Fiduciary Representation Traps

Presented by:
Shirley Berger Whitenack, CAP

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Ethical Considerations

• Conflicts of Interest
• MRPC 1.7
• MRPC 1.8
• MRPC 1.9
Personal Representative

• Initial meeting:
  – Fact Gathering
  – Estate Administration issues
  – Other issues, i.e., Elective Share
Personal Representative

- Attorneys do not represent “the Estate.”

- Attorneys represent the fiduciaries in a representative or individual capacity.
Communications with beneficiaries

• Personal representative should communicate with unrepresented beneficiaries

Be familiar with your state’s version of MRPC 4.3
Rights and Duties of Executors

• Derived from will

• Applicable state laws

• Court orders
Rights and Duties of Administrators

- Derived from state laws
- Court orders
Personal Representatives

- Locate will
- Identify & determine value of probate assets
- Secure and manage property
- Pay claims and taxes
- File tax returns
- Identify beneficiaries
- Distribute assets
Standard of Care

• Personal representatives must perform their duties in the same manner as a prudent person would manage his or her own affairs
• High standard of care
• Must deal impartially with beneficiaries
• Act in good faith
Delegation

- Personal representatives can engage attorneys, accountants, realtors, financial advisors and others.

- Personal representatives must supervise those he or she retains.
Uniform Principal and Income Act

- Provides procedures for personal representatives and trustees in allocating assets to principal and income and governs their distribution to beneficiaries.
Trustees

• Avoid self-dealing

• Avoid improper delegation

• Deal impartially with beneficiaries

• Prudently invest trust assets.
Trustees

• Keep accurate records

• File tax returns and/or accountings

• Comply with terms of the trust document.
Trustees

• May be governed by:
  • Principal and Income Act
  • Prudent Investor Act
  • Uniform Trust Code
Uniform Prudent Investor Act

• Standard of prudence applied to investments as part of total portfolio

• Primary consideration is balancing in all investing between risk and return

• Permissible to invest in anything that contributes to achieving risk/return objectives
Uniform Prudent Investor Act

• Diversification is incorporated into definition of prudent investor

• May delegate with proper safeguards
Uniform Trust Code

- Requirements for creating a trust
- Duty of trustee to act in good faith
- Power of the court to modify or terminate trust
- Effect of spendthrift provisions and rights of creditors and assignees to reach trust
Uniform Trust Code

- Power of the court to require, dispense with, modify or terminate a bond
Uniform Trust Code

• Intended to provide greater flexibility to modify and terminate trusts

• Treats revocable trust as a Will equivalent

• Presumption that trust is revocable unless trust instrument provides otherwise.
Uniform Trust Code

• Incorporates or supersedes:

• Uniform Probate Code (Article Viii)
• Uniform Prudent Investor Act
• Uniform Trustee Powers Act and
• Uniform Trust Act
Special Needs Trusts

- Trustee must understand public benefits programs and how distributions may affect the beneficiary’s eligibility for those programs.

- Trustee may need to coordinate with legal guardian, parents and advocates.
Uniform Power of Attorney Act

• Authority of multiple agents
• Authority of guardian
• Impact of dissolution of marriage where spouse is agent
• Portability
• Authority to make gifts
• Standard of agent conduct and liability
Power of Attorney

- Attorney-in-Fact is a fiduciary

- Standard of care varies from state to state
  - Due care
  - Trustee standard
  - Care exercised by other agents in similar circumstances
Guardians and Conservators

- Uniform Guardianship and Protected Proceedings Act

- Act in ward’s best interest and exercise reasonable care, diligence and prudence.
Client Under a Disability

• MRPC 1.14

Attorney has duty to prospective fiduciary

Attorney also may have some duties to the ward
Guardianship Conflicts

- MRPC 1.7
- MRPC 1.8
- MRPC 1.9
Health Care Power of Attorney

• Uniform Health Care Decisions Act

• State statutes
Health Care Power of Attorney

- Agent must make decisions as if principal were making decisions.

- Express wishes

- Substituted judgment

- Best interests
Fiduciary Representation

Elder law and special needs law attorneys often represent fiduciaries such as executors, administrators, trustees, guardians, conservators, attorneys-in-fact and agents pursuant to health care proxies. The representation may be limited to counseling or may encompass the defense of a fiduciary against claims that fiduciary duties were breached.

Sometimes elder law and special needs law practitioners serve as fiduciaries. Such representation can lead to traps for the unwary. Occasionally, malpractice suits are filed against attorneys who represent fiduciaries or who serve as fiduciaries. It is imperative that practitioners understand the powers and duties of fiduciaries and the obligations of attorneys who represent them.

Ethical Considerations

Ethics rules prohibit attorneys from drafting instruments that designate the lawyer or a person related to the lawyer as a beneficiary unless the lawyer or the person related to the lawyer is related to the client. See, e.g., MRPC 1.8(c). The rule does not prohibit an attorney from seeking to be named as a fiduciary in a client’s documents even though such designations may be lucrative for the attorney. Such appointments, however, are subject to the rules set forth in MPRC 1.7 because of the risk that the attorney’s personal interest may conflict with that attorney’s obligation to advise the client concerning alternative choices in designating fiduciaries. See MRPC 1.7 and Comment to MRPC 1.8.

Infrequently, there may be a good reason for the client to designate his or her attorney as a fiduciary. For example, a long-time client may not have any relatives or friends to name as attorney-in-fact and may want his or her long-time attorney to serve in that capacity. Attorneys who seek to be appointed as fiduciaries, however, should obtain the client’s informed consent.
and the attorney should advise the client of his or her financial interest in the designation. In addition, the attorney should advise the client of alternative candidates to serve as fiduciaries. See comment to MRPC 1.8. Practitioners who seek to serve as fiduciaries for clients should consult the ethics rules in their jurisdictions to ensure compliance with those rules.

Some practitioners draft provisions that purport to require the fiduciary to retain the scrivener of the instrument as counsel for the fiduciary. While the ethics rules do not seem to prohibit this practice, such provisions are not enforceable as fiduciaries are free to retain their own independent counsel. ACTEC Commentaries on the Model Rules of Professional Conduct, 4th Ed. (2006) 1, MRPC 1.7.

Fiduciaries frequently ask drafters of estate plans to represent them in carrying out their obligations under the governing instruments. Attorneys-in-fact, for example, may want advice from the drafter about making gifts pursuant to a power of attorney. Trustees may seek counsel on permissible investments or distributions. While there is no ethical prohibition in representing the fiduciary in such cases, there clearly may be conflicts of interest between the original client and his or her fiduciary.

It is prudent in such cases for attorneys who agree to represent the fiduciaries of original clients to set forth the scope of the representation in their retainer agreements in the event of such conflicts. For example, the engagement letter may advise the fiduciary that in the event of a conflict the lawyer will no longer represent either the original client or the fiduciary. Alternatively, the engagement letter may advise the fiduciary that attorney’s advice will be consistent with the original client’s expressed desires or best interests and that in the event of a

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1 The ACTEC Commentaries can be viewed online at http://www.actec.org/public/CommentariesPublic.asp#TOC.
conflict, the lawyer may cease representing the fiduciary but may continue to represent the principal. Fleming, Elder Law Answer Book, 2:34.

Attorneys who represent fiduciaries may also owe a duty to the beneficiaries. The scope of the representation is a critical consideration in determining the scope of such a duty. For example, an attorney who represents a fiduciary in a lawsuit brought by a beneficiary against the fiduciary may owe no duties to the beneficiary beyond that owed to other non-clients. On the other hand, an attorney who represents a fiduciary in the fiduciary’s representative capacity may owe duties derivatively to the beneficiary. ACTEC Commentaries, MRPC 1.2. Practitioners should be familiar with the ethics rules in their states pertaining to fiduciary representation.

**Executor/Estate Administrator**

The designated personal representative may come to your office for the initial consultation with other family members. While the other family members may assist the putative client in giving the practitioner pertinent information, it is important to advise the other participants that the attorney does not represent them. MRPC 4.3. The attorney also should counsel the potential client about the importance of preserving the attorney-client privilege as the fiduciary may become adverse to the beneficiaries of the estate. MRPC 1.6. If another family member has significant information or the client insists that the other family member attend the meeting, it may be possible to establish that the other person is an agent of the client, thereby preserving the attorney-client privilege. Flowers, To Speak or Not to Speak: Effect of Third party Presence on Attorney Client Privilege, 2 NAELA Law Journal, 153,171 (2006).

The attorney should engage in fact gathering as soon as possible after the decedent’s death. A review of the will and the probate and non-probate assets of the decedent and his or her spouse may lead the attorney to conclude, for example, that the spouse who was designated as
the executor should be advised to pursue an elective share claim. If the will may be contested by one or more of the beneficiaries, the attorney may want to advise the client to engage separate counsel to handle the estate litigation as the client’s personal interests in the litigation may differ from the estate’s interests.

A putative personal representative may decline to serve as a fiduciary. Accordingly, the attorney should evaluate and counsel the designated fiduciary as to his or her duties and determine whether the client wishes to accept the position.

It is important for attorneys to understand that they do not “represent the estate.” They represent the personal representative either in a fiduciary capacity or an individual capacity. ACTEC Commentary on MRPC 1.2. The failure to understand this distinction can result in ethical grievances against the attorney.

Assume, for example, that a will nominates an individual and a financial institution to serve as co-executors. Together, they engage the services of an attorney to assist them in administering the estate. During the course of the estate administration, the attorney learns that the individual co-executor improperly gifted assets to himself during the testator’s lifetime through the use of a power of attorney. The attorney, believing that he represents “the estate,” files a complaint on behalf of the corporate fiduciary the against the individual co-executor to compel the return of those funds to the estate. In essence, however, the attorney has sued his own client, the individual co-executor.

The practitioner must also be careful regarding communications with the beneficiaries of the estate. The attorney may advise the beneficiaries that he or she has been retained by the personal representative, that the attorney does not represent the beneficiaries and that they have a right to retain independent counsel. Additional communications between the attorney for the
personal representative and the beneficiaries, however, may result in ethical violations. This is because ethics rules expressly prohibit attorneys from rendering legal advice to an unrepresented party, other than the advice to retain legal counsel, if the attorney knows or reasonably should have known that the interests of the unrepresented party are or have a reasonable probability of being in conflict with the interests of the client. See, e.g., MRPC 4.3.

The rights and duties of an executor are derived from the decedent’s will, applicable state statutes and court orders in proceedings involving the estate. The duties of an estate administrator are set forth in the governing statutes and court orders, if any. Generally, the personal representative has a duty to settle and distribute the estate expeditiously and efficiently. See, e.g., Uniform Probate Code (“UPC”) section 3-703. Specifically, the fiduciary must locate the original will, identify and determine the value of the probate assets, secure real property and take possession of personal property, prepare and file tax returns, pay claims and taxes, identify the beneficiaries, manage the assets and distribute the assets pursuant to the terms of the will or the laws of intestacy. See UPC Section 3-709. It is appropriate for fiduciaries to engage counsel to advise them as to their duties in administering the estate and performing certain specialized tasks such as preparing fiduciary tax returns.

Personal representatives are required to perform their duties in the same manner that a prudent person would manage his or her own affairs and are held to a strict standard of care. They must act in good faith and deal impartially with beneficiaries.

Although a personal representative cannot delegate decision-making authority, the fiduciary can engage attorneys, accountants, realtors, financial advisors and others. The personal

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2 The UPC has been enacted in the following states and U.S. territory: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, Utah and the U.S. Virgin Islands.
representative, however, may be held liable if those hired by the personal representative cause harm to the estate. Therefore, the attorney should counsel the client regarding his or her duty to supervise those hired to assist the personal representative in administering the estate.

Most states have enacted the Uniform Principal and Income Act, which was designed to provide procedures for personal representatives and trustees in allocating assets to principal and income, and to govern their distribution to beneficiaries. Practitioners advising personal representatives and trustees should become familiar with their state’s statutory scheme for allocating principal and income.

Trustees

Trustees have a duty to avoid self-dealing, to avoid improper delegation of the trustee’s duties, to deal impartially with all beneficiaries and to prudently invest the trust assets. All Trustees are required to keep accurate records, file tax returns and/or accountings and comply with the terms of the trust document. Depending on the jurisdiction, the actions of the trustee may be governed by the state’s Principal and Income Act, Prudent Investor Act and Uniform Trust Code.

Most states have enacted the Uniform Prudent Investor Act (“UPIA”). Several other states have enacted prudent investor statutes that are similar to the UPIA. This Act made five fundamental changes to the criteria for prudent investing set forth in the Restatement of Trusts 3d: Prudent Investor Rule.

- The standard of prudence is applied to investments as part of the total portfolio, rather than to individual investments.

- The fiduciary’s primary consideration is balancing in all investing between risk and return.
• Rather than restrict the types of investments, the trustee is permitted to invest in anything that contributes to achieving the risk/return objectives of the trust so long as the other requirements of prudent investing are met.

• The requirement that fiduciaries diversify investments has been incorporated into the definition of prudent investing.

• Trustees are permitted to delegate with the proper safeguards.

The Uniform Trust Code (“UTC”), considered the first national codification of trust law, was promulgated by NCCUSL in 2000 and amended in 2005. According to the Prefatory Note, there was a realization that, given the greatly expanded use of trusts in recent years, trust law was thin and fragmentary in many states. The UTC was drafted to provide a comprehensive guide on trust law issues. The UTC was modeled on California’s trust statute in close coordination with Restatement (3d) of Trusts.

Although the UTC consists of a set of default provisions that a trust instrument may override, there are a number of notable exceptions. Section 105(b) sets forth the exception over which the terms of a trust do not prevail. Included among the mandatory rules are:

• the requirements for creating a trust;

• the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

• the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a lawful purpose, not contrary to public policy;

• the power of the court to modify or terminate a trust;
the effect of a spendthrift provision and the rights of creditors and assignees to reach a trust; and

- the power of the court to require, dispense with, modify or terminate a bond.

In addition to the specification of the rules that are not subject to override in the trust instrument, the UTC provides other innovative provisions such as Article 3 on representation of beneficiaries, the trust modification and termination rules that are intended to provide greater flexibility and are found at Sections 410-417, and Article 6 on revocable trusts. The drafters considered Article 6 to be one of the more important articles of the UTC in that it treats a revocable trust as a Will equivalent. Section 602 also provides that a trust is presumed revocable unless the trust instrument provides otherwise; however, this Section only applies prospectively. This is a reversal of common law that presumes, absent evidence of contrary intent, a trust is irrevocable. The comment to Section 602 states that it is likely that a trust instrument which is silent regarding revocability, was not prepared by a professional and was intended as a Will substitute.

The UTC incorporates or supersedes several uniform acts, such as the:

- Uniform Probate Code (Article VIII);
- Uniform Prudent Investor Act;
- Uniform Trustee Powers Act; and
- Uniform Trusts Act.

Special Needs Trusts

The administration of a special needs trust is similar to that of other trusts insofar as accounting and tax law are concerned. The trustee of a special needs trust, however,
must also understand the public benefits programs that may be available to the beneficiary and how distributions from income or principal may affect the beneficiary’s eligibility for those programs.

There may be others who are assisting the special needs beneficiary in obtaining benefits, such as a legal guardian, parents and advocates. The trustee must work together with those others to insure that the beneficiary is accessing the public benefits that he or she is entitled to receive.

**Attorney-in-Fact Under A Durable Financial Power of Attorney**

A power of attorney is a written instrument by which a principal authorizes another individual, known as the agent, to perform specified acts on behalf of the principal. The power of attorney is an effective planning tool for those who anticipate needing assistance with financial matters. A power of attorney may eliminate the need for a guardianship proceeding, the associated court costs and a public determination of incapacity. A client executing a power of attorney intends the agent to act for the client’s benefit. Giving another person the authority to manage one’s financial affairs through a power of attorney, however, opens the door to financial abuse of the authority by the agent.

Power of attorney forms are now widely available on the internet allowing a principal to sign a simple document that conveys extraordinary powers without the benefit of counsel. The popularity of the power of attorney has contributed to its use in transactions more complex than originally intended by the law. An unscrupulous agent acting under a broad power of attorney may have authority to conduct transactions that are not in the principal’s best interest such as transferring the principal’s property without notifying the principal. In an effort to curtail abuses of powers of attorney, states have adopted statutes that address execution requirements, fiduciary
obligations, limitations of the authority of the agent and the standard of care required of the agent.

At common law, powers of attorney terminated upon the incapacity of the principal. A durable power of attorney is created by statute to either survive the incapacity of the principal or become effective upon the incapacity of the principal, permitting the extended management of the principal’s assets. In 1954, Virginia enacted the first durable power of attorney statute that allowed agents to act for an incapacitated principal.

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) made statutory durable powers of attorney part of the Uniform Probate Code (“UPC”) in 1969 to provide an alternative to court-oriented protective procedures. The durable powers of attorney provisions of the UPC were amended and a separate Uniform Durable Power of Attorney Act was adopted in 1979. The original Uniform Durable Power of Attorney Act which, at one time was followed by most states, was last amended in 1987.

The current Uniform Power of Attorney Act (“UPOAA”) was adopted by NCCUSL in 2006 in response to a national review of state power of attorney legislation. This review determined that many states had enacted provisions with respect to areas that the original Uniform Durable Power of Attorney Act was silent including:

1. authority of multiple agents;
2. authority of a guardian appointed after the execution of the POA;
3. impact of the dissolution of a marriage where the spouse is the agent;
4. portability;
5. authority to make gifts; and
6. standards of agent conduct and liability.
The presumption of the UPOAA is that a power of attorney is durable unless otherwise expressed. It provides a default standard for agent conduct and liability. The UPOAA provides for third party reliance on the power of attorney and liability for unreasonable refusal to accept the power of attorney. The agent may file for a court order to enforce acceptance of the power of attorney. An optional statutory form for creating a power of attorney is included in the UPOAA.

The UPOAA addresses legislative trends and best practices and balances the need for acceptance of an agent’s authority against the need to prevent and redress financial abuse. While all 50 states have power of attorney statutes, nine states, Arkansas, Colorado, Idaho, Maine, Montana, Nevada, New Mexico, Virginia, Wisconsin, and the U.S. Virgin Islands, have adopted the UPOAA. In addition the UPOAA was introduced this year in Alabama and Texas.


There is little dispute that an agent under a power of attorney is a fiduciary. Many state statutes, however, are silent as to the agent’s standard of care. In those state statutes that address the standard of care, there are substantial differences among the states. Illinois and Indiana, for example, employ a standard of “due care.” 755 Ill. Comp. Stat. Ann. 45/2-7 (“Whenever a power is exercised, the agent shall act in good faith for the benefit of the principal using due care, competence, and diligence in accordance with the terms of the agency and shall be liable for negligent exercise.”); Ind. Code Ann. § 30-5-6-2 (“Except as otherwise stated in the power of attorney, the attorney in fact shall use due care to act for the benefit of the principal under the terms of the power of attorney.”). Florida and Missouri, on the other hand, use a standard of care akin to that of a trustee. Fla. Stat. Ann. § 709.08(8) (“Except as otherwise provided [in the statute], an attorney in fact is a fiduciary who must observe the standards of care applicable to trustees …”); Mo. Ann. Stat. § 404.714 (“A person who is appointed an attorney in fact under a
power of attorney, either durable or not durable, who undertakes to exercise the authority conferred in the power of attorney, has a fiduciary obligation to exercise the powers conferred in the best interests of the principal, and to avoid self-dealing and conflicts of interest, as in the case of a trustee with respect to the trustee's beneficiary or beneficiaries…”). Section 114 of the UPOAA addresses the minimum mandatory standard of care that must be employed by an attorney in fact. It states that the agent under a power of attorney must “act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances.”

Section 114 of the UPOAA requires the attorney-in-fact to act in accordance with the principal’s “reasonable expectations” to the extent they are known by the agent. If those expectations are not known, the attorney-in-fact must act in the principal’s “best interest.” The agent must act in good faith and only within the scope of authority granted in the power of attorney. Clearly, practitioners should be familiar with the law governing powers of attorney in their jurisdictions.

When representing an attorney-in-fact, the practitioner must determine the scope of representation and whether the attorney has a duty not only to the agent but also the principal. If the lawyer is retained to advise the attorney-in-fact, that lawyer clearly has a primary attorney/client relationship with the agent, even though the lawyer may also owe a duty to the principal. On the other hand, if the attorney is retained to represent the principal through the attorney-in-fact, the attorney’s duties are murkier. NAELA’s Aspirational Standards at B5 state that under such circumstances the principal’s “known wishes and best interests” are primary. A common scenario may arise where the agent under a power of attorney consults an attorney to make gifts in order to qualify the principal for public benefits. The principal may be competent and may not want such gifts to be made. Practitioners should make inquiry as to the competency
of the principal and should attempt to determine the wishes of the principal before assisting the
agent in transferring the principal’s assets.

**Guardians and Conservators**

Guardianships and conservatorships are governed by state statutes. As a result, the duty
of care owed by guardians to the wards or conservatees varies from jurisdiction to jurisdiction.

In 1982, the National Conference of Commissioners on Uniform State Laws approved the
Uniform Guardianship and Protective Proceedings Act. That Act was replaced in 1997 and was
enacted by Alabama, Colorado, District of Columbia, Hawaii, Massachusetts, Minnesota and the
U.S. Virgin Islands. Section 314 of the 1997 Act states that a guardian “shall act in the ward’s
best interest and exercise reasonable care, diligence, and prudence.”

MRPC 1.14 addresses the representation of a client under a disability. Specifically, it
requires the attorney to maintain a normal client-attorney relationship with the client as far as
reasonably possible. While it permits an attorney to initiate protective proceedings to protect the
person and property of the client, it also requires the attorney to reveal information about the
client only to the extent reasonably necessary to protect the client’s interests.

According to the ACTEC Commentary to MRPC 1.14, an attorney retained by a person
seeking appointment as a guardian or conservator has an attorney-client relationship with the
prospective fiduciary. Nevertheless, the attorney also may owe some duties to the ward even if
the attorney never represented the ward. If the attorney has knowledge that the fiduciary is acting
improperly with respect to the ward’s interest, the lawyer may have an obligation to disclose,
prevent or rectify the fiduciary’s misconduct. See MRPC 1.2(d).

Theoretically, an attorney may represent the guardian or conservator of a current or
former client if the representation of one will not be directly adverse to the other client. See
MRPC 1.7, MRPC 1.8 and MRPC 1.9. In practice, however, there may be a specific risk that the representation of a guardian or conservator will be materially restricted by the lawyer’s obligations to the ward or conservatee. In *Wyatt’s Case, supra.*, The New Hampshire Supreme Court suspended an attorney for two years for violating the conflict of interest rules in his representation of a ward and the ward’s conservator, and for acting adversely to the ward by assisting others in seeking a guardianship over him.

**Power of Attorney for Health Care**

Every state has statutes authorizing the use of advance health care directives. Concerned about the fragmentation of these laws and the inconsistency of advance health care directive statutes from state to state, the National Conference of Commissioners on Uniform State Laws approved the Uniform Health-Care Decisions Act in 1993. Since that time, however, only six states have enacted the Act.

A power of attorney for health care, also known as an advance health care directive or health care proxy, authorizes an agent to make medical decisions for the principal when he or she is no longer able to give informed consent to medical treatment. While the state statutes may vary, there are some common concepts that govern health care agents.

Generally, a health care agent is required to make decisions for the principal as if he or she were making those decisions. Obviously, this task is easier if the principal’s wishes are expressed in writing or at least have been communicated to the agent. If the principal’s wishes are not known, however, the agent must employ substituted judgment to determine what the principal would do or not do. Such decisions may require the agent to consider the principal’s religious beliefs, values, previous decisions and personality. If the agent is unable to determine
what the person would choose to do under the circumstances, then he or she must make decisions that are in the best interests of the principal.