

Colorado Bar Association – Elder Law Section
Professional Fiduciary Oversight Exploration Committee

Proposed Professional Fiduciary Regulations

Introduction

First, many thanks to the members of this committee for working diligently to get this initial draft completed and into the hands of the Colorado Bar Association in a relatively short period of time. The members of the committee can be found in Exhibit 1 to this draft.

The Professional Fiduciary Oversight Committee, a committee of the Colorado Bar Association-Elder Law Section has developed a list of proposed professional fiduciary regulations (“PPFRs”) that could be used to regulate or license professional fiduciaries throughout the state of Colorado. As of this writing, it is uncertain whether these PPFRs will become statutory and therefore regulated by DORA or if they might be adopted on a less formal basis and form the framework of licensing body. Although ideally, knowledge of the ultimate home of these PPFRs would have been helpful in the formulation and drafting thereof, we simply did not have that luxury. We felt it a better strategy to develop the PPFRs first and look for a home for them once drafted. We are using the term “Regulations” simply because we hope that they will ultimately become regulations. If they become part of some other governing body they may be referred to differently.

Professional fiduciaries can generally be divided into those that handle financial matters (Financial Fiduciaries) for their clients and those that handle health care and living matters (Healthcare Fiduciaries) for their clients. Examples of the roles of each include:

Financial fiduciaries

- Conservator
- Agent under general durable power of attorney
- Personal representative
- Trustee
- Do any of these agencies do bill pay without a POA???

Healthcare fiduciaries

- Guardian
- Agent under medical or health care power of attorney

The PPFRs are divided similarly. The first group of PPFRs would apply to all professional fiduciaries, ie. both financial and healthcare fiduciaries. The second group are PPFRs that would apply to financial fiduciaries only while the third group would apply to healthcare fiduciaries only.

Finally, we expect that these PPFRs would be revised (maybe significantly) depending on the ultimate home for them, but we believe we have captured the substance of the needs of the marketplace within the enclosed PPFRs.

Background

Among other reasons, the aging of the population of the U.S. has and continues to create a greater need/demand for professional fiduciaries. Between 2010 and 2015, Colorado's growth in its 65 plus population was 3rd fastest in the US (<https://demography.dola.colorado.gov/crosstabs/>). We believe it safe to say that the need for professional fiduciaries is surpassing the supply. Professional fiduciaries are charged with taking intimate care of their clients whether they be healthcare or financial. The opportunity for unintended mistakes (on one end of the spectrum) to gross negligence and/or abuse (on the other end of the spectrum) by fiduciaries is ever present. This opportunity is certainly present in professional fiduciary situations but is also present in non-professional (generally family member) fiduciary situations. Although there is the belief that the vast majority of mistakes/abuses happen in the non-professional fiduciary situations, the professional fiduciary industry is not immune to these mistakes and abuses. In fact, there have been a number of high profile situations in which professional fiduciaries have been found to have abused their role and their clients. These abuses have resulted in financial loss to the clients, negative impact to well-being and emotional devastation to the clients and their families.

There are certainly “bad actors” in each and every profession. Because of the relationship of the fiduciary to her/his client, bad actors can be especially harmful in this industry. The goal of these PFRs is three fold: 1) Ensure that people who choose to perform professional fiduciary work are well qualified and maintain a high level of integrity and professionalism in practicing in the field, 2) Catch potential “bad actors” and prevent them from entering the profession before they have a chance to harm their clients, and 3) Provide a place that disgruntled clients and/or “interested parties” can turn to report “bad actors” with the confidence that they will be investigated.

Proposed Regulations

I. General Regulations

- a. License Requirement for a Professional Fiduciary
 - i. A Professional Fiduciary shall only be permitted to provide services if they hold a current license under these regulations.
 - ii. Professional Fiduciary - A person providing services for a fee to a non-family member serving under the Colorado Probate Code as a guardian, agent under a medical or health care power of attorney, conservator, agent under a durable or nondurable power of attorney, trustee, and/or personal representative defined in Colorado Revised Statutes Title 15 Probate, Trusts and Fiduciaries Section 15-10-201. **[does this include bank trust officers, attorneys providing fiduciary services, chartered trust company officers]**
 - iii. A license shall be active for a period of two years. License renewal shall have the same requirements as those to obtain the initial license.
- b. Age Requirement for a Professional Fiduciary - 21 years of age (consistent with statute) subject to revision should the statutory limit change.
- c. Education Requirement for a Professional Fiduciary – the following table presents the minimum education/experience matrix for professional fiduciaries.

	Bachelors Degree In <u>Related Field [1]</u>	Bachelors Degree in Non- <u>Related Field</u>	Associates Degree in Related <u>Field [1]</u>	Associates Degree in Non-Related <u>Field</u>	High School Diploma or GED <u>Equivalent</u>
Years of Relevant Work Experience [1]	0	2	3	4	5

[1] See definitions of related work experience/field of study in healthcare and financial fiduciary sections.

- d. Training/Competency Requirement for a Professional Fiduciary – Professional fiduciaries shall be required to attend fiduciary training [course to be developed] and pass a competency test associated with the training.
- e. Credit Reporting Requirement for a Professional Fiduciary
 - i. Each professional fiduciary shall obtain a credit report on her/his self to include FICO score and shall maintain the report in company records for review. Professional fiduciaries shall maintain a FICO score that is equal to or greater than the midpoint between the “Good Credit” and Very Good Credit” as defined from time to time by Experian (the credit reporting bureau). Currently (as of 2/1/2020) this number is 705 (670=Good, 740=very good).
 - ii. Professional fiduciary firms shall obtain credit reports on their employees that handle client assets or have contact with clients or client records. Credit report frequency, retention and minimum FICO score for employees shall be consistent with I.e.i above. (See exception for Healthcare Fiduciaries in II.b_below.)
- f. Background Check Requirement for a Professional Fiduciary: All professional fiduciaries shall, for themselves and all of their employees, obtain and retain all (?) of the following:
 - i. “Fingerprint” background checks from state approved fingerprint background check services, currently Colorado Fingerprinting and Identogo or participating local law enforcement offices.
 - ii. Full court record search (civil and criminal) available at www.cocourts.com.
 - iii. National sex offender registry search.
 - iv. **[Other national search source TBD]**
- g. Bad Acts Requirement for a Professional Fiduciary – People/entities that have been found guilty of “bad acts” may be denied licensure or existing licensure may be revoked. Bad Acts could include, but not limited to, criminal charges or convictions, breaches of fiduciary duty or removal as a fiduciary. The affected person/entity will be permitted an opportunity to submit an explanation which may be considered for purposes of licensure.
- h. Insurance Requirements for a Professional Fiduciary: Professional fiduciaries/professional fiduciary firms should carry the following minimum coverages with limits that are commensurate with their/their firm’s level of activity, ie. more clients or employees command higher limits (should we try to define a minimum or wait on that?):

- i. Professional liability insurance
 - ii. Employee dishonesty insurance
 - iii. Workers' compensation insurance, for professional fiduciary firms with employees.
 - iv. Liability and workers' compensation insurance for estates under the purview of the professional fiduciary, where applicable.
- i. Policies and Procedures Requirements for a Professional Fiduciary: Professional fiduciaries/professional fiduciary firms shall develop and maintain a list of policies and procedures and the adherence thereto should be monitored continuously.

- j. Code of Ethics and Standards of Practice Requirements for a Professional Fiduciary: Professional fiduciaries shall understand, adopt and adhere to the Code of Ethics and Standards of Practice published by the National Guardianship Association (NGA).
- k. Continuing Education Requirement for a Professional Fiduciary: all professional fiduciaries, once licensed and in order to renew their license must complete 20 hours of continuing education relevant to their type of license (Healthcare or Financial). Four of the 20 hours must be in ethics. Those that are obtaining continuing education credits for other related certifications shall be able count those credits towards license renewal continuing education requirements.
- l. Annual Reporting Requirement for a Professional Fiduciary: Professional fiduciaries/professional fiduciary firms shall report annually on their activity. The annual report shall include the following information
 - i. Fiduciary name or firm name and all contact information
 - ii. Type of fiduciary
 - iii. Name of all employees
 - iv. Confirmation that all credit report/background check information is current and on file, with copy of all background checks
 - v. Number of cases being actively managed by role of fiduciary (ie. guardianship, care manager, trustee, conservator, etc.)
- m. All of the above I.a. thru I.l. shall be used for licensure of all professional fiduciaries. In addition, when making application for licensure, the professional shall designate whether the application is for Healthcare Fiduciary or Financial Fiduciary or both and the appropriate section(s) below shall apply to them as well.

II. Healthcare Fiduciary Regulations

- a. For purposes of minimum education/experience requirements mentioned in I.c. above, the following shall be considered relevant:
 - i. Social work
 - ii. Human Services, Counseling, Psychology, Special Education
 - iii. Child and Family Studies
 - iv. Gerontology
 - v. Nursing
 - vi. Rehabilitation
 - vii. Public Health
 - viii. Occupational Therapy, Physical Therapy or Speech or Language Therapy
- b. Credit report exception for Healthcare Fiduciaries: only named Healthcare Fiduciaries and any employees that have account signing authority or access to financial accounts shall be subject to credit report requirements in I.e. above.

III. Financial Fiduciary Regulations

- a. For purposes of minimum education/experience requirements mentioned in I.c. above, the following shall be considered relevant:
 - i. Finance
 - ii. Accounting
 - iii. Bookkeeping

- iv. Law
- v. Paralegal
- vi. Management
- vii. Personal finance
- b. Internal controls for financial fiduciaries.
 - i. Each organization or individual should consider the potential for fraud in its business and operations and implement adequate internal controls to safeguard the assets under its control.
 - ii. In determining the internal controls to implement, organizations should refer to the framework defined in the 2013 Internal Control – Integrated Framework guide developed by COSO, Committee of Sponsoring Organizations of the Treadway Commission (or later version as updated). Documentation shall be maintained showing that each professional fiduciary has read and understands the principles and concepts of internal control discussed in the framework on an annual basis.
 - iii. Professional fiduciaries will be able to show adherence of how they are:
 - 1. Maintaining an environment of control
 - 2. Identifying and addressing areas of risk
 - 3. Developing and implementing control activities
 - 4. Providing relevant and quality information to support internal control
 - 5. Regularly monitoring activities

Professional Fiduciary Oversight Exploration Committee

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