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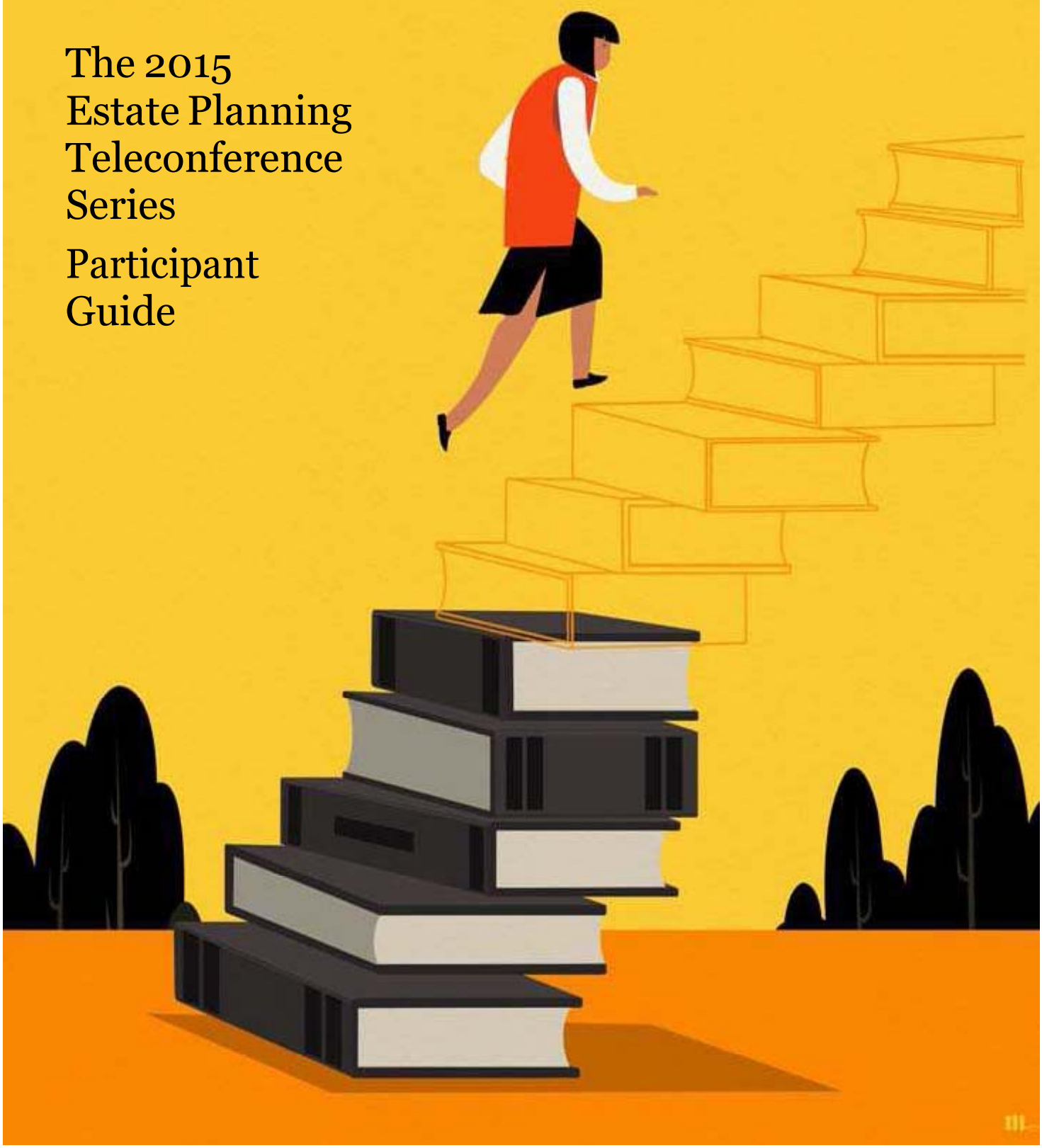

Ethics Issues in Trust Administration

Cannon Financial Institute, Inc.

Presents

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By

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Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar (Probate and Trust Committee), the Illinois State Bar Association (Section on Trusts and Estates), The Bar Association of Metropolitan St. Louis (Probate and Trust Section, member and past chairman) and the Estate Planning Council of St. Louis.

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Mr. Redd is an elected member of The American Law Institute, a Fellow of The American College of Trust and Estate Counsel (Missouri State Chair; Past Regent; Communications Committee (Chair); Estate and Gift Tax Committee; and Fiduciary Litigation Committee) and an Adjunct Professor of Law (Estate Planning) at Northwestern University School of Law. He also serves as Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. Mr. Redd is listed in The Best Lawyers in America and is nationally ranked by Chambers USA in its "Wealth Management" category. He frequently writes and lectures nationally on topics in the trusts and estates field.

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A. Duties Owed to Non-Client Beneficiaries By Lawyers Representing Trustees

1. Lawyer's Duty to Disclose Information to Beneficiaries

The ethical duties of a lawyer who represents a Trustee[1] may compel the lawyer to disclose information to the beneficiaries. The American Bar Association's Model Rules of Professional Conduct (the "Model Rules"), in Model Rule 1.2, which is entitled "Scope of Representation and Allocation of Authority Between Client and Lawyer," addresses this issue. The Model Rule itself states, in pertinent part, that a lawyer must follow the client's decisions concerning the objectives of the representation and that the lawyer may take such action as is impliedly authorized to carry out the representation. With the client's informed consent, a lawyer may limit the representation if the limitation is reasonable. 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).

[1] Although this outline focuses on ethics issues in trust administration, the issues discussed herein may be equally applicable in the estate administration context.

The ACTEC Commentary on Model Rule 1.6 ("Confidentiality of Information") explains that these duties to the beneficiaries, although limited, may qualify the lawyer's duty of confidentiality with respect to the Trustee. Model Rule 1.6 itself states, in pertinent part, that a lawyer shall not reveal information relating to the representation of a client unless informed consent is given, the disclosure is impliedly authorized or the disclosure is permitted by one of several exceptions listed in Model Rule 1.6(b), including a disclosure that is required to comply with a law or court order. Regarding situations in which the lawyer believes that his or her services are being used by the Trustee to commit a fraud resulting in substantial injury to a beneficiary's financial interests, the ACTEC Commentary states that the lawyer usually may disclose confidential information to the extent necessary to protect such beneficiary's interests.

The potentially expansive nature of the lawyer's communications-related duties to the beneficiaries is further illustrated by the Proposed ACTEC Commentaries[2] 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."

In addition, a few states recognize a "fiduciary exception" to the attorney-client privilege that is generally afforded by Model Rule 1.6. *See* Proposed ACTEC Commentaries. The fiduciary exception generally provides that a lawyer may not withhold attorney-client communications from trust beneficiaries if the communication relates to administration of the trust and the lawyer's services are paid for using trust assets. *See* Skidmore & Morris, *Whose Privilege Is It, Anyway? The Fiduciary Exception to the Attorney-Client Privilege*, 27 Prob. & Prop. 21 (Sept./Oct. 2013); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011); *Hammerman v. The Northern Trust Company*, 329 P.3d 1055 (Ariz. App. 2014); *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 712-13 (Del. Ch. 1976). Other states have expressly rejected or limited the fiduciary exception by statute, essentially rejecting the idea that the beneficiaries are automatically clients of the lawyer. *See, e.g.*, Fla. Stat. § 90.5021(stating, in part, that "A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure . . . to the same extent as if the client were not acting as a fiduciary;" N.Y.C.P.L.R. § 4503(a)(2) (in the absence of an agreement between the attorney and the Personal Representative to the contrary, "[n]o beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary;" Personal Representative defined to include Trustees); Ohio Rev. Code Ann. §5815.16 ("an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services

[2] The American College of Trust and Estate Counsel ("ACTEC") is currently updating its commentaries on the Model Rules. The proposed revisions have been approved by the ACTEC Professional Responsibility Committee but have yet to be approved by the Board of Regents. Throughout these materials, references to the unpublished Fifth Edition are referred to as the "Proposed ACTEC Commentaries," and references to the currently published Fourth Edition (2006) are referred to as the "ACTEC Commentaries." A reference to the Proposed ACTEC Commentaries denotes a difference between the two editions.

for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations").

As noted above, a lawyer's duties to trust beneficiaries may change depending on the capacity in which the lawyer represents the Trustee. A lawyer may represent a Trustee in his or her fiduciary capacity and/or in his or her individual capacity. The Trustee's duties to the beneficiaries may be far more limited in the latter case than in the former. The former typically involves "fulfillment of the client's fiduciary responsibilities and not the client's individual goals" while the latter is focused on advancing the client's goals irrespective of the impact on the fiduciary estate. *See* Proposed ACTEC Commentary on Model Rule 1.2. The ACTEC Commentaries acknowledge that some jurisdictions explicitly permit a lawyer to disclose client confidences (in conformity with Model Rule 1.6, regarding confidentiality, and Model Rule 1.8 regarding use of confidences to the disadvantage of a client) if a potential breach of trust has been committed. Accordingly, the ACTEC Commentaries suggest that a lawyer consider conditioning representation of a fiduciary on being able to make this disclosure (evidenced by written agreement) in states that do not require or permit this disclosure to beneficiaries. In the event a lawyer agrees to represent the client in both a fiduciary and an individual capacity, the ACTEC Commentaries suggest informing the beneficiaries of this fact, including what impact it will have on the information disclosed to them.

2. Legal Malpractice Claims by Third Parties and the Role of Privity

Some courts bar a malpractice claim by a trust beneficiary against the lawyer for the fiduciary under the "privity rule," which states that the fiduciary alone, and not the trust, is the lawyer's client, and therefore a beneficiary has no standing to bring a claim against a lawyer. *See, e.g.*, *Chinello v. Nixon, Hargrave, Devans & Doyle, LLP*, 15 A.D.3d 894 (N.Y. App. Div. 2005) (stating that absent fraud or "other special circumstances" an attorney is not liable to parties not in privity). Yet, states that do not bar claims based on privity typically require the plaintiff to prove that he or she is an intended third party beneficiary of the attorney-client relationship to be successful. *See, e.g.*, *Hart v. Comerica Bank*, 957 F.Supp. 958 (E.D. Mich. 1997) (finding beneficiary could maintain action against counsel for Co-Trustees because "her interests [were] consistent with those of the Trust and the Co-Trustees . . . and because she is a foreseeable and known relying third-party beneficiary" of the representation); *Basista v. Alms*, 2015 IL (1st) 142114-U (Ill. Ct. App. Oct. 30, 2015) (barring claim by trust beneficiaries because beneficiaries could not prove that beneficiaries were intended beneficiaries of representation of Trustee, but allowing leave to amend complaint to bring claim against counsel on behalf of trust because Trustee was involved in breach of trust and demand on Trustee to sue counsel would have been futile); *cf. Witzman v. Gross*, 148 F.3d 988 (8th Cir. 1998) (finding that a trust beneficiary was neither an incidental beneficiary of the attorney-client relationship as opposed to a direct, intended beneficiary nor in privity of contract with attorney and that permitting a claim by beneficiary against the attorney would create inherent conflict of interest for the attorney if estate's interests conflicted with beneficiary's individual interest).

Claims against a Trustee's lawyer have not been limited to beneficiaries. States have also considered cases by successor fiduciaries against former fiduciaries' attorneys 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).

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). In *Stueve Bros.*, attorney-at-law Raymond Novell hired Jay Wayne Allen to represent Novell in his capacity as Trustee of various Steuve family trusts. Together, they swindled over $25 million of trust assets from the Steuves. Given the extent to which the two lawyers acted in concert to withhold information regarding the various trust transactions from the beneficiaries and to transfer trust assets into their own bank accounts, the court found that the beneficiaries sustained a claim against Allen. Furthermore, the beneficiaries could maintain an action against Allen's former law firm, Berger Kahn, based on their knowledge of Allen's actions, lack of communication to the client regarding their knowledge and continued receipt of fees for Allen's representation of Novell and the Steuves.

B. Conflicts That May Arise From Representing Co-Trustees

Model Rule 1.7 ("Conflict of Interest: Current Clients") provides, in pertinent part, that a lawyer shall not represent a client if there is or will be a "concurrent conflict of interest." A concurrent conflict of interest occurs when: (1) the representation of one client will be directly adverse to another client; or (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. Model Rule 1.7(b) provides that, notwithstanding the concurrent conflict, a lawyer may represent a client if each client gives informed written consent, so long as the lawyer believes he or she will be able to diligently represent both clients, the law does not prohibit the representation, and the representation does involve representing one client against another in the same litigation.

The ACTEC Commentary on Model Rule 1.7 states that the representation of multiple clients in the estate planning context makes economic sense and aids in efficiency given the "interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives." Thus, the nature of estate planning matters is generally nonadversarial, and lawyers need not reflexively resist representing multiple parties with potentially conflicting interests. Nonetheless, the ACTEC Commentary suggests that a lawyer should represent co-fiduciaries only if their "interests do not conflict to an *impermissible* degree." (emphasis added). If a lawyer represents Co-Trustees, the ACTEC Commentary also states that the lawyer should clearly communicate with all parties the extent to which the lawyer

will be obligated to share information disclosed by one party. Under Model Rule 1.6, discussed above, a lawyer is generally prohibited from revealing client confidences unless the client gives informed, written consent or one or more limited exceptions applies. Thus, if a lawyer agrees to represent clients with similar but potentially conflicting interests, either jointly or separately, the lawyer should disclose at the outset what information will or will not be shared with the other parties and obtain a written understanding of the same by the clients. *See* Proposed ACTEC Commentary on Model Rule 1.6. A failure to do so may result in the lawyer having to withdraw from representation of one or all parties.

Although a lawyer's representation of Co-Trustees is likely to be a joint representation, some cases may warrant a lawyer representing Co-Trustees as separate clients. The Proposed ACTEC Commentary on Model Rule 1.7 recommends meeting with each client, both jointly and individually, to determine each client's objectives, interests and concerns before deciding whether joint or individual representation of each party is most appropriate. Individual representation may be more appropriate where goals and objectives differ. The lawyer will need to use his or her judgment as to whether a conflict waiver should be obtained under these circumstances. The Proposed ACTEC Commentaries on Model Rule 1.7 also recommend that a lawyer consider whether representation of one Trustee would preclude the lawyer from representing one or more clients in the future. This may be particularly relevant for lawyers considering representing a corporate Trustee because it may be more likely in that context, than if the lawyer were considering representing an individual Trustee, that the lawyer will be asked to represent a client in the future who is adverse to the Trustee.

While naming more than one Trustee often provides more checks and balances and allows for the division of responsibility between or among the Co-Trustees, the Co-Trustees may have individual interests that conflict with the interests of the trust. In *Matter of Rothko*, 372 N.E.2d 291 (N.Y. 1977), three Co-Executors were found to have breached their fiduciary duties in administering the estate of famous painter, Mark Rothko. Two of the Co-Executors were expected to benefit personally from the contracts of sale entered into by the Co-Executors due to their personal relationships with one of the organizations receiving Rothko's paintings. The other Co-Executor was found to have failed to exercise the required due diligence of a person aware of the potential conflicts of the other Co-Executors. The third Co-Executor, who did not have an individual conflict, argued that he was acting on advice of counsel. The court rejected this defense by stating that the advice of counsel is no defense if the fiduciary was negligent in exercising his or her duties. The lawyer in *Rothko* may have better served his client by advising the dissenting Executor to deliver a written dissent to the other Co-Executors. *See* Uniform Trust Code (UTC) § 703(f) & (h); Morken & Freidman, *Early Detection of Possible Pitfalls in Fiduciary Obligations Can Prevent Later Problems*, 74-JAN N.Y. St. B.J. 22, 22 (Jan. 2002).

A surviving spouse and child of a decedent may be appointed Co-Trustees under the predeceased spouse's Will. The lawyer may already represent each individual in his or her estate planning matters and also be asked to represent the parties jointly as Co-Trustees. Assuming the predeceased spouse left the surviving spouse less than his or her spousal entitlement under applicable state law, the spouse may consider taking his or her statutory share, thereby reducing

what is left for the remainder beneficiaries, including the Co-Trustee child and his or her siblings not represented by the lawyer. Model Rule 1.7 states that if a lawyer's representation of one client will materially limit a lawyer's responsibilities to another client or a third person, then the lawyer must comply with the informed consent requirements of Model Rule 1.7. However, the Proposed ACTEC Commentaries suggests that it may not be necessary for a lawyer to obtain conflict waivers from the other trust beneficiaries who are not the lawyer's clients. Specifically, the Commentary states that Model Rule 1.7 contemplates waivers only from "affected clients," and it should be sufficient for the lawyer to explain to both Co-Trustees (particularly, the surviving spouse in this scenario) their duties to each client and to third parties and to obtain waivers only from clients who are impacted by the lawyer's continued representation of the surviving spouse in his or her individual capacity. Nevertheless, the lawyer should suggest that the Co-Trustee child seek separate counsel with regard to the issues that may arise should the surviving spouse elect against the Will.

C. Ethics Concerns for Lawyers who Serve as Trustees

The lawyer who drafted a Will or *inter vivos* trust instrument may be an appropriate choice to serve as Trustee under that Will or trust instrument if the lawyer has specialized knowledge of the family and/or certain assets, such as real estate or business interests. Kanyuk, Radford & Fox, "Ethical Considerations in Acting as an Executor or Trustee or Representing an Executor or Trustee: Do You Really Want to Do This?" AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, 2015 Annual Meeting. As the preparer of the estate plan, the drafting lawyer would also have firsthand knowledge of the client's intent. ABA Formal Ethics Opinion 02-426 (May 31, 2002). In addition, the drafting lawyer may be designated as Trustee because there are no family members appropriate for the task or the trust is too small to warrant incurring the fees of a corporate fiduciary. Harker, "Some Ethical Considerations for Attorneys Who Serve as Trustee," Missouri Bar Probate and Trust Law Committee (May 2014).

However, the potential ethical violations, and the steps that must be taken to avoid them, often will outweigh whatever advantage there may be in a lawyer serving as Trustee. Some attorneys may agree to serve as Trustee without careful attention to these rules because the attorney may have a longstanding relationship with one or more members of the family or to avoid awkward conversations with a valued client. Following these rules, however, will help avoid disputes and adverse legal and ethical consequences in the future. Kanyuk, Radford & Fox, *supra*.

1. Conflicts of Interest

The potential for conflicts of interest is the primary ethics issue that arises in this context. Model Rule 1.7 is implicated if there is a significant risk that the lawyer's interest in being designated as a Trustee will materially limit the lawyer's judgment in advising the client concerning such designation. ACTEC Commentary on Model Rule 1.7. A conflict of interest also may arise if, when the lawyer is serving as Trustee, the lawyer wants to hire his or her own law firm to represent him or herself in his or her capacity as fiduciary. In addition, as discussed further below, while serving as Trustee, the lawyer or his or her law firm may be asked to

represent either a beneficiary or a creditor of the trust or estate. ABA Formal Ethics Opinion 02-426 (May 31, 2002).

The ACTEC Commentary on Model Rule 1.7 provides that "a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of [Model Rule] 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer." Under Model Rule 1.7(b), discussed above, a lawyer may serve as a fiduciary, even if there is a concurrent conflict of interest, if the lawyer shows that the requirements of this subsection have been met.

Thus, the lawyer must be able to show that the client has made an informed, independent decision in choosing the lawyer as Trustee. Kanyuk, Radford & Fox, *supra*. In doing so, the lawyer must comply with Model Rule 1.4(b), which states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See In the Matter of Wayne H. Eisenhauer*, 689 N.E.2d 783 (Mass. 1998) (court found an impermissible conflict of interest when lawyer drafted a trust, designated himself as Trustee and granted himself a veto power over the naming of any successor Trustee without first discussing this issue with the client); Kanyuk, Radford & Fox, *supra*.

ABA Formal Ethics Opinion 02-426 (May 31, 2002) states that a lawyer may serve as a Trustee as long as the lawyer can demonstrate that he or she has complied with the Model Rule 1.4 and Model Rule 1.7. Regarding Model Rule 1.4, the Opinion states that

> The lawyer must provide reasonably adequate information to permit the client to understand the tasks to be performed by the fiduciaries, the desired skills in a fiduciary, the kinds of individuals or entities likely to serve effectively, and the benefits and detriments of using each, including costs. A lawyer may disclose his or her own ability to serve as fiduciary, but cannot allow the potential self-interest to interfere with the exercise of independent professional judgment.

See also Georgia Formal Advisory Op. No. 91-1 (September 13, 1991); NY S.C.P.A. § 2307-A (allowing a drafting lawyer to designate him or herself as Executor under a client's estate plan if certain disclosures are made in writing and acknowledged by the client). The Opinion also states that the lawyer who is acting as the Trustee may appoint him or herself or his or her law firm as lawyer for the Trustee. The Opinion emphasized, however, that the fees for services as Trustee and as legal counsel must be reasonable under Model Rule 1.5(a). The Opinion added that the lawyer must disclose whether the compensation is "subject to statutory limits or court approval, and how the compensation will be calculated and approved." The lawyer must also disclose whether the lawyer will hire others to perform certain duties, such as investment management, and the expected fees for such services. *See also In re Charron*, 918 S.W.2d 257 (Mo. 1996) (court found that lawyer charged excessive fees when serving as Personal Representative of a client's estate when the amount charged exceeded the amount approved by the Probate Court).

The ACTEC Commentary on Model Rule 1.7 provides similar guidance. In addition, the ACTEC Commentary also states that the lawyer should tell the client of any significant relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary that may be appointed. *See Gunster, Yoakley & Stewart v. McAdam*, 965 So.2d 182 (Fl. Dist. Ct. of App. 2007) (law firm liable for damages for facilitating the appointment of a corporate Personal Representative with which it had a referral relationship, leading to increased expenses for the estate). Kanyuk, Radford & Fox, *supra*.

Even though a lawyer initially may determine that no conflict of interest exists, conflicts issues must be reviewed regularly to determine if changes in circumstances have caused a conflict of interest to arise. Kanyuk, Radford & Fox, *supra*.

2. Representing a Beneficiary or Creditor

ABA Formal Ethics Opinion 02-426 (May 31, 2002) also provides that if a lawyer who is serving as a Trustee also represents a beneficiary or creditor of the estate or trust, the lawyer must resolve any conflicts of interest that may arise under Model Rule 1.7(a). The Opinion found that representation of a creditor or beneficiary that has interests adverse to the trust in this situation would not be permissible even with client consent because it would be unreasonable for a lawyer to conclude, under Model Rule 1.7(b), that he or she could provide competent and diligent representation. Representation of a creditor or beneficiary in an unrelated matter, however, may be permissible. *See also In re Charron*, 918 S.W.2d 257 (Mo. 1996) (lawyer had an impermissible conflict of interest when he served as Personal Representative of his client's estate, Trustee of his trust and was a creditor of his estate for legal services provided to the decedent); *Office of Disciplinary Counsel v. Walker*, 366 A.2d 563 (Pa. 1976) (lawyer as drafting attorney, Personal Representative and one of the beneficiaries).

3. Exculpatory Clauses

Another issue that arises when a drafting lawyer designates him or herself as Trustee is whether the drafting lawyer can insert exculpatory clauses into the trust document regarding his or her own activities as Trustee. Model Rule 1.8(h)(1) provides that the lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." The ACTEC Commentary on Model Rule 1.8 provides that the exculpatory clause should be included in this situation only "at the client's request" and after obtaining the "informed consent of an unrelated client." *See also* RESTATEMENT (SECOND) OF TRUSTS, § 222, Comment d (exculpatory clause not enforceable when the Trustee drafted the trust document if it was inserted due to an abuse of a fiduciary or confidential relationship); *Petty v. Privette*, 818 S.W.2d 743 (Tenn. Ct. App. 1989) (allowing exculpatory clauses in this situation as long as there is no overreaching, undue influence or abuse of fiduciary relationship). Kanyuk, Radford & Fox, *supra*.

4. Other Concerns

The lawyer may have to deal with several practical issues once he or she has begun to serve as Trustee. The lawyer will have to determine who will handle all the reporting, accounting, investment management and other activities. Harker, *supra*. The lawyer will also have to determine whether each of these activities is covered by his or her malpractice insurance carrier. Challis, Nail, et al., "Lawyer as Fiduciary – Balancing Ethical Considerations with Client Demands," Missouri Bar Annual Estate and Trust Institute (2015).

The lawyer serving as Trustee must also ensure that the governing document allows the lawyer to resign at any time and for any reason and allows the lawyer to appoint a successor Trustee without court approval if no designated successor Trustee is available to serve. Challis, Nail, *supra.*

D. Propriety of Seeking Releases Upon Trust Termination

Beneficiaries often appreciate efforts by Trustees to keep administration costs down, and the trust termination context is no exception. Increasingly, Trustees and beneficiaries are entering into release and indemnification agreements (hereinafter, 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 the court.

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 (1959); RESTATEMENT (THIRD) OF TRUSTS § 97 (2012). 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); *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. 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 (the "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" (the "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 provided that, in consideration of PNC's distribution of the Trust assets, the remainder beneficiaries would acknowledge consultation with an attorney, affirm review of the trust records and approve the Trust administration by PNC. The Agreement also contained a provision that released PNC from liability and provided indemnification to PNC for expenses related to the Trust termination (the "Indemnification Clause").

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 the Trust affairs (the other alternative being for PNC to obtain the release and indemnification it sought by petitioning a Maryland court for 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 Clause, 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, as neither the Trust instrument nor Maryland statutes addressed these issues. As to the breach of fiduciary duty claim, the court noted that it is permissible for a Trustee to request the beneficiaries' consent to what might otherwise be a breach of trust because "a trustee may engage in a self-interested course of action so long as the beneficiaries provide valid, informed consent" and that therefore, a Trustee must be able to request such consent. PNC's request for execution of the Agreement amounted to such a request, and therefore the request itself was not a breach of trust. In a footnote, the court declined to examine whether PNC had provided the beneficiaries with sufficient information, because the parties did not brief or argue that issue on appeal.

In rejecting Petitioners' claim that the Indemnification Clause was over-broad, the court noted that the Indemnification Clause "track[s] closely, although not perfectly, to the terms PNC would have received had it petitioned for (and received) a court order formally approving the accounting and termination of the Trust" under Maryland law. While the court stated that the Agreement did create some differences in the relative rights that PNC and Petitioners would otherwise have had under default Maryland trust law, and that "these differences are material and represent a fairly sizeable increase in the amount of protection PNC would have received, as a trustee, from liability and cost," the court nevertheless found that such differences "are of degree rather than kind."

Of note is the court's finding, in a footnote, that the language of the Indemnification Clause 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*, 402 Ill. App. 3d 997, 932 N.E.2d 569 (2010) (finding attorney'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).

Although approved in *Hastings*, courts are split as to whether a Trustee may condition distributions on the execution of a release provided all 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). Even 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), held that the language of the trust instrument did not provide discretion to 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."

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2D)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

INSTRUCTIONS

Certify Your Attendance Online at www.vsb.org

Complete this Certification. Retain for two years.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A $100 fee will be assessed for failure to comply with either deadline.

Member Name: _____ **VSB Member Number:** _____

Address: _____ **Daytime Phone:** _____

_____ **E-mail Address:** _____

_____

City **State** **Zip**

Course ID Number: **NDD0002**

Sponsor: **Cannon Financial Institute**

Course/Program Title: **Ethics Issues in Trust Administration**

Live Interactive *Approved CLE Credits (Ethics Credits): **1.5 (1.5)**

Date of telephone/webcast: _____ **Location(s):** _____

By my signature below I certify

___ I attended a total of _____ (hrs/mins) of **approved CLE**, of which (_____) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

_____ _____

Date Signature

Questions? Contact the MCLE Department at (804) 775-0577

If not certified online, this form may be mailed to:

Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
Web site: www.vsb.org

[Office Use Only: Teleconference]

Pennsylvania Continuing Legal Education Board

601 Commonwealth Avenue, Suite 3400 • P.O. Box 62495 • Harrisburg, PA 17106-2495
(800)497-2253, (717)231-3250 • FAX (717)231-3251
www.pacle.org
E-mail: pacleb@pacle.org

CREDIT REQUEST FORM

BA_____

This form is to be used when you have attended a course that is not sponsored by an AccreditedProvider. Lawyers seeking Pennsylvania CLE credits must complete Section B of this form and return it to PACLE, along with a Uniform Certificate of Attendance, if available, and a check made payable to PACLE for the $1.50, per credit hour attendance fee payment. Please refer to Section C to calculate the correct attendance fee payment.

SECTION A : Course Information

Provider: **1854** Cannon Financial Institute

Course: **208131** Ethics Issues in Trust Administration (450776)

Date: 12/08/2015 13:00 **Location:** Alternate Delivery

Total CLE Credit Hours: Maximum: 1.50 = 1.50E

SECTION B : Lawyer Information

Lawyer Name _____ PA Lawyer ID _____

Address _____

City _____ State _____ Zip _____

By signing below, I certify that I attended the activity described above and am entitled to claim:
_____ Ethics

_____ _____
Signature Date

I am enclosing check #_____ for $_____

NOTE: If you attended the maximum 1.50 credit hours for this course, please enclose $3.00 attendance fee payment. See Section C below for calculation.

SECTION C : Attendance Fee Calculation

Pennsylvania grants one (1) CLE credit for each 60 minutes of attendance at an approved course. Pennsylvania requires a $1.50 per credit hour attendance fee payment. This $1.50 fee is also required for any portion of a credit hour. We accredit only programs that are at least one hour long; in addition, we accredit only in half hour increments. Please refer to the example below when calculating your attendance fees.

1 hour = 1.50	1.5 to 2 hours = $3.00	2.5 to 3 hours = $4.50	3.5 to 4 hours = $6.00
4.5 to 5 hours = $7.50	5.5 to 6 hours = $9.00	6.5 to 7 hours = $10.50	7.5 to 8 hours = $12.00

etc...

CANNON
FINANCIAL INSTITUTE

Certificate of Attendance

_____

(Participant Name)

_____

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Ethics Issues in Trust Administration
(745665)

December 8, 2015

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

Colorado – 2 General Credits, 2 Ethics Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CANNON

FINANCIAL INSTITUTE

Certificate of Attendance

_____

(Participant Name)

_____

(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Ethics Issues in Trust Administration

December 8, 2015

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

The following states have been approved for 1.5 hours of Ethics Credit: (Course number is indicated in parenthesis):Alabama, Arkansas (ETH48113), California, Delaware, Georgia, Idaho, Illinois, Iowa (161397), Kentucky (151767), Louisiana, Maine (036034), Minnesota (199865), Mississippi, Montana (25861), Nebraska(101895), Nevada (6512), New Mexico, New York, North Carolina, North Dakota, Oregon (1048* 215), Pennsylvania, South Carolina, Tennessee (Distance Ed), Texas (901306282), Utah , Vermont, Virginia, Washington, Wisconsin , & Wyoming.

These states have been approved for the following Ethics Credit: Colorado – 2 hours, Florida - 2 hours (1407645N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Hawaii, Maryland, Massachusetts, Michigan & South Dakota
The following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Indiana & Ohio-Site Coordinators must apply for credit as the sponsor in order for participants to receive credit
Kansas–Attorney or Site may apply 30 days prior to program
New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit and self-report their attendance.*
New Jersey-Attorneys can use this certificate to submit to New Jersey State Bar for 1.5 Ethics credits (Reciprocity Rule)
New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, CO, DE, GA, KY, LA, MS, NM, NC, ND, OK,. Type of credit: Ethics, 1.5 Credits
* In order for PA attorneys to receive credit they must listen to the teleconference in a live classroom setting. The teleconference site must also be listed on the PACLE website and the site must be open to any PA attorney who desires to listen to the program. Call PACLE at 1-800-497-2253 with questions on website listing.

****As required by the following State Bars, and in order to obtain CLE in these states, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia and Washington. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CANNON
FINANCIAL INSTITUTE

Certificate of Attendance

_____
(Participant Name)

Has successfully completed the Cannon Financial Institute, Inc. course:

Ethics Issues in Trust Administration

December 8, 2015

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour. For information regarding available CPE credits please visit http://cpemarket.nasbatools.com/index.
  Instructional delivery method: Group-Live
  NASBA #103655; Field of Study –Ethics or Specialized Knowledge & Application
- **Enrolled Agent (IRS)** — **2.0 credit hours**
  Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
- **Certified Financial Planner (CFP™)** — **Pending Review**
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 credit hours**
- **Certified Wealth Strategists (CWS®)** — **2.0 ethics hours**
- **Certified Investment Management Analyst (CIMA®)** — **1.5 ethics hours**
  Course #15CFI012
  If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your My IMCA account at www.imca.org/user
- **Certified Trust Financial Advisor (CTFA™)** — **2.0 credit hours**

Fiduciary Law	0
Taxes	0
Investments	0
Financial Planning	0
Ethics	2

- **Certified Retirement Services Professional (CRSP™)** — **2.0 credit hours**
- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant** — **1.5 credit hours**
  (**No Individual State Insurance Credit Available)

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Ethics Issues in Trust Administration

Date and Time of Activity: December 8, 2015 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,

10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics: 1.5

Elimination of Bias in the Legal Profession:

Prevention, Detection and Treatment of Substance Abuse:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: _____

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:_____

Elimination of Bias in the Legal Profession:_____

Prevention, Detection and Treatment of Substance Abuse: _____

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.

Thank you for attending this event.

Today's event features an online, post-event evaluation form. To send us your feedback, please click on the link below, or type the URL into your web browser's address bar.

http://eval.krm.com/eval.asp?id=21900

Your feedback and comments are very important to us. Thank you in advance for taking the time to complete this evaluation!