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## Report of Working Group on Lawyer as Fiduciary

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# REPORT OF WORKING GROUP ON LAWYER AS FIDUCIARY\*

## INTRODUCTION

The participants of this working group identified the issue for discussion as the role of lawyer as fiduciary as it pertains to working with the elderly. The group discussed areas of potential conflict and the applications of the Model Rules of Professional Conduct ("Model Rules"). The members raised, discussed, and analyzed questions prior to making any recommendations. In some cases, the group relied upon theoretical or practical applications, while in others, the group used hypothetical situations. The authors prepared this paper to reflect the concerns raised and to portray accurately the issues considered by the working group. In areas where the members failed to achieve total consensus, this paper also reflects the minority positions.

### I. HYPOTHETICALS AND QUESTIONS RAISED

#### A. *Hypotheticals*

The working group identified two hypotheticals for inclusion in its report.

##### 1. Hypothetical (1)

Lawyer (L) is trustee of a trust created by the now deceased client. L drew the trust. L has represented the beneficiaries in the past. L knows from prior representation that one beneficiary is a spendthrift. *Issue:* L cannot disclose this information, but can she act on this information? Is the only recourse for the lawyer to withdraw?

##### 2. Hypothetical (2)

Father (F) owns a business. Son (S) is an employee with a minor interest in the business. Lawyer (L) has served as guardian for F and as counsel for S. F now wants to sell the business against the wishes of S. *Issue:* Can lawyer withdraw from representing S as a client and only represent F?

#### B. *Questions Raised*

The working group raised a number of questions as to the appropriateness of the lawyer serving as fiduciary. The group focused on whether public policy should preclude this arrangement and felt that this issue had to be resolved prior to the identification of other issues. The group raised the following questions:

1. Should a drafting attorney also serve as the fiduciary?

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- a. Should this relationship be prohibited?
- b. If allowed, what ethical and state law restrictions should apply?
- c. Are current standards adequate?
- d. Are suggestions for changes in state laws needed?
2. What conditions of appointment are acceptable?
  - a. What level of competence is to be expected?
  - b. What educational efforts are needed to educate lawyers on elder law issues and specific client issues?
3. What ethical restrictions apply to a drafting lawyer who is serving as a fiduciary?
  - a. May a drafting lawyer serving as a fiduciary employ himself or herself or his or her law firm?
  - b. Is independent judgment compromised in this situation?
  - c. Is there a conflict of interest?
  - d. What areas of conflict arise in confidentiality from the lawyer serving in dual capacities?
  - e. What standards should govern payment of compensation to an attorney working in dual capacities?
  - f. Are there any dual roles to be prohibited, for example sole trustee, self perpetuations, charitable trust?
4. What ethical restrictions apply to a lawyer serving as a fiduciary?
  - a. What about when the lawyer is serving in multiple roles, has previously represented parties in substantially related matters, or is serving as mediator?
  - b. What action should be taken when the lawyer receives information from one client which is detrimental to the other client?
  - c. How is the client defined?

## II. DISCUSSION

The group discussed the above-stated issues in light of hypothetical situations, theoretical and practical models, the Model Rules, and The American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct ("ACTEC Commentaries"). Following discussion, the group made consensus decisions and, in some cases, recorded minority positions.

### A. *Lawyer as Fiduciary*

A lawyer, with proper training, is uniquely qualified to serve as a fiduciary and offers increased consumer protection due to his or her specialized knowledge and training both in the law and of fiduciary responsibilities. Similarly, a lawyer must adhere to ethical rules which govern conduct. As a result, lawyers are meeting society's increasing need for fiduciaries with a broad knowledge of the law.

Many of the elderly population in need of fiduciary assistance are widowed women who are without other trusted individuals to handle their affairs. Public entitlements and pension plans are other areas which require the involvement of a fiduciary as well as someone with legal exper-

tise. Thus, the elderly often turn to a lawyer for assistance with fiduciary matters. Some lawyers are well suited to handle the fiduciary affairs because of their training in issue-spotting, analysis, substantive law, communication, conflict resolution, and legal ethics. Alternative qualified professionals, especially those versed in working with the elderly, may be severely limited in these areas.

### B. *Drafting Lawyer as Fiduciary*

The working group expressed client protection and potential conflicts of interest as its main concerns in addressing whether a drafting lawyer should serve as the fiduciary. The members felt that the drafting lawyer who acts as a fiduciary best serves the client because a lawyer who has had a long working relationship with a client may be the most knowledgeable person to draft a particular document if the need for a complex instrument arises. In some cases, the client requests the drafting lawyer to serve as fiduciary because, as far as the client is concerned, he or she is the only available alternative.

The working group reached a consensus and determined that public policy should not preclude a drafting lawyer from serving as fiduciary under appropriate circumstances. While the participants noted that the elderly may be more susceptible to the lawyer's interest, the group recognized that a lawyer has an obligation under Model Rules 1.7 and 1.8 to disclose any conflicts of interest. The lawyer should inform the client of the role and duties of a fiduciary, other alternatives for appointment, and comparative costs. The ACTEC Commentaries state that "[a]s a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries."<sup>1</sup> The Commentaries further state that "[t]he client should also be informed of any significant lawyer-client relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary under consideration for appointment."<sup>2</sup>

### C. *Conditions of Appointment of Drafting Lawyer as Fiduciary*

Assuming that the appointment of the drafting lawyer as fiduciary has met all public policy and disclosure requirements, the working group next turned to the question of conditions of appointment and asked whether waivers or exculpatory language are appropriate when the lawyer acts as a fiduciary. The members also raised other issues such as improper solicitation, dual compensation, undue influence, and the appearance of impropriety.

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1. American College of Trust & Estate Counsel, Commentaries on Model Rules of Professional Conduct 50 (Oct. 18, 1993) [hereinafter ACTEC Commentaries].

2. *Id.*

### 1. Improper Solicitation or the Appearance of Impropriety

A lawyer serving as fiduciary owes the client a duty of loyalty as well as the ethical obligations to act competently and to provide full disclosure. The lawyer must explain the role and responsibility of a fiduciary without soliciting that role. Questions of impropriety arise when the lawyer is serving in dual roles and is being compensated for both roles. Model Rule 1.8(a) states that a lawyer serving as fiduciary may receive payment for both roles if the situation is "fair" and "reasonable" to the client, fully disclosed and in writing, if the lawyer gives the client reasonable opportunity to seek independent counsel, and if the client consents in writing. Due diligence is required to assure that the client has a complete understanding of the dual roles and compensation structures. Model Rule 1.8(c) indicates that the drafting lawyer is prohibited from being a beneficiary of the represented estate.

### 2. Use of Waivers or Exculpatory Language

The working group acknowledged that most states allow exonerating or waiver language, but questioned whether it is advisable to allow such language if the drafting lawyer is fiduciary. Both ACTEC and the ABA have concluded that exculpatory language is permissible if the lawyer has fully discussed all the ramifications of the exonerating clause with the client.

The members asked whether the purpose of the exculpatory language is to protect the client or the lawyer and determined that exculpatory language waives the rights of the client and relieves the lawyer from certain responsibilities. This led the group to query the acceptability of allowing the lawyer to appoint himself or herself and also to exonerate himself or herself. Certainly where the drafting lawyer is a fiduciary, competence and accountability are key factors to client protection. The discretionary powers and authorities of a fiduciary may be expanded. In all cases, however, the fiduciary must act in good faith and with due regard to the best interests of the estate and all persons interested therein.

Since the original premise that lawyers may serve as fiduciaries is built around a higher level of knowledge, training, competency, and the fact that lawyers are bound by the Model Rules, a lawyer who chooses to serve in the dual roles shall not be excused from accountability or competency governing the fiduciary role. This level of accountability should be applicable to all paid professionals serving in the dual roles of draftsman and fiduciary. Every working group member agreed that all paid professionals who provide fiduciary services should be prohibited from including exculpatory language when the professional is also the draftsman.

#### D. *Potential Conflicts for Drafting Lawyer as Fiduciary*

Next, the working group asked whether a drafting lawyer serving as

fiduciary should be allowed to employ himself or herself or members of his or her firm as counsel. The group felt that this arrangement makes sense for the client because it is usually the most efficient and cost-effective manner in which to handle the administration of the estate. Indeed, if the lawyer is serving as fiduciary, it is presumed that he or she is qualified to serve as counsel. Ethically, questions of impropriety may arise when the fiduciary refers an issue to the lawyer rather than handling it unassisted. The group noted that perhaps review by a court would assure reasonable compensation for both roles and thus provide the client with a policing agency.

The participants also considered issues of client capacity to be critical when dealing with the elderly and concluded that, when the client is competent, notice and approval of the client is required. When the client is incompetent, however, court supervision is required to protect the client and to provide for accountability of the lawyer acting as fiduciary without unnecessarily increasing costs. The members also recognized that elderly clients often use legal instruments such as powers of attorney to assure that their affairs are kept confidential. Thus, some felt that required court supervision may be over-regulation and may add to the client's costs and the possibility of conflicts with beneficiaries. The Model Rules cover accountability and disclosure and certainly address these situations.

Edward Spurgeon and Mary Jane Ciccarello suggest that when a lawyer serves in a fiduciary capacity, he or she shall consider only the best interests of the estate and all the persons interested therein, including the necessity for specialized, independent legal assistance and the comparative overall costs, in deciding whether and whom to employ as attorney for the fiduciary.<sup>3</sup> Thus, in those cases where the lawyer acting as fiduciary also serves as attorney for the fiduciary or estate or employs the firm with which he or she is associated to serve as the attorney, he or she shall not have another attorney perform legal services that he or she reasonably could perform as part of the fiduciary responsibility.

The working group endorsed a practice guideline as suggested by Spurgeon and Ciccarello. Under the Model Rules, when the lawyer is serving as fiduciary, the Model Rules shall apply as if the lawyer were representing a client. The lawyer serving in the role of fiduciary does not represent the beneficiaries as their lawyer. The working group expressed a minority opinion that the fiduciary should be precluded from hiring himself or herself or his or her own firm as legal counsel for the fiduciary. The minority expressed the overriding concern that the lawyer serving in both roles may compromise his or her independent judgment.

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3. See Edward D. Spurgeon & Mary J. Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1357 (1994).

### E. *Potential Conflicts for Lawyer as Fiduciary*

The lawyer serving as fiduciary in multiple roles, perhaps in a legal capacity, presents a new set of ethical dilemmas. Ethical responsibility, questions of confidentiality, and issues of dual representation all emerge. The working group asked what rules of ethical conduct govern a lawyer who is serving solely in a fiduciary role and whether the lawyer can establish that he or she is not serving in a legal capacity. The Model Rules require a lawyer to represent the best interest of the client in all situations. Several authorities and some courts have contended that the ethics rules apply to any and all professional conduct of lawyers.

The working group agreed that, based on current law, Model Rules 1.6, 1.7, and 1.8 apply to the lawyer serving solely as fiduciary. To determine how these rules apply, the group asked how the client should be identified. The participants also addressed the bounds of confidentiality and asked whether a lawyer can act on the basis of confidential information acquired from earlier representation of the client as lawyer or acquired while serving as fiduciary. Thus, the working group wondered whether a lawyer may impute to his or her firm any information learned while serving in the fiduciary role. While Model Rule 1.6 addressing confidentiality does apply to these situations, there exists a common law obligation to maintain confidences.

This led the working group to ask whether the lawyer-fiduciary can act upon this knowledge. Discussing the first hypothetical,<sup>4</sup> the group agreed that the rules that govern the guardian-ward relationship do not transfer well into the lawyer-fiduciary relationship. In that hypothetical, the fiduciary has the duty to consult with the beneficiary and to say that he or she will either have to act on the information and obtain a waiver or resign. The family, however, often assumes that the lawyer is representing the family. Thus, there needs to be a better solution than resignation or waiver.

The second hypothetical<sup>5</sup> addresses the definition of "same" or "substantially related" matters under Model Rule 1.9. The lawyer as guardian should not be representing the son without the father's consent due to the assumption that, as guardian, the lawyer is still bound to abide by the Model Rules. The fiduciary is the client and the lawyer does not represent the beneficiary. The court may appoint a fiduciary *ad litem* to serve in the situation creating the conflict, which would allow the lawyer to continue in the role of fiduciary for the father. The working group members agreed that the use of a fiduciary *ad litem* to address the substantially related matter is one option available which would allow the fiduciary to continue representation in all other matters permitted by Model Rule 1.9. The group also felt that the lawyer as fiduciary may also serve in a mediator role under Model Rule 2.2. However, in the case

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4. See *supra* part I.A.1.

5. See *supra* part I.A.2.

of lawyer withdrawal from the role of mediator, Model Rule 2.2 needs to be clarified to allow for the continuation of the lawyer-fiduciary role except for the subject matter of the mediation.

The working group acknowledged that many of the concerns raised regarding a lawyer acting as a fiduciary are not unique. Elderly clientele, however, present the lawyer with additional challenges such as vulnerability, capacity, and appearance of impropriety in upholding the ethical standards. The working group formed its consensus opinions into recommendations for consideration in the plenary session.<sup>6</sup>

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6. For the full text of the Recommendations of this working group, see Conference on Ethical Issues in Representing Older Clients, *Recommendations, in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989 (1994).



