Representations Involving Fiduciary Entities: Who is the Client?

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REPRESENTATIONS INVOLVING FIDUCIARY ENTITIES: WHO IS THE CLIENT?

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A significant unresolved ethical issue that haunts attorneys who are engaged to assist in the administration of a fiduciary entity is: to whom do the attorney's duties and loyalties run, and with what ancillary or derivative obligations? In most situations this "who is the client" issue is of academic interest only, because the potential for a real conflict among the fiduciary, beneficiaries, and claimants such as creditors or disappointed heirs never ripens into a real controversy. But in a small percentage of cases involving fiduciary administration the real and present issue is whether an attorney who is engaged to advise the administration represents the fiduciary who actually hired the attorney, the beneficiaries of the fiduciary entity, or the entity itself. This issue is complicated geometrically if the attorney also is acting as fiduciary and takes the position that the attorney also is serving in a legal advisory role.

The following hypothetical provides a framework within which to discuss ethics issues that arise if an attorney is engaged to assist in a fiduciary administration. Although the same ethical issues might arise if the facts do not posit an elderly beneficiary or fiduciary, resolution of these issues is complicated if the elderly individual is in need of protection from overreaching by others. Similar considerations might arise if the facts include a minor or other legally incapacitated individual.

Hypothetical

Attorney (A) was hired to assist in the administration of an estate and pour over trust of a decedent (D) whom A did not represent during life. The fiduciaries are the decedent's surviving spouse (S) and two children of the decedent's prior marriage. A has not represented any of these individuals previously. S is advanced in age and A is not certain whether S is having trouble dealing with the confusion and grief that naturally would follow D's death or is in the early stages of diminished capacity. Nevertheless, S was cognizant enough as a cofiduciary to insist on the employment of an attorney with no prior connection with or loyalties to any of the fiduciaries or D's family.

D's estate plan provides for S for life, remainder to D's children by the former marriage. S has a separate estate and was given no power to divert any of D's property to S's intended beneficiaries. The children, as remainder beneficiaries, have expressed a preference to invest the trust for growth during S's overlife, although S is concerned about the costs of continued long term health care and wishes to generate

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1. Appointment of such clearly adverse beneficiaries as cofiduciaries would not be common, although it might be a testator's rudimentary effort to impose checks and balances that otherwise would not exist if either the spouse or the children were named alone.
maximum current income. As it is, a large portion of the corpus of the estate is stock in a family business, in which one of the children is an active manager, and it produces only a modest dividend and that is not declared in every year.

Other sources of potential tension include a provision in the trust that permits the cotrustees to invade corpus for the benefit of S but directs them to consider S's other resources in exercising that discretion. In this respect, there is some concern that, if S is beginning a decline in both physical and mental health, it may be necessary in the future to consider extended care or other health maintenance options, and some attention is being focused on qualifying S for governmental assistance and on preserving the trust assets for the ultimate remainder beneficiaries. Whatever is done in this respect may impact the quality of care that S receives.

During the course of administration A may be asked to advise the cofiduciaries regarding the propriety of various fiduciary recommendations, including loans to a child or to the family business, the power to make gifts from the corpus of the trust that will reduce the amount includible in S's estate at death, whether to make an S Corporation election with respect to the family business stock held in the trust, and investment decisions that may impact the various beneficiaries. Also possible is that a fiduciary might act improperly, perhaps even criminally, in the course of the administration and that A will learn of this defalcation but that others will not. Assume that no guardian or personal representative has been appointed for S and none will be appointed unless A seeks that action. None of S or the children has their own personal attorney.

Existing authority relating to the issues raised by this hypothetical is confused and suggests that, at least in some contexts, the answer to the question of who the client is may be a combination of the three alternatives: the beneficiaries, the estate, or the fiduciary. The question is relevant for a number of reasons, including concerns about:

Confidentiality and Privilege: For example, if one fiduciary reveals to the attorney (or the attorney discovers in the course of the representation) that the fiduciary has made a mistake, or acted in a dishonest, fraudulent, or criminal manner, may (or must) the attorney reveal this information to, or may it be discovered by, the beneficiaries, or the other fiduciaries, or a court that supervises the administration, or does the duty of confidentiality or the concept of privilege preclude such revelation or discovery?

Conflicts of Interest: To whom must the attorney be loyal if multiple cofiduciaries or a predecessor and a successor fiduciary disagree, or the fiduciaries and the beneficiaries disagree, or a fiduciary is a creditor of the entity or one of several beneficiaries whose interests conflict with other fiduciaries or beneficiaries, and does the attorney have a conflict of interest in the context of such representations? In this case the hypothetical poses a potential for conflict among several constituents: the spouse as against the children (the income beneficiary as against the remainder beneficiaries and one cofiduciary against another cofidu-
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Fiduciary (or the one child who is active in the business. Other conflicts may develop between the remainder beneficiaries and the beneficiaries of the spouse's estate, with respect to spend-down planning for Medicaid qualification purposes. And tax issues could create conflicts in some plans as well.

Privity and the Right to Sue the Attorney: Although not specifically an ethics issue, a very closely related issue is the attorney's liability and the rights of various parties to assert a cause of action against the attorney, or to dismiss the attorney.

Competence and Loyalty to the Beneficiaries: Must the attorney protect the beneficiaries' interests as individuals or only indirectly as beneficiaries of the fiduciary entity that the attorney serves, and must the attorney seek protective measures if, for example, a beneficiary is being overreached by a third party or by a fiduciary, or appears to require the appointment of a guardian or conservator to protect the beneficiary? For example, if S is at risk and no one else acts, must or may A do so?

The identity of the client may be confused further if the attorney serves as a or the only fiduciary or if the attorney also represented the settlor of the trust or the decedent whose estate is being administered, or the beneficiaries, which may justify various expectations about the attorney's role that in turn may define that role.

CONFUSION IN EXISTING AUTHORITY

The Comment to Model Rule 1.7 states that:

In estate [or trust] administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

The limited authority on this issue is not consistent and virtually none comes from ethics disputes. Instead, the reported cases typically involve ancillary issues like fee disputes, evidentiary privileges, and legal malpractice claims raising the question whether beneficiaries have the right to sue the attorney. The Comment assumes that the attorney may choose who will be the client when entering into the relationship, preferably communicated in an engagement letter. Discussed here is the "default rule" that applies if nothing was said regarding this issue.

A majority of authorities addressing this issue conclude (more or less) that the personal representative is the client, although many also state that a duty—akin to a fiduciary duty—runs from the attorney directly to

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2. See infra note 77 (regarding tax related conflicts that may arise).
3. For the sake of easy reference, this discussion refers to the ABA Model Rules of Professional Conduct [hereinafter Model Rules]. The provisions of the prior ABA Model Code of Professional Responsibility are substantially the same regarding the primary issues involved, so different results should not obtain regardless of the format adopted in the relevant jurisdiction.
the beneficiaries of the fiduciary entity. Unfortunately, the imprecise manner in which courts and ethics opinions address this question—and the mixed signals they give by the inaccuracy of their analysis and description—leaves a great deal of confusion. For example:

[C]ounsel for the personal representative of an estate owes fiduciary duties not only to the personal representative but also to the beneficiaries of the estate. 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." Rule 4-1.7, Rules Regulating the Florida Bar (comment). It follows that counsel does not generate a conflict of interest in representing the personal representative in a matter simply because one or more of the beneficiaries takes a position adverse to that of the personal representative. A contrary position would raise havoc with the orderly administration of decedents' estates, not to mention the additional attorney's fees that would be generated.4

Notice should be given to the fact that Florida, by express Rule, has established that the fiduciary is the client, thereby seeking to minimize the issues that may arise. A viable approach to this problem is that other states follow the Florida approach.

Some cases go farther by stating that, although the attorney-client relation is with the fiduciary, the attorney has a fiduciary relation to the fiduciary that runs to the beneficiaries.5 It is not clear whether fiduciary duties to the fiduciary that run to the beneficiaries differ from fiduciary duties to the beneficiaries directly.

Other cases state that the attorney for a fiduciary represents the fiduciary entity and not just the fiduciary,6 without clarifying how they perceive the fiduciary entity to be different from the beneficiaries or the fiduciary alone and whether this direct duty differs from a fiduciary duty. Yet other authorities are less clear again:

[T]he lawyer, 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.7

It is not clear whether this is a fiduciary duty and whether it runs only to the fiduciary or also to the beneficiaries or the estate (and whether that difference is significant).

Conflicting authorities abound on the essential question. For example, one American Bar Association ethics opinion states:

[T]here is no indirect fiduciary relationship to the legatees which would disqualify the attorney from representing the executors in [a] claim for

5. See In re Estate of Larson, 694 P.2d 1051, 1054 (Wash. 1985) (en banc).
extra compensation . . . . Even though the lawyer representing the executor may have a duty to see that the assets are preserved and not wasted and has an obligation to the legatees in that respect . . . he is not thereby disqualified to represent the executors in their claim for compensation . . . The attorney's clients are the executors and not the heirs or beneficiaries.\[8\]

Yet various other authorities are directly opposite, expressing opinions such as:

"[A]n attorney for an estate represents the heirs and distributees and legatees" . . . and is in "a position of trust with respect to all of those interests in the estate." . . . Here the . . . executor, in consulting with the attorney . . . was necessarily acting for both itself as executor and for the beneficiaries under the will.\[9\]

Does this mean the fiduciary is not the client but only an agent contracting on behalf of the beneficiaries, or are they all clients in some form of joint representation?

[When an attorney undertakes a relationship as adviser to a trustee, [the attorney] in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary.\[10\]

Presumably this refers to the attorney's fiduciary duty to the beneficiaries, and does not mean that the fiduciary is not also a client.

The legal services were performed at the request of the trustee for the benefit of the beneficiaries . . . . In effect the beneficiaries were the clients . . . as much as the trustees were, and perhaps more so.\[11\]

Does this mean they all are clients?

[A]n outside attorney . . . is technically selected and employed by the fiduciary in its capacity as such, but . . . in fact usually also represents the beneficiaries of the estate, whose interests or desires may conflict with the fiduciary's technical duties or limitations in that capacity and thus with the interests of the fiduciary.\[12\]

What exception does the court anticipate when it uses the qualifier "usually," and is this not a fiduciary duty but, instead, a direct attorney-client relation to the beneficiaries?

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8. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1017 (1967) (emphasis added) (attorney for executor may represent executor in petition for extraordinary fees, the question being conflicts of interest with respect to beneficiaries). Contra In re Estate of Halas, Jr., 512 N.E.2d 1276 (Ill. App. Ct. 1987) (fiduciary duty to estate beneficiaries conceded in a suit involving attorney fees).

9. Estate of Torian v. Smith, 564 S.W.2d 521, 526 (Ark. 1978) (emphasis added) (attorney-client privilege does not prevent disclosure to beneficiaries of communications between attorney and executor).


Some authorities that go further in finding a more direct relation to the beneficiaries may be distinguishable or explainable on the basis of special circumstances. For example:

An attorney for a guardianship has two clients: (1) the disabled person's estate both before and after the disabled person's death; and (2) the guardian in his capacity as guardian.\(^\text{13}\)

This statement does not establish whether it is intentional or meaningful that the first client listed was the person's estate and not the person, at least while the person is alive. Guardianships have created unique responses and some authorities suggest that there are higher duties on attorneys for guardians, for reasons that are not altogether clear on the basis of the guardian's fiduciary duties to the ward or the attorney's duties to the guardian.

In addition, privity of contract requirements in a few states produce justifiable but precedentially unreliable results. For example:

A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance.\(^\text{14}\)

The case from which this statement is taken was somewhat unusual because the applicable state law is the minority position that still requires privity of contract to sue an attorney for malpractice. It is not clear whether the court meant that disappointed beneficiaries are clients with a right to sue or somehow just acquire the privity of the fiduciary or entity by virtue of vested interests in the entity. It also seems questionable that a beneficiary's interest must be vested, and this statement does not address the rights of an individual who was meant to be a beneficiary but who was excluded entirely due to an attorney's negligence.\(^\text{15}\) Moreover, consistency is lacking on the privity aspect. For example, according to one frequently cited decision:

[T]he attorney for the administrator of an estate represents the administrator, and not the estate. . . . By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate.\(^\text{16}\)

Third parties, such as beneficiaries or creditors, may be incidental beneficiaries, but incidental benefits may not generate a duty on the attorney.

Particularly in the case of services rendered for the fiduciary of a dece-

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15. Contrary to Elam is Weingarten v. Warren, 753 F. Supp. 491 (S.D.N.Y. 1990) (attorney for trustee incurs fiduciary duties that run to the beneficiaries but those beneficiaries are not in privity of contract with the attorney for malpractice liability purposes).
dent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants. The fiduciary's attorney, as his legal adviser, is faced with the same task of disposition of conflicts. It is of course the purpose and obligation of both the fiduciary and his attorney to serve the estate. In such capacity they are obligated to communicate with, and to arbitrate conflicting claims among, those interested in the estate. While the fiduciary in the performance of this service 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. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. 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.17

Are the beneficiaries owed an indirect duty by the attorney and, if so, what would that mean?

When an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate.18

Does this mean there are no duties to the beneficiaries?

As illustrated in these snippets from various authorities, the way courts and ethics committees describe the relationship with the fiduciary, with the beneficiaries, and with the entity itself differs rather dramatically, generating uncertainty and confusion that prevents any real understanding of the attorney's role in those cases in which the question of the identity of the client is relevant. In an effort to add meaning to this quagmire, a leading treatise on the subject suggests that the fiduciary entity is the client and that the fiduciary is a "primary" client while the beneficiaries are "derivative" clients.19 One author of that treatise also postulates that one way to view an attorney who represents a guardian may be to regard the ward as a derivative client,20 arguing that an attorney for

17. Id. at 489-90 (emphasis added) (citations omitted).
18. In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986) (emphasis added). See also Lasky, Haas, Cohler & Munter v. Superior Court, 218 Cal. Rptr. 205 (Ct. App. 1985) (court's holding that beneficiaries could not discover communications between trustee and attorney was dicta because of its prior holding that work-product never given to the trustee cannot be discovered by the beneficiaries in any event).
20. Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. Legal Ethics 15 (1987), citing Fickett v. Superior Court, 558 P.2d 988 (Ariz. 1976) (attorney for guardian has a duty to protect ward from injury by guardian of which attorney knew or should have known).
"the party in the dominant position" has a duty to "the party in the position of dependency." 21

Treatment of the fiduciary entity as the client is the least common resolution of this issue in the reported case law, but is not without support.

[T]he attorney's client is the estate, rather than the personal representative. The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion. 22

It is not clear whether the estate as a client is any different from the fiduciary or the beneficiaries as clients, although the resolution of a few issues, particularly involving confidential information, may be easier to justify under this formulation.

POSSIBLE RESOLUTIONS

Existing precedent obviously is confused, perhaps because existing authority represents an attempt to deal with the client identity question in too many contexts and with too many competing equities or objectives. In this context, the American Bar Association Real Property, Probate and Trust Section appointed a study committee ("the ABA Study Committee") to evaluate this question (along with several others) and to suggest an interpretation that considers all relevant issues in a consolidated manner.

ABA Study Committee Report

The ABA Study Committee produced a Report that embraces three essential elements:

21. Professor Hazard, in a letter to the author dated December 2, 1991, also stated:

The attorney-client privilege ordinarily does not shield the fiduciary from disclosure in favor of the beneficiaries . . . regardless of the identity of the client. . . .

Most probate lawyers . . . view their relationship with the fiduciary as not only confidential but personal. However much they may wish that this is the law, it is not, any more than corporate counsel has a personal relationship with the CEO.


22. Steinway v. Bolden, 185 Mich. App. 234, 238 (1990) (emphasis added) (suit by successor personal representative to assert attorney liability for defalcation of prior representative, defended on grounds that only the prior representative could sue as the attorney's client; jurisdiction of the court was established on the basis of the successor's right to sue because the estate and not the prior representative was the attorney's client). See also Rule 1.7 cmt., supra text accompanying note 3 ("Under one view, the client is . . . the estate or trust, including its beneficiaries").
Absent an agreement otherwise, the attorney's client is the fiduciary, not the entity nor the beneficiaries.

The attorney has no duties to the beneficiaries other than those prohibitions ("negative" duties) that flow from the fact that the attorney's client is a fiduciary whose own duties of good faith, impartiality, and to avoid breaches of trust apply to the attorney as well.

The duty of confidentiality does not prevent the attorney from sharing information with the beneficiaries to the extent the beneficiaries could obtain that information in litigation and the attorney-client privilege would not protect it from their discovery.

The first element reflects the vast weight of authority. And although the second element attempts to cast the attorney's duties in a manner that minimizes the appearance that the attorney has obligations to others than the fiduciary, this element too is not a major departure from existing authority. But the third element of the ABA Study Committee Report is controversial, although it is thought to be necessary if the attorney is to deal with the most troubling aspect of this form of representation.

To illustrate, assume under the facts of the hypothetical that S continued to deteriorate mentally and that the other cotrustees (children by the settlor's prior marriage) essentially are in charge of trust administration. Without seeking A’s advice and contrary to the wishes of S as cotrustee and beneficiary, they converted trust investments to minimize income and loaned trust funds to the family business (which one of them operates). A learned of both acts and advised the cotrustees that they were improper under fiduciary law and must be rectified. A was told, however, that no changes would be made “because S is too far gone to complain” and all the other beneficiaries concurred with these actions. Now A must consider what action, if any, is required. More specifically, A must decide whether to reveal the information received from the cotrustees that discloses these improprieties and, if so, to whom. The cotrustees’ position is that A is their attorney, that the information is confidential and therefore may not be revealed to a court or other authority, and that A therefore must keep quiet about A’s conclusions concerning their actions.

Because preservation of this information benefits the cotrustees at the expense of S, which the ABA Study Committee concluded is the wrong balance in this conflict, the Report formulated a construct that allows A to act affirmatively to rectify the impropriety, rather than merely withdrawing from the representation. In concluding that information not privileged from discovery by S in litigation is not protected by the confidentiality prohibitions of Model Rule 1.6 from disclosure to S or a proper court, the Study Committee Report is contrary to some authority on point. Nevertheless, it is thought to be a proper resolution of this diffic-

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cult issue and it finds some antecedent in a similar rule adopted in the State of Washington in an effort to address the notion that withdrawal may leave the real parties in interest in the lurch.

Washington's version of Model Rule 1.6 was amended to add a subsection (c), authorizing an attorney to reveal a breach of fiduciary duty by a court-appointed fiduciary. That amendment is not as expansive as the ABA Study Committee Report, however, because it reflects a compromise that allows disclosure only to a court and only if the fiduciary was appointed by a court. Like the ABA Study Committee Report, the Washington Rule neither mandates disclosure nor specifies when the attorney would be justified in not disclosing.

The ABA Study Committee Report reflects the determination that regarding the fiduciary as the client creates a problem that various resolutions only partially address. For example, because it is limited to court-appointed fiduciaries, Washington Rule 1.6(c) does not confront the problem in the full spectrum of cases that could arise, including that presented by the hypothetical. Unfortunately, both the Washington resolution and the ABA Study Committee Report leave open the specter of attorney liability if the confidence could be but is not revealed.

For example, an Illinois ethics opinion states that an attorney is subject to discipline and to civil liability if the attorney does not affirmatively disclose information about a fiduciary's defalcation. This puts the attorney in a difficult position if the fiduciary is regarded as the attorney's client, even if the duty of confidentiality does not preclude disclosure, because it requires the attorney to exercise discretion whether to turn on the client in favor of other, more important, principles.

In this respect a mandatory disclosure rule rather than authority to disclose would be easier for the attorney to apply. But a mandatory duty to disclose is problematic in its own right because it might cause the attorney to become a fiduciary watchdog, duplicating functions performed by the fiduciary to permit the attorney to know what a reasonably competent attorney "should know," therefore permitting the attorney to comply with the duty of disclosure. In addition to the added costs this might generate, in some cases mandatory disclosure also could be needlessly harmful because it could destroy the beneficiary's trust in a fiduciary that made and corrected an innocent mistake. Without the flexibility to exercise discretion, such as to determine that disclosure serves little purpose and could generate significant harm, the attorney presumably would report all fiduciary misconduct just to be certain that

24. See Ill. State Bar Ass'n, Ethics Op. 91-24 (1992) (guardian asserted ownership of monies that attorney believed belonged to the ward's estate). Contra 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 326.4 (4th ed. 1989) [hereinafter Scott on Trusts] (attorney not liable to beneficiaries for participation in a fiduciary's breach of fiduciary duty unless the attorney knew or should have known that the attorney was assisting the fiduciary to commit that breach; knowledge alone without knowing assistance is not adequate to generate attorney liability).
the attorney does not incur personal liability. The ABA Study Committee concluded that this took the rule too far.

Several other aspects of the ABA Study Committee Report are significant. For example, it recognizes that justifiable expectations on the part of various individuals may result in multiple and, in some cases, conflicting representations. To illustrate, the hypothetical assumes that there was no prior representation by A of any of the parties or of the decedent and thus precludes the issue whether any prior representation generates justified expectations about who the attorney represents. The reality, however, is that many cases involve attorneys who represented a decedent during life and various surviving family members, which may require a Model Rule 1.7 or 1.9 analysis involving conflicts of interest generated by a former representation or by the representation of multiple current clients. At the least it may require the attorney to act affirmatively to disabuse individuals from assuming the attorney represents them if the attorney does not intend to maintain an attorney-client relation with anyone other than the fiduciary. In a case such as that posed by the hypothetical, this could create a problem if the individual with the justifiable expectation is unable to comprehend the attorney's disclaimer of representation or is unable to engage another attorney.

Moreover, the ABA Study Committee Report generates a potential need to obtain consent to conflicts of interest involving former clients or multiple current clients. To illustrate, consider two modifications to the hypothetical. Assume first that A previously represented both D and S while D was alive and therefore either has a former or a current client relation with S. Assume second that S is named to act alone as D's personal representative and, quite naturally, wants A as the family attorney to assist in that fiduciary engagement.

Recognizing that administration of the estate may require A to render opinions about the propriety of S taking certain actions or making certain elections that will impact the relative entitlement of the beneficiaries of the present and future interests (being S and the children of D's former marriage), A determines that there may be a conflict of interest because of A's former or current representation of S as an individual. So A contacts S seeking consent to this potential conflict, stating that A may be called upon to render opinions to S as personal representative that are not necessarily in the best interests of S as an individual. In the role of a

25. Often it is not clear when an estate planning representation ends with respect to clients who still are living, so it is not possible to know (without more, such as facts showing that A sent D and S an "exit" letter terminating their relation, which is very unlikely, or that S has engaged personal counsel other than A) whether A's representation of S terminated at some point before D died or is continuing (but perhaps "dormant", in the sense that S may not want A to perform any specific services but continues to regard A as S's attorney). Whether the representation of S is terminated or ongoing, the Model Rules require a consent, under Rule 1.7 by both S as an individual and by the fiduciaries as current clients, or under Rule 1.9 by S alone as the former client.
present or former client, S consents under Model Rule 1.7 or Model Rule 1.9 to this potential conflict.

In turn, A also states to S as personal representative that, because of A's former or current representation of S as an individual, A might render opinions to S as personal representative that might be influenced by A's representation of S as an individual. If Model Rule 1.7 is applicable, requiring consent of both current clients, the issue is whether S, acting as personal representative, can give an effective consent to this conflict.26 If S cannot give an effective consent in the fiduciary capacity, because S is the source of the conflict that generates this problem and therefore has a fiduciary conflict of interest, then who could give the requisite consent on behalf of the fiduciary or the entity? In many cases the identity of the future interest beneficiaries is not ascertainable and, even if it were, their consent might not be obtainable or effective because they are minors or have only contingent future interests. S as fiduciary is obligated by fiduciary law principles not to allow personal interests to affect fiduciary judgments,27 including the grant of consent in this situation, and could be sued for any breach of this fiduciary duty. But A's ethical duty is not informed by S's fiduciary law duty and litigation to redress a fiduciary law breach of duty would not cure any consequences of A's unconsented conflict. Thus, it may not be adequate to rest the ethics analysis on fiduciary law principles. Indeed, A's ethical violation could precede and need not depend on any compensable damages flowing from S's breach in granting the consent.

This form of conflict involving multiple representations occurs with regularity in fiduciary administrations. Many practitioners and probably most clients would be appalled at the notion that an attorney cannot assist in a fiduciary representation if the attorney has a current or former client relation with any beneficiary, without obtaining an effective consent, and that an effective consent is impossible to obtain if the beneficiary also is acting as fiduciary. Moreover, a suggestion that a successor or temporary fiduciary be appointed to give consent likely would be dismissed by most observers as ranging from unnecessary under fiduciary law constraints to impossible because the objective temporary fiduciary should conclude that consent never should be given.

In the context of conflicts of interest, the ABA Study Committee Report recognizes that an attorney should advise the fiduciary about the duty of impartiality that both the fiduciary and the attorney must meet. For example, the hypothetical posits facts that make impartial adminis-

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26. If S is a former client because A's representation of D and S already terminated, S need not consent in the capacity as personal representative because, under Model Rule 1.9, only the former client must consent to A's potential conflict of interest in representing a new client. Any effort at this time to cause Model Rule 1.9 to apply in lieu of Model Rule 1.7 by A terminating the client relation with S as an individual is not likely to be effective.

27. See 2A Scott on Trusts, supra note 24, §§ 170, 183.
tration unrealistic, which may require A to withdraw from the representation or to alert all potentially affected beneficiaries that conflicts may exist and that they may wish to obtain their own counsel to protect their interests. It is clear under the ABA Study Committee Report that A may not participate in any action by a fiduciary that constitutes a breach of trust, either by direct assistance, by filing misleading or false reports, or otherwise deceiving the beneficiaries or any supervisory court, but it is not clear that A must withdraw if S as the fiduciary merely has a conflict of interest.

The ABA Study Committee Report rejects the notion of an affirmative duty on A to inform the beneficiaries or any supervisory court of any impropriety, and most attorneys probably would not reveal information regarding conflicts of interest, on the theory that it is not a serious breach of fiduciary duties absent some affirmative act by the fiduciary. Thus, if the fiduciary’s acts do not involve a clear defalcation (for example, if the facts show only that investments are questionable or that reasonable fiduciaries might differ on an appropriate exercise of discretion under specific facts and circumstances), the attorney is left with discretion but no duty to disclose, which creates potential liability as the price for having flexibility. These conflict of interest concerns, hypothetical as they may be in garden variety situations, nevertheless may so infect a fiduciary representation that the attorney cannot ethically assist in the fiduciary administration if there is a prior or current representation of any of the beneficiaries. None of this is addressed adequately by the ABA Study Committee Report.

Aside from the conflict of interest situation, the ABA Study Committee Report recognizes that a fiduciary may engage an attorney and, by agreement, preclude the attorney from revealing the fiduciary's confidences. In such a case it probably is necessary for the fiduciary to pay the attorney out of its own funds, rather than entity funds, at least until it is determined that the fiduciary is entitled to reimbursement for its reasonable expenses incurred in the administration and that these include reasonable attorney fees. In addition, although it is likely that the fiduciary would not engage an attorney with a prior involvement in the situation or who has a current or former client conflict, it may be necessary for the attorney to dispel any expectations that the beneficiaries may develop that the attorney for the fiduciary represents their interests.

Finally, absent an agreement otherwise, the ABA Study Committee Report recognizes that there are no secrets as between cofiduciaries, meaning that the attorney may and potentially must share all relevant information obtained from one with any other cofiduciaries. In the hypothetical this would permit A to reveal confidential information received from the children as cotrustees to S as a cotrustee. This revelation is made possible by virtue of their cofiduciary status and does not depend on any determination that the lack of privilege allows this disclosure to S as a beneficiary. Unfortunately, in the hypothetical, given S's deteriora-
tion, even if A may disclose this information to S it is not likely to pro-
duce any protection of S's interests.

Other Exceptions to the Duty of Confidentiality

An attorney's ability to reveal a defalcating fiduciary's wrongdoing is
one of the most important consequences of determining who the attorney
represents and with what duties and limitations. Model Rule 1.6 defines
an attorney's duty of confidentiality and provides several exceptions that
may help to define or avoid problems generated under various alternative
resolutions to the client identity issue. If applicable and sufficiently com-
prehensive, these resolutions could free the analysis of this issue from this
one significant element and permit consideration of other alternatives.

One exception to the duty of confidentiality is found in Model Rule
1.6(a), which authorizes the revelation of information that is "impliedly
authorized in order to carry out the representation." For example, fidu-
ciaries normally are obligated by state law to account to the beneficiaries,
to a supervisory court, or to both. Information provided to the attor-
ney by the fiduciary may be subject to disclosure by the attorney in com-
pliance with that duty. This is not to say, however, that disclosure by the
attorney is impliedly authorized if the fiduciary has chosen not to make
an accounting or has decided to account in an incomplete, dishonest, or
other misleading manner. It is clear under Model Rule 3.3(a) that an
attorney may not assist a fiduciary in misleading a tribunal and must
disclose material facts to a tribunal if necessary to avoid assisting in a
fiduciary's criminal or fraudulent act. And Model Rule 4.1 prohibits an
attorney from making a false statement of material fact or law to a third
party and requires disclosure of material facts to avoid assisting a client's
criminal or fraudulent act. But it is not clear that the Model Rule 3.3
duty of candor to a tribunal is applicable if, for example, the attorney did
not assist in the fiduciary's defalcation or its cover up, and it especially is
not helpful if no court is involved because administration is un-
supervised. And the Model Rule 4.1 duty to others is triggered only if
the attorney affirmatively acted, either by making false statements or by
assisting the fiduciary, and rectification following assistance to the fiduci-
ary as opposed to the attorney having lied is subject to the Model Rule
1.6 confidentiality prohibition. Thus, this first exception does not pro-
vide an adequate escape from considerations of the duty of confiden-
tiality.

A second exception to the duty of confidentiality is the Model Rule
1.6(b)(1) authority to reveal confidential information to the extent neces-
sary "to prevent the client from committing a criminal act that the law-
ner believes is likely to result in imminent death or substantial bodily
harm." Although this provision is not broad enough to authorize disclo-
sures against the fiduciary's prohibition in a typical fiduciary defalcation

28. See id. § 173.
situation, it was the subject of heated debate when the Model Rules were adopted and various adopting states may permit disclosure under their expanded versions. For example, an alternative provision to Model Rule 1.6 would have permitted revelation if necessary "(1) to prevent the client from committing a criminal or fraudulent act that . . . is likely to result in . . . substantial injury to the financial interests or property of another; [or] (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." 29 Although the American Bar Association rejected this proposal in adopting the Model Rules, many states modified their particular versions of Model Rule 1.6 to incorporate it. 30 In those states, certain disclosures (for example, to preclude a fiduciary from embezzling) may be authorized without the need to characterize the fiduciary representation in a manner like the ABA Study Committee Report.

A third exception is found in Model Rule 1.6(b)(2), which permits disclosure of confidential information to the extent necessary "to establish a defense to a . . . civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." Arguably, 31 this exception permits an attorney to disclose information needed to establish a preemptive defense to civil liability to which the attorney would be exposed under state law if the attorney otherwise failed to alert beneficiaries or others to a fiduciary defalcation. Thus, if state law could impose liability on an attorney who did not rectify a fiduciary defalcation that the attorney knew about or should have known about, 32 the argument is that the attorney may make the necessary disclosure. Otherwise, it simply is untenable to create a duty and with it the potential for liability and the certain loss of time, money, and reputation in asserting a defense thereto, without permitting disclosures that allow the attorney to comply with that duty. It seems pretty clear, however, from reading the Comment to Model Rule 1.6(b)(2) that this exception was created solely in anticipation of an attorney defending against actions brought against the attorney for malpractice or other wrongdoing and not to preempt or rectify events that might generate such liability. 33

30. See Hazard & Hodes, supra note 19, App. 4 for a summary of state modifications.
32. See supra note 25 and accompanying text.
33. Cf. Restatement of the Law Governing Lawyers § 73 cmt. h at 33 (Council Draft No. 10, Nov. 17, 1993) (adopting position that attorney does not have a duty to a non-client to disclose client confidences merely because "someone might advance an argument that the . . . client's conduct constitutes a crime or fraud," suggesting that preemptive acts based on speculation about potential liability are not authorized).
Entity as Client

Another alternative was considered by the ABA Study Committee that would allow disclosure of confidences without deviating from accepted notions regarding confidentiality or application of any exception to Model Rule 1.6. This alternative was rejected, however, as lacking sufficient support in the law. It would regard a fiduciary entity as a separate jural personality with an identity and status as the client in the same manner as a corporation or partnership is a client. Under this entity representation alternative, each entity acts through an "agent" or representative (a corporate officer, a managing partner, or the fiduciary) but the attorney ultimately is responsible to the entity and its constituents (shareholders and board of directors, partners, and beneficiaries) rather than to the agent who hired the attorney. Moreover, the attorney is authorized to disclose otherwise confidential information to constituents of the entity on an "as needed" basis. This alternative has not been considered by many courts—probably because of the historical notion that a decedent's estate or a trust has no legal existence—but it is recognized that a fiduciary entity such as an estate or a trust is a separate legal entity for tax and other purposes. This approach has a number of advantages recommending it and, because it is somewhat novel, the balance of this article is devoted to an explanation of the concept.

Regarding an entity as the attorney's client is addressed in Model Rule 1.13, Restatement of the Law Governing Lawyers § 212, and Model

34. It is not suggested by this reference that the fiduciary is subject to the law of Agency. The Restatement (Second) of the Law of Agency § 14B (1958) provides that an agent and a trustee both are fiduciaries and, in some cases, an individual can be both "[i]f he has such title and also holds the property subject to the control of another." Id. § 14B cmt. b. The law of agency is not essential for purposes of this analysis and is not considered further.

35. The notion is that a plaintiff cannot sue a fiduciary estate, which has no legal existence independent of the fiduciary that represents it. See, e.g., In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986): “Attorneys represent people. There is no such position known as 'attorney of an estate,’” citing In re Ogier, 35 P. 900 (Cal. 1894). Although the most common organization that is recognized as an entity for purposes of Model Rule 1.13 is the corporation, which has an existence recognized at law by virtue of incorporation, less formalistic entities such as partnerships also are regarded as entities for purposes of Model Rule 1.13. Fiduciary entities such as estates and trusts, which in traditional property parlance constitute property held subject to the administration of a fiduciary with duties to beneficiaries, are recognized as separate jural personalities for purposes such as taxation. Thus, statements such as that quoted from Wagner are antiquarian and at least the first sentence of that quote clearly is wrong, as shown by the fact that attorneys represent entities such as corporations and partnerships and not individual people. Furthermore, just as a corporation or a partnership designates an individual to deal with the world on its behalf, a fiduciary entity exists vis-a-vis the world through the fiduciary, making the analogy appropriate for these purposes.

36. See, e.g., Estate of Hubberd v. Comm'r, 99 T.C. 335 (1992) (estate as an entity, rather than its beneficiaries or their fiduciary, is a party eligible for an award of litigation costs). Other circumstances in which the entity is recognized might include wrongful death recoveries by an estate on behalf of the decedent in a survival act state, and tort or contract actions in which the fiduciary clearly was acting solely in a fiduciary capacity.
Code EC 5-18, which apply to the representation of an organization and, if adapted to this situation, would treat the attorney as representing the trust or estate as a jural personality. According to Model Rule 1.13(a), "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Restatement § 212(1) specifies that "[a] lawyer employed or retained to represent an organization represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures." Were it possible to regard this approach as applicable to a fiduciary representation, the fiduciary would be the responsible agent and the beneficiaries and any involved court would be the constituents.

For purposes of the entity representation rule, an "organization" need not be incorporated (although the normal application of this rule is in the context of corporate counsel); an organization may include any entity "with a recognizable form, internal organization, and relative permanence. Many organizations are recognized as entities for other legal purposes, but such recognition is not invariably required for purposes of" Model Rule 1.13,37 under which "even a small group informally organized for a limited purpose can be considered an entity. . . . If the group is seen as having an identity apart from the individuals who comprise it, it can have separate status as a 'client' in the relationship with the lawyer."38

Indeed, partnerships have been regarded as organizations within the meaning of Model Rule 1.13, recognizing that "the rationale behind [Rule 1.13] is that an organization will have goals and objectives that may, or may not, be consistent with the goals and objectives of all or some of its members or other constituents."39 This describes a fiduciary relationship in which the beneficiaries are the constituents, albeit a difference between these entities normally regarded as organizations and the typical fiduciary entity is that the beneficiaries did not come together to form the fiduciary entity, as normally is the case with a corporation or partnership. Nothing in the operation of Model Rule 1.13 suggests, however, that voluntariness is a requisite to recognition as an organization for purposes of applying this rule. Indeed, many shareholders in corpo-


\[38.\] Hazard & Hodes, supra note 19, § 1.13:103, at 390.2 (Supp. 1993).

\[39.\] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361 (1991). Curiously, for purposes of diversity jurisdiction under the Federal Rules of Civil Procedure, a partnership is not regarded as the proper party and instead its partners are deemed the real parties in interest. \textit{See} Carden v. Arkoma Assoc., 494 U.S. 185 (1990). But to test diversity with respect to a decedent's estate the fiduciary and the beneficiaries are ignored and the decedent's domicile is determinative. 28 U.S.C. § 1332(c)(2) (1988). Thus, civil procedure notions arguably should not drive these issues in the ethics arena. In addition, perfect analogues are not likely to be found for any alternative proposed, although an analogue probably can be found to support most any reasonable proposition that can be supported under the ethics rules alone.
rations acquire their status involuntarily (for example, by inheritance) and this status does not alter the fundamental nature of the corporation as an organization subject to Model Rule 1.13.

The essential element of the entity representation precept is that the attorney represents the entity and not any of the entity's responsible agents or constituents individually. Because the attorney may deal with the various agents or constituents rather than with the entity proper, it may appear that an attorney-client relationship exists with them individually, but this approach regards them as acting only on behalf of the entity. "When an agent for a principal hires another agent for the principal, the second individual does not become a subagent of the first. Instead, the two become co-agents, and owe allegiance to their common principal rather than to one another."\(^4\) The entity is the principal and the agent who hires the attorney, such as a corporate officer or, in this analysis, the fiduciary, is merely the entity's representative, employing the attorney as another agent of the entity. The attorney is paid by the entity using assets of the entity and not assets of the agent who hired the attorney, and serves the entity rather than the agent who hired the attorney. Although the attorney may incur responsibility to various constituents of the entity (such as the fiduciary or the beneficiaries) as "derivative" clients, under the entity representation alternative the organization or fiduciary entity is the primary client to whom the attorney's duties are owed.

As perceived in this manner, the fiduciary who hired the attorney (indeed, if a corporate fiduciary is involved, the employee acting as an agent of the corporate fiduciary that hired the attorney) is merely another agent of the true client (the entity) and could not, for example, dismiss the attorney in an effort to cover up any wrongdoing. The attorney, if unable to persuade the fiduciary in any respect (such as to correct a wrong), independently must determine what is best for the entity and, if necessary, "go up the chain of command to resolve the matter."\(^4\) The existence of cofiduciaries, even if they do not agree, does not complicate this analysis any more than if a corporation had multiple disharmonious corporate officers. Indeed, the entity representation theory may make it easier to resolve conflicts that otherwise might infect a cofiduciary representation than a rule regarding the cofiduciaries as the clients. Thus, for example, in the hypothetical with cofiduciaries who have conflicts of interest, A need not choose between them nor withdraw if the personal interests or objectives of the fiduciaries or the beneficiaries become irreconcilable. Indeed, at that point, A's objective representation of the fiduciary entity, independent of the wishes of the respective fiduciaries, may be indispensable to proper fiduciary administration.

Although the "chain of command" seems relatively clear in the context of a corporation (the attorney normally deals with the corporation's officers, who report to its board of directors), the lack of a clear hierarchy in a fiduciary setting is no more troublesome than in the context of other entities, such as a partnership, in which the chain of command equally is obscure. Just as there are situations in which the attorney for a corporation is entitled to carry information to shareholders regarding self-dealing or other wrongs committed by corporate officers or majority shareholders, the analogy to carrying information to beneficiaries of a fiduciary entity seems natural. In the fiduciary setting, if a court is involved, it also seems natural to regard the court as being a higher authority, like a board of directors vis-a-vis corporate officers.

In each setting, it is only within this chain of command (as compared to taking information entirely outside the entity), that the disclosure of information obtained in the representation is not improper under the entity representation theory. The key to this analysis is to regard the fiduciary as an agent and the beneficiaries as constituents of the estate or trust and apply a rule that "[i]nformation given to the lawyer by agents of the entity must be made available to the entity when it is in the best interest of the entity."43 "Rule 1.13 . . . is not a rule about disclosures outside an entity, but serves primarily as an analytic tool for understanding relationships and hierarchies within an entity, and the problem of communicating with a client which in reality is only a nonexistent fiction."44 This describes a fiduciary entity as well as it describes a corporation or a partnership.

This vision of the client representation issue that regards the fiduciary entity as a separate jural personality and treats it as the client has several potential advantages. One is that it clarifies the attorney's responsibilities to the various parties who have an interest in the administration. Rather than trying to establish the meaning and extent of fiduciary, derivative, or ancillary duties to the beneficiaries, or the ability to reveal otherwise confidential information if the fiduciary is regarded as the client, the attorney would know that legal representation of a fiduciary entity is guided by the same focus that guides the fiduciary administration itself—the best interests of the entity and the beneficiaries for which it is held—evaluated in an objective sense rather than with an view toward protection of some but not all of the various constituents involved.

A second advantage is relevant in those cases that involve actual fiduciary misconduct. By regarding the entity as the client rather than the fiduciary or the beneficiaries, the attorney avoids the question of the attorney's ability to reveal a fiduciary's breach of duty. It also makes it more clear to whom the attorney owes its fidelity if a conflict of interest arises. To permit disclosure under the ABA Study Committee approach

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42. See id. § 1.13:403.
43. Id. § 1.13:107, at 396.
44. Id. § 1.13:111, at 401.
requires acceptance of its conclusion that the duty of confidentiality does not apply as between the fiduciary and either the beneficiaries or a court, to the extent the information could be discovered by the beneficiaries. That interpretation is not necessary if the entity is regarded as the client because it is clear that confidentiality does not apply within an organization or entity to the extent explicitly or impliedly authorized to carry out the representation or to prevent substantial injury to the organization. To the extent disclosure is reasonably necessary in the best interests of the organization, and other constituents have a need to know, the attorney may disclose otherwise confidential information without exposure. The ABA Study Committee Report also generates an issue whether the attorney-client privilege that otherwise would protect against discovery by outsiders is lost for all purposes by virtue of discretionary disclosure to beneficiaries. The entity representation alternative avoids this issue as well.

45. See Model Rules, supra note 3, Rule 1.13(b) and cmt.

46. Under the ABA Study Committee proposal the attorney-client privilege that would not apply as against discovery by beneficiaries, as discussed supra note 22, nevertheless would exist with respect to third party discovery. This privilege against outsiders would be lost following disclosure of privileged confidential information to a nonclient, the notion being that, to the extent there has been disclosure, there no longer is confidential or privileged information upon which the privilege can work. See 1 McCormick on Evidence § 93, at 342 (4th ed. 1992). Thus, the issue is whether the protection of the privilege is lost for all purposes if otherwise privileged information is disclosed to a beneficiary who is not regarded as the attorney's client. See infra text accompanying note 56 regarding the question whether beneficiaries are clients of the attorney in garden variety fiduciary representation situations.

The attorney-client privilege is not lost to the extent otherwise confidential information is disclosed to constituents in an entity representation. See Upjohn Co. v. United States, 449 U.S. 383 (1981). Moreover, loss of the privilege would not occur under the ABA Study Committee approach if disclosure to beneficiaries is regarded as permissible. Thus, if it is correct for evidence law purposes that information is not privileged as against the beneficiaries, then the attorney-client privilege is not deemed waived when that information is disclosed to a beneficiary. But the ABA Study Committee approach puts a potentially high price on an attorney's voluntary revelation of fiduciary confidences to beneficiaries who are not the attorney's client if disclosure to them is not regarded as an exception to the waiver rule in the same manner as disclosure within an entity representation. This issue is not addressed by the ABA Study Committee Report.

In the only case found directly on point, In re Estate of Baker, 528 N.Y.S.2d 470 (Surr. 1988) (surviving spouse as beneficiary of estate sought disclosure of additional documents following revelation of certain information regarding the fiduciary's administration, claiming the attorney-client privilege asserted by the fiduciary was waived as to the spouse by virtue of prior disclosures on the same subject), the court held that the privilege was not lost, but the rationale for its holding is uncertain because the opinion referred to two different grounds upon which it may be held that the attorney-client privilege is not available to a fiduciary as against a beneficiary and the court did not indicate which ground it was relying upon.

The attorney-client privilege has been held to be unavailable to a fiduciary on the grounds that: (1) the privilege should not be asserted against those for whose benefit the legal advice is sought, and (2) both the fiduciary and the beneficiaries are the clients of the attorney and the privilege may not be asserted between clients who consult an attorney on a matter of common interest. . . .

This court is of the opinion that a fiduciary has an obligation to disclose the
A third advantage of the entity representation alternative lies in the fact that the law informing the resolution of questions that arise in representing entities such as corporations is relatively well-developed and can be relied upon to inform the resolution of analogous issues that arise in the fiduciary context.

As in most cases involving an attorney's representation of a corporation, in the vast majority of fiduciary representation cases no conflict or breach exists and it does not matter whether a technical classification regards the client as the fiduciary as opposed to the beneficiaries or the entity. But in cases in which the issue is significant, regarding the fiduciary as the client means the attorney is conflicted if the beneficiaries' interests are adverse and, at some point in the representation, the fiduciary's negligence, misconduct, or objection to the attorney's advice might require the attorney to withdraw from the representation rather than take other actions that might be more beneficial to the various constituents (beneficiaries or creditors, for example) or the entity itself. Without the ability to disclose fiduciary misconduct, the effect of treating the fiduciary as the client is to force the attorney to abandon the representation to avoid being accused of participation or complicity in the fiduciary's wrongdoing. Withdrawal does not serve the interests of the beneficiaries who rightly are regarded as the real parties in interest, it does not rectify the wrongdoing, and it leaves the attorney with the very difficult

advice of counsel with respect to matters affecting the administration of the estate. . . .

Accordingly, the court finds that the memorandum is not a document protected by the attorney-client privilege as between the fiduciaries and beneficiaries of the estate. Therefore, disclosure of the memorandum to . . . the spouse did not waive the attorney-client privilege as to other documents protected by the privilege.

Id. at 473-74. Estate of Torian v. Smith, 564 S.W.2d 521 (Ark. 1978), held that there is no privilege as against the beneficiaries because the attorney represents the beneficiaries, which reflects the second rationale for the Baker conclusion. If the second rationale for disclosure is not applicable, however, because the beneficiaries are not properly regarded as the attorney's clients in the garden variety fiduciary representation situation, then the first rationale would support the court's holding alone, and that is the logic underlying the ABA Study Committee Report conclusions. Under this analysis, Baker would be authority for the proposition that the ABA Study Committee proposal will not result in a waiver or loss of the attorney-client privilege if information is revealed to the beneficiaries.

Dicta in Robertson v. Central Jersey Bank & Trust Co., 834 F. Supp. 705, 710 (D.N.J. 1993) (guardian ad litem's report prepared for appointing court was not protected by attorney-client privilege because guardian, who was a lawyer, was not acting in a legal capacity and because there could be no expectation of confidentiality because the report was prepared for disclosure to the court), supports the notion that disclosure to a court destroys the attorney-client privilege if the court record is a public document; quaere whether an attorney's discretionary disclosure to a court can be made under such circumstances that any otherwise existing privilege is not destroyed.

47. See ABA Comm. on Ethics and Professional Responsibility, Informal Dec. C-778 (1964) (attorney for guardian did not represent the ward and could not reveal guardian's misappropriation of funds).

48. See Hazard, Client Fraud, supra note 29.
line to draw of when withdrawal is required. The final advantage of the entity representation alternative, then, is that it need not create this conflict of interest anguish.

Illustration and Comparison of the ABA Study Committee Report and the Entity Representation Alternative

In cases that involve a breach by the fiduciary, any resolution of the issue that favors the fiduciary with confidentiality and loyalty protects the party least entitled to protection. Under a resolution that regards the fiduciary as the client and the duty of confidentiality as applicable, the attorney either must be able to reveal information or to signal knowledgeable beneficiaries that something is wrong by the manner in which a withdrawal is accomplished. Without the latitude provided by any of the three exceptions to the duty of confidentiality or by the entity representation alternative, an attorney who does right by the beneficiaries by violating the fiduciary's expectations and rights as a client may be civilly liable to the fiduciary and may have destroyed the attorney-client privilege as against discovery by outsiders. 49

Without a rule allowing disclosure, the attorney's only allowable recourse is the mere act of withdrawal, which may not put the parties most entitled to protection on notice that they should seek representation of their own to investigate something that is amiss. Thus, if traditional thinking regards the fiduciary as the attorney's client, and if the duty of confidentiality applies because no exception is triggered, then the attorney cannot disclose information that reveals the wrongdoing: only the manner of withdrawal may constitute a warning that there is a problem. 50 With certain fiduciary situations, particularly involving the elderly, this constitutes a very significant deficiency in the manner in which the rules of professional responsibility apply to fiduciary representations.

In the context of the hypothetical, when A learns of fiduciary investments that A regards as improper, or learns that one cofiduciary has engaged in prohibited self dealing, a traditional application of the duty of confidentiality would require A to determine whether any exception to the Model Rule 1.6 duty of confidentiality exists. If none does, then A would need to decide whether to withdraw, and whether or how to do so in a manner that alerts a court or other beneficiaries or cofiduciaries of the existence of a problem without violating the duty of confidentiality to the fiduciary. Announcing to a supervisory court that A is withdrawing but cannot say why, while encouraging the court to order an accounting or inventory, is an odd manner to preserve confidences while revealing enough information about the problem to alert other parties and argua-

49. See supra note 46.
50. See Hazard, Client Fraud, supra note 29, at 304. Hazard characterizes the situation thusly: "What the ABA has done [in Rule 1.6] is loudly to proclaim that a lawyer may not blow the whistle, but quietly to affirm that [the lawyer] may wave a flag."
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bly protect their interests (and perhaps to protect the attorney from violating any duty to the beneficiaries that could result in their suing the attorney).

Both the ABA Study Committee Report and the entity representation approaches obviate the need to engage in such a ritual, in each case permitting the attorney to exercise discretion whether to reveal information to a beneficiary or any supervisory court. The difference between these two alternatives is that the entity representation approach allows disclosure without creating a rule that is contrary to traditional thinking about the duty of confidentiality, without concerns over violation of duties of loyalty to the attorney's client (which is the fiduciary under the ABA Study Committee resolution), and without risk of greater damage to the attorney-client privilege.51 The entity approach does not expose entity confidences to outsider discovery, it does not require the attorney to fear retaliation by the fiduciary who might feel entitled to the attorney's undivided loyalty, and it does not require the attorney to rely on any of the three stated exceptions to Model Rule 1.6.52

The ABA Study Committee Report avoids these issues by sublimating the duty of confidentiality. Experience shows that regarding the fiduciary as the client is easier for some to conceptualize and acknowledge than trying to overcome traditional notions that a fiduciary entity does not have a legal existence, even for the limited purposes of Model Rule 1.13. The entity representation resolution avoids the confidentiality issues because disclosure among constituents of the entity is appropriate and proper. The charade of preserving confidences while waving the withdrawal flag is eliminated under either alternative because the attorney is permitted to directly notify beneficiaries or a supervisory court that a problem exists. But to accomplish this desirable objective, the ABA Study Committee Report must alter the meaning of Model Rule 1.6 while the entity representation alternative interprets the rules in a manner that makes disclosure permissible without affecting the application or operation of Model Rule 1.6.

The Intermediary Alternative

Although not noted by the Model Rules or existing authority, it might be argued that Model Rule 2.2 is a theoretically correct provision to deal with the fiduciary representation situation. The theory would be that the attorney, along with the fiduciary, serves as a mediator between beneficiaries and other claimants (such as creditors) of the fiduciary entity. The root of such an analysis is the notion that the fiduciary is charged with the responsibility of impartially representing the best interests of all parties who are interested in the fiduciary entity and the attorney merely

51. See supra note 46.
52. Only the attorney defense exception appears applicable in this situation, and that only if the "affirmative" defense argument actually has merit. See supra text accompanying notes 31.
assists the fiduciary in fulfilling that duty. Under this intermediary approach, the attorney would be free to reveal information obtained from one party to the intermediation (such as the income beneficiary) to any other party (such as a remainder beneficiary), to the extent it is relevant to the representation.\(^5\) It is questionable, however, whether disclosure to a supervisory court or instigation of court proceedings to redress a fiduciary defalcation would be authorized under this alternative. Because the fiduciary and the attorney both are in the role of intermediator and not as parties to the intermediation, it is not clear that secrets of one intermediator (the fiduciary) may be revealed to anyone. Alternatively, if this theory of a joint intermediation is accurate, it might be argued that the attorney has no client as such (and surely not the fiduciary, which is just a joint intermediator), so nothing is protected from disclosure within the intermediation.\(^5\)

Other problems exists with the intermediation notion. For example, Model Rule 2.2(c) permits any client of a mediation to discharge the attorney, presumably meaning that any beneficiary or potentially even a creditor could require the attorney to withdraw. Beneficiaries and other claimants normally do not have a right to dismiss the fiduciary, much less the fiduciary's counsel.\(^5\) Further, there is no indication in Model Rule 2.2 or its Comments that this Rule was intended to cover more in a fiduciary setting than, potentially, mediation of a conflict between multiple fiduciaries or conflicting beneficiaries. Thus, this interpretation does not appear to provide a workable rule that fiduciary secrets may be disclosed to any interested party.

The Beneficiary as Client Alternative

Although it may seem that the real parties in interest in a fiduciary representation are the beneficiaries, and therefore that the beneficiaries ought to be regarded as the client, this view finds little direct support in the authorities and confuses the client identity issue with the question of an attorney's liability to a nonclient (a beneficiary) flowing from acts of the attorney. For example, several courts have held that "an attorney [who] represents a [fiduciary] . . . assumes a duty of care and fiduciary duties toward the beneficiaries,"\(^5\) notwithstanding that in some cases the beneficiary was separately represented. This is not to say, however, that the beneficiaries were clients of the attorney. The proposed Restatement of the Law Governing Lawyers § 73(4)\(^5\) formulation is that

\(^53\). See Model Rules, supra note 3, Rule 2.2 cmt.
\(^54\). See id., recognizing that confidentiality does not bar disclosures within the common representation.
\(^55\). See 2 Scott on Trusts, supra note 24, § 107.3.
a lawyer owes a duty ... to a non-client when and to the extent that circumstances ... make it clear that appropriate action by the lawyer is necessary ... (b) to prevent or rectify a crime or fraud violating a fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect its rights and recognizing such a duty would not create inconsistent duties significantly impairing the performance of the lawyer's obligations to the client.

Comment h to § 73 further provides that:

[A] lawyer must use due care to protect a beneficiary when it is clear that this is necessary to prevent a criminal or fraudulent violation of fiduciary duties ... or to rectify (typically by disclosure) the consequences of such a violation, and when action by the lawyer would not violate the jurisdiction's professional rules. The duty is essential because of the importance of fiduciary duties and the need of their beneficiaries for protection. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, recognizing the duty will not ordinarily subject the lawyer to conflicting or inconsistent duties. Moreover, to the extent that the lawyer has assisted, even unwittingly, in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer. . . .

The duty recognized by Subsection (4)(b) arises only when circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary to prevent or rectify a crime or fraud violating a fiduciary duty owed by a client. The duty thus exists only when circumstances known to the lawyer make it clear that a crime or fraud has occurred or is about to occur. . . .

Subsection (4)(b) recognizes a lawyer's duty only when the beneficiary of fiduciary duties is not reasonably able to protect himself or herself. That would be the case, for example, where the beneficiary is incompetent and not represented by counsel or protected by a guardian other than the lawyer's client. It would also be the case where the fiduciary had kept from the beneficiary the information needed to put the beneficiary on notice of a breach. . . .

A lawyer owing a duty under Subsection (4)(b) is not liable for failing to take an act forbidden by professional rules to which the lawyer is subject. . . . Thus, a lawyer is not liable for failing to disclose confidences when the jurisdiction's rules forbid the disclosure. . . . For example, if a fiduciary retains a lawyer to advise and defend the fiduciary in dealing with the consequences of a crime or fraud that the fiduciary has already committed, the lawyer is not liable for failing to inform the beneficiary of the breach.

As applied in this context, this means that the fiduciary has duties to the beneficiaries that may create a duty on the fiduciary's attorney in certain cases, but the beneficiaries do not become the attorney's clients. Example 8 to § 73 illustrates the operation of this formulation:

Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circum-
stances in which this would constitute the crime of embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no further steps to prevent Client's unlawful act or to rectify its consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures. . . . Client becomes insolvent and the funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

This derivative or indirect liability to the beneficiaries as nonclients raises several problems.

One is the duty of confidentiality, which the Restatement rule deals away by predicking disclosure on there being no violation of the duty, which makes the rest of the disclosure duty irrelevant: if it were no violation of the duty, it would be an easy matter to regard the fiduciary as the client and not agonize over the ability to protect the beneficiaries. Thus, the Restatement's caveat is instead an effective negation.

Another problem is cost, especially if the case involves a court appointed fiduciary that must account to the court, because attorney involvement of the variety anticipated may duplicate fiduciary functions and oversight that should be performed by a supervisory court, all at an increased cost to the entity and, ultimately, to its beneficiaries. Comment h to Restatement § 73 states that the attorney's duty exists "only when circumstances known to the lawyer make it clear that appropriate action" is required, which may be an effort to minimize the need to make affirmative inquiries or exercise oversight to avoid liability. It is unlikely that this will provide enough comfort or guidance to relieve the attorney from the perceived need to be proactive, however, which leaves the risk of increasing costs.

To the extent this rule thereby turns a fiduciary's attorney into a fiduciary watchdog, it also subverts the attorney's representation of the fiduciary. A fiduciary that desires counsel in a classic sense, with duties of loyalty and confidentiality to the fiduciary alone, therefore might be forced to hire yet another attorney as the fiduciary's individual counsel and, at least indirectly, pass that cost along to the beneficiaries as well.

Finally, not only is the attorney conflicted, with no clear indication whether the duty of confidentiality exists and therefore constitutes an impediment, the attorney may not even know the identity of the beneficiaries and, if the fiduciary is not court appointed, the ability to fulfill the stated duty is made extremely difficult, if not impossible. Although this last impediment can infect any of the other resolutions offered, they do not involve an affirmative duty to unknown beneficiaries that can expose the attorney to liability with no reasonable opportunity to fulfill the attorney's obligations.
Criticisms of the Entity Representation Alternative

Another American Bar Association report ("the Link Report")\(^58\) acknowledges that "traditionally, and in most situations," the attorney hired to assist in the administration of an estate has been regarded as owing its duties to the personal representative. That Report discusses several perceived impediments to finding the fiduciary entity to be the client.

First, the Link Report states that "[t]he constituents of an estate... are not as structured as a corporate hierarchy. The language of [Model Rule 1.13] and comment, therefore, does not support an interpretation of the estate as an entity."\(^59\) It also cites Restatement of the Law Governing Lawyers § 212 Comment b, which refers to the fact that "[p]ersons forming an organization... usually are linked by a common interest that partly transcends their individual interests," and states that this suggests that an estate is not an "organization" subject to the application of § 212. The individual beneficiaries of an estate maintain their own interests; if anything, their individual interests transcend the common interest. The Restatement comments support the inference that an estate is not an "entity," as defined by the Model Rules.\(^60\)

As illustrated in the hypothetical, it is clear and perhaps likely that individual beneficiaries and even separate cofiduciaries may have conflicting interests and objectives. It is questionable, however, whether beneficiaries of a fiduciary entity place their common interests above those of the entity or of each other vis-a-vis the rest of the world, any more than the shareholders of a corporation or the partners in a partnership place their individual interests above those of the organization when dealing with anyone other than other constituents of the entity. It is not uncommon for constituents of any entity to place their individual interests above those of other constituents when dealing with each other, but the fiduciary entity does not differ with respect to the way its constituents regard themselves in dealing with outsiders, including agents of the entity such as the entity's attorney. Nor do the attorney's role or duties differ as compared to the representation of a more commonly regarded organizational client. In addition, nothing in the Model Rule or Restatement indicates that any thought, positive or negative, was given to applying the entity representation alternative to a fiduciary entity.

The Link Report also suggests that the entity approach raises several


\(^{59}\) Id. at 67 n.142.

\(^{60}\) Id.
additional problems. One is that the attorney may be a beneficiary of the estate, so a decision in the best interests of the entity may benefit the attorney personally. To this might be added the fact that the attorney may be the fiduciary. According to the Report, “suspicious beneficiaries, who may infer that the attorney acted only in his interests, would have to speak through the personal representative and either (1) require an explanation or (2) obtain their own attorney to investigate the situation.”61 This commentary ignores the fact that attorneys always have the risk of conflicting independent interests, as to which the ethics rules provide guidance and relief.62 This situation is similar to that in which an attorney represents a corporation in which the attorney is a shareholder, officer, director, or any combination of these.

A second problem noted is that:

Problems with a duty of confidentiality may arise when the personal representative, as agent of the entity, gives the attorney information concerning a conflict. Such information must be made available to the entity if it is in the entity’s best interest. Nevertheless, dissemination of confidential information within the entity is proper only to the extent the entity client has authorized disclosure.63

This statement misperceives the rules relating to confidentiality and disclosure within an entity representation. “Information given to the lawyer by agents of the entity must be made available to the entity when it is in the best interest of the entity.”64 According to the Comment to Model Rule 1.13, “[t]he lawyer may not disclose . . . information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation,” which includes disclosures to constituents (beneficiaries or a supervisory court in the context of a fiduciary entity) if necessary to rectify wrongdoing.65 That the wrongdoing fiduciary as an agent of the entity would not authorize such disclosure is not the appropriate test, any more than a corporate officer’s objection would preclude corporate counsel from disclosing the officer’s misconduct. There is no privilege vis-a-vis constituents of an entity, nor is there a duty of confidentiality if disclosure is in the best interests of the entity.

A third point made by the Link Report is that:

A duty of loyalty to the group requires the lawyer to assess independently what is best for the group as a whole, because the attorney, beneficiaries, and personal representative are co-agents of the estate.67

61. Id. at 68 n.143.
62. See Model Rules, supra note 3, Rule 1.8.
63. Link Report, supra note 58, at 68 n.143, citing Model Rules, supra note 3, Rule 1.6(a).
64. Hazard & Hodes, supra note 19, § 1.13:107, at 396.
65. Model Rules, supra note 3, Rule 1.13 cmt.
66. See supra note 21.
67. Quaere whether it is copacetic to refer to beneficiaries as agents of a fiduciary entity.
If the personal representative acts adversely to the estate's interest, the attorney should, as the comment suggests, recommend that the personal representative obtain independent representation. The attorney does not violate Rule 1.9 by litigating on behalf of the "estate" client against the personal representative, because the representative does not qualify as a "former client." The estate normally acts through the personal representative, however, creating a very difficult conflict situation. The language of the Rule and comment, as well as the many potential problems, suggest that an estate is not an entity client within the meaning of Rule 1.13.68

The existence of such a conflict of interest is no different, or more severe, than the conflicts that may arise between an attorney for a corporation or other organization and its officers, agents, or constituents with whom the attorney previously has dealt. In each case Model Rule 1.13(e) recognizes that representation of the constituent personally may entail a conflict of interest, and Model Rule 1.13(d) stresses that the attorney must "explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." This potential adversity is no justification for rejecting the entity-representation concept when dealing with an estate or trust, any more than it is in dealing with any other organization.

Notwithstanding these asserted problems, the Link Report itself makes it clear why the entity representation approach would be useful. The following statements all are intended by that Report to inform its reader of the parameters of the rule that applies in this situation. First, regarding the need to define the client in the context of fiduciary dishonesty, the Link Report notes the duty of confidentiality but concedes that:

[T]he duty of disclosure may rise above the duty to maintain confidentiality.

It is the duty of the attorney to observe the proper purpose of the representation. For instance, if the fiduciary requests the attorney's advice on how to rectify or cover-up illegal actions, the attorney must act carefully to avoid implication in the misconduct. Under Rule 1.2(d), the attorney has a duty not to assist a fiduciary in perpetuating a fraud. Furthermore, the attorney's duty of loyalty runs to the fiduciary as a primary client but may also extend to protection of the beneficiaries' interests as the secondary clients.69

Citing Hazard for the primary-secondary aspect but no authority for the duty to protect against dishonesty by the fiduciary, the Report accepts that this is most problematic if the fiduciary is regarded as the client. Then it says:

[In the] primary-derivative client matter, the attorney also owes a duty of loyalty to the beneficiary, and the attorney must, consequently, try to remove the fiduciary. If the attorney is characterized as an interme-

68. Link Report, supra note 58, at 68 n.143 (footnote added).
69. Id. at 75-76 (citation omitted).
diary between multiple clients, disclosure of the information is not considered a breach of his duty to the fiduciary. The attorney is protected by his warning to the fiduciary at the outset of representation. The Rules acknowledge that joint representation alters the rules of confidentiality and, consequently, the attorney-client privilege. Under these circumstances, the fiduciary has no recourse against the attorney who discloses information, because the duty of confidentiality provides for effective representation of both the fiduciary and beneficiary.70

Disclosure is consistent with both the entity representation concept and with the ABA Study Committee Report, neither of which rely upon either a joint representation or an intermediation model (much less both). The Link Report also states that:

In representing a dishonest fiduciary, the attorney not only must maintain loyalty to the beneficiaries but also must be truthful to the probate court regarding the fiduciary’s actions. If pertinent information is not disclosed on the inventory or death tax returns, and if the attorney discovers this or is informed by the personal representative, the attorney is caught between a duty of confidentiality to the fiduciary and a duty of disclosure to the government or beneficiaries. The correct response of the attorney is usually disclosure when the fiduciary’s action is fraudulent or criminal. This response is supported by Rule 1.2 “Scope of Representation” and Rule 3.3 “Candor Toward the Tribunal.”71

To the extent this is correct, it is consistent with both the entity approach and the ABA Study Committee Report, but neither Model Rule 1.2(d) (cited) nor Model Rule 4.1 (not cited) is implicated if the attorney did not assist the fiduciary and, because the government is not a tribunal, Model Rule 3.3(a)(2) is not applicable; furthermore, the attorney does not have a duty of disclosure to the government.72 More importantly, any duty of loyalty to beneficiaries should not be limited to circumstances in which a tribunal is involved and Model Rule 3.3 is implicated, and in all cases the attorney’s duty should be limited to circumstances in which the attorney assists the fiduciary.

Finally, the Link Report states that:

If the attorney fails to persuade the client to allow disclosure, the comment outlines the possible remedial measures the attorney must make

70. Id. at 77 (citations omitted).
71. Id. at 78.
72. Circular 230, 31 C.F.R. § 10.21 (1993) (the government’s own rules regulating practice before it in the tax arena). Section 10.21 specifies that “[e]ach attorney . . . who . . . knows that the client has not complied with the revenue laws . . . or has made an error in or omission from any return . . . shall advise the client promptly of the fact . . . .” But although the attorney is required to advise the client to amend an erroneous return or to file a missing return, Circular 230 does not require Attorney to blow the whistle on the client. Moreover, the better position regarding Model Rule 3.3 is that the IRS is not in the position of a tribunal in this respect. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1965). Thus, disclosure notwithstanding the rule of confidentiality is not required.
to comply with Rule 3.3(a)(4). The attorney must first remonstrate the
client confidentially, then seek to withdraw, and finally, if these mea-

sures fail, make disclosure to the court.\textsuperscript{73}

Further, the Link Report suggests that the failure to disclose to the court
constitutes a fraud on a tribunal under Model Rule 3.3 because the attor-
ney is an officer of the court.

This analysis results in the Link Report's conclusion that disclosure is
required. But it reaches this result in an uncertain manner informed only
by Model Rule 3.3, which is not applicable in an unsupervised adminis-
tration because there is no tribunal, and it requires the attorney to ascer-
tain when duties to beneficiaries of a derivative or secondary nature or
duties to a tribunal outweigh duties of a primary nature to the fiduciary.
The ABA Study Committee Report suffers the same need to exercise dis-
cretion and balance conflicting duties.

On the other hand, the entity representation alternative absolves the
attorney from having to determine whether activities about which the
entity and its constituents should know rise to the level of "a criminal or
fraudulent act" that then permit or require disclosure under Model Rule
3.3(a)(2), whether the attorney assisted in the fiduciary's crime or fraud
in a way that triggers Model Rule 4.1, or whether the duty of confiden-
tiality exception to that Rule removes the duty or ability to disclose. The
entity as client alternative under the dictates of Model Rule 1.13 reaches
the right protective conclusions in a simple and untormented manner be-
cause the wrongdoer is not entitled to protection as against the constitu-
ents with the primary interest. It is both logical and helpful to interpret
these rules to regard the fiduciary entity as the client, the court and the
beneficiaries as entitled to disclosure, and the fiduciary as an agent (like
the officers of a corporation) who, when doing wrong, is entitled to no
protection vis-a-vis constituents of the entity. Such an analysis produces
more certain and less anguished action by the attorney in pursuing a
result—disclosure—that every alternative embraces.

Although the duty of confidentiality is the most difficult aspect of the
client identity issue, there also is the issue of attorney liability to the
beneficiaries. This is not a very difficult question if a negligent attorney
can be sued by the fiduciary under an analysis that regards the fiduciary
as the attorney's client and also recognizes that the beneficiaries could
force the fiduciary to sue the attorney. Thus, even if the beneficiaries are
not the attorney's clients and even if there is a privity defense or a lack of
derivative duties to the beneficiaries, it would be unusual for attorney
malpractice exposure to be avoidable under either alternative. As a con-
sequence, it makes little sense to argue over a rule that, at best, makes it
more cumbersome for the real parties in interest to redress an attorney's
wrongs. There is, however, yet another issue that deserves more detailed
consideration.

\textsuperscript{73} Link Report, \textit{supra} note 58, at 81.
The Link Report cites Model Rule 1.9 as prohibiting an attorney who has withdrawn from a fiduciary representation from thereafter representing the beneficiaries, the entity itself, or a new fiduciary against the former fiduciary to recover any losses attributable to the former fiduciary’s misconduct. The Report suggests that “[r]epresentation in opposition to the personal representative in the administration of the estate would clearly be regarded as changing sides” in violation of Model Rule 1.9.74 “The lawyer is also prohibited from using information relating to the representation of a former client to the disadvantage of the client . . . .”75 Presumably the effect of this interpretation is that, if fiduciary misconduct is discovered, the attorney must withdraw (if the representative won’t make it right when admonished to do so) and may not participate in an action to redress that wrongdoing, notwithstanding the attorney’s special knowledge and abilities in this endeavor.

Such a proscription would be wasteful and contrary to the expectations of all but the defalcating fiduciary. Both the Link Report and the ABA Study Committee Report reach resolutions that suffer the same defect by virtue of regarding the client as the fiduciary rather than the entity. Unlike both of these reports, however, if the entity is viewed as the client to whom the attorney always owes the exclusive duty of loyalty and any agent betray this client, the attorney is not changing sides when actions are undertaken to rectify the wrongdoing. Under the entity approach the fiduciary is only an agent acting on behalf of the entity as true client and no rule prohibits the attorney from representing the entity in redressing such wrongdoing. This approach is workable to the extent the fiduciary and all other constituents is advised at the beginning of the representation (as admonished in Model Rule 1.13(d)) that the attorney represents the entity and not the individual agents or constituents thereof.

LIMITATIONS ON THE ENTITY REPRESENTATION ALTERNATIVE

Regardless of how the question of the client’s identity is resolved, it is clear that it is improper for an attorney to represent a fiduciary entity as well as the fiduciary or the beneficiaries of the entity individually, if their interests conflict, unless the consent required in Model Rule 1.7 is secured.76 Fortunately, not all beneficiaries and entities present conflicts of interest, but conflicts are not unlikely, as shown by the hypothetical.77

74. Id. at 90.
75. Id. at 91.
76. See, e.g., In re Estate of Ragan, 786 P.2d 754 (Ore. Ct. App. 1990), aff’d, 843 P.2d 442 (Ore. 1992) (potential conflict arose when estate’s attorney discovered that administration expenses, including attorney fees, would consume the entire estate, which was worth considerably less than originally valued, leaving nothing for beneficiary the attorney also represented). Securing consent could be complicated because it is not clear who may give that consent on behalf of a fiduciary entity, particularly if the conflict involves the fiduciary as an individual. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 564 (1962); supra text accompanying notes 26-27.
77. Conflict should be expected in most sophisticated situations, given tax related
Thus, any attempted mutual representation is fraught with conflict of interest danger. Similarly, it would be improper for a drafting attorney to represent beneficiaries or disfranchised heirs seeking to set aside a decedent’s will.78

None of these situations diminishes the propriety, however, of regarding the entity as the client in the normal fiduciary relation, nor are any constituents precluded from engaging the services of other attorneys to represent their personal interests. This particularly is true about a wrongdoing fiduciary who wishes to hire an attorney and compensate that attorney out of its own resources, guaranteeing the attorney’s confidentiality and loyalty and avoiding any conflicts with the entity and its attorney.

**ILLUSTRATIONS OF THE ENTITY REPRESENTATION ALTERNATIVE**

*Example:* Attorney represented Decedent (D) and drafted D’s estate plan, which named D’s child (C) as executor of D’s estate and as trustee of several following trusts that will be held for the primary benefit of D’s surviving spouse for life, remainder to D’s descendants. During the course of administration Attorney discovers that C has made several decisions that work to the benefit of the remainder beneficiaries of the trusts, including C, and to the detriment of the surviving spouse. Attorney has advised C that these decisions were improper and has recommended corrective action but C has not followed Attorney’s advice. Rather than merely withdraw from this representation, decisions that must be made (for example, elections such as partial QTIP, alternate valuation, generation-skipping transfer tax reverse QTIP and exemption allocation, trapping distribution, section 642(g) swing item, section 643(e) DNI carry-out, and section 643(g) estimated tax allocation), the possibility of statutory forced heir share elections, will contests, disclaimers, contested accountings, valuations, funding, investment decisions, and principal and income allocations in administration of an entity that may disfranchise one or more beneficiaries, and the resultant need to make equitable adjustments to compensate for the effects of those decisions and, potentially, giving rise to a surcharge action against the fiduciary. See generally Malcolm A. Moore, *Conflicting Interests in Post-mortem Planning*, 9 U. Miami Inst. Est. Plan. 190 (1975); Malcolm A. Moore, *Conflicts in Post-Mortem Planning After the Tax Reform Act*, 12 U. Miami Inst. Est. Plan 600 (1978).

78. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 564 (1962) (which also held that it was improper to represent the decedent’s corporation and the decedent’s estate when a dispute over the corporate stock arose during probate); *In re Estate of Bartoli*, 533 N.Y.S.2d 324 (App. Div. 1988), aff’d Will of Bartoli, 521 N.Y.S.2d 392 (Surr. 1987) (drafting attorney could not represent contestants); *In re Estes*, 221 N.W.2d 322 (Mich. 1974) (attorney suspended for representing co-executor in suit against estate as to which attorney was the other co-executor). Cf. Goldthwaite v. Disciplinary Bd. of the Alabama State Bar, 408 So.2d 504 (Ala. 1982) (ethics violation of having represented personal representative and then contestants avoided in part because attorney was one of the heir-contestants); *In re Williams*, 309 N.E.2d 579 (Ill. 1974) (attorney censured for representing surviving ex-spouse in collecting insurance proceeds after having represented the decedent in having the ex-spouse removed as beneficiary under those policies); *In re Michal*, 112 N.E.2d 603 (Ill. 1953) (it was improper for attorney to represent surviving spouse attempting to defeat prenuptial agreement the attorney drafted for the decedent).
Attorney reminds C that Attorney represents the estate and the following trusts and not C personally and, in that capacity, may disclose information relating to these decisions and their effects to the surviving spouse, notwithstanding C's objections that Attorney is precluded by the attorney-client privilege and the duties of loyalty and confidentiality. Faced with this disclosure, C either will make the corrections recommended by Attorney or will hire counsel to represent C or all the remainder beneficiaries in arguing that the actions taken were proper. The surviving spouse also may need to hire counsel and, lacking a Model Rule 1.7 consent, Attorney should not also represent any beneficiary.

Example: Attorney represented the personal representative (E) of the estate of a decedent whom Attorney never met. Although E is not a beneficiary of the estate, E was named as joint tenant with right of survivorship on a substantial certificate of deposit with the decedent and claims that it passed to E at the decedent's death as nonprobate property. E asks Attorney to determine whether the certificate of deposit properly is an asset of the estate. Attorney may render that opinion because Attorney's client is not E personally but the estate and all its constituents. Attorney may disclose to the other beneficiaries that the certificate of deposit exists and should inform them that, if they are not satisfied with Attorney's opinion regarding E's survivorship rights, they may retain their own counsel.

Hypothetical: A learned of fiduciary decisions made by the cotrustees who are remainder beneficiaries of the trust, indicating that self-dealing and conflicts of interest have infected administration of the trust. As income beneficiary and a cotrustee, S is the person A normally would inform about these actions and it would be up to S to proceed to enforce corrective action. Because S may be unable to process this information when disclosed by A, an alternative course of action may be necessary. As attorney for the entity, A has no obligation to obtain representation for S because S individually is not A's client, but A may be permitted to institute proceedings for the appointment of a personal representative for S and, if such a representative is appointed to protect the interests of S, disclosure by A to that representative also would be permitted. Alternatively, having advised the cotrustees to rectify their improprieties and given their refusal, A need not withdraw but instead may report the fiduciary breaches to an appropriate court if it is clear that the remainder beneficiaries are not interested in challenging these actions and that S is not in a position to pursue a remedy.

79. See In re Estate of Roark, 829 S.W.2d 688 (Tenn. Ct. App. 1991) (attorney's dismissal by lower court and denial of fees and expenses reversed; opinion that personal representative owned the certificate of deposit, which was not disclosed until a sensitive sale of estate property was completed, nevertheless was regarded as timely because beneficiaries' interests were not prejudiced by delay).

80. This topic is considered in other articles included in this symposium. See Burnele Powell & Ronald C. Link, Confidentiality Issues in Representing the Elderly, 62 Fordham L. Rev. 1197 (1994); Jan Ellen Rein, Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do Within and Beyond the Competency Construct?, 62 Fordham L. Rev. 1101 (1994).
DEVIATIONS FROM THE ENTITY REPRESENTATION ALTERNATIVE

If the entity representation alternative is applicable as the default rule, deviations from it would be permissible by agreement. Most likely a deviation would be desired if the attorney never had a relationship to any of the decedent or the beneficiaries, instead having been hired by the fiduciary solely because of the attorney's prior contacts with the fiduciary. In such a case the attorney might not want to be bound in any way to beneficiaries to whom the attorney has no allegiance. Even then, however, as noted in Model Rule 1.13(e), because of likely expectations by the beneficiaries, the attorney should make it clear that the fiduciary is the sole client.\(^8\) This situation is not likely to arise unless the attorney is hired after the fiduciary is in trouble, in which case it is even more appropriate that the client be regarded as solely the fiduciary.\(^8\)

A second modification of the entity representation rule might be advocated in cases involving representation of a guardian or conservator for an incompetent ward. In such a case the ward is not self-sufficient and cannot be expected to engage an attorney for separate representation or to redress wrongs of the fiduciary that are revealed by the attorney. Indeed, the very person charged with the duty to protect the ward is the fiduciary who may be committing a wrong. Using cases from this unique situation to establish a proposition that the attorney owes duties directly to normal beneficiaries of fiduciary entities and extrapolating from this special case to other fiduciary representation cases is ill-advised, because the guardianship or conservatorship situation differs from the garden-variety circumstance in which a beneficiary (or the beneficiary's personal representative, if the beneficiary is incompetent) can be informed about a default or breach and can be expected to then pursue remedies without the assistance of the attorney for the entity.

Moreover, the guardianship or conservatorship situation may not itself be an appropriate exception to the normal fiduciary representation rule. Those who would impose duties on the attorney in a guardianship or conservatorship directly for the benefit of the ward would answer that there is no one else to serve that function. This ignores the fact that a court is involved and, assuming the attorney does not assist in any fraud on the tribunal, the court ought to protect the ward's interests if the court is doing its job. Under the entity representation alternative the attorney who is aware of a guardian's breach of duty is free to notify either the ward (although this is not likely to be effective) or the court. The only difference between this conclusion and the law that has been

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\(^8\) Regarding the application of a reasonable expectations approach to determining the identity of the client, see Note, An Expectations Approach to Client Identity, 106 Harv. L. Rev. 687 (1993).

\(^8\) In such a case it also might be appropriate for all attorney fees to be paid by the fiduciary out of the fiduciary's own funds, subject to reimbursement from the entity if the fiduciary is found to have acted properly.
declared in a handful of cases\textsuperscript{83} is that the attorney would have no duty to do so, which eliminates difficult questions that surround a "knew or should have known" standard for imposing liability on the attorney and therefore minimizes the risk of an attorney being sued for not discovering a fiduciary defalcation that a reasonably competent or attentive attorney would have recognized. A "should have known" standard with a duty to disclose naturally would encourage attorneys to be more vigilant to avoid such exposure, which could lead to the attorney becoming a fiduciary watchdog and, in the process, duplicating the court's oversight function and the fiduciary's administration, in both respects increasing costs.

As attorney for the guardianship or conservatorship rather than for the guardian, conservator, or the ward, the attorney would have the discretion to act in the best interests of the guardianship or conservatorship, which might include reporting the guardian or conservator's actions to the beneficiary or might entail a report to an appropriate court, or both. The difficult aspect of the guardianship or conservatorship case is whether the attorney should be cast in the role of a superfiduciary, charged with the responsibility to report fiduciary defalcations and imposed with liability for failing to do so. Under the entity representation alternative it is unnecessary to adopt such an approach to give the attorney the latitude to disclose fiduciary defalcations because the attorney already has the authority to pursue actions that will make the situation right. If courts do not regard this as an adequate result in this unique situation, however, and therefore conclude that the ward also is a client of the attorney, the need for this modification should be limited to this special case and should not inform the proper resolution in garden variety entity representations.

CONCLUSION

Following the approach in Florida, other states should be encouraged to establish, by express amendment to their Rules or by a Comment explaining them, who the attorney represents in the absence of a representation agreement to the contrary. In establishing this rule it is necessary and appropriate to distinguish between an attorney's duties to nonclients (such as beneficiaries under most of the alternative visions of the entity representation situation) and to restrict the impetus to expand the concept of "derivative" duties by adopting a rule that provides protection to beneficiaries without creating untenable or undefinable obligations of the attorney. Among the available options, regarding the beneficiaries as the attorney's client should be rejected because the beneficiaries do not engage the attorney, the beneficiaries almost always have conflicting interests (because some are current and others are future interest holders), and in some cases the attorney may not know the wishes or even the identity of the various beneficiaries. Casting the attorney in the role of a

\textsuperscript{83} See supra note 56.
watchdog over the fiduciary to protect the interests of beneficiaries also is untenable and subverts the attorney-client relation, regardless of who the client is deemed to be. Any rule that creates an obligation on an attorney to police a fiduciary should be rejected.

As regards the attorney's duties to the beneficiaries, an overview of the wildly diverse statements in the case law shows that the attorney should be bound by the same fiduciary duties that restrict the fiduciary's dealings with the beneficiaries, such as the duties of impartiality, objectivity, privacy, and loyalty (to avoid self dealing and conflicts of interest). Regardless of the verbiage used, it seems reasonably predictable that the same results would obtain in most cases under any of the formulations advocated, in the sense that an attorney's action that violated a direct attorney-client relation would be found to violate a derivative or fiduciary duty to a nonclient beneficiary of the fiduciary or the fiduciary entity that the attorney represents. Thus, it does not appear to matter much how this question is resolved, except perhaps to the extent a privity requirement effectively would preclude otherwise meritorious claims by nonclient beneficiaries.

The intermediary alternative has no precedent and little to recommend it, the confidentiality issue is not better resolved under it, and conflicts of interest and the ability of any party to the intermediation to dismiss the attorney under Model Rule 2.2(c) make it a worse result than the other available resolutions. Thus, it too should be rejected.

As between the ABA Study Committee recommendation that the fiduciary be regarded as the client, and the entity representation alternative, a number of serious issues must be considered. The entity representation approach has little direct precedential support. As against that detriment, the ABA Study Committee approach presents a number of disadvantages, the most severe of which being that it depends upon a confidentiality rule that also has no precedent. In addition, the need to exercise discretion whether to reveal confidences places an attorney at risk of liability to the fiduciary if the fiduciary is regarded as the client, which is avoided under the entity representation approach because the fiduciary is not the client and has no entitlement to confidentiality within the entity (except to the extent a disclosure to constituents of the entity was not necessary). Moreover, the ABA Study Committee alternative presents the disadvantage that disclosure may constitute a waiver of the attorney-client privilege for all purposes. Thus, it is easier for an attorney to exercise the discretion to reveal information contrary to the wishes of a fiduciary under the entity representation alternative, which facilitates the objective of protecting the integrity of fiduciary relations. Presumably this is the ultimate goal of any rule considered. Fortunately, on the confidentiality issue alone, both approaches recognize and justify disclosure, making it seem clear that regardless of the theoretical underpin-

84. See supra text accompanying notes 3-23.
nings employed, a defalcating fiduciary is not entitled to hide behind the duty of confidentiality.

Aside from the duty of confidentiality, which is the most important issue raised by the question of the identity of the attorney's client, other elements of this analysis seem to favor an entity representation alternative. For example, regarding the fiduciary as the client opens the possibility that a wrongdoing former fiduciary will dismiss the attorney, and cofiduciaries who collectively are the client but who have conflicts between themselves cast the attorney into an unworkable position. In addition, if the attorney for a fiduciary finds it necessary or appropriate to withdraw, Model Rule 1.9 would preclude the attorney from representing a successor fiduciary in an action that seeks to redress the fiduciary's wrong; that problem is avoided if the attorney's client is regarded as the entity itself. Because it is proper and desirable for the attorney to represent the entity in pursuing remedies against a wrongdoing fiduciary, a rule that impedes the entity's recovery should be regarded with disfavor.

Because privity and the ability to redress attorney negligence are not seriously impacted by any theory chosen, the balance seems to favor the entity representation alternative. But regardless of the outcome on that debate, the clear implication for every alternative discussed is that a wrongdoing fiduciary is not entitled to confidentiality as a protection against discovery and redress by the affected beneficiaries. Whether the ABA Study Committee Report or the entity representation alternative is adopted as the justification, the attorney should be free to protect the beneficiaries' interests by disclosure. Either result is preferable to regarding a wrongdoing fiduciary as a client that is entitled to confidentiality, because that approach fails to notify any successor to the attorney of the nature of the fiduciary's wrongdoing and it leaves withdrawal as the attorney's only permissible action, which poses significant risks to beneficiaries who are too ignorant, naive, or oblivious to react to an attorney's indirect signal sent solely by the manner of withdrawal. Both resolutions justify notification of the beneficiaries or a court with jurisdiction, without requiring the attorney to withdraw. And both negate the obligation to abandon the beneficiaries by withdrawal at just the time when their interests demand the greatest protection.

Because either alternative produces the right result, ultimately it is less important which is favored so long as either is permissible and adopted. In the final analysis, what this comparison also may prove is that the original proposal to modify Model Rule 1.6 to permit disclosure of a client's fraud or crimes that are likely to produce substantial injury to the financial interests or property of a nonclient should be embraced by the American Bar Association as it has been in varying forms in many states.85

85. See supra text accompanying notes 30-31.