A Fiduciary’s Lawyer’s Duty to the Fiduciary and its Beneficiaries: A Rhyme and a Reason for Every Season

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A Fiduciary’s Lawyer’s Duty to the Fiduciary and its Beneficiaries: A Rhyme and a Reason for Every Season

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I. Introduction. Prior to the middle of this century, American courts consistently held that an attorney’s duty extended only to the attorney’s client. Conversely, only a client could sue a lawyer for malpractice. Courts referred to the relationship that must exist before a duty would be found to be one of “privity” between the lawyer and the client. This area of law became loosely known as the “Privity Doctrine.”

Although the erosion of the Privity Doctrine had already begun with other professions, beginning with a series of California negligent will-preparation cases, an attorney’s privity defense to claims by non-clients began to show cracks in the bulwark. More recently still, courts are now deciding a wide variety of non-client claims against attorneys, including claims by beneficiaries against the attorneys representing their fiduciaries. In addition, courts have opined on the scope of a lawyer’s duties to non-clients in a variety of areas, including discovery disputes, fee disputes, disqualification proceedings and ethical opinions.

While these developments have proceeded, scholars have sought to provide guidance to estate attorneys on how to act ethically and how to avoid malpractice claims in representing fiduciaries. See, e.g. ACTEC Commentaries (2nd Ed. 1995); Reports of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association, 28 REAL PROP. PROB. & TR J. 763 (1994) (“Special Study Committee Report”); Geoffrey C. Hazard, Jr., Triangular Relationships: An Exploratory Analysis, 1 GEO. J. LEGAL ETHICS 15 (1987); Robert W. Tuttle, The Fiduciary’s Fiduciary: Legal Ethics in Fiduciary Representation, 1994 U. ILL. L.R. 889 (1994); Geoffrey C. Hazard Jr. and W. William Hodes, THE LAW OF LAWYERING, Prentice Hall & Business (2nd Ed., Supp. through 1994). Each work reflects the authors experiences and perceptions of proper results. And this one will too.

This paper is written from the perspective of a practicing attorney who needs specific guidance in dealing with fiduciary representation ethically while minimizing liability exposure. Although this is the paper’s perspective, the paper should also provide guidance to beneficiaries seeking redress against their fiduciaries’ attorneys.

Accordingly, this paper will provide an update on what is happening regarding claims by beneficiaries against their fiduciaries’ attorneys, an analysis of these developments in conjunctions with the ethical rules guiding lawyers, and suggestions based on how one practicing lawyer is dealing with these issues.
II. Foundations of Current Law: The Privity Doctrine. All cases dealing with an attorney’s liability to non-clients for negligence in the performance of the attorney’s duties can trace their ancestry to the United States Supreme Court’s decision in Savings Bunk v. Ward, 100 U.S. 195 (1879) (appeal from a District of Columbia trial court). In Savings Bank, an attorney searched title to real property and opined that the borrower held “good and . . unincumbered” (sic) title. The borrower used the attorney’s opinion to secure a loan. When the borrower defaulted, the lender sued the attorney. The Supreme Court ruled that the lack of privity between the lender and the attorney barred the lawsuit. The Court identified only three exceptions to this rule: where there is fraud, collusion, or the attorney’s act is imminently dangerous to someone’s life. Id. at 205-06.

As applied to attorneys, the Privity Doctrine is based on public policy grounds: for attorneys to represent their clients with zeal, they must not have conflicting duties to third persons. On the other hand, attorneys should not be able to use their license to practice law to damage innocent third parties. Initially, the protection of zealous representation was paramount. Thus, the United States Supreme Court opined, if non-clients could sue attorneys, “[t]here would be no bounds to actions and litigious intricacies. ..” Id. at 202. However, even in 1879, not everyone agreed. With only a cursory analysis, three dissenting justices would have held the attorney liable to the lender.


II. The Development of Cracks in the Privity Defense. While not necessarily the first crack in the attorney’s privity defense, three California cases provide the starting point for analyzing when a fiduciary’s attorney may be held liable to unhappy beneficiaries. Moreover, with only a few exceptions, all other state courts have considered these cases in determining whether to permit claims against attorneys in the absence of privity. See Morley, Michael P., Privily as a Bar to Recovery in Negligent Will-Preparation Cases: A Rule without a Reason, 57 U.Cin.L.R. 1123 (1989), at fn. 46 and fn. 47.

In each of the California cases, a negligently prepared or executed will prompted the beneficiary to sue. As a result, the testator’s and the beneficiary’s interests are identical, but the testator, having died, cannot sue. Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. App. 1981). In analyzing lawsuits by beneficiaries against the fiduciary’s attorneys, this identify of interest is a key fact in understanding the scope of the attorney’s duty and potential liability.
A. Biakanja v. Irving, 320 P.2d 16 (Ca1.1958). In Biakanja the California Supreme Court held a notary public liable to a beneficiary of an invalidly executed will even though there was no privity of contract between the notary public and the beneficiary. The Court adopted a six prong balancing test for determining whether the lack of privity between the scrivener and the disappointed beneficiary should preclude a lawsuit by the beneficiary.

B. Lucas v. Hamm, 364 P.2d 685 (Cal. 1961). In Lucas, an attorney drafted a testamentary trust that violated the rule against perpetuities. The beneficiaries of the trust sued the attorney. The California Supreme Court applied a slightly modified form of the balancing test in Biakanja to determine that the attorney had a duty to the beneficiaries of the defective trust. The Court rejected the privity rule as an absolute protection to the attorney. Although the Court used the balancing test, it seemed to rely primarily on whether or not the lawyer and the testator intended to benefit the beneficiary. Thus, the Court’s remedy sounded in contract law.

C. Heyer v. Flaig, 449 P.2d 161 (Cal. 1969). While the California’s Supreme Court’s decision in Heyer v. Flaig reaffirmed the balancing test used in Lucas, it did so by rejecting the contract basis of Lucas. Instead, the Court applied the six prong balancing test to determine whether the attorney had a duty to the beneficiary upon which the beneficiary could sue for damages in tort.

Iv. Negligent Will-Preparation Cases: Theories of Recovery.

A. The Biakanja Balancing Test. The California Supreme Court in Biakanja formulated a test for determining whether the defendant owes a duty to a non-client by weighing “various factors, among which are”:

1. The extent to which the transaction was intended to affect the beneficiary;
2. The foreseeability of harm to the beneficiary;
3. The degree of certainty that the beneficiary suffered harm;
4. The closeness of the connection between the defendant’s conduct and the injury suffered;
5. The moral blame attached to the defendant’s conduct;
6. The policy of preventing future harm.

Biakanja, 320 P.2d at 18.
B. **The Lucas Balancing Test.** Lucas modified the Biakanja Balancing Test by deleting the moral blame factor and adding a consideration of the effect on the legal profession of finding a duty. As modified, the test is:

1. The extent to which the transaction was intended to affect the beneficiary;
2. The foreseeability of harm to the beneficiary;
3. The degree of certainty that the beneficiary suffered harm;
4. The closeness of the connection between the defendant’s conduct and the injury suffered,
5. The policy of preventing future harm.
6. The burden on the legal profession if a duty is found to exist.

*Lucas, 364 P.2d at 688.*

C. **The Third Party Beneficiary Test.** In a negligent will-preparation case, the testator clearly intends to benefit the designated beneficiaries. Thus, the law of contract, specifically third party beneficiary contract law, provides a logical basis for determining whether an attorney would be liable to a non-client beneficiary. Under Section 302 of the Restatement of Contracts, a non-party to a contract can enforce contractual obligations flowing to the non-party provided it is an “intended” third party beneficiary of the contract; if the third party is only an incidental beneficiary, the third party has no rights under the contract. Restatement (Second) of Contracts §302 (1979).

As a result, when the Pennsylvania Supreme Court considered the California cases, it held that contract law was the exclusive means of establishing liability. *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983). In a negligent will-preparation case, the Court there held that privity was a requirement to sue an attorney in tort; however, the Court approved of contract claims based on Section 302 of the Restatement. *Id. at 750-51.* In *Schreiner v. Scoville*, 410 N.W.2d 679 (Iowa 1987), the Iowa Supreme Court used contract law to determine whether the attorney owed a duty to the testator’s beneficiary. It ruled: “A lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries as expressed in the [will]”). See also *Hermann v. Frey*, 537 N.E.2d 529 (Ind.App. 1989) (interpreting dicta in *Walker v. Larson*, 526 N.E.2d 968 (Ind. 1988) to adopt the Third Party Beneficiary Test); *Angel v. Oberon Investment*, 512 So.2d 192 (Fla. 1987) (rejecting balancing tests and adopting the Third Party Beneficiary Test).
D. **States Allowing either Test.** Kansas and Oregon have authorized disappointed beneficiaries to sue under either theory, the Third Party Beneficiary theory or a tort theory (based on the *Lucas* Balancing Test). *Pixel v. Zuspann*, 795 P.2d 41 (Kan. 1990); *Hale v. Grace*, 744 P.2d 1289 (Ore. 1987).

E. **The Hybrid Third Party Beneficiary/Balancing Test.** In a different context, the Washington Supreme Court fashioned a hybrid, balancing test. *Trask v. Butler*, 872 P.2d 1080 (Wash. 1994). In *Trask*, a beneficiary sued the personal representative’s attorney. In dismissing the case, the Washington Supreme Court combined the Balancing Test and the Third Party Beneficiary Test into one test “The intent to benefit the plaintiff is the first and threshold inquiry in our modified multi-factor balancing test.” Id. at 842. Once that test is met then the Court applies the *Lucas* Balancing Test.

In 1995, the Missouri Supreme Court adopted this same test in a negligent will-preparation case (but, interestingly, without citation to *Track*). *Donahue v. Shughart, Thomson & Kilroy, P. C.*, 900 S. W.2d 624,628-29 (Mo. 1995).

F. **Limitations in Negligent Will-Preparation Cases.** While these tests have generally expanded attorney liability to third parties in negligent will-preparation cases, there are still significant limitations.

1. **Privity as an Absolute Bar.** Lack of privity remains an absolute bar to suits against attorneys in negligent will-preparation cases in Texas, Nebraska, New York and Ohio. See *Berry v. Dodson, Nunley & Taylor*, 717 S.W.2d 716 (Tex.App. 1986), cert. denied 729 S.W.2d 690 (1987); *St. Mmy’s Church v. Tomek*: 325 N.W.2d 164 (Neb. 1982); *Spivey v. Pulley*, 526 N.Y.S.2d 145 (App.Div. 1988). The Ohio experience is checkered. In 1987, the Ohio Supreme Court held that a disappointed beneficiary could not sue the testator’s attorney because there was no privity between the attorney and the beneficiary. *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987). However, two years later the Ohio Supreme Court held that the beneficiary of a decedent’s estate could sue the fiduciary’s attorney because, as a “vested remainderman” the beneficiary was in “privity” with the fiduciary’s attorney. *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989). The court distinguished *Simon* on the basis that a potential beneficiary does not have a “vested interest in the estate.” Id. at 618. See also *Klancke v. Smith*, 829 P.2d 464 (Colo.App. 1991) (holding attorney for stepmother in wrongful death action (for death of husband/father) had no duty to the decedent’s children absent fraud or malice).
2. **Other Limitations.** While the trend has been to expand attorney liability in negligent will-preparation cases, that trend has not been uniform. In late 1994, the Colorado Court of Appeals (2-1 decision) held that disappointed beneficiaries could not sue the testator’s attorney unless the attorney’s error appeared on the face of the documents. *Glover v. Southard*, 894 P.2d 21 (Colo.App. 1994). In that case, the attorney failed to coordinate the testator’s will and trust agreement. The court refused to use extrinsic evidence to show that the testator intended the documents to work together.

In 1995, the Connecticut Court of Appeals held that an attorney who drafted a will making specific bequests had no duty to inquire into whether or not the testator had sufficient assets to fulfill the specific bequests. *Leavenworth v. Mathes*, 661 A.2d 476 (Conn.App. 1995). When the testator died the estate could not fulfill the bequests because of other pre-residuary bequests of the testator’s real property.

Finally, again in 1995, the California Court of Appeals held that an attorney owes no duty to the beneficiary of an unsigned will. *Radovich v. Locke-Paddon*, 41 Cal.Rptr. 573 (Cal.App. 1995). The beneficiary claimed that the attorney delayed preparation of the will and failed to follow up after delivery of the draft when the attorney knew the testator was taking chemotherapy treatments for breast cancer. In considering the *Lucas* balancing test, the Court focused on the burden on the profession by concluding that a duty to rush the execution of a document “improperly comprise[s the] attorney’s primary duty of undivided loyalty to his or her client.” *Id.* at 583.

**G. Summary.** Because the first prong of the balancing test is the intent of the transaction to benefit the third party, and the Third Party Beneficiary Test party beneficiary test is premised on finding that the third party was an “intended” beneficiary, each test will lead to the same result in most cases. However, because other factors can outweigh the first prong of the balancing tests, the attorney’s duty to non-clients should be broader when using the balancing tests as opposed to when using the Third Party Beneficiary Tests. Similarly, because the *Trask* hybrid balancing test requires both the Third Party Beneficiary Test and a balancing test to be met, the attorney’s duty to non-clients should be the narrowest when using that test.

**V. Other Theories of Recovery in Third Party Cases against Attorneys.** Non-clients sue attorneys in other areas as well. These cases affect the analysis of a fiduciary’s attorney’s exposure to claims made by the beneficiaries of the estate.
A. **Implied Contract.** In the partnership area, when attorneys represent the general partners of the partnership, what relationship do the attorneys have with the limited partners? Two recent cases analyzed the issue in terms of implied contract. *Marguilies by Mat-g&es Y. Upchurch*, 696 P.2d 1195 (Utah 1985); *Responsible Citizens v. Superior Court*, 20 Cal.Rptr.2d 756 (Cal.App. 1993).

In *Marguilies*, defendant doctors sought to disqualify the law firm representing a plaintiff in a medical malpractice action on the basis that the law firm had represented a limited partnership in which they were limited partners Tom a creditor’s action in an unrelated matter. Because the lawyer’s work had been to protect the general and limited partners horn liability in excess of their capital contributions, the Utah Supreme Court held that there was an implied contract between the attorneys for the partnership and the limited partners and disqualified the law firm. The Court reached this conclusion because “it was not at all unreasonable for the limited partners to believe that [the law tirm] was acting for their individual interests as well as the interests of the partnership in that litigation.” *Marguilies*, 696 P.2d at 1200.

In *Responsible Citizens*, a party sought to disqualify the law firm representing an adverse party on basis that the law firm had represented the party as a partner of a general partnership. The California Court of Appeals held that representation of a partnership did not mean that the law fum automatically represented partners. To make that determination, the Court remanded for a determination based on express and implied contract principles. *Responsible Citizens*, 20 Cal.Rptr.2d at 765; *but see Rendler v. Marcos*, 453 N.W.2d 202 (Wisc.App. 1990) (limited partners had no claim against attorneys for limited partnership).


*But see Arpadi v. First MSP Corporation*, 628 N.E.2d 1335 (Ohio 1994) (attorney owes duty to limited partners because attorney is in privity with all to whom attorney’s client, the general partner, owes a fiduciary duty; *see Elam v. Hyatt Legal Services* at V1.G below).

B. **Assumption of Duties.** Any person, including a lawyer, can assume a duty he or she would not otherwise have. For example in *Schwartz Y. Greenfield*, the borrower’s attorney offered to file security documents for the lender and negligently failed to do so. The Queen’s County Supreme Court, Special Term, held that: “Once the [attorney] voluntarily assumed the duty to tile these papers, he had a positive duty to do so.” 396 N.Y.S.2d 582, 584 (Sup. Court 1977). See
also Franko v. Mitchell, 762 P.2d at 1351 (paragraph V.A above) (the Court noted that an attorney can assume a duty to a person, making it a client, although there was no fee charged or paid, because “[a]n important factor in evaluating the relationship is whether the client thought an attorney-client relationship existed”).

C. Negligent Misrepresentation. As noted above, American law has long held that an attorney can be sued for fraud. Under Section 552 of the Restatement (Second) of Torts, one party to a transaction can sue the other party’s agents for negligent misrepresentations made during the course of the transaction. Can this theory of liability be asserted against attorneys?

1. Section 552. In relevant part, this section provides:

INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) The liability stated in Subsection (1) is limited to loss suffered:

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(Emphasis added). By its terms, Section 552 would apply to an attorney acting in his or her capacity as an attorney in either “obtaining” or “communicating . . . information.” If this duty is deemed to apply to an attorney representing a fiduciary, the attorney could have a duty of care to insure that the information the fiduciary gives the attorney is accurate.
The attorney could argue that the beneficiary was not involved in a “business,” and therefore the Section does not apply. As between an innocent beneficiary and the negligent attorney, a court may be inclined to think the multi-million dollar trust constitutes a business as to the beneficiary. Although no case has held a fiduciary’s attorney liable to beneficiaries under this theory, it has been argued. Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex.App. 1993). In that case, the Court rejected the application of Section 552 but not on the basis that there was no business.

Where a non-client has sued an attorney for negligent misrepresentation, the results have been inconsistent

2. **Cases holding a Non-Client Cannot Sue.** In October of 1995, the Missouri Court of Appeals considered whether an attorney who prepared an opinion letter for a borrower to obtain financing could be liable to the lender for negligent misrepresentation. Murk Twain Kansas City Bank v. Jackson, 1995 WL 576803 (Mo.App. 1995) (not released for publication as of 1/8/96). The opinion letter inaccurately recited that the security documents would be enforceable. Following the Missouri Supreme Court’s decision in Donahue v. Shughart (see paragraph IV.E above), the Court held that before the lender could sue, it must establish that its claim met the Modified Balancing Test. Since the lender could not establish that the client intended for the attorney’s work to benefit the lender, the Court awarded judgment to the defendant attorney. See also Moss v. Zufiris, Inc., 524 So.2d 1010 (Fla. 1988) (holding that absent a showing of liability under Florida’s Third Party Beneficiary Test, the non-client could not maintain an action for negligent representation against the attorney); Onitu Pacific Corporation v. Trustees of Bronson, 843 P.2d 890 (Ore. 1992) (same; also arguing that §552 was not intended to apply to arms-length transactions); In re Phar-Mor, Inc. Securities Litigation, 892 F.Supp. 676 (applying Third Party Beneficiary Test as a prerequisite to suing an accountant under §552); Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex.App. 1993) (in line with Texas’ Strict Privity Doctrine, the Court held that §552 does not apply to lawyers); Anderson v. McBurney, 467 N.W.2d 158 (Wisc.App. 1991) (applying the Third Party Beneficiary Test).

3. **Cases Holding a Non-Client Can Sue.** In 1995, the New Jersey Supreme Court ruled that a prospective purchaser could sue a former owner’s attorney. Petrillo v. Bachenberg, 655 A.2d 1254 (NJ. 1995). While representing the former owner, the attorney took two pages from a set of percolation tests, stapled them and sent them to the purchaser. The effect
was to make it appear that the land had passed 2 out of 7 tests rather than 2 out of 3. The purchaser, using the two page document, then sold to the plaintiff. Although the attorney represented the purchaser in its sale to the plaintiff, there was no evidence that the attorney knew that the two pages had been delivered to the plaintiff. In analyzing cases using a balancing of factors or the Third Party Beneficiary Test, the Court concluded that other courts “typically limit a lawyer’s duty to situations in which the lawyer intended or should have foreseen that the third party would rely on the lawyer’s work.” Id. at 1358. The Court further cited to Restatement (Second) of Torts Section 552 as a basis for liability. See also Atlantic Paradise Associates, Inc. v. Perskie, Nehmad & Zelter, 666 A.2d 211 (N.J.App. 1995) (where the Appellate Division, following Petrillo, held an attorney liable under Section 552 for inaccurately opining that real estate could be used as a “condotel” in a public offering statement).

In 1991, interpreting Michigan law, the Sixth Circuit held that an attorney preparing a corporate debenture for a closely held corporation could be sued under Section 552 by all foreseeable persons in the class of injured persons. Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir. 1991).

Finally, in an extreme example, the Tennessee Supreme Court used Section 552 as a basis for holding a seller’s attorney liable to buyer when the attorney negligently failed to have the deeds transferring title properly acknowledged. Collins v. Binkley, 750 S.W.2d 737 (Term. 1988). The Court did not explain how this negligence constituted supplying false advice for the guidance of third parties.

4. Lessons? In light of the potential exposure on a negligent representation, what should a lawyer for a fiduciary do? One can be a watchdog. Or perhaps the attorney should never make or assist in making any communications to the beneficiaries. These questions highlight the problems with applying Section 552 to attorneys. Instead of zealous representation, the attorney has conflicting and uncertain duties. Nonetheless, New Jersey, Michigan and Tennessee lawyers must contend with exposure to beneficiaries under Section 552.

VI. Beneficiaries Suing their Fiduciaries’ Attorneys: Current Trends. With this background, we can now examine specific cases that have decided when beneficiaries can sue their fiduciaries’ attorneys. To show where the law seems to be headed, we will analyze the cases in chronological order.
A. *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. App. 1976). The guardian of a ward absconded with the ward’s assets. The ward’s successor guardian sued the former guardian’s attorney. The trial court dismissed. On appeal, the Court of Appeals used the *Lucas* Balancing Test and held the attorney had a duty to the ward.

We are of the opinion that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If [the attorney] knew or should have known the guardian was acting adversely to his ward’s interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward. In fact, we conceive that the ward’s interests overshadow those of the guardian. *Id* at 990; emphasis added.

*See also Cook v. Connelly*, 353 N.W.2d 184 (MinnApp. 1984) (stating ward was in privity with attorney for guardian).

B. *Morales v. Field*, 160 Cal.Rptr. 239 (Cal.App. 1979). The attorneys for the trustee-executor petitioned for court approval of the fiduciary executing a loan guarantee without disclosing that the attorneys also represented a co-guarantor (whose potential liability was reduced as a result of the fiduciary’s guarantee). Using the *Lucas* Balancing Test, the Court felt the potential harm in allowing the attorneys to represent conflicting parties warranted finding that the attorneys had a duty to the beneficiaries to disclose the representation of the co-guarantor. The Court stated further:

An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary. *Id* at 244.

*But see Johnson v. Superior Court*, 45 Cal.Rptr.2d 312,317 (Cal.App. 1995) (noting that California Courts have not followed this decision and suggesting it could be limited to situations where the fiduciary’s attorneys make affirmative representations of care to the beneficiary).

C. *Baer v. Broder*, 436 N.Y.S.2d 693 (Sup.Ct. 1981), aff’d on other grounds, 447 N.Y.S.2d 538 (A.D. 1982). The executor of the decedent’s estate hired an attorney to pursue a wrongful death claim. The executor was also a statutory beneficiary of the action. Later, the executor/beneficiary brought a claim against the attorney for malpractice in handling the wrongful death action. The attorney
moved to dismiss on the basis that the estate had no interest in the action and that
the beneficiary, as beneficiary, was not in privity with the attorney. Despite the
lack of privity, the Court held that the beneficiary had a cause of action because of
the “face to face” nature of the meetings with the attorney. In essence, the Court
found that there was an implied contract.

decedent’s estate sued the executor’s attorney for failing to give tax advice that
would have saved substantial estate taxes. The New York intermediate Court of
Appeals, following New York’s adherence to the Privity Doctrine, dismissed. See
also Viscardi v. Lerner, 510 N.Y.S.2d 183 (A.D. 1986); Spivey v. Pulley, 526

E. Jenkins v. Wheeler, 316 S.E.2d 354 (N.C.App. 1984). The beneficiary sued the
executor’s attorney for negligence in pursuing a wrongful death action.
Reinstating the lawsuit, the North Carolina Court of Appeals used the Biakanja
Balancing Test and determined that the attorney’s duties ran to the beneficiaries.
In applying the test, the Court stated:

[Public policy has always required that attorneys represent their clients
zealously. When the client merely represents a class of beneficiaries, the
attorney should consider the beneficiaries’ interests, without undue
concern for the interests of the legal representative. Id. at 357.

In analyzing this, and other wrongful death cases, note that the heirs have a cause
of action under wrongful death statutes that the executor asserts for their benefit.
Although there is discretion in how the lawsuit is handled, the executor has no
discretion once a settlement or judgment is obtained. The executor pays the
proceeds to the heirs as directed by state law..

deteriorated, nephew, allegedly with uncle’s consent, used a power of attorney to
sell stock and make unsecured loan to nephew’s business. Before proceeding,
nephew sought legal counsel, and attorney advised him that, because of conflict of
interest, nephew should not proceed with plan. After nephew insisted he had
uncle’s permission, attorney helped sell the stock, prepared a promissory note for
nephew and distributed the proceeds of the stock sale to nephew. The New Jersey
Superior Court held that, as a result of nephew’s power of attorney, when attorney
accepted stock proceeds and prepared note, he entered into an attorney client
relationship with uncle. In addition, after uncle’s death, attorney continued to
represent nephew as the personal representative of the estate. Using the Biakanja
Balancing Test and the Rules of Professional Conduct, the court held that the
attorney had a duty to the beneficiaries in representing the fiduciary for the estate.
and its principal. The New Jersey Supreme Court cited Albright with approval in its recent decision in Petrillo. See ? above.

G. Elam v. Hyatt Legal Services, 541 N.E.2d 616 (Ohio 1989). The testator devised a life estate to the life beneficiary. The attorney representing the executor transferred the property subject to the life estate to the life beneficiary in fee simple, and the remaindermen sued. The trial court and appellate court dismissed on the basis of lack of privity. See Simon in IV.F.1 above. The Supreme Court reversed and remanded for trial. Because only two years earlier the Court had reaffirmed an attorney’s use of the privity defense in Ohio, the Court held that the beneficiaries of the estate were in privity with the fiduciary’s attorney. Id at 618.

H. Goldberg v. Frye, 266 Cal.Rptr. 483 (Cal.App.1990). The executor and his attorney negotiated an improvident settlement agreement. The beneficiaries sued the attorney. The California Court of Appeals analyzed the issue in terms of the Lucas Balancing Test and held the beneficiaries could not sue the attorneys for negligence in a probate estate administration. The Court explained its analysis of the public policy issues as follows:

Contrary to the allegations in the complaint, it is well established that the attorney for the administrator of an estate represents the administrator and not the estate. Particularly in the case of services rendered for the fiduciary of a decedent’s estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. While the fiduciary in the performance of [its duties] may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney by definition represents only one party: the fiduciary. . The beneficiaries are entitled to even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary’s attorney.

Viewing the legatees’ claim in this light, we find it impossible to conclude that the parties to the attorney’s contract entered into same for the principal purpose of providing benefit to the legatees. We find nothing to indicate that this attorney’s retention was in any respect different from the typical retention of counsel by a fiduciary of a decedent’s estate. As noted above, such retention constitutes the counselor the attorney for the fiduciary, and not the attorney for the estate, its beneficiaries, its creditors or others who may be interested therein. Id. at 489-90.

I. Neal v. Baker, 551 N.E.2d 704 (Ill.App.1990), cert. denied 553 N.E.2d 378 (1990). The beneficiary sued the personal representative’s attorney for negligent advice concerning tax issues and failing to the defend a will contest. On appeal,
the Illinois Court of Appeals, applying the Third Party Beneficiary Test, affirmed the trial court’s dismissal of the claim; It held:

An attorney owes a duty to a non-client in the most limited of circumstances. . . A non-client must prove that the primary purpose and intent of the attorney-client relationship is to benefit or influence the third party. . The primary purpose of the attorney-client relationship between [the personal representative] and [the attorney] was to assist [the personal representative] in the administration of its duties.

J. **Weingarten v. Warren, 753 F.Supp. 491 (S.D.N.Y. 1990).** The remainder beneficiaries alleged that the trustee’s attorney was negligent in allowing trust principal to be converted to income. The Federal District Court interpreting New York law dismissed that the beneficiaries claim against the attorney for malpractice because of New York’s adherence to the Strict Privity Doctrine. *Id.* at 496-97. However, the Court ruled that the beneficiaries could sue the attorney for breach of fiduciary duty based on the New York Court of Appeals’ decision in *In re Clarke’s Estate, 188 N.E.2d 128 (N.Y. 1962).* In *Clarke,* an attorney negotiated an agreement to split a brokerage commission with the realtor recommended by the attorney to sell estate property, the Court of Appeals denied the attorney compensation from the estate stating:

The agreement with [the broker], even without the subsequent arrangement [to keep a share of the broker’s commission with a new purchaser], put the attorney in a position of divided loyalty. An attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself. [Citation omitted.] And it matters not that no actual harm was done the estate . . . . *Id.* at 130.

K. **Anderson v. McBurney, 467 N.W.2d 158 (Wisc.App. 1991).** The decedent’s will left his estate to his lawyer. The lawyer’s law firm represented the lawyer as executor of the estate. The lawyer filed an affidavit with the court inaccurately alleging that the decedent had no heirs. The decedent’s only child was incapacitated and omitted from the decedent’s will. Her guardian sued the attorneys for negligence in failing to discover her status as an pretermitted child. The Wisconsin Court of Appeals affirmed dismissal of the child’s claims, holding that the only exception to the Privity Doctrine in Wisconsin was under the Third Party Beneficiary Test and that the child did not qualify.

L. **Saks v. Damon Raike and Company, 8 Cal.Rptr.2d 869 (Cal.App. 1992).** The trustee sold valuable real estate and reinvested in real estate subject to a single tenant. When toxic waste was found on property, its value dropped precipitously. Beneficiaries sued the attorney for negligence, breach of contract and breach of
fiduciary duty. The California Court of Appeals affirmed the dismissal of those claims. In dicta, the Court noted the Supreme Court’s decision in Lucas and cited with approval Goldberg. See VI.H above.

M. Rutkowski v. Hollis 600 N.E.2d 1284 (Ill.App. 1992). Wife, as executor of her deceased husband’s estate, sued the attorney who had represented her deceased husband as executor of a third party’s estate. Husband was also a beneficiary of the third party’s estate. In her complaint, wife alleged that her husband as a beneficiary had a claim against the attorney for providing negligent tax advice in the administration of the estate. The Illinois Court of Appeals, while acknowledging that husband as executor had a claim against the attorney, affirmed the dismissal of the wife’s claim on behalf of her husband as a beneficiary of the estate. In doing so, the Court addressed wife’s claim that her husband as beneficiary was a third party beneficiary of attorney’s contract with husband as executor.

The non-client must allege and prove the intent of the contract was primarily to benefit the non-client third party through the attorney’s actions. Even if [wife] had appropriately alleged [husband] was an intended third-party beneficiary, she could not have successfully brought an action against [attorney] because of the potentially adversarial relationship between an executor’s interests in administering the estate and the interests of the beneficiaries of the estate. [Attorney’s] primary duty was to [husband] as executor of the estate and not to the beneficiaries of the estate, including [husband].

N. Charleston v. Hardesty 839 P.2d 1303 (Nev. 1992). The trustee of a private trust took all of the trust’s assets and later filed for bankruptcy. The guardian of the beneficiary of the trust sued the trustee’s attorney. The attorney argued that he owed no duty to the incapacitated beneficiary. The trial court granted summary judgment to the attorney. On appeal, the Nevada Supreme Court reversed. The Court relied on the California Court of Appeals’ decision in Morales (see VI.B above) and ignored its sister division’s decision in Goldberg (see VI.H above). stating:

We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiary as a matter of law. In the present case, if [the attorney] was the attorney for the trustee, we conclude that he owed the [beneficiaries] a duty of care and fiduciary duties. Id. at 1306-07.
0. *Hopkins v. Akins*, 637 A.2d 424 (C.App. 1993). Mother named son as personal representative of her estate and left two thirds of her estate to son and one third to her husband, son’s adoptive father. When son sold mother’s home, the attorney for son (as personal representative) wrote husband and advised him that the proceeds from the sale would be placed in a two signature joint account between son and attorney. After sale, son absconded with the sale proceeds and husband sued the attorney for her negligence in not securing the proceeds. The District of Columbia Court of Appeals reversed the trial judge’s judgment in favor of the father. The Court ruled that attorney’s letter did not constitute a contract to hold the home proceeds. Further, based on the “potentially adversarial relationship [that exists] between an executor’s interests . and the interests of the beneficiaries,” it held that the attorney for an estate owes no duty of care to the estate’s beneficiaries. *Id.* at 428. It acknowledged an exception only when “the [beneficiaries] were the direct and intended beneficiaries of the [attorney’s] services.” *Id* at 429.

P. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex.App. 1993). The beneficiaries sued the trustee’s attorneys for alleged errors in distributing the estate. The Texas Court of Appeals affirmed the trial court’s dismissal of the claim on the basis of Texas’s adherence to the Privity Doctrine. See also *Oliver v. West*, 908 S.W.2d 629 (Tex.App. 1995) (same).

Q. *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994). Four of 68 beneficiaries of a trust sued the attorneys for the trustees when stock in a newspaper company comprising 90% of the trust’s assets had a steep decline in value. The beneficiaries claimed breach of duty and breach of contract. The Massachusetts Supreme Court affirmed the dismissal of the beneficiaries’ complaint. As to the beneficiaries’ Third Party Beneficiary claim, the Court, relying on Section 302 of the Restatement (Second) of Contracts, held that they were incidental beneficiaries and not entitled to protection. As to the issue of whether the attorneys had a duty, the Court stated:

> That the interests of the trustee and the interests of the beneficiaries may at times conflict cannot seriously be disputed. Should we decide that a trustee’s attorney owes a duty not only to the trustee but also the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney’s task of advising the trustee.

Our decisions make clear that it is the potential for conflict that prevents the imposition of a duty of the [fiduciary’s attorneys] to the beneficiaries.

Moreover, the disciplinary rules which govern attorney conduct in Massachusetts require . that an attorney preserve the secrets and
confidences gained in the course of representing a client. To impose a duty on a trustee’s attorney to beneficiaries could create situations antithetical to this disciplinary rule. Id. at 544-45.

R  Jewish Hospital v. Boatmen’s Nat’l Bank, 633 N.E.2d 1267 (Ill.App. 1994), cert. denied 642 N.E.2d 1282 (1994). Beneficiaries of the testator’s will sued the attorney who negligently prepared the will and who, after the testator’s death, represented the personal representative of the estate and negligently prepared the estate tax return. The Illinois Court of Appeals, using the Third Party Beneficiary Test, held that the attorney owed the beneficiaries a duty in preparing the will, but the attorney did not owe a duty to the beneficiaries in representing the personal representative of the estate. In reaching its conclusion, the Court stated:

Our supreme court has strongly embraced the concept that third-party-beneficiary status should be easier to establish when the scope of the attorney’s representation involves matters that are non-adversarial, such as in the drafting of a will, rather than when the scope of the representation involves matters that are adversarial . . .

Often, the estate’s adversary is a beneficiary of the estate who is contesting the will or making a claim against the estate or petitioning to have the executor removed or held liable for mismanagement of the estate. An attorney representing an estate must give his first and only allegiance to the estate, in the event that such an adversarial situation arises. Even though beneficiaries of a decedent’s estate are intended to benefit from the estate, an attorney for an estate cannot be held to a duty to a beneficiary of an estate, due to the potentially adversarial relationship between the estate’s interest in administering the estate and the interests of the beneficiaries of the estate. (Citations omitted). Id. at 1277-78.

S. Trask v. Butler, 872 P.2d 1080 (Wash. 1994). Brother brought a malpractice action against attorney representing sister as personal representative. The Washington Supreme Court adopted the Hybrid Third Party Beneficiary/Balancing Test. See IV.E above. In determining that public policy did not impose a duty, the Court stated.

The policy considerations against finding a duty to a non-client are the strongest where doing so would detract from the attorney’s ethical obligations to the client. This occurs where a duty to a non-client creates a risk of divided loyalties because of a conflicting interest or a breach of confidence.
[Thus,] we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries. *Id.* at 1084-85.

*See also Leipham v. Adams*, 894 P.2d 576 (Wash.App. 1995) (beneficiaries conceded that they had no claim against attorneys for personal representative).

*The Trask* Court’s analysis is contrary to the Washington Supreme Court’s earlier analysis in *Matter of Estate of Larson*, 694 P.2d 1051 (Wash. 1985). There the Court had stated:

> In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. The personal representative stands in a fiduciary relationship to those beneficially interested in the estate. . . The personal representative employs an attorney to assist him in the proper administration of the estate. Thus, the fiduciary duties of the attorney run not only to the personal representative but also to the heirs.

However, *the Trask* Court did not expressly *overrule Larson*. Instead, it merely noted that *Larson* did not hold that there was privity of contract between the attorney and beneficiaries, that it was not a malpractice case, and that it did not apply the Hybrid Balancing Test.

T. *Goldberger v. Kaplan, Strangis and Kaplan, Psi.*, 534 N.W.2d 734 (Minn.App. 1995). The beneficiaries sued the personal representative and its attorneys for negligence in administering the estate. The Minnesota Court of Appeals adopted the Hybrid Third Party Beneficiary/Balancing Test with a slight twist. After considering the *Lucas* Balancing Test and the Third Party Beneficiary Test, the Court stated: “It seems, then, that the supreme court intended the Lucas factors as an aid in determining whether the non-client is a third-party beneficiary and that is how we have analyzed this case.” It dismissed the claims against the attorneys because:

> Here, appellants are not the direct, intended beneficiaries of the personal representative’s attorneys’ services. As permitted by statute, the personal representative hired the attorneys to assist and advise him in fulfilling his fiduciary duty to manage the estate in accordance with the terms of the will and the law and “consistent with the best interests of the estate.” The attorneys’ services, therefore, must be directed towards serving the best interests of the estate and, thus, all beneficiaries. If any “person” is a third-party beneficiary of the attorneys’ services, it is the estate itself; at best, individual beneficiaries of the estate are only “incidental beneficiaries” of the attorneys’ services. *Id.* at 738-39.
U. *Leyba v. Whitley*, 1995 WL 694126 (N.M. 1995). The conservator for the minor beneficiary of his father’s estate sued the lawyers who represented the personal representative in a wrongful death claim. The lawyers successfully negotiated a settlement but paid the proceeds to the minor beneficiary’s mother who used the money for her personal benefit. The New Mexico Supreme Court, using the Hybrid Third Party Beneficiary/Balancing Test, held that the attorney owed a duty to the minor beneficiary. The Court noted its approval of *Spinner* and *Trask* (see V.LQ and V.LS above), but distinguished this case because:

A trustee in the traditional sense has broad discretionary powers over the estate assets and must make difficult investment and distribution decisions. The attorney for the trustee must assist the trustee to make these discretionary decisions. A personal representative under the Wrongful Death Act, by contrast, must simply distribute any proceeds obtained in accordance with the statute and has no discretionary authority. As argued most persuasively by Leyba, the personal representative has no authority per se to act as trustee or conservator with respect to wrongful death proceeds distributable to a statutory beneficiary who is still a minor. The personal representative’s lack of discretionary powers over any wrongful death recovery makes the trust cases inapposite.

V. Summary. These cases show a number of trends that restrict a beneficiary’s ability to sue its fiduciary’s attorney. First, the increasing use of the Third Party Beneficiary Test or the Hybrid Third Party Beneficiary/Balancing Test limit the attorney’s duty more than the balancing tests do. Moreover, those courts that use the California balancing tests are focusing more attention on its first element: The extent to which the transaction was intended to affect the beneficiary. The overall effect is to limit the scope of the attorney’s duty. Second, recent court decisions that have analyzed the policy considerations in extending a duty to the beneficiaries have emphasized that it is the potential for adversity in the estate setting that negates any duty. Finally, several of these decisions focus on the attorney’s ethical duty to represent clients with undivided loyalty.

Discerning trends is one thing; discerning the precise status of the law is another. For instance, absent fraud, collusion or malice, New York courts have limited a lawyer’s duties to his or her clients. *Thus*, in *Weingarten* (see V.LJ above), the Federal District Court for the Southern District of New York held (true to New York precedents) that a non-client cannot sue the lawyer for malpractice. However, the Court ruled that the non-client beneficiary could sue the lawyer for breach of fiduciary duty. Similarly, the Washington Supreme Court ‘states in *Estate of Larson* (see V.LS above) that lawyers for a fiduciary have duties to the heirs, but then it states it is not overruling *Estate of Larson* when it holds that the beneficiaries cannot sue the fiduciary’s attorney (see *Trask v. Butler* at V.LS
above). One wonders what kind of duty a person can have to another person that will \textit{not} support a claim for breach of duty? This lack of consistency makes pegging the exact status of “the law” extremely difficult.

Moreover, when courts have dealt with other issues, such as discovery disputes, they have opined in broad language that can be used to establish the scope of an attorney’s duty to the fiduciary’s beneficiaries. Thus, a discussion of these other cases is necessary to a full understanding of these issues.

VII. Understanding the Scope of a Fiduciary’s Attorney’s Duties to Beneficiaries: Cases in Other Areas.

A. Discovery Disputes. \textit{When} beneficiaries sue a fiduciary, they invariably want to know what their fiduciary and its attorney have been discussing \textit{or} what the attorney has been doing. When the fiduciary opposes discovery of attorney-client communications or the attorney’s work product, the parties often call on courts to resolve the \textit{issue}. In general, courts have ordered fiduciaries and their attorneys to disclose their communications and work product.

1. \textit{Riggs National Bank v. Zimmer}, 355 A.2d 709 (Del.Ch. 1976) ("\textit{Riggs}"). \textit{Riggs} is the seminal case in this area. Beneficiaries of a private trust sought discovery of a memorandum prepared by the fiduciary’s attorney. The Delaware Chancery Court compel discovery, reasoning:

\textit{[T]he payment to the law firm out of the trust assets is a significant factor, not only in weighing ultimately whether the beneficiaries ought to have access to the document, but also it is itself a strong indication of precisely who the real clients were.}

As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered.


If, as Riggs and its progeny imply, the beneficiary is the “real” client then the attorney naturally owes the beneficiary a duty of care as the attorney would any client. In this regard, the Massachusetts Supreme Court, following its analysis of the fiduciary’s attorney’s duty vis a vis the beneficiaries in Spinner v. Nutt (see VLQ above), held that a fiduciary could assert the attorney-client privilege to preclude discovery by beneficiaries. Symmons v. O'Keefe, 644 N.E.2d 631 (Mass. 1995).

Note, however, that it does not automatically follow that a jurisdiction’s decisions will follow its duty decisions and vice versa. For instance, the Federal District Court in Comegys was interpreting Texas law when it followed the “ver persuasive reasoning of. . . Riggs.” Contrary to the analysis in Riggs, Texas courts have consistently held that absent fraud or malice, a non-client cannot sue an attorney. Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716 (Tex.App. 1986), cert. denied 729 S.W.2d 690 (1987); Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex.App. 1993). Thus, there is some authority for limiting the scope of discovery cases to discovery issues.

2. **Joint Clients.** In resolving discovery and evidentiary disputes, several courts have considered whether the beneficiaries are joint clients with the fiduciary. For example, in Estate of Torian v. Smith, the Arkansas Supreme Court, in resolving a dispute over whether the executor’s attorney could testify in support of a fee application, held that the beneficiaries were joint clients with the executor. 564 S.W.2d 521 (Ark. 1978). Similarly, in Gump v. Wells Fargo Bank N.A., the California Court of Appeals held: “We conclude that when an attorney counsels a trustee to aid him in his duties as administrator of a trust, the trust
beneficiaries are ordinarily to be treated as clients of the attorney and “joint clients” [for purposes of California’s rules of evidence].” 237 Cal.Rptr. 311,335 (Cal.App. 1987) (note that this case was later decertified); but see Lasky, Haas, Cohler & Munter v. Superior Court, 218 Cal.Rptr. 205,213 (Cal.App. 1985) (rejecting Gump). On the other hand, in Quintel Corp. N. V. v. Citibank N.A., in discussing the “joint client” exception to the attorney-client privilege in the context of an agent acting as attorney in fact for a principal, the Federal District Court, interpreting New York law, held:

An attorney who represents two parties with respect to a single matter may not assert the privilege in a later dispute between the clients. The exception only applies, however, where the attorney actually represented both parties. The fact that [the agent’s] attorneys engaged in negotiations and performed legal services in connection with the acquisition does not make [the principal] the client of these attorneys. [The principal] retained his own counsel to represent him in connection with the acquisition. 567 FSupp. 1357, 1364 (S.D.N.Y. 1983).

Thus, there would likewise appear to be authority for limiting the joint client exception to discovery and evidentiary issues.

B. Fee Disputes. Fee disputes between beneficiaries and their fiduciary’s attorney have generated broad statements concerning the fiduciary attorney’s duties. For instance, in In re Clarke’s Estate, where an attorney negotiated an agreement to split a brokerage commission with the realtor recommended by the attorney to sell estate property, the Court of Appeals denied the attorney compensation from the estate stating:

The agreement with [the broker], even without the subsequent arrangement [to keep a share of the broker’s commission with a new purchaser], put the attorney in a position of divided loyalty. An attorney for a fiduciary has the same duty of undivided loyalty to the cestui as the fiduciary himself. [Citation omitted.] And it matters not that no actual harm was done the estate . . .

188 N.E.2d 128,130 (N.Y. 1962). It was this language that led the Federal District Court in Weingarter v. Warren to hold that the beneficiaries of a trust could sue the fiduciary for breach of duty even though New York law precluded a malpractice claim. See V1.J above.
Similarly, in *Matter of Estate of Larsen*, the Washington Supreme Court, in resolving a dispute between the beneficiaries and the fiduciary’s attorney concerning fees, stated:

> In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. The personal representative stands in a fiduciary relationship to those beneficially interested in the estate. The personal representative employs an attorney to assist him in the proper administration of the estate. Thus, the fiduciary duties of the attorney run not only to the personal representative but also to the heirs. 694 P.2d 1051 (Wash. 1985). As noted, *Trasky. Butler* effectively overruled this dicta, See VI.S above. See also *Estate of Halas*, 512 N.E.2d 1276 (Ill.App. 1987) (in fee dispute, attorneys conceded that they owed fiduciary duties to beneficiaries).

C. **Disqualification Proceedings.** Similarly, when a beneficiary seeks to disqualify the fiduciary’s counsel, courts opine on the scope of the attorney’s duties. For instance, in *Estate of Gory*, the beneficiaries sought to disqualify the personal representative’s attorneys on the basis that the attorneys owed fiduciary duties to both the personal representative and the beneficiaries. The Florida Court of Appeals reversed the trial court’s disqualification order, stating:

> We have no quarrel with the view that counsel for the personal representative of an estate owes fiduciary duties not only to the personal representative but also to the beneficiaries of the estate. [citing *Matter of Estate of Larson*]. This does not mean however, that counsel and the beneficiaries occupy an attorney-client relationship. They do not. “In Florida, the personal representative is the client rather than the estate or the beneficiaries.”

570 So.2d 1381,1382 (Fla.App. 1990)

Conversely, when the Arizona Court of Appeals had to consider a similar issue, it disqualified the attorney. *Estate of Shano*, 869 P.2d 1203 (Ariz.App. 1994). The attorney represented the named personal representative and primary beneficiary of a holographic will and sought the probate of that will. The attorney secured his client’s informal appointment as special administrator. When the decedent’s surviving spouse filed a contest to the will, the Court appointed another party to act as special administrator. The attorney associated as co-counsel of the new special administrator. Based on its analysis in *Fickett v. Superior Court* (see VI.A above), the Court of Appeals disqualified the attorney because: “As attorney for
the special administrator, [the attorney] owed a derivative fiduciary duty to the [potential beneficiaries], including the surviving spouse . ..” Id. at 1207.

D. Ethics Opinions. Ethics opinions also offer the opportunity for broad statements concerning the scope of an attorney’s duties to its fiduciary/client’s beneficiaries. For example, the New York State Bar Association, Committee on Professional Ethics considered the duties of an attorney representing an executor when the attorney learns the executor intends to commit a breach of trust or has committed a breach of trust. Opinion No. 649 (1993). Answering that an attorney should disclose a breach of trust in some circumstances and not in others, the committee stated:

We have held that while the executor’s attorney has a “duty to represent the executor with undivided loyalty,” the executor’s counsel is prohibited from “taking any position antagonistic to the estate or inconsistent with the executor’s duty to carry out the testatrix's will.” . . We reiterated in N.Y. State 5 12 that the attorney, although retained by the executors, has a duty not only to represent them individually, but also to serve the best interests of the estate to which they, in turn, owe their fiduciary responsibilities.

Opinion No. 649 (1993). Again, if New York still adheres to the Strict Privity Rule, how can the attorney owe duties to the estate that are contrary to those owed to the executor?

In comparison, the ABA Ethics Committee opined that a lawyer to a fiduciary owed its loyalty to the fiduciary and was not authorized to disclose confidential information to any third party, including the fiduciary’s beneficiaries. American Bar Association Formal Ethics Opinion 94-380, “Counseling a Fiduciary” (1994).

In Matter of Goldman, the Montana Supreme Court, in disciplining an attorney for submitting false evidence in a worker’s compensation case, stated:

The duty of an attorney is broader than that of a trustee because the persons entitled to rely on the attorney cover a broader range. A trustee is responsible to his beneficiary, or persons claiming through his beneficiary, but an attorney’s responsibility runs to his clients, the Bar itself, the court and the general public.

588 P.2d 964 (Mont. 1978). If the attorney owes a duty that is broader than that owed by a trustee, what duty does the attorney owe to beneficiaries when representing a fiduciary?
E. **Duty to Disclose Fiduciary Breach to the Court.** Outside of Washington, ethical rules preclude disclosures by an attorney to the detriment of its fiduciary client except in limited circumstances. See VIII.F below. However, two Illinois appellate court decisions have mandated disclosures of a fiduciary’s possible misdeeds. In *Estate of Glenos*, when the executor accepted an offer that was 1/3rd lower than the final offer accepted for the sale of an estate asset, the executor’s attorney became suspicious and discussed the matter with an assistant to the probate judge. The Court of Appeals approved the attorney’s conduct, stating “As an attorney and officer of the court, [the executor’s attorney] was under an obligation to inform the court of his suspicion of fraud on the part of the executor.” 200 N.E.2d 65,67 (Ill.App. 1964) (emphasis added).

In *Estate of Minsky* the Court of Appeals denied fees to the executor and the executor’s attorney. 376 N.E.2d 647 (Ill.App. 1978). The Court stated:

> From the evidence adduced, the trial judge could conclude that [the executor] knew that [his sister] was indebted to the decedent. . . and did not attempt to collect or recover this money. As an attorney and officer of the court, [the executor’s attorney] was under an obligation to inform the court of any suspicion of fraud or wrongdoing on the part of the executor.

Id. at 650 (emphasis added).

Note that these statements are inconsistent with the Illinois Court of Appeal’s decision in *Neal v. Baker* (see VI.1 above) where the Court held the attorney for the fiduciary owed no duty to the beneficiaries unless they met the Third Party Beneficiary Test. Further, neither does Rule 1.6 of the Illinois Rules of Professional Conduct support these statements. See Exhibit A at 45.

F. **Summary.** These authorities show that the courts, in dealing with the fiduciary’s attorney in one context, make statements that create enormous uncertainty regarding the scope of the attorney’s duties in representing a fiduciary. It would be facile to say that these authorities are limited to the issue considered. As noted above (see VI.S above), the Washington Supreme Court in *Trask v. Butler* dealt with its broad statement in *Matter of Estate of Larson* concerning the attorney’s duty to beneficiaries in the fee dispute by limiting the comments to a fee dispute. Moreover, it is highly unlikely that the Montana Supreme Court, following its decision in *Matter of Goldman*, will hold that any member of the public can now sue a Montana attorney based on the attorney’s duty to the public. See VII.D above. However, the New York Court of Appeals’ statement in a fee dispute (*In re Clarke’s Estate*, VII.B above) became the basis for the *Weingartner v. Warren* decision (see VI.J above) permitting a beneficiary to sue the fiduciary’s attorney for breach of duty even though the beneficiary could not sue the attorney for malpractice. Nonetheless, attorneys must seek an ethical and workable course in
estate administration. To do so, the attorney must understand the ethical rules and how scholars are interpreting their application to attorneys representing fiduciary.

VIII. Attorneys Representing Fiduciaries: The Ethical Quagmire. Given the widely divergent decisions and their different settings, trying to chart an ethical course of conduct is somewhat like navigating a quagmire on foot -- there are plenty of opportunities to sink in the muck. Thus, while courts struggle with suits against attorneys, discovery motions, fee disputes and the like, attorneys must seek a solid path upon which to tread. The ACTEC Commentaries, the Special Study Committee Report, the Law of Lawyering, the proposal of the American Law Institute (the “ALI”) in its Restatement (Third) of the Law Governing Lawyers, among others, provide guidance. While these sources have common themes, there are significant disagreements. Charting a way through the quagmire requires an understanding of what these scholarly works say.

A. The Key Issue. The key issue is the scope of the lawyer’s duty of loyalty to the lawyer’s fiduciary client. The Comment to Rule 1.7 of the Model Rules of Professional Conduct (the “MRPC”) begins: “Loyalty is an essential element in the lawyer’s relationship to a client.” Commentators agree.

Admonitions to be loyal flow freely in discussions of lawyering. Geoffrey Hazard warns “[i]n the relationship with a client, the lawyer is required above all to demonstrate loyalty.” Charles Wolfram emphasizes: “Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer’s virtually total loyalty to the client and the client’s interest.”

Michael K. McChrystal, Lawyers and Loyalty, 33 WM. &MARY L. REV. 367,367 (1992) (citations omitted). Thus, loyalty has traditionally been viewed as the foundation upon which the attorney-client relationship exists. Moreover, this analysis has been so long stated, repeated and honored that clients expect their lawyers to be totally loyal to their interests.

1. Loyalty and Its Limitations. Loyalty enjoys a hallowed state because it protects values that are essential to America’s system of justice. Thus: (i) Client loyalty encourages better client conduct by authorizing the lawyer to counsel a wayward client instead of having to withdraw without correcting the problem; (ii) Loyally protecting client confidences encourages free disclosure of information; (iii) Loyalty grants the client the autonomy to learn the legal facts and then choose for him-, her- or itself what course to follow; and (iv) Loyalty protects the promise, made
expressly or by implication, that the lawyer will zealously advocate the client’s position. *Id.* at 386305.

Because “loyalty has its costs,” American law, and the ethical rules governing lawyers, recognize that a lawyer’s duty of loyalty has its limits. *Id.* at 367. Simply put, loyalty to a client can prevent an otherwise moral and just result from happening. The issue then is which moral and just results warrant authorizing a lawyer to be, in the words of Mr. McChrystal, “scrupulously disloyal” (that is, acting disloyally, including the disclosure of client confidences, because of a duty to a more worthy ethical principle). *Id.* at 369.

Determining when a lawyer may be “scrupulously disloyal” entails a balancing of the relative good of loyalty to a client versus loyalty to another ideal or person. Lawyers have long struggled with the relative value of loyalty to a client versus protecting the interests of third parties and ideals. In this area, there is an on-going struggle between how, on the one hand, state bar associations, and the lawyers they represent, state supreme courts, and the judges they represent, handle this issue, and, on the other hand, how some estate planning lawyers and scholars handle this issue.

2. When **Can a Lawyer** be Scrupulously Disloyal? Thus, in representing a fiduciary, when is it ethical to be scrupulously disloyal. Note that it is only when the attorney’s loyalty to the fiduciary is at issue that the ethical dilemma arises. When the attorney can act for a beneficiary’s benefit and be loyal to the fiduciary, there is no ethical issue to solve.

B. **The ACTEC Commentaries.** With its publication of the ACTEC Commentaries in 1993, the College took a major step in providing guidance for attorneys representing fiduciaries. As shown by the publication of the second edition of the Commentaries in 1995, the College continues to analyze and refine its analysis of the estate lawyer’s duties. Continued analysis and research will likely bring additional fine tuning.

The Commentaries take the position that an attorney may be authorized to disclose a fiduciary’s breach of duty to the beneficiaries or a court and may be required to disclose in order to “protect the interests of the beneficiaries.” See VIII.B.3 below. In the absence of a contrary agreement with the fiduciary, this is the default rule. The Commentaries permit an attorney to modify the default rule by agreeing with a fiduciary that the attorney will not disclose breaches to the beneficiaries provided the attorney gives notice to the beneficiaries that the attorney is doing so.
In tenor, the Commentaries encourage attorneys to take a proactive approach to protecting the beneficiaries. By so doing, they resolve the issue of when to be “scrupulously disloyal” in favor of protecting innocent beneficiaries. The relevant portions of the Commentaries, and the issues they raise, follow.

1. **Implied Authorization to Disclose.** The lawyer is also impliedly authorized to disclose otherwise confidential information to the courts, administrative agencies, and other individuals and organizations as the lawyer believes is reasonably required by the representation.

   ACTEC Commentaries (1995) at 41.

2. **Disclosures by Lawyer for Fiduciary.** [T]he fiduciary’s retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer’s duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. . . . In any event, the lawyer may not knowingly provide the beneficiaries or the court with false or misleading information.

   ACTEC Commentaries (1995) at 41.

Query: Can a client ever impliedly authorize an attorney to be disloyal? Implied authorization should support the client’s goals. The suggestion of using this doctrine to permit a lawyer for a fiduciary to disclose a breach is inconsistent with the development of the doctrine. See generally Jocelyn N. Sands and Roy Corm III, STUDENT’S COMMENT: Confidentiality and the Lawyer’s Conflicting Duty, 27 How.L.J. 329 (1984). See further discussion regarding this issue at VII1.D below.

3. **Duties to Beneficiaries.** . . . The attorney for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. . . [I]n some circumstances the attorney may be obligated to take affirmative action to protect the interests of the beneficiaries.


4. **Disclosure of Acts or Omissions by Fiduciary Client.** In some jurisdictions an attorney who represent a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty.
In jurisdictions that do not require or permit such disclosures, an attorney engaged by a fiduciary may condition the representation upon the fiduciary’s agreement that the creation of an attorney-client relationship between them will not preclude the attorney from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty. . . . Whether or not such an agreement is made, the attorney for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. The nature and extent of the duties of the attorney for the fiduciary are shaped by the nature of the fiduciary estate and by the nature and extent of the attorney’s representation.


5. Attorney Should Not Attempt to Diminish Duties of Attorney to Beneficiaries Without Notice to Them. Without having first given written notice to the beneficiaries of the fiduciary estate, an attorney who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to dish or eliminate the duties that the attorney owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, an attorney should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary that the attorney would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the attorney for a fiduciary to make such disclosures, the attorney generally should not give up the opportunity to make such disclosures when the attorney determines the disclosures are needed to protect the interests of the beneficiaries.


C. The Special Study Committee Report. In 1994, the ABA’s Real Property, Probate and Trust Law Section Special Study Committee issued its report on professional responsibility. 28 REAL PROP., PROB. & TR J. 765 (1994). One section of the report dealt exclusively with the duties of the attorney for a fiduciary. Id. at 825. Although similar to the ACTEC Commentaries, the Special Study Committee Report has some important differences.

1. Absent a continuing attorney client relationship with one or more beneficiaries, the Special Study Committee Report takes the position that the fiduciary is the attorney’s only client. However, the Report stresses that the attorney represents the fiduciary as a fiduciary, and not individually. Special Study Committee Report at 832.
2. However, having taken the position that the attorney only represents the fiduciary, the Special Study Committee Report takes the position that the lawyer must treat the beneficiaries as clients in certain circumstances.

The Duties of the Lawyer for the Fiduciary May Be Modified by a Written Agreement. . . However, if the rights or protections of the beneficiaries will be affected, the beneficiaries also must consent to the agreement. For instance, if the fiduciary wants to take away the lawyer’s authority to disclose breaches of fiduciary duty to the beneficiaries, the beneficiaries’ consent is required.


Although the basic command of Rule 1.6 is that lawyers must maintain silence with respect to information about their clients, there are many situations in which clients either actively want disclosures made or in which it can be assumed that they would want disclosures made in order to advance the task the lawyer has engaged to carry out. In still other situations, the operation of law requires that disclosure be made by the client or by the lawyer as the client’s agent. All of these situations are contemplated by the introductory language of Rule 1.6(a) permitting disclosures “that are impliedly authorized in order to carry out the representation.”

THE LAW OF LAWYERING 1.6:201-I “Authorized or Required Disclosure of Information About a Client” at 158,3, (emphasis added). Based on the idea that a client impliedly authorizes all disclosures that the operation of law demands, the authors argue:
Since a fiduciary is required to provide truthful and complete information to a beneficiary, a competent lawyer for a fiduciary must insure that such information is in fact passed along. Disclosing this kind of information must be understood as “impliedly authorized in order to carry out the representation,” as set forth in Rule 1.6(a). As discussed in § 1.6:201-1 [see quoted language above], it is often the case that clients would rather nor have disclosed what they have already “authorized” to be disclosed in this sense, and that would certainly include defalcating or otherwise faithless fiduciaries.

LAW OF LAWYERING, 1.3: 108 “Primary and Derivative Clients” at 78-80.1, fn. 2.1 (emphasis added).

This analysis is plain wrong. When the “operation of law” requires disclosure, a client’s consent is irrelevant. The lawyer discloses because he or she must. Thus, to discuss “implied authority” to disclose in this context makes no sense. Indeed, the statement in the Comment to Rule 1.6 that a lawyer in litigation must admit matters that cannot be properly denied does not even belong in Rule 1.6; instead, that principle should logically be based upon the direction in Rule 3.3 that “a lawyer shall not make a false statement of material fact or law to a tribunal.” MRPC Rule 3.3(a)(1). The Comment to Rule 3.3 provides: “An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein. . .” MRPC Rule 3.3 “Representations by a Lawyer.” Where the matter at issue “cannot properly be disputed,” the lawyer has knowledge that precludes making a false statement orally to the court and in any document filed with the court.

Equally illogical is the argument that “it is often the case that clients would rather not have disclosed what they have already ‘authorized’ to be disclosed.” If one expressly authorizes a lawyer to disclose information and then changes one’s mind, the client can withdraw the authorization. This proposition takes the position that once the law presumes an “implied authorization,” it can never be withdrawn. The Comment rejects this analysis: “A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client’s instructions or special circumstances limit that authority.” Comment to Rule 1.6 (emphasis added).

E. The ALI Restatement of the Law Governing Lawyers.

1. Sections 111 and 113 Rejects the Law of Lawyering Position. The ALI has been working on a series of drafts of a Third Restatement of the Law Governing Lawyers (“Restatement LGL”). See, e.g., Restatement (Third)
of the Law Governing Lawyers, Tentative Draft No. 3, April 10, 1990. Section 1111(1) prohibits any disclosure if it would “adversely affect” the client or if the client directs no disclosure be made. The Restatement LGL addresses the concept of “implied authority” to disclose in Section 113 as follows:

§ 113. USING OR DISCLOSING INFORMATION TO ADVANCE CLIENT INTERESTS OR FOR PURPOSES OF LAW PRACTICE

Unless the client has directed otherwise, a lawyer may use or disclose confidential client information:

(1) When the lawyer reasonably believes it will advance the interests of the client . .; or

(2) When the lawyer reasonably believes it is appropriate and not inconsistent with the client’s interests . .

(Emphasis added.) Thus, the Restatement LGL permits disclosures that are not expressly authorized only when the disclosure advances the client’s interests or is not inconsistent with the client’s interests. Under this standard, a lawyer would not be “impliedly authorized” to disclose a fiduciary-client’s breach of duty absent an express authorization by the fiduciary.

2. Proposed Section 73 Supports the Law of Lawyering Position. In April 1994, the ALI issued a tentative draft of the Restatement of the Law Governing Lawyers addressing when a lawyer owed duties to non-clients (that could then subject the lawyer to a claim of malpractice). Restatement LGL, Tentative Draft No. 7, April 12, 1994. In the area of fiduciary administration, Section 73 provided that in some circumstances, the lawyer would owe a duty of care to the beneficiaries that would subject the lawyer to claims of malpractice.

[A] lawyer owes a duty to use [the prescribed amount of] care . . [t]o a non-client when and to the extent that circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary . . to prevent or rectify the breach of a fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect
its rights and such a duty would not significantly impair the performance of the lawyer’s obligations to the client

Thus, this Section would mandate actions, including disclosures of confidential information, in some situations when an attorney represents a fiduciary. This proposed section of the LGL would create an impossible standard for determining lawyer malpractice: how does a lawyer decide when a non-client is reasonably able to protect its rights? Would it be sufficient if the beneficiary were a patent lawyer? Moreover, how does the lawyer determine when acting on the duty would “significantly impair” the “lawyer’s obligations to the” fiduciary. Note that if the lawyer guesses wrong, the fiduciary would have a malpractice claim. Indeed, one can envision a lawyer subject to this standard filing a declaratory judgment action asking for the court to direct whether fiduciary or client had the greater claim on the lawyer’s duty of loyalty. One thing is certain: any lawyer acting for the benefit of a beneficiary under this standard would soon learn that the fiduciary viewed any disclosure as a “significant impairment” of the lawyer’s obligations to the fiduciary.

Less than two months after Section 73 was proposed by Charles Wolfram, the project’s reporter, the ALI sent the proposal back to him with directions to re-think the matter. ABA/BNA Lawyer’s Manual of Professional Conduct, Current Reports, June 1, 1994 at 139

While one would think that the ALI’s action would place the issue on hold, several courts have cited proposed Section 73 in support of their decisions regarding the scope of an attorney’s duties to third parties. See, e.g., Petrillo v. Bachenerg, 655 A.2d 1254 (N.J. 1995) (citing another part of Section 73); Atlantic Paradise Associates, Inc. v. Perskie, Nehmad & Zelter, 666 A.2d 211 (N.J.App. 1995) (same). Thus, even though withdrawn, Section 73 may affect the analysis of an attorney’s duties to his or her fiduciary/client’s beneficiaries.

F. State Ethics Codes and Rules Reject the Law of Lawyer Position. Exhibit A is a table showing when each of the 50 states and the District of Columbia authorizes a lawyer to be “scrupulously disloyal.” The summary is illuminating. Only Washington (state) authorizes a disclosure of a fiduciary’s breach of trust, and then only to the Court. The closest any other jurisdiction comes to
authorizing' disclosure are the 16 jurisdictions that permit disclosure of fraudulent conduct in certain circumstances. None of the remaining 35 jurisdictions authorizes disclosures of fraudulent misconduct. Instead, these jurisdictions require a potential or actual crime to activate the authorization to disclose. Of these states, 10 jurisdictions authorize disclosures only to prevent a murder or battery (with substantial injuries). In struggling to balance the good engendered by keeping a loyalty and the good engendered by authorizing a disclosure, the state bar and supreme courts of every jurisdiction except Washington determined that something more than a breach of fiduciary duty was required to authorize a “scrupulously disloyal” act -- and in approximately two thirds of the jurisdictions, something substantially more -- a crime.

Moreover, Exhibit A further identifies 17 states that simply do not permit disclosures based on implied authorization in any circumstances. In those states, express authorization, in one case in writing, is required before the lawyer can disclose a client’s confidence. One of these, Utah, adopted the MRPC but expressly removed the “implied authorization” language from both Rule 1.6 and the Comment to Rule 1.6. Of the remaining states, Florida adopted the “implied authorization” language, but it expressly limits that authority to disclosures that “serve the client’s interest.”

G. Complications: The Reliance Defense. Unfortunately, the fiduciary’s desire to use the Reliance Defense further complicates the attorney’s ethical duties. The fiduciary can invoke the Reliance Defense when the fiduciary relies on an expert’s advice in jurisdictions that have adopted the Uniform Trustees Powers Act or the Uniform Probate Code and in certain other jurisdictions. See generally Charles M. Bennett, *When the Fiduciary’s Agent Errs -- Who Pays the Bill -- Fiduciary, Agent, or Beneficiary?* 28 REAL PROP. PROB. TR J. 429 (1993). In general, if the fiduciary acts reasonably in retaining the agent, the fiduciary is exonerated for the agent’s errors. In some, but not all, states that have approved of this defense, the fiduciary must also prove that it acted reasonably in relying on the agent.

The problem with the Reliance Defense is that the fiduciary often seeks exoneration at the expense of the innocent fiduciary. For instance, in *Estate of Gangloff v. Borgers*, the defalcating agent, an attorney, absconded with estate assets. 743 S.W.2d 498 (Mo.App.2d 1987). Thus, to support the Reliance Defense

'Some states mandate disclosures in certain situations. As shown on Exhibit A, mandates deal with particularly egregious situations. Thus, for purposes of treating the limits of a lawyer’s right to disclose, mandates are included as authorizations.
Defense, a fiduciary would be wise to insure that the agent is subject to a direct action by the beneficiary and can answer for its errors. This logically leads to the conclusion that the engagement letter between the agent and the fiduciary should include a provision naming the beneficiary as a third party beneficiary of the agent’s agreement. If the attorney rebuts any intent to benefit the estate’s beneficiaries as third party beneficiaries for him- or herself (see discussion at M.D.2 below), how can the attorney then recommend including such language in the contracts between me fiduciary and other agents (accountants, real estate brokers, etc.)?

The only case to deal with both issues failed to consider this conflict. In Jewish Hospital v. Boatmen’s Nat ‘l Bunk (see VLR above), the Illinois Court of Appeals dealt with both the Reliance Defense and the duty of the personal representative’s attorney to the estate’s beneficiary. After first holding that the beneficiary could not sue the attorney directly under the Third Party Beneficiary Test the Court exonerated the fiduciary based on its reliance on its attorney’s advice. “The [fiduciary] had a right to hire an attorney to handle the legal affairs of the estate, and the [fiduciary] had a right to rely on the attorney’s advice. ..” Id at 1281.

In jurisdictions that have embraced the Reliance Defense, the attorney must consider whether his or her actions for its own protection create an immediate conflict of interest with its fiduciary.

H. Summary. Based on this analysis, the author believes that a lawyer’s right to act with scrupulous disloyalty towards his or her fiduciary client is much more limited than the ACTEC Commentaries, the Special Study Committee Report and the Law of Lawyering would suggest. In sum, consider this: A lawyer can voluntarily choose to represent multiple clients even though there is the possibility of “material limitations” on the lawyer’s ability to represent each client, provided “each client consents after consultation.” MRPC Rule 1.7(a) and (b). However, when that occurs, the lawyer has equal duties to each. Either client can terminate the lawyer’s services. MRPC Rule 1.16(a)(3). Moreover, absent an express agreement with the clients, the lawyer must not use any confidential information to the disadvantage of one client and to the advantage of the other. See MRPC Rules 1.7, 1.8(b), 1.8(d), 1.8(g), and 1.9(c). Viewed in this context, it would seem to be inconsistent to permit a disloyal act to a fiduciary/client in order to benefit a beneficiary/non-client.²

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² In the minority of states where a beneficiary is treated as a client or derivative client of the lawyer, the lawyer still should not prefer one client (the beneficiary) over another (the fiduciary).
IX. General Recommendations.

A. Know the Law in the Jurisdiction. As shown above, the law concerning a fiduciary attorney’s ethical and legal duties to the fiduciary’s beneficiaries is anything but consistent. In addition, courts adopt rules that make sense in one context and not in another. Thus, it follows, lawyers must know the law of their jurisdiction before deciding how best to handle these complicated issues. Where possible lawyers should actively seek to define the terms of their duties to fiduciaries and beneficiaries in an engagement agreement. Whether this can be done depends on the law in each state. Consider:

1. Arkansas. A lawyer practicing in Arkansas, in the face of the Supreme Court’s decision in Estate of Torian (see VII.A.2 above), should treat the fiduciary and its beneficiaries as joint clients. As a result, the lawyer should plan to work directly with the beneficiaries. Otherwise, the lawyer has duties to unseen and unknown clients, a certain prescription for problems. Alternatively, Arkansas lawyers might consider including a paragraph in their petitions for probate asking the probate court to limit their duties to acting as counsel for the personal representative.

2. Nevada. In Nevada, Charleson v. Hardesty although citing California decisions using a balancing test, apparently holds that a trustee has a fiduciary duty to beneficiaries in all cases. Thus, a Nevada attorney may have no ability to control the scope of his or her duties to the fiduciary’s beneficiaries in an engagement agreement.

3. Arizona. The Arizona Courts of Appeal have adopted the Lucas Balancing Test. Thus, outside of guardianship cases (see Fickett v. Superior Court at VI.A above), an Arizona attorney should be able to control the extent of his or her duties to the beneficiary in the engagement agreement.

4. Pennsylvania. In Pennsylvania, where the Third Party Beneficiary Test controls, the lawyer should be able to control the extent of his or her duties to the beneficiary in the engagement agreement.

5. New York. Despite New York’s continued adherence to the Strict Privity Doctrine, New York lawyers would be well advised to avoid assuming any duties to their fiduciaries’ beneficiaries. Where the Appellate Division’s decision is Baer v. Broder (see VI.C above) was based on the “face to face” relationship between the attorney and the beneficiary, New York lawyers need to be careful if they have meetings with the beneficiaries, even if the fiduciary is also present. A tactful letter to beneficiaries
explaining that the lawyer represents the fiduciary and that the beneficiaries should consider seeking their own counsel could avoid this problem.

6. Minnesota. In Minnesota, a lawyer representing a guardian represents the ward. Thus, a Minnesota lawyer cannot affect the nature of his or her duties to the ward. *Cook v. Connelly*, see VI.A above.

Despite the inconsistencies and uncertainties, if lawyers will consult the law of their own jurisdiction, they can profit from the following suggestions.

B. **Analyze the Nature of the Fiduciary Representation.** While there are certain general conclusions that can be drawn from this analysis, no one should apply the rules in a vacuum. In those states that follow the balancing tests, the lawyer must analyze each situation based on the specific representation that is being undertaken. For instance, in Arizona and Minnesota, if an attorney represents a guardian of the estate or conservator for an incapacitated person, the attorney should view the incapacitated person as “the” client. *See Fickett v. Superior Court* (Arizona) and *Cook v. Connelly* (Minnesota) at VI.A above. But in other situations, the attorney may have only limited or no duties to the fiduciary’s beneficiaries. See *Franko v. Mitchell* (using the Lucas Balancing Test in determining a borrower’s attorney’s liability to a lender) at V.A above.

C. **Adhere to the State’s Ethical Rules.** While the ACTEC Commentaries, the Special Study Committee Report and other scholarly works can provide general guidance, each attorney must know and adhere to the ethical rules of his or her jurisdiction. As explained above, outside of Washington, these rules do not readily support the positions taken by these scholars. Charting an ethical course requires an understanding and appreciation of the jurisdiction’s ethical rules. *Compare* Utah Rules of Professional Conduct, Rule 1.6 (deleting any implied authority to disclose) with Washington Rules of Professional Conduct, Rule 1.6 (expressly authorizing an attorney to disclose a breach of duty to the Court). No matter how beneficial a course of conduct may seem, it should give one serious concern if it violates the letter of the ethical rules in the jurisdiction.

D. **Execute an Engagement Letter with the Fiduciary.** Estate lawyers, facing growing time demands necessitated by complex estate and income tax laws, find it difficult to execute engagement letters. However, if the lawyer is to control the nature of the lawyer’s duties to beneficiaries, the lawyer must execute an engagement letter. Based on the ACTEC Commentaries, the Special Study Committee Report, the positions of other legal scholars, if the attorney does not have an engagement letter, he or she will likely be presumed to have undertaken
duties to both the fiduciary and the fiduciary’s beneficiaries. To opt out of this default position, the attorney needs an engagement letter.

1. **Represent the Fiduciary both as a Fiduciary and Individually.** When an attorney represents the fiduciary, absent a contrary agreement with the fiduciary, the Special Study Committee opines that the attorney represents the fiduciary only as a fiduciary and not as an individual. Special Study Committee Report at 831-32. Thus, this may be the default rule. But, is this advisable? If an attorney represents the fiduciary both as a fiduciary and individually, the attorney has established a prima facie case of potential adversity with the beneficiaries of the estate. Moreover, this representation is consistent with how attorneys really represent fiduciaries. For instance, if an attorney files an accounting with the court, the attorney is seeking an order that benefits the fiduciary individually (exoneration from claims for liability) at the expense of the beneficiaries (future suit for damages). Thus, the attorney should represent the fiduciary in both capacities.

2. **Negate any Third Party Beneficiary Relationship.** The letter should specifically negate any duty to the beneficiaries. The ACTEC Commentaries authorize engagement letters that permit the attorney for the fiduciary to disclose confidential information concerning the fiduciary’s activities, including violations of its duties, to the beneficiaries. ACTEC Commentaries at 32. If the attorney follow this course, this agreement forms the basis of a duty to the beneficiaries upon which they can sue. Thus, unless the attorney feels comfortable with this arrangement, the engagement letter should negate any duty to the beneficiaries.

3. **Acknowledge the Potential for Conflicts of Interest.** As noted, those courts holding that the attorney’s duties run only to the fiduciary have done so in part on the basis of a potential conflict of interest. Thus, include a provision in the engagement letter acknowledging that possibility.

4. **Affirmatively Commit to be Loyal to the Fiduciary.** Even if the attorney has duties to the beneficiaries in that jurisdiction, no client is offended by an affirmative commitment of loyalty. Where possible, the attorney should commit to be loyal to the fiduciary above all. When doing so, the attorney needs to apprise the fiduciary of potential problems. Thus, the attorney should:
3. **Deal with Confidentiality Issues.** The apparent majority rule is that the beneficiaries of the fiduciary estate can discover confidential communications between the fiduciary and its lawyers. Thus, the attorney needs to advise the fiduciary of this fact in the engagement letter. Again, the fact that discovery may be compelled is no **reason** to assume the duty to disclose. Simply advise the fiduciary that courts have compelled disclosure and suggest that if the fiduciary has communications that it wants protected, it should use separate counsel at its own expense.

6. **Make it Simple.** There is a tendency in drafting engagement letters to cover the waterfront. While this may make sense, be as brief and simple as possible. In this context, consider *Profit Sharing Trust for Marprowear v. Lampf*, 630 A.2d 1191 (N.J.Sup.Ct. 1993). There the Court held the attorneys who gave an opinion letter in conjunction with a public offering liable to investors notwithstanding the inclusion of disclaimer language in the offering. The plaintiffs expert testified that “information mentioned only within a lengthy offering statement was not a **meaningful** disclosure.” *Id.* at 1195 (emphasis added).

7. **Sample Engagement Letter.** One struggling lawyer’s example is attached as Exhibit B.

**E. Send a Letter of Explanation to the Beneficiaries.** In addition, the lawyer should send a letter of explanation to **the** beneficiaries. While acknowledging that the lawyer will communicate with the beneficiaries, the letter should explain that the lawyer represents the fiduciary and that the beneficiaries can obtain separate counsel if they so desire. This negates any implied contract, any assumption of a duty to the beneficiaries and the first two prongs of the *Lucas* Balancing Test (intent to benefit third party and foreseeability of harm).

There are two problems with these letters, one legal and one practical. The legal problem arises when the beneficiary is not legally competent. Sending a letter to that beneficiary accomplishes nothing. An attorney may solve this problem in many jurisdictions by sending the letter to the beneficiary’s natural or legal guardian (on the basis of the doctrine of virtual representation). Where the beneficiary has no natural or legal guardian, the attorney should consider sending the notice letter to the Court or petitioning the Court for a determination that notice can be delivered to another **sui juris** beneficiary. The Court **may** then determine that other competent beneficiaries in the same position as the incompetent beneficiary can represent his or her interest. Alternatively, the Court could appoint a guardian or guardian **ad litem**.
The practical problem with these letters is making them tactful. Exhibit C contains the author’s latest effort. Does it work?

F. **Be Wary of Helping Beneficiaries.** In estate administration, attorneys often assist beneficiaries with the recovery of assets that are not subject to fiduciary administration. The two most common examples would be collecting life insurance and pension proceeds. The attorney should be able to help the beneficiary recover the life insurance without significantly increasing his or her exposure. In that event, the attorney should send a letter to the beneficiary stating that at the direction of the fiduciary (whose direction would have been obtained), the attorney will assist in recovering the insurance as part of the attorney’s duties to the fiduciary.

Recovering pension funds, however, is much more difficult. The fiduciary may want the beneficiary to make elections (to minimize the estate’s taxes) that conflict with what is in the beneficiary’s best interest. Before jumping to help, the attorney should carefully consider the impact on the fiduciary and the estate. Moreover, unlike life insurance, the attorney must actively represent the beneficiary concerning pension proceeds -- there are simply too many issues to try to act for the beneficiary as an accommodation to the fiduciary. Thus, the attorney should have the fiduciary’s consent to contract with the beneficiary as a client, open a file and bill the beneficiary for the services rendered.

G. **Never Make a (Mis)Representation.** Where some courts have approved suits by non-clients against attorneys on the basis of negligent misrepresentation under Section 552 of the Restatement (Second) of Torts, an attorney would be wise to never make any representation to the beneficiaries. While this is probably impractical, the attorney can be careful not to make representations that the attorney does not know to be accurate. Where the attorney makes a representation, he or she should consider doing so in writing, thus lessening the chance for a controversy over what was represented.

H. **Be Prepared to Withdraw.** Lawyers generally, and estate lawyers in particular, abhor withdrawing from representing a fiduciary. Representing any client who is paying for their legal services with other people’s money is easier than representing someone whose legal fees comes from its own pocket. However, if the attorney commits to provide loyal service to the fiduciary, the fiduciary breaches its duties to the beneficiaries, and the fiduciary insists that the attorney assist it in hiding those breaches, the attorney may have no option but to withdraw. As noted above, even if the beneficiaries are deemed to be the attorney’s clients, the lawyer’s duties to the fiduciary preclude disclosing the breach to the beneficiaries in all jurisdictions and to the courts in all jurisdictions except Washington.
I. **Document a Withdrawal.** If the lawyer withdraws, the lawyer should prepare a memorandum to the file that documents the events that led to and the reasons for the withdrawal. This step protects the attorney against a claim by either the beneficiaries or the fiduciary.

J. **Be Flexible.** The attorney needs to recognize that there can be no absolute rules. For instance, in many jurisdictions, the ethical rules authorize the attorney to disclose confidential information if the fiduciary has used the attorneys services in committing a fraud. If an accounting has failed to disclose a material fact, these rules would authorize the attorney to disclose the undisclosed fact. See also MRPC Rule 3.3, Candor toward the Tribunal.

X. **Specific Recommendations when the Attorney has previously Represented the Beneficiaries.**

A. **Representing the Fiduciary and the Beneficiaries as Clients.** When the attorney has previously represented one or more beneficiaries, the attorney faces additional problems. On the one hand, the attorney can continue to represent the fiduciary and the beneficiary with the written consent of each client. See MRPC Rule 1.7. When an actual conflict occurs, the attorney may be able to resign from representing one party and continue representing the other, provided both parties consent. MRPC Rule 1.9, If either client refuses to consent to the attorney’s continued representation of one of them, or if the attorney determines that he or she cannot adequately represent the continuing client, the attorney must withdraw from representing either party. MRPC Rule 1.9 (as a prerequisite to continued representation, the attorney must reasonably believe that the attorney can adequately represent the continuing client).

B. **Representing only the Fiduciary.** Under MRPC Rule 1.9, the attorney can represent the fiduciary only with the beneficiary/client’s consent.

C. **Representing the Fiduciary who is also a Beneficiary.** Representing the fiduciary as a fiduciary and individually as a beneficiary requires the attorney to make a threshold determination that the attorney can adequately represent the fiduciary in both capacities. Both commentators and the courts approve this arrangement absent improper conflicts between the fiduciary/beneficiary’s duties and interests. Special Study Committee Report at 842-43; Matter of the Application of Birnhaum, 460 N.Y.S.2d 706 (Sur.Ct.1983).

D. **Representing only the Beneficiary.** If the attorney chooses to represent only the beneficiary, the attorney avoids all conflicts and has a duty of care to the client only. Obviously, the attorney cannot be sued for the fiduciary’s wrongdoings.
XI. **CONCLUSION.** Despite the uncertainty incident to the continuing development of the law regarding the duties of a fiduciary’s attorney to the beneficiaries of the estate, attorneys can make and implement reasoned decisions regarding the scope of their ethical and legal duties. In making these decisions, the author believes that when a fiduciary’s attorney has the duty to protect beneficiaries, the attorney must compromise the representation of the client and take additional steps for the attorney’s own protection that must ultimately be paid for by the beneficiaries of the fiduciary estate. Limiting the scope of when an attorney can be “scrupulously disloyal” in accordance with state ethics codes and rules helps society by making the attorney’s work manageable, understandable and cost-effective. Thus, while following the author’s suggestions requires effort, doing so will benefit attorneys, fiduciaries and beneficiaries.
<table>
<thead>
<tr>
<th>State/Reference</th>
<th>Starting Point</th>
<th>Variations?</th>
<th>Does state recognize implied duty to disclose?</th>
<th>Is Lawyer Allowed to Disclose to Client's Disadvantage?</th>
<th>If Mandatory Disclosures Required, Explain</th>
<th>If Discretionary Disclosures Authorized, Explain</th>
<th>Other Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama RPC Rule 1.6</td>
<td>Model Rules</td>
<td>none</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent crime where imminent death or subst. bodily harm</td>
<td></td>
</tr>
<tr>
<td>Alaska RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent crime or fraud where likely death, subst. bodily harm or subst. injury to property</td>
<td></td>
</tr>
<tr>
<td>Arizona Rule 42, RPC ER 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8 (b)</td>
<td>prevent crime where imminent death or subst. bodily harm</td>
<td>prevent any crime</td>
<td></td>
</tr>
<tr>
<td>Arkansas MRPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent any crime</td>
<td>Specifically authorizes lawyer to withdraw and disaffirm any opinion, document, etc.</td>
</tr>
<tr>
<td>California Cal. Bus. &amp; Prof. Model Code § 6063(c)</td>
<td>Statute</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>Cal. Eas. &amp; Prof. Model Code § 6063(c) requires lawyer to hold confidences &quot;inviolate, even at peril to self.&quot;</td>
<td>San Diego Bar interpreted this to preclude warning of client intent to murder</td>
</tr>
<tr>
<td>Colorado RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent any crime</td>
<td></td>
</tr>
<tr>
<td>Connecticut RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>prevent crime where likely death or subst. bodily harm</td>
<td>(i) prevent crime where subst. injury to property; (ii) rectify crime or fraud where client used lawyer</td>
<td></td>
</tr>
</tbody>
</table>

1 Qualified because disclosures to disadvantage of client are precluded *except as required or permitted under Rule 1.6.*

Seminar D -- Exhibit A, Page No. 43 -- CMB
<table>
<thead>
<tr>
<th>Col. 1</th>
<th>Col. 2</th>
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<tbody>
<tr>
<td>State; Reference</td>
<td>Starting Point</td>
<td>Variations?</td>
<td>Does state recognize implied ethical duty to disclose?</td>
<td>Is Lawyer Allowed to Disclose to Client's Disadvantage?</td>
<td>If Mandatory Disclosures Required, Explain</td>
<td>If Discretionary Disclosures Authorized, Explain</td>
<td>Other Comments</td>
</tr>
<tr>
<td>District of Columbia RPC Rule 1.6</td>
<td>Hybrid²</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>none</td>
<td>(i) prevent crime where imminent death or subst. bodily harm; (ii) prevent bribery or intimidation of witnesses; (iii) when permitted by Rules or req'd by law or court order</td>
<td><em>Required by law</em> offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Delaware RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no³; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent crime where likely death or subst. bodily harm</td>
<td></td>
</tr>
<tr>
<td>Florida RPC Rule 4-1.0</td>
<td>Model Rules</td>
<td>yes, but see Other Comments</td>
<td>no</td>
<td>prevent any crime; prevent death or subst. bodily harm</td>
<td>none relating to issue of lawyer's duties to fiduciary client</td>
<td>Florida has a form of implied duty to disclose only when the disclosure serves the client's interest, thus undermining argument that lawyer can reveal a fiduciary client's breach of duty.</td>
<td></td>
</tr>
<tr>
<td>Georgia CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime where (ii) when permitted by Rules or req'd by law or court order</td>
<td><em>Required by law</em> offers means of making Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Hawaii RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no³; Rule 1.8(b) with 1987 amendment</td>
<td>if information clearly proves, must disclose to prevent crime or fraud where client uses lawyer; subst. injury to property</td>
<td>On lawyer's reasonable belief: (i) prevent crime or fraud where likely death. subst. bodily harm, or subst. injury to property; (ii) rectify crime or fraud where client uses lawyer; (iii) when permitted by Rules or req'd by law or court order</td>
<td><em>Required by law</em> offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Idaho RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>prevent any crime</td>
<td></td>
</tr>
</tbody>
</table>

Although the District of Columbia Model Rules of Professional Conduct generally follow the MRPC, this Rule follows MCPR DR 4-101.

Seminar D -- Exhibit A, Page No. 44 -- CMB
<table>
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<tr>
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<th>Variations?</th>
<th>If Lawyer Allowed to Disclose to Client's Disadvantage?</th>
<th>If Mandatory Disclosures Required, Explain</th>
<th>If Discretionary Disclosures Authorized, Explain</th>
<th>Other Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>no</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>prevent crime where appears death or subst. bodily harm</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Indiana RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>prevent any crime</td>
</tr>
<tr>
<td>Iowa CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Kansas RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Kentucky RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>(i) prevent crime where imminent death or subst. bodily harm; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Louisiana RPC Rule 1.6</td>
<td>Model Rules</td>
<td>none</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>prevent crime where imminent death or subst. bodily harm</td>
</tr>
<tr>
<td>Maine CPR 3.6(b)</td>
<td>Model Code</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Maryland RPC 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>(i) prevent crime where likely death, subst. bodily injury or subst. injury to property; (ii) rectify crime or fraud where client used lawyer; (iii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Col. 1</td>
<td>Col. 2</td>
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</tr>
<tr>
<td>State: Reference</td>
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<td>Variations?</td>
<td>Does state recognize implied duty to disclose?</td>
<td>Is Lawyer Allowed to Disclose to Client's Disadvantage?</td>
<td>If Mandatory Disclosures Required, Explain</td>
<td>If Discretionary Disclosures Authorized, Explain</td>
</tr>
<tr>
<td>Massachusetts Canons DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Michigan RPC Rule 1.6</td>
<td>Model Code&lt;sup&gt;3&lt;/sup&gt;</td>
<td>yes</td>
<td>no</td>
<td>qualified no&lt;sup&gt;1&lt;/sup&gt;; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>(i) prevent any crime; (ii) rectify crime or fraud where client used lawyer; (iii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Minnesota RPC Rule 1.6</td>
<td>Model Code&lt;sup&gt;4&lt;/sup&gt;</td>
<td>yes</td>
<td>no</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>(i) prevent any crime; (ii) rectify crime or fraud where client used lawyer; (iii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Mississippi RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>no</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
<tr>
<td>Missouri RPC Rule 1.6</td>
<td>Made, Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>prevent crime when likely death or subst. bodily injury;</td>
</tr>
<tr>
<td>Montana RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>prevent crime where likely death or subst. bodily injury;</td>
</tr>
<tr>
<td>Nebraska CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
</tr>
</tbody>
</table>

<sup>3</sup> Although the Michigan Model Rules of Professional Conduct generally follow the MRPC, this Rule follows MCPR DR 4-101.

<sup>4</sup> Although the Minnesota Model Rules of Professional Conduct generally follow the MRPC, this Rule follows MCPR DR 4-101.
<table>
<thead>
<tr>
<th>State Reference</th>
<th>Col. 2</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Nevada RPC Rule 156</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre §7 Rule 1.8(b)</td>
<td>prevent crime where likely death or subst. bodily injury;</td>
<td>rectify crime or fraud where client used lawyer</td>
<td></td>
</tr>
<tr>
<td>New Hampshire RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no, adds to Rule 1.8(b) &quot;except with consent after consultation.&quot;</td>
<td>none</td>
<td>prevent crime where likely death or subst. bodily injury;</td>
<td></td>
</tr>
<tr>
<td>New Jersey RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre §7 Rule 1.8(b)</td>
<td>prevent crime or fraud where likely death, subst. bodily harm or subst. injury to property, or fraud on court</td>
<td>(i) rectify crime or fraud where client used lawyer; (ii) to comply with law</td>
<td></td>
</tr>
<tr>
<td>New Mexico RPC Rule 16-105</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; adds requirement of &quot;consent after consultation.&quot;</td>
<td>should reveal to prevent crime where likely death or subst. bodily injury;</td>
<td>prevent crime where likely subst. injury to property</td>
<td></td>
</tr>
<tr>
<td>New York CPR ER 4-101</td>
<td>Model Code</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order; (iii) to withdraw lawyer's work product to prevent continued crime or fraud</td>
<td></td>
</tr>
<tr>
<td>North Carolina RPC Rule 4</td>
<td>Model Code</td>
<td>yes</td>
<td>yes</td>
<td>no; see comment to Rule 5.4</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
<td></td>
</tr>
</tbody>
</table>

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3 Although the North Carolina Model Rules of Professional Conduct generally follow the MRPC, this Rule follows MCPR DR 4-101.

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<table>
<thead>
<tr>
<th>Col. 1</th>
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<td>State: Reference</td>
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<td>Variations?</td>
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<td>Is Lawyer Allowed to Disclose to Client's Disadvantage?</td>
<td>If Mandatory Disclosures Required, Explain</td>
<td>If Discretionary Disclosures Authorized, Explain</td>
<td>Other Comments</td>
</tr>
<tr>
<td>North Dakota RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; Rules 1.6, 1.7 and 1.8 explicitly so state</td>
<td>prevent crime where likely death or subst. bodily injury</td>
<td>(i) prevent crime or fraud where non-innominant death, subst. bodily injury or subst. injury to property; (ii) rectify crime or fraud where client used lawyer; (iii) when permitted by Rules or req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Ohio CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Oklahoma RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>(i) prevent any crime; (ii) rectify crime or fraud where client used lawyer; (iii) when permitted by Rules or req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Oregon CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Pennsylvania RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>none</td>
<td>(i) prevent crime where likely death or subst. bodily injury; (ii) rectify crime or fraud where client used lawyer</td>
<td></td>
</tr>
<tr>
<td>Rhode Island RPC Rule 1.6</td>
<td>Model Rules</td>
<td>none</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent crime where likely death or subst. bodily injury</td>
<td></td>
</tr>
<tr>
<td>South Carolina RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent any crime</td>
<td></td>
</tr>
<tr>
<td>South Dakota RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>(i) prevent crime where likely death or subst. bodily injury; (ii) rectify crime or fraud where client used lawyer</td>
<td></td>
</tr>
<tr>
<td>Tennessee CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
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<tr>
<td><strong>State; Reference</strong></td>
<td>Starting Point</td>
<td>Variations?</td>
<td>Does state recognize implied task to disclose?</td>
<td>Is Lawyer Allowed to Disclose to Client's Disadvantage?</td>
<td>If Mandatory Disclosures Required, Explain</td>
<td>If Discretionary Disclosures Authorized, Explain</td>
<td>Other Comments</td>
</tr>
<tr>
<td>Texas Disciplinary RPC Rule 1.05</td>
<td>Model Code</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>if information clearly proves, must disclose to prevent crime or fraud where likely to cause death or substantially harm</td>
<td>(i) prevent any crime or fraud; (ii) rectify crime or fraud where client used lawyer; (iii) when req'd by Rules, law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Utah RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent crime or fraud where likely death, severe bodily harm or substantial injury to property; (ii) rectify crime or fraud where client uses lawyer; (iii) to comply with Model Rules or other law</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually; Utah deleted &quot;implied disclosure&quot; language</td>
</tr>
<tr>
<td>Vermont CPR DR 4-101</td>
<td>Model Code</td>
<td>none</td>
<td>no</td>
<td>no</td>
<td>none</td>
<td>(i) prevent any crime; (ii) when permitted by Rules or req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Virginia CPR DR 4-101</td>
<td>Model Code</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>(i) if client states intent to commit crime, information to prevent; (ii) if information clearly proves, information to rectify fraud on court</td>
<td>(i) if information clearly establishes, information to rectify fraud; (ii) when req'd by law or court order</td>
<td>&quot;Required by law&quot; offers means of letting Commentaries refer to each state individually</td>
</tr>
<tr>
<td>Washington RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pea 187 Rule 1.0(b)</td>
<td>none</td>
<td>(i) prevent any crime; (ii) to the court, a fiduciary's breach of duty</td>
<td>Washington is the only state to deal with issue specifically; note that disclosure is permissive, not mandatory, and is made only to the</td>
</tr>
</tbody>
</table>

Texas subdivides "confidential information" into "privileged" information (information within the scope of the evidentiary attorney-client privilege -- "confidences" under the MCPR) and "unprivileged" information (all other confidential information that a lawyer acquires during the representation -- "secrets" under the MPRC). A lawyer may disclose "privileged" information only with a client's express consent but is "impliedly authorized" to disclose unprivileged information.

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<table>
<thead>
<tr>
<th>State/Reference</th>
<th>Starting Point</th>
<th>Variations?</th>
<th>Does state recognize implied duty to disclose?</th>
<th>Is Lawyer Allowed to Disclose to Client's Disadvantage?</th>
<th>If Mandatory Disclosures Required, Explain</th>
<th>If Discretionary Disclosures Authorized, Explain</th>
<th>Other Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Virginia RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent any crime</td>
<td></td>
</tr>
<tr>
<td>Wisconsin SCR 20:1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>no; pre '87 Rule 1.8(b)</td>
<td>prevent crime or fraud where likely death, subst. bodily harm or subst. injury to property</td>
<td>rectify crime or fraud where client used lawyer</td>
<td></td>
</tr>
<tr>
<td>Wyoming RPC Rule 1.6</td>
<td>Model Rules</td>
<td>yes</td>
<td>yes</td>
<td>qualified no¹; Rule 1.8(b) with 1987 amendment</td>
<td>none</td>
<td>prevent any crime</td>
<td></td>
</tr>
</tbody>
</table>

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EXHIBIT B

SAMPLE ENGAGEMENT LETTER
REPRESENTATION OF FIDUCIARY IN ADMINISTRATION
OF AN ESTATE
(Fiduciary is not a beneficiary)

Salt Lake City, UT 84___

Re: Engagement Letter with Blackburn & Stoll, LC
Our Reference: ___

Dear ________

Thank you for engaging me1 and my firm to help you with regard to your fiduciary responsibilities as Personal Representative of the Estate of ________. I am writing this engagement letter to insure that what I do for you is what you want, to cover any issues that are unique to your situation and to make sure you understand how we bill for our services. This helps avoid any misunderstandings between us.

I understand that you have retained us to advise you on your fiduciary responsibilities as Personal Representative. This may include advice on legal issues related to investments, allocation of income and principal, payment of claims, tax advice, and distribution decisions. I also understand that you want us to represent your individual interest as the Personal Representative of the estate. Provided there is no serious conflict of interest between your duty as personal representative and your individual interests, we can do this. We will provide advice as you request. In addition, where legal action is needed, we will represent you in those matters. In general, unless your directions are illegal or unethical, we will act as you direct.

In the course of representing you, you may authorize us to work with the beneficiaries of the estate in resolving issues related to the estate. When we do so, it will be as your counsel. Thus, our loyalty is to you. Because of the potential for conflicts between you and the beneficiaries, neither of us intends by this engagement letter to create a contract for the benefit of the beneficiaries of the estate or to grant the beneficiaries any rights by virtue of our agreement.

When we represent a fiduciary, to avoid any misunderstanding, we find it helpful to discuss how communications between us will be treated. As you are aware, as part of our duty of

___________

1 Blackburn & Stoll, LC is a limited liability company. If the firm is a professional corporation, delete “me” to avoid potential liability as a personal holding company.

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loyalty to you, in general we are ethically bound to keep our communications with you confidential. There are some exceptions to this rule in extreme situations: for instance if you told us you were going to kill one of the beneficiaries or you used our services to commit a fraud, we could ethically disclose that information. Absent these extreme situations, we will keep your communications with us confidential. And even if an extreme situation arises, we will first attempt to resolve the problem without disclosure.

However, when a client is a fiduciary for others (beneficiaries), some courts have held that the communications between the fiduciary and its attorney can be reviewed by the beneficiaries. Our position on this matter is that, absent an express consent from you or an implied consent necessary to fulfill our obligations to you in your best interest, we have an ethical obligation to keep our communications confidential from all parties, including the beneficiaries you represent. Nonetheless, you need to realize that a court may later order us to disclose all communications we have had with you. If you have a communication that you wish to make to an attorney that is highly sensitive, we recommend you consider hiring separate counsel at your own expense to advise you on that matter. If you have any questions or concerns with regard to this matter, please discuss them with me.

We charge for our services at standard hourly rates. My rate is $per hour. Please note that we charge for costs incurred only when we pay a third party provider. For instance, we do not charge for photocopy expenses done on our machines, but we do charge when we send large projects out to Kinko’s, Alphagraphics or others. We do not charge for long distance telephone calls. We do charge for filing fees, deposition costs and similar expenses. We will send you monthly billing statements which will itemize our services and costs incurred.

By signing this engagement letter, you will be agreeing to our representation of you under these terms. If that is not acceptable to you, please do not sign the engagement letter. Instead, contact me so that we can discuss your concerns.

I am committed to providing you high quality legal services that are responsive to your needs and are cost efficient. Any time you are concerned that we are not meeting those needs, please bring it to my attention so that we can remedy the problem. I would encourage you to talk to me about any questions or concerns that arise during the course of our representation.

---

2 Based on Rule 1.6 of the Utah Rules of Professional Conduct.
If this arrangement is acceptable to you, please execute the enclosed copy of this letter and return it to me. I have enclosed a stamped and self addressed envelope for your convenience. Again, I will be glad to review any questions or concerns with you.

Sincerely yours,

Charles M. Bennett

On behalf of ___ Bank, I agree that you have correctly stated what ___ Bank wants you to do, it hereby engages Blackburn & Stoll, LC to represent it on these terms.

Dated: ____________

___ Bank

__________________________
Trust Officer

CMB:wps
Enclosure (copy of letter: SASE)
EXHIBIT C

SAMPLE LETTER TO BENEFICIARIES
WHEN REPRESENTING FIDUCIARY IN ADMINISTRATION
OF AN ESTATE
(Fiduciary is not a Beneficiary)

Salt Lake City, Utah 84___

Re: Representation of ______ Bank as Personal Representative of the Estate of_______
Our reference: _______

Dear ________

As you may be aware, ______ Bank has retained my firm [me] to assist it with its duties and
rights as personal representative of your Mother’s estate. I am writing to make sure that there is
no misunderstanding concerning whom I represent. While I represent ______ Bank and it alone in
this matter, I want you to understand that you can at any time seek your own legal counsel to
assist you with any question or concern you may have. Since I represent ______ Bank, I will keep
my communications with it confidential except to the extent that it authorizes me to disclose
those communications.

Although I represent only ______ Bank, that does not mean I will not talk to you. I
understand ______ Bank has authorized me to respond to your inquiries and requests about your
Mother’s estate, and, unless it withdraws that authorization, I will do so. Of course, as noted
above, I will not disclose confidential information without its authorization. If at any time you
are concerned with regard to what is being done, you should seek your own legal counsel.

Please feel free to contact me if you have any questions or concerns regarding this letter.

Sincerely yours,

Charles M. Bennett

cc: _______
Trust Officer, ________ Bank
CMB:wps

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