

## ARTICLES

### DRAFTING ATTORNEYS AS FIDUCIARIES: FASHIONING AN OPTIMAL ETHICAL RULE FOR CONFLICTS OF INTEREST

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*The American Bar Association recently revised the ethical rules that govern lawyers. Its Ethics 2000 Commission proposed a number of changes to the Model Rules of Professional Conduct, including revisions to the rules that affect how the profession handles conflicts of interest in the area of attorneys who draft instruments that name themselves as fiduciaries. The intersection of these changes, with their subsequent clarification by an ABA opinion issued in May 2002, has broad implications for attorneys practicing in this area. Given the increasing elderly population, the trillions of dollars that they are transferring to their baby-boomer children, and the shrinking number of banks willing to assume the role of fiduciary, there is an argument that the profession should be encouraging its members to take on this role for clients. However, the financial interest that the drafting attorney has in the fiduciary fee and the information asymmetry between lawyers and most clients create a conflict of interest. This article explores the ethical norm that resulted from the Ethics 2000 revisions to the Model Rules and the issuance of the ABA opinion interpreting those revisions. It explores the flaws in this norm and how it might be revised to better minimize the agency costs that exist while remaining consistent with the fiduciary nature of the attorney-client relationship.*

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## I. INTRODUCTION

The convergence of the historic transfer of trillions of dollars from the World War II generation to its baby-boomer children and fundamental changes in the banking industry that have left many middle-class Americans without the option of a corporate fiduciary create both an opportunity and an ethical dilemma for the legal profession.<sup>1</sup> Lawyers are generally good candidates to provide fiduciary services. They have specialized skill, knowledge, and ethical training that provide value to their clients and that can yield profits to them if they contract with the clients to act both as the lawyer who drafts their estate planning instruments and as the fiduciary who will execute those instruments. This dual role raises ethical concerns that implicate the rules governing solicitation of clients and the provision of independent legal advice. This article focuses on the latter issue and the current ethical rules that govern this contractual relationship.

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1. See John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11 (2003) (defending the continuing validity of their “low-growth minimum estimate” of the transfer of wealth over the years 1998-2052), available at <http://www.bc.edu/research/swri/meta-elements/pdf/41trillionreview.pdf>; Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 517-18 n.135 (2000) (discussing various estimates of the wealth transfer to the Baby Boomer generation, ranging from \$10.4 trillion to \$136 trillion). For a general analysis of the shifts in the banking industry due to mergers, see Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215; see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 638 (1995) (stating that “[p]rivate trustees still abound, but the prototypical modern trustee is the fee-paid professional, whose business is to enter into and carry out trust agreements”); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 633-34 n.57 (2004) (citing Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 775 (2000)) (stating that “the vast majority of trusts are administered by large financial institutions such as trust companies”). Sitkoff also notes the lack of empirical data in this area. *Id.* at 648.

The drafting attorney/client relationship in this context actually involves a two-tiered transaction. The first step is a contractual negotiation for the legal drafting services and independent advice of the lawyer and the second is for non-legal service, that of being an executor or trustee.<sup>2</sup> Each of these transactions has aspects of an agency contract. They implicate the typical problems raised by any agency contract, but they also involve a more complex set of regulatory parameters, including not just agency law but also fiduciary law, ethical codes, and even contract law. Monitoring and enforcement issues inherent in typical agency contracts are exacerbated by the fact that many of these clients are elderly when entering into the initial contracts for drafting services and are dead when the agents begin to perform their duties. Information asymmetry, in particular, and the risk of overreaching by the lawyer are significant problems given the age and/or lack of sophistication of most estate planning clients.<sup>3</sup>

The American Bar Association Model Rules of Professional Conduct (hereinafter the "Model Rules") were modified by the ABA's Commission on Evaluation of the Rules of Professional Conduct (hereinafter "Ethics 2000"). When the new language is read together with a subsequent ABA opinion interpreting those revisions, the Model Rules now allow a lawyer to seek such an appointment. They also subject this type of attorney-client transaction to the conflicts of interest provisions of Rule 1.7 only if the lawyer decides that her financial interest in the transaction will impair her independent advice to

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2. There is some scholarly discussion of whether the ethical rules of the legal profession should extend to this second-tier transaction since it involves a non-legal service. The consensus seems to be that they should, and this article will not explore that conclusion, though it should be noted that it is an interesting and complex question. See, e.g., Andrew M. Goldner, *Minding Someone Else's Businesses: Pennsylvania Rule of Professional Conduct 5.7 Leads the Way*, 11 GEO. J. LEGAL ETHICS 767, 785 (1998) (discussing the issue in the area of multidisciplinary practices and urging other states to follow Pennsylvania's lead in applying rules of ethics to lawyers' nonlegal transactions).

3. See Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403, 410-11 & n.21 (2000) ("The ever increasing number of older adults, including those with Alzheimer's Disease or other forms of dementia, and people with developmental disabilities and other neurological impairments present ethical issues that are far removed from the paradigmatic client envisioned by the drafters of codes of conduct."). He goes on to cite statistics on aging that have important public policy implications: "Between 1990 and 1995, the number of people age 65 and older increased by 48 million to a total of 368 million, which represented 6.4% of the world's population." *Id.* at 410 n.21 (citing Kevin Kinsella, *The Demography of an Aging World*, in THE CULTURAL CONTEXT OF AGING: WORLDWIDE PERSPECTIVES 17, 18 (Jay Sokolovsky ed., 2d ed. 1997)). In our country, "[a]s a result of low birth rates prior to and during World War II, the elderly population will remain relatively static between 1995 and 2010. Beginning in 2010, however, the elderly population will rapidly increase as the so-called 'baby boomers' begin to reach age 65." *Id.* (citations omitted).

the client on the best candidate for fiduciary. This article will argue that this post-Ethics 2000 ethical norm<sup>4</sup> is flawed and itself needs revision. It ignores long-standing ethical traditions in this area and actually increases the costs involved in using lawyers as fiduciaries.

This article will make the argument that the rules should provide mandatory disclosure in every case in which a drafting attorney is named as a fiduciary, recognizing the fact that such a transaction is a per se conflict of interest. Fashioning an ethical norm that requires mandatory disclosure in all cases is consistent with the traditional fiduciary view of the attorney-client relationship. American jurisprudence has long described lawyers as having a fiduciary relationship with their clients that carries with it certain duties, including the duty of loyalty.<sup>5</sup> Lawyers are bound to provide independent professional judgment and to give clients candid advice.<sup>6</sup> However, the relationship between an attorney and client is also a business relationship. The client contracts with the attorney to perform certain acts on behalf of the client in exchange for consideration, the attorney's fee. The client is paying the attorney to give him legal advice and to act as his agent. Thus, the attorney-client relationship is a multi-faceted relationship, characterized by aspects of fiduciary, agency, and arm's-length contractual relationships.<sup>7</sup>

Financial conflicts of interest in particular impair an attorney's ability to render independent legal advice to the client. Under the ethical rules governing the profession, attorneys must represent their clients without regard to their own financial interests.<sup>8</sup> In the area of estate planning, an attorney

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4. This article will use the term "ethical norm" when referring to the Ethics 2000 revisions to the Model Rules. "Norm," rather than "rule," is used here because the Model Rules still do not contain any separate rule governing this type of situation. There is only a Comment to a rule governing the issue of attorneys drafting wills that make them beneficiaries, not a separate rule.

5. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000); MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.7 cmt. 1, 1.7 cmt. 6, 1.8, 1.9, 1.10 (2002). For an excellent article that addresses the topic of fiduciary duty, agency relationships and durable powers of attorney, see Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, Part III (2001).

6. ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 2.1 (5th ed. 2003).

7. For an insightful description of the complexity of the attorney-client relationship and the risks of trying to categorize it, see Robert Condlin, "What's Love Got To Do With It?"—"*It's Not Like They're Your Friends for Christ's Sake*": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211 (2003). See also Richard A. Corwin, *Ethical Considerations: The Attorney-Client Relationship*, 75 TUL. L. REV. 1327 (2001); Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659 (1994); Douglas K. Schnell, Note, *Don't Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship*, 17 HARV. J.L. & TECH. 533 (2004).

8. For example, there is an ethical rule that restricts an attorney from becoming involved in a

named as a fiduciary stands to gain financially not only from her role as attorney for the client, but in her separate role as fiduciary. Thus, this potential financial gain by the attorney in being appointed may well affect the likelihood that the attorney will tell the client that other parties, for example, family members or banks, may also be good candidates for the position of executor or trustee.

Given the nature of the increasing social need for fiduciaries, this article begins with the premise that facilitating such contracts increases the social good and provides value both to the attorneys involved and the clients who get special knowledge and skill from attorneys they have come to know and trust.<sup>9</sup> However, given the information asymmetry involved in these relationships, a rule that requires full disclosure and informed consent is a sound approach in this context. It best balances the interests of the client in choosing his attorney as fiduciary with the interest in decreasing the risk of opportunistic behavior that exists in this situation.

Part II of this article will review the traditional fiduciary view of the attorney-client relationship. Part III will piece together the ethical norm that governs drafting attorney/fiduciaries in the wake of the American Bar Association's Ethics 2000 revisions to the Model Rules of Professional Conduct and their issuance of an opinion that attempts to interpret those changes. Part IV will propose an alternative ethical rule that balances efficiency and fairness and that facilitates the use of lawyers as fiduciaries. Part V concludes that the choice of an ethical rule will have a significant impact on the regulation and perception of the legal profession for many years to come.

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business transaction with a client. The underlying concern is that such an interest impairs the attorney's ability to make independent judgments in the client's best interests. Rule 1.8 states:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2002). *See generally* Jeffrey N. Pennell, *Ethics Issues: "You Can't Teach Ethics,"* PL/EST. 657 (2004) (describing the impact of the Model Rules on the profession as a whole and the additional impact of the law of agency on these issues in particular).

9. However see discussion *infra* at note 122 with regard to those who would view allowing any waiver of this conflict to constitute a "logical fallacy" given the underlying fiduciary duty.

## II. THE NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP

The Restatement (Third) of the Law Governing Lawyers (hereinafter “Restatement”) posits a multi-faceted view of the attorney-client relationship. The premise that attorneys have a heightened duty to their clients when contracting for services beyond that of two arm’s-length parties to a contract runs throughout the Restatement. Ethics scholar Geoffrey C. Hazard, Jr., states that “the formation of the client-lawyer relationship [is] primarily but not exclusively a contract arrangement,”<sup>10</sup> while the Reporter for the Restatement, Charles W. Wolfram, states that a “lawyer is a fiduciary.”<sup>11</sup> Thus, the Restatement generally characterizes the relationship between a client and his attorney as a fiduciary relationship,<sup>12</sup> while providing that some of the attorney’s duties may be altered through contract.<sup>13</sup> It also characterizes the original formation of the relationship as a mostly, but not entirely, contractual event.<sup>14</sup> In the Introduction, the Reporter emphasizes the fact that the relationship between a client and his attorney is based primarily upon agency law.<sup>15</sup> The relationship is formed voluntarily and the lawyer is entrusted with information and matters that may be sensitive and may make the client “vulnerable to harm.”<sup>16</sup> Furthermore, the actions of the attorney/agent, because of their intricacy and technical nature, may not be readily monitored by the client/principal.<sup>17</sup> The Restatement characterizes the relationship as primarily one of agency. However, because of the delicate nature of the material the client has entrusted to the lawyer, the Restatement “provides a number of safeguards for clients beyond those generally provided to principals.”<sup>18</sup>

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10. Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, at XXI (2000).

11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000).

12. *Id.*

13. *See id.* § 16 cmt. f.

14. *See id.* § 14 and cmts.

15. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000). Agency law has been defined as a mostly fiduciary relationship with the ability to alter the duties of the agent to the principal through contract. *See* RESTATEMENT (SECOND) OF AGENCY §§ 12, 13, 14 (1958) (describing Agent as Holder of a Power, Agent as a Fiduciary, and Control by Principal, respectively).

16. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000).

17. *Id.*

18. *Id.*

In general, a lawyer has four duties to her client, not including any other duties that are stated throughout the Restatement and those prescribed by “general law.”<sup>19</sup> The four basic duties are to:

(1) proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation; (2) act with reasonable competence and diligence; (3) comply with obligations concerning the client’s confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and (4) fulfill valid contractual obligations to the client.<sup>20</sup>

The duty of loyalty, inherent in (3), and the duties defined by contract embodied in (4) are discussed at length in the Comments to the Restatement.<sup>21</sup> For example, under the duty of loyalty, the lawyer must act in a way that best promotes the interests of the client.<sup>22</sup> Furthermore, the lawyer may not misuse information given to her by the client and must safeguard the information from others’ misuse.<sup>23</sup> As stated in the Comment, “[a] lawyer must be honest with a client.”<sup>24</sup> A lawyer may not use her position to “obtain [an] unfair contract[ ]” or do anything that would “create risk to the lawyer’s independent judgment.”<sup>25</sup>

The duties that a lawyer owes the client may be adjusted or defined in scope by contract prior to the representation.<sup>26</sup> There are general parameters for valid contracts between a lawyer and her client, including, for example, fee schedules and appropriate contractual limitations on the duties that a lawyer owes a client.<sup>27</sup> In addition to these general rules for the validity of such contracts,<sup>28</sup> several other sections deal with more specific clauses and terms of contracts, for example, attempts to limit a client’s rights. The Restatement also includes limits on malpractice liability waivers and contractual waivers of conflicts of interest.<sup>29</sup>

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19. *Id.* § 16 cmt. a (suggesting that these duties appear only to extend to the client after the attorney has assented to the representation).

20. *Id.* § 16.

21. *Id.* § 16 cmts. e, f.

22. *Id.* § 16 cmt. e.

23. *Id.*

24. *Id.*

25. *Id.* A lawyer who drafts himself/herself into the position of executor or trustee without full disclosure would arguably be taking advantage of the situation to “obtain [an] unfair contract[ ].” *Id.*

26. *Id.* § 16 cmt. f.

27. *Id.* § 18 and cmts.

28. *Id.* § 18 cmt. a.

29. *Id.*

Generally, a contract between a lawyer and her client will be valid, unless the contract or “modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter” or “the contract is made after the lawyer has finished providing services.”<sup>30</sup> If a modification is made beyond a reasonable time, or if the contract is not made until after the services have been provided, the client may attempt to avoid the contract because of the implications that the lawyer used her unfair leverage to secure the contract.<sup>31</sup> The lawyer must demonstrate that the contract was fair in the circumstances and that no pressure was placed upon the client to agree to the contract in order for such a contract to be deemed valid.<sup>32</sup> Otherwise, the contract will be construed as “between client and lawyer as a reasonable person in the circumstances of the client would have construed it.”<sup>33</sup> There are three reasons for construing these contracts from the client’s perspective.<sup>34</sup> “First, lawyers almost always write such contracts” and general contract law usually points to construing contracts against the drafter.<sup>35</sup> Second, lawyers are the more sophisticated party and are better trained to find errors and omissions in contracts and correct them.<sup>36</sup> Third, there is consensus that lawyers should inform their clients of all the risks and benefits of the contracts to which they agree.<sup>37</sup> That latter duty to inform is again beyond the traditional notions of the obligations between contracting parties.

There are limits on the lawyer’s ability to restrict her duties to her client by agreement.<sup>38</sup> These rules are aimed at the duties determined at the outset of the relationship, as opposed to waiver or ratification of actions done *ex post facto* to shield the lawyer or client from liability.<sup>39</sup> The Restatement allows for modification and limitation of such duties as long as the client is “adequately informed” and “the terms of the limitation are reasonable in the circumstances.”<sup>40</sup> If a client makes the choice to limit her lawyer’s duties to

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30. *Id.* § 18(1)(a)-(b).

31. *Id.* § 18 cmts. e, f.

32. *Id.* § 18 cmt. e.

33. *Id.* § 18(2).

34. *Id.* § 18 cmt. h.

35. *Id.*

36. *Id.*

37. *Id.* With such contracts being construed in the light most favorable to the client, this may imply that full disclosure must have taken place in order for such contracts to sustain scrutiny.

38. *See id.* § 19.

39. *Id.* § 19 cmt. a.

40. *Id.* § 19(1)(a)-(b). This statement reflects the duty of full disclosure embodied in the Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2c, 1.2 cmts. 6-8, 1.8h, 1.8 cmts. 2, 14 (2002).



her, the Restatement contains requirements aimed at protecting the client in this circumstance.

In addition to the duties outlined above, the lawyer has ongoing duties during the course of representation. These include the duty to “inform and consult” with the client (including dealing with clients with “diminished capacity”),<sup>41</sup> the duty to keep confidential all information that a client shares with an attorney,<sup>42</sup> and the duty to avoid and prevent conflicts of interest with the client.<sup>43</sup>

Thus, the Restatement provides guidance as to the nature of the attorney-client relationship. In doing so, it confers duties on the attorney that go beyond those owed by one arm’s-length contracting party to another. In conjunction with the Model Rules of Professional Conduct, it provides the ethical construct within which lawyers are regulated. The changes to the Model Rules after Ethics 2000, when read together with an ABA opinion interpreting those changes in the context of a drafting attorney naming herself as a fiduciary, leave an ambiguous and less than optimal ethical norm in this area.

### III. THE POST-ETHICS 2000 ETHICAL NORM FOR DRAFTING ATTORNEY/FIDUCIARIES

The multi-faceted nature of the attorney-client relationship is reflected in the dual nature of the ethical codes and rules that govern the profession. Ethics codes are typically seen as moral guides to professional behavior, yet they also reflect the economic relationship that exists when an attorney agrees to represent a client and give that client her independent legal advice.<sup>44</sup>

In estate planning, that legal advice includes the attorney educating the client as to the nature of the post-death estate administration process. The attorney must advise the client that he needs to name a fiduciary—an executor and/or trustee—as part of the planning process. In its most recent ethics opinion on the subject, the ABA described a lawyer’s basic duties in the context of advising a client on his choice of fiduciaries:

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41. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 20 and cmts., 24 and cmts.

42. See *id.* §§ 59-67 and cmts. (explaining generally lawyer-client confidentiality).

43. See *id.* §§ 121-127 and cmts. (explaining generally conflicts of interests).

44. See Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflicts of Interest Regulation*, 82 IOWA L. REV. 965 (1997).

One of a lawyer's important responsibilities in providing estate planning for his client is to help her select an appropriate personal representative to administer her estate and a trustee to manage any trust established by the will. . . . The lawyer is required by Rule 1.4(b) . . . to discuss frankly with the client her options in selecting an individual to serve as fiduciary. . . . This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs.<sup>45</sup>

In a previous article, *Fiduciary Duty: A New Ethical Paradigm for Lawyer/Fiduciaries*, this author left for a future work a more in-depth exploration of some of the conceptual conflicts raised when an attorney acts to draft both an instrument and names herself as a fiduciary.<sup>46</sup> Rather than delving into those issues at length, the previous article focused on significant procedural reforms necessary to implement the conceptual model embraced by this author. The prior article noted that the trusts and estates community was awaiting guidance from the ABA Standing Committee on Ethics and Professional Responsibility, which had not yet issued their opinion on this issue when the prior article went to press.<sup>47</sup> This section begins where that article, written before more "guidance" had come down from the ABA, left off with regard to the conceptual issues involved in drafting attorneys naming themselves as fiduciaries. When eventually issued, the ABA opinion created significant ambiguity when read together with the Ethics 2000 revisions.<sup>48</sup> That ambiguity warrants the closer look at the issue taken in this article. This section reiterates the description of the traditional ethical norm, as well as the Ethics 2000 changes in this area. It then integrates and evaluates the impact of the new ABA opinion on that ethical norm.

The author's previous article notes that the traditional ethical rules have historically discouraged a lawyer from asking her client to name her as executor or trustee. The profession's longstanding position has been that, "so long as the client originally had the idea for the attorney to serve as fiduciary, then there were no ethical violations."<sup>49</sup> The Model Code of Professional

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45. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-426 (2002) (addressing a lawyer serving as a fiduciary for an estate or trust) [hereinafter ABA Formal Op. 02-426].

46. Paula A. Monopoli, *Fiduciary Duty: A New Ethical Paradigm for Lawyer/Fiduciaries*, 67 MO. L. REV. 309, 312 n.8 (2002).

47. See *id.* at 334 n.97.

48. ABA Formal Op. 02-426.

49. See Monopoli, *supra* note 46, at 328 n.75 (citing Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357, 1376 (1994)). As Spurgeon and Ciccarello have noted, the 1908 Canons of Professional Responsibility,

Responsibility was adopted in 1969. It included Ethical Consideration (“EC”) 5-6 which provided that: “a lawyer should not consciously influence a client to name him as executor, trustee or lawyer in such instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.”<sup>50</sup> Ethical considerations under the Model Code were aspirational rather than mandatory disciplinary rules.<sup>51</sup>

In 1983, the ABA adopted the ABA Model Rules of Professional Conduct. These superseded the Model Code and, unlike the Model Code, the Model Rules did not include the prior Ethical Consideration 5-6 nor any similar provision. The Model Rules subsumed the issue of drafting attorneys under the more general conflict of interest provisions of Rules 1.7 and 1.8. This excision of EC 5-6 was apparently a gradual process since there is evidence that an early draft of the Model Rules contained a note in the Commentary that a lawyer should not “seek” to have himself named in an instrument as executor. However, that note was not included in the final version of the Model Rules.<sup>52</sup> Since the Model Rules no longer specifically addressed lawyers being named as, and acting in the role of, fiduciary, the result was that lawyers had less explicit guidance about assuming the role of executor or trustee than they did under the Model Code prior to 1983. One

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the precursor to the Model Code, were not seen as prohibiting the practice of lawyers acting as executors. *Id.* at 1376. Spurgeon and Ciccarello cite Henry S. Drinker and Joseph A. deFuria, both of whom note the lack of concern about lawyers serving as fiduciaries. *See id.* at 1375 n.73, 1376 n.74. *See also* Ronald Chester, *The Lawyer as Charitable Fiduciary: Public Trust or Private Gain*, 25 PAC. L.J. 1353, 1356 n.20 (noting that “[a]lthough not explicitly prohibited by disciplinary or other rules, the attorney’s conduct in being named a fiduciary does represent a potential conflict of interest violating the fiduciary obligation of loyalty to the charitable entity” and citing to the deFuria article).

50. *See* Monopoli, *supra* note 46, at 328 n.76 (citing MODEL CODE OF PROF’L RESPONSIBILITY EC 5-6 (1969), reprinted in JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 429 (West Group ed., 2002-03) (1959)) (noting that in addition to the ABA Model Rules, there are other sources of law that inform the ethical rules in this area, including the American Law Institute’s RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS). For a list of all these sources, see *Report of the Special Study Committee on Professional Responsibility, Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary*, 28 REAL PROP. PROB. & TR. J. 803, 806-07 (1994) [hereinafter *Report of the Special Study Committee*]. *See also* State v. Gulbankian, 196 N.W.2d 733 (Wis. 1972) (finding that drafting attorney must be especially careful that he does not in any way suggest or insinuate that he be appointed in a fiduciary capacity). More recently see Estate of Peterson, 565 S.E.2d 524 (Ga. Ct. App. 2002) (noting that the drafting attorney must not promote himself or herself or consciously influence the client in the decision). This case is discussed in depth, *infra*, at notes 112, 134 and accompanying text.

51. *See* Monopoli, *supra* note 46, at 328 n.77 (citing Spurgeon & Ciccarello, *supra* note 49, at 1376).

52. *See id.* at 328 n.78 (citing Spurgeon & Ciccarello *supra* note 49, at 1377).

might argue that this resulted in less protection for unsophisticated clients as well.

In December 1993, a number of scholars convened a conference on these and other related issues at Fordham University School of Law.<sup>53</sup> Edward D. Spurgeon and Mary Jane Ciccarello's conference article advocated improved disclosure and monitoring safeguards. They went on to endorse the idea of revising the Model Rules to once again include more specific guidance to lawyers in this area.<sup>54</sup> The first opportunity to do so, following the 1993 Conference, was the formation of the American Bar Association's Ethics 2000 Commission in 1997. The purpose of the Commission was to consider comprehensive revisions to the Model Rules.<sup>55</sup> The Commission completed its work and issued its final report on November 27, 2000.<sup>56</sup> The Commission proposed hundreds of changes to the Model Rules, but none of these included any provision that would reinstate the letter or the spirit of the old EC 5-6. Despite the 1993 conference Working Report and the scholarship that came out of it, the Commission failed to revive the more specific guidance lost when EC 5-6 was written out in 1983. Ethics 2000 took the Model Rules from an arguably neutral position on the issue to one that expressly allows lawyers to "seek" such appointments, raising the serious question of whether the profession now explicitly permits solicitation of clients by lawyers seeking to be fiduciaries.<sup>57</sup>

This author's previous article notes that in May of 2001, the Reporter for Ethics 2000 posted the following response to a question posed during an ABA Teleconference on the new rules as to whether the drafters had considered reincorporating the Model Code's EC 5-6 that "a lawyer should not

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53. See *Proceedings of the Conference on Ethical Issues in Representing Older Clients: Report of the Working Group on Lawyer as Fiduciary*, 62 *FORDHAM L. REV.* 1055 (1994) [hereinafter *Report of the Working Group*].

54. See Monopoli, *supra* note 46, at 329 n.80 (citing Spurgeon & Ciccarello, *supra* note 49, at 1357).

55. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *GEO. J. LEGAL ETHICS* 441 (2002).

56. See Monopoli, *supra* note 46, at 329 n.81 (citing James Podgers, *New ABA Model Rules May Be Under Construction in the Next Few Months*, 87 *A.B.A. J.* 58 (2001)).

57. See MODEL RULES OF PROF'L CONDUCT R. 7.3(a):

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

*Id.* At least in the case of new clients, this section would seem to be in conflict with the Comment to Rule 1.8(c) which allows a lawyer to seek a lucrative appointment as executor or trustee.

consciously influence a client to name him as executor, trustee or lawyer in an instrument.” The Reporter for the Commission responded that:

The Commission is recommending that the text of Rule 1.8(c) be amended to prohibit lawyers from soliciting “any substantial gift from a client including a testamentary gift.” A new Comment [8] will provide as follows: “This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client’s informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.”<sup>58</sup>

Not only did Ethics 2000 fail to reinstate the explicit prohibition against consciously influencing a client to name one as a fiduciary, the new Comment [8] states that “this Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position.”<sup>59</sup> This language does *not* prohibit lawyers from *seeking* to have their clients name them as a fiduciary.<sup>60</sup> “Seek” is synonymous with “solicit”<sup>61</sup> so the provision may be read to mean that it will be acceptable for a lawyer to suggest that a client name him or her as a fiduciary in the will that the lawyer is drafting.<sup>62</sup> This

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58. See Monopoli, *supra* note 46, at 330 n.82 (citing the posting of Professor Nancy J. Moore, nmoore@bu.edu, Boston University School of Law, Chief Reporter, ABA Ethics 2000 Commission (May 18, 2001) during ABA Teleconference on the Ethics 2000 proposed revisions (copy on file with Author) (citing Model Rules of Prof’l Conduct (Proposed Revisions 2001), available at <http://www.abanet.org>)). In the Reporter’s Explanation of Changes, the drafters state:

This new Comment clarifies a present ambiguity by addressing the question of whether appointment of the lawyer or the lawyer’s firm as executor constitutes a “substantial gift” within the meaning of this Rule. The commission believes that such appointments are not “gifts” but that they may create a conflict of interest between the client and the lawyer that would be governed by Rule 1.7.

ABA Commission on Evaluation of the Rules of Professional Conduct, Model Rule 1.8, Reporter’s Explanation of Changes, *Rule 1.8* (2001) [hereinafter ABA Report], available at <http://www.abanet.org/cpr/e2k-rule18rem.html> (last visited Nov. 30, 2004).

59. See Monopoli, *supra* note 46, at 330 n.83 (citing ABA Report, *supra* note 58).

60. See *id.* at 330 n.84 (citing ABA Report, *supra* note 58). “[T]he Comment does not specifically apply to drafting attorneys. It seems to allow all lawyers to seek to have themselves named as executors or any other lucrative fiduciary position.” *Id.*

61. See *id.* at 330 n.85 (citing ROGET’S 21ST CENTURY THESAURUS 713 (2d ed. 1999)).

62. See *id.* at 330 n.86 (citing *Report of the Special Study Committee*, *supra* note 50, at 809 n.14). That is contrary to the prior understanding that, while a drafting attorney may serve as a fiduciary, it is not ethical for the lawyer to solicit—read seek—such appointment. It directly contradicts EC 5-6 as described in a Reporter’s Note dropped from the final commentary to Model Rule 1.8 that “EC 5-6 of the Code states

explicit allowance is inconsistent with the fiduciary view of the attorney-client relationship in that it encourages the lawyer to take an advantage for herself, given the client's lack of information.

The second part of the Ethics 2000 Comment appears to be more consistent with a fiduciary view of the attorney-client relationship. It includes a provision that such lawyer/fiduciary appointments *are* subject to conflict of interest rules under the Model Rules *but only when* there is a "significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary."<sup>63</sup> The sentence is then linked to the next one providing for disclosure, but which presumably only requires such disclosure and the client's concomitant informed consent when the lawyer determines that there is a conflict under Rule 1.7. The ambiguity here leaves open the possibility that in many cases a lawyer will decide that her judgment is not materially limited and thus no disclosure and informed consent requirements would attach.

Ethics 2000 revised the definitions of "informed consent" and "confirmed in writing."<sup>64</sup> These need to be read together with the Comment to give a full picture of the revised norm under Comment [8]. "Informed consent" now requires that attorneys not act prior to obtaining the consent of the client and after providing the client with "adequate information."<sup>65</sup> Furthermore, the consent of the client must be obtained in writing, presumably to avoid future disagreements, even though the written statement of consent usually does not have to be signed.<sup>66</sup> "Confirmed in writing" complements the definition of

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that a lawyer should not seek to have himself or a partner or associate named in an instrument as executor of the client's estate." *See id.* at 330 n.87 ("The Author has suggested to the Ethics 2000 Commission that the Comment could be changed to read: 'This Rule does not prohibit a lawyer *from accepting an appointment* as executor or other potentially lucrative fiduciary position.' This would still effectuate the Commission's desire to clarify that such appointments do not constitute 'gifts' but still preserve the ethical tradition of not allowing lawyers to 'seek' such appointments.").

63. *See id.* at 331 n.88 (citing ABA Report, *supra* note 58).

64. Love, *supra* note 55, at 445-47.

65. *Id.* at 445.

66. *Id.* Love does identify the new commentary as the source for guidance as to what counts as "adequate information" and what balances should be applied to determine this level of information. *See* MODEL RULES OF PROF'L CONDUCT R. 1 cmt. 6 (2002):

The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to

“informed consent” and provides for both written and electronic confirmations. This requirement can be satisfied, for the most part, by a letter from the attorney to the client.<sup>67</sup>

In addition to adding definitions to the first section of the Model Rules, Ethics 2000 addressed the substantive rules regarding conflicts of interest in the area of current and former client conflicts. The commission changed the structure of Rule 1.7 as well the commentary to the rule.<sup>68</sup> While the substance of the rule remains essentially unchanged,<sup>69</sup> it now defines conflict of interest and then distinguishes a “directly adverse” interest from one that is only “materially limited.”<sup>70</sup> According to the rule, a representation that includes a conflict of interest may only be undertaken once all of the parties have agreed to the representation through “informed consent” confirmed in writing.<sup>71</sup> However, certain representations that are directly adverse may still not be consented to by the represented party.<sup>72</sup> In this revised rule, there still remain certain immutable duties that lawyers may not contract away.<sup>73</sup>

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advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

*Id.*

67. Love, *supra* note 55, at 446-47. Love points out that in only three situations is the client required to sign the consent. First, regarding contingent fees, “[a] contingent fee agreement shall be in a writing signed by the client.” MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (2002). Second, on entering business transactions with the client, “1.8(a)(3) the client gives informed consent, in a writing signed by the client.” MODEL RULES OF PROF’L CONDUCT R. 1.8(a)(3) (2002). Finally, “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement . . . unless each client gives informed consent, in a writing signed by the client.” MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2002).

68. Love, *supra* note 55, at 451.

69. *Id.* at 451-52.

70. *Id.* at 452.

71. *Id.*

72. *Id.* at 453.

73. The prior rule that completely prohibited a lawyer from representing a party when a close family member was representing the opposition has been loosened. It now provides that “ordinarily” there will be a conflict, leaving room to allow close relatives to represent both sides of a case. *Id.* at 452. “[A] lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party . . .” MODEL RULES OF PROF’L CONDUCT R. 1.7, cmt. 11 (2002). The new comment also addresses how unforeseen circumstances should be handled by the attorney. Love, *supra* note 55, at 453-54. Some commentators have pointed out that the commentary

However, Comment [8] seems to contemplate that an attorney named as a fiduciary creates a conflict which the lawyer can resolve by disclosure and informed consent, confirmed in writing. In other words, it is not an immutable conflict.

In May 2002, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that gave more insight into how the ABA would interpret the new changes to Model Rules with regard to an attorney acting as a fiduciary.<sup>74</sup> It must be read together with the Ethics 2000 revisions to yield a complete picture of the ethical norm that now applies to drafting attorneys:

In the Committee's opinion, a lawyer may accept appointment as a fiduciary under a will or trust that the lawyer is preparing for the client, so long as the lawyer discusses with the client information reasonably necessary to enable the client to make an informed decision in selecting the fiduciary. If there is a significant risk that the lawyer's interest in being named a fiduciary will materially limit his independent professional judgment in advising the client in her choice of a fiduciary, the lawyer also must obtain the client's informed consent, confirmed in writing.<sup>75</sup>

The first unusual aspect of this opinion is its failure to address the new language that allows an attorney to seek to have the lawyer named as executor. It finesses the issue of the change in language that now allows a lawyer to seek appointment by stating that: "When exploring the options with the client, the lawyer may disclose his own availability to serve as a fiduciary."<sup>76</sup> Unfortunately, it does not directly address the new language of Comment [8] which explicitly provides not only for disclosure of the lawyer's availability but also implies that actively suggesting that the lawyer be named is ethical in every case, be it a new client or an old one.

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singles out transactional representation and estate planning in particular, stating that a lawyer should "make clear [his] relationship to the parties involved" when, for example, he is preparing documents for a husband and wife. *Id.* at 454 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 27 (2002)).

74. ABA Formal Op. 02-426, *supra* note 45.

75. *Id.* at 7. Note that the committee also found that:

Because a fiduciary performs services for compensation, accepting appointment as fiduciary is not accepting a gift from a client who is unrelated to the lawyer, such as Rule 1.8(c) prohibits. In addition, because appointing a fiduciary is not a "business transaction with a client," Rule 1.8(a) does not apply to require the client to give her signed, informed consent to the essential terms of the arrangement after receiving the lawyer's written advice to seek independent legal advice. *See* Rule 1.8 cmt. 8 ("This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative position.").

*Id.* at 6-7.

76. *Id.* at 2.



The ABA opinion also creates ambiguity about the nature of the level of discussion or disclosure required and when it is required. Comment [8] is structured so that the disclosure and informed consent rules (which are embodied in Rule 1.7) only apply when the lawyer decides that her judgment will be “materially limited.”<sup>77</sup> Thus, it leaves a yawning gap in cases where the lawyer decides that no such limitation exists, arguably leaving the lawyer with no duty to disclose in such a case. On the other hand, the ABA opinion states that under Rule 1.4(b) a lawyer has a duty to “discuss frankly with the client her options in selecting an individual to serve as fiduciary.”<sup>78</sup> The ABA opinion implies that this duty extends to every representation, even if the lawyer does not feel that Rule 1.7 applies. Thus, the two texts are inconsistent on this point. The ABA opinion states:

When there is a significant risk that the lawyer’s independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client’s informed consent and confirm it in writing.<sup>79</sup>

In other words, all cases require “discussion,” which the ABA opinion seems to use interchangeably with disclosure, so that the lawyer’s decision that Rule 1.7 applies would only trigger an additional duty to obtain the client’s informed consent confirmed in writing. The ABA opinion would attach a duty of disclosure regardless of whether Rule 1.7 applies. This is clearly inconsistent with Comment [8] which implies that only a Rule 1.7 case triggers disclosure plus informed consent. It states that “[i]n obtaining the client’s informed consent to the conflict, the lawyer should advise the client [as to] the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.”<sup>80</sup> This construction clearly links the disclosure to the obtaining of informed consent for the conflict, which implies that the duty of disclosure is only triggered when Rule 1.7 is deemed to apply. Thus, it would not apply in all cases.

In contrast, the ABA opinion indicates that the lawyer is bound by Rule 1.4(b) in all cases to discuss (read “disclose”):

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77. *Id.* at 3 n.9.

78. *Id.* at 2.

79. *Id.* at 2.

80. MODEL RULES OF PROF’L CONDUCT R. 1.8, cmt. 8 (2002).

frankly with the client her options in selecting an individual to serve as [a] fiduciary. [The] discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs.<sup>81</sup>

At least the nature of the disclosure, though not when it is required, is essentially the same in both texts.

Finally, the ABA opinion states that because a fiduciary performs services for compensation, accepting appointment as a fiduciary is not a “business transaction” with a client.<sup>82</sup> Thus, it does not trigger the heightened requirements of Rule 1.8(a) which, in addition to disclosure and informed consent confirmed in writing, would require the client to sign a consent after being informed by the lawyer that she should seek independent legal advice about the matter.<sup>83</sup> This differs from a Rule 1.7 conflict, which only requires a communication to the client from the lawyer under the “informed consent, confirmed in writing” provision.<sup>84</sup> Rule 1.8(a) would also require a client's signature, a lawyer to advise the client that it would be advisable to consult another lawyer before waiving the conflict, and that the client has a reasonable opportunity to do so.<sup>85</sup>

Read together, Comment [8] to Rule 1.8(c) and the ABA opinion yield ambiguity at best and contradiction at worst. The Model Rules should be revised to better comport with the fiduciary view of the attorney-client relationship, providing that a lawyer may accept an appointment but not that she may seek one. The trigger for disclosure under Comment [8] should not be a discretionary decision by the attorney that Rule 1.7 applies, and the entire situation should be the subject of a free-standing rule—not an adjunct to another rule which deals with a related, but distinct, situation: gifts to drafting attorneys.

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81. ABA Formal Op. 02-426, *supra* note 45, at 2.

82. *Id.* at 3.

83. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2002).

84. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

85. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2002).

#### IV. A PROPOSAL FOR AN ETHICAL RULE THAT BALANCES EFFICIENCY WITH FAIRNESS

If the ABA were to revisit the provisions governing attorneys as fiduciaries, the drafters should consider the following factors in redrafting the ethical rule in this area. They should recognize that their view of the nature of the attorney-client relationship drives the choice of an ethical rule. At the most conceptual level, they would be faced with the decision as to whether allowing an unregulated relationship, adopting a disclosure model, or prohibiting the relationship altogether is the most intellectually consistent approach to resolving the financial conflicts of interest that arise in the drafting attorney being named as the client's fiduciary in the context of estate planning.

In addition, ethical codes are meant to enforce professional norms and avoid harm to clients or patients. The drafters would have to consider the specific harms to be concerned with in the lawyer/fiduciary context, including impinging on client autonomy (and balancing that risk with the preservation of clients' freedom to contract with a fiduciary of their choice). The harms also include the reputational cost to the legal profession as a whole imposed by systemic failures to protect individual clients by lawyers who ignore conflicts of interest. These risks of harm might arguably be minimized by incorporating disclosure and informed consent as elements of that model, but such measures may not reduce the risks sufficiently to comport with the view of the protections that a fiduciary relationship should entail. An absolute prohibition model may be the only model conceptually consistent with the traditional view of a lawyer as general fiduciary, but it comes at great social cost, given the lack of corporate fiduciaries available to the average American.

If the drafters were to conclude that encouraging drafting attorneys to act as fiduciaries in appropriate cases should be a goal, they would then have to consider whether the rule facilitates such contracts. In addition to the normative or moral function, ethics codes have economic implications, and the drafters should consider whether a rule reduces the agency costs involved in hiring a lawyer as a fiduciary. If one believes that facilitating lawyers as fiduciaries is a worthy goal, given the lack of alternatives for many clients, then the rule should be both fair (to reflect the fiduciary nature of the relationship) and efficient (so that clients will be encouraged to select lawyers).

*A. Is the Post-Ethics 2000 Norm Efficient?*

The question posed by many law and economics scholars is how to fashion default rules that minimize agency costs.<sup>86</sup> These agency costs include the costs of monitoring the agent to make sure that she behaves in a manner aligned with the interests of the principal. Ethical rules should encourage bonding mechanisms to minimize the agency costs in this regard.<sup>87</sup> Penalties for lawyers who fail to disclose are one way to encourage such alignment of interest. The following sections propose an ethical rule that makes such penalties predictable and consistent.

In his article, *Ethical Rules, Agency Costs, and Law Firm Structure*,<sup>88</sup> Professor Larry Ribstein describes those agency costs and argues that one function of ethical rules is to reduce those costs which are inherent in the attorney-client relationship:

Ethical rules are a form of professional self-regulation enforced by civil liability or professional discipline. An important, though not the only, function of ethical rules is reducing agency costs between lawyers and clients. . . . Agency costs typically involve conflicts between the agent's and principal's interests. The conflicts arise because the agent has the power to control the principal's affairs but does not fully bear the risks and rewards associated with this control. Agency costs are potentially significant in legal representation because the client delegates significant discretion to the lawyer but incurs high monitoring costs because of the specialized and idiosyncratic nature of professional work. . . . Such conflicts often involve shirking—that is, a failure to invest the amount of time and other resources representing clients necessary to maximize the interests of both lawyers and clients. . . . Lawyers' sensitivity to risk also may give them an incentive to reduce risk by doing more work than the client needs. Lawyers' and clients' interests may conflict more subtly than in other types of relationships because lawyers can shape their clients' demand for legal services. A client goes to a lawyer not merely to buy particular services, but also to buy the lawyer's expertise in deciding what must be done in performing a general task (such as litigation). Lawyers may use their discretion to cause the client to buy more services than the client would buy if the client made the decision with full information.<sup>89</sup>

The post-Ethics 2000 norm suffers from this problem if the language of Comment [8] is invoked. Thus, in some cases the lawyer does not have to

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86. See, e.g., Susan Block-Lieb, *The Politics of Privatizing Business Bankruptcy Law*, 74 AM. BANKR. L.J. 77 (2000) (analyzing bankruptcy law as a form of default rule that may be opted out of in an effort to reduce social costs).

87. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1129-30 (1981).

88. Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998).

89. *Id.* at 1708-10.

provide the kind of disclosure that would yield a client on the other side of the transaction who has full information. Full information is essential to an efficient market,<sup>90</sup> and an ethical rule that fails to yield such full information is less than efficient.

Professors Jonathan Macey and Geoffrey Miller in their article, *An Economic Analysis of Conflict of Interest Regulation*,<sup>91</sup> also embrace an agency model of the attorney-client relationship in evaluating the efficiency of ethical rules governing conflicts of interest. The financial compensation attached to the services certainly militates for a description of the relationship as that of an agency contract.<sup>92</sup> As Macey and Miller note:

The concept of legal “ethics” is deeply embedded in the notion of law as a learned profession. Lawyers are expected to behave in accordance with a high standard of morality. . . . [It] carries [with it] a powerful normative connotation; it suggests that legal ethics has a large moral component and might in fact be seen as an applied branch of moral philosophy. Consistent with this normative thrust, the system of legal ethics is often understood as a moral code for the legal profession.<sup>93</sup> Yet there is an undeniably powerful economic element in legal ethics rules as well. . . . Thus, while ethical rules undoubtedly have a moral component, they also have an economic function.<sup>94</sup>

Macey and Miller posit that the profession has an interest in creating efficient default rules to regulate conflicts of interest, because it increases profits for lawyers; the public has a similar incentive, because it reduces the cost of contracting for legal services.<sup>95</sup> They argue that economic theory predicts that

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90. See, e.g., Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 611 n.98 (2004) (citing William H. Beaver, *Market Efficiency*, 56 ACCT. REV. 23, 27 (1981)); Maria O’Brien Hylton, “Socially Responsible” Investing: *Doing Good Versus Doing Well in an Inefficient Market*, 42 AM. U. L. REV. 1 (1992).

91. Macey & Miller, *supra* note 44. Note that Macey and Miller focused on the conflict inherent in representing multiple clients. This article deals with a different conflict: the financial conflict inherent in the drafting attorney naming herself as fiduciary and the consequent impairment of independent advice that may result.

92. In this country, fiduciaries generally do their work in exchange for monetary compensation, but, in some other countries, this is not necessarily the norm. Historically, fiduciaries were not entitled to compensation for their services. As a comparative law matter, in England, the common law concept of a fiduciary as a person in whom a testator could “impose a purely conscientious obligation, a precatory, moral duty, to confer a benefit upon a third party” still exists. Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney—Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 305 (1988).

93. Macey & Miller, *supra* note 44, at 965 & n.1 (citing David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 455-59 (1981); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 231 (1979)).

94. *Id.* at 965-66.

95. *Id.* at 965.

there is a threshold of harm to the client, below which the attorney should be allowed to represent another party without obtaining the first client's consent.<sup>96</sup> Thus, in evaluating the post-Ethics 2000 norm, one might argue that the harms to the client in those cases where the lawyer's interest would not materially limit her ability to render independent advice (in other words the cases under Comment [8] that appear not to require disclosure) are fairly minimal. Hence, the rule operates in an efficient manner, since it does not require disclosure (or informed consent) in a class of cases that would not yield significant harm to the client. However, why the lawyer's decision that her interest is not materially limited has any link as to how much harm a client suffers in these cases is not at all clear. One can envision a case where the lawyer feels that her long relationship with the client is enough to prevent such material limitation, but that has little connection to the harms listed above including limiting client autonomy and the risk of overreaching by lawyers who are in a position to have significant information about, and influence over, an elderly client.

Macey and Miller wrote their article prior to the Ethics 2000 changes. After those changes were enacted, several scholars examined the new Ethics 2000 commentary's more-accepting view of contractual waivers of conflicts.<sup>97</sup> In his article, *Advance Waiver of Conflicts*,<sup>98</sup> Professor Richard Painter distinguishes between immutable rules and default rules in the context of the profession's ethical rules governing conflicts of interest. His article provides a useful framework in which to evaluate the financial conflict of interest inherent in drafting attorneys naming themselves as fiduciaries:

Contractarian economics distinguishes *immutable rules* from *default rules*. An *immutable rule* is a rule that *cannot* be changed by a contractual agreement. A

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96. *Id.* But see Steven Lubet, *There Are No Scriveners Here*, 84 IOWA L. REV. 341 (1999), which states:

It was therefore disheartening to see two prominent legal scholars, Jonathan Macey of Cornell and Geoffrey Miller of New York University, endorse the very course of action that has brought so much unnecessary grief to so many lawyers and clients. Writing in a recent issue of the Iowa Law Review, Professors Macey and Miller assert that client consent may be unnecessary when a single lawyer represents several negotiating parties whose goals are in "substantial alignment," especially when the attorney is acting as a mere scrivener. This conclusion is normatively wrong and positively dangerous to practicing lawyers.

*Id.* at 341-42.

97. See, e.g., Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701 (2001); Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971 (2001).

98. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289 (2000).

*majoritarian immutable rule* is suitable for most parties in most situations, whereas a *tailored immutable rule* is designed for a specific subset of parties. A *default rule*, unlike an immutable rule, *can* be changed by a contractual arrangement. Because lawyers are fiduciaries for their clients, courts and bar associations are wary of making some rules of professional responsibility default rules instead of immutable rules. Under the *Model Rules*, for example, lawyers cannot get client permission to commingle client funds with their own [or] put themselves in a client's will unless they are related to the client. On the other hand, there are some situations in which lawyers and clients are allowed to contract around rules of professional responsibility. Rules governing client conflicts are a salient example; a client sometimes may consent to a conflicting representation.<sup>99</sup>

Painter goes on to define what he calls majoritarian default rules and penalty default rules, with the majoritarian rule reflecting the rule most parties would prefer.<sup>100</sup> He notes that parties who do not like the rule will bargain around it, unless the bargaining costs are too high.<sup>101</sup> In the latter case, they will stay with the default rule, although it is suboptimal.<sup>102</sup> The argument for adopting a majoritarian rule is that it minimizes transaction costs. Few people will opt out of the default.

Penalty default rules are quite different. They, in fact, do not reflect what most parties would want.<sup>103</sup> As such, they arguably increase transaction costs. However, the rationale for adopting penalty default rules is that it will both encourage parties to negotiate for a tailored solution or rule and encourage lawyers to disclose conflicts.<sup>104</sup> Painter's analysis focuses on the advance waiver of conflicts that involve representing multiple parties rather than financial conflicts. But much of his analysis is applicable to both kinds of conflicts. In particular, his observation that "*ex-ante contracting* is complete[] before most relevant facts [are] known"<sup>105</sup> is true for the client who selects the drafting attorney as his fiduciary. In allowing the lawyer to serve, the client is granting his consent to not only the financial conflict that arguably impairs the lawyer's ability to give independent advice but also to future conflicts in terms of the lawyer's choice of counsel for the estate and the fiduciary's loyalty to the estate and beneficiaries. Painter notes that, in the corporate context, scholars have long debated:

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99. *Id.* at 289-90 (citations omitted).

100. *Id.* at 290.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

whether fiduciary principles or contract should control when the two conflict, and criticism of contract focuses on information asymmetry. . . . Critics of the primacy of contract also point out that designing contract terms is difficult when future outcomes are difficult to compute. In recent years ex-ante contracts have been allowed to trump fiduciary . . . but there are [some] limits, and many issues . . . are resolved ex post.<sup>106</sup>

Are conflicts rules majoritarian or penalty default rules? Painter argues that while others have characterized them as the majoritarian rules that most clients would prefer, there is an alternative argument for a penalty rules label.<sup>107</sup> He cites the rules that prohibit lawyers in transactional practice from “representing clients with adverse interests, even in unrelated matters.”<sup>108</sup> Lawyers frequently obtain permission to do just this and this suggests that most parties would prefer a rule which allows such representation. But, Model Rule 1.7 is structured like a penalty default rule in that it prohibits the waiver of a conflict *unless* informed consent, confirmed in writing, is obtained. The point of a penalty default rule here is to acknowledge “the information asymmetry between lawyer and client by forcing the lawyer to disclose relevant information about both representations before the client consents.”<sup>109</sup> And, such penalty rules impose social costs when the barriers to lawyer and client contracting around them are high. They tend to be overbroad and provide an incentive for lawyers not to represent clients and “prevent lawyer-client relationships from being formed in the first place.”<sup>110</sup> The current Comment [8], to the degree that it does not require mandatory disclosure in all cases, is arguably more efficient and better facilitates lawyers as fiduciaries. For example, the requirement that client consent be given “after consultation,” (an immutable aspect of some penalty default rules in the Model Rules) introduces an ex-post risk into the equation. “The possibility that courts might disqualify a lawyer by applying these immutable standards

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106. *Id.* at 290-91 (references omitted). In fact, “[i]n the lawyer-client context also, contract and fiduciary principals clash if the client is contracting at a time when she does not know many of the relevant facts.” *Id.* at 291. This is the reason, Painter argues, that many default rules in the ethical rules that govern lawyers contemplate ex-post contracting:

The words “consent after consultation” appear regularly in professional responsibility codes and suggest that a consenting client should know all or most of the relevant facts before consent is obtained. . . . [T]here are circumstances in which lawyers and clients both benefit from ex-ante contracting over a future contingency [e.g.] agreeing ex-ante on how the lawyer will handle a problem such as conflicts of interest within an organizational client or client fraud.

*Id.* at 291-92 (citations omitted).

107. *Id.* at 293.

108. *Id.*

109. *Id.*

110. *Id.* at 294-95.



ex-post forces lawyers to carefully explain potential conflicts to their clients before obtaining consent, and sometimes to withdraw from a representation when circumstances change, even if consent has been obtained.”<sup>111</sup> Note that ex-post review of an executor or trustee’s appointment may give rise to disqualification as well if she has not conformed to the ethical stricture regarding disclosure.<sup>112</sup> As Painter points out, courts have been unpredictable in their ex-post review of ex-ante waivers of conflicts.<sup>113</sup> This lack of predictability tends to increase the cost of the rule.<sup>114</sup> One might well argue that Comment [8], in building in discretion on the part of the lawyer to choose whether Rule 1.7 applies, will invite more such ex-post review and, thus, is more costly than a rule which mandates disclosure in every case.

Painter asks whether it matters what the default rule is if the system chooses a default rule rather than an immutable rule.<sup>115</sup> If people are going to contract around it anyway, why should the substance of the rule be of concern? Invoking Ronald Coase, Painter notes that if one assumes rational actors, perfect information and no transaction costs, then the Coase theorem

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111. *Id.* at 294.

112. *See In re Estate of Peterson*, 565 S.E.2d 524 (Ga. Ct. App. 2002).

113. *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981) (determining that advance waiver may not always be revoked due to reliance of the other parties upon the agreement; however, the court did not broadly permit advance waiver, but instead narrowed the field to “long-standing” consent combined with detrimental reliance of the other party); *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (refusing to draw a distinction between a sophisticated client and an unsophisticated client and indicating the attorney had not sufficiently informed the client; therefore, the court struck the advance waiver of conflicts); *Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D.N.Y. Nov. 14, 1990) (finding that a response letter to an attorney affirmatively acknowledging the situation demonstrated informed consent and advance waiver); *Interstate Props. v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982) (finding that informed consent had been given and advance waiver provided by the Pyramid Company); *Elliott v. McFarland Unified Sch. Dist.*, 211 Cal. Rptr. 2d 802 (Cal. Ct. App. 1985) (upholding an advance waiver); Painter, *supra* note 98, at 297-308 (citing *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 449 F. Supp. 951 (S.D.N.Y. 1978)) (upholding advance waiver of conflicts of interest).

114. *Painter, supra* note 98, at 309-10. Painter also compares the ABA Model Rules regarding conflicts of interest to the ALI’s approach in the *RESTATEMENT OF THE LAW GOVERNING LAWYERS*. He concludes that the Model Rules are becoming increasingly like the Restatement’s more flexible approach. The Restatement relies upon “a list of criteria for determining whether advance consent is enforceable: the client’s sophistication, the client’s opportunity to obtain independent advice of counsel, and the client’s familiarity with the type of conflict waived.” *Id.* at 309. In fact, that is exactly what the profession needs to look at when it comes to attorneys acting as fiduciaries. The Restatement’s approach would lead one to conclude that most clients in the estate planning context are unsophisticated, have little chance to obtain independent advice and are unfamiliar with the nature of the conflict waived because they have little if any knowledge of what executors and trustees do. Thus, one might argue that the Restatement approach would tend to support the argument that such waivers are not appropriate.

115. *Painter, supra* note 98, at 292.

would hold that it really does not matter.<sup>116</sup> But, in the real world, there are transaction costs and lawyers and their clients may possess a “cognitive bias” against contracting around a default rule. Thus, penalty default rules in particular impose social costs because the contracting parties adhere to a suboptimal default rule.<sup>117</sup>

The new ABA opinion on the subject takes great pains to note that “appointing a fiduciary is not a ‘business transaction with a client,’ [thus] Rule 1.8(a) does not apply to require the client to give her signed, informed consent to the essential terms of the arrangement after receiving the lawyer’s written advice to seek independent legal advice . . . .”<sup>118</sup> Note that there is a real question about whether such penalty default rules as those included in Rule 1.8(a) *should* in fact be adopted in the context of a drafting attorney “seeking” the financially lucrative role of executor or trustee. (The Georgia Supreme Court analogizes the two in its formal advisory opinion and sees the attorney’s financial interest in the executor fee as akin to the kind of financial interest in the transaction that should trigger disclosure.<sup>119</sup>) These provisions’ “signed, informed consent to the essential terms of the arrangement after receiving the lawyer’s written advice to seek independent legal advice”<sup>120</sup> reflect a higher level of informed consent, and the imposition of a mandate to suggest that the client seek independent legal advice would clearly discourage such arrangements and, thus, be less efficient. The many costs to the client from seeking another lawyer’s opinion are high and unlikely to be warranted in many cases. It would be a suboptimal rule in that sense.

### *B. Is the Post-Ethics 2000 Norm Fair?*

If the drafters of the Model Rules view the attorney-client relationship more as a fiduciary relationship and less as a purely contractual one, it is arguable that it is conceptually inconsistent to allow certain conflicts to be waived. If one looks at the attorney-client relationship against the backdrop of immutable fiduciary duties that exist apart from those negotiated and imposed by the rules of ethics and common law rules regarding attorney and client, one might reasonably conclude that lawyers should not be allowed to resolve certain conflicts at all, even by disclosing and receiving informed

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116. *Id.*

117. *Id.*

118. ABA Formal Op. 02-426, *supra* note 45, at 2-3.

119. *See infra* Appendix for the full text of this opinion, FAO 91-1.

120. ABA Formal Op. 02-426, *supra* note 45, at 3.

consent from the client. One might argue that such conflicts are so inherent that it is a “logical fallacy” to conclude that duties like the duty of loyalty may be waived by “informed” consent on the part of the client.<sup>121</sup> Many would argue that such an approach is antithetical to the very idea of a fiduciary relationship.<sup>122</sup> However, the drafters may conclude that the social cost of prohibiting these relationships is too high and that mandatory disclosure will alleviate the risk of harm inherent in the conflict.

There is an argument that mandatory disclosure resolves the information asymmetry problem and provides the client with full information. This not only enhances efficiency, as noted above, it also comports with social norms in terms of fairness to the client and is consistent with the fiduciary duty of loyalty. Comment [8] falls short of this goal by failing to require disclosure in every case. The ABA opinion does better in this regard by at least implying that “discussion” if not “disclosure” is required in all cases.

Lawyers are often the most appropriate choice for clients selecting a personal representative or trustee. Elderly clients often have long relationships with, and great confidence in, their lawyers. In an increasingly mobile society, clients may have tenuous connections at best to their children or siblings in other parts of the country. Lawyers who are trained in the scope of fiduciary responsibilities in law school and who are constrained by ethical rules and malpractice concerns are arguably better fiduciaries than banks or family members. The disclosure provided for in both Comment [8] and the ABA opinion provide the appropriate level of information for the client, including the alternatives to the lawyer as fiduciary and the lawyer’s financial interest in the appointment. The language of the ABA opinion is better in that it more clearly fleshes out what the nature of the risks of conflict are and it also provides that a drafting attorney should explain to the client that she will be faced with the odd prospect of hiring a lawyer for the estate. Such a choice is obviously another of the ethical pitfalls. This posits that a lawyer/fiduciary can really make a detached judgment about who is the best lawyer to represent the fiduciary. The lawyer is unlikely to hire another lawyer or someone

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121. William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999).

122. *See id.* at 1757-64. Sage summarizes this point well in the health care context when he notes “[r]egulating fiduciary obligations through disclosure therefore presents a logical fallacy. To the extent that the fiduciary obligation between physician and patient arises from a relationship of dependence, not from an express contractual agreement, physicians’ duty of loyalty arguably should not be waivable upon disclosure.” *Id.* at 1759. This author grappled with this issue in a prior article and finally rejected a model that would prohibit lawyers from acting as fiduciaries and embraced a disclosure model. *See* Monopoli, *supra* note 46.

outside her firm. In this dual role, the issue of being paid both executor's fees and legal fees raises another ethical issue that should be disclosed to the client. Many clients are under the impression that the lawyer will do the legal work for free if named as the executor and many lawyers will discount their fees (thus making them efficient choices for many clients). These issues should be clarified under any new rule.

Disclosure of course is not a panacea. Many elderly clients will not be able to absorb this information, and informed consent may not be truly informed. However, the alternative is generally an immutable rule that prohibits lawyers from acting as fiduciaries, and the social costs of such a rule are very high. In other words, one might argue that the benefits of the absolute prohibition model are outweighed by the costs to the public of not having enough well-trained fiduciaries to assist them.<sup>123</sup>

In fashioning a balanced rule, the drafters should consider that the drafting attorney conflict is pervasive and the risk of breach of the duty of loyalty and opportunistic behavior, as in any agency contract, is high. The situation is replete with "serious problems of conflict of interest, overreaching, undue influence, and solicitation."<sup>124</sup> Comment [8] in the post-Ethics 2000 norm also fails to provide that a "lawyer must advise the client," rather than "should" do so, and that an attorney who drafts an instrument that names him or her as a fiduciary constitutes a *per se* conflict.<sup>125</sup> This failure may reflect a much more arm's-length or contractarian view of the attorney-client relationship. The client beware—he must acquaint himself to a large extent with the inherent ethical problems replete in such appointments—solicitation, conflicts of interest in terms of impaired independent judgment, overreaching, and undue influence—all of which are implicated by the financial benefit to the drafting attorney of being named fiduciary.<sup>126</sup> As such, the post-Ethics

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123. See Spurgeon & Ciccarello, *supra* note 49, at 1383 & n.129 (citing Leonard Levin, *Legal Ramifications of Unethical Estate Planning Practices*, TR. & EST. 50 (1985), for the proposition that an absolute prohibition would also cause "serious disruption to the legitimate expectations of [the] client[ ]").

124. DeFuria, *supra* note 92, at 299. For an extensive analysis of why a drafting attorney naming himself or herself as fiduciary in the instrument raises all of these issues, see *id.* at 300-06. See also Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 86-101 (1984) (laying out the argument in favor of an absolute prohibition model that would bar drafting attorneys from naming themselves as fiduciaries).

125. The ABA Standing Committee on Ethics and Professional Responsibility (The ABA Committee that issues opinions on ethical issues) did not take the position that naming oneself as a fiduciary is a *per se* conflict that requires disclosure and waiver of the conflict by informed consent of the client. See ABA Formal Op. 02-426, *supra* note 45.

126. See Monopoli, *supra* note 46, at 334 n.98 ("As a comparative law matter, in England, the common law concept of a fiduciary as a person in whom a testator could 'impose a purely conscientious

2000 norm is less than fair or less than consistent with a fiduciary view of the attorney-client relationship and the information asymmetry therein.

*C. A Rule that Facilitates Lawyers as Fiduciaries and that Balances Efficiency and Fairness*

The trend expressed in the Ethics 2000 revisions in this area suggests a move away from client protection and toward a more arm's-length view of the attorney-client relationship—from a fiduciary to a contractarian view of the relationship. Under Comment [8], if a lawyer may now seek appointment as a fiduciary, that suggests that the impairment of her independent judgment and advice to the client as to who may be best candidate for the role of fiduciary is of far less concern to the profession as an ethical matter. Giving her an option to decide for herself whether this situation raises a conflict which can then be resolved simply by disclosure also suggests a move away from the notion that the relationship of lawyer and client has certain immutable duties that may not be waived.

In fashioning a new rule that reflects the fiduciary nature of the relationship, the drafters should provide that this kind of conflict is a per se conflict. The very financial benefit conferred poses a risk to the independent advice of the attorney, and the decision as to whether there is a conflict under Rule 1.7 should not be discretionary. Admittedly, this would be a revision that is counter to the Ethics 2000 Commission's move toward a more contractarian view of conflicts rules, the trend reflected in the broader changes made by Ethics 2000.<sup>127</sup> However, it would be a necessary element of any

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obligation, a precatory, moral duty, to confer a benefit upon a third party' still exists.") See also DeFuria, *supra* note 92, at 305. DeFuria stated:

Under normal circumstances, a testamentary fiduciary [in England] is not entitled to remuneration for his services . . . [and this] rule [extends] to solicitors acting as estate fiduciaries, who are only entitled to out-of-pocket expenses. . . . The reason for the rule is to prevent the inherent conflict of interest and self-dealing that inevitably results whenever a fiduciary profits from his trust. . . . Because of this, the English cases reason that a fiduciary may not be compensated for his time and trouble. However, if the testator specifically directs in his will that the fiduciary is to receive compensation, payment will be permitted. . . . Since it would be improper for an attorney to suggest that his client include a fee payment clause in the will, and since it takes an affirmative act on the part of the client to authorize a fiduciary's fee, the English rule [would] appear[ ] to reduce somewhat the potential for impropriety whenever an attorney drafts a will that names himself as a testamentary fiduciary.

*Id.* at 305 n.159; see also *Earl of Perth v. Fitzalan-Howard*, [1982] Ch. 61 (Eng. C.A.) (allowing the court to use its inherent jurisdiction to impose higher fiduciary's fees than originally provided in a trust).

127. See Love, *supra* note 55. As Professor Margaret Love notes in her article on the Ethics 2000 revisions, part of the impetus for the project was the adoption of the *Restatement of the Law Governing*

revised rule if the rule were to adequately protect the client and reflect the fiduciary view of the relationship.

Attorneys, faced with changing economic conditions, naturally attempt to reformulate the ethical constructs within which they practice in order to stay economically viable in the face of competing service providers.<sup>128</sup> Some authors have proposed a sophisticated client exception for conflicts rules to enhance efficiency and to allow lawyers to better compete with other professions, like accountants.<sup>129</sup> In considering a new rule, the drafters of the Model Rules might find such an exception appealing, but it fails to help resolve the particular conflict issue inherent in drafting attorneys naming themselves as fiduciaries. Virtually all estate-planning clients are arguably unsophisticated. Thus, creating a sophisticated client exception, while it might make a new rule more efficient, would contravene the goal of

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*Lawyers* by the American Law Institute (ALI) and certain inconsistencies in the Model Rules. *Id.* at 442. One of the issues that Ethics 2000 faced was the growing need to clarify the concepts surrounding conflicts of interest. *Id.* In the end, Ethics 2000 revised many of the rules regarding current and former client conflicts of interest, and the rules regarding transactions that a lawyer may make with her client, making it easier for lawyers to engage in such transactions:

R. 1.8(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking . . . independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

MODEL RULES OF PROF'L CONDUCT R. 1.8 (2002). The risks attendant in such business transactions are described more thoroughly in the new commentary than in the prior version. Love, *supra* note 55, at 458-59; MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 3 (2002) ("In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction."). The rules now permit participation in transactions with clients, provided informed consent is obtained in writing. In other words, they have been transformed from immutable rules into penalty default rules. However, there are still some transactions that will be barred by Rule 1.7 (current client conflict) even though the client may give her consent in writing. Love, *supra* note 55, at 458-59. For example, the new rules would still bar the acquisition by an attorney of an interest in the litigation. MODEL RULES OF PROF'L CONDUCT R. 1.8(i) (2002) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client . . ."). See also James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 256-57 (2003).

128. Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 699 (2000). In her article, Benison argues that although clients demand lawyers who are loyal, clients also seek out less expensive means of providing the same services. Benison argues that a "sophisticated client" exception should be provided in the conflicts of interest rules to allow for less expensive legal services.

129. *Id.*

incorporating a fiduciary approach. Such an exception might reduce the number of clients who are dissuaded from using attorneys as fiduciaries, given the lack of disclosure, and it thus might be more efficient in the sense that more of these relationships will be formed, one goal of efficient ethical norms. However, if those relationships turn out to yield a high percentage of unethical lawyers who fail to provide quality services or actually embezzle estate or trust funds, then in the long-run fewer such contracts will be formed, assuming perfect information flows in the market and the reputational bonding the default rules assume fails to materialize.<sup>130</sup>

Note that lawyer-client relationships are akin to consumer contracts, since many clients (other than perhaps large corporate clients) are analogous to consumers who purchase services. And, while good faith can be equated to honesty in the contractual process, as Professor Scott FitzGibbon notes, fiduciary duties are more closely related to a more complete disclosure on the part of the one bargaining party, the lawyer/fiduciary.<sup>131</sup> Several states require such disclosure.<sup>132</sup> Of these, the Georgia model provides a comprehensive

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130. If one thinks of the initial contract for legal services as being subject to contract law as well as ethical strictures, one must consider the impact of contract law on the performance of those services. If a lawyer provides less than independent advice about who the best fiduciary would be, she is arguably in breach of the good faith requirements implicit in contract law. In contract law, there is an implicit duty of good faith and fair dealing between contracting parties. One court stated: "Where fairness and justice require, the court may impose upon a contract a duty required to effectuate the implicit covenant of good faith and fair dealing necessarily involved in the parties' contractual relationship." *Einhorn v. Ceran Corp.*, 426 A.2d 1076, 1080 (N.J. Super. Ct. Ch. Div. 1980). The concept is thus quite broad and is often used as an equitable remedy to correct injustices that the court perceives in a contractual relationship. Restatement (Second) of Contracts § 205 comment "a" states that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). The case that best describes the concept of unconscionability is *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). The *Williams* decision stated that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." E. ALLAN FARNSWORTH, CONTRACTS § 4.28, at 311 (3d ed. 1999) (quoting *Williams*, 350 F.2d at 449). However, good faith and unconscionability standing alone would not provide the same level of protection as the imposition of the higher level of duties of lawyer as fiduciary. Some would argue that the distinction is one without a difference, but, for purposes of this article, it will be assumed that the latter is substantively different from the former.

131. Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 325 (1999).

132. See ABA Formal Op. 02-426, *supra* note 45, at 2 n.6:

*See, e.g.*, Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility Informal Op. 96-36 (March 5, 1996) (Under Rule 1.4(b), "when a client asks a lawyer to draft a trust naming that lawyer (or that lawyer's partner or associate) as trustee, the lawyer must advise the client of the

approach and provides an efficient and predictable means of disclosure in the form of a standard consent form. However, its implementation by the court in a recent case illustrates how difficult it may be to achieve such an optimal balance in this area, even with a well-crafted rule.

#### *D. The Georgia Model*

In a decision ironically handed down the same month and year as the ABA's advisory opinion, the Supreme Court of Georgia reaffirmed the ethical norm set out by that court in its 1991 formal advisory opinion on the issue.<sup>133</sup> That model is preferable to the post-Ethics 2000 norm that exists under the Model Rules and the ABA opinion today in terms of fashioning an ethical rule that balances fairness and efficiency while preserving client autonomy. In *Estate of Peterson*,<sup>134</sup> the court upheld a disqualification of an attorney from serving as executor of a will even though he made full disclosure. He had failed to give written notice to or obtain written consent from his client.<sup>135</sup> The act of naming oneself as executor implicated Standard 30, which involved the potential for impaired independent judgment given the possible financial gain.<sup>136</sup>

Lawyer Robert Lanyon drafted and was named in a client's will as the successor executor. The client's wife was to have been the initial executor but she predeceased the client.<sup>137</sup> The decedent's heirs challenged the lawyer's

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duties of a trustee, the lawyer's ability to perform those duties, the availability and ability of others to perform those duties, the compensation payable to a trustee, and the potential for conflicts of interest, as well as any other factors relevant to the particular circumstances of the client.").

*See also id.* at 2 n.11:

*See, e.g.,* N.Y. Surr. Ct. Proc. Act § 2307-a (2002) (testator to be informed, prior to execution of will naming as executor the lawyer drafting the will or a lawyer affiliated with him that, subject to limited statutory exceptions, any person, including a lawyer, is eligible to serve as executor; that absent any contrary agreement, any person including a lawyer who serves as executor is entitled to receive an executor's statutory commissions; and that if the lawyer-executor or a lawyer affiliated with him renders legal services for the executor, the lawyer rendering the services is entitled to receive just and reasonable compensation for the legal services in addition to statutory fiduciary's commissions); Cal. Bus. & Prof. Code § 6103.6 (West 2002) (stating that a lawyer who drafted instrument serving as sole trustee may be removed unless the instrument was reviewed by an independent lawyer who counsels the testator or settlor and provides a "certificate of independent review").

133. *See infra* Appendix.

134. *In re Estate of Peterson*, 565 S.E.2d 524 (Ga. Ct. App. 2002).

135. *Id.* at 525-26.

136. *Id.* at 524.

137. *Id.*



appointment on the grounds that he had a conflict of interest. While the court found that Lanyon did not promote himself or consciously influence his client's decision to name him as executor, and that Lanyon fully disclosed orally to his client the potential conflicts, he failed to obtain the client's consent in writing or to give the client the kind of written notice required by the Georgia Supreme Court in Formal Advisory Opinion 91-1. Lanyon argued that his client's execution of the will naming Lanyon as the executor constituted the kind of notice sufficient to meet the requirements of FAO 91-1. The court disagreed, stating:

Considering FAO 91-1 as a whole, and particularly in light of the opinion's provision that "[a]n attorney's full disclosure is essential to the client's informed decision and consent," we conclude that . . . the required writing must at least acknowledge the disclosure essential to an informed decision and consent.<sup>138</sup>

Note that *Estate of Peterson* arguably echoes the Macey and Miller position that a de minimus exception to disclosure and informed consent in the area of multiple representation is the best rule. If the Georgia model had included such a de minimus exception when the risk of harm to the client was small, the attorney might well have been allowed to continue as executor. The de minimus exception in this case would not be with regard to the disclosure itself, but merely to the requirement that the notice to or consent from the client be in writing. The risks here were minimal—the attorney was not even the initial fiduciary and the court found that he orally disclosed to the testator. By disqualifying the attorney, one could argue that testator's intent was defeated here.<sup>139</sup> However, doctrinal rules often defeat a testator's intent and supporters of a rigid rule might well argue that a small number of such outcomes is worth the increased protection for most unsophisticated testators.<sup>140</sup> One could argue that a rigid rule is easier to apply as a systemic

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138. *Id.* at 525-26.

139. Freedom of testation and testator's intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates. For example, in writing about this area of the law, scholars note that "[t]he organizing principle of Anglo-American law is freedom of disposition: the donor's intention is given effect except to the extent that it contravenes public policy." Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 2 (2003). See also Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C.L. REV. 199, 209 (2001) ("Donative freedom is a principal value in the American system of inheritance."). These scholars have then gone on to explore the accuracy and the wisdom of those doctrinal touchstones.

140. Note that although many of the cases identify the importance of freedom of testation and effectuating testators' intent, some scholars have correctly noted that:

[o]ur property law system reinforces the classical liberal conception of rights as instruments for promoting individual autonomy. The cloak of private law, along with the traditional view that a

matter, is more predictable and is more administratively efficient. However, rigid application of the rules may well lead to results that defeat testator's intent.

The court's application of the rule was very strict. They might have chosen to exercise some flexibility, since it appears there was little risk to client autonomy or risk of fraud in the *Peterson* case. Strict application by a court is always a cost that must be factored into the process of rule selection and their effect on outcomes. In the end, concerns about fairness have to be balanced with concerns about efficiency, with the former perhaps proving to be the more important (though costly) value to facilitate by ethical norm.

There is another interesting aspect of the Georgia Rule. Unlike the ABA opinion, it assumes that the financial interest in the fee is, in fact, the equivalent of other kinds of financial interests that would impair a lawyer's independent judgment. Under the ABA opinion, accepting appointment as a fiduciary is not considered to be a "business transaction" with a client that would trigger higher levels of informed consent, that is, a signed writing by the client.<sup>141</sup>

The Georgia Model also reiterates the old EC 5-6 when it states that, "It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared when the lawyer does not consciously influence the client in the decision . . . ."<sup>142</sup> Ethics 2000 should also have re-incorporated this very clear guidance, dropped from the 1983 Model Rules.

The Georgia Model also provides for a standard, "off the rack" disclosure form to be provided to the client in all cases.<sup>143</sup> This is the most efficient and predictable way to make sure that full disclosure and informed consent has been obtained, given the nature of the conflict of interest and the transactional information asymmetry.

When states consider adopting the Ethics 2000 changes to the Model Rules and when the drafters of the Model Rules revisit them, they should

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donative transfer represents the property owner's unilateral act, causes many to fall into the trap of believing that the law implements, and only should implement, an individual's subjective intent. The state, however, has no direct access to the property owner's subjective will. It only can determine the manifestation of the property owner's will through words and actions. The state's dependence on the property owner's manifestation of intent moves its inquiry from identifying subjective intent to imputing intent.

Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 611-12 (1988) (footnotes omitted).

141. See *supra* note 75 and accompanying text.

142. See *infra* Appendix.

143. This form is included in FAO 91-1 and reproduced in the Appendix. See *infra* Appendix.

consider a rule akin to the one enunciated by the Georgia Supreme Court. While subject to the risk that it may be enforced too rigidly, its underlying philosophy, clear guidance and standardized method of evidencing disclosure, and informed consent are the best effort at balancing efficiency and fairness that this author has seen to date. As the court in *Estate of Peterson* noted:

The opinion recognizes that a client is free to appoint the lawyer hired to prepare the will as executor and that in some cases this may be in the client's best interest. Nevertheless, the opinion warns that the risk that some lawyers may take advantage of being named fiduciary for the client "creates the need for restrictions that offer assurance that the naming of the lawyer as executor or trustee is the informed decision of the testator or settler." Accordingly, "an attorney's full disclosure is essential to the client's informed decision and consent."<sup>144</sup>

The drafters of a new rule would have further assistance in the American College of Trusts & Estates Counsel (hereinafter "ACTEC"), which published a comment on Model Rule 1.7 (written in 1985, prior to the Ethics 2000 revisions).<sup>145</sup> The ABA's Section on Real Property Probate and Trust Law's *Principles for Attorneys Acting in Other Fiduciary Roles*<sup>146</sup> offers similar

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144. *In re Estate of Peterson*, 565 S.E.2d 524, 525 (Ga. Ct. App. 2002) (citations omitted).

145. THE AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL, ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 156 (3d ed. 1999), available at <http://www.actecfoundation.org/pdfdocs/comment1.pdf> (last visited Nov. 6, 2004) [hereinafter ACTEC COMMENTARIES].

As a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries . . . so long as the client is properly informed, the appointment does not violate the conflict of interest rules of the MRPC 1.7 . . . and the appointment is not the product of undue influence or improper solicitation by the lawyer.

*Id.* at 156. The ACTEC guidelines lay out the specific information that should be encompassed with the concept of "full disclosure" and an "adequately informed" client:

The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes.

*Id.* at 155-56. ACTEC further defines an informed client as one who is "provided with information regarding the role and duties of the fiduciary, the ability of the lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary." *Id.* at 157.

146. *Principles for Attorneys Acting in Other Fiduciary Roles*, 1992 ABA SEC. REAL PROP. PROB. & TR. L., cited in Bradley R. Cook, *Principles for Attorneys Acting in Other Fiduciary Roles*, 6 PROB. & PROP., Mar./Apr. 1992, at 6. See Monopoli *supra* note 46, at 333 n.95 In an article seeking comments on the proposed Principles by Bradley R. Cook in the "For Your Information" section of *Probate & Property*, Cook stated that, while the Section Council of the American Bar Association Real Property, Probate and Trust Law Section believes that it is appropriate for a drafting attorney to act as an executor or trustee, "performing in such roles carries additional responsibilities and certain risks for the attorney, and no

assistance to any future drafters since it is also aimed at ensuring that attorneys chosen as fiduciaries protect their clients' interests by disclosure.

## V. CONCLUSION

Fashioning an optimal ethical norm in the context of drafting attorneys as fiduciaries must be informed by efficiency, fairness, and the complex nature of the attorney-client relationship. The process must take into account the unique nature of the two-tiered transaction, and, viewing the attorney-client relationship as "an agency contract characterized by information and monitoring difficulties,"<sup>147</sup> is also helpful in evaluating the current ethical norm.

Even if the current rule were efficient, efficiency is not the only goal of the ethical rules as a normative matter. Other goals, such as preserving the unique fiduciary nature of the attorney-client relationship, may trump the goal of efficiency in this context. Thus, some immutable characteristics may be included in the rule even though they increase its costs.

The ABA should revisit its approach to this issue under Rule 1.8 and adopt a rule more closely aligned with the Georgia Supreme Court's model. That rule should provide that lawyers may not consciously influence their clients to name them as fiduciaries, and it should provide for adequate disclosure in all cases. It should require a standard disclosure, a consent form, and the client's signature. The issue of drafting attorneys as fiduciaries is becoming increasingly important as:

[w]e are in the process of creating a "global society that is by far the oldest in the history of the world. This aging process will be one of the dominant trends over the coming decades in the industrialized world—and, for different reasons, in the third world as well—reshaping societies across the globe."<sup>148</sup>

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attorney should undertake to serve as an executor, trustee or other fiduciary without being properly trained and equipped to perform all of the associated tasks in a competent and efficient manner." *Id.* See also Monopoli, *supra* note 46, at 333. For example, Principle 9, titled *Role of the Attorney in Advising the Client*, emphasized that, "[r]egardless of whether the attorney is named as a fiduciary, it is the responsibility of the attorney to advise the client as to the considerations affecting the choice of an appropriate fiduciary." *Principles for Attorneys Acting in Other Fiduciary Roles*, cited in Spurgeon & Ciccarello, *supra* note 49, at 1370 n.53.

147. Macey & Miller, *supra* note 44, at 965.

148. Nicholas D. Kristof, *Aging World, New Wrinkles*, N.Y. TIMES, Sept. 22, 1996, at 1, cited in Rosenberg, *supra* note 3, at 410 n.21.

These aging clients have physical and mental disabilities that “are far removed from the paradigmatic client envisioned by the drafters of codes of conduct.”<sup>149</sup> The profession’s choice of ethical norms in this area should reflect those disabilities and the resulting information asymmetry. It should fashion an ethical norm that allows clients to efficiently contract with their attorneys for this service, while remaining cognizant of the risk of opportunistic behavior inherent in these relationships. Such an optimal rule would be consistent with the traditional fiduciary view of the attorney-client relationship, while it facilitated a much-needed service for many clients.

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149. Rosenberg, *supra* note 3, at 410.

## APPENDIX:

State Bar of Georgia

Issued by the Supreme Court of Georgia

On September 13, 1991

Formal Advisory Opinion No. 91-1

(Proposed Formal Advisory Opinion No. 86-R13)

Ethical propriety of drafter of will serving as executor.

It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared when the lawyer does not consciously influence the client in the decision to name him or her executor or trustee, so long as he or she obtains the client's written consent in some form or gives the client written notice in some form after a full disclosure of all the possible conflicts of interest. In addition, the total combined attorney's fee and executor or trustee fee or commission must be reasonable and procedures used in obtaining this fee should be in accord with Georgia law.

Question Presented: It is ethically proper for a lawyer to be named executor or trustee in a will or trust he or she has prepared?

Disciplinary Standard of Conduct No. 30 provides:

Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

The financial interests of an executor or trustee reasonably may affect an attorney's independent professional judgment on behalf of the client. The conduct in question falls clearly within the coverage of Standard No. 30. Standard No. 30, however, provides exceptions for this type of conflict. These exceptions to a conflict of interest are the client's written consent or written notice to the client after full disclosure. These exceptions are in question here.

There is no limitation on client consent in Standard No. 30 unless the "appearance of impropriety" prohibition of Canon 9 of the Georgia Code of Professional Responsibility creates an implied limitation. It is our opinion that the conduct in question does not necessarily create an "appearance of impropriety," and we note that the "appearance of impropriety" prohibition is not included in the Standards of Conduct.

This opinion finds support in the interpretive guidance of the aspirational statement in Ethical Consideration 5-6.

EC 5-6—A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those cases where a client

wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

The implication of Ethical Consideration 5-6 is that the naming of an attorney as executor or trustee in a will or trust he or she has prepared does not per se create an appearance of impropriety, but that such an arrangement creates a risk of appearing to be improper, which must be guarded against by the attorney.

A testator's or settlor's freedom to select an executor or trustee is an important freedom, and it should not be restricted absent strong justification. For a variety of reasons, the attorney may be the most appropriate choice of fiduciary for the client. The risk that some lawyers may take advantage of a lawyer-client relationship to benefit themselves in a manner not in the client's best interest should not outweigh that freedom.

This risk of self-dealing instead creates the need for restrictions that offer assurance that the naming of the lawyer as executor or trustee is the informed decision of the testator or settlor. An attorney's full disclosure is essential to the client's informed decision and consent. Disclosure requires notification of the attorney's potential interest in the arrangement; i.e., the ability to collect an executor's or trustee's fee and possibly attorney's fees. Unlike a real estate transaction where an attorney has a personal interest in the property, being named as executor or trustee does not give the attorney any personal interest in the estate or trust assets other than the fee charged. Waiver of State law fiduciary requirements in the document is permissible as long as waiver is ordinary and customary in similar documents for similar clients that do not name the attorney as fiduciary.<sup>150</sup>

In the light of the above, full disclosure in this context should include an explanation of the following:

- 1) All potential choices of executor or trustee, their relative abilities, competence, safety and integrity, and their fee structure;
- 2) The nature of the representation and service that will result if the client wishes to name the attorney as executor or trustee (i.e., what the exact role of the lawyer as fiduciary will be, what the lawyer's fee structure will be as a lawyer/fiduciary, etc.);

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150. For example, granting broad powers to a fiduciary or relieving the fiduciary of return or bond requirements is a common practice, can substantially reduce the expense of administration of an estate or trust, and does not relieve the fiduciary of the duty to administer the estate properly in or reduce substantially the rights of the beneficiaries to enforce that duty. On the other hand, a provision that attempted to relieve the fiduciary of negligence would probably not be ordinary and customary and would be improper.

3) The potential for the attorney executor or trustee hiring him or herself or his or her firm to represent the estate or trust, and the fee arrangement anticipated; and

4) An explanation of the potential advantages to the client of seeking independent legal advice.

These disclosures may be made orally or in writing, but the client's consent or the attorney's notice to the client should be in writing.

The client's consent could be obtained by having the client sign a consent form that outlines the information described above.

Consistent with other jurisdictions that have addressed the issue and the Standards and Rules of the Georgia Bar, it [is] our opinion that it is ethically permissible for testator or settlor to name as executor in a will or trustee of a trust the lawyer who has prepared the instrument when the lawyer: (a) does not promote himself or herself or consciously influence the client in the decision; (b) fully discloses the conflict as described above, and (c) either obtains client consent in some form of writing or notifies the client in writing.<sup>151</sup>

Any executor or trustee is allowed by Georgia law to hire legal counsel, according to the needs of the estate or trust he represents, and pay reasonable fees for their services. O.C.G.A. § 53-7-10. An attorney who has ethically named himself or herself as executor or trustee in an instrument he or she has prepared may act as an attorney for the estate or hire a member of his or her firm as attorney. The fiduciary and the attorney, however, must exercise caution to avoid actual or perceived conflicts of interest in this circumstance.

When a lawyer has ethically named himself or herself as executor or trustee in an instrument he or she has prepared, the lawyer can receive fees for performing both services. If, however, any costs of preparation or execution overlap, the attorney must see that these costs are charged only once. He or she may not charge both the client and the estate or trust for a single task.

As a lawyer prepares a will or trust instrument, he or she is performing services for the client-testator/settlor as a lawyer. It is the lawyer's task at this

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151. In Pennsylvania, an attorney ethically may act as co-executor in a will that he or she prepares as long as the attorney advises the client (in a way never specified) of the potential problem that the attorney may be required to testify regarding the will if it is challenged. Professional Guidance Opinion 80-2 of the Philadelphia Bar Association. The attorney also may not take advantage of his position as draftsman to promote himself or herself or "sell" the ideas to the client. *See also* Professional Guidance Opinion 8-17 of the Philadelphia Bar Association (concerning an attorney naming himself successor-trustee in a will he drafted).



time to make sure the client's wishes for the later disposition and distribution of the client's property are integrated into a plan acceptable to the client.

The lawyer acting in his or her capacity as an executor or trustee is performing a different function altogether. It is the lawyer's task as executor or trustee to effectively implement the integrated plan for disposition and distribution of the testator's or settlor's property. Not only is the lawyer's function different, the tasks are different. The lawyer should still be appropriately and reasonably compensated whether the compensation is provided in the instrument or by statute, but an attorney acting as a fiduciary should not double dip fees charged to the client or estate.

Georgia law provides that an attorney serving as an administrator cannot double dip in fees. See *McDow v. Corley*, 154 Ga. App. 575 (1980); and *Davidson v. Story*, 106 Ga. 799, 32 S.E. 867 (1899). It is recognized that if the attorney is serving as both executor or trustee and as legal counsel, it may be difficult to sort out each task performed as one performed clearly in one capacity or the other. Any fees above Georgia's statutory provisions for compensating executors that an attorney may incur in a dual role as lawyer and fiduciary must be collected by filing an application for extra compensation with the Probate Court under O.C.G.A. § 53-6-150. *McDow*, 154 Ga. App. at 576; and *Davidson*, 106 Ga. at 801. In keeping with both Georgia law and ethical considerations, the total fees charged by an attorney in such a dual role should be reasonable.<sup>152</sup>

#### ADDENDUM TO FORMAL ADVISORY OPINION NO. 91-R1

##### Form Notification and Consent Letter

[MR. OR MS. FULL NAME]

[ADDRESS]

[CITY, STATE ZIP]

Dear [MR. OR MS. LAST NAME]:

Because you have asked me to serve as Executor and Trustee under your will, I must explain certain ethical considerations to you and obtain your

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152. In accord Okl. Opin. No. 298 (Feb. 28, 1991) (stating an attorney serving as executor of estate and as attorney for the estate may charge reasonable fees for each so long as charges do not overlap.); Ala. Opin. No. 81-503 (undated) (indicating an attorney may serve as administrator of estate and as attorney for the estate and may charge reasonable fees for each); Wis. Opin. No. E-80-14 (Dec. 1980) (stating that a lawyer, appointed as guardian, may serve as attorney for the guardian, and may charge reasonable fees for performing in both capacities).

written consent to the potential conflicts of interests that could develop. The purpose of this letter is to summarize our discussions about your naming me as fiduciary in your will.

A lawyer cannot prepare a will or trust in which the client names that lawyer as fiduciary unless that decision originates with the client. The lawyer should never suggest that he/she be named or promote himself/herself to serve in that capacity.

Others who might serve as your fiduciaries include your spouse, one or more of your children, a relative, a personal friend, a business associate, a bank with trust powers, your accountant, or an investment advisor.

I can serve as executor and trustee if that is your desire. The potential conflict arises primarily from the probability that I will hire this firm to serve as attorneys for the estate and trust. An attorney is entitled to compensation for legal services performed on behalf of the estate and trust, and the executor and trustee are also entitled to compensation for services in that capacity. When a lawyer has been named as executor and trustee pursuant to the ethical requirements of the State Bar, he/she can receive fees for performing services both as executor and trustee and as attorney as long as he/she charges only once for any single service. Further, the total compensation for serving as both fiduciary and attorney must be reasonable. If you name me as executor and trustee in your will, I and the other lawyers in my firm will charge at our normal hourly rates for all services performed. [NOTE: Modify the preceding sentence as appropriate.]

I must also point out to you that a lawyer's independence is compromised when he/she acts as both fiduciary and as lawyer for the fiduciary. Some of the potential conflicts in this regard are:

1. The question whether a particular task is "legal" or "fiduciary" in nature;
2. The question whether services being performed are really necessary in the circumstances;
3. The propriety of giving the fiduciary broad discretionary powers and exemption from bond;
4. The lack of independent review of the document by an attorney other than the one who drafted it; and
5. There may be other potential conflicts that have not occurred to me.

In accordance with the ethical requirements of the State Bar of Georgia, it is necessary for me to obtain your statement that the potential conflicts of interests have been explained to you. In that regard, please review the statement of consent below. If it is satisfactory to you, please sign and return the enclosed copy to me. If you want to discuss any point further, please call. If you decide not to execute the consent, please advise me whom you would

like to serve as executor and trustee instead of me. If you have any doubt concerning the information contained in this letter or the effect of signing the consent, you should discuss it with another lawyer of your choice.

Sincerely,

\_\_\_\_\_  
Attorney

### CONSENT

I, \_\_\_\_\_ (Client) \_\_\_\_\_, have voluntarily named as executor and trustee in my will and trust, \_\_\_\_\_ (Attorney) \_\_\_\_\_, who prepared the instrument in his/her capacity as my attorney. Mr./Ms. \_\_\_\_\_ (Attorney) \_\_\_\_\_ did not promote himself/herself or consciously influence me in the decision to name him/her as executor and trustee. In addition, Mr./Ms. \_\_\_\_\_ (Attorney) \_\_\_\_\_ has disclosed the potential conflicts which he/she thinks might arise as a result of his/her serving as both executor and trustee and as attorney for the estate and trust. An explanation of the different roles as fiduciary and attorney, an explanation of the risks and disadvantages of this dual representation, an explanation of the manner in which his/her compensation will be determined, and an opportunity to seek independent legal advice were provided to me prior to my signing this consent.

Date \_\_\_\_\_

\_\_\_\_\_  
(Signature)