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## Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest

Joel C. Dobris

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## Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest

JOEL C. DOBRIS\*

*Trust terminations pose ethical problems for lawyers. Beneficiaries often view the trustee's lawyer as "their" lawyer. The Code of Professional Responsibility and the recently adopted Model Rules of Professional Conduct provide little guidance in resolving the conflicts of interest that arise in trust terminations.*

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\* Professor of Law, University of California, Davis; B.A. 1963, Yale College; LL.B. 1966, University of Minnesota. The author wishes to thank Mary E. Olden, Class of 1983, University of California, Davis, School of Law, for her aid in the preparation of this article; and Chancellor James H. Meyer, University of California, Davis, for supporting this research through his Law School Faculty Summer Research Grant Program.

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## I. INTRODUCTION

The trusts and estates practice, especially trust terminations, provide fertile ground for problems of lawyer conduct.<sup>1</sup> Several factors, including some unique to fiduciary administration, contribute to the abundance of ethical questions in the area. One unique factor is the nature of the fiduciary-beneficiary relationship.<sup>2</sup> During the existence of the trust, the fiduciary must always act in the best interest of the beneficiary.<sup>3</sup> The relationship might be described as symbiotic.<sup>4</sup> The rules of fiduciary conduct rigidly proscribe any actions by the trustee that would benefit the fiduciary at the expense of the beneficiary.<sup>5</sup> Yet, at the time of trust termination, conflict between their interests is inherent.<sup>6</sup> Perhaps for the first time, their interests diverge. Now, theoretically each needs the protection of independent counsel.<sup>7</sup> Ordinarily, the trustee is aware of this need.<sup>8</sup> The beneficiary, however, is more vulnerable. Just as the beneficiary may be unaware of the new relationship with his trustee, he may be unaware of his relationship with the trustee's lawyer.<sup>9</sup>

Typically, a lawyer whom the beneficiaries perceive as "the family lawyer" draws the trust.<sup>10</sup> The fiduciary usually selects as counsel the lawyer who drew the instrument, especially when the trustee is a bank.<sup>11</sup> The lay beneficiary continues to think of the lawyer as "his" attorney, unaware that the lawyer presently has a client—the trustee—whose interests replace or take precedence over those of the family.<sup>12</sup>

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1. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER 115 (N. Galston ed. 1977).

2. See E. SCOLES & E. HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 251 (3d ed. 1981).

3. 1 A. SCOTT, THE LAW OF TRUSTS § 2.5 (3d ed. 1967).

4. J. RITCHIE, N. ALFORD & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 1384 (6th ed. 1982).

5. 2 A. SCOTT, *supra* note 3, § 170.

6. J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1384-86.

7. *Id.*; see PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 120-21; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

8. This is certainly the case with an institutional fiduciary.

9. PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 120-21.

10. *Id.* at 118-20.

11. J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1387.

12. *Id.* at 1384-86; PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 120-21; see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983); cf. Kahn & Gallo, *The Widow's Election: A Return to Fundamentals*, 24 STAN. L. REV. 531, 536 (1972) (attorney's duty to advise surviving spouse in community property jurisdiction whether or not to

Problems of more general occurrence can also arise, typically when the lawyer represents persons with potential rather than actual conflicts of interest. For example, a lawyer may represent two beneficiaries of the same trust, whose interests may diverge in the future.<sup>13</sup> The question then becomes at what point their interests so diverge as to require the lawyer to withdraw from representation of the trustee, the beneficiary, or both.<sup>14</sup> That there are multiple sources of guidelines to "ethical" conduct compounds the problem.<sup>15</sup>

## II. METHODS OF CONTROLLING LAWYER CONDUCT

There are several formal ways to control lawyer conduct. They include general criminal law, specific criminal statutes dealing with lawyer misconduct,<sup>16</sup> civil liability for malpractice,<sup>17</sup> disciplinary rules prescribing minimum standards of conduct enforced by the organized bar,<sup>18</sup> and nonbinding standards of desirable conduct.<sup>19</sup>

This article deals with desirable conduct—questions of professional ethics. It is not an article about professional discipline for misconduct, although there are references to standards of professional discipline. It is certainly not an article about the crimes of professionals. That is the stuff Professor Hazard has called "police court jurisprudence."<sup>20</sup> This inquiry focuses primarily on two codes: the current Model Code of Professional Responsibility

elect against deceased spouse's will).

13. See W. FISHER, *WHAT EVERY LAWYER KNOWS*, 45-46 (1974).

14. See generally Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977).

15. Traditionally, American principles of legal ethics date from the publication of the Sharswood lectures in 1854. See G. SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (Philadelphia 1854) (original title, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW*). This is somewhat simplistic. See A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 29 (1976). The Sharswood lectures led to the creation of the Alabama State Bar Association Code of 1887. T. MORGAN & R. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 2 (2d ed. 1981). This in turn led to the original American Bar Association Canons of Professional Ethics of 1908. See *Report of the Committee on Code of Professional Ethics*, *TRANSACTIONS OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 56 (1908). The Canons were replaced by the ABA Model Code of Professional Responsibility on August 12, 1969. T. MORGAN & R. ROTUNDA, *supra*. The ABA adopted the Model Rules of Professional Conduct on August 2, 1983. It is hoped that the states will soon follow suit.

16. See CAL. BUS. & PROF. CODE §§ 6126-6131 (West 1974).

17. See generally R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* (2d ed. 1981).

18. See *MODEL RULES OF PROFESSIONAL CONDUCT* (1983).

19. See *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* Preamble and Preliminary Statement (1981) (ethical considerations deemed "aspirational in character").

20. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 59 (1978).

(CPR) and the newly adopted Model Rules of Professional Conduct ("Model Rules" or MRPC).

The Code of Professional Responsibility is a body of disciplinary and ethical rules promulgated by the American Bar Association. It is currently in effect, in various forms, in many American jurisdictions.<sup>21</sup> The Model Rules of Professional Conduct are a controversial, proposed replacement for the CPR.<sup>22</sup> It is likely that the Model Rules will replace the Code of Professional Responsibility in those states that now follow the CPR.<sup>23</sup>

This article compares the treatment under the CPR and the Model Rules of ethics in trust terminations and discusses problems not addressed by either set of rules. The article defines the problems and offers solutions tailored to the actualities of this specialty practice.<sup>24</sup>

21. PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 221-25.

22. See, e.g., Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645 (1980). The first draft of the Model Rules generated substantial controversy, see, e.g., Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074 (1980), especially from estates lawyers. The Probate and Trusts Division of the Real Property, Probate and Trusts Law Section of the American Bar Association registered tentative opposition to several of the rules. There was opposition to the first draft of Rule 1.6, which allowed division of fees between lawyers in separate firms if each assumed joint responsibility. There was opposition to former Rule 1.9(b), which prohibited an attorney from preparing a dispositive instrument giving the attorney or a member of the attorney's family any gift; the opposition feared this provision would interfere with the lawyer's preparing wills for members of the lawyer's own family. *Discussion Draft of Model Rules of Professional Conduct Issued by ABA Commission, PROB. & PROP.*, summer 1980, at 15. The author believes that the prophylactic benefits would have been worth the inconvenience, perhaps with an exception for the immediate family.

The Proposed Final Draft of 1981 also generated controversy. See Pike & Granelli, *Ethics Code Keeps Inching Along; Will It Ever Get ABA Approval?*, Nat'l L. J., Aug. 24, 1981, at 8, col. 2. The Proposed Final Draft of 1982 generated controversy also. See Winter, *Lawyer Ethics on Trial*, 68 A.B.A. J. 1197-98 (1982).

23. See Winter, *supra* note 22.

24. The commentators have not given a great deal of consideration to ethical problems in the trusts and estates practice. For example, the Harvard Law Review Developments Note on lawyers' conflicts of interest omits trusts and estates from its discussion of specialty practices. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981).

Some discussion can be found in the following sources: CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING 1-33 (1965); PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 221; Avery, *Avoiding Liability to Nonclients in Estate and Trust Work*, 2 CAL. LAW., Feb. 1982, at 34; Casner, *Estate Planning Statesmanship*, 8 INST. ON EST. PLAN. §§ 74.1200-1205 (1974); Corneel, *Estate Planners: Where Do Your Loyalties Lie?*, 116 TR. & EST. 356 (1977); Eckhardt, *The Estate Planning Lawyer's Problems: Malpractice and Ethics*, 8 INST. ON EST. PLAN. ¶ 74.600 (1974); Gallo & Haberman, *Malpractice and Conflicts in Estate Planning*, 1975 INST. ON EST. PLAN. & PROB. ADM. 26; Kindregan, *Conflict of Interest and the Lawyer in Civil Practice*, 10 VAL. U.L. REV. 423 (1976); Martin, *Professional Responsibility and Probate Practices*, 1975 WIS. L. REV. 911; McCown, *Ethical*

Experience suggests that lawyers want a simple set of rules that specify what they can and cannot do.<sup>25</sup> It is difficult to use the Code of Professional Responsibility,<sup>26</sup> primarily because of its mix of compulsory rules and exhortations to good conduct. The Model Rules are simpler to use because they consist only of mandatory rules, and because they are clearly written in a Restatement format.<sup>27</sup> Both sets of rules, however, offer precise answers to relatively few questions. More specific answers will, the author believes, eventually come from special-purpose codes promulgated by the various specialty bars.<sup>28</sup> One hopes such codes will someday supplement the more general standards in the CPR or its successor. For the near future, the answers to many questions of professional conduct will be found in articles such as this.

### III. THE ATTORNEY'S DUTY IN SPECIFIC SITUATIONS

One can imagine many situations creating problems of conduct for lawyers. They need not all be resolved. It is enough to deal with

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*Problems in Probate Matters*, 39 NEB. L. REV. 343 (1960); Midonick, *Attorney-Client Conflicts and Confidence in Trusts and Estates*, 35 REC. A.B. CITY N.Y. 215 (1980); Miller, *Functions and Ethical Problems of the Lawyer in Drafting a Will*, 1950 U. ILL. L.F. 415; Moore, *Conflicting Interests in Postmortem Planning*, 9 INST. ON EST. PLAN. ¶ 1921 (1975); Panel Discussion: *Professional Ethics*, 8 INST. ON EST. PLAN. ¶ 74.700 (1974); O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 693 (1980); *Report of Committee on Role and Function of Estate Lawyer*, 12 REAL PROP. PROB. & TR. J. 223 (1977); Wade, *Professional Responsibility and the Estate Lawyer*, 9 COLO. LAW. 1568 (1980); Note, *Trusts: Consequences of Attorney's Good Faith Representation of Adverse Parties in Trust Administration—Potter v. Moran* (Cal. 1966), 55 CAL. L. REV. 948 (1967); Comment, *Wills—Undue Influence*, 50 MICH. L. REV. 748 (1952); Recent Cases, *Professional Responsibility—Will Drafting—Provisions Naming the Draftsman as Executor or Directing His Retention as Attorney for the Estate*, 38 MO. L. REV. 321 (1973); Comment, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456 (1972); *Attorney Beware—The Presumption of Undue Influence and the Attorney Beneficiary*, 47 NOTRE DAME LAW. 330 (1971); Comment, *Testamentary Designation of Probate Counsel*, 51 TUL. L. REV. 334 (1977); Comment, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will*, 24 UCLA L. REV. 422 (1976); Case Comment, *Legal Ethics—Drafter of a Will Who Serves as Executor*, 75 W. VA. L. REV. 190 (1972).

25. See generally Wydick, *Trial Counsel as a Witness: The Code and Model Rules*, 15 U.C.D. L. REV. 651 (1982).

26. See G. HAZARD, *supra* note 20, at 7.

27. Lawyers are not alone in seeking simpler codes of ethics. The American Medical Association has enacted a new "simpler" code. See Reinhold, A.M.A., *Facing Legal Pressures, Adopts Less Rigid Code for Doctors*, N.Y. Times, July 23, 1980, at A1, col. 4.

28. See Martin, *supra* note 24 (discussing Statement of Principles Regarding Probate and Practices and Expenses adopted by the Section of Real Property, Probate and Trust Law of the American Bar Association).

the most pressing of these ethical questions and to rely on the patterns of resolution to provide useful models for resolving other problems.

An introductory word about the nature of trust relationships may be helpful. A trustee is one who holds legal title to property for the benefit of another—the beneficiary.<sup>29</sup> The trustee receives compensation for discharging his responsibilities as fiduciary<sup>30</sup> and is liable if he fails to meet a minimum standard of fiduciary conduct.<sup>31</sup> On appropriate occasions the fiduciary presents a record of his acts to the beneficiary and seeks a release from all liability for the period covered by the record.<sup>32</sup> Typically, the trustee requests some or all of his compensation at that time.<sup>33</sup> More specifically, the trustee presents a detailed financial account<sup>34</sup> as well as a separate document in narrative form describing major events in the administration of the trust. The document also effectuates the settlement of the account.<sup>35</sup>

#### A. *Preparation of the Fiduciary's Account*

The first step in obtaining approval and release is the preparation of an account in the form customarily used in the jurisdiction. The account details all the trustee's acts since the last account or since the inception of the trust.<sup>36</sup> Trustees account as required by law, custom, or circumstance. Trustees in some jurisdictions may be required to account periodically.<sup>37</sup> This usually is so for trustees of testamentary trusts in the more traditional jurisdictions. Such accounts, if *ex parte*, are frequently not binding.<sup>38</sup> The following circumstances may require that the trustee present an account: the death of a beneficiary, the death of a trustee, a partial payout of

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29. 1 A. SCOTT, *supra* note 3, § 2.3.

30. See N.Y. Surr. Ct. Proc. Act § 2309 (McKinney 1967).

31. See, e.g., *Surcharge Litigation and How to Avoid It*, 16 REAL PROP. PROB. & TR. J. 715 (1981) (discussion of hypothetical cases).

32. 1A W. NOSSMAN & J. WYATT, TRUST ADMINISTRATION AND TAXATION § 27.26[2] (2d ed. rev. 1981).

33. A. LORING, A TRUSTEE'S HANDBOOK § 22, at 81, § 66 (6th ed. 1962).

34. *Id.* § 22.

35. For an example of a petition closing a fiduciary's account, see E. MILLER, A PRACTICAL GUIDE TO THE ADMINISTRATION OF NEW YORK ESTATES 318 (1969). For an example of a trustee's account, see *id.* at 318. For a discussion of the nonjudicial settlement of accounts, see Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40 (1957).

36. A. LORING, *supra* note 33, §§ 22, 23.

37. *Id.* § 22.

38. See *In re Enger's Will*, 225 Minn. 229, 30 N.W.2d 694 (1948). See generally Kehoe, *Allowance of Probate Accounts*, 59 MASS. L.Q. 315 (1975).

trust principal after passage of a number of years, the termination of the trust.<sup>39</sup>

*Suggesting the Preparation of the Account.* When there is a preexisting relationship between the trustee and his lawyer, the lawyer may suggest the preparation of an account. This suggestion usually does not create the problem of solicitation.<sup>40</sup>

*Who Prepares the Account?* Once the trustee decides to render an account, the trustee, the lawyer, or a third party can prepare the account. Though some commercial fiduciaries may prepare their own accounts, most commercial and virtually all individual trustees rely on the lawyer.<sup>41</sup>

(a) *Confidentiality.* The preparation of fiduciary accounts is complex. Therefore, nonspecialists may wish to refer such matters to an outside preparer.<sup>42</sup> While an attorney has a duty to keep a client's affairs confidential, intraoffice referral does not breach this duty, even if the client is not informed.<sup>43</sup> Referral outside the office may also be made without the approval of the client. This is not a breach of the attorney's duty to preserve the confidences of the client, when made for legitimate purposes.<sup>44</sup>

(b) *Who Bears the Cost of Preparing the Account?* Assuming that the fiduciary refers the account to the lawyer, the question becomes whether the trustee, the lawyer, or the beneficiary should absorb the cost of the preparation. If the account is done outside the lawyer's office, there is a preparer's bill to be paid. If done within the firm, there are office costs to be allocated. This is not directly a question of proper conduct, but it is relevant to the discussion. There are three possibilities: the cost can be absorbed by the trustee out of his commission; the cost can be absorbed by the lawyer out of her<sup>45</sup> fee; or the cost can be absorbed by the trust (and ultimately by the beneficiaries) as an expense of

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39. G. BOGERT & D. OAKS, *CASES AND TEXT ON THE LAW OF TRUSTS* 483 (5th ed. 1978).

40. An attorney may call the attention of a former or a present client to a change in law relevant to the former or present engagement and accept employment arising from the contact. See *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* DR 2-104(A)(2) (1981).

41. A. LORING, *supra* note 33, § 21 at 77, § 22. See generally 2 A. SCOTT, *supra* note 3, § 172.

42. That specialist may be a lawyer, a certified public accountant, a "fiduciary accountant" trained by apprenticeship, or even a moonlighting employee of a bank trust department.

43. See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.6 comment (1983).

44. See *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* EC 4-3 (1981); *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.6 (1983).

45. The feminine personal pronoun will be used throughout this article to refer to the lawyer.



administration.

Trustees receive fees for performing their duties. Lawyers receive fees for representing trustees. Trustees' fees, or commissions, and lawyers' fees are not uniform.<sup>46</sup> They are sometimes set by the instrument,<sup>47</sup> sometimes by custom, and sometimes by judicial rule or statute.<sup>48</sup> Trustees' commissions and legal fees are usually a small percentage of the principal of the trust for which the account is prepared.<sup>49</sup> Lawyers often do not make fee adjustments even though a particular trust requires more or less work than other trusts.<sup>50</sup>

Although it is not easy to make generalizations in this area because of the differences among and within jurisdictions, it appears that the lawyer usually is expected to prepare the account and to absorb the cost out of her fee.<sup>51</sup> This expectation has implications for the proper conduct of both the trustee and his lawyer. A trustee who pays a full customary fee to his attorney plus an additional fee to an outside accountant might well be committing a breach of trust in the ordinary situation.<sup>52</sup> He may, however, be justified in paying an extra fee under special circumstances, e.g., when a particular accountant is familiar with the complicated problems of a closely held business.<sup>53</sup>

The lawyer also may find herself constrained by the usual practice. Since an attorney has a duty to charge no more than a reasonable fee, the lawyer who charges a full customary fee without preparing an account may well be acting improperly.<sup>54</sup> It seems unlikely, however, that she would be disciplined in the absence of egregious circumstances.<sup>55</sup> The very lack of certainty concerning both customary fees in fiduciary situations and the services to be

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46. See generally Martin, *supra* note 24.

47. See UNITED STATES TRUST COMPANY OF NEW YORK, TRUST & WILL PROVISIONS i-vi (1981).

48. See, e.g., N.Y. Surr. Ct. Proc. Act § 2309 (Consol. 1967).

49. G. BOGERT & D. OAKS, *supra* note 39, at 499-503.

50. Martin, *supra* note 24, at 924; see Report of the Committee on Administration & Distribution of Decedents' Estates, Fiduciary and Probate Counsel Fees in the Wake of Goldfarb, 13 REAL PROP. PROB. & TR. J. 238 (1978). See generally Eubank, *The Future for Estate Lawyers*, 10 *id.* 223, 230-32 (1975).

51. See *Lawyers Serving as Executors and Trustees*, 7 REAL PROP. PROB. & TR. J. 745, 748 (1972).

52. See 3 A. SCOTT, *supra* note 3, § 242.2.

53. See *id.*

54. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1981).

55. See T. MORGAN & R. ROTUNDA, *supra* note 15, at 152-55.

performed for the fee provides protection from discipline.<sup>56</sup>

### B. Settlement of the Fiduciary's Account

After the fiduciary has prepared the account, it must be presented to the person with the power to approve it. Ordinarily, this is the beneficiary.<sup>57</sup> Depending on the jurisdiction and the circumstances, the settlement will be either judicial (formal) or non-judicial (informal).<sup>58</sup>

*Judicial Accountings.* A judicial account is, at least in form, a full-fledged adversary proceeding.<sup>59</sup> The beneficiary is served with a petition, a copy of the fiduciary's account, and an order to show cause why the account should not be settled.<sup>60</sup> The beneficiary has an opportunity to retain a lawyer and to appear and contest the account.<sup>61</sup> If the beneficiary fails to contest the account, it will be settled by default, and the fiduciary will be released from all liability for acts fully disclosed in the account and petition.<sup>62</sup>

Theoretically, a properly prepared petition and account provide full disclosure of the fiduciary's acts and make it clear to the beneficiary that the proceeding is one in which substantial sums of money may be at stake.<sup>63</sup> In truth, such instruments are often extremely complicated and difficult for nonspecialists to understand.<sup>64</sup>

A fiduciary's account may be settled judicially rather than informally for several reasons, including the following:

- (1) The jurisdiction may require, by either law or custom, that fiduciary accounts be settled judicially.<sup>65</sup>
- (2) Court approval may be required when a beneficiary is unable to release the fiduciary effectively. For example, a benefi-

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56. See *Lawyers Serving as Executors and Trustees*, *supra* note 51, at 745.

57. The statement in the text is a simplification. The person with the power to approve the account could be the trustee of a continuing trust or a person given the power to settle the trustee's account. See Westfall, *supra* note 35, at 74-76.

58. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382.

59. See Whitman, *National Fiduciary Accounting Study*, 7 REAL PROP. PROB. & TR. J. 467, 469, 476 (1972); see also Westfall, *supra* note 35, at 41.

60. *E.g.*, CAL. PROB. CODE § 1138.4 (Deering 1981).

61. J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-85.

62. Westfall, *supra* note 35.

63. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-85.

64. See *A Baker's Dozen Topics*, 10 REAL PROP. PROB. & TR. J. 243, 259-61 (1975). The adoption of a simplified and uniform account may well lead to increased understanding of fiduciary accounts by both lawyers and laypersons. See Whitman, *supra* note 59.

65. See *Limiting Future Actions After Trust Account Approval*, 2 REAL PROP. PROB. & TR. J. 503 (1967); see also G. BOGERT & D. OAKS, *supra* note 39; Westfall, *supra* note 35.

ciary might be legally incompetent because of age or mental incapacity.<sup>66</sup>

(3) The fiduciary may need a judicial construction of the instrument or instructions respecting the proper exercise of a management power.<sup>67</sup>

(4) There may be so many beneficiaries that it is more efficient to use the judicial process to settle the account than to arrange an informal settlement.

(5) The beneficiaries may be contentious, or the account may show some less-than-perfect act by the fiduciary. In such cases, the fiduciary may seek the protection of a judicial proceeding.<sup>68</sup>

A judicial settlement provides protection for the trustee, because the beneficiary will find it almost impossible to set aside a judicial settlement of the account as to matters set forth therein in the customary manner.<sup>69</sup> If properly served with the documents in the proceeding, the beneficiary will be unable later to make claims such as one of misrepresentation by the accounting trustee. Our judicial system prevents a court from later providing relief for the beneficiary who was properly served with a petition and account that provided full disclosure as defined under local law.<sup>70</sup>

*Informal Accountings.* Informal settlement of an account occurs without using the courts.<sup>71</sup> A full spectrum of possible informal settlements exists. At one extreme is the presentation of a stationery store form without an account, purporting to release all claims. At the other extreme is the presentation of a complete account in the judicially required form, with an extensive document, often called a "receipt and release", that is as detailed as a judicial petition.<sup>72</sup> In most jurisdictions the latter type of informal account fully protects a fiduciary in appropriate circumstances.<sup>73</sup> That is, a fiduciary is protected when he makes full disclosure, the benefi-

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66. See, e.g., *Spicer v. Wright*, 215 Va. 520, 211 S.E.2d 79 (1975).

67. See G. BOGERT & D. OAKS, *supra* note 39, at 567-68. A trustee might need instruction as to the allocation of receipts and expenditures in a particular situation. Courts will entertain such petitions, although they will not exercise a fiduciary's discretionary powers. See, e.g., *Spicer v. Wright*, 215 Va. 520, 211 S.E.2d 79 (1975).

68. See *Limiting Future Actions After Trust Account Approval*, *supra* note 65.

69. See *id.*

70. See *In re Enger's Will*, 225 Minn. 229, 30 N.W.2d 694 (1948).

71. See Westfall, *supra* note 35.

72. See Fleming, *Settlement of Trustee's Account Without Court Proceedings*, 5 INST. ON EST. PLAN. ¶ 71.600-601 (1971). A form of receipt and release can be found at 27 CARMODY-WAIT 2D, CYCLOPEDIA OF NEW YORK PRACTICE § 166:9 (1968).

73. See, e.g., *In re James' Estate*, 86 N.Y.S.2d 78 (Surr. Ct. 1948).

ciary has capacity to and does understand the account, and there are no collateral issues of overreaching or the like. A release with no account or with an incomplete account is not sufficient, because a release is ordinarily not effective without full disclosure.<sup>74</sup>

Informal settlements have much to recommend them: (1) they usually take less lawyer time and are thus more efficient;<sup>75</sup> (2) they usually can be settled more quickly;<sup>76</sup> and (3) they do not become part of the public record.<sup>77</sup>

#### IV. CONFLICTS OF INTEREST

The essential problem of lawyer conduct in the settlement of fiduciary accounts is the conflict of interest between the trustee and the beneficiary. Professors Ritchie, Alford, and Effland have described the problem thusly:

The fiduciary's duty is normally to protect his beneficiary (the heirs or devisees of a decedent's estate, the incapacitated person in the conservatorship, the beneficiaries of a trust). Yet at the point of obtaining private or judicial approval of accounts the fiduciary's personal interest is in conflict. He wants his accounts approved without question; he no longer represents the beneficiary and the latter must look out for himself. The problem is how the beneficiary can best be protected in an accounting proceeding. Should the court exercise a supervisory role and actively audit the account? Should the beneficiary be expected to retain his own legal counsel? Does the lawyer retained by the fiduciary but paid out of the estate owe a duty to the beneficiaries or only to the fiduciary? (At present there is a surprising diversity of professional opinion on this point; see Whitman, Report of the National Fiduciary Accounting Study (1972) pp. 59-67). If the lawyer learns from the fiduciary that the latter has prepared a fraudulent account, can he reveal this to the court? If the lawyer merely realizes that the account includes questionable items, can and should he inform the beneficiary? Should there be a requirement that every account be approved by a court-appointed CPA? If the beneficiary is incompetent (as usually is the case in guardianship or conservatorship), should a guardian ad litem be appointed to protect the incompetent's interest? Protection may be costly and unnecessary. There is no

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74. 27 CARMODY-WAIT 2D, *supra* note 72, § 166:11; 28 *id.* § 170:92.

75. See generally Martin, *Justice and Efficiency Under a Model of Estate Settlement*, 66 VA. L. REV. 727 (1980).

76. 27 CARMODY-WAIT 2D, *supra* note 72, § 166:8.

77. *Id.*

simple answer. The Uniform Probate Code is drafted on the premise that the beneficiary should look after his own interest except in conservatorships; the court is not expected to exercise a supervisory function.<sup>78</sup>

There are several ways of analyzing conflicts of interest in the area of professional responsibility. Much has been written about the problem,<sup>79</sup> but it may be useful to restate the basic pattern of analysis.

### A. A General Analysis

A lawyer has an obligation to avoid conflicts of interest.<sup>80</sup> That is, a lawyer must not let anything interfere with her loyalty to her client or her independent professional judgment.<sup>81</sup> The 1908 Canons of Professional Ethics forbade the attorney's representing conflicting interests without the express consent of the clients after full disclosure.<sup>82</sup> The Canons have been replaced by the CPR, which may ultimately be replaced by the Model Rules. Each of these successive sets of guidelines for lawyer conduct treats conflicts of interest somewhat differently.<sup>83</sup> The CPR takes the view that the issue is one of loyalty and requires undivided loyalty to the client on the part of the attorney.<sup>84</sup> The Model Rules treat conflicts of interest as problems of direct adversity or as problems that adversely affect the quality of representation a client receives.<sup>85</sup>

There are essentially three kinds of conflicts of interest: (1) conflicts between multiple clients; (2) conflicts between the lawyer and the client; and (3) conflicts between the client and a third

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78. J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1394.

79. See, e.g., H. DRINKER, *LEGAL ETHICS* (1953); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); Aronson, *supra* note 14; Corneel, *supra* note 24; Midonick, *supra* note 24; Morgan, *Conflicts of Interest and the Former Client in the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 993; *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24. The Twentieth Century Fund recently sponsored a series of book-length studies of conflicts of interest in various areas. C. WELLES, *CONFLICTS OF INTEREST: NONPROFIT INSTITUTIONS* (1977). Excellent bibliographies can be found in the footnotes to the Harvard *Developments Note*, *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, and in the appendix to Mr. O'Dea's article, O'Dea, *supra* note 24, at 741-44.

80. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1981).

81. Patterson, *supra* note 22, at 656. See generally Aronson, *supra* note 14.

82. AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

83. See generally T. MORGAN & R. ROTUNDA, *supra* note 15.

84. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981) and the attendant ethical considerations and disciplinary rules.

85. See MODEL RULES OF PROFESSIONAL CONDUCT (1983).

party.<sup>86</sup> A conflict of interest may be potential or actual;<sup>87</sup> if actual, it may be insubstantial or substantial.<sup>88</sup> Moreover, the substantiality of a conflict will be a function of the importance one attaches to the underlying policy of requiring attorneys to avoid conflicts of interest.<sup>89</sup>

#### 1. POLICIES SERVED BY BARRING CONFLICTS OF INTEREST

The rule that the attorney-client relationship should be as free as possible of conflicts of interest serves several policies.<sup>90</sup> First, a cornerstone of our Judeo-Christian culture is that one must be dutiful<sup>91</sup> and loyal to those to whom one is bound.<sup>92</sup> No article on conflicts of interest is complete without the obligatory quote from Matthew exhorting the reader to serve but one master: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon."<sup>93</sup> Moreover, under principles of Anglo-American jurisprudence a fiduciary has a duty of undivided loyalty to his or her beneficiary.<sup>94</sup> A no less obligatory quote from Chief Judge Cardozo's opinion in *Meinhard v. Salmon*<sup>95</sup> expresses this duty:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.<sup>96</sup>

It is a commonplace that an attorney has a fiduciary relationship

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86. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1981).

87. See *id.* EC 5-3, EC 5-15.

88. See *id.* DR 5-105.

89. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1244, 1251-84.

90. See *id.*

91. See E. BODENHEIMER, *PHILOSOPHY OF RESPONSIBILITY* (1980).

92. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 516-20 (5th ed. 1956).

93. *Matthew* 6:24 (King James).

94. 2 A. SCOTT, *supra* note 3, § 170.

95. 249 N.Y. 458, 164 N.E. 545 (1928).

96. *Id.* at 464, 164 N.E. at 546.

with her client.<sup>97</sup> The term "fiduciary relationship" is an umbrella that covers a variety of relationships between persons and as to property.<sup>98</sup> A fiduciary must put the interests of the beneficiary first and in the event of misconduct is subject to the powers of the equity courts.<sup>99</sup>

The second policy reason for avoiding conflicts of interest is our society's reliance on the adversary system.<sup>100</sup> An adversary system is based on fealty of the advocate to her client, and the ultimate threat to the system is disloyalty.<sup>101</sup> An adversary system must incorporate safeguards against divided loyalty.<sup>102</sup>

Third, conflicts of interest can interfere with the rendering of legal services. The model of attorney professionalism is the cool, detached lawyer advising her client competently and compassionately. Both the office lawyer and the litigator need to avoid intrusions on the lawyer-client relationship. Interests that compete with those of the client can seriously interrupt the attorney's delivery of legal services.

Fourth, lawyers wish to maintain the confidence of the public for reasons of gain, pride, and efficiency.<sup>103</sup> Conflicts of interest seriously undermine public confidence in the legal process and in the bar. Therefore, the CPR deals not only with actual conflicts of interest, but also with situations that create even the appearance of conflicting interests. Canon 9 of the CPR exhorts the lawyer to avoid even the appearance of impropriety.

Lawyers and the legal system function best if clients feel free to discuss matters fully with their attorneys.<sup>104</sup> Several rules relevant to the attorney-client relationship take this into account.<sup>105</sup> For example, the purpose of the attorney-client privilege is to encourage frank discussion.<sup>106</sup> Any rule that fosters client confidence contributes to maximizing the effectiveness of the legal system.

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97. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981).

98. See 1 A. SCOTT, *supra* note 3, § 2.5.

99. E. SCOLES & E. HALBACH, *supra* note 2, at 7-9.

100. See generally M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

101. See generally *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24.

102. See *id.*

103. Public confidence contributes to the efficient functioning of our legal system and our society. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981); MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

104. L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 277 (1971):

105. See *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

106. 8 J. WIGMORE, *EVIDENCE* § 2291 (McNaughton rev. ed. 1961).

Control of conflicts of interest inspires client confidence in the individual lawyer and in the system.

As society becomes more complex,<sup>107</sup> we become more concerned with eliminating injustice and imperfection.<sup>108</sup> Lawyers have become increasingly aware of the conflict problem.<sup>109</sup> Unfortunately, one of the effects of this awareness is complexity.<sup>110</sup> The classic solution when there is a conflict of interest is to bring in another lawyer. This inevitably increases the cost of the transaction; it may also leave the client feeling, at best, like a victim of overregulation and, at worst, like a victim of a sinister plot to increase lawyers' incomes.<sup>111</sup>

## 2. CONFLICTS OF INTEREST BETWEEN MULTIPLE CLIENTS

The trusts and estates area is rife with potential and actual conflicts of interest, most frequently between multiple clients of a single attorney.<sup>112</sup> Fiduciaries' and beneficiaries' interests often diverge. The reports are full of cases demonstrating fiduciary-beneficiary disagreement.<sup>113</sup> The interests of beneficiaries are also often dissimilar. What is good for the income beneficiary may be bad for the principal beneficiary.<sup>114</sup> The interests of multiple fiduciaries are not always the same, especially when the trust instrument gives them separate duties.<sup>115</sup> The fiduciary who is one of several beneficiaries may have interests that are different from those of the other beneficiaries. The lawyer may knowingly or accidentally find herself representing these conflicting interests.<sup>116</sup>

## 3. THE CPR APPROACH

The CPR deals with conflicts of interest in an unstructured and sometimes frustrating manner. Relevant statements are dispersed throughout the Code in various Canons, Ethical Considera-

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107. See generally F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920).

108. Compare *Symposium: The Quest for Equality*, 1979 WASH. U.L.Q. 1, with Westen, *The Empty Idea of Equality*, 94 HARV. L. REV. 537 (1982).

109. See generally G. HAZARD, *supra* note 79.

110. See *id.* at 109; Kaplan, *Representation of Multiple Clients*, 62 A.B.A. J. 648 (1976); *The One-Lawyer Divorce*, Nat'l L.J., Jan. 25, 1982, at 1, col. 1.

111. See Kaplan, *supra* note 110, at 648.

112. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER *supra* note 1, at 115.

113. See, e.g., *Mueller v. Mueller*, 28 Wis. 2d 26, 135 N.W.2d 854 (1965).

114. See, e.g., *In re Catherwood's Trust*, 405 Pa. 61, 173 A.2d 86 (1961).

115. See *The Co-Trustee Relationship—Rights and Duties*, 8 REAL PROP. PROB. & TR. J. 9 (1973).

116. See Midonick, *supra* note 24.



tions ("ECs") and Disciplinary Rules ("DRs"). The main Canons addressing the issue are Canons 4, 5 and 9:

- Canon 4: "A Lawyer Should Preserve the Confidences and Secrets of a Client."
- Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."
- Canon 9: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Canon 5 is the major source of the rules concerning conflicts of interest. The Canon seeks to maximize a lawyer's loyalty to the client and to protect the attorney-client relationship against intrusions interfering with the lawyer's exercise of professional judgment. Problems involving multiple clients are covered by Ethical Considerations 5-14 through 5-20. EC 5-14 affirms the CPR's commitment to disinterested judgment and undiluted loyalty. It assumes that judgment and loyalty are in peril whenever multiple clients have "differing" interests, defined as interests that are "conflicting, inconsistent, diverse or otherwise discordant." EC 5-14, like all ECs, defines a goal of conduct rather than a minimum standard of conduct,<sup>117</sup> and precludes the acceptance or continuation of employment that will adversely affect judgment or loyalty. Taken alone, EC 5-14 leaves to the lawyer the decision to refuse employment or to withdraw. The criterion for the decision to refuse employment or to withdraw is whether or not the lawyer's capacity to act will be diminished.

EC 5-15 seeks to guide the conscientious lawyer who faces what the CPR calls "potentially differing interests."<sup>118</sup> The lawyer is urged to treat uncertain situations as requiring remedial action. EC 5-15 then states in mandatory terms that, in litigation, a lawyer should never represent multiple clients with differing interests and should only rarely represent multiple clients with potentially differing interests. The prohibitory tone of EC 5-15 is inappropriate, because the Ethical Considerations were drafted to describe ideal rather than required conduct.<sup>119</sup> At any rate, the distinction is academic; the EC merely reiterates the binding prohibition

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117. This article is primarily about ethical conduct. The CPR deals with both ideal conduct and minimum conduct. The Model Rules deal only with minimum conduct. If that minimum conduct standard is not met, the lawyer will be disciplined.

118. The use of the word "potentially" suggests by negative inference that once interests actually diverge a different result must obtain. See Appendix A to this article.

119. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981).

against such conduct found in DR 5-105. EC 5-15 permits the representation of potentially differing interests in nonlitigation situations. As will be seen, this distinction is not particularly helpful in the area of fiduciary administration.<sup>120</sup> EC 5-15 also allows presentation of multiple clients in nonlitigation situations where their interests "vary only slightly."

Thus there appear to be three categories of conflicts: differing interests, interests that vary only slightly, and potentially differing interests. Within these categories, permissible conduct varies depending upon whether or not the representation involves litigation. The following table states the basic CPR structure for dealing with conflicts between clients. A more complete table is set forth as an appendix to this article.

	Propriety of representing differing interests	Propriety of representing potentially differ- ing interests	Propriety of representing interests which vary only slightly
<u>Litigation</u>	Never	Rarely, if ever	Rarely, if ever
<u>Non- Litigation</u>	Rarely, if ever	Often	Often

When a lawyer permissibly represents differing interests, EC 5-16 requires that the attorney fully inform her clients. Each client must consent to the representation after a full explanation. EC 5-17 catalogs situations in which potentially differing interests are likely to arise. It mentions, as one example, a lawyer representing multiple beneficiaries of an estate. The EC offers little specific guidance. It suggests the need for case-by-case analysis and reiterates the policy goal that there be no adverse effect on the lawyer's judgment.<sup>121</sup>

EC 5-19 states the obvious—that a lawyer may represent multiple clients when their interests are the same. Logically, this EC should precede the other ECs in the group, and it is startling to find this elementary principle stated after more complicated matters. The positive statement does not support a negative inference that a lawyer may not represent differing interests. Having ap-

120. See *infra* text accompanying notes 251-52.

121. EC 5-18 states that the lawyer for an *entity* owes allegiance to the entity and not to persons associated with the entity, such as officers and directors. Traditionally, this rule is not applied to trusts and estates. The lawyer's duty of loyalty is owed to the fiduciary and not to the trust entity. To do otherwise would make the lawyer an attorney for the beneficiaries, since it is they who are the equitable owners of the trusts "entity." Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

proved the representation of similar interests, the EC cautions lawyers to think like clients—to identify the similar interests that will appear dissimilar—and then to explain to the client why the appearance of conflict is false. This advice does not address the reality of the trusts and estates practice.<sup>122</sup> Clients do not often detect false conflicts and demand their own lawyers. More often, the problem is convincing the client (and sometimes the lawyer) that a real conflict exists that requires withdrawal or separate representation.

EC 5-19 concludes with a requirement that a lawyer must always withdraw when a client perceives a conflict, without regard to the existence of an actual conflict. Since a client can always fire his lawyers, the need for the statement is unclear.<sup>123</sup>

EC 5-20 closes this series of ECs by narrowly approving the lawyer's serving as an impartial arbitrator or mediator in matters involving present or former clients. To comply with the CPR, the lawyer must provide full disclosure prior to acting and must forswear representation of any of the parties in the matter afterward. EC 5-20 is of no particular interest in fiduciary matters, because it blesses only arbitration and mediation. That approval cannot be expanded to cover the representation of differing interests.<sup>124</sup> EC 5-20's prohibition of further representation of the disputing parties makes this clear.

The Disciplinary Rules set mandatory guidelines.<sup>125</sup> Under Canon 5, the key rule is DR 5-105.<sup>126</sup> It requires a lawyer, on pain of discipline, to decline or withdraw from employment if her exercise of professional judgment will be, or is likely to be, adversely affected or if the employment will likely involve the lawyer in representing differing interests. There is an exception to the rule. The lawyer may represent multiple clients when it is "obvious" that the representation of each will be adequate, and if each consents after full disclosure.<sup>127</sup> Interestingly enough, nothing is said directly in

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122. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115.

123. This is recognized in the comment to the first draft Model Rule 5.2. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 comment (Discussion Draft 1980).

124. See MODEL RULES OF PROFESSIONAL CONDUCT Introduction to Rules 5.1-2 (Discussion Draft 1980); Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

125. See *supra* note 119.

126. The lawyer who wishes to know what she can and cannot do must turn to DR 5-105; it contains the relevant prohibitions on lawyer conduct and the exceptions thereto.

127. *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1292-306.

the Disciplinary Rule about the permissibility of representing differing interests; it is presumed that the representation of significantly differing interests always impairs the lawyer's professional judgment.

Obviously, the CPR provides a somewhat tortured system for dealing with conflicts of interest between multiple clients. Under the CPR, the lawyer who wishes to avoid punishment (1) accepts or continues no representation where her professional judgment will be, or is likely to be, affected; and (2) accepts or continues no representation involving actual or potential conflicts of interest unless (a) it is obvious that she can adequately represent all interests, and (b) all clients have consented after full disclosure.

This ostensible exception in DR 5-105 to the no-conflicts rule loses its apparent importance in the face of EC 5-15. Since EC 5-15 states that a lawyer should never represent in litigation multiple clients with actually differing interests, it becomes "obvious" under DR 5-105 that adequate representation is impossible.

The risk of representing potentially differing interests in litigation is that the potential conflict will ripen into an actual conflict. A lawyer must be careful, therefore, in representing multiple beneficiaries in a litigated trust termination. For example, a lawyer should not represent both the estate of the deceased life tenant and the remainder beneficiary if the claim involves allocation of receipts and expenditures between income and principal.<sup>128</sup> Agreeing to represent both parties without knowing what the account shows carries a real potential for conflict. Agreeing to represent multiple beneficiaries against a trustee who has stolen trust assets, however, would involve no unusual problems of allocation, and would be proper.

Canons 4 and 9, and the DRs and ECs thereunder, also deal with conflicts of interest. Canon 4 requires the attorney to preserve her client's confidences and secrets, a specific component of the general duty of loyalty. A loyal attorney does not reveal her client's confidences and secrets. Secrecy and confidentiality enhance the lawyer-client relationship and aid the functioning of the legal system.<sup>129</sup> While the subject matter of the trusts and estates practice is particularly personal and sensitive, the application of Canon 4 to that area is quite straightforward.

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128. See, e.g., *In re Catherwood's Trust*, 405 Pa. 61, 173 A.2d 86 (1961).

129. L. PATTERSON & E. CHEATHAM, *supra* note 104. See generally Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 U. KAN. L. REV. 215 (1982).

Canon 9 exhorts the lawyer to avoid even the appearance of impropriety. A catchall provision of the CPR, its policy goal is to foster public confidence in the bar.<sup>130</sup> Canon 9 speaks directly to several situations giving rise to apparent or, arguably, even to actual conflicts of interest as well as to other inappropriate acts. It also sets standards for dealing with client property. Canon 9 actually contributes little and merits no further discussion here.

#### 4. THE MODEL RULES OF PROFESSIONAL CONDUCT

The Model Rules of Professional Conduct are preferable in many ways to the CPR<sup>131</sup> and for several reasons are easier to apply. First, the Model Rules consist almost exclusively of duties rather than recommendations.<sup>132</sup> Guides to superior conduct, such as the ECs, are gone. Though helpful in theory, the aspirational guidelines of the ECs are complicated, confusing, and detract from the usefulness of the CPR.<sup>133</sup> Dropping them is wise.<sup>134</sup> Second, the language of the Model Rules is clearer than that of the CPR. Third, the organization of the Model Rules makes them easier to use. They employ the Restatement format familiar to most lawyers.<sup>135</sup> A glance at the table of contents provides orientation for the lawyer confronting a problem. Fourth, the commentary demonstrates a realistic understanding of the practical problems faced by lawyers.<sup>136</sup> It acknowledges the complexity of the lawyer's role in our society and the impossibility of promulgating general or specific rules to cover all situations.<sup>137</sup>

*Rule 1.7.* The primary tool for dealing with conflicts of interest is Rule 1.7. The Rule reads in its entirety,

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

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130. Aronson, *supra* note 14, at 810-11.

131. Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of The Model Rules*, 1982 A.B. FOUND. RESEARCH J. 519.

132. Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116, 1117 (1981).

133. *Id.*

134. See MODEL RULES OF PROFESSIONAL CONDUCT Chairman's Introduction (Proposed Final Draft 1981).

135. *Id.*

136. Kutak, *supra* note 132, at 1120.

137. Not all lawyers are happy with the Model Rules. For example, the Rules have been attacked by the New York County Lawyers' Association. See Kohn, *County Lawyers' Board Opposed to Final Draft of ABA Code*, N.Y.L.J., June 22, 1982, at 1, col. 2.

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The major policies behind the Rule are protecting the lawyer's independent professional judgment and protecting her loyalty to her client.<sup>138</sup> The Model Rules, like the CPR, acknowledge that the major threats to independent judgment are the lawyer's responsibilities to other clients and third persons and the lawyer's own individual interests.<sup>139</sup>

The Model Rules do not preclude representation of clients with conflicting interests in all cases—only in those where there is direct adversity,<sup>140</sup> or where the conflict would “materially interfere with the lawyer's independent professional judgment” or “foreclose courses of action that reasonably should be pursued on behalf of the client.”<sup>141</sup> The comment to Rule 1.7 states that a client may choose to ignore either a potential or actual conflict of interest.<sup>142</sup> If, however, a disinterested lawyer would conclude that the client should not agree to the representation, then the lawyer whose services were sought may not ask the client to consent and must refuse to represent the client.<sup>143</sup>

Rule 1.7 defines two kinds of conflicts between clients. Paragraph (a) of Rule 1.7 focuses on direct adversity between clients and establishes a standard for accepting representation of a new client or representation of a present client in a new matter. The

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138. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

139. See *id.*

140. See *id.*

141. *Id.*

142. See *id.*

143. See *id.*

lawyer must reject the representation if it is "directly adverse" to the interests of another client (who might be called the "senior" client), unless (1) the lawyer reasonably believes that she may undertake the representation, and (2) the affected clients consent after "consultation." Rule 1.7(a), designed to protect the "senior" client, is narrow in its effect because it addresses only situations of direct adversity.

Paragraph (b) of Rule 1.7 focuses on what might be called the "junior" relationship. The lawyer must reject the junior relationship if the representation may be "materially limited by the lawyer's responsibilities to another client," unless (1) the lawyer reasonably believes that she can undertake the representation, and (2) the junior client consents after consultation.

Rule 1.7(b) is broader in scope than 1.7(a). Its standard of material limitation allows lawyers to accept multiple clients whose interests are not in perfect harmony. Rule 1.7(a) has the same permissive effect, because it affects only the narrow category of situations where there is direct adversity. Thus, taken together, the two parts of Rule 1.7 allow lawyers to accept multiple clients with conflicting interests in many situations.

Moreover, if a proposed representation runs afoul of the initial limitations of Rule 1.7, it still may be allowed with the client's consent after consultation. The term "consultation" first appeared in the June 1982 version of the MRCP. It is defined in the terminology section as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."<sup>144</sup> This definition presumably applies in Rule 1.7(a). Consultation is given a more definite meaning in 1.7(b)(2), the situation in which the common representation falls within the "materially limited" definition and involves "multiple clients in a single matter." In that context consultation is defined as including, at a minimum, "explanation of the implications of the common representation and the advantages and risks involved."<sup>146</sup> One hopes that the general definition of consultation will be interpreted as stringently as the more specific definition in 1.7(b)(2).<sup>146</sup>

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144. *Id.* preamble. The term "consultation" is defined in a manner substantially similar to the term "disclosure" as used in the 1981 Proposed Final Draft of the Model Rules and which has been omitted from the Rules as adopted.

145. *Id.* Rule 1.7(b).

146. The general definition of consultation might be applied differently under 1.7(a) and under 1.7(b) in situations where the special 1.7(b)(2) definition of consultation does not apply.

The comment to Rule 1.7 deals with conflicts in litigation by stating that under the Rule a lawyer may not represent adversaries in litigation.<sup>147</sup> The comment also discusses the representation of parties on the same side of litigation and forbids representing them when their positions are incompatible or when there are "substantially different possibilities of settlement."<sup>148</sup> The negative inference is clear that if the interests are not substantially different, then common representation is possible. For example, a lawyer could not represent both income and principal beneficiaries if the question were one of allocation of receipts or expenditures between income and principal,<sup>149</sup> but the same lawyer could represent both if they were generally discontented with the trustee's investment

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147. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). The 1981 version of the Model Rules applied this prohibition only to contentious litigation. There was a strong negative inference that a lawyer could represent nominal adversaries in noncontentious litigation. Thus, the notes to that version stated that a lawyer could represent only nominally opposed parties "who seek the same judgment and whose interests are not antagonistic." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 notes (Proposed Final Draft 1981) (citing *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977)); *Merwin v. Richardson*, 52 Conn. 223 (1884); see *Sapienza v. New York News, Inc.*, 481 F. Supp. 676 (S.D.N.Y. 1979); *Realco Services, Inc. v. Holt*, 479 F. Supp. 867 (E.D. Pa. 1979). The fate of this notion as announced in the case law is unclear under the final version of the Model Rules. The comment says that 1.7(a) prohibits representation of opponents in litigation, yet the Rule itself speaks in terms of direct adversity. The comment is a guide to interpreting the Rule, but must yield to the express language of the Rule.

A cursory reading of the June 1981 version suggests that a lawyer for a trustee who is accounting judicially (in what is nominally an adversary proceeding) could *not* also represent the beneficiary, even if the account contained no problems. However, a close reading of 1.7(a) and the notes suggests the opposite. It might be argued that the final version of Rule 1.7(a) speaks only to direct adversity. In the factual situation given above, the goal of both sides would be the same—a swift, low-cost termination of the trust. Thus the notes and cases cited would allow the same lawyer to represent both nominal plaintiff and nominal defendant.

As an example, assume that Trust Company was accounting to Beneficiary on the wind-up of a trust for his benefit and that Lawyer was the attorney for both Trust Company and for the Beneficiary family. If the argument above was accepted, Lawyer could opine to Beneficiary that the trust was properly administered and that there was no reason to hire another lawyer to review the account or contest the settlement of the account. And Lawyer could go on to represent both parties in court in the judicial settlement.

Presumably, a lawyer would agree to such a dual representation only where she had a longstanding relationship with the trust beneficiary. Should true adversity develop, withdrawal from both sides would be required in order to avoid the risks of discipline and malpractice.

It is interesting to consider whether Lawyer is entitled to bill Beneficiary for such an opinion. Many lawyers would undoubtedly forego a bill on the theory that the trustee's legal fee was compensation enough. A more fee-oriented lawyer, however, might justify a modest additional charge to Beneficiary, primarily for the additional time taken to confer with Beneficiary.

148. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

149. See, e.g., *In re Catherwood's Trust*, 405 Pa. 61, 173 A.2d 86 (1961).



performance. A rule of conduct that allows one lawyer to represent multiple beneficiaries under certain circumstances in a litigated trust termination is wise. Such litigation is often over-lawyered, with each lawyer collecting a separate fee.

Also within the scope of Rule 1.7 is the axiom, descended from the former Canons, that a lawyer may not ordinarily proceed against a client in one matter whom she represents in a different matter.<sup>150</sup> This can be changed, however, by client consent. Thus, in the ordinary situation, a lawyer who is outside general counsel to the trust department of a bank may not represent a disgruntled trust beneficiary suing the bank as trustee.

There is, however, a more intriguing question for the trusts and estates specialist who is not general counsel to a bank. May a lawyer who is attorney for the bank that is trustee of the Jones trust sue the same bank in its capacity as trustee of the Smith trust? Before answering, a short description of how banks hire lawyers is in order. A bank trust department, or the bank as a corporate entity, has general counsel and perhaps internal house counsel as well. The general counsel advises the bank on major questions of policy, renders opinions on questions of fiduciary conduct involving a large number of estates and trusts, and provides will and trust forms. Payment for these services ordinarily comes from the bank's general funds. The general counsel is in many senses "the bank's lawyer."

A completely different situation exists when the bank acts as the fiduciary of a particular estate or trust, e.g., the Jones trust. Then the bank ordinarily hires as its lawyer the drafter of the instrument—the Jones family lawyer.<sup>151</sup> This custom guarantees families that their lawyer will represent family estates and trusts, and it also encourages lawyers to name banks as fiduciaries.<sup>152</sup>

Now it is appropriate to ask the question again. May a lawyer who is representing the bank as trustee of the Jones trust sue the same bank as trustee of the Smith trust? The short answer is, "No

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150. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

151. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1387.

152. See *Lawyers Serving as Executors and Trustees*, *supra* note 51. Indeed, encouraging a client to name a bank as a fiduciary is the closest a lawyer can come to guaranteeing herself the fiduciary's representation. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1387. A direction in an instrument to retain the drafter is not binding, however, and in some circumstances is improper. See *State v. Gulbankian*, 54 Wis. 2d 605, 196 N.W.2d 733 (1972). See generally Comment, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456 (1972).

and yes." Under Rule 1.7 the *tentative* conclusion is "no."<sup>153</sup> This negative can change, however, if the bank consents after consultation. The bank's consent is unlikely to be forthcoming, however.

Assuming that banks usually will not consent, Rule 1.7 effectively denies beneficiaries access to virtually every member of the trusts and estates specialty bar in a given area, because most, if not all, such lawyers are likely to be representing the bank in some

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153. There is substantial concern that when a lawyer represents a client who is bringing suit against another client there will be a loss of confidence on the part of the second client and a risk of disloyalty on the part of the lawyer. Even though the two representations may be entirely unrelated, the courts have not generally blessed lawyers who represent persons who are suing another current client. In *Cinema 5 v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976), however, the court declined to establish a rule that would require disqualification of a lawyer if he sued an existing client in an unrelated case. The court stated that at the very least the lawyer must show there is no actual or apparent conflict of loyalties. In *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978), plaintiff's law firm had represented him from 1965 to 1969 and also in the present action against IBM beginning in 1972. A member of plaintiff's law firm also had represented IBM in an unrelated labor matter from 1970 to 1976. IBM moved for plaintiff's law firm's disqualification, which the court granted. The court implied that, if there had been disclosure and consent by the clients, it would have allowed dual representation. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1307.

State courts seem stricter in dealing with the question. In *Grievance Comm. of the Bar v. Rottner*, 152 Conn. 59, 203 A.2d 82 (1964), a law firm was retained by the trustee in a debt collection action. During the course of that representation, the firm was retained by another client in an action against the trustee for assault and battery. The court disqualified the law firm and vigorously stated that the maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client even though the nature of such employment is wholly unrelated to that of his existing representation.

The Supreme Court of Utah held that an attorney acted improperly by first agreeing to defend *B* in a civil suit brought by *H* and then agreeing to defend *H* in an unrelated criminal action. See *In re Hansen*, 586 P.2d 413 (Utah 1978).

*Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1298-1303, discusses the risks that both clients face if they are represented by the same lawyer. For example, it finds the risk that Smith, a beneficiary, faces is greater than that faced by the bank-trustee, because Lawyer's representation of Bank as trustee of the Jones trust is unrelated to Smith, but Lawyer's representation of Smith is directly related to Bank. Therefore, the note concludes, Lawyer may defend Smith less vigorously in order to maintain her relationship with Bank. As valid as this analysis may be in other situations, it seems irrelevant in the factual situation given in the text. A bank is unlikely to hire a lawyer in the normal course except when she has brought in her own clients as bank customers. Indeed, the concern that the lawyer might deprive the bank of future business might induce the bank to consent to the representation.

Of course, all of this changes when Lawyer's representation of Bank as fiduciary of the Jones trust ends. Then, Model Rule 1.9, discussed in the text accompanying note 179, *infra*, does not interfere because there is no meaningful relationship between the causes of action. Lawyer runs the risk, however, of losing the opportunity to represent Bank in matters arising later in which she has drafted the will or trust, because she would then be acting as advocate against Bank, and both Bank and Smith could veto the representation. This would harm a lawyer with a significant estates practice, because trusts and estates lawyers do not get rich suing banks.

capacity. This result is unfortunate. While many lawyers are competent to represent a beneficiary adequately, matters of fiduciary administration are often so arcane that a specialist is particularly useful.<sup>154</sup>

Economics may make this result more probable than do the Model Rules. A trust lawyer may be unwilling to go against a bank because the suit might later interfere with her retention as lawyer for the bank when instruments she has drafted become effective. Trusts lawyers do not earn their livings suing banks. The question raised by the hypothetical situation and the answer to that question illustrate a belief long held by the author: rules of ethical conduct often provide the lawyer with an excuse to reject a client whose cause of action is unattractive (in this case, economically) to the lawyer.<sup>155</sup>

It is unfortunate that the effect of a basically sensible rule, when combined with the reality of the specialty practice, is to deny trust beneficiaries access to the lawyers best suited to their cases. Of course, there are always out-of-town lawyers, nonspecialist litigators who can master any case, estates lawyers who do not work closely with banks, and, in larger cities, lawyers who specialize in probate litigation. So, let us not weep too long.

A different type of problem arises when the lawyer both represents the bank that is trustee and acts as family lawyer for the beneficiaries of the same trust. There is a formal attorney-client relationship between the lawyer and the bank. Often, there will also be an attorney-client relationship between the lawyer and the family members who are beneficiaries.<sup>156</sup> That relationship may be *de facto* or *de jure*. The relationship is *de jure* if all parties agree that the lawyer represents the beneficiaries in the matter of the trust termination. The relationship is *de facto* if there is no such agreement, but there are facts and circumstances that justify the beneficiaries' conclusion that the lawyer represents them in the matter of the trust termination.<sup>157</sup> This conclusion might rest on the lawyer's conduct towards the beneficiaries or on prior relations between the lawyer and the beneficiaries.<sup>158</sup> The beneficiaries often are unaware that the attorney's representation of the trustee may

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154. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

155. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977).

156. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115.

157. See *id.*

158. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1983).

conflict with her duty to them.

Where one lawyer represents two clients, there is always a potential that she will find herself representing conflicting interests. The lawyer might dismiss Rule 1.7 as inapplicable, asserting that there is not direct adversity or material limitation, and ignore the issue of conflicts. That would be unwise. She might conclude that Rule 1.7, though currently inapplicable, might become applicable due to a potential conflict of interest. She might then explain the potential for conflict to the beneficiaries. The more sophisticated trustee will already be well aware of the problem. Then the lawyer might request the consent of both trustee and beneficiaries to her continuing in her dual role. In current practice, however, many lawyers will continue both representations without informing the beneficiaries of the potential problem.<sup>159</sup>

As long as the lawyer recognizes that a conflict may develop in the future, she should not be obliged, on pain of discipline, to explain the potential problem to the clients in advance. All commercial fiduciaries are aware of the potential for conflicts of interest and are well-equipped to protect themselves. If things run smoothly, the lawyer should be able to allow the *de facto* or *de jure* relationship with the beneficiaries to exist until such time as it runs afoul of Rule 1.7. If the potential conflict ripens into an actual one, the lawyer must perform a new Rule 1.7 analysis and may have to withdraw or seek to mediate. These matters are discussed in further detail later in this article.<sup>160</sup>

These problems have existed in the trusts and estates practice for many years.<sup>161</sup> The comment to Rule 1.7 recognizes this in the context of estate administration. It states:

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending on the circumstances, a conflict of interest may arise. In estate 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.<sup>162</sup>

Many of the conflict questions that arise in the estate adminis-

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159. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115.

160. See *infra* text accompanying notes 169-71.

161. See, e.g., Corneel, *supra* note 24.

162. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

tration are analogous to those that arise in trust terminations, as discussed in this article. For purposes of this article, the author takes what he believes to be the traditional view that the fiduciary, not the probate or trust estate as an entity, is the client.<sup>163</sup> In this setting conflicts may arise under either paragraph (a) or paragraph (b) of Rule 1.7.<sup>164</sup>

1.7(a) and 1.7(b) do not always coincide neatly with the realities of trust terminations. As a general rule, more acrimonious disputes are settled by litigation, and less acrimonious disputes are settled by informal negotiation. This traditional view is reflected in Rule 1.7 and the comment that follows.<sup>165</sup> The comment suggests that one lawyer can never represent both plaintiff and defendant in an action.<sup>166</sup> It would seem, therefore, that all judicial accountings fall within the Rule 1.7(a) definition of direct adversity simply because they involve a plaintiff and a defendant.<sup>167</sup>

In the area of trust terminations, however, it is not the case that only acrimonious disputes are settled judicially. The decision to litigate is often based on many factors, including the extent of the dispute, local rule or custom, and the presence of minor or unborn beneficiaries. On the other hand, an informal trust accounting normally signifies that the trust termination is undisputed, but this is not always the case.<sup>168</sup> The structure of Rule 1.7 does not always fit this reality of trust terminations. As a result, the question arises whether or not, in a judicial trust termination where the adversity is purely formal, one lawyer may represent both the trustee and the beneficiary. The parties are then only technically plaintiff and defendant. Is there a rigid prohibition against one lawyer's representing, even in a friendly judicial trust termination, both the nominal plaintiff and the nominal defendant? Are they, by definition, so directly adverse that it is always against public policy for one lawyer to represent both?

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163. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382. See generally NATIONAL FIDUCIARY ACCOUNTING STANDARDS PROJECT, UNIFORM FIDUCIARY ACCOUNTING PRINCIPLES AND MODEL ACCOUNT FORMATS (1980). A substantially similar version of the Uniform Principles can be found in *Proposed Uniform Fiduciary Accounting Principles and Model Account Formats*, 13 REAL PROP. PROB. & TR. J. 941 (1978).

164. Paragraphs (a) and (b) of Rule 1.7 set different standards to be applied to determine if a conflict exists.

165. See Aronson, *supra* note 14, at 810-11.

166. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

167. Rule 1.7(a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by Rule 1.7(b).

168. See Westfall, *supra* note 35.

The short and simple answer appears to be that the same lawyer may never represent both trustee and beneficiary in a judicial accounting. One could argue that in appropriate circumstances there is no direct adversity, that the nominal plaintiff-defendant status is without substance, and that 1.7(a) and 1.7(b) are both irrelevant. It could also be argued that the 1.7(a) prohibition is initially applicable, but that the curative provisions of that section are available to allow the dual representation. The first person to make these arguments may face significant opposition from those who find the notion that one lawyer can adequately represent plaintiff and defendant inconceivable.

Whether one lawyer may represent both trustee and beneficiary in informal settlements is a function of the degree of difference between their interests.<sup>169</sup> There may be direct adversity of such intensity that 1.7(a) alone is operative, and the lawyer is then unable reasonably to accept the representation. The fact that the settlement of the trust is informal may not be determinative of the conflict of interest analysis.

In those informal accountings where adversity is less intense, the lawyer may reasonably believe that the representation is appropriate, and the clients could consent after consultation. That is, 1.7(a) would still govern, but its curative provisions would permit the dual representation. In an informal settlement where the representation of one client may be only "materially limited" by the representation of the other client, 1.7(b) would govern. In that case, it might not be reasonable for the lawyer to believe that dual representation was appropriate, and the need for two lawyers would be indicated. If the reasonable belief standard is met, however, then the lawyer could represent both clients after consultation.

Common sense suggests that no lawyer would undertake de jure representation of both trustee and beneficiary in any judicial settlement of an account, irrespective of cordial relations between them. Nor would she represent both trustee and beneficiary in a settlement where there would be a material limitation on her ability to represent one of the clients. There is little reason in this area of the law for a lawyer to agree to function in a "materially limited" fashion, even if consent is available.<sup>170</sup> The risks to lawyer

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169. See Appendix A.

170. It is a reasonable assumption that in the wind-up of a trust there is potential for both small and large conflicts of interest between the parties to arise. The best way to analyze a small conflict of interest between a fiduciary and a beneficiary is to assume that we

and clients outweigh any potential benefits of continued representation.<sup>171</sup>

*Rule 1.9.* In order to bridge the gap between Rule 1.7 and Rule 1.9, one should note Rule 1.16, which deals with attorney withdrawal, that is, declining or terminating representation. Rule 1.16, as relevant to this discussion, requires an attorney to withdraw if the representation results in violation of another Model Rule.<sup>172</sup> For present purposes, when the conflict of interest exceptions to Rule 1.7 can no longer be satisfied, the lawyer must withdraw under Rule 1.16.<sup>173</sup>

The attorney may choose at the outset to withdraw from rep-

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are dealing with an estate rather than a trust. The executor of an estate is entitled to a fee. A reasonable fee might be three percent of the estate. In a million dollar estate this would be \$30,000. An estate of that size could easily be open for three years. The question is, when does the executor get paid? The historic starting point for answering the question is that the executor gets paid at the termination of the estate. This means that the \$30,000 stays in the estate for three years earning income for the estate's beneficiaries. Assuming a return of ten percent, there is a substantial pecuniary conflict to the extent that the executor is entitled to be paid earlier in the administration of the estate. When the estate opens, the conflict is only potential and clearly should not interfere in any way with the relationship between the lawyer and the fiduciary on the one hand and the beneficiaries on the other hand. If the fiduciary seeks early compensation, which happens with increasing frequency, then a conflict of interest exists to the extent that the availability of early payment lies in the discretion of the judge. At some point, the discretion will be exercised by reference to custom or court rule, and the conflict will disappear.

A lawyer, asked by a fiduciary to petition for early payment of the fee, clearly seems to have the duty to prepare the papers. Thereafter, a conflict of interest arises. Can the lawyer point out the potential imposition to the beneficiary? Can she encourage the beneficiary to resist the request? Can she warn the beneficiary of the conflict, such as it is, and suggest that the beneficiary consult another lawyer?

In answering these questions, the starting point has to be that the matter is not important enough to prevent the lawyer from functioning in a normal manner. Nor is it important enough to justify the retention of separate counsel. Indeed, the best resolution of the matter may lie in intermediation, which is discussed in the text accompanying notes 187 to 236, *infra*.

171. Lawyers often represent multiple trustees of the same trust. This is another example of potential multi-client conflicts. They arise in a more straightforward fashion, because there is no doubt that multiple attorney-client relationships exist. Such multiple representations are common and usually satisfactory. The interests of the trustees, however, can diverge. For example, if there has been some form of investment mismanagement that is attributable solely to the corporate fiduciary, then an individual family member acting as a co-fiduciary would likely need independent counsel. Once these potential conflicts become actual, the attorney must refer to Model Rule 1.7.

At that point, the bank is likely to turn to its general counsel for representation, and the beneficiaries to a third lawyer. The family lawyer who has done much of the day-to-day representation of the fiduciaries presumably would be entitled to substantial compensation for that work, and indeed, probably would participate in the uncontested aspects of the wind-up of the trust.

172. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).

173. *Id.* Rule 1.16(a)(1).

representing both parties, and the matter is then closed.<sup>174</sup> If the attorney seeks to continue representing one of the clients, then a further analysis must be made. The client from whose representation she has withdrawn becomes a former client. The lawyer must then consider Rule 1.9, which governs conflicts of interest between present and former clients. In most cases, Rule 1.9 forbids the continued representation unless the former client consents after consultation.

Rule 1.9 provides,

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.9 is straightforward. A lawyer may not represent an interest materially adverse to that of a former client if the representation arises out of the same or a substantially related matter. Additionally, the lawyer is prohibited from using information relevant to the prior representation in a manner adverse to the former client. Both prohibitions may be waived by the former client's informed consent. The Rule serves to preserve loyalty and avoid misuse of confidential information.<sup>175</sup>

Problems under Rule 1.9 commonly arise in two circumstances in the trusts practice. The first exists where an attorney has multiple clients involved with the same trust, and a conflict not within an exception to Rule 1.7 arises between them. Rule 1.16 requires that she no longer represent both parties; Rule 1.9 addresses the question whether or not she can continue to represent either.<sup>176</sup> The second circumstance creating problems under Rule 1.9 arises where the lawyer has represented a commercial fiduciary in matters involving a number of unrelated trusts and is now asked (perhaps as a guardian ad litem) to oppose the bank in unrelated

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174. See *id.* Rule 1.16.

175. See *id.* Rule 1.9 comment.

176. See generally *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24.



litigation.<sup>177</sup>

Rule 1.9 is of interest in trust terminations primarily in the first type of situation, that is, when a lawyer has represented multiple parties within the guidelines of Rule 1.7,<sup>178</sup> and there subsequently is discord. At that point, under Rule 1.9 the lawyer may not continue to represent any of the parties. The disqualification rule is, however, for the client's protection and so may be waived after consultation.<sup>179</sup> Waiver may be obtained when there is open conflict or when the conflict is still merely potential.<sup>180</sup> The classic conflicts of this first sort are between fiduciary and beneficiary, between multiple fiduciaries of the same trust, or between beneficiaries with different property interests in the same trust. These situations are discussed in more detail below.<sup>181</sup>

The second problem area under Rule 1.9 involves the specialist who represents a commercial fiduciary on a repeated basis in matters involving unrelated trusts, but who does not currently represent the fiduciary, and who would now oppose the fiduciary. This is a "pure" Rule 1.9 situation. That is, the bank is truly a former client, not a former client by virtue of a Rule 1.16 withdrawal. In that situation the lawyer may take a legal position contrary to that taken by the bank.<sup>182</sup> She could not, however, attack the bank for questionable policies that she discovered during the previous representations.<sup>183</sup>

In either the withdrawal or the former-representation situation, the fiduciary could, but would be unlikely to, waive the protection of the Rule.<sup>184</sup> Where the attorney's relationship with the bank is of long duration, and her relationship with the beneficiaries is solely with respect to the trust, the beneficiaries might be

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177. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115-32.

178. The representation might also take place as an intermediary under Rule 2.2.

179. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1983).

180. The stark formality of a waiver at the beginning of a representation of persons with potentially conflicting interests, presumably in writing, will certainly intrude on the gentility of the estates practice. It would be most intrusive if obtained from beneficiaries after a testator's death. For a discussion, in another estate administration context, of early presentation of a waiver of procedural rights, see Kahn & Gallo, *supra* note 12.

181. See *infra* text accompanying notes 187-236.

182. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1983).

183. For a discussion of the type of questionable policy discussed in the text, see Levmore, *Bank Trust Departments and "Float" Revenue: Finding the Proper Procedures*, 98 BANKING L.J. 817 (1981). See also E. HERMAN, CONFLICTS OF INTEREST: COMMERCIAL BANK TRUST DEPARTMENTS (1975).

184. The result might be different if the lawyer was a major source of business for the bank. Then the bank might waive the protection of the rule in order to please the lawyer as a source of business.

more likely to waive their protection, if any, under Rule 1.9.<sup>185</sup>

It is easy to see why a lawyer who represents banks on a regular basis might be reluctant to sue a bank on behalf of a disgruntled beneficiary. It is wise to avoid the snarls of conflict of interest rules, and changing sides, even though it often is not disloyal, smacks of disloyalty. Also, it is unwise to alienate one's best potential clients. The situation is suggestive of the separation of torts lawyers into a plaintiff's bar and an insurance defense bar.<sup>186</sup>

*Rule 2.2.* Model Rule 2.2 deals with the lawyer's role as intermediary. It deserves our consideration because it deals with representation of multiple clients and conflicting interests, requiring yet another conflicts of interest analysis by the trustee's lawyer. Rule 2.2 provides,

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the ef-

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185. The beneficiaries might well assume that the lawyer would inevitably prefer the bank's point of view. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1296-306.

186. The comment to Rule 1.9, states that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." The application of this rule to the trust termination situation is, however, less simple than the rule might make it appear. This is so because a curious situation arises when a bank hires the "family" lawyer to represent it in its dealings with the beneficiaries of a family trust. The situation involves the reversal of several "normal" role patterns.

In one role reversal, the client, i.e., the bank, is often more sophisticated than the lawyer. The bank routinely deals with trusts and legal questions of fiduciary responsibility. The lawyer, retained solely because of her association with the family, may be without special competence in the trust area. The bank officer will feel neither the need nor the inclination to disclose any secrets to the lawyer. The relationship is not one of intimate confidence and reliance by the client.

The lawyer, who was hired because of past representation of the family, no longer represents them. Precisely because of that prior representation, she now represents an interest at least potentially adverse to theirs. If there is a falling out between fiduciary and beneficiaries, it seems almost inevitable that the lawyer would either represent only the fiduciary or withdraw. This is so because the fiduciary is on the defensive and will seek to defend acts about which the lawyer is likely to have special knowledge. No sensible fiduciary would agree to a lawyer crossover in this situation, and a system allowing that would condone disloyalty. Withdrawal and payment for services rendered up to that point seems inevitable. The long-term association with family interests forecloses the lawyer's continuing to represent the fiduciary. Having been privy to the confidences of the fiduciary forecloses the lawyer's continuing to represent the family.

When the lawyer has a previous working relationship with the fiduciary and is distant from the beneficiaries, her continuing allegiance to the fiduciary creates fewer problems.

fect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

The Rule allows a lawyer, under certain conditions, to represent multiple clients with conflicting interests. Within its somewhat restrictive framework, Rule 2.2 is a meaningful expansion of the current limitations on the ability of one lawyer to represent multiple clients with conflicting interests in the same matter.

Under the CPR, the ethical lawyer who represents clients with conflicting interests has to fit one of several limited categories. For the most part, these have already been discussed.<sup>187</sup> The only category not discussed is the very limited one of arbitrator-mediator set out in EC 5-20.<sup>188</sup> EC 5-20 allows a lawyer to arbitrate or mediate client differences under such limited circumstances that it has had virtually no meaning in the trusts and estates practice.<sup>189</sup>

Rule 2.2 apparently would allow a lawyer to represent clients

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187. See *supra* notes 117-30 and accompanying text.

188. EC 5-20 reads in its entirety,

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

189. See Frank, *The Legal Ethics of Louis D. Brandeis*, *supra* note 124, at 683.

with conflicting interests in very limited new circumstances. Rule 2.2 clearly allows a lawyer to act in nonlitigation situations as an intermediary between clients with potentially conflicting interests. It arguably also allows a lawyer to act as intermediary between clients with actually conflicting interests in noncontentious and non-antagonistic, nonlitigation situations. Rule 2.2(a)(3) seems to allow the lawyer to act as intermediary when she believes it is appropriate and will not have an adverse effect; language in the comment also indicates that this interpretation is correct. The comment approves "common representation where the clients' interest are substantially *though not entirely* compatible."<sup>190</sup>

It seems to the author that Rule 2.2 and its comment do not directly and concretely approve common representation of conflicting interests in mediation. The Rule and comment do, however, lay the base for future approval of such representations. Most broadly construed, the Rule does approve such representations under appropriate circumstances—those that are noncontentious and hold a substantial promise of successful conclusion.<sup>191</sup> To understand Rule 2.2, it is helpful to compare the lawyer with the fiduciary. The lawyer who acts as an intermediary is much like the fiduciary who must make decisions in an impartial manner without favoring either income or principal beneficiaries.<sup>192</sup>

Under Rule 2.2, before a lawyer may act as an intermediary, i.e., before she may represent potentially or actually conflicting interests with the goal of harmonizing them, several threshold requirements must be met: (1) consultation with and consent by the client; (2) reasonable belief by the lawyer that the clients' best interest will be served, that each client will be able to make informed decisions as the matter progresses, and that there is little risk to the clients in the arrangement if a common goal cannot be reached; and (3) reasonable belief by the lawyer that she can act impartially

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190. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(a)(3) comment (1983) (emphasis added). "The general rule prohibiting representation of clients with conflicting interests by a single attorney has never been so broadly stated as to preclude an attorney from ever accepting employment from two different persons merely because of a conflict of interest." *Kreis v. Block*, 75 A.2d 523, 524 (D.C. 1950), *quoted in* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 notes, at 115 (Proposed Final Draft 1981). "In each of these instances there is a possibility of conflict, *if not actual conflict*, in the interests of the persons represented, but it cannot be said as a matter of law that an attorney is prohibited from acting for both parties in such cases with the knowledge and consent of both." *Lessing v. Gibbons*, 6 Cal. App. 2d 598, 606, 45 P.2d 258, 261 (1935) (emphasis added), *quoted in* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 notes, at 115 (Proposed Final Draft 1981).

191. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 & comment (1983).

192. *See id.* Rule 2.2(a)(3).

and without affecting her other responsibilities to the clients.<sup>193</sup>

It is crucial to the intermediation process that the client be able to make adequately informed decisions throughout the process.<sup>194</sup> The elimination of additional lawyers places more responsibility on the clients. Therefore, Rule 2.2 wisely requires the lawyer to "consult with each client concerning the decisions to be made and the considerations relevant in making them."<sup>195</sup> Without such a requirement intermediation cannot work. The Rule also provides for mandatory withdrawal if any of the clients request it, or if the threshold conditions for intermediation cease to exist.<sup>196</sup>

After the lawyer has withdrawn from the role of intermediary, she may not represent any of the clients "in the matter that was the subject matter of the intermediation."<sup>197</sup> Although Rule 2.2 makes no explicit statement on the question, one assumes that the withdrawal obligations of Rule 1.16 apply, though Rule 2.2 provides a more demanding withdrawal standard than Rule 1.16, and a former-client analysis under Rule 1.9 must still be made. Therefore, the lawyer will have to withdraw completely in most cases unless she can obtain the former client's consent.

There seem to be several policies behind this modification of the lawyer's adversarial role: (1) promoting efficiency by reducing cost and complexity;<sup>198</sup> (2) improving access to legal representation by reducing costs (even if the representation is less than fully adversarial and is thus in some sense impaired);<sup>199</sup> (3) improving the public image of the bar<sup>200</sup> by promoting a result that many clients seem to want; and (4) keeping up with changes within the profession, which seem to be ahead of the professional responsibility apparatus on this question.<sup>201</sup> Intermediation is a useful and wholesome step forward. It is the author's belief, however, as the following analysis will show, that the concept has somewhat lim-

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193. See *id.* Rule 2.2 & comment.

194. Similarly, information is the *sine qua non* of the trust accounting. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-83.

195. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(b) (1983).

196. *Id.* Rule 2.2(c).

197. *Id.*

198. The desire for efficiency in the world of estate administration is discussed in many places. For an example, see Martin, *Justice and Efficiency Under a Model of Estate Settlement*, 66 VA. L. REV. 727 (1980).

199. See Legal Ethics Forum, *Representation of Multiple Clients*, 62 A.B.A. J. 648 (1976).

200. The public image of the bar is a factor in legal ethics. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981).

201. See Legal Ethics Forum, *supra* note 199.

ited utility in the area of trust terminations.

The specifics of intermediation are quite interesting. Most of the examples given in the comment to Rule 2.2 involve representing clients with different claims to the same assets, e.g., creators of a new business, creditors of a troubled business, takers of an estate, or parties to a divorce.<sup>202</sup> To determine the permissibility of intermediation in a given situation, one must examine in context the various threshold requirements of Rule 2.2. The Rule requires that the lawyer explain to each client "the implications of the common representation, including the advantages and risks involved."<sup>203</sup>

It is useful at this point to look at the role of the lawyer in the termination of a trust. During the time the trust has been in existence, the lawyer has probably been counsel of record to the trustee and may have rendered advice on questions of fiduciary's administration or distribution. She is most likely to have rendered advice if the trustee has encountered problems, or if there has been some reason to account or make a partial payment of principal.

At the termination of the trust, the trustee must see to the preparation of a formal accounting and either a petition or a "receipt and release."<sup>204</sup> Ordinarily, this is lawyer's work.<sup>205</sup> If the account shows questionable conduct on the part of the trustee, then the trustee will surely need a lawyer to help avoid or minimize his liability to the beneficiaries.<sup>206</sup> Moreover, the language of the instrument or the circumstances existing at termination may require a judicial proceeding to determine the meaning or application of the trust's terms.<sup>207</sup> Again, this is lawyer's work. Until the lawyer knows what the fiduciary has done, which may well not be until after the account has been prepared, the lawyer cannot know the advantages and risks that might be involved in mediation. It therefore appears that, through the point of preparing the account, the lawyer must work for the trustee alone, reserving judgment as to whether she can also represent the beneficiaries. If there is a problem in the fiduciary's administration, she must represent only the

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202. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1983).

203. *Id.* Rule 2.2(a)(1).

204. A receipt and release is a document showing the receipt of all funds by the beneficiary and a release of the fiduciary from further liability. See Westfall, *supra* note 35. See generally A. LORING, *supra* note 33, § 116.

205. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-86.

206. See *id.* at 1384. See generally *Limiting Future Actions After Trust Account Approval*, *supra* note 65, at 503.

207. G. BOGERT & D. OAKS, *supra* note 39, at 567-68.

trustee. If the account does not present any problems, then she may also work as an intermediary between the fiduciary and the beneficiary.<sup>208</sup>

The second requirement of Rule 2.2(a)(2) is that the lawyer hold a reasonable belief "that the matter can be resolved on terms compatible with [all] the clients' best interests."<sup>209</sup> Often the lawyer has no basis for any belief on this point until the account has been prepared and proves to be free of any question of breach of duty by the trustee. Only then is mediation appropriate, because there are no problems. At that point efficiency is not served by the beneficiaries' having a lawyer. They do not need one and often do not hire one.<sup>210</sup>

A problematic administration might seem initially to be intermediable. It is not at all clear, however, that mediation will work when the beneficiary has a complaint about the trustee's conduct, especially where the fiduciary is an institution. Banks rarely admit liability or settle claims involving their own liability. This is the case because courts are reluctant to punish fiduciaries who act, however unsuccessfully, in good faith.<sup>211</sup> Also, commercial fiduciaries must resist every attempt at surcharge to avoid constant litigation by beneficiaries complaining about investment performance.

When something is amiss, a beneficiary ordinarily may obtain redress only by prosecuting a successful case against the fiduciary. In that case, the beneficiary must retain his own counsel. The lawyer for the trustee will not be able to settle the dispute by intermediation.

A third requirement under Rule 2.2(a)(2) is that a lawyer who wants to act as an intermediary must reasonably believe "that each client will be able to make adequately informed decisions in the matter."<sup>212</sup> This requirement, too, may interfere with the use of intermediation in trust terminations. It is not at all clear that in

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208. See generally Fleming, *supra* note 72, ¶ 71.600.

209. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(a)(2) (1983).

210. That beneficiaries often do not retain lawyers is noted in *City Bar Ethics Opinion*, N.Y.L.J., Sept. 22, 1982, at 3, col. 1. Since beneficiaries rarely hire their own lawyers, since there is no sharing of the fee, and since the trustee pays the fee out of the trust assets before distributing the net to the beneficiaries, it seems that the primary purpose of intermediation is to provide a way for the fastidious lawyer to provide comfort and advice to the beneficiaries without running afoul of a disciplinary stricture against representing inharmonious interests.

211. See *In re Brownell*, 112 Misc. 2d 719, 447 N.Y.S.2d 591 (Delaware County Ct. 1981).

212. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(a)(2) (1983).

any fiduciary accounting matter the typical beneficiary is able to make an "adequately informed decision." An accounting is far too complex for the average beneficiary to understand.<sup>213</sup>

The cases take the position that an account constitutes full disclosure, but the truth is that, while fiduciary accounts may provide full disclosure, they do not provide adequate understandable information absent extensive explanation by a knowledgeable person.<sup>214</sup> Thus the only way to cross this threshold of Rule 2.2(a)(2) is for the lawyer or the accounting fiduciary to provide extensive interpretation of the account. They may be unwilling to do this for reasons of time or, as discussed immediately below, out of a desire to protect their own interests.

There is yet another requirement of Rule 2.2 that may make it inapplicable to trust terminations. Rule 2.2(a)(2) requires that there be "little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful." Due to the complexity of fiduciary accountings, many beneficiaries fail to recognize any trustee shortcomings. In a formal adversary proceeding, neither the lawyer who represents the trustee nor the trustee has an obligation to explain the account to the beneficiary.<sup>215</sup> If they do offer an explanation, it is out of a sense of decency or as a matter of business judgment. Often, to explain is to invite litigation. Therefore, intermediation always poses a risk for the trustee when there is cause for beneficiary complaint, because intermediation increases the beneficiaries' knowledge about their rights. Most fiduciaries would agree to intermediation only where their administration has been exemplary. Again, efficiency<sup>216</sup> is not served by intermediation, because, when the administration has been satisfactory, the beneficiaries are unlikely to hire a second lawyer.<sup>217</sup>

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213. See generally NATIONAL FIDUCIARY ACCOUNTING STANDARDS PROJECT, *supra* note 163. A fiduciary who wishes to be released from all liability to his or her beneficiaries must obtain a release from the beneficiaries based on full disclosure. Full disclosure consists of providing a detailed fiduciary account that shows every financial transaction during the period covered by the account. Such accounts are very long, complicated documents that few lawyers, much less nonlawyers, can understand. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-86.

214. See generally *Limiting Future Actions After Trust Account Approval*, *supra* note 65.

215. See Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981). See generally Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C.L. REV. 181 (1981).

216. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 32.

217. Presumably the preceding discussion has made many readers uncomfortable: a system based on full disclosure that discloses very little, a suggestion that "wise" fiduciaries



Rule 2.2(a)(3) further requires that the lawyer reasonably believe "that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients." This threshold requirement of impartiality is most important. The lawyer must believe that she can harmonize what must be a minimal number of conflicts between clients to whom she owes a duty of loyalty.<sup>218</sup> If harmony cannot be attained, then resolution must occur within an adversary framework. Impartiality thus becomes crucial—both the reasonable initial belief that the lawyer can be impartial and the continuing requirement of actual impartiality. Without impartiality, intermediation is impossible.<sup>219</sup>

Rule 2.2(b) contains yet another threshold requirement for intermediation. It requires the lawyer-intermediary to "consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions." As discussed above, a constant flow of information to the client is crucial to intermediation.<sup>220</sup> Intermediation rests, in large part, on the assumption that the informed and competent client will protect his or her own interests. This self-help is necessary because the lawyer-intermediary role is incompatible with the lawyer's traditionally single-minded advocacy of one party's interests.<sup>221</sup>

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will seek to keep beneficiaries in the dark to minimize liability. The author suggests one solution—understandable fiduciary accounts that provide adequate information to non-specialists. Some progress is being made towards this goal. See generally NATIONAL FIDUCIARY ACCOUNTING STANDARDS PROJECT, *supra* note 163; J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-86.

More complex than the issue of incomprehensible accounts is that of fiduciary-beneficiary adversity. There is an inevitable duality in the relationship. During the administration of the trust the fiduciary must act solely for the beneficiary. When the fiduciary seeks the settlement of the account, however, he must act solely for himself. At the point at which the fiduciary must protect himself, the beneficiary must be warned. Perhaps every fiduciary account might carry the label, "Warning: the Surgeon General has determined that this account may be dangerous to your fiscal well being!"

Of course, once it becomes clear that the fiduciary has acted properly and has not imposed upon the beneficiaries, things return to normal. All parties have a common goal—the efficient winding-up of the trust with a minimum expenditure of time and money. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-86.

218. Cf. Dobris, *Equitable Adjustments in Postmortem Income Tax Planning: An Unremitting Diet of Warmths*, 65 IOWA L. REV. 103, 107-08 (1979) (discussing duty of impartiality).

219. As to impartiality, see 2 A. SCOTT, *supra* note 3, § 183 and 3 *id.* § 232. See also J. SHEPARD, *THE LAW OF FIDUCIARIES* (1981).

220. See *supra* note 195 and accompanying text.

221. If the lawyer is to continue to represent one client, it ordinarily should be the

The comment to Rule 2.2 deals with fees in intermediation:

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.<sup>222</sup>

The shared fee structure suggested in the comment is worthy of note for two reasons: (1) it may make some attorneys more comfortable with the nontraditional process of intermediation, and (2) Rule 2.2 affords the attorney who follows its guidelines a degree of protection from claims by nonclients.

Many lawyers may be uncomfortable in the intermediary's role of representing conflicting interests. The comment's approval of the lawyer's taking fees from both clients clearly underscores the propriety of the dual representation. Moreover, the shared fee structure focuses the attention of all parties on the special nature of the relationship.

The shared fee also serves as an emblem of intermediation. It is the best evidence of the lawyer's role as intermediary. Conversely, a party who pays nothing to the lawyer may find it difficult to establish a *de facto* attorney-client relationship under the Rule.<sup>223</sup> The lawyer is, in all likelihood, protected from a claim that she owed a duty to a party who paid her no fee. The shared fee device, however, like many other aspects of Rule 2.2, is incompatible with current practices in the area of trust termination.

Traditionally, the trustee pays the lawyer a fee consisting of a small percentage of trust principal.<sup>224</sup> As discussed above, the beneficiaries typically do not retain a lawyer.<sup>225</sup> They ordinarily satisfy themselves with information, if not advice, from the trustee's lawyer. The trustee's lawyer does not charge the beneficiaries for any time spent with them. It is understood to be part of the represen-

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trustee, because the trustee is more likely to have divulged confidences and secrets to the lawyer.

222. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment, at 64 (1983).

223. See Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 658 (1982).

224. Ultimately, the fee reduces the amount of property going to the beneficiaries, but this is not categorized as a payment by the beneficiaries. See generally J. PRICE, *CONTEMPORARY ESTATE PLANNING* § 1.15 (1982).

225. See *supra* note 210.

tation of the trustee.<sup>226</sup> Only if the beneficiaries feel a need for independent counsel do they hire another lawyer, typically on an hourly basis.<sup>227</sup> The beneficiaries pay that hourly fee directly. It is not a trust expenditure, and it does not operate to reduce the fee of the trustee's lawyer.<sup>228</sup>

Should the lawyer for the trustee act as an intermediary, the traditional fee pattern presumably would change. Paradoxically, the cost of an uncontested trust settlement might increase in intermediation, because the lawyer may do more work and accept more responsibility.<sup>229</sup> The lawyer might then be entitled to her customary fee from the fiduciary plus a fee from the beneficiaries. Intermediation, a concept designed to lower costs, may raise costs absent a restructuring of customary fee arrangements.<sup>230</sup> Finally, even if the fee structure is changed, there is no direct economic incentive for the trustee to seek intermediation; any savings accrue to the trust fund and its beneficiaries, not to the trustee.

The comment imposes yet another threshold requirement for intermediation that may make it unavailable in some trust terminations. It states that "a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent."<sup>231</sup> In any jurisdiction where fiduciary accounts are settled judicially, intermediation may therefore often be unavailable because such a settlement is technically a litigation, and there may be possible grounds for contention between the parties.<sup>232</sup>

The fiduciary who agrees to intermediation runs a significant risk that the beneficiaries will later claim that the settlement was not binding because they were not adequately represented by the intermediary,<sup>233</sup> or they did not know the nature of the proceedings.<sup>234</sup> Once again, the use of intermediation as a tool in trust ter-

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226. As to fee practices in the probate area, see generally Martin, *supra* note 24.

227. See generally J. PRICE, *supra* note 224, § 1.15.

228. Moreover, in such a case the negotiations may be too contentious for intermediation.

229. See generally Martin, *supra* note 24.

230. Such a general restructuring may be inevitable anyway. See generally J. PRICE, *supra* note 224, § 1.15.

231. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1983).

232. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-84. If not contentious, it is tempting to argue that a judicial settlement is often a litigation in form only and that it is foolish to observe form over substance.

233. See *Limiting Future Actions After Trust Account Approval*, *supra* note 65. There is also the risk of a malpractice suit. See Johnston, *supra* note 223, at 658.

234. See *Limiting Future Actions After Trust Account Approval*, *supra* note 65.

minations seems ill-advised.<sup>235</sup>

Intermediation stands on three legs: impartiality, information and withdrawal. The primary purpose of Rule 2.2 is to define a safe harbor for the lawyer as intermediary in order to encourage intermediation. The Rule requires affirmative conduct by the lawyer to reach the safe harbor. Intermediation is a very useful concept, but it is apt to prove of little value in the trust termination setting.<sup>236</sup>

*Summary of the MRPC Approach to Conflicts of Interest.* The primary goal of the Model Rules is to preserve the lawyer's independent judgment and her loyalty to the client. The lawyer must avoid conflicts between interests that are directly adverse or that materially interfere with the lawyer's independent professional judgment. Client consent cures dual representation problems except where there is an absolute prohibition against the representation or where a disinterested lawyer would say that the client should not agree to the dual representation. There can be no dual representation in contentious litigation.<sup>237</sup> There can be no representation of two parties on the same side of litigation when

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235. Intermediation is inappropriate for other reasons as well. The lawyer's duty of confidentiality also operates to bar intermediation except where the fiduciary has done an acceptable job. The comment makes clear that a lawyer must maintain all client confidences while acting as intermediary. If the trustee's performance is in any way vulnerable to attack, then to the extent that that vulnerability is not set out in the account, the duty to maintain client confidences bars the lawyer from divulging it. To the extent it is apparent from the account, the duty of loyalty often requires that the lawyer not discuss it.

The comment suggests that the impartiality required for intermediation may be impossible for the lawyer to maintain where she has a long-term relationship with one client and a short-term relationship with another. In many trust terminations, the attorney has had a long-term relationship with both the institutional trustee and the beneficiaries. Even if the longer relationship was with the beneficiaries, both the bank and the lawyer may strongly desire that the lawyer continue to represent the bank. Again, it seems that intermediation cannot be used to rationalize the lawyer's position. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1983).

236. If intermediation is to be used in trust terminations, then the lawyer's role is crucial. As discussed above, after the account is prepared the lawyer must decide whether the trustee's conduct is sufficiently proper to justify an uncontested settlement. Only if it is can she consider suggesting intermediation with its attendant risks to clients and professional reputation. The attorney may find that these risks are justifiable only for those beneficiaries with whom she has had a previous professional relationship.

Reliance on impartiality and information parallel the trust model. That is, the trust beneficiary is protected in large part by the requirements that the fiduciary keep the beneficiary informed, and that the trustee act impartially. So too, the client of the lawyer-intermediary is protected by an information and impartiality rule.

237. Under the 1981 version of the Model Rules, a lawyer arguably could represent both sides in a noncontentious litigation under appropriate circumstances. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 notes, at 55 (Proposed Final Draft 1981).

their positions are incompatible or when there is a possibility of substantially different settlements. It is proper to represent parties on the same side of the litigation if their differences are insubstantial. A lawyer may not sue in one matter a client whom she currently represents in an unrelated matter unless she obtains the consent of that client. A lawyer may not sue a former client in the same or a substantially related matter if the present client's interest is materially adverse to the former client's, unless the former client consents. A lawyer may not use information obtained from a former client to the disadvantage of the former client without that person's consent.

A lawyer may act as an intermediary. She may represent persons as an intermediary in nonlitigation situations where their interests are potentially conflicting and perhaps when they are actually conflicting. Before a lawyer may act as intermediary she must explain the implications and risks of intermediation to all clients and obtain their consent. Moreover, the lawyer must hold the reasonable belief that the best interests of all the clients will be served, that all the clients can make adequately informed decisions regarding the subject of the intermediation, that there is little risk to any client if the goal of the intermediation is not reached, and that the lawyer can act impartially and without effect on her other responsibilities to the clients. The lawyer-intermediary must withdraw if any client requests it or if any of the above conditions cease to exist. After withdrawal, the lawyer may not represent any party to the intermediation unless such representation of one client will be proper as to the intermediation clients no longer represented.

The Model Rules are derived from and closely related to the CPR. There appears to the author, however, to have been a slight shift of focus. The primary concern of the MRPC is the preservation of independent professional judgment. This idea is derived from Canon 5 of the CPR. Loyalty to the client and the safeguarding of information, in that order, are only slightly less important. This seems to indicate a slight movement towards what might be described as a solicitor's test and away from a barrister's test. That is, the court lawyer's first concern—loyalty to the client—may be yielding to the desk lawyer's first concern—preservation of independent professional judgment. The concern for the appearance of propriety seems to have lost its place in the ethics firmament. That is all to the good.

On balance, the Model Rules are an improvement of the pro-

fession's conflict of interest standards. They are more realistic and more useful than the CPR. If a profession is to be self-policing, its rules must, of course, be sensible and understandable. The Model Rules meet these criteria.

*Dealing With Unrepresented Persons.* Another important issue in the ethics of trust terminations involves the lawyer's dealings with unrepresented persons. This situation raises issues of overreaching<sup>238</sup> and overzealous representation.<sup>239</sup> Moreover, these issues may shade imperceptibly into questions of the lawyer's representing clients with conflicting interests. When a lawyer deals on behalf of a client in a matter involving an unrepresented person, a de facto attorney-client relationship<sup>240</sup> may arise between the lawyer and the unrepresented person. At that point, the lawyer is involved in the de facto representation of conflicting interests. This problem, like many others in the trusts and estates practice, arises because of the ties that often exist between the lawyer and several of the concerned parties.<sup>241</sup>

Two classic factual situations in the trust termination area create this problem. The first is where the lawyer represents a trustee whose performance is less than perfect. The trustee's desire to settle the account may result in pressure on the lawyer to improperly induce the beneficiaries to settle.<sup>242</sup> This situation itself typically generates two problems worthy of discussion.

The first problem is how to protect the beneficiary from overreaching and from the inadequate representation that results when a lawyer improperly represents conflicting interests.<sup>243</sup> The second is the procedural question whether a lawyer for the fiduciary may informally submit to the beneficiary the papers initiating a judicial accounting, or whether the lawyer must formally serve the papers on the beneficiary.<sup>244</sup>

The following example illustrates the problem of the lawyer

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238. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 176; see also Comment, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456 (1972).

239. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 119. There may also be a problem of solicitation, which is beyond the scope of this article.

240. The de facto relationship may be actual or constructive. See Johnston, *supra* note 223.

241. See generally PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115.

242. See *id.* at 115, 120-21; J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 1382-84; Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, *supra* note 215.

243. See *infra* text accompanying notes 245-47.

244. See *infra* note 251.

representing a trustee who performed poorly. Assume that Lawyer is "the family lawyer," Parent is the trustee, and Child is the trust beneficiary. Parent-Trustee has done a poor job of investing, and, upon termination of the trust, wants to be released without liability and without Child becoming aware of the mismanagement. If Child is not formally represented in the termination, what ethical questions are presented for Lawyer? Must she look to conflict of interest rules governing representation of multiple de facto or de jure clients, or to the rules governing a lawyer's dealing with unrepresented persons?<sup>245</sup> The thoughtful lawyer will look to both. The best protection, however, would be for her to clarify the relationship between Lawyer and Child.<sup>246</sup>

The second classic factual situation in the trust termination area is the presentation of an irrevocable trust to the beneficiary who has received a substantial payment of principal outright.<sup>247</sup> To illustrate this situation, assume that a trust is terminated in favor of a person who is possibly still in need of trust protection. May the lawyer for the parent of a twenty-one year old who has just received five million dollars from a terminating trust propose a new irrevocable trust to the beneficiary at the request of the parent?<sup>248</sup>

The CPR offers little guidance in resolving ethical questions when dealing with the unrepresented person. Canon 7, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," is all the CPR has to offer. Neither the Canon, nor the ECs and DRs thereunder, offer useful guides to lawyer conduct.<sup>249</sup> DR

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245. In practice, it may be hard to determine when a de facto attorney-client relationship has arisen. An appearance of impropriety analysis might be made under the CPR, but not under the Model Rules.

246. See W. FISHER, *supra* note 13, at 43.

247. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 120-23; see also *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

248. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 119; see also *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

249. Properly diligent representation, as a goal, has a built-in problem—*overzealous* representation. This is especially problematic when the opponent is unrepresented. See Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, *supra* note 215. See generally Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, *supra* note 215. Any rule that keeps a lawyer on one side of a dispute inevitably has the effect of encouraging litigants to hire counsel. EC 7-18 provides,

If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

(footnote omitted).

7-104(A)(2) states that a lawyer shall not “[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel.” The Code does, however, allow some communication with an unrepresented litigant so long as no advice is given. How much communication it allows is unclear. For example, the simple question whether a lawyer may informally submit pleadings or papers to an opponent arises frequently. Yet to this day it remains uncertain what the answer is under the Code.<sup>250</sup> Thus, conservative lawyers often insist on having the papers formally served on beneficiaries in fiduciary accountings that are to be settled judicially.<sup>251</sup>

Much of the CPR has no relevance to situations involving unrepresented persons unless it is assumed that the unrepresented person has become a de facto client of the lawyer and is a victim of the lawyer’s mistaken representation of conflicting interests. Canon 5, “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client,” is the primary canon dealing with such conflicts of interest. It seems that Canon 5 and the ECs and DRs thereunder really are not addressed to the lawyer who deals with the unrepresented party. Use of Canon 5 to control lawyer conduct in this type of situation may, however, curb overreaching and overzealous representation. To the extent it is relevant, it has been discussed above.<sup>252</sup>

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DR 7-104(A)(2) goes on to state that a lawyer should not “[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.” (footnotes omitted).

250. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 notes (Proposed Final Draft 1981).

251. As the notes to the 1981 draft of the Model Rules state,

For example, although it is a common and often necessary practice, the propriety of a lawyer’s submitting papers for the approval or signature of an unrepresented person has been unclear. Compare ABA Formal Opinion 102 (1933) (permissible for lawyer to draw up settlement papers in workmen’s compensation dispute and submit to employee on behalf of client employer) with ABA Informal Opinion 1255 (1972) (improper to submit a responsive pleading to unrepresented defendant in a divorce action even when accompanied by advice that defendant seek independent counsel). The propriety of a lawyer’s conduct in such circumstances depends largely on whether it was subsequently deemed a mere “communication” (which is proper) or implicit “advice” (which is improper). Compare *In re Schiff*, 542 S.W.2d 771 (Mo. 1976); ABA Informal Opinion 1269 (1973) (permissible to submit a form waiving issuance of summons and entry of appearance to unrepresented defendant in divorce action) with ABA Informal Opinion 1140 (1970) (improper to request unrepresented defendant in domestic relations case to sign prepared form waiving issuance of summons, and providing for voluntary submission to jurisdiction and venue).

*Id.* at 167.

252. See *supra* note 117-28 and accompanying text.



The Model Rules address in a very abbreviated fashion the problem of the unrepresented person. They do so in Rule 4.3, which provides,

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The basic goal of Rule 4.3 is to ensure that the unrepresented person is aware that the lawyer is a partisan.<sup>253</sup> The Model Rules do not directly address the problem of overzealous representation or overreaching<sup>254</sup> when a lawyer is dealing with an unsophisticated, unrepresented lay opponent.

The comment to Rule 4.3 is as brief as the Rule. It too deals solely with clarifying the lawyer's role in the mind of the unrepresented person.<sup>255</sup> To gain some understanding of how Rule 4.3 relates to overreaching, one must turn to the notes following the 1981 version of Rule 4.3.

The notes state that a lawyer may communicate with an unrepresented person and that it is proper for a lawyer to submit papers and pleadings "for the approval or signature of an unrepresented person."<sup>256</sup> The notes label such a practice "common and often necessary."<sup>257</sup> They state further that "no misconduct is present where a lawyer provides an accurate statement of the law, or prepares papers for settlement or trial, so long as it is made clear that the lawyer does not act as counsel for the unrepresented person or otherwise purport to advance the latter's interests."<sup>258</sup> The Model Rules thus arguably permit more interaction between an attorney and an unrepresented opponent than the CPR. The Model Rules seem to allow the lawyer for the accounting trustee to deal with the unrepresented beneficiaries in a limited but sensible fashion without risking discipline for overreaching.<sup>259</sup> This, however,

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253. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 comment (1983).

254. *But cf. id.* Rule 1.2 comment (dealing with fraud).

255. See *id.* Rule 4.3 comment.

256. *Id.* Rule 4.3 notes, at 167 (Proposed Final Draft 1981).

257. *Id.* For instance, the lawyer for the accounting trustee may wish to talk to unrepresented beneficiaries in order not to alienate them.

258. *Id.*

259. Or risking seeing the transaction set aside. See *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

assumes that the notes to the 1981 version of the MRPC will prove to be recognized as an authoritative interpretation of the Rule.

Another problem in dealing with the unrepresented beneficiary is the risk that a de facto lawyer-client relationship will arise.<sup>260</sup> The Model Rules arguably lessen the risk of such an occurrence. A communication that, under the CPR, is tainted with impropriety from the outset is more open to characterization as a de facto lawyer-client relationship.<sup>261</sup> A communication that can be justified under Rule 4.3 is less open to such characterization. Thus it may be that the Model Rules, in allowing limited communication between the lawyer and an unrepresented opponent, reduce the risk of a claim that a lawyer-client relationship has developed. One hopes that lawyers who follow the notes to Rule 4.3 will find a safe harbor.

The risk remains, however, that any communications, approved or not, will be characterized in some negative fashion. The only sure way for a lawyer to avoid a post-settlement claim of either de facto representation or overreaching is to interact very little with the unrepresented beneficiary.<sup>262</sup>

These problems of de facto representation of clients with conflicting interests and of overreaching may be academic in the informal accounting situation,<sup>263</sup> because the lawyer who advises her trustee client to account informally probably has already concluded that the trust accounting is free of problems. The beneficiary who has no cause of action cannot be harmed by failing to pursue the trustee. The lawyer who is involved in such an informal settlement can take "risks" and deal in an informal way with the unrepresented beneficiary. Similarly, if the blameless trustee is accounting judicially because of custom or law, the lawyer can, if she wishes, seek an informal waiver of citation. As soon as there is any question of the propriety of the fiduciary's conduct, however, the lawyer should deal most fastidiously with the beneficiaries and should seriously consider a judicial accounting with formal service of process.<sup>264</sup>

The second classic situation described above, which involves

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260. See Johnston, *supra* note 223, at 658.

261. The communication is tainted with impropriety because it cannot be justified under the CPR.

262. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 notes (Proposed Final Draft 1981). A third risk is that the beneficiary may claim that he never understood the nature of any waiver of citation.

263. Fleming, *supra* note 72, ¶ 71.600.

264. See W. FISHER, *supra* note 13, at 45-48.

presenting an irrevocable trust to the beneficiary who has received a substantial amount of money, is a curious business.<sup>265</sup> Hypothetically, Parent could hire Lawyer to persuade Child, a trust beneficiary, to put his trust proceeds into an irrevocable trust.<sup>266</sup> Lawyer could identify herself as the representative of Parent and could say, in effect, "Junior, I am here as a lawyer for your parent with a goal of having you sign this trust agreement that will tie up your property in knots against your interest. I hope you will retain a lawyer to review this. Now, let me tell you about this trust that I have prepared. Remember, I am not your lawyer." If Child signs the trust under these circumstances, has Lawyer overreached the unrepresented child, or has she represented the conflicting interests of both Parent and Child?

From one point of view, there is no way Junior could conclude that Lawyer represented him. Then, conflict of interests analysis would seemingly be irrelevant. The problem is purely one of overreaching, and the Model Rules simply do not deal with the question.<sup>267</sup>

Even with such a dramatic disclaimer, however, one could argue that Lawyer *was* representing Junior. That is, it might be said that the relationship between a lawyer and the grantor of a trust is inherently and inevitably a lawyer-client relationship, and that no contrary characterization of the transaction could be recognized. Then the conduct problem would be one primarily of the lawyer's representing conflicting interests.<sup>268</sup>

The question whether the hypothetical situation involves overreaching or conflicts of interest is circular. When an unrepresented person is overreached by a lawyer, the lawyer is implicitly giving advice, albeit bad advice. When the lawyer gives advice to persons with adverse interests, she is representing conflicting interests, and the matter is then subject to a conflict of interests analysis.

If the lawyer for Parent in this situation presents a trust to Child, it seems clear that a lawyer-client relationship arises between Lawyer and Child-Grantor. At that point, if the conduct of

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265. See *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

266. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 119, 122-23.

267. One is then left to state law doctrines such as equitable overreaching. See J. RITCHIE, N. ALFORD & R. EPFLAND, *supra* note 4, at 176; see also *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

268. If this is correct, then a lawyer for a charity could not approach a sophisticated businessperson and ask that person to sign a trust agreement making a transfer to the charitable trust.

Lawyer is to be professionally responsible, she must be able to conclude that the representation does not run afoul of the prohibitions against the representation of conflicting interests. The standard is that her professional judgment not be impaired. This means that Lawyer would have been prepared to recommend the creation of the trust if Child had walked in off the street, and Lawyer had no connection with Parent. Lawyer must believe Child needs the trust.<sup>269</sup> Whether or not this is the case is a function of the terms of the particular trust.<sup>270</sup> One certainly can imagine a wealthy young person's wanting and needing the protection of an irrevocable trust.<sup>271</sup> If the trust terms provided substantial flexibility and access to the trust for the creator, then, in the proper circumstances, the trust might be desirable.<sup>272</sup> If the trust suggested by the parent is inflexible and parsimonious, however, it is one that very few experienced lawyers would propose to clients on their own initiative.<sup>273</sup> Therefore, under the hypothetical circumstances, it seems fair to conclude that the lawyer who suggests to the young beneficiary that he create another trust runs a substantial risk of acting in a professionally irresponsible manner, unless the trust terms are generous and flexible.<sup>274</sup> Even then, problems of professional responsibility may still be present. When a person is unhappy about an irrevocable financial arrangement that he has entered into with the participation of a lawyer who also represents another person who is interested in the transaction, there is no certainty or predictability for the lawyer.<sup>275</sup> To protect herself, the lawyer who deals with an unrepresented person should do so in the most meticulous and ethical fashion.<sup>276</sup>

### B. *Conflicts of Interest Between Lawyer and Client*<sup>277</sup>

The conflicts between lawyer and client in the context of this

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269. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 128-29.

270. See *id.*

271. See *id.*

272. See *id.* Such a trust would likely include substantial powers of invasion in the trustee and substantial powers of appointment in the grantor.

273. See J. MANNING, *ESTATE PLANNING*, 110-15 (2d ed. 1982). See generally Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751 (1978).

274. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 128-29.

275. See *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

276. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 1, at 115, 128-29.

277. See Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981). See generally *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1244, 1286-92.

article include the setting of fees,<sup>278</sup> the purchase of trust property by the lawyer,<sup>279</sup> and the avoidance of costly formal procedures in settling accounts.<sup>280</sup>

The lawyer's interest in being compensated is inevitably in conflict with the client's pecuniary interest.<sup>281</sup> This is a conflict inherent in the lawyer-client relationship. It cannot be eliminated, but it can be controlled.<sup>282</sup> Fee-related conflicts of interest are minimal in the trust termination area. This is a function of the system of setting attorney's fees in trust terminations.<sup>283</sup> In most jurisdictions, the lawyer for an accounting trustee is not paid by the hour. She is paid a flat fee that is a very modest percentage of the property in the trust.<sup>284</sup> This is presumptively reasonable and ordinarily need not be reviewed each time a trust is terminated.<sup>285</sup> If a lawyer feels she is entitled to charge a higher than ordinary fee, then at least the possibility of overcharging exists. With fees set by custom or law and subject to judicial scrutiny,<sup>286</sup> however, there is little risk of a lawyer's unduly influencing a client to pay a higher fee. Moreover, to the extent that the fiduciary is a sophisticated client, the risk of undue influence decreases even further.<sup>287</sup>

278. See J. PRICE, *supra* note 224, § 1.15.

279. See ABA Informal Ethics Opinion C-804 (1964); J. PRICE, *supra* note 224, § 1.11 at 29 (citing 2 A. Scott, *supra* note 3, §§ 170-170.11); Ledwith, *Conflict of Interest Problems Not Limited to Actions Affecting Fiduciary Personally*, 10 EST. PLAN. 22, 23 (1983).

280. See generally Westfall, *supra* note 35.

281. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 comment (Discussion Draft 1980).

282. See *id.*

283. J. PRICE, *supra* note 224, § 1.15. See generally Martin, *supra* note 24.

284. See generally Raddue, *Fees & Commissions*, in CALIFORNIA ESTATE ADMINISTRATION § 38.2 (1959).

285. See Estate of Nazro, 15 Cal. App. 3d 318, 93 Cal. Rptr. 116 (1971).

286. See, e.g., *id.*

287. The CPR standard for determining whether the legal fees charged by a lawyer are reasonable is established in DR 2-106: "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The Code offers eight factors in determining the reasonableness of a fee. These factors include

- (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;

While the fee schedule largely alleviates the problem of overcharging in individual situations, it presents two problems of its own. The first is the possibility of systematic overreaching. That is, it may be said that lawyers' percentage fees for fiduciary representation are too high and that the setting of fees in schedules is simply wholesale overreaching.<sup>288</sup> The solution usually offered is to require the lawyer to submit itemized bills based on an hourly rate.<sup>289</sup>

The author believes that fixed percentage fees are often a "bargain" in small trusts and estates matters and that the suggested reform will serve only the wealthy.<sup>290</sup> The real problem is the procedural complexity of fiduciary administration; the real solution is law reform, not fee reform. If it were easier to wind up a particular trust, then a lawyer could charge less.<sup>291</sup>

The second problem with fee schedules is the possibility that the lawyer will devote insufficient time to the work, since the fee is set. However, the risk of the lawyer's cutting corners is slight. The rigidity of the formula for winding up a trust tends to divide lawyers' work product into only two categories, competent and incompetent. Since no lawyer wants to be labeled incompetent, the problem does not exist in trust terminations to the extent that it might in other situations where there is a whole spectrum of work-product quality.<sup>292</sup>

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(8) whether the fee is fixed or contingent.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (B)(1)-(8) (1981).

The Model Rules standard is that legal fees must be reasonable. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (a) (1983). The Rules use factors similar to those used by the CPR in determining reasonableness. See *id.* Rule 1.5 comment. Therefore, if a lawyer charges a fee that is higher than the customary fee, the fee must still be reasonable. The lawyer would have to show that, because of factors described by the CPR or Model Rules, such as time limitations imposed by the client requiring numerous lawyers to work on the trust, the fee was reasonable. See also R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 28-56 (1980); Berger, *Court Awarded Attorney's Fees: What is Reasonable?*, 126 U. PA. L. REV. 281 (1977).

288. See J. PRICE, *supra* note 224, § 1.15.

289. See *id.*

290. The author also believes that many people confuse high-percentage contingent fees with low-percentage estates and trusts fees.

291. See J. RITCHIE, N. ALFORD & R. EFFLAND, *supra* note 4, at 32. See generally Martin, *supra* note 24. The argument is that a fee schedule eliminates competition, with economies of efficiency and scale either not being obtained or not being passed on to the consumer. One might counter with the argument that schedules prevent padding of hourly fees. This argument may in turn be rebutted by the argument that free competition will drive out fee padders.

292. For a lengthy discussion in another context of the ethical duty to be competent, see Mounts, *Public Defender Programs, Professional Responsibility, and Competent Rep-*

The second area of concern in the relationship between lawyer and client involves purchases by the lawyer of trust property from the trustee or purchases of distributed trust property from the trust beneficiary. The wise and conservative lawyer does not make such purchases. They are, however, permissible, if undesirable, so long as the proper steps are taken.

A trustee may buy from the trust under certain conditions: (1) all the beneficiaries must consent to the sale; (2) the trustee must make full disclosure; (3) the trustee must not induce the sale by taking advantage of his relationship with the beneficiaries or by other improper conduct; and (4) the transaction must be in all respects fair and reasonable.<sup>293</sup>

Under trust law, the lawyer seeking to purchase trust property from the trustee is required to meet essentially the same requirements as a trustee who purchases. In addition, the lawyer must obtain the approval of the client, i.e., the trustee, as well as of the beneficiaries.<sup>294</sup>

Rules of professional responsibility also apply. The CPR deals with the problem of purchases from a client in DR 5-104(A), which

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*resentation*, 1982 Wis. L. Rev. 473. When a trust terminates, there is little flexibility about when the lawyer will be paid. There is much more flexibility in the wind-up of an estate. A lawyer will often prefer to be paid sooner, rather than later. Trust beneficiaries are often better off if the lawyer is paid later. These conclusions are very much the case in periods when interest rates are high or when standard trust investments are appreciating on a daily basis. Lost interest or a lost increase can be meaningful. Moreover, the lawyer's personal income tax planning, if the trust termination straddles two years, or the beneficiaries' tax situation, if the final year's deductible expenditures exceed the income of the trust, can play a role in the timing of the payment of the fees.

The resolution seems fairly straightforward. The lawyer should receive her payment at a customary time. A lawyer does not have an affirmative obligation to put off taking a fee to maximize post-mortem planning opportunities for the beneficiaries. Early payment to accommodate the lawyer, without the informed consent of the trustee and beneficiaries, is inappropriate. A trustee need not keep the principal totally invested in a rising stock market, as a matter of law, although a sophisticated trustee should make reasonable efforts to maximize beneficiary return during the period of termination.

293. 2 A. Scott, *supra* note 3, § 170.1, at 1197.

294. *See id.* § 170.6, at 1316: "If the trustee's attorney, acting as his advisor in the administration of the trust, purchases trust property for himself, the sale is voidable." This is so unless the beneficiary consents to the sale after receiving a full disclosure from the trustee, and the sale is fair and reasonable. *See id.* § 170.1; *see also* Presbyterian Church v. Plainfield Trust Co., 139 N.J. Eq. 501, 52 A.2d 400 (1947). In that case, the fiduciary and the lawyer argued that the conveyance of trust property was lawful because it was negotiated in good faith and because no fact within the knowledge of the lawyer that could improperly influence the trustee was concealed. The court recognized the standard for dealings between lawyer and client, but found that, because the client was a fiduciary, the beneficiary was entitled to full knowledge of the conveyance and was required to consent to it. The court found the fairness of the price to be immaterial.

states, "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."<sup>295</sup>

Model Rule 1.8(a) states, "A lawyer shall not enter into a business transaction with a client . . . unless the transaction and terms . . . are fair and reasonable to the client."<sup>296</sup> The early notes under Rule 1.8 provided that "[i]n dealings with a client, the lawyer must show that the relationship was not exploited, that the client was fully and fairly informed of all material facts and that a full and fair price was given."<sup>297</sup> The lawyer and the client may well have differing interests. The CPR and the Model Rules allow the business transaction if the lawyer discloses the ramifications of the differing interests to the client-trustee who then consents to the sale.

The safest way for a *lawyer* to buy from a *trustee* is with prior judicial approval upon notice and full disclosure to the beneficiaries, with some mechanism (such as an independent appraisal) to ensure the fairness and reasonableness of the price, and without impropriety.<sup>298</sup> Similarly, if the lawyer wishes to purchase a former trust asset after the distribution of the asset to the beneficiary, ethics must be considered. If the beneficiary is a client, then the immediately preceding ethical analysis applies.<sup>299</sup>

295. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(A) (1981).

296. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a)(1) (1983).

297. *Id.* Rule 1.8 notes, at 61 (Proposed Final Draft 1981); see *Spencer v. Nelson*, 73 Cal. App. 3d 68, 238 P.2d 169 (1951).

Occasionally circumstances are such that a lawyer seeks to purchase a trust asset before obtaining judicial approval, with the hope that the court will approve the act after it has taken place. See 2 A. SCOTT, *supra* note 3, § 170.7. A court may retroactively approve a sale if the sale appears to be in the best interest of the trust estate. The trustee is taking the risk, however, that the court will not approve. If the court does not approve, then both trustee and lawyer are implicated. Although it is theoretically acceptable, it is unwise to pursue such a course of action. The risk is substantial that the lawyer's desire to make the purchase will cause the lawyer to provide the trustee with poor advice. A potential conflict exists between the lawyer's own interests and the interests of the client trustee.

298. An *ex parte* judicially approved sale is not acceptable under either the CPR or the Model Rules. In the discussion in the text, both full disclosure in judicial proceedings and notice substitute for informed beneficiary consent.

299. If the beneficiary is a former client of the lawyer (former, perhaps, because the trust termination is concluded and there is no ongoing lawyer-client relationship between them), then the analysis arguably remains the same. It is reasonable to assume that the same standards apply when a lawyer purchases property from a former client as when she purchases property from a present client. The lawyer must show that the relationship was not exploited, that the client was fully and fairly informed of all material facts, and that a fair price was given. See *Spencer v. Nelson*, 73 Cal. App. 3d 68, 238 P.2d 169 (1951). The



If the beneficiary was never a client, then the following analysis is appropriate. There must be no confusion in the mind of the beneficiary as to the relationship between himself and the lawyer. This may be difficult to establish, given the lawyer's prior representation of the trustee. If it is established that there never was an attorney-client relationship, then the only ethical restrictions on the lawyer's conduct are those relating to overreaching and, under the CPR the appearance of impropriety.<sup>300</sup> Any determination of misconduct will be based on the individual facts and circumstances.

The third area of potential attorney-client conflict is that of avoiding costly formalities in terminating a trust. This may be possible in very limited circumstances. Assume a jurisdiction where informal accountings are customary.<sup>301</sup> These accountings consist of an extensive fiduciary account<sup>302</sup> and a document called a receipt and release<sup>303</sup> prepared by the lawyer and presented to the competent adult beneficiaries. The lawyer usually accepts a traditional percentage fee for presiding over such a termination.<sup>304</sup> Implicit in the transaction is an opinion by the lawyer that the account and the receipt and release provide the trustee with complete protection from later liability. The lawyer probably never tells the trustee-client that there is a much cheaper, if much riskier, way to handle the termination—the trustee can simply turn the assets over to the beneficiary with copies of whatever records happen to be available and obtain the beneficiary's signature on a printed form release.<sup>305</sup>

Is it ethical for a lawyer to offer only the formal, either judicial or nonjudicial, method of termination to a client? Obviously, trustees who are related to the beneficiary might be willing to risk being successfully sued at a later date if the savings in legal fees were to go to the beneficiary.

At this time, the author does not see an ethical obligation to advise trustees of this alternative. The risks to the trustee would be hard to explain to many clients. Should the beneficiary later decide to sue the trustee, the risk to the lawyer that this might be

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courts would still be very concerned with the appearance of impropriety and overreaching.

300. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981).

301. See J. PRICE, *supra* note 224, § 4.24, at 204.

302. See NATIONAL FIDUCIARY ACCOUNTING STANDARDS PROJECT, *supra* note 163.

303. See *supra* note 204.

304. See generally Raddue, *supra* note 284, § 38.2.

305. See generally *Limiting Future Actions After Trust Account Approval*, *supra* note 65.

found to be malpractice would be substantial.<sup>306</sup> It is at least arguable that the informal "settlement" does not meet the minimum standard of competent practice.<sup>307</sup> A lawyer has an obligation to provide competent advice,<sup>308</sup> and need not risk malpractice liability.<sup>309</sup>

## V. A HYPOTHETICAL: THE TRUSTEE WHO IS A BENEFICIARY

A concluding hypothetical situation can best illustrate the application of the rules to the complex reality that faces the lawyer in trust terminations. Dealing with the trustee who has an inherent conflict of interest (typically, a trustee who is also a beneficiary) is one of the more perplexing problems in the trust and estates practice. The substantive law is troublesome,<sup>310</sup> so it should come as no surprise that the associated ethical questions are problematic as well.<sup>311</sup>

A trustee owes an absolute obligation of loyalty to his beneficiaries,<sup>312</sup> but the law also allows a trustee to be one of the beneficiaries.<sup>313</sup> When a beneficiary is a trustee, conflicts of interest are often inherent in the situation. The law tolerates the conflicts as long as there is no breach of the various duties of a trustee, the chief of these being the duty of impartiality.<sup>314</sup>

The settlor may greatly expand the powers of the beneficiary-trustee. Within certain limits, the settlor may specifically allow the beneficiary-trustee to act in ways that benefit him and to derive a personal benefit from his acts. Without the settlor's authorization,

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306. See R. MALLEN & V. LEVIT, *supra* note 17, §§ 620-627.

307. See *id.* § 627; Johnston, *supra* note 223, at 629.

308. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). Similar problems might arise if a trustee wanted a full, but informal, accounting in a jurisdiction where all accountings were required to be judicial.

309. See R. MALLEN & V. LEVIT, *supra* note 17, § 627; Johnston, *supra* note 223, at 629.

310. See *Bank of Nevada v. Speirs*, 95 Nev. 870, 603 P.2d 1074 (1979).

311. There are some classic family situations that seem to be breeding grounds for such problems. One occurs where the father dies and the son is put in charge of the family business or family farm and is made trustee for the widow and daughter. The trusts are inevitably part-owners of the business. Two typical breaches of trust arising out of this situation are of interest to us. The first is where the son runs the business "into the ground." The second is where the business prospers, and the son diverts business opportunities to himself or diverts corporate assets to himself in the guise of employee compensation and the like.

Another classic situation occurs where there is a second wife who is a trustee for the children of the first marriage. The children of the prior marriage are often given short shrift by their stepmother-trustee.

312. A. LORING, *supra* note 33, § 20.

313. 2 A. SCOTT, *supra* note 3, §§ 99-99.5, 115.

314. *Id.* § 183; 3 *id.* § 232.

such acts would constitute a breach of trust.<sup>315</sup> Settlers (as advised by their lawyers) often fail to include provisions authorizing the beneficiary-trustee to act in his own self-interest.<sup>316</sup> Even when they do include such provisions, however, settlers may not go beyond certain limits and may not sanction breaches of trust, which are against public policy.<sup>317</sup> Ordinarily, however, the powers given a particular trustee are less than the full range permitted. Thus, to discuss meaningfully conflicts of interest and breach of trust in a given situation, one must know the powers granted to the beneficiary-trustee by the instrument and by local law. It is only with respect to the specific powers given to a particular beneficiary-trustee that one can characterize his conduct as proper or improper.

Let us assume the beneficiary-trustee has acted in a way clearly benefiting himself. Depending on the circumstances, that conduct may fall anywhere on a continuum that ranges from obviously proper conduct to a clear breach of trust. The author sees four artificial, but useful, categories on the continuum. They are (1) conduct that is proper even though it may benefit the beneficiary-trustee; (2) a "gray area" comprising conduct as to which a lawyer could not predict an outcome in litigation; (3) another "gray area" comprising conduct as to which a lawyer may believe there is a meaningful chance of providing the beneficiary with a remedy; and (4) conduct that seems clearly to be a breach of trust and that should therefore lead to a remedy.

When the trustee is disinterested, and others besides the trustee rely on the lawyer, ethical problems exist only when the trustee's performance is less than adequate. When the trustee is also a beneficiary, however, almost any action carries a potential for conflict of interest. The possibility that the lawyer will find herself improperly representing conflicting interests expands dramatically. Conflicts of interest for the trustee are inherent in his dual role. And, if the beneficiary-trustee's inherent conflict is not properly resolved each time he acts, then the lawyer is faced with her own professional conflicts of interest. Without care on the lawyer's part, the trustee's conflicts of interest can ensnare the lawyer.<sup>318</sup>

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315. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING PRACTICE § 13.45 (1982).

316. See *Mueller v. Mueller*, 28 Wis. 2d 26, 135 N.W.2d 854 (1965). The irony is that one is often left with the feeling that the creator of the trust would have wanted the trustee to act in the "improper" fashion that leads to liability. Nonetheless, the law does not vindicate the possible intent of the settlor in such situations.

317. See *Wood v. Honeyman*, 178 Or. 484, 169 P.2d 131 (1946).

318. Imagine what happens when beneficiaries, corporate and individual trustees, the

Most of these questions involve conflicts of interest among multiple clients and are thus an extension of the analysis in the preceding section.<sup>319</sup> Secondly, to the extent that the lawyer does not approve of the client-beneficiary-trustee's conduct, questions of terminating the representation and informing the other beneficiaries of the trustee's actions may also arise.<sup>320</sup>

A simple example may prove useful. We can vary it as the need arises. Let us assume that a trust is about to terminate. Upon its termination, two-thirds of the trust corpus is to go to brother John and one-third is to go to his sister Sally. The trust has \$300,000 in assets invested in publicly traded securities. John, the sole trustee, plans to put the publicly traded securities into a private holding company having 300 shares of stock. John would receive 200 shares of the stock of the private holding company and Sally would receive 100 shares, giving John control. This is significantly different from Sally's receiving a pro rata share of a portfolio of publicly traded securities.<sup>321</sup>

Let us also assume that Lawyer represents both John and Sally as the "family"<sup>322</sup> lawyer. The ethical problems confronting Lawyer as the trustee's attorney vary depending upon the trustee's powers and upon whether or not Sally is aware of this proposed action. If Sally is aware of John's plan and protests the action, Lawyer faces an immediate conflict of interest. The alternatives of continued representation (insofar as permitted), intermediation, and required withdrawal have been discussed above.<sup>323</sup> If Sally is unaware of John's plan, Lawyer faces a different problem. Lawyer must weigh her duty to maintain John's client confidences against the exceptions to the duty<sup>324</sup> and the rules permitting voluntary withdrawal in the face of unsavory client conduct.<sup>325</sup>

Let us examine these problems under the assumption that Sally does not know about the trustee's proposed plan. The characterization of John's actions, and thus of Lawyer's duty, depends on state law and the terms of the trust. In a "standard" trust in which John is given no special administrative powers and is released from

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board and officers of the family business, and the pension trustee of the same business all look to one lawyer for advice. The permutations and combinations are mind-boggling.

319. See *supra* notes 112-276 and accompanying text.

320. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).

321. See *Hillyard v. Leonard*, 391 S.W.2d 211 (Mo. 1965).

322. See R. MALLEN & V. LEVIT, *supra* note 17, § 623.

323. See *supra* notes 112-237 and accompanying text.

324. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

325. See *id.* Rule 1.16.

no duties, it seems reasonably clear that absent the approval of Sally<sup>326</sup> the proposed recasting of the trust portfolio immediately prior to termination would be a breach of trust.<sup>327</sup>

If the trustee is given very broad, boilerplate powers to deal with the trust portfolio, but no specific power to form a holding company of the sort mentioned, then the presence of impropriety would be less evident. John's actions would likely still constitute a breach, however, because the action is unusual and because it deprives Sally of the full benefit of unfettered ownership of liquid assets.<sup>328</sup> If the instrument specifically empowered the trustee to take such action, the action would be perfectly legitimate,<sup>329</sup> and most courts probably would not then prohibit the creation of the holding company.<sup>330</sup>

Let us now change the hypothetical and discuss the trustee's actions in three different contexts: (1) where neither Sally nor any other beneficiary or trustee is also relying on Lawyer, who we know is representing John as trustee; (2) where Sally is relying on Lawyer; and (3) where there is a co-trustee relying on Lawyer.

When no other parties are relying on the trustee's lawyer, there are two considerations: the lawyer's duty to inform the beneficiary, and the lawyer's following her own conscience and resigning.

Let us now assume that John is the sole trustee and Lawyer's only client in the matter. If Lawyer has no other de jure or de facto client, then she is not faced with any conflicting interest. The only ethical question is whether or not she has a duty to inform those who will possibly be harmed by her client's less-than-scrupulous acts. That is, does Lawyer have a duty to inform Sally, who is not a client, of John's plan? Under the CPR, Lawyer has no duty to inform the harmed beneficiary. The CPR's general rule that a lawyer shall not knowingly reveal a confidence or secret of a client

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326. Sally would obviously be unwise to give her approval.

327. See Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965).

328. See *id.*

329. An example of such authorizing language might read,

There is a tradition in my family of holding publicly traded securities in holding companies. I specifically authorize my trustee, prior to the termination of this trust, to see to the creation of such an investment vehicle and to the distribution of shares in that corporation upon the termination of the trust, even if it leaves a trust beneficiary a minority shareholder in such a holding company.

330. Trustee actions that are permissible under a "standard" trust—which is least liberal in its grant of powers—are automatically permissible under the other less restrictive instruments, as well. Thus if the action is not a breach under standard powers, then it is not a breach under more liberal powers.

would apply.<sup>331</sup>

There are only two exceptions to the CPR rule. They deal with criminal or fraudulent conduct by a client. Since John's conduct is neither, the exceptions do not apply.<sup>332</sup> Nor, under the CPR, does Lawyer have a duty to inform the court of the activity.<sup>333</sup>

The result in the example is the same under the Model Rules. Rule 1.6(a) states substantially the same general rule as the CPR with respect to this situation—that a lawyer shall not reveal information relating to the representation of a client without the client's consent.<sup>334</sup> For purposes of this article, Rule 1.6(b)(1) also states substantially the same exception as the CPR—the lawyer may reveal information about a client to prevent him from committing a crime that is likely to result in death or substantial injury to the person of another.<sup>335</sup> Again, the trustee's proposed act

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331. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1981). " 'Confidence' refers to information protected by the attorney-client privilege under applicable laws and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.* DR 4-101(A).

332. DR 4-101(C) provides an exception to the general rule that a lawyer must preserve client confidences. The rule allows a lawyer to reveal the intention of the client to commit a crime. In the hypothetical situation, the trustee-beneficiary's conduct does not constitute a crime. The other exception to the rule of preservation of client confidences is DR 7-102(B)(1). It states that a lawyer who receives information clearly establishing that the client, in the course of the representation, perpetrated a fraud upon a person shall reveal the fraud to the affected person except when the information is privileged. The proposed action of the trustee-beneficiary does not constitute a tortious fraud, and therefore the exception does not apply either. Also, DR 7-102(B) has been construed to apply only to past frauds. See Callan & Davis, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976).

333. See *supra* note 332. Two ethics opinions provide that the lawyer may not reveal client confidences to the court even when the client has misappropriated funds from a ward's trust. The ABA Committee on Ethics and Professional Responsibility, in Informal Opinion 778 (1907), provided that when a lawyer has been informed by his client that the client guardian has misappropriated funds from the trust, the lawyer has no duty to report the misappropriation to the court and should not do so without client consent. The Committee stated that the lawyer should do everything in his power to see that his client makes full restitution and informs the court of his own misconduct. The Committee also stated that if the client did not make restitution the lawyer should resign from the representation.

Los Angeles County Bar Association Committee on Legal Ethics Opinion 267 (1960) also dealt with a lawyer who was informed that his client misappropriated funds from a ward's trust. The Committee stated that the lawyer had no duty to inform the court and should not reveal the information to the court. The Committee recommended that the lawyer seek to have the client rectify the misappropriation and prepare a true account. Indeed, the lawyer may not inform either the beneficiaries or the court, because this would violate an ethical obligation, and the attorney could be subject to discipline for failure to comply with his duty to preserve the confidences and secrets of his client.

334. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

335. See *id.* Rule 1.6(b)(1). There are significant differences between the CPR and the

of forming a holding company does not constitute a crime. Therefore, Lawyer may not reveal the information to the beneficiary or to the court. Rule 4.1(b) imposes on the lawyer an affirmative duty of disclosure to third parties. It applies only to crime and fraud, however, and so has no application to the trustee's conduct in the example.<sup>336</sup>

Under both the CPR and the Model Rules, a lawyer has an affirmative duty to inform the client if she believes that the proposal is improper and unwise, even if it is not illegal or morally wrong. If the action is arguably or clearly proper, then the lawyer certainly has no problems of professional responsibility.<sup>337</sup>

Let us consider the second context—the situation in which Sally, another beneficiary, relies on Lawyer, who also represents John, the beneficiary-trustee. Reiterating, John, as beneficiary-trustee, plans a holding company. Lawyer represents John and Sally. Sally does not know about John's plan. The powers granted by the trust are not broad enough to allow the holding company. That is, the action would likely be a breach of John's fiduciary duty.

Since Lawyer represents, *de jure* or *de facto*, another beneficiary, as well as the beneficiary-trustee, Lawyer is representing conflicting interests and must consider whether or not it is proper to inform the affected client, Sally, of the intended imposition by John. Lawyer must also decide whether or not she has to withdraw. At this point, the situation changes significantly. Any harm that flows from the conduct of the beneficiary-trustee impinges upon another client of the lawyer and not upon third party.

Lawyer's first duty is to offer wise counsel—to try to dissuade

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Model Rules. These differences, however, do not affect the subject discussed. The proposed action of the beneficiary-trustee to create a private holding company does not constitute a crime, so Rule 1.6(b)(2) does not allow the lawyer to reveal the information to the beneficiaries or the court.

336. See generally Crystal, *supra* note 129.

337. EC 7-5 states, "A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand . . ." EC 7-8 states, "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . Advice of a lawyer to his client need not be confined to purely legal considerations. . . . [I]t is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." (footnote omitted). Model Rule 1.2(e) states, "When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." Also, Rule 2.1 states that "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

John.<sup>338</sup> If Lawyer fails to dissuade John, then Lawyer has conflicting duties. The duty to preserve John's confidences<sup>339</sup> conflicts with the duty adequately to represent Sally<sup>340</sup> and with the duty to keep Sally fully informed of matters affecting her affairs.<sup>341</sup> The CPR and the Model Rules permit and compel a lawyer to disclose client conduct that is criminal or (under the CPR) fraudulent. The trustee's proposed action does not fall within either category; it constitutes only an abuse of discretion.<sup>342</sup>

It appears that Lawyer is obliged to resign from the representation of both clients without revealing John's plans to Sally.<sup>343</sup> Continuing the representation would force Lawyer to breach a duty to one of the two clients. Lawyer may not continue to represent either one because, as discussed above, this would involve opposing a former client under inappropriate circumstances.<sup>344</sup> After Lawyer withdraws, we must assume that Sally will be protected by the adversary system.<sup>345</sup>

338. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

339. See *id.* Rule 1.6.

340. See *id.* Rule 1.1.

341. See *id.* Rule 1.4.

342. Any analysis applicable to a clear abuse of discretion situation will also cover the cases involving lesser evils.

343. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).

344. See *supra* notes 174-86 and accompanying text.

345. If Lawyer's advice is ignored, may Lawyer withdraw without the client's approval? DR 2-110(C)(1) permits a lawyer, in a matter not pending before a tribunal, to withdraw from representation where the client insists that the lawyer engage in conduct that is contrary to the lawyer's judgment and advice but not prohibited by the Disciplinary Rules.

EC 7-8 states, "In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from employment." The hypothetical does not involve a matter pending before a tribunal. The proposed act will be shown in the final account, which has not been prepared and which is not before a court. Therefore, the lawyer may withdraw.

Under the Model Rules, the lawyer may resign if the withdrawal can be accomplished without a material adverse effect on the interests of the client. Under the comment to Rule 4.3, she may even be obliged to resign. That comment reads,

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

The Model Rules allow a lawyer to resign from representation without cause if the withdrawal will not prejudice the client. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983). The 1981 version of Model Rule 1.2(c) allowed a lawyer to withdraw if a client insisted upon an objective that the lawyer considered repugnant or imprudent, provided she could do so without material adverse effect on the interests of the client. See *id.* Rule 1.2(c) (Proposed Final Draft 1981).



Now let us examine the third context, in which John has a co-trustee who is not a beneficiary, but who is also represented by Lawyer. For simplicity's sake, assume that no other trust beneficiary (Sally) is a client of Lawyer.<sup>346</sup>

John again plans his holding company under a trust instrument giving him only standard fiduciary powers. This is likely to be a breach of duty.<sup>347</sup> Lawyer's conflict of interest problems, if any, are a function of several things: (1) how much Co-trustee knows about the proposed action by John, (2) to what extent Co-trustee appreciates the legal consequences of the proposed act, and (3) whether or not Co-trustee agrees to the action.

Assume first that Co-trustee is completely unaware of the proposed action. Since John cannot act without Co-trustee's consent,<sup>348</sup> Co-trustee must learn of John's plan before it can be implemented. Therefore, Lawyer does not face a problem of informing as much as she faces a matter of professional etiquette. John should be the one to tell Co-trustee, though Lawyer certainly

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The CPR deals, in EC 9-2, with the duty to inform the second client, which states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client." See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981). Model Rule 1.4(b) states, "[A] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

As to the duty to resign, the CPR requires in DR 5-105(B) that where multiple clients' interests differ in a meaningful way, "[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected." Model Rule 1.7 would also require resignation. Prior to such resignation, the lawyer has a right and a duty to seek to dissuade the aggressive client from the planned abuse of discretion. Under both the CPR and the Model Rules, the lawyer must resign once it is clear that she cannot arrange an accommodation of interests, and may not represent either party.

346. It is quite common for creators of trusts to appoint more than one trustee. See H. TWEED & W. PARSONS, *LIFETIME AND TESTAMENTARY ESTATE PLANNING* 129 (8th ed. 1978). Typically, multiple trustees share duties equally, although sometimes trustees' duties are separated, with specific trustees given specific duties. For example, a bank might make all financial decisions, while a family member might make decisions regarding distributions. Or a bank might perform all ministerial duties, e.g., recordkeeping and tax returns, an investment adviser might choose all investments, and a family member might make decisions regarding disbursements of income and principal.

Each trustee is entitled to his own lawyer. If there are multiple lawyers, custom or statute may limit the total legal fees paid to all the lawyers. Nonetheless, multiple lawyers will often collect more total fees than would one lawyer. It is common, however, for multiple trustees to retain one lawyer—usually the drafter of the instrument. That lawyer is typically best acquainted with the situation and is the obvious choice of the trustees. An ethical lawyer may properly accept such a representation. Initially, the trustees have a common cause, and there is no expectation of conflict.

347. See *Hillyard v. Leonard*, 391 S.W.2d 211 (Mo. 1965).

348. See A. LORING, *supra* note 33, § 30, at 101.

may urge John to tell Co-trustee sooner rather than later.

Assume secondly that Co-trustee knows about the proposed plan but does not appreciate its legal ramifications, and so is prepared to agree to the action. Then Lawyer can and should advise Co-trustee of the impropriety of the proposal. Lawyer has an obligation to Co-trustee to do this. So advising Co-trustee is not disloyal to John, because Lawyer has an obligation to keep her clients, including Co-trustee, informed of facts and circumstances affecting their representation.<sup>349</sup> Also, this is not a breach of Lawyer's duty to preserve John's confidences, because John and Co-trustee are engaged in a common venture with a common goal—the orderly administration and proper termination of the trust. John's plan has no place in that scheme. While John might have a right of confidentiality as to the rest of the world, John cannot possibly have a protectable confidential interest in Co-trustee's not knowing about a proposal that might well subject them both to liability.<sup>350</sup> Co-trustee is entitled to understand the proposal and its legal ramifications.

Assume finally that Co-trustee knows about the proposed actions, appreciates its ramifications, and opposes the plan. So long as Co-trustee stands his ground, Lawyer has no problem of professional responsibility. Joint action is required to create the holding company.<sup>351</sup> John's proposal is forestalled by Co-trustee's refusal to agree to the plan. The co-trustees have several alternative courses of action, and when they have decided what course to follow, Lawyer can implement their decision.

If the two trustees cannot agree, they must go to court for instructions.<sup>352</sup> They now have opposing cases to make to a judge. Although they may not be denominated plaintiff and defendant,

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349. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1981).

350. EC 7-8 states, "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client." The Model Rules make the duty to keep the client informed even more explicit in Rule 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In the earlier notes to Rule 1.4, the Committee stated that a lawyer should inform the client of possible adverse consequences that may arise from the execution of an agreement. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 notes, at 30. Therefore, it seems clear that Lawyer owes Co-trustee the duty of informing him of John's proposed conduct, which constitutes an abuse of discretion.

351. See A. LORING, *supra* note 33, § 30, at 101.

352. See *id.*

they surely are opponents and cannot be represented by one lawyer.<sup>353</sup> Also, it is likely that Lawyer would not be permitted to represent either one of the trustees in the request for instructions.<sup>354</sup>

Now assume that the co-trustees are acting under broader fiduciary powers, but that the trust instrument still falls short of clearly authorizing the holding company. Assume that the local law of the jurisdiction makes the plan questionable and somewhat risky. If Co-trustee does not appreciate the legal ramifications of the plan, Lawyer, as above, must see that Co-trustee comes to understand.<sup>355</sup> And if Co-trustee knows the legal problems and the two trustees cannot agree, then the analysis in the preceding paragraph would apply. Finally, if the instrument authorizes formation of the holding company, then no new problems of professional responsibility arise.<sup>356</sup>

To summarize, when a trustee is also a beneficiary of the trust, and when there are other trustees or beneficiaries with different interests, then the exercise of the trustee's managerial powers can sometimes create serious ethical problems for the trustee's lawyer. Expansive drafting of the trust document can broaden the trustee's powers and the range of permissible acts. Eliminating some duties may give the trustee freedom to act in ways that would oth-

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353. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

354. See *id.*

355. See *id.* Rule 1.4.

356. One can imagine trustees who do not know what to do, but who have no quarrel. They are simply baffled. Then their lawyer might well be able to petition for instructions for them both. The court would certainly require notice to all beneficiaries in order to obtain briefing from all affected viewpoints.

The hypothetical given in the text assumes a situation in which the parties concerned are aware of the full ramifications of the proposed action. The trustees must agree on an action before it can properly be taken. If Co-trustee opposes the action, then they have not yet decided. If the inability to act is a function of Co-trustee's uncertainty as to the propriety of their action or their power to act, a court may aid in construing the instrument or determining the relevant rule of law. See *In re Estate of Rothko*, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977). If a court believes the trustees are refusing to perform their fiduciary function, a court may refuse to grant instructions. See *id.* If the trustees become totally deadlocked, the court may appoint a third trustee or seek the resignation of the deadlocked trustees. In the alternative, the court may give instructions as to the best method of administration. See G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 554 (rev. 2d ed. 1980). The Iowa Probate Code section 633.76 requires that co-trustees concur on the exercise of trust powers. If they cannot agree, they may apply to the court, which will make such orders as it deems proper. See IOWA CODE ANN. § 633.76 (West 1964).

If both trustees know the conflict exists, the lawyer has no loyalty or conflict of interest problem as to informing the other trustee. The lawyer may simply advise the clients on what she understands the law to be. Indeed, the lawyer may seek to intermedicate between the two clients. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983).

erwise constitute a breach of trust.<sup>367</sup> In certain situations of starkly adverse interests, the lawyer may be forced to withdraw.

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357. This freedom may allow the trustee to advance his own situation in trust administration without fear of liability. A conflict of interest may still remain, however, even though it is not actionable. It is possible to imagine drafting where even the conflicts of interest would be eliminated. For example, "I direct my beneficiary-trustee to exercise all administrative powers in his own favor since he is the primary object of my bounty." Except as limited by public policy, this language would be effective.

It is interesting to consider the following hypothetical situation under Model Rule 1.9. Assume that Bank and Trustee are co-trustees. Lawyer represents them as co-fiduciaries. Beneficiary discovers an impropriety in the administration and sues Bank and Trustee. The impropriety was such that Bank is primarily liable. What are Lawyer's options and conflicts? Can she represent both clients, either client, or must she withdraw completely? The problem can be analyzed in two ways. The problem can be viewed as one involving lawyer representation of two co-defendants. The two clients have adverse interests, however, because they have inconsistent defenses. This presents a classic conflict of interest for the lawyer.

Model Rule 1.7 seemingly requires that one lawyer not represent both co-trustees. The same result ensues under the CPR. DR 5-105 requires that an attorney decline or withdraw from employment that would involve her in the representation of divergent interests. See *Developments in the Law—Conflicts of Interests in the Legal Profession*, *supra* note 24, at 1244, 1293.

The next question is whether Lawyer could represent one of the clients. If she does, the client no longer represented becomes a former client. Then, Model Rule 1.9 states that a lawyer may not represent another person in the same or a substantially related matter if the interest of that person is materially adverse to the interest of the former client. In this situation, the representation derives from the same matter. Thus Rule 1.9 would be dispositive: Lawyer may not continue to represent either.

Model Rule 1.9 also states that a lawyer may not make use of confidential information to the disadvantage of the former client while representing a present client. It is likely that the lawyer in the hypothetical situation could have obtained information from Bank that would be adverse to its interest if Lawyer used that information in representing Trustee.

The prohibition of the rules may be waived if both parties consent to Lawyer's continuing to represent one of them. Consent would be required in this case because of the confidential information and because of the adverse interests of the two parties deriving from the same matter. Although Trustee might conceivably consent to Lawyer's representing Bank, it is not likely that Bank would consent to Lawyer's representation of Trustee.

The problem may also be analyzed as one in which Lawyer was retained by two parties with potentially conflicting interests. The standard wisdom is that, should the potential conflict develop into an actual conflict, the attorney must withdraw from representing either client and advise them to seek separate counsel. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, *supra* note 24, at 1310.

However, there may be circumstances in which the attorney could represent one of them. The most obvious is where the clients consent. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(a), 1.9(a) (1983). Representing one of the clients would again create the former- and present-client relationship discussed above. Any agreement would necessarily involve formal consent and a waiver of rights to object to the conflict.

To summarize, conflicts between fiduciaries are usually fairly straightforward and stark, and therefore are easy to deal with. It ordinarily becomes clear at some point that the fiduciaries must have independent counsel and that the family lawyer who has represented the trustees must withdraw. At that point, a bank is likely to turn to its own general counsel for representation, the other trustee to another lawyer, and the beneficiaries to yet a third lawyer. The family lawyer who has done most of the day-to-day representation of the

## VI. CONCLUSION

Numerous conflicts of interest arise for the lawyer in the trusts and estates practice; many of them arise upon trust terminations. Trust terminations take place in a wide variety of situations that must be analyzed separately to determine what conflicts of interest are present.

These conflicts present themselves in a variety of ways. They emerge out of the characteristics of each situation, which include multiple *de facto* or *de jure* client relationships, the customary ways that the fiduciary selects a lawyer, the special relationship between trustee and beneficiary, and the often close ties that exist between settlor, lawyer, trustee, and beneficiaries. Trust terminations can be especially complex because of the fiduciary relationships that are always present and the family relationships that are often present. Moreover, the lawyer often is involved with settlor, trustee, and beneficiaries.

The complexity is compounded by the presence of competing policies: the resolution of disputes within an adversary system that assigns to each interested party a loyal advocate; the efficient termination of trusts in a era of crowded judicial calendars; the growing public perception that transactions are overlawyered; and repose in disputes, especially in the type of family situations that are often found in the trust context.

One lawyer theoretically may represent multiple parties with conflicting interests under limited circumstances. Nonetheless, traditional notions of advocacy and adversity quickly lead to the hiring of additional lawyers when the risk of disloyalty or the loss of independent judgment becomes significant. It is easy to understand the call for more lawyers. The lawyer's task is so much simpler if she represents only one client in a matter. Dealing with multiple clients in a conflict of interest situation is difficult. The lawyer must first know the substantive law and the facts of the particular representation. She must also know the ethical rules governing conflicts of interest. She must use those rules in making a threshold decision as to the propriety of the dual representation. And she must constantly recalculate the continuing propriety of the initial decision to undertake the representation.

Many situations require additional lawyers. Traditional policy goals of the adversary system frequently are considered most im-

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fiduciaries presumably would be entitled to substantial compensation for that work, and perhaps could participate in the uncontested aspects of the wind-up of the trust.

portant. The script for the adversary scenario requires each actor in the drama to hire his own lawyer. We should, however, resist the temptation to participate in that drama. The involvement of more lawyers in a situation may be socially unwholesome because of the added cost and complexity and because it may engender the perception that lawyers' ethics encourage the hiring of unnecessary extras.

The questions considered in this article are complex. Despite the complexity of the issues and the diversity of disparate fact situations, however, the lawyer is aided by common sense, by an understanding of what is fair, by a fastidious approach to problems of conflicts of interest, and by a close analysis of the factors involved in each situation. There are no easy answers, but conscientious lawyers should be able to avoid disloyalty and loss of independent professional judgment, even in the maze of family and fiduciary relationships so often found in the trusts practice.

## APPENDIX

The following charts set forth, in simplified fashion, treatment of conflicts of interest under the Code of Professional Responsibility and under the Model Rules of Professional Conduct. It is the author's hope that the reader will find them useful.

MULTIPLE CLIENT REPRESENTATION

Code	Client Relationship	Fundamental Conflict of Interest	Actual Meaningful Differing Interest	Actual Slight Differing Interest	Potential Meaningful Differing Interest	Potential Slight Differing Interest	No Conflict of Interest
C	Litigation Opposite Side	Never EC 5-15 DR 5-105(A-C)	Never EC 5-15 DR 5-105(A-C)	Never EC 5-15 DR 5-105(A-C)	Never EC 5-15 DR 5-105(A-C)	Rarely	Rarely
	Litigation Same Side	Never EC 5-15 DR 5-105(A-C) ABA Informal Opinion 1441	Never EC 5-15 DR 5-105(A-C) ABA Informal Opinion 1441	Never EC 5-15 EC 5-17 DR 5-105(A-C) ABA Informal Opinion 1441	Rarely EC 5-17 DR 5-105(A-C) ABA Informal Opinion 1441	Often EC 5-17 DR 5-105(A-C) ABA Informal Opinion 1441	Yes EC 5-19
P R	Nonlitigation Opposite Side	Never EC 5-15 DR 5-105(A-C)	Never EC 5-15 DR 5-105(A-C)	(Answer a function of facts & circumstances. See general discussion.)	Rarely EC 5-15	Often EC 5-15	Yes EC 5-19
	Nonlitigation Same Side	Never DR 5-105(A-C)	Never DR 5-105(A-C)	Sometimes EC 5-15 (Answer a function of facts & circumstances. See general discussion.)	Sometimes EC 5-15	Often EC 5-105	Yes EC 5-19



## MULTIPLE CLIENT REPRESENTATION

Code	Client Relationship	Fundamental Conflict of Interest	Actual Meaningful Differing Interest	Actual Slight Differing Interest	Potential Meaningful Differing Interest	Potential Slight Differing Interest	No Conflict of Interest
M	Litigation Opposite Side	Never 1.7	Never 1.7	Never Comment to 1.7	Never Comment to 1.7	Probably Never Comment to 1.7	Probably Never Comment to 1.7
R	Litigation Same Side	Never 1.7	Never 1.7	Sometimes Comment to 1.7	Rarely Comment to 1.7	Often Comment to 1.7	Yes 1.7
P	Nonlitigation Opposite Side	Never 1.7	Rarely 1.7(b)(1)(2) 2.2	Sometimes 1.7(b)(1)(2) 2.2	Sometimes Comment to 1.7 2.2	Often Comment to 1.7 2.2	Yes Comment to 1.7 2.2
C	Nonlitigation Same Side	Never 1.7	Infrequently 1.7 2.2	Often 1.7(b)(1)(2) Comment to 1.7	Sometimes 1.7 2.2	Often 1.7 2.2	Yes 1.7 2.2

## OPPOSING PRESENT AND FORMER CLIENTS

Client Relationship	Related Representation		Unrelated Representation	
	CPR	MRPC	CPR	MRPC
Present Client	Never EC 5-15 DR 5-105	Never Rule 1.7 Comment to 1.7	Never DR 5-105(A-C)	*
Former Client	Never EC 4-6 DR 5-105(A-C)	**	Yes EC 4-6 DR 5-105(A-C) Canon 9	Yes Rule 1.7

\* Not if directly adverse or materially limits lawyer's independence without lawyer's reasonable belief and client consent. Rule 1.7; Comment to 1.7.

\*\* Not if the representation is substantially related and materially adverse. Rule 1.9.