, thus, no fiduciary duty was owed to her at the time of the alleged breach.

d. ***Gwinn v. Gwinn*, 60 N.E.3d 890 (Ill.App. 2016)**. Following his wife's death, the defendant remarried and, in his capacity as Trustee of his wife's trust, subsequently removed at least $425,000 in principal from the trust to pay for a custom-built home which was titled in his new wife's sole name. Pursuant to the trust instrument, the Trustee had discretion to make distributions of income to himself, as the primary beneficiary, and also distributions of principal to himself "as the trustee deems necessary or advisable from time to time for his health, support and maintenance in reasonable comfort." The trust instrument also called for discretionary distributions of income and principal to the Grantor's children (the plaintiffs). The trust instrument stated that the Grantor's "primary concern with respect to [her] children [wa]s for their care and education until they bec[a]me self-supporting…."

Plaintiffs (three of four children of defendant) alleged that defendant had breached the trust by making an "extraordinary gift" to his second wife, and that the purchase of the home was

not necessary for defendant's health, maintenance and support. The Illinois Appellate Court ultimately held that, while the Grantor undoubtedly gave the defendant broad discretion as Trustee to provide for himself as the primary beneficiary, with no particular obligation to support the plaintiffs from the trust assets while he was alive, the defendant could not do whatever he wanted with the trust assets. Nothing in the trust instrument allowed the Trustee, using trust assets, to make extraordinary gifts to his second wife.

2. Trust Investments

a. ***Carter v. Carter*, 965 N.E.2d 1146 (Ill. App. 2012)**. A trust was created by a decedent for his second wife ("Spouse") during her lifetime. Spouse was to receive all of the income from the trust. No principal distributions were permitted during Spouse's lifetime. Upon Spouse's death, the trust remainder was to be distributed to the decedent's daughter ("Daughter"), who was Spouse's stepdaughter. Spouse was named as the Trustee of the trust. The trust instrument granted the Trustee the ability to make a wide variety of investments, "regardless of diversification and regardless of whether the property would be considered a proper trust investment." Spouse, as Trustee, invested all of the trust property in tax-free municipal bonds. Daughter filed suit against Spouse for breach of the following fiduciary duties: duty of impartiality, duty of prudent investment, duty to properly manage trust assets and duty to preserve trust property.

The Illinois Appellate Court held that Spouse's investment of the trust property was consistent with the decedent's intent, and that Spouse's actions were not "wholly unreasonable and arbitrary." The Trustee had broad investment authority and the court concluded that the trust instrument allowed Spouse, as Trustee, to make whatever investments were necessary to maximize income and that no provision of the trust instrument required the Trustee to grow or preserve principal for Daughter.

b. ***Wood v. U.S. Bank*, 828 N.E.2d 1072 (Ohio App. 2005)**. Nearly 82% of the assets of a trust created by John Wood initially consisted of Star Bank stock worth about $8 million. The Trustees were permitted under the trust agreement to retain, manage and invest the stock held in the trust "as they deemed advisable or proper." Shortly after Wood's death, some of the other assets of the trust were sold to cover the debts, taxes and expenses of the estate. As a result, Star Bank stock comprised an even higher percentage of the trust assets than before the sale. The trust's Star Bank stock thereafter plummeted in value, and Wood's surviving spouse, Dana, sued the Trustee.

The court found the language of Wood's trust instrument was unambiguous and authorized Star Bank to retain its own stock even though Star Bank would ordinarily not have been permitted to do so under the "rule of undivided loyalty." However, the retention language in the trust did not override Star Bank's statutory duty to diversify. Ohio R.C. § 1339.54(B) (renumbered as Ohio R.C. § 5809.03(B) (effective 1-1-2007)) tracks Uniform Prudent Investor Act § 3 and requires the existence of "special circumstances" before the Trustee will be relieved of a duty to diversify. The court found that Wood's trust instrument was silent as to diversification, and therefore the duty to diversify set forth in Ohio R.C., § 1339.54(B) applied. The court stated that, to eliminate the duty to diversify, the trust instrument must specifically

authorize the Trustee "to retain in a specific investment a larger percentage of the trust assets than would normally be prudent." *See*, *also*, *Fifth Third Bank v. Firstar Bank, N.A.*, 2006-Ohio-4506 (Ohio App. 2006).

B. Beneficiaries' Consents, Waivers and Releases

Beneficiaries often appreciate efforts by Trustees to keep administration costs down, and the trust termination context is no exception. Trustees and beneficiaries often enter into release and indemnification agreements (a "release") that exonerate the Trustee from liability for any breaches of trust and indemnify the Trustee for costs that may arise while winding up the trust. This approach is often preferred to the alternative of the Trustee's filing accountings with and seeking to have them approved by a court of competent jurisdiction.

Uniform Trust Code ("UTC") § 1009 provides:

> A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:
>
> (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
>
> (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

See also UTC § 817(c); RESTATEMENT (SECOND) OF TRUSTS §§ 216-218; RESTATEMENT (THIRD) OF TRUSTS § 97. A representative of the beneficiary may also execute a release on the beneficiary's behalf. *See* UTC § 1009, cmt. Generally, a Trustee may be reimbursed or exonerated for reasonable costs and expenses relating to trust administration. *See* SCOTT & ASCHER ON TRUSTS § 22.1 (5th ed. 2007 & Suppl.); *see also* UTC § 817, cmt. (stating that reasonable withholding may vary depending on the circumstances of outstanding debts, expenses or taxes).

In *Hastings v. PNC Bank*, 54 A.3d 714 (Md. Ct. App. 2012), the Court of Appeals of Maryland found that a corporate Trustee's request for a release and indemnification from trust beneficiaries prior to distributing the trust remainder to them was lawful. PNC Bank, N.A. ("PNC") was the Trustee of a testamentary trust that terminated upon the income beneficiary's death in 2007. In the process of winding up the trust, PNC sent the remainder beneficiaries an accounting of the entire trust and a "Waiver, Receipt, Release and Indemnification Agreement" along with a letter directing that, if they approved of the accounting, they should sign the agreement and return it to PNC. The agreement also contained a provision that released PNC from liability and provided indemnification to PNC for expenses related to the trust termination.

In addition, the letter stated that PNC would distribute the trust assets upon execution of the agreement. PNC's position was that it was not conditioning the distributions on execution of the agreement but rather was presenting an alternative method for concluding trust

administration (the other alternative being for PNC to obtain the release and indemnification it sought by petitioning a Maryland court to approve a final accounting).

Three of the remainder beneficiaries (the "Petitioners") filed suit against PNC, seeking a judgment declaring PNC's "demand" for the execution of the agreement to be unlawful on the grounds that the terms of the agreement, particularly the indemnification provision, were "over-broad" and extended PNC more protection than was otherwise available to it under Maryland law. The Petitioners also alleged that, in requesting the agreement, PNC had breached is basic fiduciary duty of good faith.

The Court of Appeals of Maryland relied on common law in rejecting these claims and holding that PNC's actions were lawful. The Court noted that "a trustee may engage in a self-interested course of action so long as the beneficiaries provide valid, informed consent" and that a Trustee, therefore, must be able to request such consent.

Not to be overlooked is the court's observation, in a footnote, that the language of the indemnification provision that purported to protect PNC "in its role as trustee and in its corporate capacity" would "not extend protection to other services provided to the Trust by PNC. For example, although the trust department of a financial institution could obtain a release of liability and indemnification agreement for the activities of its trust department in administering the trust, it could not seek a release of liability of its securities brokerage for broker's services provided to the trust, if the trustee happened to employ the institution's own brokerage division to execute trades on behalf of the trust. Otherwise, the financial institution would effectively use its position as trustee to obtain a release for its securities division, which would appear at odds with the duty of loyalty."

The dissent argued that PNC did not provide full information to the beneficiaries in connection with the agreement, stating that "a beneficiary cannot properly consent to a breach of fiduciary duty without having full and complete information relating to the breach." In many other jurisdictions, failure to disclose full information to the beneficiary has invalidated releases. *See, e.g.*, *Janowiak v. Tiesi*, 932 N.E.2d 569 (Ill. App. 2010) (finding lawyer's silence as to transaction damaging to trust assets may constitute fraudulent concealment); *cf. Matter of HSBC Bank U.S.A.*, 70 A.D.3d 1324 (N.Y. App. Div. 2010) (finding that Trustee fulfilled fiduciary duty by providing petitioners with full accounting and petitioners waived rights against Trustee through release).

Courts remain split as to whether a Trustee may condition distributions on the execution of a release provided all relevant information has been disclosed to the beneficiaries. *See, e.g.*, *Allen v. Ritter*, 35 A.3d 443 (Md. App. 2011) (holding that Maryland statutes provided executor the right to request a release before making a distribution that had already been court approved so long as the release was not a product of "fraud, material mistake or substantial irregularity" because without a release the executor could still be sued for claims related to the distribution and have no assets to fund a defense); *but see Bellows v. Bellows*, 196 Cal. App. 4th 505 (2011) (holding that a Trustee could not provide that cashing a check was acceptance of the terms of a receipt and release when California statutes do not permit mandatory distributions from being withheld and previous court order required the distribution). In the absence of a statute

addressing whether a Trustee could condition distributions on execution of a release, the Michigan Court of Appeals in *In re Stout Trust*, 2014 Mich. App. LEXIS 137 (2014), *affirmed in part, reversed and remanded on other grounds*, 2015 Mich. App. LEXIS 2386 (2015), held that the language of a trust instrument did not allow the Trustee to condition mandatory distributions on the execution of a release. The Michigan Trust Code permits a beneficiary to release the Trustee from liability for breaches of trust, but the statute could not be interpreted to "give the trustee the authority to require a release as a condition to a beneficiary's receipt of the distribution that he or she is entitled to pursuant to the terms of a trust."

C. Statutes of Limitation for Bringing Claims Against Fiduciaries

UTC § 1005 provides:

> (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
>
> (b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
>
> (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:
>
> > (1) the removal, resignation, or death of the trustee;
> >
> > (2) the termination of the beneficiary's interest in the trust; or
> >
> > (3) the termination of the trust.

Amending or supplementing a report may not re-start the statute of limitations, particularly if the initial report adequately disclosed the existence of the potential claim for breach of trust and informed the beneficiary of the time he or she has to commence a proceeding against the fiduciary, as was the case in *Ducharme v. Ducharme*, 850 N.W. 2d 607 (Mich. App. 2014). Glazier, "No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Back: Defending Breach of Fiduciary Duty Claims in the Context of Trust and Estate Administration," 58 Tax Management Memorandum 179 (April 17, 2017).

It is important to note that subsection (a) applies only if the Trustee has furnished a report. The statute of limitations period does not begin to run against one who has waived the furnishing of a report or in cases where the Trustee has failed to report to beneficiaries. With regarding to subsection (c), while the five-year limitations period will normally begin to run on the termination of the trust, it can also begin earlier, such as if a Trustee leaves office prior to the termination of a trust or if the beneficiary receives a final distribution prior to the termination of the trust. *See* UTC § 1005, cmt.

In non-UTC states, when the statute of limitations begins to run and when it ends can vary considerably. The statute of limitations may be tolled under a state's statutory or common law due to inadequate disclosure of material information by the Trustee. *See* Horwood, Wolven & Zaluda, 857-2nd T.M., Managing Fiduciary Liability.

D. Lawyer Liability That May Arise From Advising Beneficiaries And Fiduciaries

1. Advising Fiduciaries

a. <u>Privity Doctrine Applied</u>. Some courts apply the privity rule to bar a malpractice claim by a trust or estate beneficiary against the lawyer for the fiduciary. These courts reason that only the executor or trustee, and not the lawyer, should be held accountable to those beneficiaries who are damaged by the fiduciary's negligence. New York, Colorado, District of Columbia, Idaho, Massachusetts, Texas and Virginia are among the states whose laws apply the privity doctrine in this context. *See, e.g.*, *Rovello v. Klein*, 757 N.Y.S.2d 496 (2003); *Allen v. Stoker*, 61 P.3d 622 (Idaho App. 2002); *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994); *Hopkins v. Akins*, 637 A.2d 424 (D.C. 1993).

States have also considered cases by successor fiduciaries against former fiduciaries' lawyers for malpractice with mixed results. *See Roberts v. Feary*, 986 P.2d 690 (Or. App. 1999) (finding that successor Trustee could not maintain action against predecessor Trustee's counsel due to lack of privity between counsel and trust beneficiaries); *cf. Borissoff v. Taylor & Faust*, 93 P.3d 337 (Cal. App. 4th 2004) (stating that successor executor could sue former executor's lawyer for malpractice because probate code specifically provides that successor executors have same powers as predecessors to bring claims on behalf of estate).

b. <u>Lack of Privity No Defense</u>. Other states have held that the lack of privity between an estate or trust beneficiary and the lawyer for the fiduciary is generally not a defense to a legal malpractice claim against the fiduciary's lawyer. In Ohio, where privity is an effective defense in the estate planning context, it usually is not a defense in an action brought by an estate's beneficiaries against the fiduciary's lawyer. *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993); *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989). Arizona, California, Florida, Illinois, Maryland, Michigan, Minnesota, Nevada, North Carolina, Oklahoma, Pennsylvania, Rhode Island and Washington are among the other states that refuse to apply the privity defense in this circumstance. *See*, *e.g.*, *Steinway v. Bolden*, 460 N.W.2d 306 (Mich. App. 1990); *In re Estate of Halas*, 568 N.E.2d 170 (Ill.App. 1991); *but see Jewish Hosp. v. Boatman's Nat'l Bank*, 633 N.E.2d 1267 (Ill.App. 1994) (lawyer owes professional obligations to estate and not to the beneficiaries in handling probate administration due to the potentially adversarial relationship between the interests of the estate and the interests of the beneficiaries). Nevertheless, courts consistently find that no duty is owed by a fiduciary's lawyer to the beneficiaries of an estate or trust under these circumstances.

c. <u>Tests to Determine Duty</u>. The most common tests used to determine whether a lawyer who renders services at the request of a fiduciary owes a duty to a non-client beneficiary are the "multi-factor balancing" test and the "third-party beneficiary" test.

(i) Multi-Factor Balancing Test. This test involves the balancing of several factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether imposing liability placed an undue burden upon the legal profession. *Blair v. Ing*, 21 P.3d 452 (Haw. 2001), *citing Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

In *Goldberger v. Kaplan, Strangis and Kaplan*, 534 N.W.2d 734 (Minn.App. 1995), the court applied the multi-factor balancing test to determine if the lawyer for the executor owed a duty to non-client beneficiaries. In this case the court concluded: (a) the appellants were merely incidental beneficiaries of the lawyer's services; (b) that, until an estate closes, injury to an estate beneficiary is uncertain; (c) an incentive to bring a malpractice suit against the lawyer rests with the executor; and (d) allowing the beneficiaries' claim would place an undue burden on the legal profession because such claims could subject the lawyer to a conflict of interest. The conflict of interest would arise whenever the interests of the executor, acting on behalf of the estate, were to conflict with the interests of the suing beneficiary.

In *Goldberg v. Frye*, 266 Cal. Rptr. 483 (Cal.App. 1990), the court denied the estate beneficiaries' claim because the estate administrator and the lawyer did not enter into their relationship intending to affect the estate beneficiaries. Furthermore, the court stated that "it would be very dangerous to conclude that the lawyer, through performance of his service to the administrator...subjects himself to claims of negligence from the beneficiaries." The court also stated that the beneficiaries are entitled to a fair administration by the fiduciary, but the fiduciary's lawyer does not owe them a duty.

In *Trask v. Butler*, 872 P.2d 1080 (Wash. en banc 1994), the court utilized a modified multi-factor balancing test to conclude that a lawyer representing a former executor did not owe a duty either to the estate or to the estate's beneficiaries. This modified approach initially determines whether the plaintiff is an "intended beneficiary of the transaction to which the advice pertained" and then analyzes the factors under the balancing test. The court found no duty existed for the following reasons: (a) the beneficiaries and the estate itself were not intended to benefit from the relationship between the executor and the lawyer but, rather, were incidental beneficiaries; (b) the heirs of the estate could institute an action against the executor for breach of fiduciary duty; and (c) the conflict of interest a lawyer would encounter in deciding whether to represent the executor, the estate or the beneficiaries would unduly burden the legal profession. *See also*, *Linth v. Gay*, 360 P.3d 844 (Wash. Ct. App. 2015).

(ii) Third Party Beneficiary Test. This approach focuses upon whether the primary purpose of the client-attorney relationship was to benefit the non-client, and involves a two-part test for determining whether a person is an intended third party beneficiary under the RESTATEMENT (SECOND) OF CONTRACTS § 302. In part one of the test, the trial court possesses the discretion to confer standing under a third party beneficiary theory by determining whether "the recognition of the beneficiary's right [is] 'appropriate to effectuate the intention of the parties[.]" Under part two, the performance must "'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the

beneficiary the benefit of the promised performance." *Blair*; *citing Guy v. Liederbach*, 459 A.2d 744 (Penn. 1983).

In *Ferguson v. Cramer*, 709 A.2d 1279 (Md. 1997), the court applied the third-party beneficiary test and held that no duty was owing by an estate's lawyer to the beneficiaries because the beneficiaries could not establish an attorney-client relationship. The court found that the benefit to the beneficiaries from the executor's lawyer was only incidental. The court concluded that, where the executor's conduct falls below the applicable standard of care, the beneficiaries might sue the executor but not the executor's lawyer. This remains true even where the executor hires a lawyer and relies on his or her advice. *See also*, *Neal v. Baker*, 551 N.E.2d 704 (Ill.App. 1990) (dismissing an estate beneficiary's claim because the scope of the lawyer's representation involved matters that were adversarial as to the beneficiary in that she was contesting the lawyer's decision to require her to pay inheritance taxes. Also, the contract between the executor and the lawyer was intended primarily to benefit the executor and the estate and not the beneficiaries).

d. Willful Misconduct. The majority rule is different, however, when the fiduciary's lawyer has engaged in conduct that is more intentional than negligent. Thus, in *Pierce v. Lyman*, 1 Cal.App.4th 1093 (1991), *superseded by statute on other grounds*, 85 Cal.App.4th 382 (2000), the court held that trust beneficiaries may bring an action against the lawyers for the former Trustees where the lawyers intentionally aided and abetted the Trustees in the Trustees' breach of their fiduciary duties. Such activities allegedly included "active concealment, misrepresentations to the court, and self-dealing for personal financial gain." *See also*, *Weingarten v. Warren*, 753 F.Supp. 491 (S.D.N.Y. 1990) (applying New York law, the federal district court held that a trust's remainder beneficiaries stated a cause of action against the Trustee's lawyer individually for breach of fiduciary duty and as executor of the Trustee's estate for alleged conversion of trust assets. However, the court held that the beneficiaries could not assert a cause of action for malpractice against the lawyer). Sometimes, a negligent representation action is an alternative theory available to third parties. *See*, *e.g.*, *Riggs Nat'l Bank v. Freeman*, 682 F.Supp. 519 (S.D. Fla. 1988).

Irrespective of a state's position on privity, a third party is far more likely to be successful in bringing a malpractice action where there has been self-dealing by the lawyer or the lawyer committed an intentional tort against the third party. *See*, *e.g.*, *Stueve Bros. Farms, LLC v. Berger Kahn*, 166 Cal. Rptr. 3d 116 (Cal. App. 4th 2013) (noting that given the extent to which the Trustee and Trustee's counsel acted in concert to withhold information regarding various trust transactions from the beneficiaries, and transfer trust assets into their own bank accounts, the court found that the beneficiaries sustained a claim against the two lawyers).

2. Ethical Duties Owed to Trust Beneficiaries

The ethical duties of a lawyer who represents a Trustee may compel the lawyer to disclose information to the beneficiaries. The ACTEC Commentaries on the Model Rules of Professional Conduct (the "ACTEC Commentaries") for Model Rule 1.2 state that, although the Trustee is primarily responsible for communicating with the beneficiaries, the Trustee's lawyer may communicate directly with the beneficiaries regarding the nature of the relationship between

the lawyer and the beneficiaries. The ACTEC Commentary on Model Rule 1.4 ("Communication") states that the Trustee's lawyer "should make reasonable efforts" to ensure that the beneficiaries are informed of decisions that may substantially affect them.

Specifically, the ACTEC Commentary on Model Rule 1.2 suggests the lawyer should explain the role that the lawyer for the Trustee usually plays in the administration of a trust, including the possibility that the Trustee's lawyer may owe duties to the beneficiaries. The ACTEC Commentary goes on to state that the lawyer should provide information to the beneficiaries regarding the trust but should also warn the beneficiaries that the lawyer does not represent them and that the beneficiaries may wish to retain independent counsel.

The ACTEC Commentary on Model Rule 1.2 also explains the duties that the lawyer owes to the beneficiaries. These duties "are largely restrictive in nature," and "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 nature of these duties depends upon the scope of the representation of the Trustee. A lawyer representing a Trustee should not enter into an agreement with the Trustee that attempts to limit the lawyer's duties to the beneficiaries, unless written notice is provided to those beneficiaries. *But see Sullivan v. Dorsa*, 27 Cal. Rptr. 3d 547 (Ct. App. 2005); *Wells Fargo Bank v. Superior Court*, 990 P.2d 591 (Cal. 2000) (both holding that the Trustee's lawyer owes no duty to the trust beneficiaries).

The potentially expansive nature of the lawyer's communications-related duties to the beneficiaries is further illustrated by the ACTEC Commentaries in the Commentary on Model Rule 4.1 ("Truthfulness in Statements to Others"), which states that, "if a fiduciary is not subject to court supervision and is therefore not required to render an accounting to the court but chooses to render an accounting to the beneficiaries, the lawyer for the fiduciary must exercise the same candor in statements made to the beneficiaries that the lawyer would be required to exercise toward any court having jurisdiction over the fiduciary accounting."

Although the lawyer for the Trustee may have an ethical duty to communicate with the trust beneficiaries, the lawyer must ensure that these communications do not conflict with the Trustee's authority under the trust instrument or otherwise conflict with the lawyer's duties to the Trustee as the client. For example, if a lawyer represents a Trustee who has discretion over income or principal distributions of trust property under the trust instrument, the lawyer should not make representations to the beneficiaries regarding whether and in what manner the Trustee may exercise such discretion. Although the lawyer may have better knowledge than the Trustee of the applicable law regarding a Trustee's exercise of discretion over distributions, the Trustee may have more extensive knowledge of the beneficiaries than the lawyer, such as the beneficiaries' other sources of income, creditor concerns and potential to cause disputes with the Trustee. Thus, the Trustee first should be allowed to exercise the Trustee's discretion to make such determinations, after any discussions with the lawyer as appropriate, and then communicate those decisions to the beneficiaries.

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