

## Formal Opinion 02-426 May 31, 2002

### Lawyer Serving as Fiduciary for an Estate or Trust

*Under the Model Rules of Professional Conduct, a lawyer may accept appointment as a personal representative or trustee named in a will or trust the lawyer is preparing for a client, subject to complying with Rule 1.4(b) and, in some circumstances, with Rule 1.7(b). Absent special circumstances, the Model Rules do not prohibit a lawyer who is serving as fiduciary of an estate or trust from appointing himself or other lawyers in his firm to represent him in that capacity, but the compensation for the legal services must be reasonable under Rule 1.5(a), taking into account the compensation for fiduciary services. A lawyer serving as fiduciary of an estate or trust and the lawyer's firm must satisfy the requirements of Rule 1.7 before representing a beneficiary or creditor of the estate or trust and ordinarily would be prohibited from representing the beneficiary or creditor in claims against the trust or estate regardless of the client's consent.*

#### Scope

This opinion addresses several ethical issues that arise under the Model Rules of Professional Conduct<sup>1</sup> when a lawyer serves as fiduciary.<sup>2</sup> The issues considered arise in the following situations: (1) a lawyer's client asks him to serve as a fiduciary under a will or trust that the lawyer is preparing for the client; (2) while serving as fiduciary of an estate or trust, a lawyer wishes to appoint himself or a member of his firm to represent him in his capacity as fiduciary; or (3) while serving as fiduciary, the lawyer or his firm is asked to represent either a beneficiary or a creditor of the estate or trust.

<sup>1</sup> This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. This opinion applies the Model Rules as amended by the ABA House of Delegates in February 2002. The conclusions and reasoning of the Committee would be substantially the same under the rules in effect prior to these amendments, except that waivers of conflicts of interest now must be confirmed in writing. See, e.g., Rule 1.7(b) (4); Rule 1.0 (b) and cmt. 5. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

<sup>2</sup> The term "fiduciary" is used in this opinion to mean solely the executor, administrator, or other personal representative of a decedent's estate or the trustee of a trust.

The Committee concludes that, in each of these situations, the lawyer must satisfy obligations arising under several of the Model Rules. In the first situation, having satisfied his obligations under Rules 1.4(b) or 1.7(b), if applicable, the lawyer may serve as a fiduciary under a will or trust that the lawyer is preparing for the client. In the second situation, there is no inherent conflict of interest under Rule 1.7 when a lawyer serving as fiduciary appoints himself or his law firm to serve as legal counsel for himself as fiduciary, absent special circumstances such as when, pursuant to law of the jurisdiction or by agreement, the lawyer for the fiduciary also represents the estate as an entity or the beneficiaries of the trust. When serving as fiduciary and as lawyer for the fiduciary, however, the amount of compensation paid the lawyer and his firm for services in each capacity must be reasonable. In the third situation, Rule 1.7 ordinarily will prohibit a lawyer or his law firm from representing a beneficiary or creditor in a matter directly adverse to an estate or trust for which the lawyer is serving as fiduciary. The lawyer and his firm may, however, represent a creditor or beneficiary in unrelated matters upon compliance with the requirements of Rule 1.7(b), including obtaining the informed consent of affected clients, confirmed by the lawyer in writing.<sup>3</sup>

<sup>3</sup> Rule 1.0(e) states that "'informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the

proposed course of conduct." See also Rule 1.0 cmt. 6 and Rule 1.7 cmt. 18 for further explanations of the term.

### I. Lawyer Designated as Fiduciary Under Will or Trust the Lawyer is Preparing

One of a lawyer's important responsibilities in providing estate planning for his client is to help her select an appropriate personal representative to administer her estate and a trustee to manage any trust established by the will.<sup>4</sup> The lawyer is required by Rule 1.4(b)<sup>5</sup> to discuss frankly with the client her options in selecting an individual to serve as fiduciary.<sup>6</sup> This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs.

<sup>4</sup> See Report of the Special Study Committee on Professional Responsibility, *Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 Real Prop. Prob. & Tr. J. 765-802, 815 (1994), approved solely by the Council of the Section of Real Property, Probate, and Trust Law (hereinafter "Estates and Trusts Report") ("An important aspect of the lawyer's counseling function in estate planning is to assist the client with the selection of a fiduciary.... the lawyer ... should counsel the client regarding the role and responsibilities of a fiduciary who serves under a will or trust."). This responsibility also applies to the selection of a trustee for an inter vivos trust that the lawyer is preparing. The rules of professional conduct applicable to advising the testator also apply to counseling the settlor of the trust.

<sup>5</sup> Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." See also cmt. 5.

<sup>6</sup> See, e.g., Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility Informal Op. 96-36 (March 5, 1996) (Under Rule 1.4(b), "when a client asks a lawyer to draft a trust naming that lawyer (or that lawyer's partner or associate) as trustee, the lawyer must advise the client of the duties of a trustee, the lawyer's ability to perform those duties, the availability and ability of others to perform those duties, the compensation payable to a trustee, and the potential for conflicts of interest, as well as any other factors relevant to the particular circumstances of the client."). Another authority suggests including the following in the explanation:

- (1) the nature of the fiduciary office (the role and function of the fiduciary);
- (2) those persons and institutions available and suitable for appointment;
- (3) any potential conflicts of interest with other fiduciary relationships or with other clients, including the client's family members, which the fiduciary appointment might trigger;
- (4) compensation issues... [and other factors].

Estates and Trusts Report, *supra* n. 4, at 818. The other factors cited in the Estates and Trusts Report, *id.* at 820-22, that we agree must, if present, be discussed with the client are: any conflicts or potential conflicts of interest with others, such as where the lawyer also represents beneficiaries or potential beneficiaries of the estate or trust, or where his firm regularly represents a bank that may be a major creditor of the client's estate of which the lawyer will be personal representative; any exoneration provision that applies by statute or is standard in the lawyer's will or trust form; and any questions relating to the lawyer's competence to serve as personal representative. If the interests of other clients, third parties, or the lawyer himself may materially limit the representation, then the informed consent requisite under Rule 1.7(b) must be obtained, as discussed more fully in Part III. See also Rule 1.4 cmt. 6.

When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary.<sup>7</sup> The lawyer must not, however, allow his potential self-interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries.<sup>8</sup> When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the

potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing.<sup>9</sup>

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<sup>7</sup> Often, the lawyer who drafts the will or trust is the one best-suited to serve as personal representative or trustee. For example, he may be familiar with the family circumstances and the client's wishes regarding multiple family beneficiaries who may have widely different financial needs and goals. See generally, Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 Fordham L. Rev. 1357, 1378-79 (1994). Because a fiduciary performs services for compensation, accepting appointment as fiduciary is not accepting a gift from a client who is unrelated to the lawyer, such as Rule 1.8(c) prohibits. In addition, because appointing a fiduciary is not a "business transaction with a client," Rule 1.8(a) does not apply to require the client to give her signed, informed consent to the essential terms of the arrangement after receiving the lawyer's written advice to seek independent legal advice. See Rule 1.8 cmt. 8 ("This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative position.").

<sup>8</sup> The testator or settlor is entitled to have the lawyer "exercise independent professional judgment and render candid advice" in assisting her in selecting fiduciaries. Rule 2.1. Comment [10] under Rule 1.7 also warns that "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client."

<sup>9</sup> Rule 1.7(a)(2) prohibits a lawyer from representing a client absent informed consent, confirmed in writing, if the representation of that client "will be materially limited by ... a personal interest of the lawyer." See Rule 1.8 cmt. 8 (if there is a significant risk that the lawyer's interest in being named fiduciary "will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary," the appointments are subject to Rule 1.7). Even when the lawyer reasonably believes that he has provided appropriate advice to his client regarding her selection of a fiduciary, in some circumstances, before accepting the position, the lawyer should confirm the client's decision in writing or urge the client to obtain independent advice from other trusted advisers or family members. These or similar measures would be desirable if, for example, the lawyer is appointed sole trustee of a trust that grants him broad powers to distribute selectively among beneficiaries who are estranged or whose interests are in substantial conflict, or when the lawyer has had no prior contact with the client.

When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job<sup>10</sup> as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision.

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<sup>10</sup> See Rule 1.4(b), *supra* note 5.

One reason for selecting the lawyer as fiduciary is his capacity to handle the legal services that will be required from time to time. The lawyer should discuss with the client the fact that the lawyer, acting as fiduciary, may select himself or his firm to serve as the lawyer for the trust or estate, with the result that additional fees may be received by the lawyer.<sup>11</sup>

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<sup>11</sup> When the drafting lawyer is named a fiduciary, issues under local law may arise. See, e.g., N.Y. Surr. Ct. Proc. Act §2307-a (2002) (testator to be informed, prior to execution of will naming as executor the lawyer drafting the will or a lawyer affiliated with him that, subject to limited statutory exceptions, any person, including a lawyer, is eligible to serve as executor; that absent any contrary agreement, any person including a lawyer who serves as executor is entitled to receive an executor's statutory commissions; and that if the lawyer-executor or a lawyer affiliated with him renders legal services for the executor, the lawyer rendering the services is entitled to receive

just and reasonable compensation for the legal services in addition to statutory fiduciary's commissions); Cal. Bus. & Prof. Code §6103.6 (West 2002) (lawyer who drafted instrument serving as sole trustee may be removed unless the instrument was reviewed by an independent lawyer who counsels the testator or settlor and provides a "certificate of independent review").

## II. Lawyer or Lawyer's Firm Representing Lawyer as Fiduciary

A lawyer acting as personal representative of an estate or as trustee of a trust frequently will wish to appoint himself or his law firm as counsel to perform legal work that arises in administering the estate or trust. By law in most jurisdictions, the lawyer so appointed represents only himself as fiduciary and not the trust or estate as an entity or its beneficiaries, absent agreement otherwise.

<sup>12</sup> For purposes of this opinion, we therefore assume that the lawyer has undertaken to represent only the fiduciary. <sup>13</sup>

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<sup>12</sup> See ABA Comm. on Ethics and Professional Responsibility Formal Op. 94-380 n.1 (1994) (Counseling a Fiduciary), *in* Formal and Informal Ethics Opinions 1983-1998 at 225 (ABA 2000) (majority view is "that a lawyer who represents a fiduciary does not also represent the beneficiaries... and we understand the Model Rules to reflect this majority view") (citations omitted). The law of the jurisdiction where the estate or trust has its *situs* nevertheless must be consulted. Because of the lack of clarity regarding the identity of the client in the administration of an estate or trust, a lawyer "should make clear the lawyer's relationship to the parties involved." Rule 1.7 cmt 27. See also Restatement (Third) of the Law Governing Lawyers §14 cmt. f (2000) (hereinafter "Restatement, Lawyers") (lawyer may have to clarify whether he represents the trust, its beneficiaries, or groupings of all of them). When the lawyer or his firm represents himself as fiduciary, this clarification is particularly called for as a matter of good practice.

<sup>13</sup> If the lawyer represents the entity or beneficiaries as well as the fiduciary, conflicts of interest resulting from the multiple representation are governed by Rule 1.7, see *infra* Part III. See also Rule 1.13 (Organization as Client) and ABA Comm. on Ethics and Professional Responsibility Formal Op. 98-410 (1998) (Lawyer Serving as Director of Client Corporation), *in* Formal and Informal Ethics Opinions 1983-1998 at 491, for guidance in resolving the ethical problems a lawyer faces if he represents the estate or trust as an entity.

In that situation, the Model Rules do not prohibit the fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of the estate or trust because the dual roles do not involve a conflict of interest. The obligations of the lawyer or his firm as counsel to the fiduciary do not differ materially from the obligations of the lawyer as fiduciary. The principal responsibility of the lawyer for a fiduciary is to give advice to assist the fiduciary in properly performing his fiduciary duties. The lawyer for a personal representative or trustee may owe a limited duty of care to the legatees and creditors of the estate or to the beneficiaries of the trust the fiduciary serves. <sup>14</sup> This duty, however, is no greater than the duty that the personal representative or trustee himself owes beneficiaries of the estate or trust. <sup>15</sup>

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<sup>14</sup> See Restatement, Lawyers, §51 at 358, describing the legal duties to third parties of the lawyer for a fiduciary:

For purposes of liability under §48, a lawyer owes a duty to use care within the meaning of §52 in each of the following circumstances: ...

(4) to a nonclient when and to the extent that:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Appropriate action that the lawyer for a fiduciary might take under Section 51(4)(b) to prevent or rectify the breach of a fiduciary duty would not extend, under the Model Rules, to disclosure of protected client information. Such disclosure is prohibited under Model Rule 1.6. See ABA Formal Op. 94-380, in Formal and Informal Ethics Opinions 1983-1998 at 226-27. As Comment *h* to Restatement, Lawyers §51 notes, the lawyer for a fiduciary is liable to the beneficiaries "only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules." However, because state versions of Rule 1.6 vary widely, the lawyer, in determining his legal duties, must review the version of 1.6 (and other law) that is applicable to the lawyer's conduct in the matter.

<sup>15</sup> See generally Restatement (Second) of Trusts, §§169-196, 201-226A (1959) (hereinafter "Restatement, Trusts"), particularly §170 (Duty of Loyalty), §183 (Duty to Deal Impartially With Beneficiaries), and §201 (What Constitutes a Breach of Trust).

When a lawyer serves concurrently as both fiduciary and counsel for the fiduciary, issues may arise regarding the reasonableness of the compensation that the lawyer and his firm receive in the dual capacities. <sup>16</sup> Rule 1.5(a), which sets standards for determining the reasonableness of lawyers' fees, does not in specific terms cover compensation that a lawyer may receive as a fiduciary. <sup>17</sup> Nevertheless, the fiduciary compensation the lawyer and his firm receive for his time and labor is relevant in determining what amount of legal fees is reasonable under Rule 1.5(a). <sup>18</sup>

<sup>16</sup> When lawyers serve in dual roles of fiduciary and counsel, courts generally have held that their overcharging and other improprieties violate excessive fee, conflicts, and other rules of professional conduct in addition to Rule 8.4. When lawyers serve solely as fiduciaries, courts usually limit infractions to those under Rule 8.4. Compare *Florida Bar v. Della-Donna*, 583 So.2d 307, 309 (Fla. 1989) (per curiam) (lawyer not acting in a legal capacity found guilty of violating several rules of professional conduct based upon service as a personal representative) with *Florida Bar v. Brake*, 767 So.2d 1163, 1167-68 (Fla. 2000) (per curiam) (Rule 8.4 applies only when lawyer engages in misconduct while employed in a legal capacity). Cf. *Matter of Disciplinary Proceedings Against Forester*, 189 Wis.2d 563, 586-90, 530 N.W.2d 375, 385-86 (Wis. 1995) (per curiam) (lawyers serving in multiple roles as drafters; trustees; counsel for trusts; officers, directors, and managers of business, majority owned by the trusts; and counsel for the businesses disbarred for multiple conflicts of interest, overcharging legal fees and other compensation, and using their multiple positions of power to exact a settlement highly favorable to themselves in litigation brought on behalf of trust beneficiaries for breach of trust).

<sup>17</sup> Rule 1.5(a) states that a lawyer's fee shall be reasonable and lists factors to be considered in determining the reasonableness of a fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

<sup>18</sup> When the lawyer and his firm are fully compensated for his time and labor through fiduciary compensation, the same time and labor cannot properly be given full weight

under Rule 1.5(a) (1). See, e.g., *In re Will of Corya*, 148 Misc.2d 723, 733-36, 563 N.Y.S.2d 581, 587-89 (1990) ("absent special circumstances, an attorney-executor cannot be paid full compensation [for services rendered] in both capacities"); *Estate of Gillet*, 139 Misc.2d 188, 190, 527 N.Y.S.2d 690, 692 (1988) (legal fees may be subject to reduction where full fiduciary commissions are taken); *Spurgeon & Ciccarello*, 62 *Fordham L. Rev.* at 1393-94. See also ABA Comm. on Ethics and Professional Responsibility Formal Op. 93-379 (1993) (Billing for Professional Fees, Disbursements and Other Expenses), *in* Formal and Informal Ethics Opinions 1983-1998 at 216; Arizona State Bar Ass'n Op. 96-07 (March 20, 1996). Cf. *Matter of Brown's Estate*, 653 P.2d 928, 931 (1982) (burden on lawyer who also served as executor to prove by "clear and convincing evidence" that, among other things, the work for which fee sought was necessary, reasonable, and beneficial to the estate and the fee reasonable).

In some jurisdictions, the compensation of lawyers for trustees and personal representatives is either prescribed by statute<sup>19</sup> or subject to court approval or regulation.<sup>20</sup> Applicable statutory compensation rates as approved by a court after informed judicial scrutiny should be conclusive in determining the amount customarily charged in the jurisdiction for similar legal services and also should be persuasive in establishing the reasonableness of the compensation that the lawyer and his firm receive for legal and fiduciary services.<sup>21</sup> Approval of the amount of compensation of the lawyer by an informed co-fiduciary or by the beneficiaries of the estate or trust or their representatives also would be persuasive in establishing the reasonableness of the legal fees under Rule 1.5(a).

<sup>19</sup> See, e.g., Fla. Stat. §733.6171 (West 2002) (compensation of lawyer for the personal representative).

<sup>20</sup> See, e.g., Md. Code Ann., Estates and Trusts §7-601 (2001) (personal representatives' and special administrators' compensation); *id.* §7-602 (counsel fees for services to estate and/or personal representatives); *id.* §14-103 (trustees' compensation rates and commissions). In Maryland, personal representatives' compensation frequently is reduced by any payment for routine legal services. The precise terms of the law of the estate's or trust's *situs* must be examined.

<sup>21</sup> The extent of judicial oversight and statutory limitations upon lawyers' compensation in the dual roles of fiduciary of an estate or trust and fiduciary's lawyer varies significantly among jurisdictions. See *Spurgeon & Ciccarello*, 62 *Fordham L. Rev.* at 1389-92 (overview of statutes and case law regulating compensation in these dual roles, including restrictions on receipt of legal fees in addition to fiduciary compensation in Missouri and Mississippi).

### III. Conflicts of Fiduciary for Estate or Trust in Representing Interested Parties

When a lawyer serves as a fiduciary and concurrently represents a beneficiary or creditor of the estate or trust, he must, in accordance with Rule 1.7, resolve any conflicts of interest that may arise.<sup>22</sup> For example, were a lawyer serving as a fiduciary to recognize, while also attempting to represent a beneficiary or creditor in a claim against the estate, that he would be obligated as fiduciary to oppose the beneficiary or creditor's claim, his representation thereby would be materially limited under Rule 1.7(a). Moreover, the representation of the beneficiary or creditor would not be permissible even with the consent of the client, because it would be unreasonable for the lawyer to conclude that he could provide competent and diligent representation when opposing the interests of an estate or trust for which he is a fiduciary.<sup>23</sup>

<sup>22</sup> Rule 1.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Comment [9] recognizes that a lawyer's responsibilities to other persons that may impose material limitations on the representation of a client could consist of "fiduciary duties arising from a lawyer's service as trustee, executor or corporate director."

<sup>23</sup> Rule 1.7(b)(1). See also Restatement, Lawyers, §135 cmt. c (fiduciary duties that materially and adversely affect lawyer's representation of a client require withdrawal from either the representation or the fiduciary position).

If the representation of the beneficiary or creditor is in an unrelated matter, however, whether the representation would be permissible is less clear. The fiduciary's fulfillment of his duty to deal fairly and impartially with all beneficiaries might be perceived by the client/beneficiary as conflicting with her own interests. <sup>24</sup> If the lawyer nevertheless reasonably believes that he will be able to provide competent and diligent representation to the beneficiary and is able to obtain the client's informed consent, Rule 1.7(b) would permit the representation. <sup>25</sup> Representation of creditors of an estate or trust in unrelated matters also would require the client's informed consent. <sup>26</sup>

<sup>24</sup> As fiduciary, the lawyer is not expected to satisfy expectations of one beneficiary that would interfere with the lawyer's responsibilities as trustee or that would be unfair to other beneficiaries. See Restatement, Trusts §183 (fiduciary must deal fairly and impartially with each beneficiary).

<sup>25</sup> In obtaining the client's informed consent, the lawyer should explain to the beneficiary the lawyer's responsibilities as fiduciary, including the duty to deal fairly with all beneficiaries, and inform her of any reasonably foreseeable ways the beneficiary's interest as a client might be adversely affected. See Rule 1.7 cmt. 18. For example, use of information gained in the representation might adversely affect the lawyer's decision whether to make discretionary payments to his beneficiary-client. See Rules 1.8(b) and 1.9(c)(1). Reasonable alternatives to his representing the client must be explained, perhaps that another lawyer in the firm should handle the matter for the beneficiary and a voluntary screen be erected. See Rule 1.0(e) and cmts. 6 & 7. Once the consent is obtained, it must be confirmed in writing. Rule 1.7(b)(4). See also Rule 1.0(b) and cmt. 1.

<sup>26</sup> Under other law, the lawyer as fiduciary also may be obligated to inform the beneficiaries of the client representation or to obtain their consent. See, e.g., *In re Estate of Fogelman*, 197 Ariz. 252, 259-60, 3 P.3d 1172, 1179-80 (Ariz. App. Div. 1, 2000) (law firm that simultaneously represented personal representative who was a partner in the firm and also represented on unrelated matters estate's creditors whose claims were in direct conflict with distribution rights of estate beneficiaries, improperly failed to inform the estate beneficiaries of the conflict even though neither the personal representative nor his firm had an attorney-client relationship with the estate beneficiaries).

Even though it would be permissible under the Model Rules for the fiduciary to represent one of several beneficiaries in unrelated matters with consent of the client, in some circumstances, the lawyer nevertheless should not do so. For example, if the lawyer serves as sole trustee of a trust with discretionary power to distribute principal or income unequally among the beneficiaries, his decision to distribute principal to only one beneficiary excluding the others might well be questioned. <sup>27</sup>

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<sup>27</sup> Appointment of one or more other impartial trustees may, in some circumstances, help resolve this issue or the trustee may have to choose between representing a beneficiary and continuing to serve as trustee. See Restatement, Lawyers, *supra* note 23. If all the beneficiaries agree that one beneficiary who is in greater need should receive distributions to the exclusion of the others, this issue would, however, be resolved. The fiduciary also should obtain waivers of objection to the disproportionate distributions from the other trust beneficiaries or their representatives as a matter of good practice.

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### Conclusion

In the Committee's opinion, a lawyer may accept appointment as fiduciary under a will or trust that the lawyer is preparing for a client, so long as the lawyer discusses with the client information reasonably necessary to enable the client to make an informed decision in selecting the fiduciary. If there is significant risk that the lawyer's interest in being named a fiduciary will materially limit his independent professional judgment in advising the client in her choice of a fiduciary, the lawyer also must obtain the client's informed consent, confirmed in writing. Although a lawyer serving as a fiduciary of an estate or trust may appoint himself or other lawyers in his law firm to represent him as fiduciary, his compensation received in both capacities must be considered in determining what is reasonable compensation for his services as lawyer. Finally, a lawyer who is serving as a fiduciary ordinarily must not represent a beneficiary or creditor of an estate or trust in a matter adverse to the estate or trust. When representing a beneficiary in a matter unrelated to the estate or trust, the lawyer must satisfy the requirements of Rule 1.7.

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