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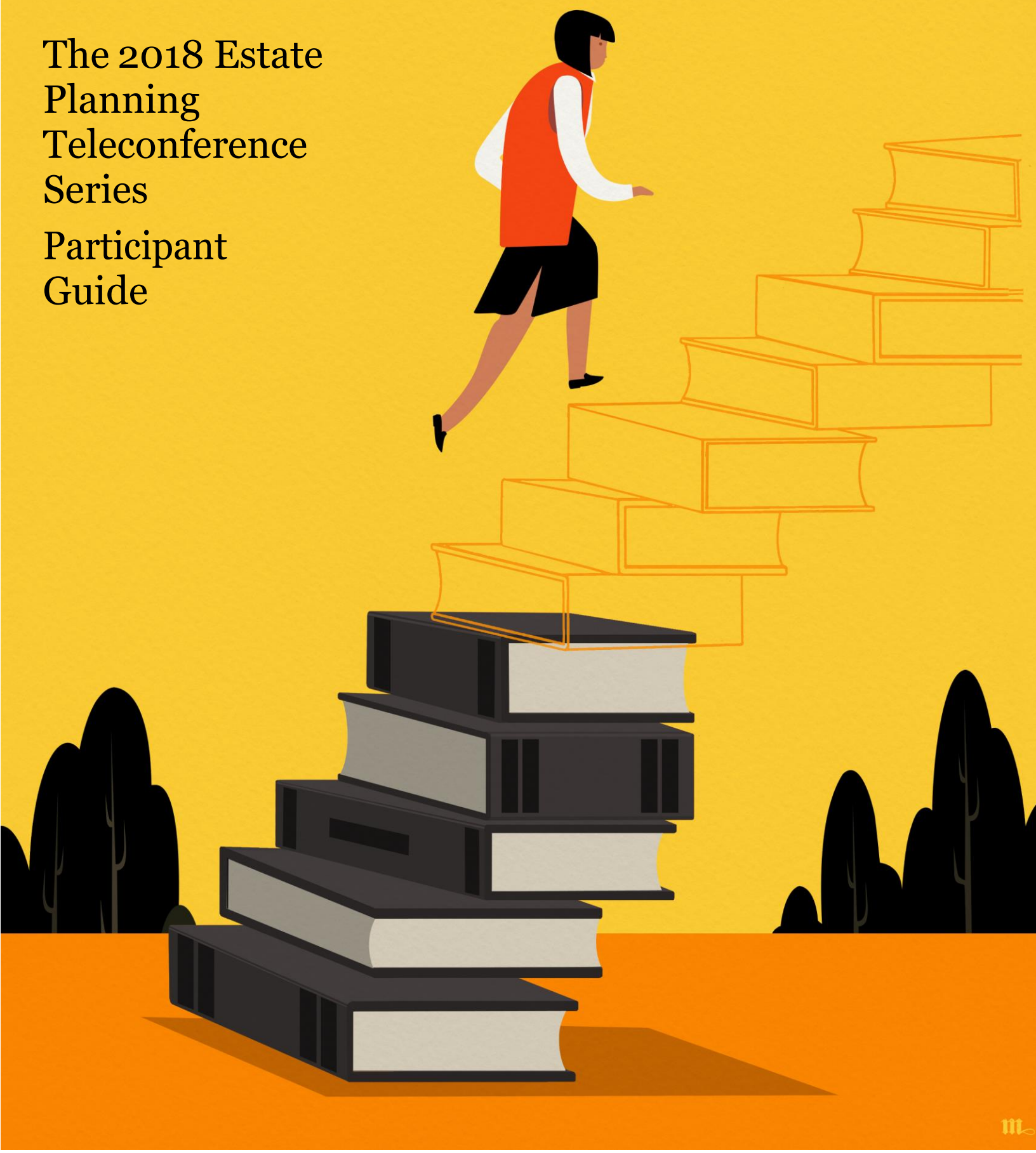

Ensnared in an Ethics Trap: Navigating Conflicts of Interest

Cannon Financial Institute, Inc.

Presents

The 2018 Estate Planning Teleconference Series

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By:

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CHARLES A. REDD

CHARLES A. REDD is a partner in the St. Louis, Missouri, office of the law firm of STINSON LEONARD STREET LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now U.S. Trust, Bank of America Private Wealth Management).

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.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the recently enacted Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Communications Committee (Past Chair); Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He 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. Best Practices for Engagement Letters

After a lawyer agrees to represent a person or persons, the lawyer should send the client an engagement letter confirming the representation. Too often, lawyers fail to tailor the engagement letter to address specific issues that may arise in the representation. A good engagement letter will identify the client(s), define the scope of the representation and corresponding fee structure, and disclose any potential conflicts and how they will be addressed should they arise.

1. Scope of Services and Fees

The American Bar Association's Model Rules of Professional Conduct (the "Model Rules"), in Model Rule 1.2, provide that a lawyer must abide by the client's decisions regarding the objectives of the representation but may limit the scope of the representation if reasonable and the client gives informed consent. The most effective way to do this is to define the scope of the representation in an engagement letter. In addition, Model Rule 1.5 provides that the basis for or rate of fees shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation unless the lawyer will be representing a regularly represented client on the same basis or rate. The lawyer must communicate to the client any change in how the fee is determined. THE ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2016) (the "ACTEC Commentaries") specifically address and validate the rise in flat fee arrangements for estate planning work so long as applicable state law does not prohibit such arrangements.

Accordingly, an effective engagement letter will clearly set forth:

- The person(s) who will be represented by the lawyer.
- The nature and extent of the obligations of the lawyer. These obligations should be narrowly described while still being accurate.
- The manner of calculating the lawyer's fees. It may also be helpful to include when and how the client will be billed and/or whether the lawyer requires a retainer.
- The circumstances under which the engagement will terminate.

2. Conflicts of Interest and Confidentiality

Assuming the lawyer, after performing a conflicts of interest analysis, determines that joint representation of two or more clients is appropriate, or presents a conflict that can be

waived by informed consent by the clients, the lawyer is strongly encouraged not to commence any representation of multiple clients without first fully disclosing to them the potential conflicts to each client and having the clients sign an engagement letter that carefully details the relationship between or among and obligations of each of the parties.

Conflicts of interest may arise between spouses, parent and child, a client and entities owned by the client, a fiduciary and beneficiary or any combination of the above. An engagement letter should discuss the potential for these conflicts to arise and include either the clients' waiver of the conflicts or specific direction as to how conflicts will be resolved should they arise. Two examples of how these conflicts might be dealt with in an engagement letter are as follows:

- **Option 1:** If a conflict of interest should arise between you, ethics considerations would prohibit me as the lawyer for both of you from representing either one of you against the other. I would not be able to advocate the position of either of you against the other, and I may then be required to withdraw as the lawyer for both of you.

- **Option 2:** If a conflict of interest should arise between you, ethics-based obligations would require me to withdraw as the lawyer for both of you jointly. If otherwise permitted by applicable ethics rules, I may then elect to continue to represent Mary as a client, but John would be required to retain another lawyer to represent him. By signing the enclosed copy of this letter, John agrees under such circumstances to my continued representation of Mary.

The lawyer may have each party execute an engagement letter that clearly specifies that there will be joint representation, that the lawyer may reveal all confidences to either (or any) party and that no information may be withheld. This type of representation is sometimes referred to as "show and tell." The engagement letter in this model should seek the waiver of any present or subsequent conflicts and the parties' consent to this form of representation.

Alternatively, the lawyer may represent the parties jointly (or separately) but be specifically prohibited from revealing any confidences. This type of representation has been referred to as the "priestly" approach. The priestly approach is fraught with potential conflicts and may result in the lawyer's having to withdraw as counsel for one, both or all clients if a conflict arises (*e.g.*, one spouse informs the lawyer of his intention to withdraw all funds held by both spouses as joint tenants).

Even if the lawyer obtains consents to the joint representation as outlined above, the lawyer cannot assume that joint representation will be appropriate indefinitely. Rather, the lawyer must be vigilant about identifying new conflicts arising in the future or the escalation of existing conflicts that might cause the ongoing joint representation to be inappropriate or require additional disclosures and consents from the individuals involved.

ACTEC provides several sample engagement letters that may be useful in a variety of representational scenarios. *See* ACTEC Engagement Letters: A Guide for Practitioners (3d ed. 2017), at https://www.actec.org/publications/engagement-letters/.

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

1. Lawyer's Duty to Disclose Information to Beneficiaries

The ethics-based duties of a lawyer who represents a Trustee[1] may compel the lawyer to disclose information to the beneficiaries. 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. As noted above, with the client's informed consent, a lawyer may limit the representation if the limitation is reasonable. The ACTEC Commentaries on 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 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

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

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 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."

In addition, some states' laws recognize a "fiduciary exception" to the attorney-client privilege that is generally afforded by Model Rule 1.6. 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 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* 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. 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' 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).

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 Stueve family trusts. Together, they swindled over $25 million of trust assets from the Stueves. 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 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 Stueves.

C. 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* 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 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 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 § 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 the 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 ACTEC Commentaries suggest 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 applicable 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.

D. Ethics Issues in Advising Closely-Held Businesses Owners

The representation of closely-held business owners is yet another circumstance in which a lawyer may be caught in an impermissible conflict of interest. In this circumstance, the lawyer should clearly determine and communicate in the engagement letter which parties the lawyer is representing and which parties the lawyer is not representing, with the caveat that such designations may need to be modified over time. *See generally* Fox, Osborne & Radford, "Ethical Issues in Advising Clients on Planning for, Creating, Operating, Transferring Control and Ownership of, and the Dissolution of Closely Held Businesses," AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (2018 Summer Meeting Materials).

1. Applicable Model Rules

Model Rule 1.7, discussed above, plays a critical role in determining whether a conflict of interest exists when representing closely-held business owners. The lawyer must also be cognizant of Model Rule 1.13, which prescribes that a lawyer retained by an organization "represents the organization acting through its duly authorized constituents." Model Rule 1.13(a). Model Rule 1.13(g) explicitly allows a lawyer representing an organization to represent any of its directors, officers, employees, members, shareholders or other constituents, subject to Model Rule 1.7. If the lawyer is representing the entity but is not representing some or all of the entity's constituents, Model Rule 1.13(f) explains that "a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Similarly, Comment 10 to Model Rule 1.13 explains that, if the lawyer is representing an entity and the entity's interest becomes or may become adverse to those of one or more constituents, the lawyer should advise the constituent of the conflict or potential conflict, that the lawyer cannot represent such constituent and that such constituent may wish to obtain independent representation.

The ACTEC Commentary regarding Model Rule 1.13 states that the "lawyer may, with full disclosure and the informed consent, confirmed in writing, of the business enterprise and an employee, represent both with respect to matters that affect both (e.g., an employment agreement) if their interests are not seriously adversarial and the lawyer reasonably believes it is possible to diligently and competently represent both the entity and the employee. . . . The lawyer may similarly represent both a fiduciary that owns an interest in a business enterprise and the business enterprise itself, unless to do so would violate MRPC 1.7."

2. Determination of Whether Lawyer for the Business Represents a Constituent of the Business

If the lawyer has not clearly identified the parties represented in an engagement letter, and updated such designations if or as necessary, courts often analyze the following factors of the particular case to determine whether an attorney-client relationship has been formed between the constituent and the lawyer for the business: (a) the frequency of contact between the lawyer and the constituent, (b) whether the lawyer has represented the constituent in any prior matter, (c) the constituent's interest in the matter at issue, (d) whether the constituent has retained his or her own lawyer, (e) the advice provided by the lawyer to the constituent, (f) the disclosure of confidences by the constituent to the lawyer, (g) payment of the lawyer's fees by the constituent

and (h) any statements by the lawyer regarding which parties the lawyer represents. Fox, Osborne & Radford, *supra*.

In *Griva v. Davison*, 637 A.2d 830 (D.C. App. 1994), a law firm represented a general partnership. Three family members, Ann Maiatico, Michael Maiatico and Rose Griva, were partners. The law firm also represented Ann and Michael. Rose was represented by separate counsel regarding partnership matters.

The law firm recommended to Ann, Michael and Rose the formation of the partnership to facilitate estate tax valuation discounts. The law firm formed the partnership and drafted the partnership agreement. At the insistence of Rose's separate counsel, a unanimous consent provision was included in the partnership agreement. Consequently, any partner could cause a deadlock in the partnership's decision-making.

After the entity was formed, the law firm continued to represent the partnership, Ann and Michael regarding partnership matters and all three family members in various other family matters. Numerous disputes arose among the partners regarding the operation of the partnership. Rose suspected that the law firm was advocating positions on behalf of Ann and Michael that were adverse to Rose's interests. Rose eventually terminated her relationship with and sued the law firm for breach of fiduciary duty, citing a conflict of interest in their representation.

The court found that, even though she had separate counsel representing her in connection with her ownership of and involvement in the partnership, Rose was "functionally" a client of the law firm regarding partnership matters given the power she had to deadlock the partnership and effectively cause a conflict between Ann and Michael and the partnership.

The court stated that "a law firm ethically can represent several individuals in creating a partnership after obtaining their informed consent pursuant to Rule 1.7(c)." The court also stated that, upon obtaining informed consent, the law firm can represent the partnership and one or more of its partners, except when a conflict would prohibit such representation under Model Rule 1.7(a). The court further explained that "a lawyer for an entity cannot represent constituents of an entity when such representation may prejudice the interests of that entity, or when it is unclear what constituents represent the interests of the entity and thus a dispute between constituents makes it impossible to know what the entity's interests are."

The court held that genuine issues of material fact existed as to whether the law firm fully disclosed to Rose the conflict of interest in representing both her and the partnership and whether Rose consented to this representation.

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December 11, 2018
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Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
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- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 credit hours**

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Certificate of Attendance

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(Participant Name)

_____
(Attorney Bar # or Social Security #)

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

Ensnared in an Ethics Trap: Navigating Conflicts of Interest

December 11, 2018

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

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 (ETH59219), California, Delaware, Georgia, Idaho, Illinois, Iowa (270904), Kentucky (181470), Louisiana, Maine (045197), Minnesota (251577), Mississippi, Montana (19372), Nebraska(151296), Nevada (31166), New Mexico, New York, North Carolina, North Dakota, Oregon (1048*255), Pennsylvania, South Carolina, Tennessee (Distance Ed), Texas(928014023), Utah , Vermont, Virginia, Washington, Wisconsin, & Wyoming

These states have been approved for the following Ethics Credit: Colorado – 1.8 hours, Florida - 2 hours (1706365N), 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
Connecticut-Attorneys can use this certificate to submit to Connecticut MCLE
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 for New Jersey CLE for 1.5 Professional Responsibility 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 & Professionalism 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, Washington and West Virginia. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
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